

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2023] NZEmpC 28
EMPC 341/2022**

IN THE MATTER OF an application for a compliance order under
 s 138 of the Employment Relations Act 2000

AND IN THE MATTER of an application for a sanction under s 140
 of the Employment Relations Act 2000

BETWEEN DARREN VINCENT OLIVER
 Plaintiff

AND STUART DALE BIGGS
 Defendant

Hearing: On the papers

Appearances: S Zindel and A Sacheun, counsel for plaintiff
 No appearance by, or on behalf of, Mr Biggs

Judgment: 28 February 2023

JUDGMENT OF JUDGE B A CORKILL

[1] This judgment is a sequel to two earlier judgments. In the first, issued on 8 July 2021, I ordered Mr Stuart Biggs to pay a contribution to Mr Darren Oliver’s costs of \$7,200.¹ In the second, issued on 3 May 2022, I made a compliance order that Mr Biggs comply with the earlier costs order of 8 July 2021; that he pay Mr Oliver \$7,200 within 28 days; and that he pay Mr Oliver costs of \$3,600 with regard to the compliance proceeding.²

¹ *Oliver v Biggs* [2021] NZEmpC 104 at [37].

² *Oliver v Biggs* [2022] NZEmpC 73 at [11].

[2] In late September 2022, Mr Oliver filed a yet further proceeding because none of the directed payments had been made. He sought a compliance order in respect of the order for costs made on 3 May 2022; he sought a sanction in respect of the breach of the compliance order concerning his costs of \$7,200; he also sought costs with regard to this proceeding.

[3] Mr Biggs has taken no formal step. In light of an affidavit of service provided to the Court on 7 December 2022, I recorded in a minute arising from a telephone directions conference held that day that I was satisfied personal service of the proceeding had been effected on him.

[4] Mr Biggs had been advised of the telephone directions conference by the Registrar by email and letter. In a reply to that email Mr Biggs said that notification of the telephone directions conference was the first he had heard of the matter; that he was working out of town with a very full schedule; and that his business was involved in a busy season with staff working to capacity. He asked that the telephone directions conference be rescheduled.

[5] Given the history, Mr Zindel, counsel for Mr Oliver, opposed the application for an adjournment. I was not persuaded there should be a deferral of the telephone directions conference, since I was satisfied that the proceeding had in fact been served, and that Mr Biggs had prior notice of the matter with no steps having been taken by him to comply with the Court's directions for payment to Mr Oliver.

[6] On that occasion, I timetabled the filing of a formal proof affidavit. I recorded that Mr Zindel had submitted that in addition to the compliance order that was sought, the Court should impose a sanction under s 140(6) of the Employment Relations Act 2000 (the Act), of \$10,000. I also recorded that Mr Oliver was seeking costs in respect of the current proceeding of \$1,900, together with disbursements of \$520.80, being a filing fee of \$306.67, and a service fee of \$214.13.

[7] I stated that once the formal proof affidavit had been filed, I would consider Mr Oliver's claims on the papers. I directed that a copy of the minute be forwarded to Mr Biggs in hardcopy form sent by courier, and by email, so that he was appraised

of the steps that would be taken. I noted that Mr Biggs thus had an opportunity to deal with the outstanding issues constructively with Mr Zindel, or seek leave to file a statement of defence out of time, if he considered he had grounds for doing so.

[8] A formal proof affidavit was filed, in which Mr Oliver said he had been trying to obtain the (unpaid) Court costs from Mr Biggs for a long period of time, and none of the amounts had been paid.

[9] I am satisfied that the minute of the telephone directions conference held on 7 December 2022 were served as directed, and that a copy of the formal proof affidavit was also served on Mr Biggs by Mr Oliver's lawyer on 13 December 2022. He has taken no steps following the receipt of these documents.

[10] There are three matters I must determine. The first relates to whether a compliance order should be made in respect of the costs which Mr Biggs was ordered to pay on 3 May 2022, of \$3,600. No explanation has been provided as to why this sum has not been paid. I order Mr Biggs to do so within 28 days of the date of this judgment.

[11] Second, I must consider the application made for a sanction in respect of the unpaid amount of \$7,200, which was the subject of a compliance order made on 3 May 2022, and which was to be complied with within 28 days.

[12] There is no explanation as to why the Court's order has not been complied with. A sanction is accordingly appropriate. The only issue is one of quantum.

[13] The relevant principles are set out in *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*.³

[14] The purpose of s 140(6) of the Act is coercive. It is well established that it is to force a defaulting party to comply with a compliance order.

³ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451.

[15] In doing so, the Court must consider the level of culpability (including the nature, scope, and duration of any default), the need for deterrence and denunciation, whether the defendant has committed similar previous breaches, the attitude of the defendant, whether the defendant has taken any steps to address its non-compliance, the defendant's circumstances including its financial position, and the desirability of a degree of consistency in comparable cases.

[16] Here, the level of culpability is not insignificant; I accept there is a need for deterrence and denunciation; Mr Biggs has consistently attempted to delay meeting his obligations as a result of which Mr Oliver has suffered financial loss; and the Court has no information about Mr Biggs' financial position because he has taken no steps to address the non-compliance, or to participate in this proceeding.

[17] Although it is a case that pre-dates *Reynolds, Coventry v Singh* is one which has a similar fact pattern to the present case and reflects a *Reynolds'* approach.⁴

[18] In *Coventry*, \$14,000 was owed, which is more than is owed here. Non-compliance had continued for seven months, which may be compared with the nine months delay which has occurred when this Court made its order of compliance. The Court in *Coventry* noted that there had been an ongoing and lengthy failure by the employer to meet his obligations, which is an apt description as to what has occurred in this case. A fine of \$3,000 was imposed.⁵

[19] In all the circumstances, I have concluded a sanction of \$3,000 is a fair sanction. That sum is to be paid to Mr Oliver by Mr Biggs immediately.

[20] Finally, I consider the claim for costs in the present proceedings. Costs on Category 1, Band A basis under the Court's Practice Directions Guideline Scale as to Costs,⁶ which is potentially the applicable category, produces a figure of \$3,816.⁷

⁴ *Coventry v Singh* [2012] NZEmpC 34.

⁵ At [25].

⁶ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

⁷ Items 1, 11, 12 and 53: 2.4 days at \$1,590 per day.

[21] The sum actually claimed, however, is rather less. Mr Oliver's costs were reasonably incurred and in the circumstances should be paid in full. I award payment of the actual costs of \$1,900, together with the disbursements of \$520.80 which were properly incurred. In the result, Mr Biggs is to pay Mr Oliver costs and disbursements in respect of the current proceedings totalling \$2,420.80.

[22] In summary, I order:

- (a) by way of compliance with the order of 3 May 2022, Mr Biggs is to pay Mr Oliver \$3,600 within 28 days of today;
- (b) by way of sanction, Mr Biggs is fined \$3,000, which he is to pay in full to Mr Oliver immediately; and
- (c) as to costs and disbursements in respect of this proceeding, Mr Biggs is to pay Mr Oliver the sum of \$2,420.80 within 28 days of today.

[23] If there are yet further defaults, consideration should be given as to whether the provisions of the Insolvency Act 2006 will provide an effective means of finalising this matter.

B A Corkill
Judge

Judgment signed at 9.15 am on 28 February 2023