

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

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

**[2025] NZEmpC 283
EMPC 119/2025**

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

BETWEEN HEALTHALLIANCE NZ LIMITED
Plaintiff

AND GARTH MURRAY CUNNINGHAM
Defendant

EMPC 228/2025

IN THE MATTER OF an application for compliance order under
s 139 of the Employment Relations Act
2000

BETWEEN GARTH MURRAY CUNNINGHAM
Plaintiff

AND HEALTHALLIANCE NZ LIMITED
Defendant

Hearing: 8 September 2025
(Heard at Auckland)

Appearances: R Upton, counsel for healthAlliance NZ Ltd
G Cunningham, defendant in person

Judgment: 22 December 2025

JUDGMENT OF JUDGE M S KING

[1] This judgment resolves an application for a compliance order and an application for sanctions for breach of a compliance order. Mr Cunningham's application for a compliance order relates to healthAlliance's alleged failure to comply

with a verification order. healthAlliance’s application for sanctions arises from an alleged breach of compliance orders which required Mr Cunningham to pay costs awards by both the Employment Relations Authority (the Authority) and the Court.

A compliance order is sought

[2] On 15 August 2024, Mr Cunningham served a notice requiring disclosure on healthAlliance.¹ The notice sought all personal information held by healthAlliance from 1 March 2019 until 17 July 2020 in the form of emails to which Mr Cunningham was not a party to, but where one of three identified individuals were either the sender or recipient. healthAlliance did not object to the notice requiring disclosure and has provided documents to Mr Cunningham. However, Mr Cunningham was dissatisfied with the documents disclosed.

[3] On 20 February 2025, the Court issued a judgment in which it granted Mr Cunningham’s application for a verification order. The judgment ordered:²

... healthAlliance is to disclose, in a sworn or affirmed statement, whether any document or any class of documents specified or described in the notice that has not been disclosed in response to that notice:

- (a) is in the possession, custody or control of healthAlliance; and
- (b) if not, whether any such document or class of documents was ever in the possession, custody or control of the opposing party; and
- (c) if so, when it was parted with and what became of it.

[4] On 28 May 2025 Mr Cunningham filed an application for compliance orders on the basis that healthAlliance had failed to comply with the Court’s orders.

[5] On 12 June 2025, healthAlliance filed a statement of defence, in which it claimed that the Court judgment did not contain a timeframe for compliance and that it has or will soon comply with the Court’s order. Its statement of defence notes that “...it will provide an affidavit fulfilling the verification order shortly. There is no need for the Court’s precious resources and time to be spent on this matter.”

¹ Employment Court Regulations 2000, reg 42.

² *Cunningham v healthAlliance NZ Ltd* [2025] NZEmpC 24 at [11].

[6] On 15 July 2025, healthAlliance filed an affidavit from Mr Huynh, people partner lead for data and digital at Health New Zealand Te Whatu Ora (healthAlliance's parent company) which was dated 7 July 2025 and sworn on 10 July 2025, about 140 days after the Court had made the verification order. This affidavit erroneously referred to a document as exhibit A of the affidavit; however, the intended document was not exhibited. During the hearing Mr Huynh corrected his evidence while under oath. On 13 October 2025, more than a month after the hearing, healthAlliance filed an affidavit from Mr Huynh which was sworn on 9 September 2025 and correctly exhibited document A.

[7] Mr Cunningham submits that Mr Huynh was not the right person to provide an affidavit verifying that healthAlliance has complied with the Court orders or with answering questions at the hearing. This is because Mr Huynh does not have technical IT expertise and did not conduct the searches for documents himself. Mr Huynh's evidence referred to an 8 November 2024 affidavit of Mr Jogia, TMP on demand manager at Health NZ Te Whatu Ora, which set out the searches he had performed in the earlier proceedings, which resulted in the Court making the verification order against healthAlliance.

[8] healthAlliance submits that Mr Huynh's 10 July 2025 affidavit complied with the 20 February 2025 Court verification order. Mr Cunningham disputes this, he submits that there is a likelihood that there are additional documents that have not been provided by healthAlliance. He points to the lack of documents disclosed between two of the individuals identified. The documents that have been disclosed by healthAlliance appear to be related primarily to documents sent by the third individual identified. However, Mr Cunningham was unable to identify which documents he says should have been provided by healthAlliance.

[9] The verification order was made by the Court in part due to concerns that healthAlliance had narrowed the scope of documents Mr Cunningham had requested in his notice requiring disclosure. It limited the searches to only emails sent between the three individuals (as opposed to one of the individuals being a recipient or sender of the email) and it appeared to have misspelt the name of one individual when searching.

[10] Mr Huynh's evidence confirmed that healthAlliance had searched all three individuals' names correctly and that it searched for senders and recipients which included all three named individuals and others which mentioned Mr Cunningham but did not include him in the email. Mr Huynh confirmed that he did contact one of the individuals in an effort to locate meeting notes from an 8 July 2020 meeting. The individual advised where any meeting notes should be kept generally; however, Mr Huynh was unable to locate these.

[11] healthAlliance's evidence was that only one of the individual's email accounts remained on its Microsoft Exchange server. The email accounts of the other two individuals were no longer on its Microsoft Exchange server, as they had left healthAlliance some time ago and their email accounts were no longer located on its server. To address this, it downloaded from its back up tapes, the personal email inboxes of all three individuals from July 2020 and searched them together with the one individual account it had managed to locate on its Microsoft Exchange server for the information requested by Mr Cunningham. It did not find any other documents to disclose.

[12] During the hearing, Mr Cunningham was asked what more the Court could order healthAlliance to do if documents were not found on the Microsoft Exchange server or on its back up tapes. Mr Cunningham responded: "Well they can't order them to do anything because they've done the best they can." However, Mr Cunningham wanted healthAlliance to explain why two of the individuals' email accounts were no longer on its Microsoft Exchange server and to provide an affidavit setting out its policy for removing the email accounts from its Microsoft Exchange server.

[13] Lastly, Mr Cunningham submits that healthAlliance's compliance occurred only as a result of his application for a compliance order. healthAlliance only provided him with an affidavit explaining the searches (type and scope of searches) when it responded in the proceedings. The evidence it filed required amendment at the hearing. Mr Cunningham submits this is unacceptable.

Legal principles

[14] The Court may make a compliance order under s 139(2) of the Employment Relations Act 2000 (the Act) where any person has not observed or complied with any order, determination, direction or requirement made or given under the Act by the Court. The purpose of a compliance order is to prevent a further breach from occurring. A party seeking such an order must show that there has been a breach and that further non-observance or non-compliance is likely.³ If those circumstances are established, the Court may make an order under s 139(2) compelling the party in breach to do any specified thing, or to cease any specified activity, for the purpose of preventing further non-observance or non-compliance. If a compliance order is made, the Court must specify a time within which it is to be obeyed.⁴

Delayed compliance

[15] During the hearing Mr Cunningham accepted, after considering the evidence filed by healthAlliance, that it had now done the best it could do to comply with the Court's verification order. Through the production of evidence as part of these proceedings, including at the hearing, healthAlliance has now complied with the Court's verification order. I do not consider it is reasonably necessary for healthAlliance to be ordered to do anything further.

[16] However, on the evidence before me, healthAlliance has delayed complying with the Court's orders without any reasonable excuse. Although the judgment making the verification order did not specify a timeframe for compliance, healthAlliance stated that it intended to fulfil the Court's orders "shortly". Instead, it took over 140 days to provide an affidavit setting out what steps it had taken to comply with the Court's verification order. As the affidavit filed in July 2025 was deficient, it needed to be corrected at the hearing and was not filed until a month later, until October 2025. I do not accept healthAlliance's submission that the absence of a specific timeframe did not result in a technical breach. The fact that its compliance only came in the late stages of this proceeding (despite stating an intention to comply with the Courts orders promptly) is a matter that is relevant to the issue of costs. Its

³ *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 72 at [9].

⁴ Employment Relations Act 2000, s 139(3).

delay and its submissions fall well short of the conduct of parties expected before the Court.

Sanctions for breach of a compliance order are sought

[17] healthAlliance is seeking orders under s 140(6)(a) and (d) of the Act to impose a sanction on Mr Cunningham because he has not complied with the following compliance orders:

- (a) On 15 November 2024, the Authority issued a determination granting healthAlliance a compliance order which required Mr Cunningham to pay healthAlliance \$10,000 in costs, with interest.⁵ Costs had previously been ordered by the Authority on 20 December 2023.⁶
- (b) On 20 February 2025, the Court issued a judgment granting healthAlliance a compliance order which required Mr Cunningham to pay healthAlliance \$7,311.50 in costs, with interest.⁷ Costs had been previously ordered by the Court on 19 July 2024.⁸

[18] On the morning of the hearing, Mr Cunningham paid \$10,000 into healthAlliance's bank account.

[19] While the payment covers the cost awarded by the Authority on 15 November 2024, it does not cover the interest payable, or the costs ordered in the Court's compliance order of 20 February 2025. healthAlliance submits that Mr Cunningham owed at the date of the hearing, a balance of approximately \$13,000 in interest on the Authority order and costs and interest on the Court's order.

[20] healthAlliance maintains that despite the part payment, Mr Cunningham is in breach of the Court's and Authority's compliance orders. It seeks sanctions in the form of an imposition of a fine and an order that all of Mr Cunningham's proceedings be stayed until he complies with the compliance orders made by the Authority and Court.

⁵ *healthAlliance NZ Ltd v Cunningham* [2024] NZERA 680.

⁶ *healthAlliance NZ Ltd v Cunningham* [2023] NZERA 771.

⁷ *Cunningham v healthAlliance NZ Ltd*, above n 2, at [19].

⁸ *Cunningham v healthAlliance* [2024] NZEmpC 132.

[21] Mr Cunningham does not dispute that he failed to comply with the Court and Authority's compliance orders. He claims that his actions do not constitute defiance or bad faith. He claims to be experiencing financial hardship which affected his ability to comply with the Court's orders and that he could not afford to pay the full \$23,000 to healthAlliance (the amount healthAlliance claims it is owed).

[22] Under cross-examination Mr Cunningham gave evidence that he is currently employed on a high-income, he owns two investment properties, in addition to a family home, and approximately \$19,000 in shares. The equity in his properties is approximately between \$600,000 to \$700,000. He had tried to obtain finance in the past and was unsuccessful. However, he has not attempted to obtain finance recently and he did not explain why he could not withdraw further amounts from his rapid repay home loan bank account facility, which was the account which he drew from to pay healthAlliance \$10,000. Mr Cunningham admitted that he did not want to sell any properties he owned as he considered they were necessary for his retirement and that he effectively put his retirement ahead of compliance with the Authority and Court orders.

Legal principles

[23] A breach of a compliance order is a serious matter. I have not been referred to any authorities where an order has been made under s 140(6)(a) of the Act, either staying or dismissing a proceeding. However, I am aware that the Court has made an order under s 140(6)(a) of the Act in *Lorigan v Infinity Automotive*.⁹

[24] The Court's jurisdiction to impose a fine or stay of proceedings is under s 140(6)(a) and (d).¹⁰ In *Peter Reynolds Mechanical Ltd v Denyer*, the Court of Appeal identified the primary purpose of s 140(6) as being to secure compliance.¹¹ It considered previous cases involving not only the imposition of fines, but also ordering imprisonment or sequestration and went on to state:¹²

⁹ *Lorigan v Infinity Automotive* [2019] NZEmpC 118.

¹⁰ Employment Relations Act, s 140(6).

¹¹ *Peter Reynolds Mechanical Ltd v Denyer* [2016] NZCA 464, [2017] 2 NZLR 451, [2016] ERNZ 828 at [75].

¹² At [75].

... we see the primary purpose of s 140(6) as being to secure compliance. That is apparent from the wording of the section. Secondly, it must be intended to enable the Court to impose some form of sanction for non-compliance with the compliance order.

[25] Further, the Court of Appeal identified a range of non-exhaustive factors in assessing whether a fine should be imposed and the amount of a fine.¹³ This includes the circumstances of any default, whether steps have been taken to address non-compliance and the need for deterrence. The Court may also consider whether the breach is a first or repeated breach by the defendant and the respective circumstances of the employer and employee, including financial considerations. There should also be consideration of other similar cases for consistency, and proportionality is another factor that may involve consideration of the sum at issue.

[26] The Court in *Lorigan* considered that these factors are also relevant to the consideration of whether a stay of proceedings is necessary in the interests of justice.¹⁴

Analysis of relevant factors

[27] Mr Cunningham has failed to pay the costs orders against him and has failed to comply with the compliance orders made by the Court and the Authority.

[28] Mr Cunningham is self-represented, he has filed a challenge to the Authority's costs award and the related compliance order. He has not appealed the costs award made by the Court or the related compliance order.

[29] On several occasions, healthAlliance have requested that Mr Cunningham make the necessary payments. Mr Cunningham has refused on the basis that he hopes that he will be successful in his challenges to the Authority's substantive and costs determination, which would mean that his debt to healthAlliance would fall away. Mr Cunningham has made the decision to prioritise his retirement savings over the Authority and Court ordered costs and related compliance orders.

[30] The default is ongoing. From the date of the hearing more than nine months has elapsed since the Authority made its compliance order and more than six months

¹³ At [76].

¹⁴ *Lorigan v Infinity Automotive Ltd*, above n 9, at [28].

since the Court made its compliance order. On the morning of the hearing, Mr Cunningham took steps to address the breach by paying \$10,000 to healthAlliance. However, this sum does not satisfy the amount outstanding on the interest of the Authority's orders, or the Court's costs and compliance orders and the interest arising from those.

[31] The total sum outstanding is \$8,381.77. This comprises of \$796.41 in interest arising from the Authority's cost and compliance orders, which began accruing from 10 April 2024,¹⁵ of which the principal was paid off on 8 September 2025. There is also \$7,585.36 in costs and interest arising from the Court's cost and compliance orders made on 20 February 2025 which remains outstanding.¹⁶

[32] Mr Cunningham has claimed that he is unable to pay the amounts awarded by the Authority or Court as payment would cause him financial hardship. However, Mr Cunningham's own evidence during the hearing does not support his claims of financial hardship. I am satisfied that Mr Cunningham has the ability to pay a fine if ordered.

[33] healthAlliance is a publicly owned employer. It is appropriate that it seek to recover its costs. However, the respective circumstances of healthAlliance, including its financial circumstances, is relevant. There is no evidence to suggest that any failure to comply with the orders of the Authority or Court has caused it to suffer any financial distress or disadvantage.¹⁷

[34] There is no evidence in other proceedings that Mr Cunningham has breached other orders of the Court or Authority, so this is the first instance of a breach.

[35] Despite healthAlliance's efforts, including the seeking of two compliance orders, one from the Authority and one from the Court, it has been unable to secure payment of the full amounts owing to it despite obtaining compliance orders.

¹⁵ *healthAlliance NZ Ltd v Cunningham*, above n 6, at [36].

¹⁶ *Cunningham v healthAlliance NZ Ltd*, above n 2, at [19].

¹⁷ Compare with *Domingo v Suon* [2017] NZEmpC 23, [2017] ERNZ 82 at [40]–[50]; *McMillian v Rescue Corporation 20/20 Ltd* [2023] NZEmpC 76, [2023] ERNZ 308 at [26]–[27]; and *Cooper v Pheonix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332 at [23]–[25].

[36] There is a need to deter breaches of orders of the Authority and Court and to encourage compliance.

Imposition of a stay of proceedings

[37] I am satisfied that the interests of justice require the imposition of a sanction. After standing back and considering the circumstances, in my view, the correct sanction is for an order of stay over Mr Cunningham's proceedings in the Court. The effect of such an order would be that, for so long as the costs orders are not paid, Mr Cunningham's challenges will not proceed. The proceedings will not be dismissed, they will be continued once the outstanding monies are paid.

[38] 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 enforcement of the underlying order available via recourse to the District Court under s 141 of the Act.¹⁸

[39] I consider that the current case is comparable to *Lorigan* and find that a stay is an appropriate and least restrictive sanction in the circumstances. It would not be in the interests of justice to impose a fine in addition.¹⁹

[40] healthAlliance may need to consider whether it pursues recovery of the balance of the outstanding sums owed to it under the Court and Authority through the District Court, as is usual for a judgment debt.

Outcome

[41] Mr Cunningham has failed to comply with the compliance orders made by the Court and Authority and a stay is imposed under s 140(6)(a) of the Act, staying Mr Cunningham's proceedings:

¹⁸ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*, above n 11, at [49] and [57].

¹⁹ *Lorigan v Infinity Automotive Ltd*, above n 9, at [44].

- (a) EMPC 221/2023 which is Mr Cunningham's de novo challenge to the Authority's substantive determination.²⁰
- (b) EMPC 2/2024 which is Mr Cunningham's non-de novo challenge to the Authority's costs determination;²¹ and
- (c) EMPC 470/2024 which is Mr Cunningham's de novo challenge to the Authority's compliance order determination;²²

[42] If the above proceedings remain stayed because the costs orders and compliance orders have not been complied with by 22 June 2026, the registry will convene a directions conference to consider any application which may be filed by then in regards to those proceedings.

[43] Costs are reserved.

[44] The parties are encouraged to agree on costs for these proceedings. There was some mixed success in relation to Mr Cunningham's application for a compliance order and healthAlliance has been successful in its application for sanctions. If the parties cannot agree on costs, healthAlliance may make application to the Court within 28 days of the date of this judgment. Mr Cunningham then has 21 days within which to respond, and any reply from healthAlliance is to be filed and served within a further seven days. Costs then would be determined on the papers.

M S King
Judge

Judgment signed at 3.10 pm on 22 December 2025

²⁰ *Cunningham v healthAlliance New Zealand Ltd* [2023] NZERA 296.

²¹ *Cunningham v healthAlliance New Zealand Ltd* [2023] NZERA 771.

²² *healthAlliance New Zealand Ltd v Cunningham* [2024] NZERA 680.