IN THE EMPLOYMENT COURT
WELLINGTON

[2017] NZEmpC 90
EMPC 116/2017

IN THE MATTER OF	an application for orders for breach of a compliance order
BETWEEN	JASON NATHAN Plaintiff
AND	BROADSPECTRUM (NEW ZEALAND) LIMITED (FORMERLY TRANSFIELD SERVICES (NEW ZEALAND) LIMITED) Defendant

Hearing:	20 July 2017 (Heard at Wellington)
Appearances:	T Cleary, counsel for plaintiff J Upton QC, counsel for defendant
Judgment:	28 July 2017

JUDGMENT OF JUDGE K G SMITH

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[1] Jason Nathan is a registered lines mechanic employed by Broadspectrum (NZ) Ltd at its Glover Street premises in Wellington. From those premises Broadspectrum provides repairs and maintenance services for the electric lines network owned or operated by Wellington Cable Cars Ltd.

[2] Despite being a registered lines mechanic, Mr Nathan has not resumed work on the lines network since he was reinstated to his former position by order of this Court on 28 October 2016.[1]

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1 *Nathan v Broadspectrum (New Zealand) Ltd* [2016] NZEmpC 135, (2016) 10 NZELC 79-070.

[3] Broadspectrum unapologetically says that, while Mr Nathan has been reinstated, it is entitled to be satisfied about his competency before allowing him to work on the network. It relies on the extensive duties it owes to him, and others, under the Health and Safety at Work Act 2015 to justify this stance.

[4] The central issue is whether Broadspectrum's stance breaches a compliance order made against it on 6 June 2017.[2]

October 2016 Judgment

[5] Mr Nathan started working for Broadspectrum in July 2008. His dismissal followed an incident on 22 June 2013 when he was responding to a call to repair a damaged span wire on the network. At the time Mr Nathan was also an Acting Team Leader.

[6] During the repair, while the span wire was being pulled into place, it flashed or arced on a nearby traffic light pole indicating that it was still energised or "live". It transpired that, while taking steps to assist in the placement of the span wire, a colleague of Mr Nathan's, Mr Jordan Smith, experienced a sensation later described as a "tingle" meaning that he may have experienced an electric shock.

[7] The resulting inquiry led to Mr Nathan's dismissal. However, Mr Nathan was successful in his proceeding against Broadspectrum and that company was ordered to reinstate him to his former position subject to conditions. The relevant conditions are those at [86](1)(b) and (c) of my judgment of 28 October 2016, which read:[3]

> 1. Mr Nathan is to be reinstated to his former position as Acting Team Leader for the defendant at Glover Street, subject to the following:
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> …
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> (b) His return to active duties at the defendant's Glover Street premises is deferred for 14 days from the date of this judgment to allow for an orderly resumption of duties and

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2 *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 72.
3 *Nathan*, above n 1, at [86].

> for any other necessary administrative steps to be taken by Broadspectrum; and
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> (c) Further, Mr Nathan is to fully cooperate in undertaking any training required of him by Broadspectrum which, for the avoidance of doubt, may take place during the time period referred to in 1(b) or such other time as Broadspectrum may direct.

[8] Broadspectrum exercised its right to seek leave to appeal to the Court of Appeal and applied for a stay until that application was resolved. A stay was granted, subject to conditions, on 5 December 2016.[4] As a result of the stay Mr Nathan was not to resume active duties at Glover Street pending the outcome of the application for leave to appeal and, if the application had been successful, until the substantive appeal had been determined. In the meantime he remained on Broadspectrum's payroll.

[9] From 28 October 2016 onwards Mr Nathan was a Broadspectrum employee, but was not actually working on any tasks for the company. Broadspectrum's application to the Court of Appeal was dismissed on 23 May 2017.[5]

[10] Mr Nathan did not take up his former position and resume active duties immediately after the judgment from the Court of Appeal was released. Broadspectrum's delay in returning Mr Nathan to work led to an application for a compliance order combined with a request for urgency on 30 May 2017. The catalyst for that application was an indication by Broadspectrum that Mr Nathan's return to actual work would be deferred for 14 days after the date of the Court of Appeal judgment and that he also needed to pass a medical examination or assessment. The 14-day deferral was said to be available because that time had been provided for in [86](1)(b) of my October judgment.

[11] Urgency was granted and the application for compliance orders was scheduled for a hearing on 6 June 2017. As at 30 May 2017 no issue about Mr Nathan undertaking competency assessments had been raised.

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[4] *Broadspectrum (New Zealand) Ltd v Nathan* [2016] NZEmpC 162 at [50].

[5] *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 202.

[12] On 2 June 2017, Mr Richard Upton, counsel for Broadspectrum, had written to Mr Cleary addressing several outstanding matters at that time. Relevantly, Broadspectrum required Mr Nathan to undertake training described in Mr Upton's letter as a basic induction relating to site safety and health and safety training. Two passages from Mr Upton's letter capture the flavour of the correspondence, and the impasse between the parties, as it was in early June:

> 2. Broadspectrum does require Mr Nathan to undertake the training I set out in my letter of 1 June, being a basic induction (which will involve site safety etc) and also some basic health and safety training. Any substantive training will then be provided on the job.
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> 3. In your communications you have suggested that this is training "as to competence". That is not the case – it is the standard induction training. For someone with Mr Nathan's experience, it should not pose an obstacle, but it is important that this be undertaken in order to ensure that Mr Nathan's skills remain up-to-date. That is particularly so given his four year absence.

[13] For completeness, Mr Upton's letter referred to training being provided for in the judgment of 28 October 2016,[6] where [86](1)(c) required Mr Nathan to fully co-operate in undertaking any training required of him by Broadspectrum.

[14] By the time Mr Nathan's application for a compliance order was heard on 6 June 2017, two issues needed to be addressed. First, whether Broadspectrum had a period of 14 days from the date on which the Court of Appeal decided the application for leave to appeal within which to prepare for Mr Nathan's return to work. Second, whether Mr Nathan could be required to undergo a medical examination or assessment.[7]

[15] In my judgment of 6 June 2017, I found that Broadspectrum was in breach of the order reinstating Mr Nathan by not doing so within 14 days and by attempting to impose as a condition of his return to active duties that he must first undergo a medical examination or assessment.[8]

[16] The following compliance order was made:[9]

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6 *Nathan,* above n 1.
7 *Nathan*, above n 2.
8 *Nathan*, above n 2, at [27].
9 At [33].

> Broadspectrum is ordered to comply with the orders contained in my judgment of 28 October 2016 by returning Mr Nathan to active duties at Glover Street no later than Wednesday 7 June 2017 at 8 am.

This application

[17] Mr Nathan completed a medical assessment on 6 June 2017 and presented himself for work at the Glover Street premises on 7 June 2017. On 8 June 2017 Mr Nathan sought further orders because, he alleges, he was not returned to active duties at Glover Street in breach of the compliance order.

[18] In this application Mr Nathan said that he was required to satisfy three conditions imposed by Broadspectrum before that company will return him to active duties, meaning allowing him to work on the lines network. They are that:

(a) he undergo an induction as a new employee;

(b) there would be a two week appraisal of his competence; and

(c) he would be vetted by Wellington Cable.

[19] Initially Mr Nathan sought a further compliance order under s 139(4) of the Employment Relations Act 2000 (the Act), a declaration that Broadspectrum had failed to comply with the order of 6 June 2017 and a fine of $20,000 pursuant to s 140(6)(d) of the Act. Mr Nathan also sought a direction that the fine be paid to him pursuant to s 140(7) of the Act. Mr Nathan no longer seeks a further compliance order.

[20] Not surprisingly Broadspectrum is opposed to this application. As to Mr Nathan's competency to work as a line mechanic that is now said to be an issue the company must take seriously. Broadspectrum says it is entitled to test Mr Nathan's competency to return to work on the network to its satisfaction.

[21] Broadspectrum says this attitude is driven out of concern for its duty to provide a safe and healthy workplace. While asserting Mr Nathan was not being "singled out" or "targeted" Broadspectrum says that it is requiring him to undertake

training to establish his competence after an absence of approximately four years, the elapsed time from the date of his dismissal in mid-2013 until the present.

[22] Broadspectrum says it is not in breach of the compliance order or the order reinstating Mr Nathan. It referred to, and relied on references to training in [86](1)(b) and (c) in the 28 October 2016 judgment. It says he has returned to work at Glover Street where he has completed an induction, has been assessed as medically fit to work and is now having his skills assessed as part of that training.

[23] Any concern about the attitude of Wellington Cable was allayed because Broadspectrum said in its notice of opposition to this application that it is not requiring Mr Nathan to be vetted by that company.

What has Mr Nathan been doing?

[24] Since the compliance order was made Mr Nathan has returned to work with Broadspectrum in the narrow sense that he attends the Glover Street premises each workday and is assigned a task each day. However, Mr Nathan has not undertaken any work on the lines network, either by himself or under supervision. For most of the time from 7 June 2017 until now Mr Nathan has been completing a series of written tests, described as skills assessments, in order to demonstrate his competency.

[25] On 7 June 2017 Mr Nathan spent the day being inducted into the workplace as a new employee would be. He was informed that he would be undertaking the induction process until Friday 9 June 2017, at which point he would then be assessed. Once the induction process was completed, he was told he would spend the next two weeks undertaking a skills assessment to assess his competency. After completing this skills assessment, if Broadspectrum considered him to be competent, his manager proposed to approach Wellington Cable to see if that company would allow Mr Nathan to work on its lines network as a new employee.

[26] Aside from the initial induction on Wednesday, 7 June 2017, and perhaps for a day or two afterwards, Mr Nathan has spent the entirety of his working day

completing these skills assessments. Not surprisingly, he objects to undertaking them and has participated under protest. Although Mr Nathan has been absent from Broadspectrum's workplace for several years he is still a qualified lines mechanic and considers that his competency ought not to be in question in this way now.

[27] Since 7 June 2017 Mr Nathan has been essentially left alone to complete these assessments. He has not been provided with all of the reference material needed to be satisfied about his answers to questions in the assessments and, for the most part, has been left to source that material from wherever he can locate it within the company. Part of Mr Nathan's uncertainty, and possibly his concern, about being subjected to this testing is that it is inconsistent with what was said in correspondence between his lawyer and Broadspectrum's lawyer where any substantive training was said to be "provided on the job".

[28] Mr Nathan considers having to now complete these skills assessments is an about-face by Broadspectrum from its previous statements.

[29] Any confusion over what Broadspectrum requires has been dispelled because of what has been clearly and unequivocally stated by Mr Craig MacDonald, who is the General Manager Power for Broadspectrum in New Zealand. Mr MacDonald is the company's senior employee in New Zealand in that part of the business in which Mr Nathan works.

[30] Mr MacDonald was not employed by Broadspectrum until relatively recently. He was not employed by the company when Mr Nathan was dismissed in 2013 and was not involved in the subsequent proceedings. However, it has fallen to him to implement Mr Nathan's return to work.

[31] Mr MacDonald confirmed Broadspectrum is testing Mr Nathan on his ability to do his job, but said the company is not questioning Mr Nathan's qualifications or experience. He considered it is Mr Nathan's current ability to undertake work activities according to new processes and procedures that is being tested.

[32] The precise nature of the new processes and procedures that require this level of assessment was not described by Mr MacDonald other than generally. In any event the incident in 2013 that lead to Mr Nathan's dismissal had resulted in some changes to Broadspectrum's processes and procedures. Many of them have now been written down where previously they had not been.

[33] Mr MacDonald said that Mr Nathan would not be allowed to work on the lines until all of these allocated skills assessments have been completed. He said it was not practicable to have Mr Nathan working on the network under supervision, because Broadspectrum would need to find a supervisor who would have to be removed from other tasks.

Has there been a breach of the compliance order?

[34] The issues are whether there has been a breach of the compliance order and, if so, whether any sanction in the form of a fine under s 140(6) is appropriate.

[35] I bear in mind that the standard of proof is beyond reasonable doubt[10] and the onus is on Mr Nathan to establish each ingredient of the grounds on which he relies for imposing a sanction.[11]

[36] The power to order compliance under s 139(1) of the Act exists where any person has not observed or complied with any provision of Part 8 or:

> (b) any order, determination, direction, or requirement made or given under this Act by the Court.

[37] Once jurisdiction is established, because an order has not been observed or complied with under s 139(1)(b), s 139(3) requires the Court to specify a time within which the compliance order is to be obeyed.

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[10] *Fletcher Development & Construction Ltd v New Zealand Labourers IUOW* [1988] NZILR 954 (LC).

[11] At 958.

[38] There was no dispute that the conduct complained of as being in breach of the order must be assessed by having regard to the precise meaning of that order in the context in which it was made.[12]

[39] The order made at [33] of my judgment of 6 June 2017,[13] was unequivocal. Broadspectrum was ordered to comply with the order in my judgment of 28 October 2016[14] by returning Mr Nathan to active duties at Glover Street no later than on Wednesday, 7 June 2017 at 8 am.

[40] Mr John Upton QC did not suggest in submissions that the order failed to satisfy s 139(1) and/or 139(3), or was in any other way unclear or ambiguous or that the company was in some way unaware of the order.

[41] Underpinning this application is the deceptively simple proposition that Mr Nathan has not been reinstated to his former position and returned to "active duties" within the meaning of the orders made in [33] of the 6 June 2017 judgment.[15] In the sense argued for by Mr Cleary, "active duties" means Mr Nathan resuming work in the same way as he did before his dismissal. That is, as a lines mechanic attending to repairs and maintenance of the lines network and who, from time to time, was an Acting Team Leader. It follows that Broadspectrum's insistence that Mr Nathan undertake these skills assessments, devoid of physical work on the network, is not a return to active duties and breaches the compliance order.

[42] Mr Upton, for Broadspectrum, submitted that the order has not been breached because what the company requires is an aspect of training, relying at least partly on the commonly understood meaning of that word. He relied on the New Shorter Oxford English Dictionary definition of "training" to show that it involves elements of instruction for a skill, as follows:[16]

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12 See *Fletcher Development and Construction Development v NZ Labourers IUOW* [1997] NZILR 954 (LC) at 960.
13 *Nathan*, above n 2, at [33].
14 *Nathan*, above n 1.
15 *Nathan*, above n 2, at [33].
16 Lesley Brown (ed) *The New Shorter Oxford English Dictionary* (Revised ed, Oxford University Press, New York, 1993) at 3363.

> **training** … **1** The action of TRAIN *v*.; esp. (**a**) the act or process of providing or receiving instruction in or for a particular skill, profession, occupation, etc.; …

[43] It follows what Mr Nathan is being required to do is an aspect of the training the Court recognised he could be compelled to undertake. In this reasoning there is a spectrum of activity on which training, including competence assessment, can be measured. So long as the task assigned to Mr Nathan falls on that spectrum, the activity complies with the Court orders.

[44] Justifying Broadspectrum's stance was said to be the extensive legal duties imposed on employers as a result of recent changes to health and safety legislation created by the Health and Safety at Work Act 2015. That legislation was said to have created significant risks for Broadspectrum and it was reasonable to expect the company could and should take steps to control them, especially when working on an electrical network poses real hazards to Mr Nathan and to others.

[45] I agree with Mr Upton's submission that determining whether or not there has been a breach rests on what was meant by "active duties". I consider that the order made required Mr Nathan to be restored to the position he had immediately before his dismissal in 2013 including being able to undertake repairs and maintenance tasks on the network.

[46] It is apparent that what Broadspectrum has done bears no relationship to the resumption of active duties, or to training, and that it is not really relying on the condition in [86](1)(c) of the October 2016 judgment to say it is carrying out training.

[47] In evidence Mr MacDonald agreed that the skills assessment was competency testing and was not the same thing as training in Broadspectrum's mind. He explained that these assessments are a method by which the company can verify a person is competent to undertake work safely. It was not training. He added that this assessment was a way of making sure that the employee understands the company's processes and procedures.

[48] Mr MacDonald agreed with a proposition put to him that there is a difference between what might be generally understood as "refresher training" and a competency assessment.

[49] Allied to that evidence was Mr MacDonald's response to questions from the Court about the skills assessment papers Mr Nathan is completing. Mr Nathan referred to a series of papers provided to him incrementally by Broadspectrum, which he had to complete and submit for marking by an external assessor. Despite the passage of time since Mr Nathan began completing these assessments in early June they had not been marked and returned to him by the time of the hearing on 20 July 2017. The day before the hearing he did discover, from talking to the external assessor, that some marking of at least one of the series of assessments had been undertaken.

[50] There was some doubt about the exact number of papers Mr Nathan is expected to complete. The assessments are in batches, or series, from the 100 series through to (possibly) the 900 series: Mr MacDonald was not sure if there were 9 series or slightly fewer, but the number of papers is extensive. He thought Mr Nathan would have to complete up to and including the 400 or 500 series. Mr Nathan's uncontradicted evidence was that he had completed 81 papers and there were approximately 40 or so to go.

[51] What was compelling about Mr MacDonald's evidence was his candid acknowledgment that some of those assessments were not a study of the changes to processes or procedures necessitated by the company's review of what happened in the incident of 2013. He responsibly acknowledged that some of the skills assessments Mr Nathan is required to complete will be for tasks not associated with that incident.

[52] Mr Cleary made the point that Mr Nathan established his competency during the trial, that was the time when any concerns about whether it was practicable and reasonable to reinstate Mr Nathan ought to have been raised including, if appropriate, his competency. None were raised at trial. In fact, in the Employment Relations Authority Broadspectrum conceded that Mr Nathan ought to be

reinstated.[17] That concession must have included an acceptance that Mr Nathan was and is competent.

[53] In requiring these skills assessments to be undertaken Broadspectrum has not tailored a response to Mr Nathan's return to work designed to refresh his skills or identify areas where further training might be needed. It has adopted a blanket approach without considering his circumstances or the terms of the compliance order.

[54] It is apparent from what Mr MacDonald said that Broadspectrum reserves to itself the ability to determine whether or not Mr Nathan will ever be allocated active duties, meaning undertaking repairs, maintenance and the usual tasks assigned to a registered line mechanic.

[55] On any view of the expression "active duties" that is not what Mr Nathan is now performing. He is back at work only in a very narrow sense not available to Broadspectrum.

[56] Broadspectrum has taken an unjustified approach to the compliance order by requiring Mr Nathan to complete assessments which are a barrier to his return to active duties. I am satisfied beyond reasonable doubt that Broadspectrum is in breach of the compliance order made on 6 June 2017.

Is a sanction appropriate?

[57] Section 140(6) of the Employment Relations Act provides for sanctions for a breach of compliance order:

> **140 Further provisions relating to compliance order by Court**
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> (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:

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[17] *Nathan v Transfield Services (New Zealand) Ltd* [2015] NZERA Wellington 120.

(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.

(7) An order under subsection (6)(d) may direct that the whole or any part of the fine must be paid to the employee concerned.

[58] Mr Upton submitted that it is important to look objectively at the facts from Broadspectrum's point of view. He emphasised that Mr MacDonald had expressed confidence in Mr Nathan's ability to complete the skills assessments, and Broadspectrum's willingness for him to do that showed the company had an insight into Mr Nathan's situation. Broadspectrum is taking steps to fully restore the employment relationship between it and Mr Nathan.

[59] Mr Upton emphasised that there is no proof of a collateral purpose to the requirement that Mr Nathan complete those assessments or that his return to active duties is being blocked. Looked at in that light, the requirement for the training to be undertaken was explicable and, at worst, there was some degree of confusion over how quickly Mr Nathan could complete the assessments which had been allocated to him. However, the company did not resile from the significance of competency testing because of the health and safety implications arising from working on an electrified network. Part of this submission was that it would be bold for the Court to order Broadspectrum to cease competency testing without the process being completed.

[60] Turning to the fine sought by Mr Nathan, Mr Upton said it was too high because Broadspectrum acted in good faith, with the benefit of legal advice, and Mr MacDonald had personally given an assurance that any future difficulties Mr Nathan

experiences in dealing with Broadspectrum's administration can be referred directly to him. Those submissions culminated in a request that, if a breach was established, and a fine is considered to be appropriate, it ought to be a modest one.

[61] He did not say what level of fine ought to be imposed if matters got that far and declined to make submissions about whether any part of a fine ought to be paid to Mr Nathan.

[62] Recently the Court of Appeal analysed s 140 of the Act in *Peter Reynolds Mechanical Ltd t/a the Italian Job Service Centre v Denyer*.[18] That case concerned a fine imposed because an employer had failed to comply with a compliance order requiring payment of money to the employee. The Court observed that a failure to comply with a compliance order is to be taken seriously. The Court also stated that the primary purpose of subsection 140(6) is to secure compliance. The section is also intended to impose some form of sanction.

[63] After analysing the sanctions available where a breach of a compliance order occurred, including imprisonment and sequestration, (the latter being regarded as a remedy of last resort[19]) the Court noted several factors to be taken into account in the following passages:[20]

> [76] … factors will include the nature of the default (deliberate or wilful), whether it is repeated, without excuse or explanation and whether it is ongoing or otherwise. Any steps taken to remedy the breach will be relevant together with the defendant's track record. Proportionality is another factor and will require some consideration of the sums outstanding. Finally, the respective circumstances of the employer and of the employee, including their financial circumstances, will be relevant.
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> [77] The wording of s 140(6) does not prevent a fine being imposed even where compliance has been achieved. The need to deter non-compliance, either by the party involved or more generally, is not to be overlooked. …

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18 *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer* [2016] NZCA 464, [2017] 2 NZLR 451.

19 At [56].

20 Footnotes omitted.

[64] Those factors in *Reynolds* were applied by Judge Corkill in *ALA v ITE*, which case dealt with breaches of a settlement agreement rather than non-payment, where Judge Corkill said:[21]

> … the correct approach in this case is to commence by considering whether a fine should be imposed, and if so for how much, having regard to the foregoing factors; …

[65] I consider the factors described in *Reynolds* are relevant in this case.

Nature of the default

[66] The default in complying with the order is deliberate and is ongoing. Broadspectrum knows what is required but insists on imposing a condition on a return to work that was not part of the original judgment or the compliance order. Broadspectrum continues to maintain that it is justified in compelling Mr Nathan to undertake these assessments, but it admitted some of them have no bearing on the circumstances which led to the incident in 2013. No effort was made to tailor the assessments in some way so that they respond to any identified deficiencies in Mr Nathan's skills, or for that matter any changes that have occurred in the four years since his dismissal, and that might warrant either further improvement, or could properly be said to be refreshing his skills. The company does not consider it is engaged in training at all and that was the only avenue available to it because of [86](1)(c) of the October 2016 judgment.

[67] It is noteworthy that when Mr Nathan presented himself for work on 7 June 2017 he completed a formal induction, but otherwise no effort was made to discuss with him what training, if any, might be desirable or appropriate. What happened was that he was immediately subjected to a detailed skills assessment regime designed to check his competency when competency had not been placed in issue during the trial and the company had previously accepted it should reinstate him disputing only the position to which he should be reinstated.

[68] I agree with Mr Cleary's submission that it is too late to raise concerns about Mr Nathan's competency to work. This default is deliberate and Broadspectrum still

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[21] *ALA v ITE* [2017] NZEmpC 39 at [145].

intends to reserve to itself an ability to say whether Mr Nathan should resume active duties and, effectively, to decide if he can remain employed. It was never part of the condition in [86](1)(c)[22] of my judgment to confer on Broadspectrum an ability to subsequently decide that Mr Nathan should be assessed for competency before he resumed the duties he previously undertook. I reject the submission that the Court is directing Broadspectrum to cease competency testing. What is required is compliance with a Court order.

Steps to remedy

[69] No steps have been taken to remedy this default. It is apparent that Broadspectrum has not reconsidered its stance even when taken to task by Mr Nathan in his application for further orders. In fairness to Mr MacDonald, I accept he is attempting to reintegrate Mr Nathan into the workforce but the way that has been chosen does not comply with either the judgment of 28 October 2016,[23] or the compliance order made on 6 June 2017.[24]

[70] Mr Upton made submissions about the appropriateness of regarding training and competency assessment as important because of the significance of the Health and Safety at Work Act 2015. I do not accept this legislation is a sufficient reason to justify what has happened or to be relevant in the assessment of a fine. While the legislation did reform workplace safety Broadspectrum is overstating that risk. The company has always had a risk arising from needing to ensure that its work is undertaken safely.

Track record

[71] Balanced against those considerations, this is the first occasion on which Broadspectrum has been pursued for breaching a compliance order.

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[22] *Nathan*, above n 1.
[23] *Nathan*, above n 1.
[24] *Nathan*, above n 2.

Financial

[72] No submissions were made about Broadspectrum's financial position, probably because it is a substantial and well-known company. I conclude it is able to pay a fine.

Proportionality

[73] Mr Nathan sought a fine of $20,000 which is half the maximum available under s 140(6)(d) of the Act. That level of fine was sought, I understand, to ensure that the penalty imposed has some 'bite', so that it has real meaning, and Broadspectrum appreciates it is being coerced into complying with the order.

[74] However, Mr Cleary was not able to refer to any cases from which assistance might be derived to support that level of fine other than the schedule attached to the decision in *Reynolds*. That schedule showed fines ranging up to $15,000, but that comparison does not provide much assistance in the circumstances in this case. The Court of Appeal also noted in *Reynolds* that no trend is apparent from cases which he had referred to. Mr Upton did not draw attention to any cases that might be considered comparable.

[75] In *ALA*[25] Judge Corkill reviewed recent decisions where the breach was other than a failure to pay money. Judge Corkill concluded in that case that the Court's approach should be the adoption of a minimum appropriate amount for a fine. Taking into account the defendant's track record of breaches of the settlement agreement and the compliance order, Judge Corkill thought a fine of $7,500 was appropriate (being a little below 20 per cent of the maximum).

[76] I agree with Judge Corkill's observations that the minimum appropriate amount for a fine is the correct approach. In this case, given the factors in *Reynolds,* a fine of $10,000 is appropriate.

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[25] *ALA*, above n 21.

Should any part of the fine be paid to Mr Nathan?

[77] This application asks that the whole of the fine be paid to Mr Nathan. Presumably, that request has been made to compensate him for the inconvenience which he has suffered as a result of the order not being complied with.

[78] I do not consider it is appropriate to order that the whole of the fine be paid to Mr Nathan under s 140(7) of the Act. However, some part of the fine should be paid to him and I consider $5,000 to be appropriate.

Outcome

[79] For the foregoing reasons I conclude:

(a) There has been a breach of the compliance order made on 6 June 2017.

(b) Broadspectrum is fined $10,000 for that breach;

(c) Of that $10,000 fine, $5,000 is to be paid to Mr Nathan.

Costs

[80] Costs are reserved. In the absence of agreement Mr Nathan has seven days from the date of this judgment to file a memorandum and Broadspectrum has a further seven days to respond.

K G Smith
Judge

Judgment signed at 3.30 pm on 28 July 2017