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Coventry v Singh [2012] NZEmpC 34 (23 February 2012)

Last Updated: 8 March 2012

IN THE EMPLOYMENT COURT AUCKLAND

[\[2012\] NZEmpC 34](#)

ARC 73/11

IN THE MATTER OF an application for compliance order

BETWEEN NOEL COVENTRY Plaintiff

AND VINCENT SINGH Defendant

Hearing: 23 February 2012 (Heard at Auckland)

Counsel: Paul White, counsel for plaintiff

Moira Macnab, counsel for defendant

Judgment: 23 February 2012

ORAL JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff has applied for orders under [s 140\(6\)](#) of the [Employment Relations Act 2000](#) in relation to the failure of Mr Singh to comply with an earlier compliance order made by the Employment Relations Authority. The plaintiff seeks a sanction of imprisonment for a period not exceeding three months and that that term of imprisonment be suspended to provide an opportunity for Mr Singh to make payment of the amounts owing under the compliance order. In the alternative the plaintiff seeks an order that Mr Singh be fined a sum not exceeding \$40,000. Also being sought are costs in relation to this application.

[2] The background to this proceeding is conveniently set out in the Authority's substantive determination of 1 April 2011. Mr Coventry was employed as a cabinet maker by Mr Singh in 2010. An hourly rate of \$30.00 was agreed. Over the course of the following six weeks Mr Coventry worked a total of 262.25 hours. Full

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payment for these hours was not made. Mr Coventry ceased working for Mr Singh on 24 October 2010.

[3] Mr Coventry subsequently filed a grievance with the Employment Relations Authority. The Authority Member determined that Mr Coventry had been unjustifiably dismissed following an investigation meeting which Mr Singh attended. The Authority awarded Mr Coventry arrears of wages in the sum of \$5,367 gross, holiday pay of \$629.36 gross, interest on these sums of 8.4 percent per annum from

19 October 2010 until the date of payment, lost earnings of \$1,350 gross and compensation of \$3,000 for hurt and humiliation. Mr Coventry then invited the Authority to consider the issue of costs which were awarded in his favour in the sum of \$3,795 plus disbursements of \$346.60.

[4] It is apparent that steps were taken to extract the sums awarded by the Authority from Mr Singh by Mr Coventry's then lawyer and subsequent counsel, Mr Upton. This included correspondence to Mr Singh requesting payment. However, no response was received and no payment was forthcoming.

[5] Mr Coventry then applied to the Authority for a compliance order. Issues arose in relation to service which are set out in

detail in the Authority's determination of 29 August 2011. The Authority made directions as to substituted service and dealt with the application for a compliance order on 26 August 2011. Mr Singh did not participate in that investigative process. The Authority Member was satisfied based on the material before her that Mr Singh had had the opportunity to meet the obligations set out in the Authority's substantive and costs determinations and had failed, in the absence of any good reason, to do so. A compliance order was accordingly issued in relation to the awards. I return to the issue of service shortly.

[6] The Authority also ordered that Mr Singh pay a further sum of \$1,773.75 by way of full solicitor/client costs to Mr Coventry on the application. The Authority ordered that Mr Singh comply with its earlier orders within a period of 21 days from the date of its determination and drew to Mr Singh's attention the strict nature of the obligation on him to comply, noting this Court's powers to fine, sequester property and imprison for non-compliance.

[7] Where any person fails to comply with a compliance order made under [s 137](#) (which relates to orders made by the Authority), the person affected may apply to the Court for the exercise its powers under [s 140\(6\)](#) ([s 138\(6\)](#)). Amongst other things, [s 140\(6\)](#) empowers the Court to order the person in default be sentenced to imprisonment for a period not exceeding three months, to be fined a sum not exceeding \$40,000 and/or to order that the property of that person in default be sequestered. Prior to exercising such a power the Court must be satisfied that the person has failed to comply with the compliance made under [s 137](#).

[8] There have been unfortunate delays in progressing this matter. When it first came before the Court, Chief Judge Colgan issued a minute on 29 November 2011, identifying issues in relation to an affidavit of service that had been filed with the application. His Honour noted the potential sanctions against the defendant and that he had taken no step in the proceeding. He observed that the Court needed to be satisfied to a high standard that the proceeding had been served on Mr Singh and directed that another affidavit from the process server be filed. He went on to direct that:

...subject to satisfactory proof of service, ... as if the defendant took no steps to defend the proceeding it would be a matter of the plaintiff formally proving his claim.

[9] A further affidavit of service was filed and was referred to the Chief Judge. He issued a minute on 20 December stating that he accepted from the affidavit that the defendant had been served with the proceedings and set the matter down for a formal proof hearing. Mr Singh appeared at the hearing. He sought leave to be heard and an adjournment on the basis that he was not ready to proceed, his lawyer being otherwise engaged. I granted that application referring to the desirability of Mr Singh having the benefit of legal counsel, given the nature of the sanctions being sought, including imprisonment, although noted the unsatisfactory features of the application advanced by Mr Singh on his own behalf.

[10] The onus is on the plaintiff to establish beyond reasonable doubt the grounds upon which he relies for the imposition of a penalty: *Fletcher Development*[\[1\]](#).

[11] While a considerable amount of evidence was focused on Mr Singh's whereabouts on 26 August 2011 (the day on which the Authority's investigation took place) it was of limited relevance. What is clear is that the Authority took appropriate steps to ensure that Mr Singh was served in advance of that investigation meeting, including via substituted service on his accountant. Even accepting, for present purposes, that Mr Singh did not know about the investigation meeting, it was accepted on his behalf that he knew that a compliance order had been made against him and that he took no steps to seek a rehearing in the Authority. If Mr Singh's accountant failed to advise him following substituted service, there may be steps available to Mr Singh in that regard. However, I am satisfied that the Authority was entitled to proceed on 26 August with its investigation meeting. Counsel for the plaintiff referred to two judgments of the High Court in relation to substituted service where the Associate Judge made the point that the aim of substituted service is not necessarily to ensure that the proceedings definitely come to attention, rather

that there is a reasonable probability that they do so.[\[2\]](#) In the event, I did not

understand Ms Macnab to be contending that the service in this case was invalid or otherwise affected the enforceability of the compliance order.

[12] The Authority concluded that it had been established that Mr Singh had had the opportunity to meet his obligations and had failed to do so. I pause to note that no issue was taken with these findings. Mr Singh accepts that he failed to pay Mr Coventry in terms of the Authority's earlier orders.

[13] A compliance order was issued and Mr Singh was ordered to comply with the Authority's earlier orders within a specified timeframe of 21 days. I am satisfied that the Authority's order complies with the statutory obligations placed on the Authority when issuing such orders. I am also satisfied, and Mr Singh accepts, that he has breached the Authority's order.

[14] I turn to consider whether this is an appropriate case for a sanction to be imposed, and if so, what the nature of such a sanction might be. As I have said, if

the Court is satisfied that there has been a failure to comply with an order under

[s 137](#) it may impose a fine, a sentence of imprisonment, and/or an order for sequestration. The plaintiff seeks an order of imprisonment or a fine but does not seek an order for the sequestration of property.

[15] The suite of sanctions available to the Court reinforces the seriousness with which a refusal to comply with Authority orders is to be treated. Failure to comply with orders of the Authority plainly raises public interest considerations and brings the administration of justice into disrepute.

[16] As the Employment Court observed in the *August Models*:

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.

[17] I am not aware of any previous breaches by the defendant of orders of the Authority and accordingly I treat him as a first offender.

[18] Counsel for the plaintiff submitted that a suspended sentence of imprisonment ought to be imposed and that, while there is a hierarchy of sanctions, imprisonment was the only sanction that would be effective given the history of this case. I do not accept that that is so. I am not aware of any case in which imprisonment has been ordered and would regard it as a sanction of last resort. I also consider that Mr Singh's financial position is relevant, as Ms Macnab submitted, in terms of likely compliance. In the circumstances and having regard to the fact that Mr Singh is a first offender, I do not consider that imprisonment is appropriate.

[19] The defendant's evidence about the reasons why he failed to meet his obligations to Mr Coventry was inconsistent. In his affidavit he emphasised that he had not made payment to Mr Coventry because he was not in a financial position to do so. This evidence was supported by an affidavit from his mother and accountant. However, in cross-examination the defendant made it plain that he regarded Mr Coventry as a contractor not an employee and had no intention of paying him. He also made reference to a saw that Mr Coventry had allegedly damaged and I took it from his evidence that in these circumstances he simply did not propose to meet his legal obligations. If Mr Singh disagreed with the outcome of the Authority's investigation, he should have filed a challenge. The fact that he takes issue with the Authority's conclusions provides no justifiable basis for ignoring the orders against him.

[20] Counsel for Mr Coventry submitted that Mr Singh did have the finances available to meet his obligations, particularly as at 31 March 2011, when he had money in his account and could have claimed some outstanding GST refunds. However, the defendant's evidence was that he had a number of outgoings that he had to meet and the statements before the Court reflected his currently constrained financial position. However, that needs to be balanced against the evidence that he gave in cross-examination where he candidly accepted that he has plenty of work on at the moment and "has an ability to pay".

[21] While I accept that Mr Singh has been under some pressure financially, this also needs to be balanced against his abject failure to take any steps whatsoever to address the issue of his legal obligations to Mr Coventry. There was some weight to Mr White's submission that what Mr Singh had done was prioritise where he wanted to spend his available money and that Mr Coventry had simply not been a priority. In any event, as I have said, Mr Singh accepted in cross-examination that he had a lot of work on and was in a position to pay. That evidence came after a discussion of his ability to meet weekly instalment payments. However, his evidence was plain that he currently has a lot of work on, and his company is in operation.

[22] Mr Singh was in flagrant disregard of the Authority's orders. He ignored the award that had been made against him and took no steps to meet his obligations. Even at this late stage he has failed to do so. While mention has been made of the possibility of a lump sum payment and weekly instalment payments there is no evidence before the Court that he has taken any such step. I have no difficulty in concluding that this is an appropriate case for a sanction to be imposed.

[23] I pause to note a submission advanced by counsel for Mr Singh, that correspondence with Mr Singh about his obligations should have made it clear what his options were, including perhaps the possibility of seeking a variation from the Authority of its compliance order. I do not accept that this argument has any weight

or mitigates against Mr Singh's failure to comply. I do accept, based on the evidence before me, that he suffers from some health issues and has suffered from some stress relating to his business, but I do not accept that these provide an adequate explanation for his failure to meet his obligations or seek to address them.

[24] In terms of the quantum of any fine, I consider that a range of factors are relevant, including Mr Singh's ongoing and lengthy failure to meet or attempt to meet his legal obligations to the plaintiff or to take any steps in that regard. I also have regard to the range of fines imposed by the Court in cases involving [s 140](#) and by the individual facts of this case, including the defendant's financial situation, as far as I can determine it. In no case that I am aware of has a fine in excess of

\$10,000 been imposed and I accept Ms Macnab's submission that those cases where such a fine has been imposed are distinguishable on the basis that there appears to have been no financial information before the Court indicating hardship.

[25] Counsel for the plaintiff submitted a fine with a starting point of \$20,000 would be appropriate. Counsel for Mr Singh submitted that if a fine was to be imposed it ought to be in the region of \$1,500. Standing back and considering all of the factors in this case I consider that a fine in the sum of \$3,000 is appropriate. That is to be paid to the Court and by the Court into the Crown bank account. Counsel on behalf of Mr Coventry sought that part of that fine be paid to him and I consider that

to be appropriate in the circumstances.^[3] I direct that 50 percent of the fine, which has been imposed, be paid to Mr Coventry.

[26] The plaintiff is entitled to recover the filing fee on this application and to have a contribution to his legal costs in prosecuting this matter in this Court. Counsel for the plaintiff submits that a significant contribution towards costs is appropriate given the history of this matter and the significant costs that the plaintiff has been put to. Counsel for the defendant submits that while full costs relating to the adjourned hearing might appropriately be awarded, such costs were not otherwise warranted.

[27] The costs associated with attendances on this proceeding amount to around \$5,000 and are set out in invoices before the Court. No issue was taken with the reasonableness of these costs. I accept that the plaintiff has been put to unnecessary cost in relation to these proceedings and that the adjournment application put the plaintiff to additional unnecessary legal expense. However, standing back I do not regard the overall conduct in these proceedings as warranting full costs, despite the fact that there are some aggravating features. In the circumstances and having regard to all relevant matters before me, including the defendant's financial position, I consider that a costs award in the sum of \$2,000 is appropriate. I direct that the defendant pay the costs to the plaintiff in the sum of \$2,000, together with the filing fee of \$306.67.

[28] I note for completeness a disputed telephone conversation between Mr Upton, (then counsel for Mr Coventry) and Mr Singh. I had the advantage of both giving evidence about that, and I have no hesitation in accepting Mr Upton's version of events.

[29] It goes without saying that the defendant remains obliged to comply with his legal obligations as expressed in the Authority's compliance order. I make the point that if he had complied at the earlier stage, he would have saved himself a lot of additional money. I urge the defendant to comply without further delay.

Christina Inglis

Judge

Oral Judgment delivered at 5.08pm on 23 February 2012

^[1] [1988] NZILR

^[2] *Sheppard v Haydock* CIV-2009-404-711 High Court Auckland, 1 December 2009 and *Frederickson v Centuron Finance Limited* B No 249-01, High Court AK, 15/12/04.

^[3] See *Boerks*.