



# Employment Court of New Zealand

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## Cooper v Phoenix Publishing Limited [2019] NZEmpC 148 (18 October 2019)

Last Updated: 23 October 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 148](#)

EMPC 120/2019

IN THE MATTER OF      an application under [ss 138\(6\)](#) and  
                                 [140\(6\)](#) of the [Employment Relations Act](#)  
                                 [2000](#)

AND IN THE MATTER    of an application to join a party

BETWEEN                MAREE COOPER  
                                 Plaintiff

AND                        PHOENIX PUBLISHING LIMITED  
                                 Defendant

Hearing:                7 October 2019  
                                 (Heard at Christchurch via Audio Visual  
                                 Link)

Appearances:        G Ogilvie, advocate for plaintiff No  
                                 appearance for defendant

Judgment:            18 October 2019

### INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application to join a party)

[1] On 12 February 2019, the Employment Relations Authority made a compliance order against Phoenix Publishing Ltd following an application by Maree Cooper.<sup>1</sup> Ms Cooper had been successful previously in two determinations of the Authority dated 28 September 2018 and 24 October 2018 respectively.<sup>2</sup>

1 *Cooper v Phoenix Publishing Ltd* [\[2019\] NZERA 68](#).

2. *Cooper v Phoenix Publishing Ltd* [2018] NZERA Auckland 301; *Cooper v Phoenix Publishing Ltd* [2018] NZERA Auckland 328.

MAREE COOPER v PHOENIX PUBLISHING LIMITED [\[2019\] NZEmpC 148](#) [18 October 2019]

[2] In September 2018 the Authority determined that Ms Cooper had been unjustifiably dismissed by Phoenix Publishing. As a result Phoenix Publishing was ordered to pay her the following amounts within 14 days:<sup>3</sup>

- (a) \$1,884.61 for money lost as a result of the personal grievance.
- (b) \$4,000 under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act).
- (c) \$5,833.33 gross for unpaid wages.
- (d) \$2,484.09 gross for unpaid holiday pay.
- (e) \$989.16 for unpaid expenses.

[3] In addition, Phoenix Publishing was ordered to pay \$10,000 as a penalty under [s 134](#) of the Act for breaching the employment agreement. Three quarters of that sum was to be paid to Ms Cooper and the remainder to the Crown.<sup>4</sup> On 24 October 2018, the Authority ordered Phoenix Publishing to pay to Ms Cooper costs and disbursements \$4,631.56.5

[4] In the Authority's February 2019 determination a compliance order, pursuant to [s 137\(2\)](#) of the Act, was made compelling Phoenix Publishing to comply with the September and October 2018 determinations. A minor adjustment to the amounts owing was made by the Authority because Ms Cooper had received a part payment of

\$4,120. 07.6 Making an allowance for that payment the compliance order compelled the company to pay to Ms Cooper \$23,202.68 within seven days of the date of the determination. Separately, the company was ordered to make a contribution to Ms Cooper's costs arising from the application for a compliance order, of a further \$460, and to reimburse the filing fee of \$71.56.

[5] Payment was not made. On 1 May 2019, Ms Cooper filed a proceeding in this Court seeking orders under [s 140\(6\)](#) of the Act against Phoenix Publishing. The

3 *Cooper v Phoenix Publishing Ltd*, above n 1, at [8].

4 At [9].

5 At [12].

6 At [10].

statement of claim sought as relief such orders as the Court considered appropriate in the circumstances.

[6] Ms Cooper has applied to join to the proceeding Bronwyn Ivy Rawson, who is Phoenix Publishing's only director. While no order has yet been made joining Ms Rawson to the proceeding, the statement of claim anticipated that eventuality and named her as if she is already a party, describing her as the second defendant. The relief sought against Ms Rawson was a compliance order, requiring her to arrange for the company to pay Ms Cooper to satisfy the determinations, together with interest and costs. Ms Cooper filed an affidavit confirming Ms Rawson's position as the director of Phoenix Publishing.

[7] The application to join Ms Rawson was opposed. The notice of opposition asserted that the only parties to the Authority's determination were Ms Cooper and Phoenix Publishing and, consequently, there were no grounds on which Ms Rawson could properly be joined to the proceeding at this stage. Counsel who filed the notice of opposition was subsequently given leave to withdraw. The company took no further part in the hearing of the application and there was no application by Ms Rawson to be heard.

[8] In support of the application, Mr Ogilvie sought to rely on *Christiansen v Sevans Group (NZ) Ltd*.<sup>7</sup> The crux of his submissions was that the Court has previously exercised power to join a party to a proceeding to ensure that orders are complied with. He accepted that, where such steps are taken, the party joined does not assume personal liability.

[9] There is a conceptual problem with the application. It assumes that the Court has power to join a party, to ensure that a compliance order is satisfied, when the proceeding is for sanctions to be imposed for disobeying the Authority's compliance order.

7. *Christiansen v Sevans Group (NZ) Ltd* [\[2013\] NZEmpC 11](#). The application also relied on *Dell v ABC01 Ltd* [\[2012\] NZEmpC 188](#); and *Northern Clerical IUOW v Lawrence Publishing Co* (1990) ERNZ Sel Cas 667 at 671-673; as approved in *Peter Reynolds Mechanical Ltd v Denyer* [\[2016\] NZCA 464](#).

[10] The Court's power to order compliance is contained in [s 139](#) of the Act. [Sections 139\(2\)](#) and (4) empower the Court to make compliance orders against a party to a proceeding, or any other person, to prevent non-observance or non-compliance with any order, determination, direction, or requirement. That was the situation discussed in *Christiansen v Sevans Group (NZ) Ltd* and approved of in *Peter Reynolds Mechanical v Denyer*. However, [s 139](#) applies only where there has been non-observance or compliance with [Part 8](#), dealing with strikes and lockouts, or where the Court has been disobeyed. That is not the situation here. The disobedience relied on in this proceeding is of the Authority's determination.

[11] What has enabled this proceeding to be before the Court is [s 138\(6\)](#). That section enables the person affected by a failure to comply with a compliance order made by the Authority to apply to the Court for the exercise of powers conferred by [s 140\(6\)](#); that is, for the Court to consider imposing sanctions on the defaulting party for disobeying the Authority. [Section 140\(6\)](#) 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:

(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:

(b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly;

(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.

...

[12] In this case, because what is involved is disobedience of the Authority, the sanctions available in [s 140\(6\)\(a\)](#) and (b) do not apply. The sanction in [s 140\(6\)\(c\)](#) is unavailable, because Phoenix Publishing is a company. If any sanction is imposed it

will be of a fine authorised by subs (d), to a maximum of \$40,000, and/or for the company's property to be sequestered under subs (e). The Court's powers, in [ss 139\(2\)](#) and (4), to join a party to the proceeding to ensure that compliance orders are met, are not repeated in [s 140\(6\)](#).

[13] [Section 140\(6\)](#) is explicit. It is about being able to punish a defaulting party for disobedient behaviour. The underlying compliance order, that is a prerequisite to applying [s 140\(6\)](#), is not affected by the proceeding seeking a sanction and is still to be complied with. The sanctions available to the Court do not include a further compliance order which would, in any event, be unnecessary.

[14] In this case the application was made on the basis that Ms Rawson should be joined to the proceeding before the Court, so that a compliance order can be made compelling her to make the company comply with the Authority's compliance order. The Authority's compliance order is before the Court only in the sense that it will be necessary to establish the order was lawfully made before turning to consider what action should be taken.

[15] It follows that there is no basis to join Ms Rawson to the proceeding, because the outcome will not involve a further compliance order. The application is dismissed.

[16] Costs are reserved.

K G Smith Judge

Judgment signed at 4.15 pm on 18 October 2019