IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2024] NZEmpC 48
EMPC 203/2023

IN THE MATTER OF	an application for a compliance order
BETWEEN	TOVIO UGONE Plaintiff
AND	STAR MOVING LIMITED First Defendant
AND	STUART BIGGS Second Defendant

Hearing:	21 March 2024 (Heard at Christchurch via Audio Visual Link)
Appearances:	J Pietras and H Neumegen, counsel for plaintiff A Oh, counsel for defendants
Judgment:	21 March 2024

ORAL JUDGMENT OF JUDGE K G SMITH

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[1] Tovio Ugone is seeking orders under s 140(6) of the Employment Relations Act 2000 (the Act) against his former employer, Star Moving Ltd, and its director and shareholder Stuart Dale Biggs.

[2] Those orders are being sought because Star Moving did not satisfy orders made by the Employment Relations Authority in a substantive determination issued on 3 February 2023.[1]

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1 *Ugone v Star Moving Ltd* [2023] NZERA 55 (Member Anderson).

[3] In that determination the Authority ordered Star Moving to pay the following amounts:

(a) $28,275.09 to Mr Ugone as compensation for lost wages under s 123(1)(b) of the Act;

(b) $842.25 for the employer KiwiSaver contributions on lost remuneration, pursuant to s 123(1)(b) of the Act;

(c) $27,500 to Mr Ugone as compensation under s 123(1)(c)(i) of the Act;

(d) $6,000 in penalties, $4,000 to be paid to the Crown and the balance of $2,000 to Mr Ugone; and

(e) $71.55 as a reimbursement of the lodgement fee Mr Ugone paid.

[4] On 13 March 2023, the Authority ordered Star Moving to pay costs to Mr Ugone of $5,250.[2]

[5] The money Star Moving was ordered to pay in the determinations of 3 February 2023 and 13 March 2023 was not paid. On 24 May 2023, the Authority made compliance orders under s 137 of the Act to compel Star Moving to satisfy the orders made in February and March.[3] In each case the compliance order compelled Star Moving to pay by 7 June 2023.

[6] The 24 May 2023 determination also dealt with Mr Ugone's application for a compliance order made under s 137(2) of the Act in relation to Mr Biggs. The Authority was satisfied that Mr Biggs, as the sole director of Star Moving, was responsible for the earlier orders not being complied with and that he was in a position to prevent further non-compliance by the company.[4] As a consequence of those

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2 *Ugone v Star Moving Ltd* [2023] NZERA 116 (Member Anderson).
3 *Ugone v Star Moving Ltd* [2023] NZERA 262 (Member Anderson).
4 At [25].

findings, another compliance order was made compelling Mr Biggs to take all necessary steps to ensure Star Moving complied with both of the earlier determinations by 7 June 2023.

[7] Despite the compliance orders the determinations remained unsatisfied until 31 August 2023. Mr Pietras advised me, and Ms Oh confirmed, that the outstanding amounts were paid on that date, which was the day before liquidation proceedings involving Star Moving were to be heard in the High Court at Nelson.

[8] The elapsed time between Mr Ugone's success in his substantive determination and receipt of payment was about six months. The elapsed time between the costs order in his favour and payment was about five months.

[9] Coincidentally, 31 August 2023 was also the date on which this claim was to proceed as a formal proof because the defendants had not taken any steps. The hearing could not proceed then because an issue had arisen about continuing in the absence of the defendants and submissions were sought from Mr Pietras on that subject.

[10] Once that issue was addressed, I took the unusual step of issuing a minute and directing it to be served on the defendants drawing to their attention the seriousness of this proceeding. They instructed counsel and Ms Oh filed an address for service and an appearance on their behalf. No issue arises today about the delay in the defendants' response or the absence of statements of defence. In any event, the positions of the parties is apparent from submissions filed in advance of today's hearing.

[11] The statement of claim sought orders that:

(a) Star Moving be fined up to $40,000;

(b) Mr Biggs be imprisoned for a term not exceeding three months;

(c) the defendants pay costs on a solicitor-client basis; and

(d) such further or other orders that the Court considers just.

[12] Because the outstanding amounts have been paid the plaintiff no longer seeks a custodial sentence in relation to Mr Biggs.

[13] Both defendants accepted breaches of the Authority's orders had occurred.

[14] Where an Authority's compliance orders under ss 137(1) or 137(2) of the Act have not been complied with the adversely affected party may apply to the Court for orders under s 140(6).[5] The section 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:
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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:
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> (e) order that the property of the person in default be sequestered.

[15] In *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)*, the Court of Appeal referred to a range of factors to consider in assessing sanctions under s 140(6).[6]

[16] The factors referred to by the Court of Appeal are not exhaustive but include the nature of the default (that is whether it is deliberate or wilful), whether it is

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5 The application is made under the Employment Relations Act 2000, s 138(6).

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 at [76] and [77]. See too [56]–[75].

repeated, without excuse or explanation and if it is ongoing. What can also be taken into account are any remedial steps, the defendant's track record, the respective circumstances of the employer and employee, the appropriateness of a deterrent penalty and the proportionality of the fine.

Plaintiff's submissions

[17] Mr Pietras submitted that Star Moving and Mr Biggs should be jointly and severally ordered to pay a fine of $25,000. He asked for an order that half of that sum be made payable to Mr Ugone. He applied for costs and disbursements totalling $13,981.50 and reimbursement of the filing fee of $306.67.

[18] Turning to the factors referred to in *Peter Reynolds*, Mr Pietras' submissions can be summarised in the following way:

(a) The level of culpability is significant.

(b) The penalty should deter and denounce the defendant's conduct.

(c) There has been an attempt by the defendants to avoid meeting the Authority's orders.

(d) There is a history of breaching orders of this Court.

(e) The defendants have been belligerent and obstructive in resisting sanctions, illustrated by Mr Biggs serving a trespass notice on the document server engaged by the plaintiff and complaining about Mr Pietras to the New Zealand Law Society.

[19] Mr Pietras submitted the assessment of the fine should begin at $15,000 with an uplift of $10,000. That starting point was proposed as being consistent with decisions such as *McMillan v Resque Corporation 20/20 Ltd*.[7] By Mr Pietras'

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[7] *McMillan v Resque Corporation 20/20 Ltd* [2023] NZEmpC 76, [2023] ERNZ 308.

assessment the sum arrived at by including the uplift would be 62.5 per cent of the maximum available fine.

Defendants' submissions

[20] Ms Oh took a different position about culpability, the need for deterrence and denunciation. She acknowledged that a starting point for a fine of $15,000 was within the available range for the Court to consider and accepted that a modest uplift might be appropriate. She did not accept that an uplift of $10,000 should be imposed because that would not, she argued, reflect the seriousness of the breaches and would be excessive.

[21] Seeking to lessen the impact of Mr Pietras' submissions about culpability, Ms Oh said that all that could be pointed to was the fact of the breaches and nothing more, characterising the defendants' non-compliance as inaction, rather than actively attempting to "thwart" the determinations or orders that were made against them. She sought to distinguish this situation from a defendant's deliberate or calculated breaches of monetary awards or of other orders such as for reinstatement or non-publication, referring to *RPW v H*, where it was said that the defendant undertook a "crusade" on social media against the plaintiff, and *Nathan v Broadspectrum (New Zealand) Ltd* where the defendant breached an order from the Court for reinstatement.[8]

[22] Ms Oh also sought to distance the timing of payment from the liquidation proceeding, saying that it would be speculative to conclude that payment was made at the last minute to avoid liquidation. Similarly, comparisons drawn from other cases that did not involve Star Moving was said to be inappropriate because neither *Peter Reynolds*, nor s 140(6), can broaden the scope of the inquiry into associated but separate legal entities. I was urged to put aside the trespass notice, and the complaint made to the Law Society, as unfortunate but irrelevant events.

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8 *RPW v H* [2018] NZEmpC 131 at [14]; and *Nathan v Broadspectrum (New Zealand) Ltd (formerly Transfield Services (New Zealand) Ltd)* [2017] NZEmpC 116.

[23] As to the defendants' financial position, Ms Oh submitted that it would be inappropriate to draw an adverse inference about the company's ability to pay and also Mr Biggs' ability to pay. Previously, a scheduled hearing was adjourned to provide an opportunity for Star Moving to produce financial information from its accountant on the basis that such evidence may have a bearing on the outcome of this case.

[24] By the time of this hearing the defendants had decided not to provide any financial information. Ms Oh submitted, and I accept, that it would be wrong to assume the defendants are unable to pay a fine.

Is a sanction appropriate?

[25] The first issue to address is whether it is appropriate to impose any of the sanctions sought under s 140(6).

[26] The Authority's orders were breached and the defendants have not suggested that there are any circumstances which should excuse them from a sanction.

[27] While the *Peter Reynolds* decision referred to the primary purpose of a compliance order being to compel the defaulting party to comply, the decision included a further purpose which was to impose a sanction for non-compliance.

[28] Breaching a compliance order is a serious matter and warrants a serious response. The Authority, the Court and the parties are entitled to expect orders to be obeyed and it is likely to be in only reasonably rare cases that non-compliance would be excused. A sanction is called for.

What sanction should be imposed on Mr Biggs?

[29] I deal first with Mr Biggs because he is the controlling mind of Star Moving.

[30] I begin by observing that I do not accept failing to satisfy the Authority's substantive and costs determinations, and the subsequent compliance orders, can be described as inaction or as being passive or in some way benign. In the face of

unsatisfied orders to pay and further orders to take action there is no meaningful difference between inactivity and disobedience.

[31] I infer that the effect of the breaches must have been significant on Mr Ugone. The Authority held that he was entitled to compensation for lost wages, and for humiliation, loss of dignity and injury to feelings and he has been put to significant effort to get no more than the Authority has determined he was entitled to in circumstances where no effort was made to challenge that determination or otherwise put it in issue.

[32] The absence of any reason for failing to pay supports a starting point of $15,000.

[33] An assessment is required as to whether there should be an uplift in the potential fine.

[34] There was agreement that the behaviour warrants an uplift. The disagreement is over how much that uplift should be. Before considering the amount of the uplift I intend to refer to some of the cases referred to by Mr Pietras.

[35] In *Cousins v Star Nelson Holdings Ltd*, the Authority awarded remedies to the applicant of just over $31,000 and imposed a $4,000 penalty on that company.[9] Star Nelson is a company that was, at all relevant times, under the control of Mr Biggs. Mr Cousens first sought a compliance order in the Authority and then the Court.[10] When the amounts owed were not paid the Authority granted a compliance order compelling Mr Biggs to take steps to have the company comply. The order was made on 3 March 2022 and was not satisfied to the point where a second compliance order was made against him on 19 July 2023.[11] The order remains unsatisfied today.

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9 *Cousens v Star Nelson Holdings Ltd* [2021] NZERA 52 (Member Beck).

10 *Cousens v Star Nelson Holdings Ltd* [2021] NZERA 305 (Member Beck); and *Cousens v Star Nelson Holdings Ltd* [2022] NZEmpC 30.

11 *Cousens v Star Nelson Holdings Ltd* [2022] NZERA 67 (Member Beck); and *Cousens v Biggs* [2023] NZERA 383 (Member Beck).

[36] *Oliver v Biggs* was, initially at least, a decision of this Court about costs following a discontinuance by the plaintiff.[12] The Court's decision records the history of the litigation. It began in September 2019 with action being taken against Mr Biggs, as a director of a company that had been the plaintiff's employer and had failed to comply with what was described in the judgment as "multiple determinations" of the Authority. The judgment records that on 12 January 2021 the Authority made a compliance order against Mr Biggs. That description by the Court was by way of background to a decision where, even though the plaintiff discontinued the claim, Mr Biggs was ordered to pay a contribution to the plaintiff's costs of $7,200.

[37] Matters did not end there so far as *Oliver v Biggs* is concerned. On 3 May 2022, the Court made a further order.[13] This time ordering Mr Biggs to comply by satisfying the costs order that had been previously made; that is to pay $7,200.

[38] A third judgment was issued in the set of proceedings between Mr Oliver and Mr Biggs on 28 February 2023.[14] A further compliance order was made and Mr Biggs was sanctioned by a fine of $3,000. I understand those orders remain unsatisfied.

[39] Mr Pietras drew to my attention the fact that *Oliver v Biggs* also mentions five determinations involving companies controlled or associated with Mr Biggs where they are said not to have satisfied Authority determinations.

[40] Ms Oh urged me not to take into account those other determinations to avoid the risk of double counting and also because the circumstances in relation to each of them are not clearly before the Court. I accept Ms Oh's submissions and put those determinations aside.

[41] Even having put those other determinations aside, the decisions of *Cousens* and *Oliver* that I have referred to show a theme that Mr Biggs, and companies he

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12 *Oliver v Biggs* [2021] NZEmpC 104.
13 *Oliver v Biggs* [2022] NZEmpC 73.
14 *Oliver v Biggs* [2023] NZEmpC 28.

controls, do not comply with orders made against them unless under compulsion. That theme must influence the amount of uplift in the fine.

[42] Little guidance is available from other decisions of this Court guiding an assessment when considering an uplift in a fine. Mr Pietras' request for a $10,000 uplift is, I consider, excessive. It is notable that he did not refer to any cases where such an uplift was imposed. Ms Oh did not suggest what level of uplift might be appropriate beyond her submission that it should be modest.

[43] Taking into account the track record I have just summarised, the deliberate nature of the breaches and the need to express disapproval of this behaviour and to deter it, I have decided that a 40 per cent uplift is appropriate. Applying the uplift means that the fine would rise to $21,000.

[44] Out of caution, I have accepted Ms Oh's submission that the trespass notice and Law Society complaint, while unsatisfactory conduct, should not be taken into account.

[45] Having reached that point, I take account of Ms Oh's submission that the orders have now been satisfied, albeit belatedly. These proceedings were filed in June 2023 and the Authority's compliance orders were not satisfied until the end of August 2023. It is reasonable to infer that payment was only made in the face of the High Court proceeding so that it was in a sense the result of yet more coercive pressure. In the circumstances a modest allowance will be made to reduce the fine to $20,000.

[46] Stepping back and looking at the proportionality of that fine compared to other cases, I consider it is at an appropriate level.

What sanction should be imposed on Star Moving?

[47] Bearing in mind Ms Oh's submissions about the risk of avoiding double counting, there is such a risk if both Mr Biggs and Star Moving are fined, because the circumstances which exposed them to a sanction under s 140(6) are essentially the

same. Taking a cautious approach, I intend to fine Mr Biggs and, in relation to Star Moving, record that it breached the compliance order and is liable to a sanction under s 140(6) but make no further order at this stage.

Compensatory order

[48] Under s 140(7) of the Act, the Court may order some or all of the fine to be paid to the employee who brought the proceeding. There is an element of compensation in such an order but it is appropriate to make it even though I am shortly going to make a costs award. In my view that is appropriate to recognise the time, and effort, that has been required by Mr Ugone to secure no more than the Authority has previously ordered he was entitled to receive. In my view, he is entitled to $10,000.

Costs

[49] Costs have been sought.

[50] Ms Oh elected to make no submissions in relation to costs.

[51] Costs should be paid by the defendants jointly and severally even though a fine was not imposed on Star Moving. The costs are fixed at $13,981.50 and reimbursement of the filing fee of $306.67.

Warning

[52] Before concluding this judgment, I consider it appropriate to record a warning to Mr Biggs that if other cases come before the Court involving requests for sanctions for not complying with Authority or Court orders he faces a serious risk of a custodial sentence.

Outcome

[53] I order:

(a) Pursuant to s 140(6) of the Act, Stuart Dale Biggs is ordered to pay a fine of $20,000 and of that sum $10,000 is to be payable to Mr Ugone.

(b) The fine referred to in paragraph [53](a) is to be paid no later than **21 days after the date of this judgment**.

(c) Costs of $13,981.50 plus disbursements of $306.67 are to be paid by the defendants jointly and severally to Mr Ugone no later than **21 days after the date of this judgment**.

(d) Leave is reserved to apply to the Court for further or other orders in the event that the fine, costs and disbursement are not paid within the time allowed.

K G Smith
Judge

Judgment delivered orally at 10.25 am on 21 March 2024