IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 219
ARC 57/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for rehearing
AND IN THE MATTER	of a challenge to objection to disclosure of documents
BETWEEN	GRAHAM D'ARCY-SMITH Plaintiff
AND	NATURAL HABITATS LIMITED Defendant

Hearing: On papers filed on 20 October and 11 and 25 November 2014

Appearances: Plaintiff in person
J Burley, counsel for defendant

Judgment: 27 November 2014

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

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[1] There are two interlocutory matters decided by this judgment. The first is the plaintiff's application for leave to "partially review and set aside" the Court's first interlocutory judgment of 23 September 2014[1] which I have treated as an application for rehearing. The second is the plaintiff's purported challenge to the defendant's objection to disclosure of documents and, in particular, the defendant's contention that the plaintiff cannot challenge its objection to disclosure because he is out of time to do so.

[2] The parties have agreed that these applications can both be dealt with on the papers filed without the necessity for a hearing.

[1] *D'Arcy-Smith v Natural Habitats Limited* [2014] NZEmpC 181.

[3] I deal first with the application for rehearing of the plaintiff's application for an order staying execution of the costs determination of the Employment Relations Authority,[2] judgment in which was delivered on 23 September 2014. The defendant opposes the application for rehearing.

[4] In the Court's interlocutory judgment issued on 23 September 2014, the Court allowed the plaintiff's application for stay of execution of the Authority's costs award against him on condition that he paid into court, by 1 November 2014, the sum of $1,211.53, representing the Authority's costs award.

[5] The Court's interlocutory judgment of 23 September 2014 was issued after the parties had, by agreement, made written submissions to the Court on 31 July, 20 August and 23 September 2014.

[6] Mr D'Arcy-Smith asks the Court to rehear and re-determine para [7] of the interlocutory judgment. That was as follows:

> [7] That is an appropriate proposal in the circumstances. There will therefore be an order staying execution of the Authority's costs award on condition that the plaintiff pays the sum of $1,211.53 to the Registrar by 1 November 2014. That sum, plus accrued interest, is to be released only upon the written agreement of the parties or by order of the Court.

[7] The "appropriate proposal" referred to was the defendant's that, as a condition of stay, Mr D'Arcy-Smith should be required to pay the relevant sum to the Registrar, to be held on interest bearing deposit pending the outcome of his challenge.

[8] Mr D'Arcy-Smith had filed and served an extensive and detailed affidavit in support of his application for stay on 1 September 2014. The defendant's notice of opposition to the plaintiff's application for stay orders, filed on 20 August 2014, is brief and addresses the merits of the Authority's determination in the defendant's favour rather than of Mr D'Arcy-Smith's application to stay execution of its costs award. The defendant was, at that stage, unrepresented by counsel as it now is. The defendant's proposal for a condition of payment in was part of an email submission

[2] *D'Arcy-Smith v Natural Habitats Limited* [2014] NZERA Auckland 287.

filed with the Registrar (and copied to the plaintiff) on 23 September 2014. The judgment was issued later the same day.

[9] Mr D'Arcy-Smith's case for a rehearing is based, first, on a submission that it is consistent with, if not a necessary constituent of, a challenge by hearing de novo that everything determined by the Authority must be done on what Mr D'Arcy-Smith describes as a "level playing field" and that "[a]ny previous award or punishment & its enforcement even into a court appointed account is by nature at odds with the very meaning of "de novo"."

[10] So, Mr D'Arcy-Smith says, the "clock [must be] set back at zero … with neither party [disadvantaged] & and by definition is starting "anew" …". He says that "… the payment of any previous award cannot be made because in essence the award did not happen & therefore cannot be enforceable, even into a court account".

[11] Unfortunately for Mr D'Arcy-Smith, s 180 of the Employment Relations Act 2000 (the Act) provides:

> **180 Election not to operate as stay**
> The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.

[12] Section 183 provides relevantly as follows:

> **183 Decision**
> (1) Where a party to a matter has elected under section 179 to have that matter heard by the court, the court must make its own decision on that matter and any relevant issues.
> (2) Once the court has made a decision, the determination of the Authority on the matter is set aside and the decision of the court on the matter stands in its place.
> …

[13] The position argued for on the filing of a challenge by Mr D'Arcy-Smith is the position addressed by s 183(2) but that is only applicable after the Court has made a decision on the challenge.

[14] Unless and until a successful challenge sets aside the Authority's determination, it remains in effect and, unless stayed, may be enforced by a party. It

is open to the Court to attach conditions to an order for stay of execution of that determination as occurred in this case.

[15] Mr D'Arcy-Smith's next ground is based on reg 64 of the Employment Court Regulations 2000 (the Regulations). This provides:

> **64 Power to order stay of proceedings**
> (1) If an election is made under section 179 of the Act, the Authority and the court each have power to order a stay of proceedings under the determination to which the election relates.
> (2) If an application for a rehearing is made under clause 5 of Schedule 3 of the Act, the court has power to order a stay of proceedings under the decision or order to which the application relates.
> (3) An order under subclause (1) or subclause (2)—
> (a) may relate to the whole or part of a determination or decision or order, or to a particular form of execution; and
> (b) may be made subject to such conditions, including conditions as to the giving of security, as the Authority or the court thinks fit to impose.

[16] Mr D'Arcy-Smith submits that reg 64 does not address the position where a party is unable to pay an amount directed by the Authority. He seeks to invoke some provisions of the Judicature Modernisation Bill 2013, currently before Parliament. These, however, may or may not become the law and may or may not apply to Employment Court challenges to Authority determinations. It is not a lawful way to interpret a current statutory provision by applying what a Minister may, in a Bill, propose for the future. Reference to a particular High Court case on its particular facts (as apparently reported in a newspaper account) does not assist the position.

[17] It is vaguely implicit in Mr D'Arcy-Smith's submissions that he says he is not able to pay in the sum equivalent to costs as a condition of a stay. However, no evidence has been adduced to this effect or, as would be expected, about his financial circumstances that might persuade the Court to revisit either the condition per se or the amount of any sum to be paid in.

[18] Making an allowance for Mr D'Arcy-Smith's lack of professional representation, and in spite of the dearth of evidence to support a claim of impecuniosity, I accept that he may not have had or taken the opportunity to respond to the defendant's submission earlier on the day that the interlocutory judgment was issued, that it should be a condition of stay that an amount equivalent to the

Authority's costs award be paid into court. In not having or taking an opportunity to put forward evidence about impecuniosity, there may have been an injustice to Mr D'Arcy-Smith and, in these circumstances, his application for rehearing will be allowed. Clause 5(1) of sch 3 to the Act allows the Court to order a rehearing "upon such terms as it thinks reasonable". The rehearing granted will accordingly be on the following terms.

[19] Mr D'Arcy-Smith may have the period of 10 days from the date of this interlocutory judgment to file and serve affidavit evidence supporting his contention of impecuniosity. This evidence should deal comprehensively with his income and financial outgoings, his assets, and any other relevant circumstances affecting his ability to pay the Authority's costs award into court within the period of a month. Mr D'Arcy-Smith should corroborate his assertions with documentary evidence where this is available. He must serve a copy of his affidavit on the defendant's solicitor.

[20] The defendant may have the period of seven days following service upon it of Mr D'Arcy-Smith's affidavit, within which to reply by affidavit.

[21] Mr D'Arcy-Smith may then have a further period of seven days to respond to any matters raised by the defendant with which he has not had an opportunity to deal. This final opportunity will be strictly in reply and must be confined to the issue of Mr D'Arcy-Smith's ability to meet the condition of payment in of the Authority's costs award.

[22] The question of conditions attaching to an order for stay will then be decided.

[23] Until that further decision by the Court, there will now be an interim order staying execution of the Authority's costs award conditional upon strict compliance by the plaintiff with the timetable directions given in paras [17]-[19] and [21] above.

[24] I deal now with the plaintiff's challenge to the defendant's objection to disclosure of documents and, first, to the defendant's contention that Mr D'Arcy-Smith is not entitled to bring that challenge because he failed to do so within time.

[25] The following background is relevant to the decision of these issues.

[26] In a determination issued on 13 June 2014,[3] the Authority concluded that the plaintiff could not bring a personal grievance because he was not an employee of the defendant.

[27] Mr D'Arcy-Smith claimed that he was dismissed unjustifiably by Natural Habitats. The Authority investigated, as a preliminary issue, the company's contention that Mr D'Arcy-Smith was not an employee at the relevant time. It upheld that contention and, therefore, dismissed Mr D'Arcy-Smith's proceedings as being beyond its jurisdiction.

[28] Mr D'Arcy-Smith has challenged that determination by hearing de novo and there have been a number of interlocutory skirmishes between the parties which do not need to be reiterated here. Mr D'Arcy-Smith is unrepresented and although the company appeared until recently to be unrepresented, Mr D'Arcy-Smith pointed out that it seems to have been receiving significant assistance from solicitors acting in the background. In any event, Natural Habitats is now represented by Mr Burley of McVeagh Fleming, Auckland solicitors.

[29] Mr D'Arcy-Smith gave Natural Habitats the standard notice requiring disclosure of documents in Form 6 of the Regulations. That notice was dated 13 October 2014 and specified 11 particular classes of document.

[30] The defendant, by its solicitors, filed and served a notice of objection to the plaintiff's notice. The defendant's notice of objection was dated 4 November 2014. The objection was on mixed grounds including that the defendant had already provided two of the documents to Mr D'Arcy-Smith during the Authority process; that seven of the documents sought were irrelevant or did not exist; and that two of the documents were "subject to the provisions of the Privacy Act 1993 … and in particular Information Privacy Principle 11 (Limits on Disclosure of Personal Information)."

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[3] *D'Arcy-Smith v Natural Habitats Limited* [2014] NZERA Auckland 237.

[31] Mr D'Arcy-Smith filed a challenge to the defendant's objection to disclosure in Form 8 of the Regulations on 10 November 2014.

[32] Dealing first with the question of compliance by Mr D'Arcy-Smith with the time limit for bringing his challenge, reg 45 of the Regulations requires such a challenge to be filed and served within five "clear days" after the date on which that party is served with the prerequisite notice of objection. The defendant says that its notice of objection was served on 4 November 2014 following which Mr D'Arcy-Smith had until 10 November 2014 to file and serve his challenge.

[33] Mr D'Arcy-Smith's challenge was sent to the Registrar by email on 10 November 2014 at 11.26 am although he failed to pay the requisite filing fee on that day. He did so on the following day, 11 November 2014, by direct credit. The Registry regarded Mr D'Arcy-Smith's challenge as being filed only once the filing fee was paid so that it was not treated as filed until 11 November 2014, that is one day late.

[34] The five clear days within which Mr D'Arcy-Smith had to file a challenge expired on Sunday 9 November 2014. In these circumstances, reg 74A applied, allowing Mr D'Arcy-Smith to have until the following working day, Monday 10 November 2014, to comply with the time limit. That was the next day on which the court office was open. As Mr Burley submits, however, Mr D'Arcy-Smith is not entitled to treat Saturday 8 November 2014 as extending by one further day the period within which he had to file his challenge. Regulation 74A deals only with the circumstances where the last day for doing an act falls on a day on which the office of the Court is closed (as here) but, significantly, only allows the extension of time to the following day on which the office is open.

[35] The plaintiff's challenge to objection to disclosure was, therefore, not filed within time. That is not the end of the matter however.

[36] Section 221 of the Act provides materially:

> In order to enable the court … to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
> …
> (c) subject to section 114(4), extend the time within which anything is to or may be done; …

[37] Section 114 does not apply in this case.

[38] In the circumstances outlined, I consider that the interests of justice do require an extension of time within which the plaintiff had to file his challenge to the defendant's objection to disclosure of documents and that is extended to 11 November 2014 accordingly.

[39] The defendant has not yet addressed the merits of Mr D'Arcy-Smith's challenge to objection to disclosure as I imagine it will wish to. Mr D'Arcy-Smith has made submissions on those matters in a memorandum filed on 25 November 2014.

[40] In the circumstances, the defendant may have the period of seven days from the date of this interlocutory judgment to file and serve on Mr D'Arcy-Smith any submissions that it may wish to make in support of its objection to disclosure of the documents sought in Mr D'Arcy-Smith's notice of 13 October 2014. The plaintiff may then have the period of three days within which to file and serve any submissions strictly in reply to those made by the defendant, following which the Court will determine the plaintiff's challenge on the papers.

GL Colgan
Chief Judge

Judgment signed at 4 pm on Thursday 27 November 2014