



Employment Court of New Zealand

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Best Health Foods Limited v Berea [2021] NZEmpC 61 (3 May 2021)

Last Updated: 7 May 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 61](#)

EMPC 398/2020

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 BEST HEALTH FOODS LIMITED
Plaintiff
AND ROXANNE BEREA
Defendant

Hearing: (on the papers)
Appearances: J Gu, agent for Best Health Foods Ltd
R Berea in person
Judgment: 3 May 2021

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:

(Application for stay of proceedings)

Introduction

[1] Best Health Foods Ltd (BHFL) has challenged a determination of the Employment Relations Authority which dealt with issues arising from a termination of Ms Berea's employment with that entity, after a short period of employment.¹

[2] The challenge is brought on a non-de novo basis. BHFL must establish that the Authority erred in fact or in law.

¹ *Berea v Best Health Foods Ltd* [\[2020\] NZERA 474 \(Member Beck\)](#).

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[3] The errors which are alleged are:

- a. Having found that there was a valid 90-day period trial provision in Ms Berea's individual employment agreement (IEA), the Authority erred when it found that no notice was given under the clause.²
- b. It erred by concluding that no fair and reasonable employer could have concluded that summary dismissal on performance grounds was warranted.³
- c. It erred at the remedies stage, in particular, by not reaching a correct conclusion as to contribution, when it determined Ms Berea's conduct did not contribute to the personal grievance.⁴

[4] The Authority, having found that no notice was given, and that Ms Berea was unjustifiably dismissed from her employment with BHFL, ordered it to pay to Ms Berea:

- a. \$3,774.58 gross lost wages; and

b. \$12,000 compensation for humiliation, loss of dignity and injury to feelings.

[5] The application for stay focuses on the alleged errors made by the Authority and an assertion that BHFL is well established and has a “perfect credit history”. Mr Gu says that the BHFL and both its directors, of which he is one, will comply with any order made by the Court.

[6] Then he states Ms Berea had no work for seven months prior to being employed by BHFL. It alleges that, after termination, she was offered work at a lower pay rate. Finally, it is contended that if any money were paid to her now, it would be difficult to recover this if the challenge ultimately succeeds.

2 At [46].

3 At [54].

4 At [62]–[65].

[7] For her part, Ms Berea opposes the application for stay. She points out that BHFL does not know what sort of job she currently has and is only making assumptions about her ability to repay.

Legal framework

[8] The application is essentially one for stay of execution. The applicable principles are well known. The Court has a broad discretion which must be exercised judicially and in accordance with principles.

[9] The following factors normally fall for consideration:⁵

- a. whether the challenge will be ineffectual if a stay is not granted;
- b. whether the challenge is prosecuted for good reasons and in good faith;
- 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 the questions involved in the case;
- f. the public interest in the proceedings; and
- g. the overall balance of convenience.

Analysis

Preliminary issue

[10] Before considering the factors just outlined, it is appropriate to observe that the Court has not been assisted by the provision of affidavit evidence for BHFL in support of its application.

5 *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

[11] BHFL is bringing the application, and if it wishes the Court to consider assertions such as potential impecuniosity on the part of Ms Berea, it must at least raise an evidential foundation which would allow the Court to conclude that there is a plausible issue as to Ms Berea’s ability to repay. It has not done so. Ms Berea has not filed an affidavit either, but she is not obliged to do so. She is the respondent to the allegation. If no prima facie case is raised against her, she is not required to offer rebuttal evidence, a point recognised in her notice of opposition.

[12] I shall return to the significance of these circumstances shortly.

Conventional considerations

[13] There is no evidence that the challenge will be ineffectual if a stay is not granted. On the evidence before the Court, if BHFL were to discharge its obligation to pay Ms Berea what she is currently due, and if the challenge as to remedies were subsequently to succeed, I have no basis for concluding that Ms Berea would not discharge her responsibility to repay such sum as may be due at that point.

[14] It appears the challenge is being prosecuted in good faith. BHFL believes that it has a proper basis for asserting that notice was given, and that this impugns the subsequent findings as to unjustified dismissal, and as to remedies.

[15] BHFL says it satisfied notice obligations by stating, when it terminated Ms Berea’s employment by email, that it would pay for the next three working days, although she did not need to attend work.

[16] It says the step it took was in accordance with dicta of Judge Perkins in

Appleyard v CoreLogic NZ Ltd.⁶

[17] In that case, Judge Perkins concluded that what occurred on the particular facts was not payment in lieu of notice, but payment in lieu of the employee being required to work out the period of notice which had been properly given under the IEA.⁷

⁶ *Appleyard v CoreLogic NZ Ltd* [2020] NZEmpC 107, [2020] ERNZ 290.

⁷ At [15].

[18] This contrasted with an earlier decision of Judge Perkins, *Farmer Motor Group Ltd v McKenzie*, where he found that payment in lieu was not an alternative to providing notice, but simply an alternative to the employer requiring the employee to work a period of notice where it is given.⁸

[19] The Authority applied that decision. It found no notice was given until after Ms Berea had been dismissed.

[20] The issue comes down to a proper interpretation of the termination events. When considering that issue, I conclude, at this provisional stage, that BHFL's ground of challenge on this point is arguable.

[21] The next consideration is whether the successful party would be affected injuriously by a stay. On the face of it, I am satisfied that Ms Berea, who is entitled at this stage for the benefit of the awards which were made, would be unfairly prejudiced by non-payment.

[22] There is no issue affecting third parties.

[23] As to novelty and importance, the issue which arises in the case is one that has been considered previously and is perhaps of some interest. However, this is not a factor which supports the grant of a stay in this case.

[24] For the same reason, I do not consider that any public interest that may exist in this challenge is a factor which would support the grant of a stay.

Conclusion

[25] Standing back, I can see no good reason as to why the application for stay should succeed. Having regard to the range of factors I have considered the application is dismissed.

[26] That means the sums ordered for payment by the Authority should be paid.

⁸ *Farmer Motor Group Ltd v McKenzie* [2017] NZEmpC 98 at [28].

[27] There is no issue as to costs given the absence of representation on both sides.

B A Corkill Judge

Judgment signed at 10.45 am on 3 May 2021