# Employment Court of New Zealand



## RPW v H [2018] NZEmpC 131 (6 November 2018)

Last Updated: 9 November 2018

**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2018] NZEmpC 131 EMPC 250/2018**
**EMPC 265/2018**

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| IN THE MATTER OF | applications for the Court to exercise powers under s 138(6) and s 140(6) of the Employment Relations Act 2000 |
| BETWEEN | RPW<br>Plaintiff |
| AND | H<br>First Defendant |
| AND | C<br>Second Defendant |

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| Hearing: | 6 November 2018 (Heard at Auckland) |
| Appearances: | S Hood and Erin Anderson, counsel for plaintiff<br>First defendant in person and on behalf of second defendant |
| Judgment: | 6 November 2018 |

**ORAL JUDGMENT OF JUDGE M E PERKINS**

[1] The defendants in this case have been found to have breached two compliance orders made by the Employment Relations Authority (the Authority) on 16 August 2018 and 27 August 2018.

[2] The circumstances of the breaches have been set out and considered in judgments of this Court dated 6 September 2018 (oral judgment)1 and 11 October 2018.2

1 *RPW v H* [2018] NZEmpC 103.

2 *RPW v H* [2018] NZEmpC 120.



[3] The breaches having been found to have been made by the defendants, a hearing was allocated for today to enable the defendants to make submissions before the Court exercised its power under s 140(6) of the Employment Relations Act 2000 (the Act). It was also to be a further opportunity for the plaintiff to make submissions if it chose to do so, and I have received submissions from Mr Hood on behalf of the plaintiff.

[4] A further affidavit and further information has been provided to the Court by both the plaintiff and the defendants. The plaintiff's further information relates to matters of postings on social media since my judgment of 11 October 2018. The first defendant has also provided, under protection of a written authority from a client, some medical information about the client's circumstances. The client is an employee of the plaintiff, or was an employee, I am not sure which, but not the person who was involved in the settlement, which is the originating circumstance giving rise to these proceedings.

[5] Draconian remedies are provided for under s 140(6) of the Act in the event of a breach of compliance orders made either by the Authority or the Court. In this case, blatant breaches have occurred. As indicated in the earlier judgments, the matter stems from a written undertaking given by the first defendant as part of a mediated settlement when representing a client.

Such settlement was effected under the Act by the Mediation Service. The undertaking by the first defendant was an agreement by him to comply with a clause in the settlement requiring non-disparagement of the plaintiff.

[6] The subsequent breaches by both the defendants, and thereby breaches of obligations imposed on their client, led to orders prohibiting publication. The compliance orders resulted from applications to the Authority by the plaintiff in an effort to restrain the defendants from continuing behaviour in breach of the settlement. I have already indicated that a term of imprisonment would not be the proper exercise of the Court's powers under s 140(6) in this case. Of the powers contained under the section, the only appropriate remedy would be a fine.3

3 Section 140(6)(d) provides that any fine not exceed $40,000.

[7] The imposition of fines under s 140(6) of the Act and the quantification of such fines has been the subject of previous decisions of this Court.

[8] In *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* Judge Inglis, as she then was, set out seven factors to be taken into account.4 These are as follows:

- The level of culpability involved (including the nature, scope and duration of any default);
- The need for deterrence and denunciation (both in relation to the particular defendant but also more generally);
- Whether the defendant has committed similar previous breaches;
- The attitude of the defendant;
- Whether the defendant has taken any steps to address its non- compliance;
- The defendant's circumstances (including financial);
- The desirability of a degree of consistency in comparable cases.

[9] On appeal, the Court of Appeal in *Peter Reynolds Mechanical Ltd v Denyer*

considering the purpose of the remedies under s 140(6), stated as follows:5

[75] As we have indicated, we see the primary purpose of s140(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.

[76] Given these two purposes, a range of factors will be relevant in a particular case to the measure of the fine. Those factors will include the nature of the default (deliberate or wilful), whether it is repeated, without excuse or explanation and whether it is ongoing or otherwise. Any steps taken to remedy the breach will be relevant together with the defendant's track record. Proportionality is another factor and will require some consideration of the sums outstanding. Finally, the respective circumstances of the employer and of the employee, including their financial circumstances, will be relevant.

[77] The wording of s140(6) does not prevent a fine being imposed even where compliance has been achieved. The need to deter non-compliance, either by the party involved or more generally, is not to be overlooked. So, for example, some recognition may need to be given in setting the level of the

4. *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC 41 at [18].

5 *Peter Reynolds Mechanical Ltd v Denyer* [2016] NZCA 464, [2017] 2 NZLR 451.

fine in a case where the defendant has deliberately delayed payment over a long period until the last moment. ...

(footnotes omitted)

[10] In *Reynolds* the courts were dealing with the breach of compliance with monetary awards, a breach which had been satisfied by the time of the hearing. The Court of Appeal substantially reduced the fine ordered by the Employment Court on that basis, setting out its reasoning as follows:

> [78] In our view there were three key considerations in this case. First, the fact that at the time of the hearing the appellant had paid the amount in full. While the Judge said she did not see much in the way of remorse, the fact that the amounts owing had been paid was important in that respect. Secondly, the amount owing was modest. We acknowledge it was a significant sum to Mr Costa but this was not a case where the employer had paid nothing at all. Rather it was, as we have indicated at [5] above, a case of short payment. Thirdly, the appellant's business was not in good shape financially. The Court first hearing the appeal allowed the appellant the opportunity of providing further evidence as to the financial affairs of the company so we have more information about that than was before Judge Inglis. That information also suggests this was more a case of muddlement. Given these circumstances, we are satisfied that the fine imposed was manifestly excessive.
> [79] Another way of cross checking the result in this case is to compare the sanctions for contempt imposed in two

more recent cases. In *Solicitor- General v Miss Alice* and in *Solicitor-General v Krieger*, fines of $5,000 were imposed in each case for deliberate and calculated breaches. That serves to reinforce our view the fine of $5,500 imposed here was manifestly excessive.

(footnotes omitted)

[11] While *Reynolds* is not directly comparable to the present case, the principles enunciated in that case both by the Employment Court and the Court of Appeal can be taken into account, perhaps in modified form, to decide what should be done in the present case. The present case is more akin to the *Miss Alice* and the *Krieger* cases where monetary awards were not involved and where there had been deliberate and calculated breaches.6 Similar considerations to those required in the present case were covered by Judge Corkill in this Court in *ALA v ITE* where, for reasons contained in in his judgment, he departed from the approach in *Reynolds.* He imposed a fine on the

6. *Solicitor-General v Miss Alice* [2007] NZHC 48; [2007] 2 NZLR 783 (HC); *Solicitor-General v Krieger* [2014] NZHC 172.

defendant of $7,500.7 In *Reynolds*, the Court of Appeal had reduced the fine imposed by this Court from $5,500 to $750.

[12] In this case there have been blatant breaches. Some of the information placed on social media has been tantamount to contempt of the Authority and the Court. At times, it has seemed that anarchy has reigned. The actions of the defendants have been an affront to the purposes of the mediation process under the Act to resolve employment relationship problems and promote good faith dealings. I have already mentioned that the actions of the defendants could also have had severe consequences for their client. The Court cannot stand powerless in the face of such actions.

[13] The imposition of a fine is a quasi-criminal procedure. While no conviction is to be entered under s 140(6), the principles of sentencing contained in the Sentencing Act 2002 have application; in particular in dealing with an offender, the Court must impose the least restrictive outcome that is appropriate in the circumstances. In this case, that means imposing a fine which is moderate but procures the purpose for which the fine is to be imposed as discussed in *Reynolds*.

[14] Applying the seven considerations from *Reynolds*, the following can be said:

a. In this case I have no doubt the defendants embarked upon deliberate breaches to advance their crusade.
b. Their views, as I have expressed in my earlier judgments, are no doubt genuinely held, but the way that they behaved was blatant and misguided.
c. Their culpability is high.
d. With such actions of blatant breach, there is a need for the penalties to reflect deterrence and denunciation.
e. In this case the defendants have not previously come before the Courts on such matters.
f. The attitude of the first defendant in particular, has not been positive or

7 *ALA v ITE* [2017] NZEmpC 39 at [175].

conciliatory.

g. The defendants have taken steps to address their non-compliance by removing the material placed on social media. I indicated that I would regard that as a substantially mitigating factor if it was done. There is some evidence that it has not been done in its entirety. There is evidence that there have been further postings.

[15] The defendants' financial circumstances have not been placed properly before the Court but would appear to be limited. I am prepared to accept the first defendant's statement that the second defendant company is running at a loss. That is likely to be a consequence of the type of business which is being run, and the matters which that company, and the first defendant, carry out.

[16] In considering the degree of consistency with comparable cases, I have regard to the material annexed to the Court of Appeal decision in *Reynolds*, although that sets out details of fines imposed to encourage compliance with monetary awards.

[17] I have thought long and hard about this matter. It has been a very difficult position to have to deal with. I have no doubt that it has been a difficult position for the plaintiff. However, I have to take into account the matters which the courts of higher jurisdiction have imposed on this Court as requiring consideration. I have to have regard to those mitigating factors and aggravating features which have been enunciated in the categories specified in *Reynolds*.

[18] There is no point in imposing a fine at a level which is going to mean that the first defendant's business will simply fold. That is not an appropriate outcome when dealing with the remedies under s 140(6).

[19] There have been other decisions of this Court recently dealing with levels of penalties under Parts 9 and 9A of the Act

and the Court has been conscious in those matters to ensure that the penalties are not counterproductive by being too high and never capable of being complied with. Those factors assume prominence in this case. That may not be entirely palpable to the plaintiff, but I have to exercise my discretion in this matter on a principled basis.

[20] I have asked the first defendant about the manner in which the second defendant company operates. Having heard that information from him, I have decided that there is really no point whatsoever in imposing any monetary penalty on the second defendant company. So far as the first defendant is concerned, I consider that the appropriate fine to impose on him is $2,000. Accordingly, he will be fined the sum of $2,000.

[21] I understand that there are other employees of the plaintiff who have some grievances, but to date those grievances have not been pursued, certainly in the employment jurisdictions. Whether they are going to be pursued in another forum is for them to decide. But I do hope this matter will come to an end. There is really no point in continuing to disparage the plaintiff. It will not achieve any positive result in my view.

**Costs**

[22] I now turn to the matter of costs and obviously there is a need for some costs to follow the event. I am quite sure that the plaintiff has spent a substantial amount of money in legal costs on this matter. Again, I am compelled in exercising the discretion on costs to take account of financial ability to pay. Any award I make will go nowhere near, I am sure, to reimbursing the plaintiff for the costs incurred by it. I have decided to bring an end to this matter today. There will be an order for costs against the first defendant in the sum of $3,500.

**Take-down order**

[23] Mr Hood finally raises the matter of an application for a take-down order. These proceedings were for a remedy under s 140(6). I am not sure that under that section there is power vested in the Court to make a take-down order and whether that should be part of a further application to the Court for a compliance order and for further remedies. Even if I made a take-down order and it was not complied with, there would have to be further applications to the Court. I have read the information, which apparently still remains in the social media posts. Without a further hearing on the matter, and enabling all the parties to present their position, I am not sure that it is

appropriate that I make a take-down order at this time. Accordingly, I have decided not to do that. That does not mean that the plaintiff is precluded from pursuing that issue by way of further applications. The first defendant has indicated that he has developed a better relationship with new management personnel in the plaintiff's business and I am hopeful that that will result in an amelioration of this entire matter so that it is not necessary for it to come back to the Court.

M E Perkins Judge

Judgment delivered orally at 12.03 pm on 6 November 2018

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