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

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

**[2024] NZEmpC 46**
**EMPC 380/2023**

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| IN THE MATTER OF | an application for a compliance order |
| BETWEEN | CTR ROOFING LIMITED<br>Plaintiff |
| AND | NORTON CROSS<br>Defendant |

Hearing: On the papers

Appearances: S Middlemiss, counsel for plaintiff
No appearance for defendant

Judgment: 18 March 2024

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**JUDGMENT OF JUDGE KATHRYN BECK**

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[1] CTR Roofing Ltd (CTR) seeks sanctions against Mr Cross.

[2] In a determination issued on 5 September 2023, the Employment Relations Authority made compliance orders.[1]

[3] The orders were that, by no later than 4 pm on 26 September 2023:[2]

(a) Mr Cross was to return the following company equipment:

(i) Yard key;

(ii) iPhone 11;

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1 *CTR Roofing Ltd v Cross* [2023] NZERA 497 (Member Fuiava).
2 At [13]–[16].

(iii) Milwaukee shears;

(iv) Milwaukee charger and battery; and

(v) Makita drill and battery.

(b) If Mr Cross failed to return the above equipment by the due date, he was directed to immediately pay CTR the amount of $2,462.47 (excluding GST).

(c) Mr Cross was directed to repay the balance of his car loan to CTR in the sum of $879.92.

(d) Mr Cross was directed to pay the costs of that application in the sum of $1,125, with disbursements of $71.55 and $92.

[4] The Authority noted that should Mr Cross fail to comply with the orders made, CTR could apply to this Court to exercise its powers under s 140(6) of the Employment Relations Act 2000 (the Act).[3]

[5] Due to a default on the part of Mr Cross, an application for sanctions has now been made under s 140(6) of the Act.

[6] Mr Cross has been served with these proceedings. He has elected to take no steps.

[7] On the basis of the evidence filed on behalf of the plaintiff in this proceeding, I am satisfied that the sums Mr Cross was directed to pay have not been paid. Section 140(6) of the Act states:

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[3] At [17].

> **140 Further provisions relating to compliance order by court**
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> …
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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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> (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:
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> (b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly:
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> (c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:
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> (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] When considering a sanction, it is necessary to approach the exercise in a principled way. The first issue is whether a sanction should be imposed at all.

*Should a sanction be imposed?*

[9] CTR submits that a sanction is appropriate in the circumstances.

[10] While it initially sought that Mr Cross be sentenced to imprisonment, this Court has already noted that this is not a suitable case for imprisonment.[4] The plaintiff no longer advances that part of its claim and seeks a fine not exceeding $40,000.[5] It considers that an appropriate and proportional fine in the circumstances would be $10,000.

[11] The affidavit of Corey Tarrant, CTR's director, establishes that reasonable efforts were made to ensure that Mr Cross was aware of the compliance orders themselves and the current proceedings.

[12] Mr Tarrant's evidence is that Mr Cross has not taken any steps to engage with the Authority proceedings or these proceedings. He has failed to comply with the

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4 *CTR Roofing Ltd v Cross* EMPC 380/2023, 13 December 2023 at [4]; and *CTR Roofing Ltd v Cross* EMPC 380/2023, 2 February 2024.

5 Employment Relations Act 2000, s 140(6)(d).

Authority's compliance order by the specified date which passed some five months ago, without excuse or explanation, and without taking any steps to remedy the breach. His failure to comply is ongoing as at 6 March 2024.

[13] CTR submits that Mr Cross's ongoing failure to engage with any of the proceedings, along with his failure to comply, amount to deliberate and flagrant disregard of the compliance order. It says these are matters that this Court should take seriously. It further submits that any order the Court makes should seek to secure compliance, while sanctioning him for his non-compliance to date.

[14] I agree. I am satisfied that this is an appropriate case for a sanction to be imposed. The second issue is what level of fine should be imposed.

*What level of fine should be imposed?*

[15] Mr Middlemiss, counsel for the plaintiff, submits that in assessing the quantum of any fine, the Court will need to consider proportionality by balancing the effects of Mr Cross's deliberate and flagrant conduct, other costs CTR has incurred to date, and the moderate value of the goods and amounts payable under the compliance order. Counsel also notes, as a relevant factor, that Mr Cross was an employee rather than an employer.

[16] As the Court of Appeal made clear in *Peter Reynolds Mechanical Ltd v Denyer*, the primary purpose of the sanctions regime is to secure compliance.[6] A further purpose is to impose a sanction for non-compliance. In *Peter Reynolds*, the Court of Appeal indicated a range of factors which would be relevant in assessing the level of a fine.[7] 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 ongoing. Any remedial steps will be relevant, together with the defendant's track record, proportionality, and the respective circumstances of the employer and the employee, including their financial circumstances.

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

7 At [76].

[17] As already noted by Mr Middlemiss, Mr Cross was not in business on his own account. He was an employee. While we have no knowledge of his current circumstances, there is no evidence of a change, and so I will assume that remains the case. There is no evidence of previous breaches, so I will proceed on the basis that there is no previous history of default. While there have been no efforts by Mr Cross to remediate, the amount owed by him in total is relatively moderate ($4,630.94) compared to some breaches heard in this Court, but it is still significant for an individual. This is relevant when considering quantum.

[18] Turning to the quantum of the fine, I have reviewed the cases referred to in the Court of Appeal in *Peter Reynolds*, and in the judgments of this Court that were summarised by Judge Smith in *Cooper v Phoenix Publishing Ltd*.[8] I have also reviewed subsequent cases.[9]

[19] In *Cooper*, Judge Smith concluded that the range of cases to which he referred suggests that, where an employer in breach has taken no steps to address the default, and there has been no issue about capacity to pay or history of previous breaches, fines start at approximately $10,000. The fines which have resulted in lower figures are few and have involved attempted remediation by a defendant, or at least reasonable efforts to do so.[10]

[20] In *Singh v Dhaliwal*, the Court ordered a fine of $5,000 against each defendant, the total of the two sanctions being $10,000.[11] In *Oliver v Biggs*, the Court ordered a fine of $3,000 in a situation similar to the present, but where a larger sum remained outstanding.[12] In *Jindal v RKM Smith Enterprises Ltd,* the Court ordered a fine of $3,000 where approximately $4,800 was outstanding under a settlement agreement and where the employer was refusing to engage.[13]

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8 *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332 at [27]–[35].

9 *McKay v Wanaka Pharmacy Ltd* [2021] NZEmpC 79, [2021] ERNZ 304; *Singh v Dhaliwal* [2022] NZEmpC 135; *Oliver v Biggs* [2023] NZEmpC 28; and *Jindal v RKM Smith Enterprises Ltd* [2023] NZEmpC 183.

10 *Cooper v Phoenix Publishing Ltd*, above n 8, at [34]. Those principles were re-stated in *McKay v Wanaka Pharmacy Ltd*, above n 9, at [35]; and *Singh v Dhaliwal*, above n 9, at [24].

11 *Singh v Dhaliwal,* above n 9, at [28].

12 *Oliver v Biggs*, above n 9, at [19].

13 *Jindal v RKM Smith Enterprises Ltd,* above n 9, at [15].

[21] The plaintiff seeks a fine of $10,000. I consider it would be disproportionate to order a fine more than double the amount of the breach ($4,630.94), particularly against an individual. I consider that a proportionate fine in this instance is $3,500.

[22] I order that Mr Cross pay the sum of $3,500 to the Crown. This liability is in addition to the sums which he has already been ordered to pay ($4,630.94).

## Outcome

[23] Mr Cross is ordered to pay a fine of $3,500 to the Crown within 28 days of the date of this judgment.

[24] Mr Cross has already been ordered to pay $4,630.94 to the plaintiff. He should now do so no later than 28 days after the date of this judgment.

[25] Mr Cross should view these orders seriously and discharge his obligations in full and without delay. Failure to do so may well result in CTR taking steps to enforce the debt through normal debt recovery channels, including bankruptcy.

## Costs

[26] CTR is entitled to costs. It has sought costs on a category 1B basis. However, I consider category 1A to be appropriate given the straightforward nature of the proceedings and the comparatively small amount of time required. I calculate such costs, based on the Court's guideline scale, as $2,385.[14]

[27] Mr Cross is ordered to pay the sum of $2,385 to CTR, which should also be paid within 28 days of the date of this judgment.

Kathryn Beck
Judge

Judgment signed at 12.45 pm on 18 March 2024

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[14] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18, steps 49 and 52.