IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 64
EMPC 14/2023

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	WHANGAMATA GOLF CLUB INCORPORATED Plaintiff
AND	BENJAMIN HARWOOD Defendant

Hearing: On the papers

Appearances: R Drake, advocate for plaintiff
V Corbett, counsel for defendant

Judgment: 24 April 2023

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application for stay of proceedings)

Introduction

[1] Whangamata Golf Club Inc (the club) has brought a challenge to a determination of the Employment Relations Authority.[1]

[2] The Authority determined that on 31 December 2021, Mr Benjamin Harwood had been unjustifiably dismissed by the club for his failure to comply with its vaccination policy. It found the dismissal was procedurally unjustified in light of

[1] *Harwood v Whangamata Golf Club Inc* [2022] NZERA 693 (Member Urlich).

sch 3A of the Employment Relations Act 2000 (the Act). Schedule 3A was a health and safety provision enacted under the COVID-19 Response (Vaccinations) Legislation Act 2021 which enabled an employee's employment to be terminated if that person was unable to comply with any relevant duty as to vaccination provided by the COVID-19 Public Health Response Act 2020.[2] The Authority concluded the club fell short of discharging various obligations in sch 3A by collapsing the specified date notice (by which Mr Harwood was to be vaccinated) into the dismissal notice, meaning the club did not give reasonable notice, nor ensure all reasonable alternatives had been exhausted prior to termination.[3]

[3] The club was ordered to pay Mr Harwood remedies for his personal grievance. He was awarded compensation of $15,000 under s 123(1)(c)(i) of the Act and reimbursement of two months' wages less monies earned in that period under s 123(1)(b). The Authority dismissed Mr Harwood's application for a penalty against the club for breach of duty of good faith.

[4] The essence of the club's challenge is that the Authority erred as a matter of law in its interpretation of recently enacted sch 3A. The club noted that during its dismissal process it had been unassisted by any previous considerations of sch 3A cl 3, given the schedule was enacted on 26 November 2021, only some three weeks prior to the date the Authority said the club's process had become flawed. The club noted in contrast, the Authority had a further 13 months of information available to it in reaching its determination that the club did not have when carrying out its process. The club submitted that it acted as a fair and reasonable employer with the information it had available at the time it was required to make the decisions.

[5] For his part, Mr Harwood has also lodged a cross-challenge asserting that aspects of the Authority's reasoning in reaching the determination were incorrect as a matter of law and fact; it is also alleged that insufficient remedies were awarded.

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2 Employment Relations Act 2000, sch 3A cl 3.

3 *Harwood v Whangamata Golf Club Inc*, above n 1, at [41] and [43].

The plaintiff's application for stay

[6] On 20 February 2023, the club filed an application for stay, which would have the effect of relieving the club from paying the sums awarded to Mr Harwood until the challenges have been resolved.

[7] The club supports its application for stay by relying on several grounds. It says that the Authority has erred significantly. It says it is suffering financial hardship. This is because significant damage and disruption was caused to its business by significant weather events affecting the Coromandel region where it operates a golf course, through the periods 27–30 January 2023 and 4–7 February 2023. Substantial sections of the course facilities have been inundated by water causing damage and resulting in the temporary closure of the golf course. There are also widespread road closures in the region affecting the ability of club members and visitors to access club facilities. In addition, its funds are currently being directed to restoration of those facilities.

[8] Mr Harwood opposes the application. In summary, he asserts that there is no real justification or evidence for concluding the Authority was in error in finding the grievance was made out. Mr Harwood also says the club's financial circumstances are not as dire as it alleges. He also cites *Watson v Fell* for the proposition that difficulty in paying is different from an inability to pay.[4]

Principles

[9] When considering an application for stay, it is well established that there are a number of factors which may fall for consideration. These include:[5]

(a) whether the challenge will be rendered ineffectual if a stay is not granted;

(b) whether the challenge is brought and prosecuted for good reasons and in good faith;

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4 *Watson v Fell* [2002] 2 ERNZ 1 (EmpC) at [10].

5 *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7]; applying *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9]. See also *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

(c) whether the successful party at first instance will be affected injuriously by a stay;

(d) the effect on third parties;

(e) the novelty and importance of questions involved in the case;

(f) the public interest in the proceeding; and

(g) the overall balance of convenience.

[10] In *Bathurst Resources Ltd v L & M Cole Holdings Ltd*, the Court of Appeal referred to applications of this kind.[6] It noted that the restraint of such orders should be the least necessary to preserve the losing party's position against the prospect of the appeal succeeding. In the case of a money judgment, that would require the judgment debtor to make some concession to the existence of the judgment.[7]

The Authority's determination

[11] The challenge relates to a recently enacted provision, which has not hitherto been considered by the Court.

[12] The procedure leading up to the giving of a notice of a termination under cl 3 of sch 3A will be a key question under consideration on the challenge and the cross-challenge.

[13] Because this is a significant issue, it is necessary to outline the Authority's conclusion with regard to the statutory requirements, and their application.

[14] As a starting point, it is necessary to set out cl 3 sch 3A cl 3, which sets out a range of steps that must be taken by an employer if considering termination of an employment agreement if there has been a failure by an employee to comply with certain duties. The clause states:[8]

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6 *Bathurst Resources Ltd v L & M Cole Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341.
7 At [19].
8 Employment Relations Act 2000, sch 3A cl 3.

3 Termination of employment agreement for failure to comply with relevant duties or determination

(1) This clause applies to the following employees:

(a) an employee who has a duty imposed by or under the COVID-19 Public Health Response Act 2020 not to carry out work (however described) unless they are—

(i) vaccinated; or

(ii) required to undergo medical examination or testing for COVID-19; or

(iii) otherwise permitted to perform the work under a COVID-19 order:

(b) an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee.

(2) For the purposes of subclause (1)(b), the employer must give the employee reasonable written notice specifying the date (the specified date) by which the employee must be vaccinated in order to carry out the work of the employee.

(3) If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the COVID-19 Public Health Response Act 2020 or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—

(a) 4 weeks' paid written notice of the termination:

(b) the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.

(4) Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.

(5) A termination notice given under subclause (3) is cancelled and is of no effect if, before the close of the period to which the notice relates, the employee becomes—

(a) vaccinated; or

(b) otherwise permitted to perform the work under a COVID-19 order.

(6) Subclause (5) does not apply if cancelling the notice would unreasonably disrupt the employer's business.

(7) Nothing in this clause—

(a) prevents an employee whose employment agreement is terminated under subclause (3) from bringing a personal grievance or legal proceedings in respect of the dismissal:

(b) prevents the parties to the employment relationship from mutually agreeing—

(i) to terminate the employee's employment agreement; and

(ii) that the employer will pay the employee in accordance with subclause (3).

[15] In the determination, the Authority traversed the chronology leading up to Mr Harwood's termination. It described an initial meeting held on 2 November 2021, where club officers met with staff to update them on the vaccination situation at the club, and to encourage staff to think about their own vaccination status.[9]

[16] Then the Authority referred to a WorkSafe New Zealand COVID-19 assessment tool used to assess the risk of transmission in various work areas of the club. Mr Harwood completed such an assessment for all areas covered by his job roles – as the Director of Golf, as a professional golf coach, and in respect of his role in a retail shop undertaking sale and customer service.

[17] The Authority outlined the information provided by Mr Harwood to the club by a letter dated 25 November 2021, including his view that the risk of COVID-19 was not substantial in the circumstances and that any risk to vulnerable people could be managed under current health and safety practices. Mr Harwood asked the club to revoke the vaccination request they had made and set out a number of questions.[10]

[18] Also on 25 November 2021, a letter was sent to Mr Harwood describing the club's vaccination policy, including the view of the club that his employment would have to end on 26 December 2021 if the required proof of vaccination had not been provided, he was unable to be redeployed, or a vaccination exemption could not be obtained.[11]

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9 *Harwood v Whangamata Golf Club Inc*, above n 1, at [11].
10 At [12]–[17].
11 At [18].

[19] The Authority said that on 30 November 2021, a further letter was sent to Mr Harwood in response to his letter of 25 November 2021. The first part of the letter acknowledged the significant issues raised and set out the club's view of the impact of the soon to be introduced COVID Vaccination Certificate (CVC) requirements for businesses operating a food and beverage service.[12]

[20] The last part of the letter referred to the potential impact on Mr Harwood, including the suggestion that if he remained unvaccinated as at 3 December 2021, he could not perform his usual duties and responsibilities, he would be stood down on full pay, he could not play golf unless he took a COVID-19 test, and he would then receive four weeks' notice of dismissal which would be superseded if he became vaccinated or received a vaccination exemption.[13]

[21] On 3 December 2021, Mr Harwood was given notice of his dismissal effective on 31 December 2021. The grounds were those which had been set out in the 30 November 2021 letter.

[22] On 13 December 2021, the club updated Mr Harwood about the scope of the CVC mandate. This had altered in light of guidance and advice it had received. There would no longer be a blanket application of the mandate to all operations when those partially consisted of a food and beverage service, such as was operated by the club. Instead, different COVID procedures could apply to different operational areas. Be that as it may, the club's view was that notwithstanding the change in scope, it would not alter its policy in light of a survey of members and risk assessment which it had undertaken.[14]

[23] On 14 December 2021, Mr Harwood responded stating, amongst other things, that the club had not addressed certain proposals he had made. At that point he raised a personal grievance for unjustified dismissal.[15]

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12 At [21].
13 At [22].
14 At [24].
15 At [25].

[24] The parties attended mediation on 22 December 2021 but were unable to resolve matters. The termination thus proceeded.[16]

[25] The Authority considered the legal requirements. It concluded that Mr Harwood had been given a fair opportunity to comment on the club's proposed COVID-19 policy before it was implemented on 3 December 2021; and that it had genuinely considered documents which had been linked to Mr Harwood's letter of 25 November 2021.

[26] However, the Authority referred to cl 3(2) of sch 3A, under which the club was obliged to give Mr Harwood reasonable notice of a specified date by which he was required to be vaccinated to carry out his work; and cl 3(4) of sch 3A, which stated that before giving a termination notice, the employer was required to ensure that all other reasonable alternatives that would not lead to termination had been exhausted.

[27] The Authority concluded that the two weeks' notice given by the club would have been reasonable notice of a specified date for vaccination, given the preceding communications, but the flaw of the club's approach was that it collapsed the specified date notice into the dismissal notice. The Authority said this was incorrect, because having satisfied itself Mr Harwood could not fulfil the vaccination requirement by the specified date, the statutory scheme required it then to turn its mind to exhausting all possible alternatives to dismissal.[17]

[28] Alternatively, if it was possible for the two notice period requirements to be fulfilled concurrently, on the evidence before the Authority the club was unable to satisfy it that a high threshold had been met in respect of cl 3(4).

[29] The club's initial view was that redeployment was an unlikely option given its understanding at the time of the vaccination mandate, but it was open to discussion. The club was unable to demonstrate that it had turned its mind to further alternatives to dismissal, to the necessary high standard.[18]

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16 At [27] and [28].
17 At [41].
18 At [41]–[42].

[30] Thus the dismissal was unjustified. Remedies were awarded as noted.[19]

Analysis

[31] I turn now to consider stay principles in light of the contextual matters.

Whether the challenge will be rendered ineffectual if a stay is not granted

[32] There is no evidence to suggest that the challenge would be rendered ineffectual if a stay was not to be granted. I therefore place this consideration to one side.

Whether the challenge has been brought for good reasons and in good faith; the novelty and importance of questions involved in the case; the public interest in the proceeding; and the merits

[33] I am satisfied that the club has brought the challenge in good faith, on a matter that is both important, and potentially of public interest.

[34] Assessing the merits of an appeal is not straightforward.

[35] The critical point relates to the club giving notice of termination. It will require consideration of the approach adopted by the Authority, including whether the necessary threshold is one which can properly be described as a "high threshold". The Authority upheld the dismissal grievance on two grounds – the second being in the alternative. This perhaps reflected the Authority's acknowledgment that the notification issue is difficult.

[36] I also take into account the grounds of Mr Harwood's cross-challenge, in which he raised concerns about other aspects of the Authority's reasoning. It appears the contentions raised for Mr Harwood are brought on a non-de novo basis.

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19 At [46]–[50].

[37] He raised four main issues: whether the club was justified in considering the views of its membership when deciding to implement a vaccine policy; whether the club's mistaken understanding as to the ambit of food and beverage requirements of the CVC mandate was relevant to justification and the club's decision not to undertake an individualised role assessment; whether the notice of dismissal of 3 December 2021 was made on a flawed basis and could not be cured by the letter dated 13 December 2021; and whether the Authority's finding that there was not a breach of good faith, in part because a sincere apology had been given to Mr Harwood about the flawed vaccination policy was erroneous since Mr Harwood says he received no apology from the club. In addition, Mr Harwood said the Authority did not address his potential contractual damages claim which he says arose from a breach of the employment agreement.

[38] I also accept that the issues raised for Mr Harwood are of the same ilk as those raised for the club.

[39] That is, they are all novel and difficult matters arising from a recently enacted provision. Both parties have brought their respective challenges in good faith. The issues involved are important, and there is likely to be a public interest in the proceeding.

[40] I do not express a view as to the prospects of success for the challenge or the cross-challenge. The representatives' submissions did not analyse sch 3A, its context or the legislative history. These factors will all require careful consideration. It is premature to evaluate the merits of the opposing arguments under a new and significant provision in the absence of this material.

[41] The factors I have considered support the possibility of a stay being ordered, at least in part.

The club's financial position

[42] The financial evidence provided to the Court suggests that the club is indeed suffering adverse consequences, both to its operating income and to its operating

expenses, as a result of the significant weather events that have affected the golf course and surrounding roading systems.

[43] However, it is also clear the club has a relatively strong asset and liability position. Moreover, the Court is advised that the club is currently applying to its bank to seek cashflow assistance.

[44] Reference was made to *Watson v Fell*.[20] That case involved an application for an order fixing security for costs. In considering this issue, Judge Shaw noted a relevant factor in that context, that difficulty in paying was not synonymous with an inability to pay. She went on to find that the applicant seeking relief had not established the other party was not impecunious in the sense that he had a total inability to pay.[21]

[45] I agree that these observations are of some assistance in the present context. Although there is no doubt that the club is facing significant challenges at present, which may take some time to address, it is not "impecunious" as is alleged. As I have noted, it has a reasonable capital base.

[46] It is to be noted that in this case, the order for stay is not sought because it is perceived there would be difficulty in Mr Harwood repaying the sum involved were the challenge to succeed. For his part, Mr Harwood takes the position, as he is entitled to do, that he is prima facie entitled to the fruits of the awards made by the Authority.

Overall balance of convenience

[47] In line with the principle outlined in *Bathurst Resources*, I consider that this is a situation where the judgment debtor should make a concession to the existence of the judgment which has been obtained against it.[22]

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20 *Watson v Fell,* above n 4.
21 At [11].
22 *Bathurst Resources Ltd v L & M Cole Holdings Ltd,* above n 6.

[48] These considerations point to the possibility of part of the sum involved being paid to Mr Harwood, and payment of part of the sum involved being stayed whilst the club's challenge is resolved.

Result

[49] The application for stay is granted in part. The club is to pay to Mr Harwood a sum equivalent to the two months' wages, less earnings received, as awarded by the Authority. This sum is to be paid within 28 days of the date of this judgment. The proceeding is stayed until that payment has been made. Once paid, the balance of the Authority's award is stayed pending resolution of the challenge and cross-challenge by the Court. At that stage, both challenges can be timetabled for a substantive fixture.

[50] Costs are reserved.

B A Corkill
Judge

Judgment signed at 1.25 pm on 24 April 2023