

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2014] NZEmpC 94
CRC 12/14**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of a stay of proceedings
BETWEEN	LUND SOUTH LIMITED Plaintiff
AND	DAVID MOWATT LOW Defendant

Hearing: (on the papers - documents received on 27 and 28 May 2014)

Representation: R M Tomkinson, counsel for the plaintiff
J A Farrow and M H Hayes, counsel for the defendant

Judgment: 13 June 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Background

[1] On 7 May 2014 the plaintiff lodged a de novo challenge to a determination of the Employment Relations Authority (the Authority) on a preliminary issue.¹ The context is a claim by the plaintiff that he was entitled to a bonus, subject to relevant conditions being satisfied, for the period 1 August 2003 until 7 September 2010. The preliminary issue related to whether that entitlement continued for the period 1 October 2008 to 7 September 2010.

¹ *Low v Lund South Limited* [2014] NZERA Christchurch 57.

[2] The Authority determined that the defendant ceased to be in the employment of the plaintiff with effect from 7 September 2010 and that his entitlement to earn a bonus continued until that date.²

[3] As well as filing a de novo challenge to the Authority's decision, the plaintiff applied for a stay of the Authority's proceedings. This was because the Authority in making its determination indicated that it considered the case should be resolved promptly. The Authority said:

[36] Given that this matter was first raised with the Authority in September 2012 and that the issues to be investigated date back many years, the parties are reminded that the Authority will not be prepared to vacate the substantive investigation meeting set down for 4-8 August 2014 except under the most exceptional of circumstances. Therefore, insofar as the parties are behind in the actions that they have been directed to take in preparation for the substantive investigation meeting, they are strongly urged to expedite those actions. As a substantive investigation meeting has already been vacated at the request of the parties once before, a lack of preparedness for the substantive investigation meeting in August 2014 will not be accepted by the Authority as reason to vacate it again.

[4] The defendant sought urgency. An urgent telephone conference took place on 16 May 2014. In the course of that conference, the Court offered time for the hearing of the challenge on 1 and 2 September 2014 in Dunedin. On that basis the defendant did not need to press his application for an urgent hearing.

[5] However, that meant that the challenge would not be resolved prior to the Authority's investigation meeting unless the investigation meeting was deferred. Counsel were requested to liaise promptly with the Authority and advise the Court as to whether or not the currently scheduled investigation meeting should be deferred to allow the Court first to resolve the challenge.

[6] On 21 May 2014, the defendant sought vacation of the Authority's five-day substantive investigation meeting set down for the week of 4 August 2014. The Authority recorded that a later email received from the plaintiff's counsel supported that application.

[7] In a notice of directions, the Authority declined to defer the fixture, stating:

² At [34].

[4] I do not understand why it is necessary to vacate the entire proceedings when the only issue under challenge is whether the bonus entitlement ended in 2008 or 2010. It will be perfectly possible to investigate all other aspects of the claim and counter-claim in August 2014. The investigation would, inter alia, enquire into what bonus, if any, was due to the applicant up to 30 September 2008. Dependent on the outcome of the challenge, if unsuccessful, it would be easy for the Authority to hold a further, short investigation with respect to any bonus entitlement due between 1 October 2008 and 7 September 2010.

[5] I am very concerned at the continued delay in investigating these matters. The statement of problem was lodged in the Authority on 3 September 2012. The date of the investigation has already been changed once at the request of the parties. I have expressed more than once to the parties' representatives my increasing concern at the drift that has been creeping into their preparation for the investigation. The matters under enquiry already date back several years, and the investigation into the preliminary matter demonstrated the adverse effect on the memories of the witnesses exerted by the passage of time.

[8] The Authority requested that this notice of direction be placed before the Court, which duly occurred.

[9] A further telephone conference was conducted with counsel on 23 May 2014. The defendant now indicated that it opposed the plaintiff's application for stay, subject to a discovery issue being resolved. This change of position was taken as a result of the comments made by the Authority in its notice of direction.

[10] Given that development, the Court timetabled the filing of a notice of opposition, an affidavit in support and memorandum from the defendant, and a reply memorandum from the plaintiff. These documents were duly filed.

[11] The essence of the opposition to the plaintiff's stay application by the defendant is:

- a) The defendant would be injuriously affected by a stay, noting that the decision under challenge relates to a discrete issue; that there is both a claim and counter-claim; that the issues go back as far as 2003, and in respect of an employment relationship that ended in July 2012; that the substantive Authority investigation meeting is set down for five days; that the defendant wishes to avoid any further delay; that if the substantive Authority proceedings were stayed the substantive hearing

would not be heard until March 2015 at the earliest; and that this would create undue prejudice for the defendant.

- b) That if a stay is not granted the plaintiff's right of challenge will not be rendered nugatory.
- c) The defendant does not believe the challenge is meritorious.
- d) The overall balance of convenience is in favour of the application for stay being denied.
- e) The Authority has indicated its preference that the substantive claim not be stayed with the exception of the preliminary issue.
- f) It was in the interests of justice that the stay not be granted.

[12] The defendant filed an affidavit in support of his position. In that affidavit he emphasised that the reason for his opposition is that the longer it takes to resolve his claim, the greater the impact the proceeding will have on him and his family, including their ability to move on with life.

[13] The grounds of opposition were supported by submissions which indicated that a further telephone conference had been held with the Authority on 26 May 2014. In the course of that conference the Authority directed a timetable relating to discovery which would enable the parties to maintain the 4-8 August hearing dates. However, the Authority also indicated to the parties that if the disclosure issue was not able to be dealt with within the time frames directed, the August hearing dates could be moved by two to three weeks.

[14] The plaintiff submitted in response:

- a) It was not accepted that the defendant would be injuriously affected by a stay due to the delay in the claims being heard, because the claims were essentially about money, and this issue could be dealt with by an award of interest.

- b) Whilst the defendant claimed that the longer that these proceedings continued, the greater the effect they have on his life, there would inevitably be delays because even if the Court were to decline ordering a stay and the Authority's investigation meeting in August proceeded, that would not necessarily be the end of the dispute between the parties having regard to potential challenges.
- c) It was not correct to say that the Authority's substantive hearing could not be heard until March 2015. This had not been stated by the Authority. It was counsel for the defendant who asserted that the matter could not be rescheduled until March 2015 having regard to other timetabling issues.
- d) A stay would not have any material injurious effect on the defendant.
- e) Dealing with the issue of overall balance of convenience, the plaintiff submitted:
- Even on the timetable proposed by the Authority, it could take up to March 2015 for the defendant to have his bonus claim fully determined by the Authority (assuming the challenge does not succeed).
 - Against that the parties would be required to prepare for two proceedings at once in respect of issues that are technical and complicated, and likely to require expert evidence; the preparation of evidence for the challenge before the Court will also be intensive; there is likely to be a dispute between the parties over disclosure in the Authority which is a complicated matter; the plaintiff has received advice from an accountant that due to a backlog in work he may not be able to assist with addressing issues over further disclosure until July 2014; any deferment of the investigation meeting until late in August, would lead to an inconvenient situation if the Authority and Court hearings closely coincide with each other;

a stay would avoid the possibility of two further separate investigation meetings before the Authority, and the risk of a challenge.

- Mediation, which had been recommended by the Court, becomes a more difficult option if a stay is not granted and the parties are having to focus on an Authority investigation and a Court hearing.
- Dealing with the overall justice it was submitted that it would be unjust for the Court not to grant a stay due to the defendant's concern over a delay, when the defendant has delayed commencing the proceedings in the Authority. Details in this regard were supplied.

Decision

[15] Conventional principles as to stay are set out in *Assured Financial Peace Ltd v Pais*.³ However, that and many other stay decisions deal with the question of whether first instance orders awarding monetary remedies should be stayed. That is not the issue in this case.

[16] In this case, the primary question is whether it is appropriate that the Authority continue with its investigation by way of a two-stage process:

- a) First to determine all issues relating to the payment of the defendant's claim for a bonus up to 30 September 2008.
- b) If the Court dismisses the challenge, then subsequently to determine the quantum of the defendant's bonus for the 2008-2010 period. It cannot be predicted at this stage as to whether it would be necessary for the Authority to determine this second issue.

³ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

[17] This question should be determined on the basis of what is in the interests of justice as between the parties.

[18] I consider the following factors are relevant:

- a) First and foremost is the Authority's view that the proceeding has been delayed and needs to be advanced as soon as possible – particularly having regard to the fact that even at this stage, memories of witnesses have been adversely affected by the passage of time. The Authority is well placed to make that assessment and it is one which is entitled to respect.
- b) If a stay were to be granted on the basis that the Court decision on the preliminary issue should be available before the investigation by the Authority could proceed, unacceptable delay will occur. Given a hearing in early September, the Court's decision could not be expected until the first two weeks of November at the earliest given the Court's other commitments. Allowing for a follow-on timetable for the filing of evidence for the investigation meeting, it is unlikely that the investigation meeting would take place until early 2015.
- c) The plaintiff has not contested the point that the second issue, as identified by the Authority, is a discrete issue. Accordingly the Court must proceed on the basis that the process which the Authority has proposed is viable.
- d) The main issue raised by the plaintiff is the inconvenience of preparing for a Court and an Authority hearing which are likely to be heard within close proximity. The Court accepts there is some inconvenience in that circumstance. It may, on the other hand, lead to some efficiencies of preparation, and a better focus on the real issues. It is an inconvenience which affects both parties, and has to be balanced against the desirability of the matter being expedited given the observations of the Authority Member.

- e) I accept the evidence of the defendant in his affidavit as to his need to have the matter resolved. That is a further factor which points towards the need to advance the disposition of the proceeding. The defendant has a right to have his claim heard and finalised in a timely way.
- f) The plaintiff refers to the work pressures of its expert accountant which could affect his ability to assist on disclosure issues. While that may well be a difficulty, it should not be an insurmountable difficulty. Furthermore, the Authority has indicated to the parties that if the disclosure issue is not able to be dealt with under the timeframe directed there is an ability for the August hearing dates to be moved by two or three weeks.
- g) A concern is raised as to whether hearings in close proximity could inhibit settlement discussions. It is not for the Court to speculate as to prospects of settlement, or as to when settlement discussions can best be conducted. That is a matter for counsel to evaluate carefully. The parties may wish to consider the desirability of further mediation once the further disclosure has been resolved. In my view this factor does not support the possibility of an order of stay being granted.

[19] I have considered all factors raised carefully. Given the discrete nature of the separate issue as identified by the Authority Member, I am not persuaded that it is in the interests of justice to stay the next stage of the Authority's investigation meeting.

[20] The application for stay is declined.

[21] Costs with regard to the application for stay will be dealt with following the hearing of the de novo challenge.

B A Corkill
Judge

Judgment signed at 2.15 pm on 13 June 2014