

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2018] NZEmpC 74  
EMPC 3/2018**

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                      GRAHAM REGINALD PITMAN  
   Plaintiff

AND                                ADVANCED PERSONNEL SERVICES  
   LIMITED  
   Defendant

Hearing:                      On the papers filed on 28 March, 27 April, and 21, 28 and 30 May  
   2018

Appearances:                S Zindel, counsel for plaintiff  
   J Goldstein, counsel for defendant

Judgment:                    2 July 2018

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**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH  
APPLICATION FOR A STAY OF EXECUTION**

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[1] Mr Graham Pitman has challenged a determination of the Employment Relations Authority ordering him to pay damages, indemnity costs and disbursements to Advanced Personnel Services Ltd, arising from determinations that he breached his employment agreement with that company.<sup>1</sup>

[2] Mr Pitman did not dispute his liability but challenged the amount he was ordered to pay. Advanced Personnel has taken steps to enforce the determination by having it certified as a judgment of the District Court. That certified judgment was the foundation for a bankruptcy notice.

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<sup>1</sup> *Advanced Personnel Services Ltd v Pitman* [2017] NZERA Christchurch 213.

[3] Mr Pitman has sought a stay of execution of the determination and his application is opposed.

[4] The following description of events was drawn from the Authority's determination on damages and costs. In an earlier determination, dated 11 September 2017,<sup>2</sup> the Authority found Mr Pitman had breached his individual employment agreement, because he assisted a company, A Temp Ltd, to compete with Advanced Personnel while still employed by it.<sup>3</sup> This action gave a springboard advantage to A Temp.<sup>4</sup> Mr Pitman's assistance to A Temp breached confidentiality and restraint of trade clauses in his employment agreements.<sup>5</sup>

[5] Because of Mr Pitman's breaches, three of Advanced Personnel's clients stopped using that company, or reduced their reliance on it during the restraint period. Their allegiances were switched to A Temp instead.<sup>6</sup>

[6] In seeking damages, Advanced Personnel wanted to be put back into the position it would have been in but for Mr Pitman's breaches. After a detailed analysis, the Authority ordered Mr Pitman to pay:<sup>7</sup>

- (a) special damages for lost profits of \$832.72;
- (b) interest on lost revenue of \$142.49;
- (c) costs and disbursements of \$48,983.61; and
- (d) general damages of \$10,000.

[7] The Authority investigated the loss of profits claimed by Advanced Personnel, and concluded the amount attributable to Mr Pitman's breaches was \$15,832.73.<sup>8</sup> That sum was reduced because of a payment by A Temp to Advanced Personnel.<sup>9</sup>

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<sup>2</sup> *Advanced Personnel Services Ltd v Pitman* [2017] NZERA Christchurch 151.

<sup>3</sup> *Advanced Personnel Services Ltd v Pitman*, above n 1, at [4].

<sup>4</sup> *Advanced Personnel Services Ltd v Pitman*, above n 1, at [7].

<sup>5</sup> At [7].

<sup>6</sup> At [8].

<sup>7</sup> At [129]-[130].

<sup>8</sup> At [38].

<sup>9</sup> At [39]; Employment Relations Act 2000, s 134(2).

[8] Advanced Personnel issued proceedings against A Temp seeking a penalty for allegedly inciting, instigating, aiding and abetting Mr Pitman's breaches of his employment agreement. A settlement was reached under which A Temp paid \$15,000 to Advanced Personnel. The Authority had the advantage by being able to read the settlement agreement but its contents were the subject of a non-publication order and, in the materials supporting and opposing this application, the parties did not provide a copy of it to the Court.<sup>10</sup> In its analysis, the Authority held the payment did not convert the penalty into compensation but declined to put it aside in the damages assessment because that would allow Advanced Personnel to have a windfall.<sup>11</sup> Taking into account the amount paid, the special damages became the difference between the lost profit and what had been paid by A Temp, namely \$832.73.<sup>12</sup> Interest on lost revenue was awarded, calculated at \$142.49.<sup>13</sup>

[9] General damages were then assessed. They were described as being to compensate for breach of contract for non-monetary aspects of the specific harm suffered.<sup>14</sup> In describing them, the Authority said they were usually limited to individuals who have suffered distress, physical inconvenience or "suffering".<sup>15</sup> It also said, in the case of a corporation, the type of general damage that might be expected may be loss of executive time, inconvenience, interruption to the company's business and/or a loss of reputation.<sup>16</sup> No authority was cited for this proposition.

[10] An award of \$10,000 for general damages was made, being described by the Authority as falling within a "reasonable range".<sup>17</sup>

[11] Indemnity costs were ordered because Mr Pitman's employment agreement contained a clause in which he was committed to indemnify Advanced Personnel where the restraint of trade provisions in the agreement were breached. The clause reads:<sup>18</sup>

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<sup>10</sup> At [1] and [52].

<sup>11</sup> At [57].

<sup>12</sup> At [60].

<sup>13</sup> At [64].

<sup>14</sup> At [65].

<sup>15</sup> At [65].

<sup>16</sup> At [65].

<sup>17</sup> At [67].

<sup>18</sup> At [70].

In the event of any failure by the Employee to comply with this clause the Employee shall indemnify the Employer against all losses, liabilities, costs, claims, charges, expenses, actions or demands which the Employer may incur as a result of any failure to perform these obligations.

[12] Advanced Personnel claimed \$81,707 in legal fees but the Authority did not accept that amount was reasonable and made adjustments.<sup>19</sup> For example, one bill of costs was rejected because it related to drafting the agreement between Advanced Personnel and A Temp.<sup>20</sup> Another adjustment was made to avoid a potential duplication arising from the company being represented by two counsel. Those adjustments brought the total down to \$70,000.<sup>21</sup> A further assessment was made to consider if all those costs were incurred in respect of a breach of the restraint in Mr Pitman's employment agreement.<sup>22</sup> It made a broad-brushed adjustment accepting that two-thirds of the work was covered by the indemnity and one-third related to other matters. The sum to be ordered for costs became \$46,000.<sup>23</sup> As a type of cross-check, the Authority considered what might have been awarded by applying its usual daily tariff and considered an uplift to the same amount would have been justified. Finally, disbursements totalling \$2,983.61 were awarded.

[13] The Authority left for a future determination any costs order for the investigation into the quantum of damages.<sup>24</sup>

### **The challenge**

[14] Mr Pitman's challenge is confined to disputing the award of general damages and the imposition of indemnity costs. He did not challenge the order to reimburse Advanced Personnel for disbursements.

[15] The statement of claim pleaded that the general damages were out of proportion to any "likely mitigation steps" for which there was plausible evidence and disproportionate to damage actually suffered.

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<sup>19</sup> At [90].

<sup>20</sup> At [91].

<sup>21</sup> At [95].

<sup>22</sup> At [96].

<sup>23</sup> At [96].

<sup>24</sup> At [133].

[16] As to the indemnity, the statement of claim pleaded an error of law was made by fixing costs relying on the agreement and departing from modest costs often ordered for investigations. The pleading also challenged the indemnity costs order because, it was said, the Authority lacks any “empowering rule” to confer jurisdiction to make one on that basis, the indemnity clause was an attempt to contract out of the Act, and purported to oust the Authority’s discretion. Indemnity costs were also said to be imposed “in terrorem” because they tend to lead to a result out of proportion to any wrong suffered.

### **The application for a stay**

[17] Filing a challenge does not operate as a stay of a determination.<sup>25</sup> Mr Pitman applied for a stay of the execution of the determination, relying on *Assured Financial Peace Ltd v Pais*.<sup>26</sup> In summary, an application for a stay involves exercising a broad discretion in the interests of justice, which is to be exercised judicially and in accordance with principle.<sup>27</sup> In this exercise, the Court must weigh carefully the rights of a successful litigant to have the benefits of the judgment being challenged and preserving the position in case that challenge succeeds.

[18] The factors considered in *Pais* were:<sup>28</sup>

- (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;

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<sup>25</sup> Employment Relations Act 2000, s 180; Employment Court Regulations 2000, reg 64.

<sup>26</sup> *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50. See also *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 3 NZLR 239 (HC).

<sup>27</sup> See, for example, *Hill v Tex Onsite Ltd* [2016] NZEmpC 73.

<sup>28</sup> *Pais*, above n 25, at [5].

- (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.

[19] There is a preliminary issue about the jurisdiction of the Court to consider granting a stay because Advanced Personnel has obtained a certificate of judgment in the District Court.

### **Jurisdiction?**

[20] Mr Pitman's case was that the Court has jurisdiction. Advanced Personnel maintained the Court does not have jurisdiction and the certified judgment is now a matter for the District Court.

[21] Section 141 of the Employment Relations Act 2000 (the Act) provides that any order made or judgment given under any of the Acts listed in s 223(1), by the Authority or the Court, may be filed in the District Court. The listed statutes include the Employment Relations Act. Under s 141 an order or judgment is enforceable "in the same manner" as an order made or judgment given by the District Court.

[22] On 17 January 2018, the Authority issued a certificate of determination under its seal, certifying Mr Pitman's total indebtedness arising from the determination. Based on the Authority's certificate, the District Court issued a certificate of judgment:

... that the document attached to this Certificate is a true copy of the Determination in the above case and that the amount of \$60,008.83 set out below is now due on the Determination.

[23] The difference in amounts is explained by associated court fees being added to the total. The District Court certificate was issued under r 11.6 of the District Court Rules 2014 "... for evidential purposes only." This certificate of judgment became the basis for the bankruptcy notice, relying on r 24.8 of the High Court Rules 2016.

[24] Mr Zindel's submissions for the plaintiff relied, almost exclusively, on reg 64 of the Employment Court Regulations 2000 (the Regulations) being applied to the

fullest because of its clear words, and Parliament's intention to confer on the Court jurisdiction to grant a stay, even though the determination had been certified as a judgment of the District Court.

[25] Support for these propositions was drawn from the High Court bankruptcy proceeding, *Wiri Pacific Ltd v Kelleher*.<sup>29</sup> In that case, the Associate Judge considered an application to set aside a bankruptcy notice founded on a costs order of the Authority, where that order had been certified by the District Court. Before the bankruptcy proceeding could be heard the Authority granted a stay. In reliance on the stay, the High Court exercised its discretion to set aside the notice.

[26] Mr Zindel submitted that the High Court respected the stay granted by the Authority and did not consider the determination had, through the process of certification, become a judgment of the District Court. However, *Wiri* was confined to the discretion exercised by the High Court and did not consider the Act or the Regulations.

[27] Mr Goldstein, for the defendant, took a contrary position. He submitted the Court did have jurisdiction to stay the Authority's determination until it was "sealed" in the District Court. Once the certificate of judgment was obtained, the proceedings had been given the status of a final judgment of the District Court. It followed this Court no longer had jurisdiction to order a stay because the proceedings had become "... a final and enforceable judgment of the civil courts." He rejected reliance on *Wiri*, because there was no argument in that case about whether the Authority had jurisdiction to grant the stay.

[28] Section 141 of the Act, read together with reg 26(3) of the Employment Relations Authority's Regulations, was said to show that, once a certificate of determination was sealed as a certificate of judgment it is both final and enforceable.<sup>30</sup> If Parliament intended otherwise, he submitted, the Act would say the certificate

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<sup>29</sup> *Wiri Pacific Ltd v Kelleher* HC Auckland CIV-2010-404-001335, 13 August 2018.

<sup>30</sup> Employment Relations Authority Regulations 2000, reg 26(3) mirrors s 141 by referring to an order being enforceable based on the certificate in the same manner as a District Court judgment or order.

obtained under s 141 was subject to a stay of execution in the Authority or the Court, which it does not do.

### **Conclusion on jurisdiction**

[29] The Court has jurisdiction over this application for a stay and the determination has not been transformed into a District Court judgment. The critical words in s 141 are “in the same manner”, indicating certifying the Authority’s determination in the District Court is merely a step to enable the successful party to pursue enforcement options.

[30] If Mr Goldstein’s submissions were correct, the Court’s ability to consider this application for a stay would end abruptly as soon as the certificate of judgment was issued. Obtaining a certified judgment is an administrative step. In this case the certificate was issued by a Deputy Registrar. If Mr Goldstein’s submission was accepted, the outcome of an application for a stay in this Court would be decided in a race between one party getting the District Court to take administrative steps to issue the certificate and the other party attempting to get a judgment in what is likely to be a contested proceeding. That result could not have been intended.

[31] A certificate of judgment is a precursor to the use of enforcement provisions in the District Court Rules, but that is not the same thing as saying the determination has become a District Court judgment. That is also evident in the language used in the certificate in stating, pursuant to r 11.16 of the District Court Rules, that it was for evidential purposes only. There is a qualitative difference between accessing the District Court’s enforcement mechanisms to pursue what has become a debt and litigation which challenges the substance of the decision which created that debt.

[32] The fact that this Court has jurisdiction is also evident from the unlikely situation that would emerge if the determination had become a decision of the District Court for all purposes. At that point, the only way to obtain a stay would be to apply to the District Court, meaning a District Court Judge would be required to make the

decision. Inevitably, that would mean considering matters raised in the employment relationship problem, which would be outside the scope of ss 161 and 187 of the Act.<sup>31</sup>

### **Application considered**

[33] The factors relied on in *Pais* are discussed below.

(a) *Challenge ineffectual?*

[34] This ground is a significant part of Mr Pitman's application. His concern is that, if the High Court makes an order bankrupting him, he will lose control of the litigation because his property will vest in the Official Assignee who may elect not to continue with it.<sup>32</sup> There is, of course, an element of speculation in this contention because Mr Pitman has not yet been bankrupted and, until that happens, the attitude of the Official Assignee to this litigation remains unknown. Mr Zindel acknowledged the Official Assignee may allow Mr Pitman to continue the challenge. Implicit in this submission was that there may be no interest in continuing with it if there are limited prospects of increasing the worth of Mr Pitman's bankrupt estate and, therefore, any potential distribution to creditors.

[35] Some concern was also expressed about Mr Pitman's ability to continue with the proceeding even if the Official Assignee agrees. He has applied for legal aid and bankruptcy may lead to the legal aid application being reconsidered if the best outcome that might be achieved from the proceeding would be for the benefit of creditors.

[36] Comments in *Pais*, and *Dymocks*, about the rights of the successful litigant to the fruits of the judgment, and the need to preserve the position for a challenge, are directed at achieving a balance between competing interests. Often a stay is sought where there is a challenge over an order to pay, coupled with a concern about the money not being recovered if it is successful. This case is different. Mr Pitman accepts liability arising from his conduct and, consequently, that he has caused damage to Advanced Personnel. All that is in issue is the extent of that damage. Speculation

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<sup>31</sup> See also the discussion in *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer* [2016] NZCA 464, [2017] 2 NZLR 451 at [41]-[42].

<sup>32</sup> Insolvency Act 2006, s 64.

about what steps the Official Assignee may take, if Mr Pitman is bankrupted, is insufficient to establish that the challenge will be rendered ineffectual in the absence of a stay.

(b) *Good reasons, pursued in good faith?*

[37] There are two aspects to this challenge disputing the amount of damages awarded to Advanced Personnel. The statement of claim challenged the award of general damages and indemnity costs. As to general damages, Mr Zindel submitted that the order was “questionable”. The Authority stated the basis for this award in a short passage describing them as being to:<sup>33</sup>

... compensate a victim of a breach of contract for non-monetary aspects of the specific harm suffered. Such damages usually are limited to individuals, who have suffered distress, physical inconvenience or suffering. In the case of a corporation, as opposed to an individual, the type of general damage that one may expect would concern loss of executive time, inconvenience, interruption to the company’s business and/or a loss of reputation.

[38] Advanced Personnel submitted \$30,000 would be an appropriate sum but that was rejected by the Authority. Instead, it awarded \$10,000, accepting the submission that the company would have had to spend time investigating the breaches and taking steps to mitigate them.<sup>34</sup> The Authority held:<sup>35</sup>

... That would have taken up executive time, and disrupted the normal operation of the business. It is not possible to quantify that loss of time, but a figure of \$10,000 falls within what one might assess as a reasonable range. I therefore accept that sum.

[39] The Authority did not refer to a particular case, or cases, for the propositions just mentioned. Mr Zindel’s criticism of the award was based on submitting that these damages are ordered where they cannot be objectively calculated such as for non-pecuniary loss or are otherwise the natural and probable result of the wrong. His submission was that it was wrong for the Authority to make an award of general damages and there was little reasoning or evidential foundation to support it.

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<sup>33</sup> *Advanced Personnel Services Ltd v Pitman*, above n 1, at [65].

<sup>34</sup> At [67].

<sup>35</sup> At [67].

[40] Mr Goldstein took a different starting point, treating the proceeding as involving issues about how much is to be paid, and when, because Mr Pitman will continue to be indebted to Advanced Personnel once the proceeding is concluded. He did not resile from the appropriateness of the order for general damages.

[41] Mr Zindel's submission that the general damages award was questionable was a bold one which he made without reference to authorities. There are cases where courts have recognised an award of general damages in a commercial context and, I consider, it would go too far to say that they were not available in this case.<sup>36</sup> However, at trial Mr Pitman is entitled to argue that the circumstances of this case do not justify general damages or, if they do, in the amount which was awarded by the Authority.

[42] The second aspect of Mr Pitman's case was that it was wrong in principle for the Authority to fix costs on an indemnity basis and order him to pay \$48,983.61 (including disbursements). First, the Authority should have considered the Calderbank offer made well before the investigation. Second, costs should have been fixed at the point in time when the Calderbank offer was made. An allied submission was that ordering costs on a contractual basis was wrong because that would oust the Authority's discretion and was inconsistent with the usual way they were awarded based on a modest sum by reference to a daily tariff.

[43] Advanced Personnel's response was that contractual indemnity costs are able to be awarded relying on *George v Auckland Council*.<sup>37</sup> In turn, *George* applied the Court of Appeal decision, *Watson & Son Ltd v Active Manuka Honey Assoc*, and the principle that a party can be contractually bound to pay the other party's full solicitor-client costs.<sup>38</sup> As *George* observed, the inquiry does not start and stop with ordering actual costs because of the existence of a contract. An assessment must be made of the scope of the contract to pay, whether the claimed costs fall within that scope, and if there are any public policy reasons preventing reliance on the contractual indemnity.<sup>39</sup>

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<sup>36</sup> See for example *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd* (1996) 3 NZ ConvC 192,398.

<sup>37</sup> *George v Auckland Council* [2014] NZEmpC 100, [2014] ERNZ 681.

<sup>38</sup> *Watson & Son Ltd v Active Manuka Honey Assoc* [2009] NZCA 595.

<sup>39</sup> To the same effect see High Court Rules 2016, r 14.6(4)(e).

[44] Mr Pitman's case is based on an assumption that his employment agreement should not have led to such a high award that was out of proportion to the matters in issue. At first blush, it does seem anomalous that an employment relationship problem that led to reasonably modest damages attracted such significant costs. However, the Authority did make an assessment of the reasonableness of the claimed costs and adjusted them downwards. It considered whether there were any public policy reasons that should mean the indemnity would not apply and concluded there were none.

[45] That said, it must be open to Mr Pitman to challenge the amount ordered for costs, potentially obtaining a reduction in them if the Authority's allowances can be shown to have been insufficient. However, given the restrictions referred to in *George* and in *Watson*, it is unlikely the award will be reduced to the point where liability is extinguished.

[46] There is no challenge to the disbursements that were ordered to be paid. They would now need to be paid in any event, but it is not clear Mr Pitman will be able to do so.

[47] There are prospects for success in Mr Pitman's proceeding, though he will only be able to reduce his exposure if he succeeds. I conclude the challenge has been brought for good reasons and in good faith.

(c) *Will the successful party be injuriously affected by a stay?*

[48] There is a potentially injurious effect on Advanced Personnel because not only will it be deprived of the benefit of the determination but, if the litigation continues, it will incur ongoing costs.

[49] There is no effect on third parties, the proceeding is not novel and important, and there are no public interest considerations. That leaves an assessment of the overall balance of convenience.

## **Overall balance of convenience**

[50] If the stay is not granted, Mr Pitman faces the prospect that he will be bankrupted and decisions about this proceeding will be removed from him. If that happens a decision may be made not to continue. Mr Pitman may find himself in a position where his bankrupt estate is affected to the extent of the orders made by the Authority, which he considers to be an overstatement of the true measure of his liability. However, at best, if he succeeds in his challenge all he will do is reduce the amount that is owed.

[51] He has not advanced a case in support of the stay by attempting to suggest, for example, that the orders made by the Authority are so deficient that his liability will be extinguished. That is perhaps evident in one illustration which is that he does not dispute the disbursements which have been ordered to be paid. At just over \$2,900, that debt exceeds the financial minimum at which a bankruptcy notice can be issued. In short, if the disbursements are not paid, Mr Pitman faces the continuation of the bankruptcy proceeding, and the same potential result insofar as his interests in the litigation vesting to the Official Assignee are concerned.

[52] On the other hand, Advanced Personnel has already been placed in a position where it needed to establish a breach, or breaches, by Mr Pitman and prove the losses it sustained. It is out of pocket and is facing on-going litigation, with associated costs, against a plaintiff who has accepted his inability to pay the Authority's orders.

[53] Often, the balance of convenience can be influenced by the party seeking the stay paying either the whole of the sum ordered to be paid, or a reasonable portion of it, to the Registrar of this Court or to a stakeholder. Making a payment in that way is designed to achieve a balance by providing the plaintiff with the assurance that money is held in such a way it can be returned if that is the outcome. The defendant is provided with an assurance that there are funds available in due course if it succeeds. In this case, there is no realistic prospect of ordering any meaningful payment to be made.

[54] The balance of convenience favours Advanced Personnel. From Mr Pitman's perspective, the most he might attempt to achieve in this litigation is a reduction in his indebtedness to Advanced Personnel. It is Mr Pitman's financial circumstances which are the fulcrum of this application, because of his concern that he may be bankrupted. By itself that is not sufficient to tilt the balance of convenience in his favour. There are no other factors on which he can rely to indicate that the overall interests of justice lend themselves towards a stay.

### **Outcome**

[55] The application for a stay is dismissed.

[56] Costs are reserved. If they cannot be agreed, memoranda may be filed although, if Mr Pitman is now legally aided, costs may need to be taken up with the legal aid provider.

K G Smith

Judge

Judgment signed at 12.45 pm on 2 July 2018