



Employment Court of New Zealand

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Bracewell v Richmond Services Limited [2014] NZEmpC 172 (17 September 2014)

Last Updated: 27 September 2014

IN THE EMPLOYMENT COURT AUCKLAND

[\[2014\] NZEmpC 172](#)

ARC 91/13

IN THE MATTER OF a challenge to a determination of
 the
 Employment Relations Authority

AND IN THE MATTER of an application for stay of
 execution

BETWEEN JAN SUSAN BRACEWELL Plaintiff

AND RICHMOND SERVICES LIMITED
 Defendant

Hearing: (on the papers filed 29 July, 19 August, 26 August
 and 2
 September 2014)

Counsel: Dr J Cook, agent for the plaintiff
 P Shaw, counsel for the defendant

Judgment: 17 September 2014

JUDGMENT OF JUDGE B A CORKILL

[1] This judgment relates to an application for stay of execution of orders made in the substantive judgment of the Court which was issued on 1 July 2014.¹ It related to a challenge brought by the plaintiff to set aside the determination of the Employment Relations Authority (the Authority) which had concluded that the plaintiff and her representative should return the clinical records of a patient to the defendant.² By way of challenge she asserted that she had the lawful right to retain and disclose confidential documents as evidence of possible criminal negligence for the purposes of an independent investigation; she also sought compensation for “stress, anxiety, and to cover advocacy costs”. In addition she challenged the costs

determination which was made by the Authority.³

¹ *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111.

² *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 481.

³ *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 519.

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[2] The defendant brought a cross-challenge. It sought an order that Ms Bracewell return all confidential information to it, and a permanent injunction restraining her from disclosing or using any confidential information. It also sought a penalty for breaches of a confidentiality clause in the relevant employment agreement.

[3] The challenge failed and the cross-challenge succeeded. The Court made a compliance order, orders of injunction, and directed Ms Bracewell to pay to the Court a penalty in the sum of \$2,000. It also stated that costs should follow the event. A direction was made for any application and evidence to be filed, by Richmond Services Limited (Richmond); and for Ms Bracewell to file and serve any submissions and evidence in response.⁴

[4] Ms Bracewell has filed an application for leave to appeal the Court's

judgment. It is understood that application is yet to be heard.

[5] Ms Bracewell has also applied to this Court for "a stay of proceedings", which I infer is a request for the Court to stay the orders it made.

[6] These were:

[144] A compliance order is made directing Ms Bracewell not to use or disclose Richmond's confidential information; this order is to take effect from the date of this decision.

[145] Injunctions are ordered also to take effect from the date of this decision:

a) An order of mandatory injunction that Richmond's confidential information in respect of any client is to be returned to it. Because Client A's confidential information is held by the Court, the Registrar is directed to return the sealed envelope of documents to Richmond 28 days after the date of this decision.

b) Ms Bracewell and any agent of hers is ordered not to directly or indirectly use or disclose any of Richmond's confidential information, including any information relating to its clients.

c) If she has not already done so, RR is directed to return all confidential information of Richmond, to Richmond.

[146] An order of non-publication is made in respect of any confidential information which has been or is held by Ms Bracewell or any agent of hers;

4 Bracewell v Richmond Services Ltd, above, note 1.

this order will include the confidential information relating to Client A as recorded in Ms Bracewell's brief of evidence and in her submissions; and in the handwritten notes she and her agent made when examining the content of the sealed envelope held by the Court.

[147] The court file may be searched only with the leave of a Judge.

[148] Ms Bracewell is to pay to the Court a penalty in the sum of \$2,000. [149] Ms Bracewell is to pay Richmond costs in respect of the Authority

proceeding in the sum of \$3,450, inclusive of GST.

[7] The essence of the application for stay, as contained in the notice of application and in Ms Bracewell's subsequent submissions, is that this Court reached incorrect conclusions. Ms Bracewell's position is summarised by the following statement in her application:

I therefore submit that the defendant's breaches of employment (court) law, and the court's misuse of the Evidence Act and subsequent factual/juridical misinterpretations and misjudgements represent a breach of my rights under employment (court), health, criminal, and common law, and thus, a severe miscarriage of justice that has denied my right to natural justice and fair hearing. It is for this reason that I am applying for leave to appeal the employment court findings in this case, and therefore seek a stay of execution of the court's judgment until this application and/or appeal has been heard.

[8] The proposed grounds of appeal are elaborated on in the submissions which were subsequently filed.

[9] Notice of opposition has been filed for Richmond. The grounds of opposition are:

a) The application for leave to appeal was brought out of time; leave to extend time has not been filed, and no explanation for the failure to bring it within time has been provided.

b) The application for leave to appeal is lacking in merit. It relates to questions of fact only and is not of general or public importance.

c) Richmond has successfully pursued the matter in the Authority and the

Employment Court, and is entitled to the judgment.

d) A third party will be detrimentally affected if the stay is granted.

Richmond's submissions develop each of these points.

Legal principles

[10] The principles relating to the granting of a stay pending an appeal are well known. They were conveniently summarised by Chief

Judge Goddard in *New Zealand Post Primary Teachers Association v Attorney-General (No 3)* where the Court referred to the following four principles:⁵

a) If no stay is granted, will the applicant's right of appeal be rendered

nugatory?

b) Will the successful party be injuriously affected by a stay?

c) The bona fides of the applicant as to the prosecution of the appeal. d) The novelty and importance of the question involved.

Discussion

[11] The first issue relates to precisely what orders it is in respect of which

Ms Bracewell seeks a stay.

[12] The first category of orders made by the Court is the compliance order directing Ms Bracewell not to use or disclose Richmond's confidential information, and the orders of injunction.

[13] Turning to the monetary orders, Ms Bracewell was ordered to pay to the Court a penalty in the sum of \$2,000. That amount has been paid to the Court, so that there is no outstanding issue in relation to it.

[14] The Court ordered Ms Bracewell to pay costs in respect of the Authority proceeding in the sum of \$3,450; I have no evidence as to whether or not that sum has been paid, but err on the side of caution and assume it has not.

Contemporaneously with the issuing of this judgment, the Court has issued a costs

5 *New Zealand Post Primary Teachers Association v Attorney-General (No 3)* [\[1991\] NZEmpC 89](#); [\[1991\] 3 ERNZ 708](#) at

709.

judgment⁶ the effect of which is that Ms Bracewell has been ordered to pay Richmond the sum of \$12,906. An application for stay can properly be considered in relation to the cost orders.

[15] The final category of orders is the non-publication order in respect of any confidential information, and the order that the Court file may be searched only with leave of a Judge.

[16] Against that background, I consider the four criteria identified above. The first relates to the question of whether, if no stay was granted, the applicant's right of appeal would be rendered nugatory. With regard to the first category of orders the effect of not granting a stay will simply mean that the compliance order and the orders of injunction will remain in place until such time as the Court of Appeal may determine otherwise. On the other hand an order of stay would permit Ms Bracewell to utilise the confidential information. No proper reason has been advanced as to why she should be permitted to do so; the assertion that the decision of this Court is wrong is not a sufficient reason. Accordingly the status quo must be maintained.

[17] The only caveat to the foregoing relates to the confidential information relating to Client A held by the Registrar. It is appropriate that the Registrar retain the sealed envelope of documents pending the grant of leave if the Court of Appeal so orders; and if it does, until such time as the appeal has been resolved. I order a stay of the direction relating to the return of the sealed envelope of documents to Richmond until further order of the Court.

[18] Subject to that order, I do not consider that Ms Bracewell's appeal rights in respect of the compliance order and orders of injunction would otherwise be rendered nugatory.

[19] I reach a similar conclusion with regard to the order of non-publication, and that the court file may be searched only with leave of a Judge. I do not accept that Ms Bracewell's appeal rights will be rendered nugatory in the absence of a stay of

these orders.

6 *Bracewell v Richmond Services Ltd* [\[2014\] NZEmpC 171](#).

[20] Turning to the financial orders, Ms Bracewell has provided no information relating to her financial circumstances and/or whether any prejudice would be occasioned, if there was no order of stay of execution of the costs orders. However, two factors suggest that a stay of the financial orders is appropriate:

a) The first is that I accept Ms Bracewell opposed Richmond's application for costs essentially on the same grounds as she has raised in her application for leave to appeal. Were the Court of Appeal to grant leave to appeal, and subsequently to allow an appeal, that might have implications for the orders for costs made in this Court. That factor points to the necessity of staying the costs orders in the meantime.

b) Ms Bracewell is not represented by a lawyer; accordingly it would be inappropriate to draw, from the fact that she has not referred in her application or submission to financial issues, the inference that she is unconcerned about them.

[21] Accordingly I order a stay of execution of the costs orders.

[22] I have considered the remaining principles that should be considered on an application for stay, and comment:

a) As to whether any party would be injuriously affected by a stay, I hold for the reasons already discussed that were the compliance order and the orders of injunction stayed, prejudice would be caused not only to Richmond, but also to Client A for the reasons outlined in the substantive judgment. Consideration of this factor strongly supports a conclusion that those orders should not be stayed.

b) Given the conclusions already reached, it is unnecessary to make any finding as to Ms Bracewell's bona fides in prosecuting the appeal, or as to the novelty and importance of the intended questions.

[23] Richmond has also raised an issue as to whether the notice of application for leave to appeal to the Court of Appeal was filed in time. Given the conclusions already reached I do not need to consider that issue further.

Summary

[24] There will be a stay of the following orders, until further order of the Court:

a) The order that the Registrar return the sealed envelope of documents to Richmond.

b. The order that Ms Bracewell is to pay Richmond's costs in respect of the Authority proceeding in the sum of \$3,450.

c) The order that Ms Bracewell pay Richmond costs in respect of the Court proceedings in the sum of \$12,906.

[25] Richmond seeks costs with regard to this application in the sum of \$1,500 plus GST, being the actual costs incurred. Applying the principles outlined in the Court's contemporaneous costs judgment,⁷ and having regard to the fact that Ms Bracewell has had partial success on this application, I consider it appropriate for her to pay 50 per cent of Richmond's costs in the sum of \$862.50 inclusive of GST. Payment of this sum is also stayed until further order of the Court.

B A Corkill

Judge

Judgment signed at 9.30 am on 17 September 2014

7 See paras [7]-[17] of *Bracewell v Richmond Services Ltd* [2014] NZEmpC 171.

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