Employment Court of New Zealand

Christiansen v Sevans Group (NZ) Limited [2013] NZEmpC 11 (8 February 2013)

Last Updated: 18 February 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 11

ARC 9/12

IN THE MATTER OF an application for a compliance order

BETWEEN BRENDA CHRISTIANSEN Applicant

AND SEVANS GROUP (NZ) LIMITED First Respondent

AND NEIL MERCER Second Respondent

AND STEPHEN EVANS Third Respondent

Hearing: 8 February 2013 (Heard at Auckland)

Counsel: Brenda Christiansen, applicant

Neil Mercer, second respondent and representative for the first respondent

No appearance for the third respondent

Judgment: 8 February 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The primary issue before the Court is whether orders should be made under s

140(6) of the Employment Relations Act 2000 (the Act) in relation to the respondent company's alleged failure to comply with the Employment Relations Authority's (the Authority's) compliance order made on 27 September 2011.[1]

[2] The Authority's compliance order followed an earlier determination[2] awarding the applicant compensation for unjustified dismissal and a penalty for breach of the employment agreement. The Authority required the respondent to comply with its earlier determination of 10 May 2011 by paying the applicant compensation of $5,000, and by reimbursing her unpaid wages, salary and allowances including holiday pay of $21,151.16, together with interest at 8.4% per annum on the amount from 7 January 2011 until the amount is paid in full. The respondent company was given 14 days to comply with the Authority's orders. The determination clearly set out the consequences of a breach of the Authority's compliance order.

[3] The application was advanced against the respondent company (against which the Authority's compliance order was made) and two directors of the company. The application had originally cited the company as sole respondent, although it was clear from the documentation filed by the applicant that she wished to proceed against the directors personally. In a minute issued on 1 February 2012, the Chief Judge observed that although it was possible to join company officers to such an application to compel them to require the respondent company to comply, any individuals to be joined would need to be cited in the entitulment served with the amended claim. This was subsequently done. However, it became clear in evidence given at the hearing that the third respondent is no longer a director of the company. It appears that he was removed after having been adjudged bankrupt last year. The applicant did not seek to pursue her application against him in these circumstances.

[4] Mr Mercer is the sole director of the first respondent company. He is also the second respondent. He appeared at Court this morning and was permitted to give evidence, and advance submissions opposing the application. I was also assisted by

the affidavit evidence filed by the applicant, and her submissions.

[5] There is no dispute that the first respondent has taken no steps to comply with the Authority's compliance order. Mr Mercer's evidence was that the company has been struggling financially for some time and that attempts to secure additional

funding from overseas sources had been pursued during 2011 and 2012 but had proved to be unsuccessful. He produced the company's bank statements which show that as at 31 December 2012 the company had a nil balance in one account, a balance of around $6.00 in another, and an overdraft of $15.75 in another. Mr Mercer's evidence was that the company's financial position remains unchanged as at today's date. He said that the company did not have any assets, although he had no documentary evidence that this was so and the applicant raised issues about the veracity of this statement. The company is currently registered, although Mr Mercer said that he does not intend to re-register it later this year. He also said that is not trading "for tax purposes".

[6] Mr Mercer says that at the time the Authority's determination was issued he was distracted by other events, namely a criminal prosecution he was facing. He was subsequently imprisoned and is currently on parole. He said that he is subject to an order of $90,000 reparation which he is paying at a rate of $100 per week out of his pension.

[7] The applicant seeks orders from the Court fining and sequestering the first respondent's property. She accepts that an order of imprisonment is not available against the first respondent. The applicant seeks a fine, sequestration of property, and/or a term of imprisonment in relation to the second respondent.

[8] Section 140(6) of the Act provides that where the Court is satisfied, on an application under s 138(6), that any person has failed to comply with a compliance order made under s 137, the Court may do one or more things listed in s 140(6)(a) to (e). Only three are relevant for present purposes, namely:

...

(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.

[9] I am satisfied that the Authority's compliance order meets the statutory requirements for such orders, set out in s 137 of the Act. I am also satisfied, on the basis of the evidence before the Court, that the first respondent has failed to comply with the Authority's compliance order.

[10] The first respondent did not challenge the Authority's original determination of 10 May 2011 and was obliged to satisfy the orders made against it. It failed to do so, even when the Authority made a further order of compliance against it. The amounts remain outstanding nearly two years later. Mr Mercer accepted that no steps have been taken in that lengthy intervening period to meet the first respondent's obligations, and nor was any attempt made to communicate with the applicant about the money that was owed to her. I accept that Mr Mercer was dealing with other issues around this time, but the company's lack of response or attempt to address the Authority's orders is unacceptable.

[11] As the Court emphasised in *Ingham (Labour Inspector) v August Models and*

Talent Limited:[3]

Parliament has determined, by both setting the maximum fine at $40,000 and allowing it to be combined with other sanctions in a suite of other measures, that refusals to comply with Authority orders are to be treated seriously.

[12] There is nothing to suggest that the first respondent has previously breached a compliance order of the Authority, and I treat it as a first offender. Having taken into account the circumstances of the case and the company's apparent financial position, I consider that a modest fine is appropriate. Accordingly, I fine the first respondent

$2,500 for its non-compliance. I also direct that the applicant receive half of the penalty recovered.

[13] The applicant sought an order for sequestration of the first respondent's assets. There is insufficient material currently before the Court on which such an order could be made, including identification of the assets to which such an order

would attach.

[14] As was observed in *August Models*:[4]

Sequestration is a complex process and a potentially costly one although ultimately the party whose property is sequestered may be liable for the costs of the sequestrator from the proceeds of the realisation of its assets. There is insufficient necessary

information before me today to make an order for sequestration. Steps such as draft orders, the written consent of the proposed sequestrator, documents of identification for the sequestrator's costs, a proposed regime for reporting by the sequestrator and the like, need to be prepared by the plaintiff and put before the Court.

[15] A similar situation presents itself in these proceedings. Leave is granted to the applicant to bring the sequestration application against the first respondent back before the Court. She will have 90 days to do so. I urge her to seek legal advice in this regard.

[16] I have considered the remaining aspects of the application, namely that orders be made fining, imprisoning and sequestering the property of the second respondent. The Court does not have jurisdiction to make such orders under s 140 given that the second respondent was not the subject of the compliance order made by the Authority.

[17] There is authority for the proposition that the Court may make a compliance order against persons who have been joined in proceedings and who are in a position to compel the defendant to meet its legal obligations: *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd.*[5] The likely difficulty with an application of this approach in the present case is the company's financial position. If the company has no financial resources available to it then there is no realistic way of the second respondent compelling it to meet its legal obligations. However, I similarly grant leave to the applicant to bring this aspect of the application back before the Court,

within the same timeframe.

[18] The first respondent remains liable to meet its obligations, namely payment of the amounts ordered by the Authority. Interest continues to run at a rate of 8.4%

on those amounts.

[19] The applicant is entitled to $306.67, by way of the filing fee on her application, together with any reasonable other disbursements to be fixed by the Registrar, which the first respondent is ordered to pay to the applicant.

Christina Inglis

Judge

Judgment signed at 4.50pm on 8 February 2013

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[1] [2011] NZERA Auckland 424.

[2] [2011] NZERA Auckland 193

[3] [2010] NZEmpC 157at [9].
[4] At [10].
[5] [1990] 1 NZILR 717 at 722.
