

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2017] NZEmpC 74
WRC 20/12**

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

AND IN THE MATTER of an application for security for costs

BETWEEN DOMINIC JAMES SPEED
 Plaintiff

AND BOARD OF TRUSTEES OF
 WELLINGTON GIRLS COLLEGE
 Defendant

Hearing: 1 May 2017

Appearances: J Bates, counsel for plaintiff
 P McBride, counsel for defendant

Judgment: 9 June 2017

INTERLOCUTORY JUDGMENT OF K G SMITH

Introduction

[1] This judgment deals with two opposed interlocutory applications. The first application is made by the plaintiff who is seeking a stay of this proceeding pending the outcome of a High Court proceeding he has commenced against the defendant and others. The second application is by the defendant seeking security for costs against the plaintiff and a stay pending that security being provided. The defendant also seeks an enlargement of time to file a statement of defence until 30 days after any security that is ordered to be paid is, in fact, paid.

Background

[2] Mr Speed is an experienced teacher. The reason for proceedings having been issued in this Court, and in the High Court, is because of the circumstances in which he lost his employment with the Board of Trustees of Wellington Girls College (Wellington Girls).

[3] For the purposes of these applications both counsel relied on, and referred to, findings made by the Employment Relations Authority (Authority) in its determination¹ and in Mallon J's judgment on judicial review proceedings issued by Mr Speed, reported as *S v New Zealand Teachers Council*.²

[4] While those decisions were relied on to provide information, and therefore context, to these applications it is apparent that if this proceeding reaches a trial there is likely to be a substantial dispute between the parties about what happened and why.

[5] A convenient summary of the circumstances leading to Mr Speed's dismissal is contained in Mallon J's judgment. Mr Speed qualified as a teacher in the United Kingdom in 1994. In 2000 he came to New Zealand and applied for registration as a teacher. Provisional registration was granted to him on 1 October 2004 subject to an undertaking; that undertaking required him to disclose to an employer his convictions for offending in the United Kingdom. The convictions were for common assault, driving without undue care and attention and failing to stop after an accident. For reasons which do not need to be discussed in this judgment, Mr Speed also agreed to conditions directed at monitoring his mental health.

[6] From February 2006 Mr Speed was employed at Wellington Girls to teach accounting and economics. A teacher must be registered and hold a valid practising certificate to teach in a school under the general education system in New Zealand.³ At the relevant time applications for registration as a teacher were made to the New Zealand Teachers Council (the Council) which was a Crown entity established under

¹ *Speed v Board of Trustees Wellington Girls College* [2012] NZERA Wellington 79.

² *S v New Zealand Teachers Council* [2014] NZHC 2881, [2015] 3 NZLR 39. Name suppression that applied then is no longer maintained in the High Court and not sought in this Court.

³ Sections 120A(2) and 130(1A). The sections of the Education Act 1989 that applied at the time Mr Speed lost his employment were repealed and replaced by the Education Amendment Act 2015. All references are to the sections that applied at the time of his dismissal.

the Education Act 1989.⁴ The Council was required to register an applicant on being satisfied about certain criteria in s 122 of the Education Act, namely that the person:

- (a) is of good character; and
- (b) is fit to be a teacher; and
- (c) is satisfactorily trained to teach; and
- (d) has satisfactory recent teaching experience.

[7] Police vetting was required in order to be registered as a teacher.⁵ The Education Act also provided for teachers' practising certificates to be renewed provided the teacher who is applying for that renewal continues to meet specified criteria.

[8] On 1 April 2010 Mr Speed applied to renew his practising certificate. That application was accompanied by a form completed by the Principal of Wellington Girls, Ms Julia Davidson. That form required an endorsement that Mr Speed was of good character and fit to be a teacher; had recent teaching experience; that his performance had been assessed as satisfactory measured against certain criteria; and that he had completed satisfactory professional development. Ms Davidson answered "yes" on that form but also provided a letter drawing the Council's attention to certain matters that were of concern.

[9] Between 2007 and 2010 Mr Speed had been involved in several incidents which subsequently impacted on the processing of his application to renew his practising certificate. They were summarised by Mallon J. Briefly, issues arose about his conduct at Wellington Girls concerning his competency. In 2008 formal disciplinary proceedings concluded that he had been involved in misconduct but not serious misconduct. In the same period he had come to the attention of the Police. He was discharged without conviction on charges of theft and common assault; a charge of wilful damage had been brought but withdrawn; a charge of disorderly

⁴ Section 139AC.

⁵ Section 130(1A).

behaviour had been brought but withdrawn; an infringement notice for a minor traffic matter had been issued; he had unpaid fines; and other complaints were made to the Police that had not resulted in charges being laid.

[10] After applying to renew his practising certificate, but before his then current certificate expired, Mr Speed was charged with several other offences: common assault; intimidation; two counts of dangerous driving; failing to remain at the scene of an accident; failing to stop in response to a police car's flashing lights and sirens; and breach of bail.

[11] These charges were the subject of a complaint by the Police to the Council. The charges were also part of the reason for Wellington Girls conducting a disciplinary investigation which had the potential to lead to a finding of serious misconduct.

[12] Mallon J's decision records that some of the criminal charges were disposed of shortly before Mr Speed's practising certificate expired and some were disposed of shortly afterwards.

[13] On 18 November 2010 Wellington Girls made what was referred to as a mandatory report to the Council. The Council has a disciplinary function which it is assisted in fulfilling through a process of mandatory reporting imposed on employers where what is in issue is a teacher's conduct or competency.⁶ A mandatory report is required where the employer believes a teacher has engaged in serious misconduct, in which case a description of the conduct relied on must be included in the report.⁷

[14] By the time Wellington Girls wrote to the Council in November 2010, all of the existing charges against Mr Speed had been dealt with and he had only one relevant conviction: failing to stop in response to a police car's flashing red and blue lights and siren.

⁶ Section 139AE(h).

⁷ Section 139AM.

[15] The Council originally informed Mr Speed that the application to renew his practising certificate might take several weeks but it did not process his application. Mr Speed's practising certificate expired on 25 September 2010.

[16] Without a practising certificate Mr Speed could not be employed by Wellington Girls after 25 September 2010. On 1 December 2010 his employment was terminated because the school could not lawfully continue to employ him.

Authority proceeding

[17] On 16 July 2012 the Authority dismissed Mr Speed's claim against Wellington Girls for unjustified disadvantage in his employment. On 13 August 2012 Mr Speed filed a challenge to that determination and elected a hearing de novo. The remedies claimed in that challenge were reinstatement, reimbursement of lost wages, compensation for alleged humiliation, loss of dignity and injury to feelings, as well as costs and a stay.

[18] The challenge has been more or less in abeyance since 2012. Some of the intervening years are explained by subsequent steps taken by Mr Speed to issue judicial review proceedings in the High Court, and subsequently a claim for damages in that Court, although not all of the elapsed time can be accounted for by these other proceedings.

Judicial review

[19] In the judicial review proceeding what was challenged by Mr Speed was the Council's decision not to process his application for a renewal of his practising certificate merely because of a complaint that was then being investigated. The Council erroneously considered it could not renew the certificate until that investigation was completed.

[20] Mr Speed succeeded and declarations were made. Having been successful, Mr Speed then issued proceedings in the High Court against the Education Council of Aotearoa New Zealand (as the legal successor to the New Zealand Teachers

Council), Wellington Girls, and his former union, the Post Primary Teachers' Association Inc (PPTA), seeking damages. Those proceedings are at a very early stage and are not yet ready for trial.

[21] In those High Court proceedings the allegations against Wellington Girls are based on the tort of negligent misstatement. The allegation is that Wellington Girls owed Mr Speed a duty to take reasonable care in the preparation of information supplied to the Council and to ensure that it was accurate and not misleading. Several alleged failures to exercise reasonable care have been pleaded in relation to the mandatory report. Generally speaking, the pleading is that the report was misleading and inaccurate, failed to include relevant documentation in breach of rules that apply to the making of complaints to the Council, and that Wellington Girls failed to hold a good faith belief that serious misconduct had occurred. Wellington Girls is alleged to have failed to advise the Council that its own disciplinary investigation into Mr Speed had been adjourned, police charges referred to had been resolved with the exception of one driving matter, and certain information was included which was contested by Mr Speed and he had not been provided with a sufficient opportunity to comment before that information was included.

[22] The remedies sought against Wellington Girls are an inquiry into the plaintiff's losses, general damages and costs.

[23] A second cause of action pleads misfeasance in public office against Wellington Girls in which the same essential allegations are made and the remedies sought are the same as those claimed in the action for negligent misstatement.

[24] Wellington Girls disputes it has breached any duty to Mr Speed and denies he is entitled to damages. All three defendants in that High Court proceeding sought an order for security for costs because Mr Speed is resident overseas. Wellington Girls and the PPTA were successful and orders were made in their favour for security for costs in the sums of \$40,000 and \$10,000 respectively.⁸ Security for costs was ordered on 19 November 2016 and the amount was paid to the Registrar of the High Court on 27 January 2017.

⁸ *Speed v Education Council of Aotearoa New Zealand* [2016] NZHC 1848.

Application for stay

[25] As a result of case management directions given by this Court, Mr Speed applied for a stay of this proceeding in this Court pending resolution of his High Court proceeding seeking damages against (amongst others) Wellington Girls. There are three grounds to Mr Speed's application although primarily he relies on concerns about the duplication of effort, and cost, required if he is obliged to continue with litigation in the High Court at the same time as litigation in this Court.

[26] In his submissions for the plaintiff Mr Bates emphasised that although there are differences between the High Court proceeding and the proceeding in this Court arising from jurisdictional differences, there are common themes in both cases. Central to both of them are allegations that Wellington Girls did not comply with the Education Act or act in good faith in communications with the Council. Those actions are said to have been directly responsible not only for Mr Speed losing his employment, but also to him being in breach of his immigration visa, and ultimately for being deported.

[27] Mr Bates's primary submission was, however, that one or other proceeding should be stayed so that Mr Speed can concentrate his resources. He submitted there was no disadvantage to Wellington Girls in this course of action because it is involved in both proceedings.

[28] For Wellington Girls, Mr McBride's submission was that this litigation is already the subject of lengthy and inappropriate delays and further delays should not be tolerated. On that basis he submitted Mr Speed should elect to either continue with this litigation or choose between doing so and litigating in the High Court but that he should not be allowed to continue to have both proceedings 'on foot'. Responsibly, Mr McBride acknowledged that there could be overlap between both proceedings and that a duplication of effort and cost is possible.

[29] It is well recognised that the Court has power to order a stay of proceedings as discussed by Chief Judge Colgan in *Transpacific All Brite Ltd v Sanko*.⁹ The

⁹ *Transpacific All Brite Ltd v Sanko* [2012] NZEmpC 7.

principal consideration is the interests of justice. In *Sanko* guidelines derived from *Mackay Refined Sugars (New Zealand) Ltd v New Zealand Sugar Co Ltd*¹⁰ and *Rooney Earthmoving Ltd v McTague*¹¹ assisted the Court's consideration of the application.

[30] Those guidelines are:

- (a) Which proceedings were commenced first?
- (b) the potential effect on the other proceeding were a stay to be granted;
- (c) the public interest;
- (d) duplicate witnesses;
- (e) duplication and waste;
- (f) state of advancement; and
- (g) multiplicity of proceedings.

Analysis

Which proceedings were commenced first?

[31] Proceedings in this Court were issued first as long ago as 2012. That is not surprising because Mr Speed was required to file his challenge to the Authority determination within 28 days. The High Court proceeding for damages was filed in 2016 and then was only able to proceed at the beginning of this year once the security for costs was paid.

[32] However, this sequence is not determinative. Judicial review proceedings were being pursued until 2014, something which was known to the parties in 2012

¹⁰ *Mackay Refined Sugars (New Zealand) Ltd v New Zealand Sugar Co Ltd* [1997] 3 NZLR 476.

¹¹ *Rooney Earthmoving Ltd v McTague* HC Christchurch CIV-2009-476-471, 30 April 2010.

and subsequently; there was co-operation between them in order to agree, first, to adjournments by consent of the proceeding in this Court to allow time for those judicial review proceedings to be taken and, subsequently, to enable them to be concluded.

[33] It was only after the judicial review proceeding was concluded that the plaintiff was in a position to potentially establish a claim against at least the first defendant in the High Court (the Education Council of Aotearoa New Zealand).

[34] The timing of the commencement of proceedings is neutral in this analysis.

The potential effect on the other proceeding were a stay to be granted

[35] As has already been noted, Mr Bates emphasised that granting a stay of the Employment Court proceeding has the potential advantage for all parties of avoiding unnecessary duplication. He was referring to the possibility that findings made in the High Court could, either wholly or at least partly, be the foundation for an issue estoppel in this Court.

[36] What is to be determined in the High Court is much broader in scope than in the proceeding in this Court. While it might be a reasonably straightforward matter to consider an issue estoppel arising from such a wide-ranging inquiry as the High Court proceeding is likely to generate, the converse is unlikely to apply. If this Court were to make findings on matters such as the mandatory report, in the context of the employment agreement between Mr Speed and Wellington Girls, there could be significant issues about whether those findings are applicable to causes of action based on tort. In that situation it is possible that the High Court would be required to re-examine matters that had been decided by this Court. That would be unsatisfactory.

[37] Mr Bates also emphasised that although there are differences between what might be achieved in the High Court and in this Court arising out of the different jurisdictions, if his client is successful in the High Court there is only a limited prospect that he may wish to continue in this jurisdiction.

[38] This factor favours granting a stay.

The public interest

[39] It must be in the public interest to make the best use of scarce judicial resources.

[40] If the High Court proceeding is more likely to resolve most of the issues between the parties, that is a better use of those resources.

Duplicate witnesses

[41] It is apparent that there will be a duplication of witnesses if a stay is not granted because the evidence needed in both jurisdictions traverses the same events. This ground favours a stay.

Duplication and waste

[42] Given the similarity of factual issues that will need to be resolved, it is highly likely that without a stay being granted there will be a duplication in the time and cost of preparation for the parties to address matters that are common to both cases.

[43] This factor supports granting a stay.

State of advancement

[44] This factor is neutral. In both jurisdictions the litigation could reasonably be described as being in their early stages. In this Court the defendant has been excused from filing a statement of defence and, aside from monitoring progress in the proceedings in the High Court, the proceeding has not been subjected to case management.

[45] Likewise, interlocutory steps have not been taken in the High Court proceeding. Mr Bates estimated that a trial would be unlikely to be allocated before 2018; while most of the information that is necessary for trial is already available

because the judicial review proceedings required extensive preparation of affidavits, and the plaintiff has had some disclosure of documents, he was naturally reluctant to say that there would be either a limited need for interlocutory steps or that none would be required at all.

[46] While the Employment Court could accommodate case management, and a trial, earlier than 2018, I do not consider this factor to outweigh any of the others.

Multiplicity of proceedings

[47] For obvious reasons it is not desirable to be running two sets of proceedings at the same time, both of which will involve contested evidence on the same subject matter.

[48] I am satisfied that it is in the interests of justice for a stay of this proceeding to be granted, but it is also appropriate to be mindful of the concerns raised by Mr McBride about the age of this proceeding and the fact that there have been earlier periods where there has been a hiatus. Consequently the stay will be subject to conditions noted below.

Application for security for costs

[49] Wellington Girls applied for an order that Mr Speed provide security for costs and, pending payment of that security, that the proceeding be stayed. It also sought an order that in the absence of payment of that security the proceeding be dismissed. In the same application Wellington Girls asked for an order enlarging the time it has to file a statement of defence until a date 30 days following the giving of security.

[50] The basis for this application is that Mr Speed does not reside in New Zealand and is a prohibited immigrant having been deported. In addition to relying on Mr Speed's absence from New Zealand, Wellington Girls referred to the fact that he was ordered by the Authority to pay costs of \$10,000 and they have not been paid.

[51] The application did not state the amount sought as security for costs. However, Mr McBride confirmed the amount sought was \$40,000 based on an expectation that a trial in this Court would take three days.

[52] Mr Bates submitted that it was not appropriate for an order for security for costs to be made and, in any event, the amount sought by Wellington Girls was excessive in all the circumstances.

[53] The unusual feature of these applications is that they both sought a stay but for different reasons. Although Wellington Girls technically opposed the application for a stay by Mr Speed, its efforts were concentrated on attempting to obtain an order for security for costs.

[54] Whether or not the application for security for costs is granted in this Court, Wellington Girls still faces continuing litigation with Mr Speed in the High Court. He has satisfied that Court's requirements for security. In those circumstances, and having decided to grant Mr Speed's application to stay this proceeding, no useful purpose would be served at this stage in separately considering and deciding the application for security for costs in this Court. There is also the potential, although not strenuously argued by either party, that imposing security for costs in this Court might undermine the conclusion of the High Court proceeding if doing so eroded Mr Speed's ability to fund the High Court litigation.

[55] I have concluded the appropriate course to take with the application for security for costs is to adjourn it until the stay of this proceeding granted to Mr Speed is set aside.

Conclusion

[56] Mr Speed's application for an order to stay this proceeding is granted subject to the following conditions:

- (a) He is to expeditiously prosecute the High Court proceeding to its conclusion.

- (b) There is to be a telephone directions conference on the first available date after 1 November 2017 for the purposes of reviewing progress in the High Court proceeding and, if necessary, reviewing the order for stay of this proceeding.
- (c) Leave is reserved to either party to apply to review the order for stay on reasonable notice.

[57] Wellington Girls's application is adjourned.

[58] Costs are reserved.

KG Smith
Judge

Judgment signed at 12 noon on 9 June 2017