

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

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

**[2023] NZEmpC 76
EMPC 205/2022**

IN THE MATTER OF an application for a compliance order

BETWEEN KYLIE MCMILLAN
 Plaintiff

AND RESQUE CORPORATION 20/20 LIMITED
 Defendant

Hearing: 25 May 2023
 (Heard at Christchurch via Audio Visual Link)

Appearances: L Johnston, counsel for plaintiff
 No appearance from defendant

Judgment: 25 May 2023

ORAL JUDGMENT OF JUDGE K G SMITH

[1] Kylie McMillan is seeking orders under s 140(6) of the Employment Relations Act 2000 (the Act) against her former employer, Resque Corporation 20/20 Ltd. She is seeking them because her employer failed to satisfy an order by the Employment Relations Authority made on 15 November 2021. It ordered the company to comply with a settlement agreement between them dated 15 April 2021.¹

[2] The terms of the settlement agreement were signed by a mediator under s 149 of the Act. The agreement required Resque Corp to pay Ms McMillan:

(a) outstanding wages and holiday pay of \$26,000 gross; and

¹ *McMillan v Resque Corp 20/20 Ltd* [2021] NZERA 504 (Member Beck).

(b) a contribution to her legal costs of \$2,000 plus GST.

[3] Under the settlement agreement payment was to be made on or before 14 June 2021. Resque Corp did not pay and Ms McMillan was obliged to apply to the Authority for a compliance order to compel it to do so.

[4] Resque Corp was represented at the Authority investigation by its director, Daniel Parrett. The explanation given to the Authority for not paying was that the company had insufficient funds because of a separate dispute that had arisen shortly after the settlement agreement was signed. The Authority's determination recorded that despite the financial setback caused by the other dispute the company expected it would be able to pay the outstanding debt from an anticipated tax refund.²

[5] The Authority made a compliance order pursuant to ss 137(1)(a)(iii) and 137(2) of the Act. Under it Resque Corp was ordered to pay Ms McMillan the outstanding amounts within 14 days together with costs of \$600 and to reimburse her for her lodgement fee.³

[6] The compliance order has not been complied with and the present application has been made.

[7] Resque Corp has not taken any step in this proceeding.

[8] Ms McMillan filed an affidavit explaining the circumstances which led to the personal grievance against Resque Corp and the settlement agreement. This morning she explained that, despite the passage of time since the settlement agreement was entered into and the existence of the compliance order, she has not received any payment from Resque Corp. Nor has she made any arrangements with the company to compromise or satisfy the debt in any other way.

² At [5].

³ At [10]–[11].

[9] Where an Authority's compliance order has not been complied with the adversely affected party may apply to the Court for orders under s 140(6).⁴ That section reads:

- (6) Where any person fails to comply with a compliance order made under section 139, or where the court, on an application under section 138(6), is satisfied that any person has failed to comply with a compliance order made under section 137, the court may do 1 or more of the following things:
 - (a) if the person in default is a plaintiff, order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the plaintiff in the proceedings:
 - (b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly:
 - (c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:
 - (d) order that the person in default be fined a sum not exceeding \$40,000:
 - (e) order that the property of the person in default be sequestered.

[10] The statement of claim sought a fine, an order for the sequestration of the defendant company's property, interest on the money outstanding in accordance with the Interest on Money Claims Act 2016 and costs.

[11] This morning Mr Johnston explained that the only sanction pursued at this hearing is a fine. A request was made, however, to preserve the application for sequestration if the Authority's order remains unsatisfied. That request is dealt with later.

[12] In *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)* the Court of Appeal referred to a range of factors to consider in assessing a fine under s 140(6).⁵ Those factors are not exhaustive but they include the nature of the default (that is whether it is deliberate or wilful), whether it is repeated, without excuse or explanation and if it is ongoing.

⁴ Under Employment Relations Act 2000, s 138(6).

⁵ *Peter Renolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451, [2016] ERNZ 828.

[13] Also to be taken into account are any remedial steps, the defendant's track record, the respective circumstances of the employer and employee, the appropriateness of a deterrent penalty and the proportionality of the proposed fine.

A penalty?

[14] The first consideration is whether a sanction under s 140(6) should be imposed at all.

[15] Breaching a compliance order is serious and warrants a serious response.⁶ The primary purpose of a sanction under s 140(6) is to secure compliance with the Authority's orders.⁷ A further purpose is to impose a sanction for non-compliance.

[16] I am satisfied that Resque Corp's conduct makes it appropriate to impose a fine. The assessment now turns to the amount of that fine.

The fine

[17] The maximum fine is \$40,000. Mr Johnston submitted that the maximum ought to be imposed, because the Authority's order was not satisfied and the company's action is contemptuous. Disapproval of that action should, he argued, be reflected in the maximum fine. I do not agree that the circumstances warrant a fine of that amount.

[18] In this case I consider the appropriate starting point at which to begin the assessment of a fine is \$15,000. I have reached that conclusion because the default in complying with the Authority's order was deliberate. Mr Johnston submitted that it was egregious and that is, I think, an appropriate description of what occurred.

[19] Resque Corp entered into an agreement to resolve the claims it was facing from Ms McMillan. It made a commitment to pay the amount within 14 days. It did not

⁶ See for example *Cousens v Star Nelson Holdings Ltd* [2022] NZEmpC 30.

⁷ *Peter Reynolds*, above n 5.

pay and there has been no explanation by the company in this proceeding about why that default occurred.

[20] In the Authority's determination, which has not been challenged, the company's explanation was recorded as the intervention of another dispute which caused what seems to have been a temporary liquidity problem. The Authority was informed, nevertheless, that the agreement could be honoured and that seems to have been a significant part of the decision to make the compliance order.

[21] In practice what that means is that the company chose to prioritise another matter over meeting the commitment it agreed it had to Ms McMillan to pay her outstanding wages and holiday pay. In the time since the Authority's compliance order was made the company has been noticeably silent but clearly put its interests ahead of Ms McMillan's interests.

[22] The breach is ongoing and it is difficult to contemplate a more significant breach than one where an employee is left out of pocket for wages and holiday pay which are at the heart of an employment relationship.

[23] Compounding that behaviour the company has chosen to take no part in this proceeding.

[24] It will be obvious from these remarks that there has been no attempt by Resque Corp to remediate its failure to comply with the order or to explain it.

[25] I have no information about the company's track record one way or the other and nor does Mr Johnston. I am prepared to assume that it has no previous poor record of failing to meet the Authority's orders.

[26] There is no information about Resque Corp's circumstances. It is not known whether it trades. Its financial circumstances are unknown. Mr Johnston urged me to assume that nevertheless the company should be treated as being able to pay a fine and I agree that is an appropriate way to proceed.

[27] Conversely, there has been a significant adverse effect on Ms McMillan. Failing to comply with the compliance order, and before that the settlement agreement, has caused her significant financial inconvenience and personal distress. The amounts owed to her were for wages and holiday pay and, as I have already said, it is difficult to imagine something more significant to an employee than a failure to pay wages and holiday pay. The failure to pay had obvious consequences.

[28] In my assessment the circumstances of this case take matters outside of the range of penalties that were referred to in *Cooper v Phoenix Publishing Ltd* and in *McKay v Wanaka Pharmacy Ltd*.⁸

[29] I agree with Mr Johnston that this is a case where it is necessary to impose a sanction to force Resque Corp to comply with the unsatisfied order and to deter it from not complying with orders in future. It is also appropriate to impose a fine as a general deterrence to underscore that determinations of the Authority must be complied with.

[30] Stepping back and looking at the proposed fine level I mentioned earlier, and bearing in mind that there are no factors which serve to reduce the fine from the indicative level I mentioned, I consider what is proposed as a fine is proportionate.

[31] Under s 140(7) of the Act the Court may order some of the fine to be paid to the employee who has brought the proceeding. Mr Johnston submitted that 100 per cent of the fine should be ordered to be paid to Ms McMillan. As a fall back he sought an order that 75 per cent be paid.

[32] There is an element of compensation in an assessment under s 140(7). Nevertheless, I consider it appropriate to make an order under that section given the impact on Ms McMillan of the company's failure to comply. Even though I am shortly going to make a costs award, she has been required to take this proceeding to force compliance with an Authority's order that ought not to have breached in the first place. My view is that the appropriate amount to order is \$9,000 under s 140(7).

⁸ *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111 at [8]; *McKay v Wanaka Pharmacy Ltd* [2021] NZEmpC 79.

[33] Earlier I mentioned the breadth of the remedies sought by Ms McMillan in her proceeding. Leave is reserved to seek further or other sanctions referred to in her statement of claim if the Authority's compliance order remains outstanding by **22 June 2023**.

Costs

[34] A contribution to Ms McMillan's costs is sought. Mr Johnston sought \$2,500 as a contribution to Ms McMillan's costs and advised me that her actual expenses have exceeded that amount. I am satisfied it is appropriate to make an order accordingly.

Outcome

[35] Pursuant to s 140(6) of the Act Resque Corp is ordered to pay a fine of \$15,000 and of that sum \$9,000 is to be made payable to Ms McMillan.

[36] Costs of \$2,500 are payable to Ms McMillan arising from the proceeding.

[37] Leave is reserved to apply for further or other sanctions in accordance with the statement of claim without further proceedings being filed.

K G Smith
Judge

Judgment delivered orally at 12 pm on 25 May 2022