

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2015] NZEmpC 10
EMPC C323/2014**

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 execution

BETWEEN GRAEME'S SERVICE CENTRE
 LIMITED
 Plaintiff

AND CATHERINE STALKER
 Defendant

Hearing: (on the papers; filed on 13, 23 and 28 January, 3 February 2015)

Counsel: R Thompson, advocate for the plaintiff
 D Beck, counsel for the defendant

Judgment: 10 February 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment determines an application for stay of execution, in respect of remedies granted by the Employment Relations Authority (the Authority) in its determination of 20 November 2014.¹

[2] The background is that the plaintiff operates a petrol station and auto workshop, the Directors of which are Mr and Mrs Paget. On 11 February 2014, Mr Paget and the defendant, an employee, met at the defendant's request to discuss employment concerns set out in a pre-prepared letter. Mr Paget did not read the letter fully, but noticed reference to a possible exit. The Authority Member found that a conversation occurred when Mr Paget asked the defendant to leave, or as she

¹ *Stalker v Graeme's Service Centre Ltd* [2014] NZERA Christchurch 186.

recalled it, to “get out”; she was advised she would be paid two weeks’ pay rather than the 14 weeks she had proposed in her letter. The Authority found that in the heat of the moment, the defendant was sent away in circumstances where she concluded that she was dismissed. The Authority went on to find that the relationship could have been restored, but any attempts to do so were inadequate and not in accordance with the obligations of good faith and what a fair and reasonable employer could have done.

[3] The Authority concluded that the dismissal was substantively and procedurally unjustified. The plaintiff was ordered to pay the defendant the sum of \$3,939.58 as reimbursement of lost wages, and \$5,950 as compensation for humiliation, loss of dignity and injury to feelings.

[4] A challenge to the Authority’s determination was filed by the plaintiff on 15 December 2014. No application for stay of execution of remedies was filed at that stage. This was not filed until 14 January 2015, supported by an affidavit from Mrs Paget. The affidavit stated:

- The defendant was now enforcing the remedies she had been awarded.
- If the plaintiff was successful in its challenge Mrs Paget did not believe that the defendant would be in a position to repay the judgment sum if it was paid to her; this belief was based on evidence contained in a brief of evidence submitted by the defendant to the Authority, which stated:

My bank has made serious demands on me for being behind with my mortgage, I have had to cancel insurance, have had the phone and power companies threatening to cut me off, plus been charged penalties on many of my accounts.

- It was stated that the plaintiff was able and willing to pay the sums awarded by the Authority to a nominated trust account, or to the Court.

[5] On 23 January 2015, an urgent application for an interim order of stay was filed, supported by a further affidavit from Mrs Paget. That affidavit stated:

- On 22 January 2015, a bailiff from the Collections Unit of the Ministry of Justice attended the plaintiff's work premises with a warrant to enforce the Authority's orders. A vehicle was seized, and the bailiff indicated that he would be returning to collect further property to recover the full amount involved.
- The plaintiff required its equipment to perform its business operations; seizure of its assets would place hardship on the business and may impact on other employees' employment.
- The sum of \$10,089.58 had been deposited into a solicitor's trust account.

[6] Counsel for the defendant filed submissions with regard to the urgent application, stating that a cheque had been written out on behalf of the plaintiff for the sum involved. It had been provided to the bailiff at a time when no application for stay had been filed. Counsel submitted, further, that on 21 January 2015 the defendant had been informed by the Ministry of Justice that the cheque which had been provided to it had been cancelled so that payment was dishonoured. The consequences of this, it was said, were significant for the defendant who now had to rearrange her finances when she had previously been relying on the prospect of payment of the judgment sum. Counsel submitted that the plaintiff should be estopped from applying for or being granted a stay of execution, given the tendering of the cheque prior to any application for stay being granted.

[7] On 23 January 2015, I issued a minute indicating that the application for an interim order of stay would be dealt with on an urgent basis; I imposed a short timetable for the filing of relevant documents and submissions. As the sum of \$10,089.58 had been deposited in the plaintiff's solicitor's trust account, I also made an interim order of stay of execution of the Authority's orders until further order of the Court, subject to a condition that it would lapse if the plaintiff's solicitors were instructed to pay out the said sum; and that the solicitors would be advised by the Registrar of these orders. These orders were made so as to maintain the status quo

until the application for stay could be considered after the filing of evidence and submissions.

[8] On 28 January 2015, a further affidavit was filed by Mrs Paget; it described the circumstances in which the cheque had been tendered. Mrs Paget said:

- On 8 January 2015 the bailiff had attended the company premises to enforce the judgment debt.
- Mrs Paget was unable to obtain legal advice at the time. She understood, however, that her advocate had a brief discussion with the bailiff.
- The bailiff advised her that if she were to provide a cheque, the Collections Unit would not provide the cheque to the defendant for a period of 14 days, which would allow her to seek an order of stay. She said that she followed this advice and provided the cheque to the bailiff.
- However, on 10 January 2015, a representative of the Collections Unit of the Ministry of Justice called her and advised her that the bailiff's advice was incorrect and that the cheque could only be held for four days.
- She said she was concerned that if the funds were paid over to the defendant, there would be no point in the challenge because there would be little likelihood of the funds being recovered if the challenge were to succeed.
- She also said she was still unable to obtain advice and therefore decided to cancel the cheque. She considered it was preferable for the plaintiff to pay the judgment debt to a solicitor's trust account, where it could be held pending the determination of the company's application for stay by this Court.

- She stopped the cheque on 12 January 2015, and placed funds for the same amount with the company's solicitors on 15 January 2015, when the solicitor's office reopened after the Christmas break.
- She believed that the Collections Unit would then allow the Court to consider the stay. However, on 22 January 2015, another bailiff attended the business premises and placed a clamp on a vehicle registered to the plaintiff.
- She had not referred to these issues in her previous affidavit, as she had not understood the importance that would be attached to them. She said that she genuinely believed that by depositing the funds into a solicitor's trust account, it would be evident that there was no intention to "hide the funds" or undermine the Court's process.

[9] There are accordingly two issues:

- a) In the circumstances is the plaintiff estopped from applying for an order for stay?
- b) If not, what order if any should the Court make on the application for stay?

Estoppel

[10] Whilst it is correct that a cheque was written out on behalf of the plaintiff in respect of the judgment debt, it was provided to the bailiff in the belief that this would be held by the Collections Unit and would provide an opportunity for an application for stay to be made. The advice given by the bailiff was relied on by Mrs Paget; and it was incorrect.

[11] Unfortunately these circumstances arose over the Christmas/New Year period when it was not possible to obtain advice following the enforcement of the judgment debt undertaken by the bailiff. That is a further contextual matter which I must take into account.

[12] Mrs Paget took matters into her own hands by cancelling the cheque, but she did then cause an amount equal to the judgment sum to be paid and held by the company's solicitor on behalf of the plaintiff.

[13] In these circumstances, I do not consider that the plaintiff has acted in a way that precludes it from applying for a stay of execution. The cheque was only ever tendered to hold the position until the plaintiff's advocate returned to work and could file the necessary application for stay.²

[14] Whilst it is regrettable that these circumstances were not fully explained in Mrs Paget's second affidavit which was filed to support the urgent application for an interim order, I am satisfied with the explanation which has now been given.

Application for stay

[15] The relevant principles relating to applications for stay are well known. In *Carter Holt Harvey v Rodkiss* I summarised them as follows:³

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

[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.

² This case can be distinguished from *Nelson v Katavich* [2013] EmpC 112 where the Court found that the money had already been paid by the defendant into the District Court and disbursed to the plaintiff. Therefore the orders of the Authority had been fully executed and there was no process which could be stayed.

³ *Carter Holt Harvey v Rodkiss* [2014] NZEmpC 73 (citations omitted).

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

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

[16] This Court has often been assisted by considering such factors as:

- (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 on 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.

[17] On the evidence and submissions now before the Court, it is apparent that after the plaintiff's challenge was filed and served the defendant's solicitor initially proposed that an amount equal to the judgment sum should be paid into a trust account administered by the Court or by the Authority. Unfortunately this did not happen which has compounded the subsequent problems. However, it does indicate that originally the defendant was prepared to consent to this course.

[18] At para [4] above, I have set out the evidence provided by the defendant herself to the Authority, which indicates some impecuniosity.

[19] No affidavit evidence has been filed on this point by the defendant herself. However, her solicitor stated in the submissions he filed with regard to the application for an urgent interim order, that:

On 21 January 2015 the [defendant] was informed by the Ministry of Justice that the cheque had been cancelled and the payment dishonoured – the effects of this have been significant for the [defendant] who has now had to rearrange finances that she had already rearranged in reliance on receiving the money that had been paid to the Ministry of Justice.

[20] The only evidence the Court has with regard to the defendant's circumstances is that she is in debt, and has had to borrow in order to deal with debt issues. Affidavits were filed by two persons on 3 February 2015 who have indicated they will "stand guarantor" for the defendant, if there was a requirement to remit the judgment sum to the plaintiff. However, the deponents gave no particulars as to their means so that no assessment can be made as to the reliability of their "guarantees". The provision of those affidavits suggests the defendant is indeed impecunious.

[21] In the absence of any evidence from the defendant herself to the contrary, I must conclude that she does have financial difficulties. I observe that payment of the judgment sum to her may result in the sum being applied to her debt by the defendant's bank. There are potential difficulties of repayment were the challenge ultimately to succeed.

[22] Both parties have submitted that their respective cases are strong. The only information the Court has as to the merits is contained in the Authority's determination. My assessment of the issues in the challenge is that they are largely factual; the outcome will depend on the Court's assessment of the witnesses when they present their evidence. In those circumstances I do not consider it appropriate to conclude that either party has better prospects of success than the other on the challenge.

[23] Standing back, I conclude that the plaintiff's rights may be rendered nugatory, unless an order of stay is granted. I note that the plaintiff undertakes to prosecute its case diligently. Against the possibility that this does not occur and given the defendant's position, I am reserving leave to her to apply to discharge the

application for stay, if the matter is not brought on in a timely way; I intend that the hearing take place promptly.

Conclusion

[24] The plaintiff is to pay the sum of \$10,089.58 to the Registrar of the Employment Court within 10 working days of this judgment. Upon such payment being made, the order of stay of execution which I made on 23 January 2015 will continue until further order of the Court.

[25] In my minute of 23 January 2015 I imposed a condition in respect of the interim order, to the effect that it would lapse if the plaintiff's solicitors were instructed to pay out the sum of \$10,089.58. I now discharge that condition so that the plaintiff may instruct its solicitors to pay the sum they currently hold to the Court.

[26] I direct the Registrar to establish a directions telephone conference with the parties; if possible this matter should be the subject of an early fixture.

[27] Costs in respect of this application are reserved, to be dealt with following the substantive hearing.

B A Corkill
Judge

Judgment signed at 9.30 am on 10 February 2015