

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2015] NZEmpC 96
EMPC 58/2015**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER of a stay of proceedings

BETWEEN ALLIED SECURITY LIMITED
 Applicant

AND EDDIE MARRIOTT
 Respondent

Hearing: (on the papers dated 8, 18 , 25 May and 2 June 2015)

Appearances: S Langton and C Hogg, counsel for the plaintiff
 D Beck, counsel for the defendant

Judgment: 23 June 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves an application for stay pending the resolution of a challenge brought by the plaintiff to a determination of the Employment Relations Authority (the Authority).¹

[2] In its determination, the Authority considered a claim by Mr Eddie Marriott that he had been unjustifiably dismissed by Allied Security Limited (Allied). He had been engaged as a security guard, and was normally employed in a guardhouse at the goods entrance of a site owned by Progressive Enterprises Limited (Progressive). Mr Marriott had removed from a computer system the contact address of his former manager, Mr Williams, who had also been the site supervisor. Because he had

¹ *Marriott v Allied Security Ltd* [2015] NZERA Christchurch 18.

difficulty in removing Mr Williams' name from the contact list, he asked Mr Williams to attend the site to assist him. Mr Marriott subsequently told the new site supervisor what had occurred. When management learned that a former employee had been permitted access to the site and to Allied's computer system for the purpose of deleting his name, a disciplinary process was commenced which resulted in the termination of Mr Marriott's employment due to serious misconduct.

[3] The Authority concluded that dismissal was not the action of a fair and reasonable employer because the alleged misconduct was not so serious as to justify that step. The Authority also found procedural deficiencies in that Allied failed genuinely to consider Mr Marriott's explanation and failed to advise him that feedback from Progressive on the issue had been considered when making the decision to dismiss.

[4] Accordingly, it was determined that Mr Marriott's personal grievance was established on the grounds he had been unjustifiably dismissed. Allied was ordered to pay him \$3,434.86 as recompense for wages lost as a result of the dismissal; and \$10,000 as compensation for humiliation, loss of dignity and injury to feelings.²

[5] Evidence filed for Allied in support of the application for stay emphasised that Allied has a genuine belief that its challenge has merit. It would take all reasonable steps to prosecute its challenge diligently. The company is concerned that the benefit of a challenge may be lost because it has no confidence that Mr Marriott would be able to repay the judgment sums if the challenge were subsequently to succeed. As a condition of the grant of stay, Allied is prepared to pay the sum involved to the Registrar of the Employment Court to be held in an interest-bearing account.

[6] Mr Marriott has also filed evidence. In his affidavit he says that the process of bringing a personal grievance has been long and frustrating, and he believes that Allied has delayed the timely resolution of his claim. He has ill health, the details of which he described, which means he is unable to maintain full-time employment. Although he works casually, he relies on a sickness benefit. He is worried that his

² *Marriott v Allied Security Ltd*, above n 1 at [54]-[55].

health will deteriorate, and the monetary awards would assist him in meeting outstanding invoices that he is currently unable to pay.

[7] After the evidence was filed and served, submissions were provided. Counsel for Allied emphasised that the company's right of challenge would be ineffectual if no stay was granted having regard to Mr Marriott's financial circumstances; that the challenge has been brought for good reason and in good faith; and that Mr Marriott's position would be protected by a payment to the Court so that it could not be said he would be injuriously affected by an order of stay. Counsel confirms that the challenge will be prosecuted diligently.

[8] The submissions for Mr Marriott in opposition confirm that he does not dispute that it is unlikely he would have access to funds that would be required for repayment, if the challenge were to succeed. Against that factor it is asserted that the amounts involved are not significant given the size and success of Allied's business so that this factor does not amount to being one of undue prejudice. It is further submitted that the challenge has not been brought in good faith, and that there have been delaying tactics and a lack of willingness to resolve the issues. It is submitted that Mr Marriott has a genuine and legitimate concern that his current ill health will only deteriorate over the coming months. It is argued that if payment of the Authority's order is not made, Mr Marriott will be injuriously affected. Having regard to all these factors, it is submitted the overall balance of convenience favours Mr Marriott.

Relevant principles

[9] 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

³ *North Dunedin Holdings v Harris* [2011] NZEmpC 118.

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.

[10] In the well known decision of *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*,⁴ Hammond J cited with approval the earlier statement of Gault J in *Duncan v Osborne Buildings Ltd* when he said: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.

[11] In *Assured Financial Peace Ltd v Pais*, the Court was assisted by considering the following factors: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 on third parties;
- (e) the novelty and importance of the questions involved in the case;
- (f) the public interest in the proceedings; and
- (g) the overall balance of convenience.

⁴ *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC).

⁵ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87 cited in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*, above n 4 at [8].

⁶ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

[12] Not all the foregoing factors are of relevance in the present case, but I address those which are. The first relates to the question of whether Allied's right of challenge will be ineffectual if a stay is not granted. It is common ground that if payment of the sums awarded by the Authority were paid, it is unlikely that Mr Marriott could subsequently reimburse Allied if its challenge succeeds. This is a strong factor favouring the grant of the order of stay.

[13] I have carefully considered the countervailing factor raised for Mr Marriott that his health could be affected if a stay is granted. Whilst there must be every sympathy for Mr Marriott's health difficulties, I do not have any reliable evidence to support the broad assertion regarding a possible impact on Mr Marriott's health if payment is not made. Also relevant to this issue is the fact that the hearing of the challenge will commence on 21 September 2015, which is only 13 weeks hence.

[14] The next factor I consider is whether the challenge has been brought and conducted for good reason and in good faith. Although this issue is contested, no detailed evidence has been provided which would support a conclusion that there has been undue delay. As far as the pursuit of the challenge in this Court is concerned, a telephone directions conference has been held; and Allied has complied with relevant directions to this point. This issue can be managed if there are indeed delays in the pursuit of the challenge by the issue of stay being brought back on for further consideration.

[15] I make no finding as to prospects of success for the purposes of this application, although this can be a relevant factor when considering the good faith of a challenge. The only documents before me in that regard are the pleadings which are, of course, unsupported by evidence at this stage; and the Authority's determination. I observe that on the evidence summarised by the Authority, conclusions were reached which were available having regard to the evidence summarised in the determination. Against that I acknowledge that Allied has a statutory right to elect a challenge de novo. It cannot be said that the right of challenge is being exercised irresponsibly. Counsel for Mr Marriott has referred to the fact that he is legally aided. Whilst that fact may have some implications for the

commercial realities of the challenge, that is not a factor that I am called on to consider as an aspect of good faith.

[16] Next is the question of whether Mr Marriott, as the successful party in the first instance, will be affected injuriously if the stay is granted. There is no doubt that Mr Marriott's financial circumstances will be enhanced if payment was made. However, I must balance against that consideration, Mr Marriott's lack of ability to reimburse Allied were the challenge to succeed. In my view, the inability to repay outweighs the financial advantage which would be achieved for Mr Marriott for the limited period between now and the hearing in September.

Conclusion

[17] Finally, I must consider the overall balance of convenience. Having regard to the difficulties of repayment along with the comparatively modest period between now and the hearing of the challenge, I consider it appropriate to exercise my discretion to grant the relief sought. I direct that the financial orders made by the Authority are to be stayed following payment of the sum of \$13,434.86 to the Registrar of the Court. That sum is to be paid within seven days of the date of this judgment. If, subsequently, there is evidence that Allied is not pursuing its challenge diligently, I reserve leave for Mr Marriott to apply for a discharge of the order of stay.

[18] Since Mr Marriott is legally aided and there are no exceptional circumstances in terms of s 45 of the Legal Services Act 2011, I make no order for costs on this application.

B A Corkill
Judge

Judgment signed at 10.45 am on 23 June 2015