

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 2/07
CRC 2/07**

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 ROBERT MACKWAY-JONES,
CHRISTINE MILLER AND JULIAN
TOMMEI AS TRUSTEES OF THE
FAMILY START SUPPORT
SERVICES (INVERCARGILL)
TRUST
Applicants

AND WILLIAM (NOBBY) CLARK
Respondent

Hearing: 2 February 2007
(Heard at Christchurch)

Appearances: Peter Churchman, counsel for Applicants
Christine French, counsel for Respondent

Judgment: 2 February 2007

ORAL JUDGMENT OF JUDGE A A COUCH

[1] The applicants in this case are the trustees of the Family Start Support Services (Invercargill) Trust (“the Trust”). This is a trust which was established in 2006 to administer the Family Start Programme in Invercargill. It is not the first organisation which has carried out that function. Some years ago the programme was first started and operated for some time by an earlier trust which I understand was known as the Invercargill Family Start Trust.

[2] Mr Clark was employed by that earlier trust as its manager and in that role he had responsibility for administering the Family Start Programme on its behalf. He carried out that role for nearly six years until February 2006 when he was dismissed. The circumstances leading to Mr Clark's dismissal by the earlier trust are highly contentious.

[3] Also in about February 2006 the original trust ceased operation. I am not aware of the full details of that but I understand that it was dissolved. In order to ensure continuity of the Family Start Programme in Invercargill, the Trust which is the applicant in these proceedings was constituted. This was done through Southland District Health Board which was given permission by the Minister of Health to take this step. Of the current trustees, Mr Mackway-Jones is the Chief Financial Officer of the Southland District Health Board and I understand that the other trustees are also employees of the Board or associated with it.

[4] Not long after Mr Clark's dismissal by the earlier trust, there were discussions between him and officers of the Southland District Health Board about Mr Clark becoming employed by the Trust as its manager. In particular, there was a meeting on the 13 March 2006 at which this proposition was advanced. Mr Clark's position is that an employment agreement was concluded that day and that he was to commence working for the Trust on Monday 27 March 2006. Shortly after that meeting Mr Clark went out of Invercargill. He returned on 26 March 2006 to find a letter addressed to him saying that the Trust did not wish to progress employment discussions with him any further.

[5] Mr Clark initiated a personal grievance against the Trust. He relied on an agreement having been reached on 13 March 2006 that he would be employed by the Trust and alleged that the subsequent rejection of him amounted to an unjustified dismissal. The Trust's primary response was that no agreement had been reached on 13 March 2006 but it also alleged that information which had come to the knowledge of the trustees after that date showed that Mr Clark was unsuitable for the position in any event.

[6] At a date which I was told was not long after 27 March 2006, Mr Clark commenced proceedings in the Employment Relations Authority. He sought confirmation that he had been employed by the Trust. He also sought remedies by way of reinstatement, arrears of wages and compensation. The employment relationship problem was investigated by the Employment Relations Authority which eventually held an investigation meeting in Invercargill on 5 October 2006. The Authority gave its determination on 22 January 2007. It found entirely in Mr Clark's favour. The remedies awarded included reinstatement, with a direction that this was to take place no later than 29 January 2007. Other remedies by way of arrears of wages and compensation pursuant to s123(1)(c)(i) of the Employment Relations Act 2000 were also awarded.

[7] The Trust immediately challenged that determination. A statement of claim was filed in the Employment Court on 26 January 2007. At the same time, the Trust sought a stay of proceedings. Although that stay is expressed to be in respect of all remedies awarded by the Authority, the principal focus was on the order for reinstatement.

[8] The principles applicable to applications for stay of proceedings relating to remedies are relatively well settled, albeit that much of the jurisprudence arose during the currency of the Employment Contracts Act 1991 and the differences between that statute and the Employment Relations Act 2000 do affect those principles to some extent. The accepted tests were conveniently summarised by Colgan J in *Air New Zealand v Hudson* unreported, 17 August 2005, AC46/05 at paragraph [6].

[9] In determining the application before me, I have regard to those principles but I do so in the context of the apparently novel circumstances of this case. There are two key factors in this case which distinguish it from other previous decisions in respect of similar applications. The first distinction is that Mr Clark never actually worked for the Trust. As will be apparent from the facts as I have outlined them earlier, the Trust brought the relationship with Mr Clark to an end before 27 March 2006, that being the date on which the Authority found he was due to start work.

[10] The second distinction is that the position of Manager of the Trust will almost certainly come to an end in the very near future. As I indicated earlier, the Trust was formed in an effort to continue the Family Start Programme in Invercargill following the demise of the earlier trust. The permission from the Minister of Health to establish the Trust limited its operation to the period up until 1 July 2007. In the interim, the Ministry of Social Development sought expressions of interest from other potential providers of the service. In late 2006 - I was informed from the bar this was in about November 2006 – the Ministry identified Presbyterian Support Services as a preferred provider and entered into negotiations with that organisation for a contract to take over the Family Start Service. The evidence contained in the affidavits before me suggests that, although a firm date has not been fixed for that takeover to occur, it is very likely to be within the next two months. That being so, the role of Manager of the Trust is likely not only to be brief but to consist, for a significant part of its remaining duration, of winding up the Trust's provision of the service, handing the service over to Presbyterian Support and dealing with staff issues that come out of that.

[11] In support of the application for a stay, an extensive affidavit was filed by Mr Mackway-Jones and an equally substantial affidavit from Mr Clark was filed in response. Both men then filed further affidavits in an effort to respond to what each other had said. In those affidavits I was provided with strongly conflicting accounts of the reasons for the demise of the previous trust and, more particularly, of the responsibility for that. The view expressed by Mr Mackway-Jones was that Mr Clark was significantly culpable. Mr Clark strongly refuted that suggestion and said that the responsibility lay with the trustees of the earlier trust.

[12] In an interlocutory application such as this, where the affidavit evidence is not tested by cross-examination, I cannot make any findings of fact about matters which are clearly in dispute. I was informed that a good deal of the evidence contained in these affidavits was also made available to the Authority in the course of its investigation but, in its determination, the Authority did not deal with this evidence in any detail. Indeed, the only reference to it appears to be paragraph [56] of the determination where the Authority dealt with the proposition advanced by the Trust that Mr Clark should not be reinstated because of his contribution to the

circumstances giving rise to his personal grievance. The Authority simply concluded “*I do not accept that there was any blameworthy contribution by Mr Clark to the circumstances of his grievance.*”.

[13] In support of the application for stay, Mr Churchman advanced a number of arguments but the essential case for the Trust came down to three propositions. The first was that the trustees believed that Mr Clark had a degree of responsibility and culpability for the serious financial problems that affected the earlier Trust. I note here that the issues in relation to the earlier trust included not only the current insolvency but also the transfer of money and assets from that trust to another trust with similar or related trustees. The trustees say that their belief that Mr Clark was involved in mishandling the former trust’s money has caused them to lack trust and confidence in him and to believe that there is a risk that he might mismanage the Trust were he to become manager of it.

[14] The second ground advanced on behalf of the Trust is that, at the meeting on 13 March 2006, Mr Clark misrepresented his involvement in the financial affairs of the previous trust.

[15] The third ground is that the circumstances have changed since the investigation of the matter by the Employment Relations Authority and that these changes render re-instatement inappropriate or impractical.

[16] As to the first two grounds, these obviously arise out of the view of events taken by Mr Mackway-Jones and his fellow trustees. As I have said earlier, that view of events is strongly contested by Mr Clark in his affidavit. In such circumstances, I cannot and do not make any findings of fact about whether Mr Clark behaved appropriately or inappropriately with respect to the affairs of the previous trust. To the extent that it remains a relevant part of proceedings before the Court, that will be a matter for the Judge who hears the substantive challenge.

[17] I am prepared to accept, however, that the concerns of the Trustees, whether they are well founded or not, are genuine and based on their understanding of the history. By way of balance I add here that I also accept that Mr Clark’s belief that he

has behaved appropriately and should bear no responsibility for previous events is equally genuine.

[18] As to the third ground advanced on behalf of the Trustees, it does seem to me that there has been a significant change in circumstances since the Authority conducted its investigation. At that stage, it was known that the Trust was likely to relinquish the service at some time in the future but this was not certain and it was unknown when it might occur. In its determination, the Authority discussed this in paragraph [58] and said *“I also observe that the new Trust remains the service provider with no date yet set for it to cease its work. The respondent’s need to employ a Manager will end at some point in the near future.”*

[19] On the information available to me now in the affidavits that have been filed, it appears virtually certain that the service will pass to Presbyterian Support Services within a matter of weeks.

[20] The case advanced to me on behalf of Mr Clark rested heavily on the proposition that, if a stay was granted, Mr Clark would be seriously disadvantaged in his future employment. In particular, it was submitted that Mr Clark’s best option for the future was to seek and, if possible, obtain the position of manager of the Family Start Service for Presbyterian Support. It was said that he would be in a much better position to obtain that appointment if he was the incumbent manager of the service for the Trust. Ms French submitted that, if he were not reinstated, Mr Clark might not be considered at all by Presbyterian Support Services for the position. She also submitted that it would assist Mr Clark in promoting himself for the position with Presbyterian Support to be familiar with the manner in which Family Start Service is now operated by the Trust.

[21] That primary ground of opposition was supported by several others. Ms French noted that the dispute between the parties had been a matter of considerable public interest in the Invercargill area and submitted that, if a stay was granted, the impression would be given that Mr Clark was somehow at fault and that this would be contrary to the view expressed by the Employment Relations Authority in its determination. She also made the point, which is undoubtedly correct, that the

outcome of this application for a stay will effectively determine the issue of reinstatement because, by the time a substantive challenge can be heard and a decision given, it is almost certain that the position will no longer exist.

[22] In evaluating the factors to be considered in an application of this sort, it seems to me in this case that distinctly different emphasis must be given to the factors which are normally considered because of the two particular distinctive features of this case which I have described earlier. In any event, those factors are only helpful guidelines. At the end of the day, I must exercise my discretion in what I perceive to be the interests of justice. In order to do that I must not only look at particular factors or features of the case; I must also stand back and look at the matter as a whole.

[23] Of the particular factors which are commonly considered, the three which seem to be most relevant in this case are whether the benefit of a successful challenge might be lost if a stay is not granted, whether the employee might be unduly prejudiced if a stay is granted and the maintenance of the status quo.

[24] I deal first with the effect of a stay or a refusal to grant a stay on the benefit of the challenge to the applicants. Mr Churchman submitted that one of the outcomes the Trustees wish to achieve by challenging the determination of the Authority is to avoid having Mr Clark work for the Trust at all. He quite correctly said that this potential outcome would be lost if a stay is not granted. Clearly, that would not go so far as to render the challenge nugatory but it does, in the unusual circumstances of this case, have some validity.

[25] As to the prejudice to Mr Clark if the stay is granted, the suggested adverse effects on Mr Clark's future employment prospects were put forward vigorously both by him in his affidavits and by Ms French in her submissions. Mr Clark went so far as to suggest that his career would be ruined if a stay was granted. While I do not doubt the sincerity of what Mr Clark says I do not believe it represents reality in this case.

[26] Presbyterian Support Services is a large, well organised and well established provider of services to the community throughout New Zealand. I am confident that it will wish to appoint the most appropriate candidate it can find to the position of manager of Family Start Services in Invercargill. It seems to me entirely unlikely that Presbyterian Support Services would not canvass widely to fill this role. It follows that Mr Clark should be able to seek an appointment to the position of Presbyterian Support Services whether or not he is practically reinstated to the position with the Trust. I do not accept that it will make much, if any, real difference to his prospects of obtaining the position at Presbyterian Support Services whether he is in what can only now be a “caretaker” role of the service for the Trust. Presbyterian Support Services will inevitably make their decision about an appointment to the position of manager of the Family Start Service when they take it over on the basis of the overall qualities of the applicants, not just what they have been doing in the few weeks immediately leading up to any appointment. In his affidavit, Mr Clark deposed to having very successfully run the Family Start Service in Invercargill for a period of nearly six years. It seems to me that this history will be very much more significant to his prospects of appointment than whether he is the “incumbent” at the time the Trust relinquishes the service.

[27] I turn now to the submission that granting a stay will damage Mr Clark’s reputation in the community. I note the conclusion by the Authority in its determination that the notoriety which has surrounded Mr Clark and his recent employment history and the distress which has arisen out of that have come principally from his involvement with the former trust. That was how the Authority viewed it at the time of its investigation meeting. Since then, Mr Clark has been vindicated by the determination of the Authority which, I am informed by counsel, has also been the subject of local publicity. The outcome of this application, as I said earlier, involves no findings of fact about Mr Clark’s character or honesty. It cannot and should not be interpreted by any party, including the media, as derogating from the conclusions reached by the Authority on those matters.

[28] I come then to the third factor which is usually given little weight in the consideration of applications of this nature, namely the maintenance of the status quo. I think the reason that it is usually accorded little weight is that it is, in most

cases, entirely predictable. The status quo in question is the situation immediately prior to the cause of action arising. Where an employee has been dismissed and an order for reinstatement is made then the status quo to be considered involves the employee working on the job. In this case, the status quo is that the employee was not working on the job. That must be so because Mr Clark has never worked on the job in the sense of being employed by the Trust to do the work of manager. It seems to me that this fact should be given more weight in this case because the order for reinstatement, if given effect, would create a situation which has never existed before, namely Mr Clark having active management of the Trust's affairs.

[29] Having considered those specific factors, I now step back and look at the matter overall. I am left with the clear view that the interests of justice require that a stay should be granted to an extent. Before setting out the conditions that I intend to impose upon a stay, however, I should briefly discuss the financial issues.

[30] Mr Clark deposed that he has had little, if any, work since March 2006, that he has incurred significant legal costs and that he has now exhausted his savings. He also informed me that, while he lacks cash, he has assets in the form of his interest in the matrimonial home he owns together with his wife and that his share is valued at something near \$200,000. I am concerned to see that any financial difficulties Mr Clark currently has should not be perpetuated by any order that I make now. It, therefore, seems to me appropriate that he should be paid in the meantime. That will also recognise that the order for reinstatement made by the Authority is not being set aside. Rather, it is being stayed in part.

[31] There will, therefore, be a stay of proceedings on the following conditions:

- The Trust is to pay Mr Clark's salary at the rate of \$88,000 per year from the 29 January 2007.
- Within 14 days, the Trust is to pay a sum equivalent to all other remedies awarded to Mr Clark by the Authority into French Burt Partners trust account to be held in trust pending the final outcome of the proceedings.

- The Trust is to pursue its challenge with diligence and to co-operate in facilitating an early hearing to the extent that it is sought on behalf of Mr Clark.
- Leave is reserved for either party to apply to the Court should these conditions be breached or if there is a need for further interim orders.

[32] In conclusion, I wish to make it clear that the intention of the order I have made with respect to reinstatement is solely to relieve the Trust of the obligation in the meantime to place Mr Clark in the role of manager in the sense that it would give him day-to-day control of its affairs.

[33] Reinstatement is to be given effect in the sense that Mr Clark has the position of manager and may describe himself as such when seeking appointment to a position with Presbyterian Support Services. In the event that the position of manager for the Trust may become redundant in the future, then Mr Clark will be entitled to proper consideration by the Trust as an employee.

[34] For the sake of completeness I note also that, should Mr Clark have serious financial difficulties in the interim period before the challenge is decided, then the leave reserved to the parties to seek further orders is to extend to an application to release some part of the funds held in trust. Whether or not that is appropriate will, of course, be a matter to be determined at that time.

[35] It seems to me at this stage that the application has not been entirely successful, in fact only successful in one respect, and that costs should be reserved. Costs are reserved.

AA Couch
Judge

Judgment delivered orally at 4.10pm on Friday 2 February 2007