IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 10/06
CRC 20/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	FONTERRA BRANDS (TIP TOP) LIMITED Plaintiff
AND	KARYN DILLON Defendant

Submissions received: 9 and 21 August 2006

Appearances: J Mills, Counsel for Plaintiff
K Stringleman, Advocate for Defendant

Judgment: 10 October 2006

INTERLOCUTORY JUDGMENT OF JUDGE AA COUCH

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[1] The matter at issue between the parties is a dispute about the interpretation and application of a collective employment agreement covering the defendant's employment by the plaintiff. The Employment Relations Authority found in favour of the defendant and, as a result, ordered the plaintiff to pay her a substantial sum of money. The plaintiff has challenged that determination pursuant to s179 of the Employment Relations Act 2000 and seeks to have the matter heard de novo by the Court. The plaintiff has now applied to the Court for a stay of proceedings on the Authority's determination pending the outcome of the challenge. The defendant opposes the grant of such a stay.

[2] In support of the application, the plaintiff has filed an affidavit from Judith Ann Mair, the South Island operations manager for the plaintiff. For the defendant,

Ms Stringleman has filed a detailed notice of opposition setting out her submissions. Ms Mills and Ms Stringleman are agreed that they do not wish to be heard further and have invited me to deal with the application on those papers.

[3] The starting point for my consideration must be s180 of the Employment Relations Act which provides:

> ***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.*

[4] It follows from the provisions of this section that, in seeking a stay of proceedings, the plaintiff asks the Court to exercise its discretion to depart from the normal course. Any exercise of discretion must be carried out according to principle. One of the fundamental principles is that the exercise of discretion should be founded on findings of fact or some other matter of substance.

[5] In this case it is difficult to discern any substantial basis for the plaintiff's application. The notice of application declares that it is made on the following grounds:

> *(a) The applicant brings the election to the Employment Court in good faith;*
>
> *(b) Granting a stay would preserve the status quo;*
>
> *(c) It would be highly prejudicial to the applicant for the award and any costs to be paid to the respondent in the event that the Employment Court allowed the challenge in whole or in part;*
>
> *(d) The applicant will diligently and expeditiously pursue the de novo hearing; and*
>
> *(e) Appearing in the affidavit of Judith Ann Mair to be filed herein.*

[6] Of these grounds, (a) and (d) are not matters of substance and, indeed, they are what one would expect from any plaintiff.

[7] As to (b), the effect of s180 is that granting a stay would be a departure from the status quo rather than the preservation of it.

[8] As to (c), this is simply an allegation of fact that, to have substance, would need to be supported by evidence.

[9] The affidavit of Ms Mair deals initially with the history of the proceedings. She then goes on to suggest in paragraph 8 that, if a stay of execution is not granted, *"the benefit of a successful challenge will be lost to the company."* In paragraph 9, Ms Mair says that if the plaintiff had to make payment to the defendant now, *"there would be no security provided by the respondent in respect of these monies."* She then asserts that *"The prejudice that would be suffered by the company would outweigh any disadvantage to the respondent in the event the Court decides not to grant this application."*

[10] Although Ms Mair makes these assertions in her affidavit, they are unsupported by any evidence. In particular, the plaintiff has not provided the Court with any evidence that the defendant is impecunious or that there is any other reason to believe that the defendant would be unable to repay money paid to her now pursuant to the Authority's determination in the event that the challenge is successful.

[11] The inevitable conclusion I reach is that, in the form in which it has been made, the plaintiff's application lacks any substance upon which I could properly exercise my discretion to make the order sought.

[12] Having said that, I must have regard not only to the specific content of the plaintiff's application but also to the overall justice of the matter. The matter at issue between the parties relates solely to the payment of money. The effect of granting a stay would be that the payment to the defendant of the money to which she is currently entitled pursuant to the Authority's determination would be delayed.

[13] Delay in the payment of money owed is normally dealt with by an award of interest. I note that the Authority did not deal with interest in its determination but, as the matter is now to be the subject of a hearing de novo, it will be open to the Court to make such order as it thinks fit regarding interest in the event that the challenge is unsuccessful. Pursuant to clause 14 of Schedule 3 to the Employment Relations Act 2000, it would be open to the Court to award interest at a rate equal to the 90-day bill rate plus 2 percent for the whole of the period since the cause of action arose in or about November 2003.

[14] It seems to me that such an award of interest in the event that the defendant was successful in the Court would be of much greater value to her than immediate

payment of the amount ordered by the Authority without the benefit of an order for interest and with the need for the defendant to keep the money intact so as to be able to repay it in the event that the plaintiff is successful in the Court.

[15] It also seems to me that, given that what is at stake is solely a sum of money, the defendant could only be prejudiced by a stay if she was, in fact, impecunious. If that were the case, it would equally provide a ground for the making of a stay.

[16] For these reasons, I make an order staying proceedings on the determination of the Authority pending determination of the proceedings currently before the Court or until further order of the Court.

[17] It is common that orders for stay of proceedings pending the outcome of a challenge are on condition that the plaintiff pay the money in question into Court or into a solicitor's trust account. I do not impose such a condition on the order for stay in this case. The plaintiff is a large company with substantial assets and, if there was any doubt about the plaintiff's future ability to satisfy the order made by the Authority, I am confident Ms Mills would have disclosed that in the application or through the affidavit of Ms Mair. That being so, there is no need to secure future payment by having the money put in trust at this stage. If the plaintiff is unsuccessful in its challenge, this is likely to be to the advantage of the defendant because the rate of interest which may be ordered by the Court is significantly greater than would be earned while it lay in a solicitor's trust account or the Court trust account.

[18] Although I have granted the order sought by the plaintiff, it is not a case in which costs should follow the event. As I have said earlier, the application filed by the plaintiff lacked any substance upon which the exercise of discretion to make the order sought could be founded. Costs on this application are to lie where they fall.

AA Couch
Judge

Judgment signed at 11.30 am on Tuesday 10 October 2006