



Go directly to jail. Do not pass Go.

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

A recent case **ALA v. ITE**, demonstrates the wide powers available to the Employment Court in circumstances where orders of the Court are disobeyed.

The names of both parties in this long-running litigation were suppressed. "ALA" is a local authority; "ITE" was employed by ALA as IT Network Specialist. Difficulties became apparent in the employment after security issues arose in ALA's information systems. ITE was placed on special leave while an employment investigation took place, and a criminal investigation was launched. ITE faced charges relating to damaging or interfering with a computer system and accessing a computer system without authorisation. ITE was suspended, and admitted accessing ALA's computer system remotely and deleting information, maintaining that such deletions were necessary to protect other organisations involved in shared services.

At a mediation in June 2014, the parties reached a full and final settlement which included express reference to ITE's ongoing obligations of confidentiality and expanded undertakings of confidentiality relating to the employment investigation.

Unfortunately, ITE felt very aggrieved by the outcome and prepared a video relating to the events. He posted the video on his website and sent emails to large numbers of ALA's staff and to the staff of other organisations. ALA then applied to the Employment Relations Authority and obtained a compliance order to have ITE remove the video from the website. A penalty for breach of the settlement agreement was awarded against ITE.

ITE challenged the Authority decision to the Employment Court, however the Court upheld the Authority's orders and required ITE to immediately comply with the order to remove the video from his website and also to comply with the terms of the settlement he had reached with ALA.

A long course of litigation followed, with attempted appeals by ITE and further orders from the Court requiring compliance, as ITE continued to refuse to remove the video. The litigation culminated in an oral judgement of the Employment Court on 26 October 2017, which closely followed a judgment issued shortly prior, where the Court found that there had been clear breaches of the Court's compliance orders, and that there was no justification for ITE to ignore these orders by publishing confidential information on multiple occasions as he saw fit.

The oral judgment related to the Court having called for submissions as to the sanctions sought by ALA against ITE, which included, among other things, a sentence of imprisonment, or a fine. In its judgement, the Court said:

"[4] Before receiving those submissions, I raised two issues with ITE. The first was whether in light of my conclusions, ITE would now remove the YouTube and Facebook material, and disable the OneDrive access he had provided to certain persons, forthwith. He said that he would consider doing so after talking to other persons and that he would need at least a couple of days to undertake that process. I asked him to confirm that he was not agreeing to remove the social media material forthwith; had he been willing to do so, I would have adjourned briefly for that to happen. ITE declined to take these materials down today, so the sanction process must proceed."

The second issue raised related to legal advice for ITE:

"[5] . . . I explained to ITE that a duty solicitor was available immediately to provide legal advice; I asked him whether he wished for that to occur given the seriousness of his personal position. ITE told the Court that he did not want to see a duty solicitor today. I record that the Court has indicated to ITE on a number of previous occasions that he would be well advised to take legal advice; I am satisfied that every possible opportunity has been given to him to do so. I am also satisfied that it has been made very clear that his position is potentially serious and that ALA is seeking either a sanction of imprisonment or a significant fine."

Welcome Back to Work!



We trust you found time to relax and unwind over the festive season. We wish you all the best for a prosperous New Year in 2018 and look forward to providing you with assistance.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

Contact Details:

Ground Floor
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Neil McPhail

Email neil@mgz.co.nz
Mobile 0274 387 803

Raewyn Gibson

Email raewyn@mgz.co.nz
Mobile 0274 387 802

Peter Zwart

Email peter@mgz.co.nz
Mobile 0274 367 757

Both ALA and ITE made submissions as to the appropriate sanctions. The Court then noted:

"[19] Before evaluating the particular factors I am required to consider, it is worth repeating a statement made in the English Court of Appeal as to why the Court must act when there has been deliberate non-compliance with orders of the Court, or as it was described on that occasion, a contempt. In Jennison v Baker Salmon LJ said:

"Contempt of court' is an unfortunate and misleading phrase. It suggests that it exists to protect the dignity of the judges. Nothing could be further from the truth. The power exists to ensure that justice shall be done. And solely to this end it prohibits acts and words tending to obstruct the administration of justice. The public at large, no less than an individual litigant, have an interest and a very real interest in justice being effectively administered. Unless it is so administered, the rights, and indeed the liberty, of the individuals will perish."

[20] Regrettably, throughout the protracted litigation in which ITE has become embroiled, he has completely failed to recognise this fundamental proposition even when it has clearly been spelt out to him."

The Court then referred to the available sanctions in circumstances of failure to comply with a compliance order, which include and:

- "(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."*

The Court acknowledged that these were 'last resort' sanctions, however it went on to consider the nature of the default, which it considered to be deliberate and flagrant disregard of the Court's order, and said:

"I must conclude that the present circumstances are very serious. In summary:

- "• ITE's reliance on a public interest defence was and is opportunistic.*
- His apparent concerns could not possibly give rise to a public interest defence, given the terms of the original compliance order and the subsequent discussion of the defence in my April judgment.*
- The reasons for the making of the order have been clearly spelt out. ITE was not at liberty to continue his crusade by making further disclosures to anyone, whether associated with ALA, or beyond that organisation.*
- The steps he took, both before and after my judgment of 1 September 2017, were in direct contradiction of the express terms of the original compliance order, and of my order of that date.*
- I am satisfied the steps taken amounted to a deliberate continuous and flagrant disregard of the Court's compliance orders. I note that they have also breached the Court's non-publication orders, but no application for contempt in respect of those particular orders has been brought."*

The Court next considered the steps ITE had taken to remedy the breaches, which it found were none. It also considered ITE's track record, deterrence, personal circumstances and other factors, including what it considered to be ITE's complete lack of insight in his continued breach of confidentiality and flaunting of the compliance order:

"[34] I also stated that the matter had been considered by the Employment Relations Authority when it made a compliance order, by this Court when it made the original compliance order, by the Court of Appeal, by the Supreme Court, and then by this Court in its orders of 12 April and 1 September 2017. Notwithstanding each of these judicial considerations where it has been made perfectly clear, in effect, that ITE must comply with his confidential obligations, he has deliberately chosen not to."

The Court considered that a fine was not appropriate as all previous penalties and fines and costs orders had not acted as a deterrent. It held:

"[37] Whilst the imposition of a sentence of imprisonment is an order of last resort, and I have not been referred to any recorded instances where this has occurred previously, that possibility must be considered on this occasion, given the multiplicity of breaches, against the continued deliberate flouting of the Court's compliance orders."

and

"[49] I am satisfied that the circumstances are so serious that the Court must conclude that imprisonment is the only option."

[50] This is a situation of escalating gravity and numerous warnings. Despite the opportunity to remedy breaches, ITE has deliberately chosen not to do so.

[51] After weighing the various factors which I have considered, I regretfully conclude that an immediate sentence of imprisonment has to be imposed. I am not prepared to defer it. There has already been far too much delay in dealing with this matter; the point has been reached where a sanction must be imposed immediately.

[52] Whilst in some cases it has been appropriate to order that a term of imprisonment would last only for so long as the breach would continue, so that the individual concerned could purge the contempt and thereby be released, such a possibility is not in the present case appropriate.

[53] First, ITE has been offered every opportunity to remedy his breaches, at least as far as the use of media platforms are concerned, but has deliberately chosen not to do so — even today, when a final opportunity was offered.

[54] Second, dealing with these particular breaches would not purge the sending of multiple emails; the harm that has been done by the sending of those emails cannot now be undone.

[55] In all the circumstances, ITE is sentenced to a term of imprisonment for 21 days. This is a committal order under s 37(4) of the Corrections Act 2004."

This is the first occasion upon which the Court has imposed a term of imprisonment, which demonstrates how extreme the circumstances of ITE's case are. It nevertheless serves as a warning that the Court has wide powers and will use them in serious cases of contempt of Court.