

[3] The defendant failed to comply within the time prescribed and did not raise any objection to the Notice. As a result of an application for a compliance order then made to the Authority, a determination was issued on 11 December 2013 ordering the defendant to comply with the Notice.¹ In addition, the determination imposed a penalty of \$1,500 upon the defendant and there was an order that the defendant reimburse the Labour Inspector for a filing fee of \$71.56. The defendant failed to take any steps in the proceedings before the Authority.

[4] In a subsequent determination dated 25 August 2014, the Authority made further compliance orders that the penalty and filing fee in the earlier determination be paid.² A further order was made that the defendant reimburse the Labour Inspector for the further filing fee of \$71.56. Again the defendant took no steps in these later proceedings before the Authority. It has not complied with any of these orders.

The sequence of events and factual background

[5] The evidence in support of the application to the Court was presented by the plaintiff, Mr Myatt. Following a complaint received by him from a relative of an employee of the defendant, Mr Myatt contacted and met with Salamaia Ah-Kuoi, the director of the defendant company. Mr Myatt then carried out an investigation and concluded that in respect of the employee he was investigating, the defendant was in breach of a combination of minimum conditions of employment provided by the Act, the Wages Protection Act 1983, the Minimum Wage Act 1983 and the Holidays Act 2003. The written employment agreement between the defendant and the employee omitted provisions for payment for work on a public holiday and breached statutory requirements on forfeiture of annual leave and accumulation of sick leave. The employee had been charged a bond which amounted to charging of a premium for employment. This was in breach of the provisions of the Wages Protection Act.³ There had also been an unsuccessful attempt to convert the nature of the employee's employment to a contract for service, resulting in breach of the

¹ *Myatt (Labour Inspector) v Pacific Appliances Ltd* [2013] NZERA Auckland 565.

² *Myatt (Labour Inspector) v Pacific Appliances Ltd* [2014] NZERA Auckland 346.

³ Wages Protection Act 1983, s 12A.

requirements to pay at least the minimum wage. When the employment was terminated, the defendant failed to pay the employee his outstanding holiday pay.

[6] The Labour Inspector endeavoured to resolve matters by having the defendant enter into an enforceable undertaking pursuant to s 223B of the Act. When this could not be achieved an Improvement Notice under s 223D of the Act was issued. It was served at the registered office of the defendant and accepted on behalf of Ms Ah-Kuoi by her husband Tai Ah-Kuoi.

[7] The defendant completely ignored the Improvement Notice. A statement of problem was then lodged with the Authority seeking an order that the defendant comply with the terms of the Improvement Notice pursuant to s 137(1)(a)(iiib) of the Act. Following this, there being no steps taken by the defendant, the first determination was issued, which included the penalty and costs.

[8] The defendant failed to pay the penalty and the costs and a further application was made to the Authority for a compliance order against the defendant. Again the defendant took no steps in the second application. Before issuing the second determination, however, the Authority directed the plaintiff to effect personal service of the application and the related documents on the defendant. As part of this process Mr Myatt served copies of all of the papers at both the defendant's address for service being its registered office, and at the home address of Mrs Ah-Kuoi, she being the sole director of the defendant company.

[9] Following personal service on Mrs Ah-Kuoi, a trespass notice signed by Mr Ah-Kuoi was served on the Labour Inspector, which warned him to stay away from the Ah-Kuoi's private residence.

[10] Following service of the documents, an investigation meeting was conducted by the Authority. Again there was no appearance by the defendant and the Authority, on 25 August 2014, issued its second determination with a compliance order requiring the defendant to pay the penalty of \$1,500, the first filing fee of \$71.56 and a subsequent additional filing fee of \$71.56. The defendant was ordered to comply within a period of 28 days. A copy of the compliance order was served on Ms Ah-

Kuoi at her home address by registered post. The defendant did not pay any of the amounts ordered and did not file any challenge to either of the two determinations.

[11] As a result of this failure, Mr Myatt has filed the present application to the Court.

[12] The defendant has taken no steps in respect of the proceedings before the Court. Prior to the hearing of the matter, Mr Myatt attended to serving the Court proceedings on both the registered office of the defendant company and by registered post to the residential address of Ms Ah-Kuoi. He also attached the documents to an email addressed to Mr Ah-Kuoi, Ms Ah-Kuoi having previously responded from this email address. This latter step resulted in Mr Ah-Kuoi sending aggressive emails to Mr Myatt including a further trespass notice and advising that Ms Ah-Kuoi no longer resided at the address.

[13] In view of the fact that a substantial fine was being sought against the company, it was considered that some benefit to the Court might be obtained from having Ms Ah-Kuoi present at the hearing as a witness. A witness summons was issued against her but it could not be served. Following the unsuccessful steps taken by both the Court and a process server to serve the witness summons a reasonable inference was made that Ms Ah Kuoi was avoiding service.

Conclusions

[14] Pursuant to s 140(6) of the Act, where the Court is satisfied that a person has failed to comply with a compliance order made by the Authority under s 137 of the Act, the Court may order inter alia that the person in default be fined a sum not exceeding \$40,000. The plaintiff seeks such a fine against the defendant in this case.

[15] Even though the defendant has taken no steps in the application before the Court, the hearing proceeded on the basis that the Labour Inspector was required to formally prove the basis for the sanction claimed. I am satisfied on the basis of the evidence presented by Mr Myatt and the documents proved and then produced by counsel, that the defendant has failed to pay the penalty and filing fees ordered by

the Authority. The Court, accordingly, has a basis for exercising its discretion under s 140(6) of the Act to impose a sanction.

[16] In *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre*⁴ Judge Inglis helpfully traversed the legal framework for applications of this nature. The following principles were adopted by Judge Inglis:⁵

- (a) The failure to comply with a compliance order made by the Authority is a serious matter because it amounts to contempt, is an affront to the Authority and has the potential to bring the administration of justice into disrepute.
- (b) The suite of sanctions contained in s 140 which include imprisonment and sequestration of property reflect the seriousness with which the legislature views non-compliance.
- (c) In determining the sanction to be imposed in a particular case the following will be taken into account:
 - (i) The level of culpability involved (including the nature, scope and duration of any default);
 - (ii) The need for deterrence and denunciation;
 - (iii) Whether the defendant has committed similar previous breaches;
 - (iv) The attitude of the defendant;
 - (v) Whether the defendant has taken any steps to address its non-compliance;
 - (vi) The defendant's circumstances including its financial position;
 - (vii) The desirability of a degree of consistency in comparable cases.
- (d) Any fine imposed ought not to be disproportionate to the gravity of the defendant's default.

⁴ *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC 41.

⁵ At [16]-[19].

[17] As Judge Inglis went on to state⁶ deterrence and denunciation are likely to have particular relevance in many of the cases coming before the Court. This is because of the desirability of not only reinforcing the importance of complying with orders of the Authority but also to ensure that employees receive what is due to them under minimum legislative standards of employment without delay or difficulty and therefore redressing the inherent imbalance of power between the parties to an employment relationship.

[18] As to the quantum of fine to be imposed, Judge Inglis helpfully set out in the *Peter Reynolds Mechanical Ltd* case the results of several cases which have previously been determined by this Court by way of fine under s 140(6) of the Act. The fines range from \$1,000 to \$10,000. Usually costs are awarded in addition. Judge Inglis considered that the level of fines imposed under the Employment Contracts Act 1991 was of little assistance. This was because the maximum fine under that legislation was \$10,000. Under the 2000 Act the maximum fine is now \$40,000 and that is a clear legislative indication that increased fines need to be considered.

[19] Applying these principles in the present case, the defendant's actions give rise to a number of matters which should be taken into account. The actions of an incorporated body are to be judged by the behaviour of its directors and officers. In this case the obstinacy of Ms Ah-Kuoi in the first instance in disregarding her company's statutory obligations to its employees when faced with an Improvement Notice is an aggravating factor. This was followed by her obstructive behaviour towards the Labour Inspector in his efforts to have the defendant remedy its breaches. That obstruction continued throughout the procedures before the Authority, particularly in failing to meet the penalty and costs awarded; and latterly the Court in its endeavours to have her co-operate with its procedures.

[20] As stated in the *Peter Reynolds Mechanical Ltd* case, the failure to comply is a serious matter tantamount to contempt. In this case the defendant's level of culpability through its director is high, resulting originally in its serious breaches of the minimum standards its employee was entitled to. The behaviour of the defendant

⁶ At [24].

through Ms Ah-Kuoi was unacceptable. There is clearly a need in this case to denounce her behaviour on behalf of the defendant and provide a deterrent to others who may be tempted to indulge in the same actions. While the company has ceased trading, there is no way of knowing its present financial circumstances. There is no evidence that it is insolvent. In any event there may yet be culpability by Ms Ah Kuoi personally if further enforcement action is taken in the event that the defendant does not meet the obligations now ordered against it, including the fine to be imposed.

[21] Having regard to all of these factors, while there do not appear to be any previous breaches by the defendant, the overall circumstances render this case a serious one of its kind. The insidious breaches of the minimum standards of employment were across a wide spectrum. Accordingly, the defendant is fined \$15,000. It is appropriate that the defendant also makes a contribution towards the costs of the Ministry of Justice in this matter. Ms Ah-Kuoi's obstruction has caused the Ministry unnecessary difficulties in prosecuting the defendant. There will be an order requiring the defendant to contribute, in addition to the fine, the sum of \$3,000 towards the costs of the plaintiff. The fine and costs are to be paid to the Crown on or before 4pm on the next business day following service of the certificate of judgment upon the defendant. Such service is to be effected on the registered office of the defendant. While it will not be determinative of service a copy is to be posted to Ms Salamanaia Ah-Kuoi at her last known residential address. The existing orders of the Authority are of course not abrogated by this decision and the defendant remains liable to pay the penalty of \$1,500 and disbursements amounting to \$143.12 earlier ordered by the Authority. Continued breach by the defendant of those orders and failure to pay the fine and costs now ordered will no doubt lead to further enforcement action.

M E Perkins
Judge

Judgment signed at 2.15 pm on 21 March 2016