

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2017] NZEmpC 72
EMPC 116/2017**

IN THE MATTER OF an application for compliance order

BETWEEN JASON NATHAN
 Plaintiff

AND BROADSPECTRUM (NEW ZEALAND)
 LIMITED (FORMERLY TRANSFIELD
 SERVICES (NEW ZEALAND) LIMITED
 Defendant

Hearing: 6 June 2017
 (Heard at Wellington)

Appearances: T Cleary, counsel for plaintiff
 R Upton, counsel for defendant

Judgment: 6 June 2017

JUDGMENT OF JUDGE K G SMITH

[1] Jason Nathan is a registered lines mechanic employed by Broadspectrum (New Zealand) Limited (Broadspectrum).

[2] Mr Nathan was dismissed by Broadspectrum in August 2013. He challenged that dismissal in the Employment Relations Authority and was reinstated, but to a position no less advantageous to him rather than to his former position.¹ Mr Nathan then challenged the Authority's determination and, on 28 October 2016, judgment was given in his favour.²

¹ *Nathan v Transfield Services (New Zealand) Ltd* [2015] NZERA Wellington 120 at [14].

² *Nathan v Broadspectrum (New Zealand) Ltd* [2016] NZEmpC 135.

[3] In my judgment Mr Nathan was ordered to be reinstated to his former position at Glover Street. His return to active duties was deferred for 14 days from the date of the judgment to allow for an orderly resumption of duties and for other necessary administrative steps to be taken.

[4] Broadspectrum sought leave to appeal that judgment to the Court of Appeal. Pending hearing that application for leave, it applied for a stay of my judgment which was dealt with on an urgent basis in a Minute dated 11 November 2016 and in my judgment of 5 December 2016.³

[5] A stay was granted subject to conditions.

[6] On 23 May 2017 the Court of Appeal dismissed Broadspectrum's application but Mr Nathan has not been permitted to resume work. He now seeks a compliance order because he maintains that he has not been allowed by Broadspectrum to return to active duties in breach of the judgment in his favour.

Preliminary matter

[7] On 2 June 2017 Mr Nathan filed an affidavit by Harriette Marie McClelland which produced recent correspondence between counsel for the parties. That affidavit did not comply with a timetable I had previously directed. When the hearing commenced this morning Mr Upton consented to that affidavit being filed and read. It was admitted accordingly.

The application

[8] Mr Nathan seeks an order under s 139(4) of the Employment Relations Act 2000 (the Act). The basis for that application is an assertion that Broadspectrum has not observed, or complied with, the Court's order reinstating Mr Nathan and is continuing not to do so.

[9] There are two primary issues:

³ *Broadspectrum (New Zealand) Ltd v Nathan* [2016] NZEmpC 162.

- (a) Has there been a breach of the order reinstating Mr Nathan made on 28 October 2016; and
- (b) if there has been a breach is it likely to continue?

(a) Has there been a breach?

[10] To address this issue it is necessary to consider two subsidiary matters in relation to which the parties disagree. My judgment of 28 October 2016 allowed a period of 14 days from the date of that judgment for Broadspectrum to take administrative steps in anticipation of Mr Nathan returning to active duties. Mr Nathan contends that 14 days elapsed last year, on or around 11 November 2016, and Broadspectrum is no longer entitled to delay his return to work. Broadspectrum says the time was deferred because of the application for leave to appeal to the Court of Appeal. It considers that time did not begin until after the Court of Appeal's decision was released on 23 May 2017.

[11] It is necessary to describe what has happened since the Court of Appeal's judgment was released to place this discussion into some context.

[12] On 24 May 2017 Mr Nathan advised Broadspectrum that he would report to work the following morning, at Glover Street, at 8 am. He presented himself to work on 25 May 2017 and spoke with his manager. Eventually he spoke to Mr James Irvine to whom his manager reports. Mr Irvine advised Mr Nathan to report for work for induction on Monday 29 May 2017.

[13] On 26 May 2017 Mr Upton, counsel for Broadspectrum, wrote to Mr Cleary who acts for Mr Nathan. Two points were made for Broadspectrum. The first was that the Court of Appeal's judgment meant that the Employment Court's stay of 5 December 2016 had been lifted and, because of the judgment of 28 October 2016, Broadspectrum had 14 days to allow for an orderly resumption of duties.

[14] The second point raised by Mr Upton was that Broadspectrum required Mr Nathan to undertake a medical examination before he returned to active duties. That

letter refers to a medical examination in one place and to a medical assessment in another but the intention is clear. Before Mr Nathan resumes active duties Broadspectrum considers it has 14 days to prepare and can impose as a condition that Mr Nathan must pass a medical examination before resuming work.

[15] Broadspectrum reiterated its position on 29 May 2017 in an email from Mr Upton to Mr Cleary in which that company's position remained unchanged.

[16] If Broadspectrum's argument is correct Mr Nathan could not expect to return to active duties before Wednesday 7 June 2017 at 8 am (that is tomorrow). When he attends work he can first be required to undertake a medical assessment because Broadspectrum is concerned that in the course of this proceeding it has become aware of a knee injury Mr Nathan suffered several years ago. Broadspectrum has to be satisfied that he is fit to resume work. It does so on the basis of health and safety concerns for Mr Nathan and his fellow employees.

[17] I do not accept Mr Upton's submission that the 14 days provided to Broadspectrum, so that it could prepare for Mr Nathan's return to work, started again once the Court of Appeal's decision was released. The stay granted on 11 November 2016, and confirmed on 5 December 2016, did not absolve Broadspectrum from complying with the obligations to reinstate Mr Nathan referred to in that judgment. The 14 days referred to had, in fact, expired by 11 November 2016.

[18] Mr Upton did not refer to any authority to support Broadspectrum's proposition that time started again once the Court of Appeal issued its decision. Accepting that proposition would involve putting aside consideration of the time that elapsed from 28 October 2016 to 11 November 2016 and, then, the further time that has elapsed since the Court of Appeal's judgment.

[19] Initially there was disagreement about whether Mr Nathan could return to work tomorrow or on Thursday morning. Broadspectrum's notice of opposition had referred to its calculation of time elapsing by Thursday. At this morning's hearing Mr Upton confirmed that Broadspectrum considers the time to have elapsed by tomorrow.

[20] However, I do not consider the position to be moot. Broadspectrum has had ample time to take whatever steps might be necessary to ensure that Mr Nathan is able to resume active duties and the fact that it continued to insist that he should not do so until 14 days had elapsed is contrary to the orders made on 28 October 2016.

[21] The next matter is about a medical examination. There is some disagreement about what Mr Nathan is being asked to submit to. He has agreed to participate in a health assessment because his employment agreement with Broadspectrum requires him to do so. However, what appears to be in dispute is the extent of that assessment and whether or not Broadspectrum can prevent Mr Nathan from returning to active duties until and unless he passes such an assessment.

[22] There was no evidence about what would constitute a health assessment or a medical examination other than that a knee injury Mr Nathan suffered some years ago would be investigated.

[23] While I accept the employment agreement provides for regular health assessments to be conducted, to ensure employees are physically competent to perform their roles, I do not accept that participating in one is an appropriate condition to impose prior to the resumption of active duties.

[24] The proceeding resolved in my judgment of 28 October 2016 was about Mr Nathan's desire to be reinstated to his former position at Glover Street. Broadspectrum was on notice that any issue relevant to reinstatement was to be addressed as part of the trial.

[25] The time to address Mr Nathan's fitness to resume active duties was during the trial. The conditions stipulated in my judgment do not include, or refer to, Mr Nathan first being declared fit for work.

[26] I reject Broadspectrum's argument that it can impose a condition on Mr Nathan that he first be examined before resuming active duties. However, that is not to say that he can subsequently resist complying with his employment agreement.

[27] I find that Broadspectrum is in breach of the orders reinstating Mr Nathan by not doing so within 14 days and in attempting to impose as a condition of his return to active duties that he must first submit to a medical examination or assessment.

(b) Is the breach likely to continue?

[28] In the last correspondence for Broadspectrum in Mr Upton's email to Mr Cleary, that company stated its position had not changed. This morning, during the hearing of this matter, Mr Upton repeated that position.

[29] In those circumstances, I am satisfied that not only has Broadspectrum failed to comply with the order reinstating Mr Nathan but has shown that it will continue to do so. Making an order is necessary, even at this stage, to draw home to Broadspectrum that it is not entitled to place barriers in the way of Mr Nathan resuming work.

Conclusion

[30] I have given some thought to the possibility that this matter might be resolved by an indication being given to the parties as to a judgment that might be likely and then providing an opportunity for compliance.

[31] The possibility of adjourning the application for that consideration to take place was canvassed this morning. Neither party was supportive of it.

[32] I am satisfied a compliance order under s 139(4) of the Act is appropriate.

[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.

[34] Leave is reserved to the parties to apply if further or other orders are considered to be appropriate.

[35] Costs are reserved.

KG Smith
Judge

Judgment signed at 4.30 pm on 6 June 2017