

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

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

**[2024] NZEmpC 64
EMPC 43/2023**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

BETWEEN CODY JOYCE
Plaintiff

AND ULTIMATE SITEWORKS LIMITED
Defendant

EMPC 30/2024

IN THE MATTER OF an application for a sanction under s 140 of
the Employment Relations Act 2000

BETWEEN ULTIMATE SITEWORKS LIMITED
Plaintiff

AND CODY JOYCE
Defendant

Hearing: 28–29 February 2024

Appearances: L Anderson, advocate for C Joyce
D Fleming, counsel for Ultimate Siteworks Limited

Judgment: 18 April 2024

JUDGMENT OF J C HOLDEN

[1] This judgment deals with three matters.

[2] Cody Joyce challenges a determination of the Employment Relations Authority that found he had not been dismissed by Ultimate Siteworks Ltd and, accordingly, he had no unjustifiable dismissal grievance or any other type of grievance.¹

[3] Mr Joyce also challenges the Authority's costs determination that required him to pay \$5,750 to Ultimate Siteworks as a contribution to its costs.²

[4] Ultimate Siteworks has applied for sanctions against Mr Joyce under s 140 of the Employment Relations Act 2000 (the Act) for a breach of a compliance order issued by the Authority that required Mr Joyce to pay the costs award, interest, and costs and disbursements in respect of the compliance order proceedings.³ This application for sanctions was filed in the Court shortly before the hearing of Mr Joyce's challenges. Ultimate Siteworks sought an order staying Mr Joyce's proceedings until the costs award was paid, or, in the alternative, a fine under s 140(6)(d) of the Act. It also sought an order that any fine be paid to it, pursuant to s 140(7). Given the proximity of the hearing and the desirability of the case not being delayed further, the Court declined the stay. Therefore, the issues that remain on this application are whether and at what level a fine should be ordered, and if ordered, whether some or all of the fine should be paid to Ultimate Siteworks.

Mr Joyce was employed by Ultimate Siteworks as a machine operator

[5] Ultimate Siteworks is a small civil earthworks business. It has two directors—Grayson and Lisa Rowe—who operate the business. It currently has three employees.

[6] Mr Joyce started work with Ultimate Siteworks on or around Monday 27 September 2021. He was employed as a machine operator.

[7] Ultimate Siteworks had an annual shutdown over the Christmas/New Year period from just before Christmas 2021 until 10 January 2022. This was advised to

¹ *Joyce v Ultimate Siteworks Ltd* [2023] NZERA 62 (Member Dumbleton) at [29].

² *Joyce v Ultimate Siteworks Ltd* [2023] NZERA 120 (Member Dumbleton) at [15].

³ *Ultimate Siteworks Ltd v Joyce* [2024] NZERA 1.

Mr Joyce in early November 2021. As Mr Joyce was only recently employed, he did not have enough accrued annual leave to cover the shutdown. Ultimate Siteworks therefore paid him annual leave in advance to ensure he had money for that period. In the event, Mr Joyce's employment ended before the return to work date of 10 January 2022.

[8] Mr Joyce was provided with the use of a company vehicle, a Nissan Navarra ute, with a tray holding a large diesel bowser to be used to refill machinery onsite, such as the machine that Mr Joyce was operating. Ultimate Siteworks allowed Mr Joyce to park the ute at his home so he could use it to get to and from work. It also allowed Mr Joyce to use the vehicle for some private use, so long as it was not abused.

[9] In the time that Mr Joyce worked for Ultimate Siteworks, however, he incurred six speeding tickets using the ute.⁴ He was required to pay the fines for the tickets, but no further action was taken against him.

[10] Then, on 31 December 2021, after Ultimate Siteworks had shut down for the Christmas/New Year period, Mr Joyce had an accident with the ute. He said he had missed a turn, slid into a barrier and damaged the front of the ute.

[11] Understandably, Ultimate Siteworks was concerned about the accident, particularly in view of the speeding tickets that had preceded it. On Wednesday 5 January 2022, it instructed Mr Joyce that the ute was to be used for work purposes only, not personal use.

[12] Nevertheless, Ultimate Siteworks considered Mr Joyce to be good at his job. It had no desire to end his employment.

[13] The instruction not to use the ute for personal use was the start of the end of the relationship between Ultimate Siteworks and Mr Joyce. There followed a series of text messages between Mr Rowe and Mr Joyce. It is convenient to replicate the

⁴ One of those tickets was not received by Ultimate Siteworks until after the ute was recovered by it.

relevant parts of those here, starting with the instruction on 5 January about the use of the ute:

ROWE: ... Also that work ute you have is for work use not personal use too by the way

JOYCE: ... I use it coz I've had to put my car in storage coz I don't have room for everything here so how am I sponse to get around?

ROWE: Not really my issue sorry mate.

JOYCE: Are you serious bro well I'm going to have to hand my notice in then I can't park my car here coz your trucks here but I can't use the truck to get around wow

Wed, 5 Jan, 9:59 pm

ROWE: Alg bro you gotta do what you gotta do

Thu, 6 Jan, 6.22 am

JOYCE: Morning that's sweet as bro I'll work off the hours I owe you first then I'll hand it in could you be a reference for my new job please

And don't worry I won't use Ute for personal use in mean time

Fri, 7 Jan, 7.37 pm

ROWE: Hey mate totally up to you, if you don't want to come back that's fine just make sure the Ute and uniform is clean and drop it off no worries. Happy to give you a reference [thumbs up emoji]

Saturday, 8 Jan, 9.24 am

JOYCE: If it's okay with you could I work first week back then head off just coz new job doesn't start for two weeks after I tell them I've handed notice in so I'll just start with them week after I've worked with you that way I can still have some money till I start my new job but up to you bro

Saturday, 8 Jan, 2.35 pm

ROWE: At the end of the day i think it's just cleaner and easier bro if you don't come back

Just clean the Ute for me and drop everything back-

Phone

Hardhat

Uniform

Docket books

Digger key

Everything you were given when you started

You can either drop it at the shed at Sharon Road or at my place whatever you want.

Cheers [thumbs up emoji]

JOYCE: Ok sweet as bro I'll do that on wensday as that's when We will have money again for gas so I can get picked up then

ROWE: Cheers

JOYCE: Thanks for having me Grayson was a pleasure take care bro [smiley face with sunglasses emoji]

[14] The next day, however, the tone of the texts from Mr Joyce changed. He did not question the fact his employment was ending but sought to be paid for additional hours, saying that, if the amount claimed was not paid, he would take it to court.

[15] Mr Rowe responded to Mr Joyce that he was waiting for his accountant to get back to him to check over everything and that Mr Joyce would then be paid what he was owed. Mr Rowe also commented: "Nothing will be done until all company contents are returned to base."

[16] Mr Joyce objected to that suggestion, saying:

Monday, 10 Jan, 6.46 pm

Sweet as and that's not how it goes only holiday pay is to be paid after property is returned all other payments are to be made before returning of company contents

And if there's anything missing then you deducted that from holiday pay

[17] Mr Rowe responded:

I have to say this is incredibly disappointing given the opportunity I had given you. At the end of the day it was your choice to leave. You will be paid what you are owed there's no problem there, and I expect all ultimate property to be returned in good clean condition including uniform, hard hat, fuel card, phone, tools etc etc by close of business Wednesday.

Those are owned by ultimate they are not owned by you, therefore are not yours to use for blackmail.

If you are not happy with the outcome then you can take it to court then.

I'm pretty disappointed in the way you have decided to handle things it's really showing your true colours.

[18] Mr Joyce responded saying he also was disappointed that he could not use the ute any further as he had no space for his personal car. He disputed that he was using the company's property to blackmail the company. He said he was owed two weeks' notice along with the statutory holidays and pay for the last two days he worked. He sought payment before Ultimate Siteworks' property was returned. He then texted that Ultimate Siteworks would not be getting the ute that day as he had no fuel and so could not return the ute until he got paid.

[19] Given the turn of events, Ultimate Siteworks sought legal advice and Mrs Rowe took over communicating with Mr Joyce.

[20] She sent a message to him on or about Friday 14 January 2022, advising:

There is no issue with us paying your statutory holiday and all employment entitlements. Our accountant is working this out. Can you please confirm for us whether you have resigned.

If you have resigned, please confirm whether you are able to work your two weeks notice. If you have resigned and are not able to work your two weeks notice, your employment will end today and the accountant will prepare a final wash up calculation.

We require that the ute is returned immediately by close of business as this is company property. We are entitled to require the immediate return of the ute per your employment agreement (even if you have not resigned) and have already requested this. Failure to return the ute is a Police matter and will be dealt with accordingly.

[21] Mr Joyce responded by text, saying "But I haven't resigned" and in another "being told your fired or not to come back is pretty much in the same category."

[22] The following Monday, 17 January 2022, Mrs Rowe sent a further message to Mr Joyce:

Hi Cody

We understood from your text message on 8th January that you had a new job and wanted to give us one week notice instead of the full notice period required in your agreement. We advised you by return text message that we did not agree to the reduced notice period. You have never been told by us that we terminated your employment. If you have not resigned, then we need you to confirm that you are available for work. If you do not intend to work, you will be deemed to have abandoned your employment in accordance with your employment agreement.

Thanks

Lisa

[23] Mr Joyce responded the same day:

No i don't have a new job as of yet once I was to hand my notice in two weeks after that I would have a new job meaning it was two weeks notice for you then I would have a new job. I can get a job any time even tomorrow but I'm dealing with this situation so I can't do anything Rn. and then Grayson's reply was that it's cleaner and easier I don't come back as you can see in messages I asked to come back to work he said no why would I feel comfortable coming back

Work doesn't start until two weeks after I've told them that I've given you notice could have been at any point that I gave it in

[24] In the event, Ultimate Siteworks went to Mr Joyce's house and uplifted its ute. Mr Joyce also returned the company cellphone.

[25] When the ute was picked up by Ultimate Siteworks, it found that there was less fuel in the diesel bowser than expected. It considered that Mr Joyce may have taken fuel from the bowser, which Mr Joyce disputed, saying there was a leak. No leak was found when Ultimate Siteworks checked the bowser, but it has not pursued its claim with respect to the alleged missing fuel.

[26] The evidence is unclear as to what steps Mr Joyce took to obtain new employment and when.⁵ He says that he was able to speak to people at Evolve Civil

⁵ Disclosure of communications between Mr Joyce and prospective employers was ordered: *Joyce v Ultimate Siteworks Ltd (No 2)* [2023] NZEmpC 153 at [39]. It seems little was provided. In

in the week ending 16 January 2022 and that Evolve Civil first offered him employment as a yard labourer, which was a job he did not want to do. He also says that he unsuccessfully applied for 6 other jobs and that he had a day's work trial with another prospective employer.

[27] By letter dated Monday 10 January 2022, after Mr Joyce turned down the yard labourer role, he was offered employment as a machine operator with Evolve Civil. The employment agreement provided by Evolve Civil was signed by Mr Joyce on 11 January 2022 and by a director of Evolve Civil on 12 January 2022. The schedule to the employment agreement provides for a commencement date of 12 January 2022.

[28] It seems that, notwithstanding the offer being to start work on 12 January 2022, Mr Joyce started work the following Monday, 17 January 2022.

[29] This evidence therefore suggests that Mr Joyce was already looking for work in the week ending 7 January 2022. Certainly, he was working on 17 January 2022 when he told Mrs Rowe that he did not have a job.

Mr Joyce had an employment agreement

[30] The clause in Mr Joyce's employment agreement that applied to work vehicles provided:

The employee will be provided with a vehicle for work purposes only. It can only be used for limited personal use. The vehicle must be parked onsite, at 55 Sharon Road, Waitoki, when not in use. There is no entitlement to any particular vehicle, or type of vehicle. The employer can change the vehicle at any time.

The employer will pay all maintenance and running costs of the vehicle. The employee will promptly pay any parking or traffic fines incurred while they are using the vehicle. The employee must have a valid driver licence of the relevant class, follow the employer's vehicle policies, and comply with all relevant traffic laws.

The employer can decide to stop providing the vehicle if it is no longer needed for the employee's duties or if it has been misused, eg repeatedly breaking traffic laws or vehicle use policies. The employee will not be compensated.

submissions, Mr Anderson, Mr Joyce's representative, said that despite trying, nothing further was found.

[31] The employment agreement provided for an annual closedown over the Christmas/New Year period. Ultimate Siteworks was required to give at least 14 days' notice of the closedown dates.

[32] Four weeks' annual leave was provided for after 12 months' continuous employment. The employment agreement provided that the employee could take leave in advance with the employer's agreement but that any unearned leave taken in advance was required to be repaid if the employee stopped working for the employer.

[33] The employment agreement provided for a general notice period of two weeks and allowed the employer to pay the employee instead of them working out their notice period.

Mr Joyce claims he was unjustifiably dismissed

[34] The principal claim by Mr Joyce is that he was dismissed by Ultimate Siteworks and that his dismissal was unjustifiable.

[35] In the Authority, the claim proceeded on the basis that he was directly dismissed. In the Court, he broadened his claim to that his dismissal was "actual or constructive" or, in the alternative, that he had been unjustifiably disadvantaged. He referred to the Court's power to find a personal grievance to be of a different type than that alleged.⁶ Any such finding, however, would be based on the same actions. In submissions, Mr Joyce seemed to wish to rely on the decision to tell Mr Joyce that he could not use the ute for personal purposes. That has not previously been the subject of a personal grievance and cannot now be pursued. In any event, as acknowledged by Mr Joyce in court, the instruction from Ultimate Siteworks was not unfair or unreasonable in the circumstances.

⁶ Employment Relations Act 2000, s 122.

The meaning of dismissal

[36] A dismissal is a termination of employment that is at the initiative of the employer.⁷ There is no particular form of words or actions required. The question is looked at objectively in light of the circumstances that applied at the relevant time.

Termination was at the initiative of Mr Joyce

[37] In the present circumstances, we are looking at a small employer dealing in a relatively informal way with one of its employees. The form and language of the communications reflects the size and nature of the business.

[38] The documentary evidence shows what occurred leading up to the end of Mr Joyce's employment.

[39] Mr Joyce initiated the termination of his employment. Ultimate Siteworks had no desire to end his employment and did not set out to do so.

[40] As can be seen from the text messages, Mr Joyce advised he wanted to end his employment. There then was a discussion between Mr Joyce and Mr Rowe as to the timing for the end of employment, and they reached agreement. That agreement was confirmed by the end of Saturday 8 January 2022.

[41] Mr Joyce then sought more money, even though there was no reason to believe that Ultimate Siteworks would do anything other than pay him what he was due. There is no suggestion that it has not done so and Mr Joyce has not made a claim for arrears under s 131 of the Act; the evidence was that there was a negative balance of approximately \$500 when Mr Joyce left his employment for the annual leave taken in advance, which Ultimate Siteworks has not sought to recover.

[42] Accordingly, I agree with the Authority that Mr Joyce was not dismissed by Ultimate Siteworks. The circumstances also do not amount to an unjustifiable disadvantage.

⁷ *Wellington, Taranaki and Marlborough Clerical Etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 at 103.

Compensation would have been quite limited in any event

[43] Even if Mr Joyce was right and Ultimate Siteworks had dismissed him by the text from Mr Rowe sent at 2.35 pm on 8 January 2022, the difference in timing between that and what Mr Joyce had requested as his end date was only one week. On top of that, Mr Joyce had an offer of employment by the end of Monday 10 January, and it appears he could have started work at his new employer on Wednesday 12 January 2022. As Mr Joyce was paid up until the end of the previous week, effectively he would have been unpaid for two days. In the event, he started work the following Monday, meaning he was unpaid for five days.

[44] The circumstances also would not have justified any more than a very modest award for humiliation, loss of dignity, and injury to Mr Joyce's feelings.

[45] Additionally, when what had seemed to be agreed became disputed, Ultimate Siteworks sought to retrieve the situation, asking Mr Joyce to confirm what he wanted to do - stay at Ultimate Siteworks, or leave. It may be that the relationship was beyond repair at that point, but that was not explored by Mr Joyce.

Mr Joyce challenges the costs determination

[46] There is no separate basis in the statement of claim for the challenge to the costs determination. This suggests the challenge to the costs determination, therefore, stood or fell with the substantive challenge.

[47] In submissions, however, Mr Joyce argued in the alternative that costs should be reduced. He suggests costs of \$2,250 would be more appropriate. He says the investigation meeting was longer than it needed to be because of the matters raised by Ultimate Siteworks and that a Calderbank offer from Ultimate Siteworks should be disregarded. I disagree. Ultimate Siteworks raised the issue of missing property before the Authority, but only sought it to be factored in if Mr Joyce was successful in his claim. I accept the Authority's view that the appropriate starting point was the tariff for one day and agree with the Authority that the Calderbank offer merited a modest uplift. The level of the costs award is appropriate.

[48] As the substantive challenge was unsuccessful, so too is the challenge to the costs determination.

Ultimate Siteworks seeks a fine

[49] The Court granted a conditional stay of the costs determination of the Authority on the basis that Mr Joyce would pay the outstanding money into Court. In the event, Mr Joyce did not pay the money into Court, and the stay ceased to have effect in mid-October 2023.⁸

[50] In October 2023, when the costs remained unpaid, Ultimate Siteworks applied to the Authority for a compliance order. The matter went to mediation, but that did not resolve the matter. The Authority then issued a compliance order pursuant to s 137 of the Act, requiring Mr Joyce to pay the costs award together with interest. It also ordered costs and disbursements on the application for the compliance order.⁹ That determination was issued on 4 January 2024 and, as at the conclusion of the Court hearing, the costs had still not been paid. Ultimate Siteworks now applies under s 138(6) for a fine of \$5,000 pursuant to s 140(6) of the Act. That provision relevantly provides:

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.

⁸ *Joyce v Ultimate Siteworks Ltd (No 2)*, above n 5, at [19]–[20].

⁹ *Ultimate Siteworks Ltd v Joyce*, above n 3.

[51] Mr Joyce submits that he should not be required to pay a fine. He points out that if he had been successful in his challenge, the costs awarded by the Authority would fall away. He also notes there were four interlocutory matters in the Court on which costs have been reserved. He notes that the time between the compliance order being made and the hearing of his challenges has been quite short.

[52] Mr Joyce says that despite being encouraged to do so, Ultimate Siteworks has not taken any steps to enforce the costs determination using the District Court civil enforcement procedures. He also says that he has had an injury and been out of work. Further, he says he has been attempting to sell vehicles to raise the money to pay the costs but that he has not had offers that enable him to do so. As at the date of the hearing, it seems that various vehicles owned by Mr Joyce have been put up for sale; some offers have been received but none that Mr Joyce considers to be satisfactory.

[53] Ultimate Siteworks submits that, as there has been a breach of a compliance order, a fine should be imposed to mark the seriousness of parties ignoring orders of the Authority or Court. It submits that it is irrelevant that Ultimate Siteworks has not taken steps to enforce the costs order in the District Court.

No fine ordered

[54] As Mr Joyce failed to comply with the compliance order of the Authority, it is open to Ultimate Siteworks to seek a sanction under s 140(6) of the Act. Sanctions are available for non-compliance with monetary orders, such as the order here to pay previously awarded costs.¹⁰

[55] It does not follow, however, that a sanction is the inevitable consequence of a failure to comply with a compliance order. The imposition of a sanction under s 140(6) is a serious matter, equivalent to a sanction for contempt. While a fine does not involve deprivation of liberty, the power to impose one for a failure to pay a monetary remedy must be exercised in the context that there is another, less punitive, option for

¹⁰ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451 at [55]. See also *Domingo v Meng Suon and Ngan Heng (t/as Town and Country Food)* [2017] NZEmpC 23, at [13] and [19]–[23].

enforcement of the underlying order available via recourse to the District Court under s 141 of the Act.¹¹

[56] In considering whether a fine is warranted, and if so, at what level, a range of factors will be relevant. Those 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. The respective circumstances of the employer and of the employee, including their financial circumstances, will be relevant. The need to deter non-compliance, either by the party involved or more generally, also is a factor to be considered.¹²

[57] Mr Joyce has known for some time that the substantive costs award of the Authority must be paid. He applied for and obtained a stay but then did not meet the conditions of that stay, meaning the costs award was payable. He has not made any payment towards the amount due — his representative explored an option of payments by instalment but made clear that was not an offer from Mr Joyce and very quickly resiled from the suggestion.

[58] The amount owing by Mr Joyce is, however, relatively modest, and the compliance order was only made in January of this year. Mr Joyce was hoping to be successful in his challenge, which would have meant his debt to Ultimate Siteworks fell away. This may go some way to explaining why he did not accept offers for his vehicles that seemed to him to be unsatisfactory. He otherwise is not in a strong financial position, having suffered an injury and been out of work. He has no track record of non-compliance.

[59] On balance, I consider it is premature to order a fine. The application by Ultimate Siteworks is unsuccessful.

¹¹ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* above n 10, at [49] and [57].

¹² At [76]–[77].

[60] Mr Joyce should be aware, however, that he still needs to comply with the Authority's compliance order. He may need to accept offers available for his vehicles, even if he considers them to be low.

[61] Ultimate Siteworks also may need to consider whether it pursues recovery through the District Court, as is usual for a judgment debt.

Costs are reserved

[62] The parties are encouraged to agree on costs for this proceeding, including on all interlocutory matters. There was some mixed success in those interlocutory matters, but Ultimate Siteworks has ultimately been successful in the substantive case. If the parties cannot agree on costs, Ultimate Siteworks may make application to the Court within 28 days of the date of this judgment. Mr Joyce then has 21 days within which to respond, and any reply from Ultimate Siteworks is to be filed and served within a further seven days. Costs then would be determined on the papers.

J C Holden
Judge

Judgment signed at 4pm on 18 April 2024