

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 24/06
WRC 22/06**

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 FRANCIS WESTON
 Plaintiff

AND GARY FRASER
 Defendant

Hearing: 11 December 2006
 (Heard at Wellington by way of telephone conference)

Appearances: N R Harding, Counsel for the Plaintiff
 M W S Nutsford, Advocate for the Defendant

Judgment: 13 December 2006

JUDGMENT OF JUDGE C M SHAW

[1] Mr Fraser successfully brought a personal grievance in the Employment Relations Authority. The Authority determined that Mr Fraser was an employee of Mr Weston, a car salesman, rather than of a company of which Mr Weston was sole director. It also found that Mr Fraser had been unjustifiably dismissed by Mr Weston on 20 July 2005.

[2] Mr Weston did not appear and was not represented at the investigation meeting. The determination reveals that the Authority had been advised by then counsel for Mr Weston that because of criminal proceedings being taken against him under the Insolvency Act 1967 he believed he would be in breach of s382(1)(a) of the Companies Act 1993 were he to respond to witness statements or in any other

way participate in the Authority's investigation. Whether that belief was correct or not, it resulted in him not taking any part at all in the Authority's investigation meeting.

[3] The Authority made monetary awards against Mr Weston totalling \$27,550. When that amount was not paid, Mr Fraser moved to enforce the judgment and obtained a charging order over a property owned jointly by Mr Weston and his partner, Ms Allen. That charging order was defeated by a prior equity and by consent was transferred on 6 December 2006 to another property owned by them.

[4] In May 2006, Mr Weston's then solicitors filed a challenge to the Authority's determination.

[5] In June 2006, Mr Weston personally applied for a stay of proceedings to prevent further execution of the charging order before his challenge to the Authority's determination can be heard by the Court. He filed two affidavits in support, one from himself, and the other from his partner, Marian Allen. He states that he was discharged from bankruptcy in 2002 having lost everything, that he is unable to obtain credit to borrow any further monies, and his application to be granted leave to have him reinstated as a company director has been thwarted by Mr Fraser's affidavit to the Companies Office. He said that he is unemployable until the directorship issue is resolved, is not working, and is being supported by his partner. He says that he has no assets which he is in sole control of that can be disposed of without paying out his partners and that his personal bank account shows a balance of \$1.52.

[6] Ms Allen says that Mr Weston was a director of Sportscar World Limited until February 2006 when the company's licence was cancelled by the Companies Office. To protect her investment in that business, she has become a director in the company and has been granted a motor vehicle trader's licence as a sole trader. She owns properties at Mawhitiwhiti Road and Tariki in conjunction with Mr Weston. His contribution is to pay off the mortgage on the Mawhitiwhiti Road property.

[7] After Mr Weston was convicted of trading as a bankrupt in September 2005, he paid \$20,000 in reparation and served 350 hours' community service. Ms Allen says that this plus his solicitor's fees took up his available cash.

[8] In addition to a notice of opposition Mr Nutsford, for Mr Fraser, submitted a newspaper article concerning a property directly owned by Mr Weston and Ms Allen. In October, the property was for sale and was featured in a large illustrated newspaper article. Mr Weston was quoted in that article as saying that it was only business interests in Australia that now draw them away from the property. The house price was quoted as \$490,000.

[9] Mr Nutsford also submitted an affidavit made by Mr Weston in support of his application to the High Court for leave to act as a director of a company. It was made on 15 February 2006. It says that he is the sole director and shareholder of Sportscar World Limited which, according to a solvency certificate attached to the affidavit, shows strong sales and a sound liquidity position. He says in his affidavit that the company is trading very profitably and it has no long term debt. The New Zealand Companies Office search reveals that he was the sole director at the time. That affidavit also reveals that in December 2005 Stuart Smillie purchased the business from Mr Weston for \$200,000.

[10] To say the least, on the basis of the evidence provided to the Court, the situation relating to the company is uncertain. The best that can be said is that Sportscar World Limited appears to be continuing to trade through Ms Allen and the company is funded by Mr Smillie who paid Mr Weston \$200,000 in December 2005.

[11] Mr Nutsford also drew the Court's attention to the District Court sentencing notes when Mr Weston was sentenced for seven charges including taking part in the management and control of a business while bankrupt and incurring credit whilst bankrupt. The District Court Judge said that from the evidence heard at trial Mr Weston was a man who has little concept of honest dealings and who has been quite willing to mislead. He also referred to Mr Weston's devious conduct and his willingness to mislead people if the circumstances suited him. The judge said that devious, underhand conmen like him needed to be kept in check.

[12] Those comments and the reference in the newspaper article to business interests in Australia support Mr Fraser's concern that the judgment sum should be held on trust pending the hearing of the challenge to the Authority's determination.

Application for stay

[13] The principles for granting a stay pending an appeal are:

- (a) Whether the successful party would be injuriously affected.
- (b) The bona fides of the applicant as to prosecution of the appeal.
- (c) The novelty and importance of the question involved.
- (d) The public interest in the proceedings.
- (e) The balance of convenience of the status quo.

[14] Mr Harding made submissions on each of these factors.

(a) *Whether the successful party would be injuriously affected*

[15] Mr Harding points out that Mr Fraser has a charging order over land owned in part by Mr Weston which will ensure the integrity of the asset until such time as the hearing is concluded. In reply, Mr Nutsford points to Mr Weston's statement about Australian interests and also notes that other assets over which he was seeking to enforce the judgment had their ownership changed before he could move on those. Given the Judge's comments in the District Court, Mr Fraser does not have any confidence that Mr Weston will not manipulate his affairs to avoid payment of the judgment sum.

(b) *Bona fides of the applicant as to prosecution of the appeal*

[16] I accept Mr Harding's assurance that the matter can proceed to a fixture as soon as possible and indeed, in the course of the telephone hearing, agreement was reached that it would be heard in February. The date has since been fixed by the Registrar as 19 and 20 February 2007.

[17] I note that although the application for a stay of proceedings was filed in June 2006 it has taken until mid December to have it dealt with. Mr Nutsford advises that the delays have been caused by changes of legal representation for Mr Weston and then an unsuccessful application to have the Authority investigation reopened. On the face of it, I believe that Mr Fraser is justified in his concerns that given his past behaviour delaying tactics could still be used by Mr Weston.

(c) & (d) The novelty and importance of the question involved; and the public interest in the proceedings

[18] There are no novel or important questions involved in this case and nor is there any public interest in the proceedings which would influence the application for a stay of proceedings.

(e) The balance of convenience and the status quo

[19] This falls to be determined by balancing the deprivation of a successful party of the rewards of its litigation against the possible denial of the results of a successful appeal to the unsuccessful party. In this case, Mr Fraser has been out of his judgment since April 2006 and because of the Christmas holiday has no prospect of having the matter heard before February 2007, almost a year later. For his part, Mr Weston does not seem to have pursued the application for stay with any urgency at all.

[20] I have discussed the question of the judgment sum being paid into Court with Mr Nutsford and Mr Harding. Mr Nutsford insists that this would be an acceptable resolution of the application. Mr Harding's instructions are that Mr Weston could only meet such an order by borrowing the money.

Decision

[21] An application for a stay of proceedings is a matter which is in the discretion of the Court. The major resistance to the order from Mr Weston has been on the grounds of his impecuniosity but I am concerned at the lack of progress on this matter to date and the fact that, in spite of his best efforts including the expense of

obtaining a charging order, Mr Fraser is no closer to the fruits of his judgment than ever.

[22] I acknowledge the right of an appellant to await the outcome of the appeal. In the present case the issue of the employment status of Mr Fraser is seriously disputed as is the identity of the employer. However, if Mr Weston's case is as strong as he submits, it is difficult to see why he did not take steps to defend the case in the Authority. Because he has provided a reason for this which is said to be based on legal advice at the time, I have decided not to call for a good faith report from the Authority which would only serve to delay the hearing of the challenge further.

[23] On balance and because of the concerns raised by the evidence submitted by Mr Nutsford and the delay in pursuing the challenge, the only equitable solution is for an order for Mr Weston to pay the money into Court.

[24] First, part of the Authority's order was for costs of \$2,500. This is to be paid directly to Mr Fraser by 19 January 2007. I find these are costs that he would be entitled to whatever the outcome of the challenge because of Mr Weston's non-participation.

[25] The balance of the Authority's order is to be paid to the Wellington Employment Court by 19 January 2007 where it is to be held on trust and in an interest bearing account until the determination of the challenge. This amount comprises \$15,300 lost wages, \$1,755 unpaid holiday pay, \$8,000 compensation, plus interest on \$1,755 at 7.46 percent from 20 July 2005 to the date it is paid into Court.

[26] The proceedings are stayed until those orders are complied with. Non-compliance may result in the plaintiff's proceedings being struck out.

[27] If the orders are complied with, the challenge will be heard at the New Plymouth District Court on 19 and 20 February 2007. A formal notice of hearing will be issued by the Registrar.

[28] The defendant's case will be heard first. The defendant's briefs of evidence and documents are to be filed and served by 1 February 2007. The plaintiff's briefs of evidence and documents are to be filed and served by 8 February 2007.

[29] Any briefs in reply by the defendant are to be filed and served by 15 February 2007.

C M Shaw
JUDGE

Judgment signed at 12.15pm on 13 December 2006