IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 73
CRC 52/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a stay of proceedings
BETWEEN	CARTER HOLT HARVEY LIMITED Applicant
AND	DAVID RODKISS Respondent

Hearing: (on the papers - submissions of both parties dated 20 March 2014, and submissions of applicant in reply dated 24 March 2014)

Judgment: 19 May 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The applicant seeks a stay of orders made by the Employment Relations Authority (the Authority) in a determination of 28 November 2013,[1] wherein it was ordered to pay the respondent $6,000 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act); it also seeks a stay of a costs order made by the Authority in its determination of 11 February 2014, wherein the applicant was ordered to pay the respondent the sum of $6,710 costs.[2]

[2] The background is as Judge Couch recorded in his minute of 7 March 2014:

[1] *Rodkiss v Carter Holt Harvey Ltd* [2013] NZERA Christchurch 243.
[2] *Rodkiss v Carter Holt Harvey Ltd* [2014] NZERA Christchurch 25.

> [2] The [respondent] was employed by the [applicant] from August 2002 until April 2013. Latterly, he was engineering manager at the [applicant's] Nelson saw mill. The [respondent] pursued personal grievances alleging that he had been unjustifiably disadvantaged in the course of his employment and unjustifiably constructively dismissed. The Authority sustained his claims of disadvantage but determined that he had not been constructively dismissed. The [respondent] was awarded compensation of $6,000.

[3] The application for stay is supported by an affidavit of Mr G J Andrews. The applicant's concern is that if a stay is not ordered the respondent will proceed with an enforcement action and thereby receive the sums awarded by the Authority. It is asserted that if the applicant subsequently succeeds on its cross-challenge, it will not be able to recover the sum so paid. Reference is made to certain evidence given by Mr Rodkiss and Mrs Rodkiss in the Authority to the effect they then had a substantial mortgage in the vicinity of $700,000. Other grounds are raised for the applicant which are analysed more fully below.

[4] A notice of opposition was filed on 4 February 2014 supported by an affidavit from the respondent. That affidavit states that the respondent does not consider the amounts involved to be significant; and describes the respondent's financial position in detail. In particular it is explained that since the Authority hearing significant steps have been undertaken by Mr Rodkiss and his wife to reduce the size of their mortgage. By February 2014 it had been reduced to approximately $76,000.

[5] The respondent explained that he could readily repay $6,000 in due course if need be. He had the ability to do so by utilising a credit card facility which has a credit limit of $10,000, or if necessary by increasing a mortgage secured over the family home, which has a rating value of $620,000.

[6] Because at that stage the only sum in issue was the compensatory award of $6,000, reference was not made to the ability to repay the costs award if the applicant was to pay that award to the respondent in addition to the compensatory award. The respondent's evidence as to means must therefore be assessed on the basis that potentially a sum of approximately $12,000 might have to be repaid.

[7] The respondent also stated that as at the date of his affidavit he was in permanent full-time employment as an engineering surveyor with an annual salary of

$85,000. That his employment is secure and ongoing is confirmed by a letter from his employer.

[8] The respondent also asserts that the application for stay has not been made expeditiously since the Authority's determination was issued on 28 November 2013 and his challenge was filed with the Court on 23 December 2013.

[9] For its part, the applicant seeks orders of stay until disposition of the challenges in this Court, subject to a condition that the sums involved be paid into Court to be held by the Registrar in an interest bearing account and to be disbursed only by further order of the Court or agreement of the parties.

Legal principles

[10] In *North Dunedin Holdings Ltd v Harris* the Court stated: [3]

> [5] The starting point must be s 180 of the Act:
>
> > **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.
>
> [6] It is clear from this provision that the orders of the Authority remain in full effect unless and until the Court sets them aside. The defendants are entitled to enforce those orders unless a stay of proceedings is granted. It follows that the plaintiffs are asking the Court to exercise its discretion to intervene in what is a perfectly lawful enforcement process.
>
> [7] The discretion conferred by s 180 is not qualified by the statute but must be exercised judicially and according to principle. I note two key principles. There must be evidence before the Court justifying the exercise of the discretion. The overriding consideration in the exercise of the discretion must be the interests of justice.

[11] In the well known decision of *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*,[4] Hammond J cited with approval the statement of Gault J in *Duncan v Osborne Buildings Ltd* where it was said that:[5]

> In applications of this kind it is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a

[3] *North Dunedin Holdings v Harris* [2011] NZEmpC 118.
[4] *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [8].
[5] *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

> judgment and the need to preserve the position in case the appeal is successful. Often it is possible to secure an intermediate position by conditions or undertakings and each case must be determined on its own circumstances.

[12] As counsel for the applicant in this instance submitted, this Court has often been assisted by considering such factors as:[6]

(a) If no stay is granted, whether the applicant's right of appeal will be ineffectual;

(b) Whether the appeal is brought and prosecuted for good reasons, in good faith;

(c) Whether the successful party at first instance will be affected injuriously by a stay;

(d) The effect of third parties;

(e) The novelty and importance of the questions involved in the case;

(f) The public interest in the proceeding;

(g) The overall balance of convenience;

[13] Counsels' submissions focused on these factors; it is convenient therefore to consider each of them in detail:

(a) *No impecuniosity*: the applicant submits that it is a well established manufacturing company with significant assets and that it will be able to satisfy any award ultimately made in the respondent's favour if that proves to be the case. The respondent submits that this is not a matter of substance. The Court accepts the submission made for the applicant but this is not a determinative factor.

(b) *Could the respondent repay the amount awarded in his favour*: this is the main factor raised by the applicant. Initially the applicant pointed to evidence given by the respondent and his wife in the Authority but

[6] See *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50.

that has obviously been overtaken by the subsequent financial arrangements they entered into. The applicant now submits that:

- A house is not a liquid asset and is not readily able to be divided or sold if the applicant was in the position of having to recover monies paid;

- The credit card limit of $10,000 does not extend to the total sum involved of $12,770;

- There is no evidence of the respondent's weekly outgoings or other financial commitments;

- Whilst there is a joint savings account where the sum of $41,872.25 is held, that is less than the amount the respondent owes in respect of the mortgage secured over the family home. It is further submitted that no up-to-date evidence as to the balance of this mortgage has been given;

- The Court has been presented with an incomplete picture of joint savings accounts;

- A relevant factor is that the respondent wants to utilise the sums awarded to fund his challenge rather than deplete savings; the inference of this submission is that in reality the respondent may be in some financial difficulty so that without payment of the Authority's awards he would have to raise monies to fund the litigation in this Court.

The respondent has provided evidence of his financial affairs as at the date of his affidavit and it is submitted on his behalf that he is far from impecunious and has the financial means to immediately repay sums ordered by the Authority if he is ultimately unsuccessful in this Court.

The Court considers that the respondent would have the means to repay the sum involved, if ordered to do so hereafter. The evidence before the Court suggests he is currently in secure employment, that he has a

credit card facility to which recourse could be made, that he has funds in hand by way of savings, and that he currently has a modest mortgage in respect of which he says he would be able to obtain an increase. Further, the various assets which were liquidated in order to reduce his mortgage indicate a positive savings record. Whilst there is always a risk of unforeseen expenditure which could deplete his resources, at this stage the Court must conclude on the available evidence that there would be an ability to repay what is a relatively modest sum if need be. The concern raised by the applicant is not established.

(c) *The respondent would not be adversely affected*: the applicant submits that the respondent would not be adversely affected if the order of stay was made since he has other assets available to him. The respondent submits that this point is not one of substance which would justify the Court departing from "the normal course".

In the Court's view the issue is less to do with the possibility of the respondent being adversely affected and more to do with him being entitled to the fruits of the orders obtained in the Authority.

(d) *Cross-challenge brought in good faith/merits*: the applicant submits that the cross-challenge is brought by it because of its genuine belief that the respondent was treated fairly throughout and because it considers it has met all of its legal obligations. The respondent submits that this is not an issue of substance.

The Court accepts that both the challenge and the cross-challenge have been brought in good faith; however in this particular decision it is not appropriate to express a view as to the likely prospects of either the challenge or the cross-challenge, save only to say that neither parties' position appears at this juncture to be so overwhelmingly strong as to lead to an obvious determination of the present application.

(e) *Applicant willing to pay into Court*: the applicant submits that it has from the outset been willing to pay the amounts awarded in the

> respondent's favour into Court. The respondent has not made any submissions on this point.
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> If a stay were to be granted there would indeed be a condition that the applicant pay the sums awarded into Court.[7]
>
> Because of the conclusions this Court has reached regarding the prospects of repayment by the respondent, the fact that the applicant is willing to pay sums involved into Court assumes less importance.

[14] Standing back and evaluating all the factors, the Court concludes that there is a reasonable prospect of recovery of monies from the respondent in due course if need be. As a successful litigant the respondent should receive the awards he obtained in the Authority. He has assured the Court that he would be able to repay the relatively modest sum involved if required to do so and would do so in a timely way. He has presented evidence which tends to support that assurance.

[15] In those circumstances, the Court is not persuaded that it needs to take the intermediate position of granting a stay with a condition as to payment into Court.

[16] The applicant's application is accordingly dismissed; costs on this application are reserved.

B A Corkill
Judge

Judgment signed at 3.45 pm on 19 May 2014

[7] *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*, above n 4.