

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

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

**[2023] NZEmpC 129
EMPC 139/2023**

IN THE MATTER OF an application for a compliance order

BETWEEN DEEPAK DHIMAN
 Plaintiff

AND NAANAK LIMITED (IN LIQUIDATION)
 First Defendant

AND DEVINDER MANN
 Second Defendant

Hearing: On the papers

Appearances: J Wood, advocate for plaintiff
 No appearance for the defendants

Judgment: 16 August 2023

JUDGMENT OF JUDGE J C HOLDEN

[1] In its determination of 6 October 2022, the Employment Relations Authority (the Authority) ordered Devinder Mann to pay the following sums to Deepak Dhiman within 28 days of the date of the determination:¹

- (a) arrears of wages of \$69,981 (gross);
- (b) arrears of holiday pay of \$28,153.14 (gross); and
- (c) interest on the two amounts to be calculated as set out in sch 2 of the Interest on Money Claims Act 2016.

¹ *Dhiman v Naanak Ltd (in liq)* [2022] NZERA 510 (Member Beck).

[2] In a subsequent cost determination, issued on 14 November 2022, the Authority ordered Mr Mann to pay Mr Dhiman the sum of \$5,375 as a contribution to his costs and to reimburse him the Authority filing fee of \$71.56.²

[3] As no payment was made, Mr Dhiman then applied for and obtained compliance orders in the Authority under s 137 of the Employment Relations Act 2000 (the Act) requiring Mr Mann to pay the sums awarded, together with \$1,125 towards his legal costs and reimbursement of another Authority filing fee of \$71.56. The Authority's determination also did not lead to payment.³

[4] Mr Dhiman now applies in the Employment Court for an order under s 140(6)(d) of the Act that Mr Mann pay a fine.

[5] Mr Mann was served with Mr Dhiman's statement of claim in April 2023 but has not filed a statement of defence or otherwise contacted the Court, Mr Dhiman or Mr Wood, Mr Dhiman's representative.

[6] The matter has therefore been put before me to be dealt with on the papers filed by way of formal proof.⁴

[7] Mr Dhiman has provided an affidavit confirming that, as at the date of affirming the affidavit (28 June 2023), he had not received any payment from Mr Mann towards the sums awarded to Mr Dhiman by the Authority.

[8] This is the case despite Mr Dhiman's representative emailing Mr Mann to remind him of the sums that are owing to Mr Dhiman.

[9] Mr Dhiman also gave evidence of the detrimental impact on him and on his family of his not being paid.

[10] He seeks a fine against Mr Mann and submits that there is good reason for the Court to award a significant portion of the fine to Mr Dhiman, as it is he who has borne

² *Dhiman v Naanak Ltd (in liq)* [2022] NZERA 593 (Member Beck).

³ *Dhiman v Mann* [2023] NZERA 156 (Member Robinson).

⁴ Employment Relations Act 2000, sch 3 cl 16.

the financial and other consequential pressures of the failure of Mr Mann to make payment. No sanction is sought against Naanak Ltd (in liquidation).

[11] Mr Dhiman also seeks costs and disbursements, with those disbursements being the Court filing fee and the cost of a process server engaged to serve Mr Mann with the Court documents.

A fine is payable

[12] Section 140(6) of the Act relevantly states:

140 Further provisions relating to compliance order by court

...

(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:

...

(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.

...

[13] When approaching the consideration of a fine, the Court must do so in a principled manner and must first consider whether a sanction is to be imposed at all. The primary purpose of s 140(6) of the Act is to secure compliance, and a further purpose is to impose a sanction for non-compliance.⁵

[14] If a fine is considered appropriate, a range of factors are likely to be relevant when assessing the level of the fine. These include the nature of the default (whether it is deliberate or wilful), whether it is repeated, without excuse or explanation, and whether it is ongoing.⁶ Any remedial steps also would be relevant, as will a

⁵ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451 at [75].

⁶ At [76].

defendant's track record. Proportionality, the respective circumstances of the employer and employee, and deterrence are all relevant considerations.⁷

[15] Here, Mr Dhiman has taken steps in the Authority as well as in the Court. The Court documents have been served on Mr Mann. No steps have been taken by either defendant to address the default in payment or even to engage with Mr Dhiman or with the Authority or Court. There is no explanation as to why this default has been allowed to occur. The lack of engagement from Mr Mann seems to be both deliberate and wilful.

[16] There has been no attempt at remediation.

[17] Because Mr Mann has not engaged with this process, there is no information before the Court as to whether he is able to pay a fine.

[18] The impact on Mr Dhiman has been serious. The amounts due to him are significant. The evidence from Mr Dhiman addresses not only the financial impact on him but also the emotional impact that the defendants' failures have had on him. Mr Dhiman has incurred the cost and stress of endeavouring to enforce the Authority's determinations.

[19] It is appropriate to order Mr Mann to pay a fine to deter him from any future breaches. It also is important to provide a general deterrence to underline the fact that compliance orders must be obeyed.

[20] In previous cases, the Court has accepted that, in situations such as the one before me, an approximate starting point is \$10,000. That starting point may be reduced where there have been attempts by a defendant to remediate the situation.⁸

[21] However, there is no basis here to reduce the fine from the starting point and a fine of \$10,000 is imposed.

⁷ *Singh v Dhaliwal* [2022] NZEmpC 135 at [15].

⁸ *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332 at [34]; *McKay v Wanaka Pharmacy Ltd* [2021] NZEmpC 79, [2021] ERNZ 304 at [20].

[22] Section 140(7) of the Act allows the Court to direct that all or any part of a fine be paid to the employee concerned.

[23] I accept that Mr Dhiman has had the burden of pursuing this matter, with the accompanying stress and costs on him. It is just that a portion of the fine be paid to him to recognise those matters.

[24] Accordingly, I order that Mr Mann pay a fine of \$10,000, of which \$6,000 is to be paid to Mr Dhiman and \$4,000 is to be paid to the Crown. These sums are to be paid within 28 days of the date of this judgment and are in addition to the sums which Mr Mann has already been ordered to pay. Those sums have been outstanding for some time and also should be paid within 28 days.

[25] I note that Mr Dhiman is entitled to pursue recovery of the sums payable. However, Mr Mann should also be aware that if he does not engage with this process and discharge his obligations as ordered, he may well face further sanctions under s 140(6).

Mr Dhiman is entitled to costs

[26] Mr Dhiman is entitled to costs on this application. He also is entitled to reimbursement of the disbursements incurred. Accordingly, Mr Mann is ordered to pay Mr Dhiman a further sum of \$1,000 towards Mr Dhiman's legal costs, together with the sum of \$755.63, covering the filing fee paid by Mr Dhiman in the Court and the fee paid to the process server to serve Mr Mann with the proceedings. These costs and disbursements also are payable within 28 days of the date of this judgment.

J C Holden
Judge

Judgment signed at 11.55 am on 16 August 2023