

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 111
EMPC 120/2019**

IN THE MATTER OF an application under ss 138(6) and 140(6) of
 the Employment Relations Act 2000

BETWEEN MAREE COOPER
 Plaintiff

AND PHOENIX PUBLISHING LIMITED
 Defendant

Hearing: 28 July 2020
 (Heard at Tauranga)

Appearances: G Ogilvie, advocate for plaintiff
 No appearance for defendant

Judgment: 28 July 2020

ORAL JUDGMENT OF JUDGE K G SMITH

[1] In this case Maree Cooper seeks orders against Phoenix Publishing Ltd under s 140(6) of the Employment Relations Act 2000 (the Act), to impose a sanction on the company, because it has not complied with a compliance order made by the Employment Relations Authority under s 137 of the Act on 12 February 2019.¹

[2] The compliance order application followed a substantive determination dated 28 September 2018 and costs determination dated 24 October 2018.²

¹ *Cooper v Phoenix Publishing Ltd* [2019] NZERA 68 (Member Trotman).

² *Cooper v Phoenix Publishing Ltd* [2018] NZERA Auckland 301 (Member Trotman); *Cooper v Phoenix Publishing Ltd* [2018] NZERA Auckland 328 (Member Trotman).

[3] The Authority's September 2018 determination held that Ms Cooper had been unjustifiably dismissed by Phoenix Publishing after she had tendered her resignation and that the company had failed to pay her wages and holiday pay she was owed. That failure to pay followed immediately after the resignation and before Ms Cooper's notice period had been worked out.

[4] The company was ordered to pay a combination of compensation pursuant to s 123(1)(c)(i) of the Act, compensation for unpaid wages, holiday pay, reimbursement of unpaid expenses. The orders required payment within 14 days.

[5] A penalty of \$10,000 was imposed on Phoenix Publishing because it had breached the employment agreement. Three quarters of the penalty (that is \$7,500) was made payable to Ms Cooper. To complete this picture, the Authority subsequently awarded the company to pay Ms Cooper costs and disbursements of another \$4,631.56. Payment of the penalty was required within 28 days.

[6] Phoenix Publishing did not pay the amounts it was ordered to pay, beyond a modest part-payment made in February 2019 and that may have been for wages. I will address the issue of the outstanding balance shortly.

[7] The Authority was satisfied that Phoenix Publishing had failed to comply with the September 2018 and October 2018 determinations.³ Taking into account the part-payment, that I have just mentioned, the Authority ordered compliance with its previous determinations. At that time the outstanding amount was \$23,202.68 and that was ordered to be paid within 7 days of the date of the determination; that is within 7 days of 12 February 2019. Additionally, the Authority ordered the company to pay \$460 towards Ms Cooper's legal fees and to reimburse her for the filing fee of \$71.56. Despite the determinations and subsequent compliance order Phoenix Publishing has not satisfied the outstanding debt.

³ *Cooper v Phoenix Publishing Ltd*, above n 1, at [14].

[8] This morning I heard evidence from Ms Cooper and she has explained that, at irregular intervals, the company has made payments to her that she believes are for unpaid wages, holiday pay and reimbursement of expenses so that the remaining unpaid balance owed to her is \$11,047.73 (that excludes the penalty). No payments have been made towards that sum in 2020 and Ms Cooper has not made any arrangement for Phoenix Publishing to satisfy the debt in any other way. I also have the impression from what Ms Cooper said that the payments she has received have arrived without advance notice and without an explanation for each payment.

[9] I need to set out briefly the procedural history of this application because it is relevant to the sanctions which have been requested.

[10] This is the second time Ms Cooper's application has been set down for hearing to consider what orders, if any, should be made. When Ms Cooper sought a compliance order from the Authority, Phoenix Publishing did not file a statement in reply and took no steps.

[11] When Ms Cooper applied to the Court for sanctions to be imposed under s 140(6) of the Act, Phoenix Publishing did not file a statement of defence and, initially at least, showed a similar disinterest in this proceeding. However, the company was well aware of the proceeding because it had been served and, furthermore, Ms Cooper applied to join the company's director (Ms Rawson) as a party to the proceeding. That joinder application necessitated an interlocutory judgment a copy of which was served on Ms Rawson and on the company.⁴

[12] This case was set down for a hearing, on a formal proof basis, on 19 December 2019. It did not proceed that day, because Phoenix Publishing made a very late application for leave to defend it supported by affidavits claiming the company had not been served. It was, therefore, necessary to adjourn to provide the company with an opportunity to progress its application for leave to defend. The company was

⁴ *Cooper v Phoenix Publishing Ltd* [2019] NZEmpC 148.

directed to take steps by serving its application on Ms Cooper's advocate, Mr Ogilvie, no later than 19 February 2020.

[13] Despite being directed to take that elementary step the company did nothing further and its application was dismissed on 21 February 2020.⁵

[14] Ms Cooper's application was set down again to be heard today.

[15] The power to impose a sanction is in s 140(6) of the Act and 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.

[16] The first issue is to consider whether a sanction should be imposed at all. Breach of a compliance order is taken very seriously. The primary purpose of s 140(6) is to secure compliance.⁶ A further purpose is to impose a sanction for non-compliance. In this case I consider a fine is the appropriate sanction and that is consistent with the submission made by Mr Ogilvie this morning.

⁵ *Cooper v Phoenix Publishing Ltd (No 2)* [2020] NZEmpC 11.

⁶ *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)* [2016] NZCA 464; [2017] 2 NZLR 451; [2016] ERNZ 828.

[17] In *Peter Reynolds v Labour Inspector* the Court of Appeal indicated a range of factors will be relevant in assessing the level of a fine. They include the nature of the default (whether it is deliberate or wilful), whether it is repeated, without excuse or explanation, and whether it is on-going. Any remedial steps will be relevant together with the defendant's track record. Proportionality, the respective circumstances of the employer and employee, and deterrence all need to be evaluated.

The nature of the default; deliberate or wilful?

[18] Ms Cooper was not able to shed any light on why the amounts owed to her were not been paid after the determinations and only partly paid subsequently.

[19] Mr Ogilvie submitted the breaches were deliberate and wilful. I agree.

[20] The company knows the compliance order was made but its response to it has not been constructive. Not participating in the investigation meeting was contemptuous of the Authority and that was exacerbated by Phoenix Publishing's half-hearted attempt to belatedly participate in this case. The failure to comply is on-going and there has been no explanation for that. In that regard there is still an on-going failure to comply. It is instructive that there have been no further attempts to pay the outstanding sums to Ms Cooper this year.

Defendant's track record

[21] Phoenix Publishing's track record is poor. The Authority identified five other cases where it failed to pay wages and holiday pay over a relatively short period of time between 2017 and 2018. That is a significant factor in this assessment.

Remediation?

[22] As has already been indicated, the company has made some part-payments but I think viewed overall its compliance with the compliance order could be described as poor. Unlike *Peter Reynolds*, where payment was made before the Court considered

imposing a sanction under s 140(6), in this case inadequate steps have been taken to satisfy the company's obligations. That is, perhaps, exemplified by what was said on the company's behalf in affidavits when it attempted to obtain leave to defend. Those affidavits concentrated exclusively on an untested allegation made on the company's behalf that it had not been served with Ms Cooper's application, but they were noticeably silent about satisfying the underlying orders made by the Authority and did not contain any information that might suggest the shortcoming was to be remediated or might in some way have been explained.

The circumstances of the employer, including financial circumstances

[23] In the absence of information from Phoenix Publishing I consider it appropriate to assume it is in a position to pay a fine.

The circumstances of the employee, including financial circumstances

[24] This morning Ms Cooper has explained to me the significant personal impact that occurred for her and her family when she was deprived of the wages she was owed having tendered her resignation. A brief comment about that is required.

[25] Ms Cooper resigned her employment and gave contractual notice that she intended to leave. Before that notice expired the company purported to terminate her employment and, in so doing, did not pay to Ms Cooper the last amount owed to her for that notice period and to reimburse her expenses. The refusal to pay caused a considerable amount of personal distress to Ms Cooper. She has explained to me that one of the immediate consequences was the need to take a personal loan so that she could meet her living expenses at that time. I have the distinct impression that the distress it occasioned has continued.

Deterrence?

[26] In the circumstances I have outlined, I consider that there is a need to impose a sanction on Phoenix Publishing to deter it from further breaches of Authority orders.

It is also appropriate to take into account general deterrence, to underline that such orders must be obeyed.

The fine

[27] The maximum fine is \$40,000. I have considered the range of fines recently imposed under s 140(6). In *Peter Reynolds* the Court of Appeal imposed a fine of \$750, but the circumstances of that case are vastly different from the present. Furthermore, when it came to the level of that fine the Court of Appeal took into account that the employer had remedied the breach before a sanction was considered.

[28] In two decisions involving *Nathan v Broadspectrum* the fines imposed were \$10,000 and \$25,000 respectively.⁷ Those cases were about reinstatement and the second one attracted a substantial fine because of a failure by Broadspectrum to reinstate Mr Nathan in a timely way. Those cases are not truly comparable to the present situation.

[29] In *Myatt v Pacific Applications Ltd* Judge Perkins imposed a fine of \$15,000. In that case the Court considered the behaviour of the defendant to be a form of contempt, because of the way it had either declined or refused to participate in the investigation meeting and attempted to serve a trespass notice on the Labour Inspector.⁸

[30] In *Domingo v Suon* the Court imposed a fine of \$11,000.⁹ In that case the plaintiff was a migrant worker who worked excessive hours and was not paid holiday pay or public holiday pay. Like this case, the defendant in *Domingo* took no steps to challenge the determination until just before the hearing in the Court and then took no

⁷ *Nathan v Broadspectrum (New Zealand) Ltd (formerly Transfield Services (New Zealand) Ltd)* [2017] NZEmpC 90; *Nathan v Broadspectrum (New Zealand) Ltd (formerly Transfield Services (New Zealand) Ltd)* [2017] NZEmpC 116.

⁸ *Myatt v Pacific Appliances Ltd* [2016] NZEmpC 24 at [21].

⁹ *Domingo v Suon* [2017] NZEmpC 23. [2017] ERMZ 82.

further steps. The Court held that the defendant was effectively trying to ignore the situation and that was aggravated by not participating.

[31] In *Carruthers v Brommel Roofing Ltd* Judge Perkins fined the defendant company \$10,000 for breaching a compliance order relating to a mediated settlement.¹⁰ The defendant failed to participate in the investigation meeting and in the Court.

[32] There are some cases where the fine was substantially less than I have just been indicating. In *RPW v H*, Judge Perkins fined the defendant \$2,000 for breaching two Authority compliance orders.¹¹ Those breaches were blatant; the defendant having provided a written undertaking in a mediated settlement not to disparage the plaintiff and had been breached. The Court held that the level of culpability was high because the breaches were deliberate and the defendant had been before the Court previously. However, and perhaps significantly, some remedial steps have been taken.

[33] Likewise in *Savage v Wai Shing Ltd* Judge Corkill fined the defendant \$2,500 for breaches of a compliance order relating to reinstatement of the defendant.¹² Reinstatement had been ordered but only partially satisfied. Salary was paid, as was subsidised accommodation, but the provision of work was not that of the plaintiff's previous role. Despite those considerations the Court found the disobedience in this case was at the lower end of the scale. It was apparent from the decision that the attempts made to give effect to the Authority's determinations, while inadequate, went some considerable way towards keeping the fine to a low level.

[34] I think those cases illustrate that where the employer in breach has taken no steps to address the breach, and there is no issue about capacity to pay, or history of previous breaches, the fines start at approximately \$10,000. Those cases which have

¹⁰ *Carruthers v Brommel Roofing Ltd* [2020] NZEmpC 22.

¹¹ *RPW v H* [2018] NZEmpC 131.

¹² *Savage v Wai Shing Ltd* [2019] NZEmpC 153.

resulted in lower fines are few and have involved attempted remediation by the defendant or at least reasonable efforts to remediate the breach.

[35] In this case Mr Ogilvie has submitted that a fine of \$15,000 is appropriate. I consider the breaches were deliberate and on-going and they were contemptuous disregard of the Authority's orders and, for that matter, the processes of this Court. The attempts to remediate the breaches have been inadequate. On this basis, the case is comparable to *Domingo* and *Brommel*, and might attract a fine of about \$10,000 but an increase is appropriate because of the aggravating feature occasioned by the belated attempt to participate that had the effect of delaying this hearing unnecessarily and causing further distress. I do not accept that \$15,000 is appropriate but weighing up all of the factors mentioned earlier, I consider a fine of \$12,000 is warranted.

[36] Section 140 allows me to order that part of the fine should be payable to Ms Cooper. Taking into account that she has borne the burden of having to make this application, and it has been clearly distressful and inconvenient to her, I think it will be just to order that of that fine \$9,000 is to be paid to her to go some way to offset the difficulties she has faced.

Outcome

[37] Phoenix Publishing Ltd must pay a fine of \$12,000 and of that sum \$9,000 is to be paid to Ms Cooper.

[38] Ms Cooper is entitled to a costs order. Submissions in relation to costs can be made in writing within 20 working days of today.

K G Smith
Judge

Judgment delivered orally at 9.37 am on 28 July 2020