IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 15
EMPC 296/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for stay of execution
BETWEEN	VULCAN STEEL LIMITED Applicant
AND	ERROL WALKER Respondent

Hearing:	(on the papers by way of documents dated 8 and 19 December 2014)
Appearances:	C T Patterson, counsel for applicant P Yarrall, advocate for respondent
Judgment:	11 February 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Background

[1] The applicant has filed a de novo challenge in respect of determinations of the Employment Relations Authority (the Authority) dated 15 October 2014[1] and as to costs.[2]

[2] The respondent was employed by the applicant as a Coil Storeman and Machine Operator. On 14 March 2014, upon reporting for work, a number of co-employees noticed the smell of alcohol on the respondent's breath. He underwent a breathalyser test recording alcohol levels which were approximately one-third of the legal driving limit.

---

1 *Walker v Vulcan Steel Ltd* [2014] NZERA Christchurch 160.
2 *Walker v Vulcan Steel Ltd* [2014] NZERA Christchurch 194.

[3] The applicant commenced a disciplinary investigation. It found the respondent to be in breach of its "zero tolerance" policy concerning alcohol and advised him that it had cause to summarily terminate his employment. It informed him, however, that it intended to take a more benevolent approach giving the respondent a final warning provided he sign an acknowledgment that he accepted the warning, that he would not challenge it, and that he would not attend the workplace under the influence of alcohol again.

[4] The respondent signed such an acknowledgment. Several weeks later, the respondent's Union raised a personal grievance of unjustified disadvantage (the first disadvantage grievance) on the grounds that the written acknowledgment was "tantamount to blackmail" in that it forced the respondent to sign away his rights under law, and that it was obtained through coercion and duress.

[5] The grievance was considered by the Authority, who directed the parties to mediation. The respondent's supervisor requested the respondent to sign a document authorising unpaid leave during the course of the mediation. The respondent declined. The time spent at the mediation (two hours) was deducted from his pay. This resulted in a further grievance being raised (the second disadvantage grievance).

[6] A week later the respondent was given a letter concerning mistakes allegedly made by him in the course of his work. A colleague of the respondent, who was also manning the machinery at the time the alleged errors occurred, did not receive such a letter. A further grievance was raised by the respondent with regard to the contents of this letter (the third disadvantage grievance). Several weeks later, and after the grievance had been made, that colleague received a letter in respect of the same alleged errors.

[7] The Authority found:

a) With regard to the first disadvantage grievance concerning the final warning, the applicant did not have grounds for dismissal. Despite the operation of a "zero tolerance" policy at the workplace, it was unclear at the time of the alleged disadvantage what the term meant – that is,

whether it forbad any consumption of alcohol, or whether it forbad alcohol consumption above a certain level. Accordingly, the applicant had no basis for concluding that it had grounds for dismissing the respondent. Further, the written acknowledgment was procured from the applicant through duress; the respondent was pressured to acknowledge that the consequences of failing to sign the form would be termination of his employment. He was accordingly unjustifiably disadvantaged by the final warning.

b) In relation to the second grievance concerning the attendance at mediation, there was no implied *contractual* right for an employee to be paid for attendance at mediation. However, the Authority noted that the direction to mediation was made by it pursuant to s 159(2) of the Employment Relations Act 2000 (the Act) which required parties to comply with such a direction and attempt in good faith to reach an agreed settlement. Section 159A also empowered the Authority to give priority to investigating matters which had been subject to mediation over any other matters where the parties had not attended mediation. Sections 3(a)(v) and 143 emphasised the speedy resolution of employment relations problems. The Authority considered that the purposes and objectives of these provisions could be defeated if an employer exercised a discretion to refuse to pay an employee for attending mediation which had been ordered by the Authority, even in the absence of a contractual right to be paid. Many employees could not afford to miss out on even a few hours pay and may choose to forego attendance at a mediation meeting. The respondent's second disadvantage grievance was accordingly upheld.

c) In respect of the third disadvantage grievance concerning allegations of error, the respondent's colleague was provided with a letter citing errors only after the applicant had become aware that the respondent had lodged a grievance as to this issue. It further found that the decision of the applicant to provide the respondent with a written document citing errors (as opposed to a verbal discussion) was in effect to create a

"paper trail" which could be used against him in the future. The respondent was unjustifiably disadvantaged through the production of such a document which could subsequently be used to his detriment. The Authority also found that the provision of the letter constituted discrimination on the basis of the respondent's involvement in union activity (namely the raising of the above grievances) pursuant to ss 104 and 107 of the Act. It found that the grievances raised by the respondent were material ingredients in the decision of the applicant to issue him with the above letter.

d) The respondent was entitled to compensation for hurt and humiliation; in relation to the first disadvantage grievance the sum awarded was $5,000; in respect of the third grievance the sum awarded was $3,000. No reductions for contributory conduct were made pursuant to s 124 of the Act as it was not considered the respondent's conduct was sufficiently blameworthy. The applicant was also ordered to pay the respondent two hours' pay lost as a consequence of the deduction of pay for attending mediation. The Authority also ordered that the warnings and letters made against the respondent be set aside. It declined to award any penalty against the applicant for breaches of good faith.

e) It had also been alleged by the respondent that he lost an entitlement to a profit share on the basis of the applicant's view that he had turned up to work in breach of its "zero tolerance" policy. Payment of this was sought pursuant to s 123(1)(b). The Authority held that the respondent established a prima facie case that he had suffered financial loss as a consequence of his unjustified disadvantage, but that the quantum in issue needed to be the subject of further investigation.

f) As the matter in the Authority progressed, the employer alleged that the employment relationship had become increasingly dysfunctional. It sought from the Authority a declaration to the effect that the respondent had thereby repudiated the relationship, and had destroyed all trust and

confidence. The Authority declined to do so, finding that there had been insufficient notice for that application; in any event, the Authority could not conduct what was effectively a disciplinary investigation for the employer. It also expressed concern at the implication of the employee's application that the raising of a personal grievance or lodging of a statement of problem constituted actions that justify disciplinary action or a conclusion that the employee had repudiated the employment agreement. The Authority concluded by observing that there were clearly difficulties in the relationship between the parties. It was emphasised that under s 4(1A) of the Act the parties were required to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative. The parties were urged to undertake urgent steps to repair their relationship, which might include meeting to agree a strategy to diffuse the current tensions that exist between them, and to work constructively on their relationship. A less confrontational stance needed to be adopted.

[8] Subsequently, in its costs determination, the Authority ordered the sum of $3,809.56 to be paid by the applicant to the respondent.

[9] In this Court, the applicant seeks:

- An order quashing the Authority's determination.
- A declaration that the applicant had grounds to dismiss the respondent for attending work under the influence of alcohol.
- A declaration that the applicant's offer of a final written warning was lawful.
- A declaration that the respondent acted in breach of the final written warning by raising a personal grievance.
- A declaration that the applicant was not required to pay the respondent to attend mediation.

- A declaration that the applicant did not discriminate against the respondent.

- A declaration that the respondent breached his duty of good faith to the applicant and acted in a manner likely to destroy the trust and confidence between the parties.

Interlocutory application for stay

[10] The applicant in its application states that it is concerned, should it pay the sums awarded by the Authority and if the challenge was subsequently successful, the applicant might refuse or be unable to repay the funds to the respondent; that would effectively mean that the applicant's challenge to the Court was rendered nugatory.

[11] Evidence has been placed before the Court of a brief exchange of correspondence between counsel for the applicant and the advocate for the respondent, in an effort to obtain agreement that a stay be implemented on agreed terms, namely that the respondent would pay the amounts fixed by the Authority to the respondent's solicitor's trust account on interest-bearing terms pending further agreement of the parties or order of the Court. That proposal was declined.

[12] The applicant has paid the sums involved to its own solicitor's trust account, so that the sums in issue are now adequately secured.

[13] It is submitted that the applicant has brought its challenge for good reason and in good faith, and that the overall balance of convenience lies with it.

[14] The respondent had filed a notice of opposition; it is submitted that the proposed challenge has little or no merit, and that it "borders on frivolous". It is also asserted that the respondent is not "impecunious".

Legal principles

[15] 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.

[16] 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 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.

Discussion

[17] I consider the following matters to be relevant to this application:

a) The respondent asserts, in effect, that the challenge has limited prospects of success having, as it is put, little or no merit. Neither party has made any detailed submissions as to the merits, and the Court is left to assess these by way of a broad overview on the basis of the

---

[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.

Authority's determination. Obviously, there are multiple issues. My assessment at this stage is that the applicant is not assured of success on its challenge. Whilst the ultimate outcome will depend on the evidence actually considered by the Court in due course, at this preliminary stage I find that the conclusions reached by the Authority appear to be conclusions which were available to it on the basis of the evidence it summarised. However, I do not go as far as agreeing with the submission made by the respondent that the challenge is bordering on the "frivolous".

b) The application made by the applicant and the memorandum filed in support asserts that were the respondent to receive the sums ordered, there would be difficulty in recovering them. No evidence has been filed by the applicant to support this submission, as is necessary where such an assertion is made. Moreover it is denied by the respondent. This factor can be significant, if an applicant can establish that its rights of challenge will in effect be rendered nugatory. But that assertion is not established in this case.

c) I also note that the Authority has yet to determine one element of the relationship problem. The Authority found there was a prima facie case that the respondent suffered financial loss arising out of the personal grievance for unjustified disadvantage when he was not awarded any profit-share payment for the financial year 2013/2014. That prima facie finding is not the subject of challenge; if, indeed there is an ultimate overpayment to the respondent due to the success of the applicant's challenge, it may then be possible for the Authority or the Court to make any necessary adjustments.

Conclusion

[18] I conclude that, after weighing all factors, the respondent is entitled to have the fruits of his judgment; there is insufficient evidence before the Court to justify the exercise of the Court's discretion to order a stay. In all the circumstances, the interests of justice require the present application to be dismissed.

[19] I reserve costs, which will be determined following the substantive hearing.

B A Corkill
Judge

Judgment signed at 4.15 pm on 11 February 2015