

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA754/2021
[2022] NZCA 1**

BETWEEN **TE MANAWA O TŪHOE TRUST**
Applicant

AND **TANIA MCDONNELL**
Respondent

Counsel: S A McKenna for Applicant
 T P Oldfield for Respondent

Judgment: 31 January 2022 at 10.30 am
(On the papers)

JUDGMENT OF BROWN J

- A** **The application for urgency in respect of the hearing of the application for leave to appeal dated 23 December 2021 is granted.**
- B** **The application dated 23 December 2021 for a stay of the Employment Court’s order for interim reinstatement dated 2 December 2021 is declined.**
- C** **Leave is reserved to file a fresh application for stay of the order for interim reinstatement if the application for leave to appeal is granted. In that event full argument can be advanced on the issue of jurisdiction raised in the memorandum of counsel for the respondent dated 19 January 2022.**
- D** **The respondent is entitled to costs for a standard interlocutory application on a band A basis with usual disbursements.**
-

REASONS

[1] On 20 January 2022 in my capacity as Duty Judge I declined the applicant’s application for a stay of an order of the Employment Court for the interim reinstatement of the respondent with reasons to follow. These are my reasons.

Relevant background

[2] On 4 March 2019 the respondent commenced work with the applicant (the Trust) as its board administrator. Her employment continued until 14 May 2021 when she was dismissed on the grounds of redundancy. She lodged a claim in the Employment Relations Authority alleging that the Trust’s decision to dismiss her was unjustified. Her application to the Authority under s 127 of the Employment Relations Act 2000 (the Act) was unsuccessful.¹ However her challenge to the Authority’s determination was successful in the Employment Court which granted her application for interim reinstatement.²

[3] On 23 December 2021 the Trust filed an application in this Court under s 214 of the Act for leave to appeal against the Employment Court’s decision. At the same time it filed an application pursuant to r 12(3) of the Court of Appeal (Civil) Rules 2005 for a stay of the Employment Court’s order for interim reinstatement. It also sought urgency for the hearing of its application for leave to appeal.

Stay applications: relevant principles

[4] In determining whether or not to grant a stay under r 12(3), the Court must weigh the factors “in the balance” between the successful litigant’s rights to the fruits of a judgment and “the need to preserve the position in case the appeal is successful”.³ Factors to be taken into account in this balancing exercise include:⁴

- (a) Whether the appeal may be rendered nugatory by the lack of a stay;
- (b) The bona fides of the applicant as to the prosecution of the appeal;

¹ *McDonnell v Board of Trustees of Te Manawa o Tūhoe Trust* [2021] NZERA Auckland 388.

² *McDonnell v Board of Trustees of Te Manawa o Tūhoe Trust* [2021] NZEmpC 214 [Employment Court decision].

³ *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

⁴ *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11].

- (c) Whether the successful party will be injuriously affected by the stay;
- (d) The effect on third parties;
- (e) The novelty and importance of questions involved;
- (f) The public interest in the proceeding; and
- (g) The overall balance of convenience.

While that list does not include the apparent strength of the appeal, that is treated as an additional factor.

Analysis

[5] While it is not of great moment, the present case does not involve an appeal as of right. The Trust's intended appeal may only proceed if this Court is of the opinion that the questions of law involved are of sufficient general or public importance, or for any other reason, to justify an appeal.⁵ However, assuming leave were to be granted, I do not consider that the appeal would be rendered nugatory by the absence of a stay. Nor do I doubt the Trust's bona fides in respect of the prosecution of its application for leave. It has sought urgency which has been granted.

[6] By contrast I am of the view that if a stay were to be granted and the interim reinstatement reversed, the position of the respondent would be injuriously affected. I consider that it would be difficult for the respondent to take back the reins of her role as board administrator if that role was disestablished and the various tasks involved are contracted out to a third party. I agree with the submission for the respondent that the longer that she is absent from the workplace the more difficult reintegration would become.

[7] The only third party involved is the independent contractor engaged by the Trust to perform the tasks previously undertaken by the respondent. Referring to that arrangement the Employment Court observed:⁶

[68] ... there is little or no risk of the Trust being in breach of that agreement merely because it has to deal with Ms McDonnell's reinstatement. The contract with the service provider is between independent contractors and

⁵ Employment Relations Act 2000, s 214(3).

⁶ Employment Court decision, above n 2.

can, if necessary, be terminated. The Trust may be in a worse position in one sense, because it may have a period of time when its actual costs increase if it has to pay Ms McDonnell and the private provider, but that is not likely to be for very long. The Trust has the contractual power to avert any ongoing costs.

[8] The third party's entitlement is only to be paid during the period of its retainer. I do not consider that there would be any relevant prejudice for the independent contractor if the contractual arrangement is lawfully terminated or a deferral arrangement put in place.

[9] I do not consider that factors (e) and (f) are significant in the analysis. However in my view the conduct of the Trust subsequent to the Employment Court's decision of 2 December 2021 weighs against the grant of a stay. It was necessary for the respondent to apply to the Employment Court for a compliance order which was granted in a judgment dated 22 December 2021.⁷ As the Judge explained:

[18] I am satisfied that no steps were taken to give effect to the order for reinstatement at any time from the date of the judgment until now. Attempts to negotiate a settlement do not excuse the failure to comply. In approaching the matter as the Trust did it accepted the risk that, if the negotiations were unsuccessful, it was exposed to the application it now faces. It follows I do not accept Mr McKenna's submission that the breach is minor, meaning it should not be a factor in considering whether a compliance order should be made. The breach was not for the few days between the cessation of negotiations and when the application was filed. It was from the date of the judgment until now, which places an entirely different light on the extent of the non-compliance.

The Judge went on to observe that the Trust had given every indication that it intended to continue on the path it established after the judgment was issued, which was to not have the respondent reinstated to work.⁸

[10] Taking all these factors into consideration it is my view that the balance of convenience falls significantly in favour of the respondent.

[11] In reaching that conclusion I have not given weight to factors (e) and (f). However if on the determination of the Trust's application for leave to appeal this Court were to form a different view and grant leave to appeal, then I consider it is

⁷ *McDonnell v Board of Trustees of Te Manawa o Tūhoe Trust* [2021] NZEmpC 232.

⁸ At [20].

appropriate to reserve leave for the filing of a fresh application for stay. In that event the Court would have the opportunity to hear full argument on an issue of jurisdiction flagged in the memorandum of Mr Oldfield of 19 January 2022 namely the interface between r 12(3) of the Rules and s 126 of the Act.

Result

[12] The application for urgency in respect of the hearing of the application for leave to appeal dated 23 December 2021 is granted.

[13] The application dated 23 December 2021 for a stay of the Employment Court's order for interim reinstatement dated 2 December 2021 is declined.

[14] Leave is reserved to file a fresh application for stay of the order for interim reinstatement if the application for leave to appeal is granted. In that event full argument can be advanced on the issue of jurisdiction raised in the memorandum of counsel for the respondent dated 19 January 2022.

[15] The respondent is entitled to costs for a standard interlocutory application on a band A basis with usual disbursements.

Solicitors:
McKenna King, Hamilton for Applicant
SBM Legal, Auckland for Respondent