

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 257A/09
5141643

BETWEEN CRAIG BUSCH
 Applicant

AND ZION WILDLIFE GARDENS
 LIMITED
 First Respondent

AND

 ZION WILDLIFE SERVICES
 LIMITED
 Second Respondent

Member of Authority: Yvonne Oldfield

Representatives: Daniel Erickson and Kate Ashcroft for applicant,
 Tony Drake and Laurene Holley for respondents

Submissions received: 29 and 31 July from Applicant
 30 July from Respondent

Determination: 31 July 2009

**REASONS FOR DETERMINATION OF THE AUTHORITY ON AN
APPLICATION FOR STAY OF PROCEEDINGS**

Employment Relationship Problem

[1] In a determination dated 31 July 2009 I declined the applicant's application for stay of proceedings or suspension of the Authority's investigation. As indicated would be the case, full reasons for that determination now follow.

[2] Some background is required on the history of the proceedings. This employment relationship problem was first lodged on 3 November 2008 as a personal grievance of disadvantage. Subsequently Mr Busch was dismissed. Interim reinstatement was sought by the applicant and declined in a determination dated 9 December 2009. The decision to decline interim relief was influenced by the fact that three days in late January 2009 had been set down for the investigation of the substantive matter.

[3] Upon returning from the Christmas break Counsel for the applicant (at that time Mr Wayne Peters) sought an adjournment on the basis that he had been unable to take instructions. It was granted. In March 2009 the Authority received an amended statement of problem and in April 2009 the respondents furnished a statement in reply to it, extending the issues for investigation with a counterclaim based on alleged breaches of the employment agreement.

[4] Mr Busch subsequently instructed Mr Erickson's firm. A three day investigation meeting was set down in late May to deal with both the personal grievance and the counterclaim. It was adjourned on its second day in recognition of the sudden and tragic death of an employee of the respondent.

[5] A further amended statement in reply was then lodged on 15 July 2009, setting out further particulars of loss associated with a damages claim and claim for a compliance order. No response has been received to this as yet. Instead, on 29 July, Mr Erickson lodged a memorandum withdrawing the personal grievance and seeking the stay of proceedings in relation to the counterclaim.

Issues

[6] In his memorandum of 29 July Mr Erickson advised that Mr Busch no longer wished to pursue a claim for reinstatement, or indeed his dismissal grievance, having decided instead to pursue a High Court claim "for reinstatement of his shareholdings and directorships."

[7] Mr Erickson went on to say that Mr Busch considered that the causes of action in the High Court proceeding overlapped the subject matter of the Respondents' counterclaim to such an extent that the remaining aspects of the matter before the Authority should be stayed.

[8] In 2008, prior to lodging his employment relationship problem in the Authority, Mr Busch had already filed proceedings in the Whangarei High Court against a number of respondents. Mr Erickson attached to his memorandum a copy of the second amended statement of claim in those proceedings (dated 24 July 2009.) The first defendant¹ in those proceedings is the first respondent in this employment relationship problem: Zion Wildlife Gardens Ltd. The second respondent in these proceedings is not party to the High Court proceedings.

[9] The counterclaims in the Authority relate to three separate allegations of breach. The respondents allege that while employed by the first respondent the applicant breached the contract of employment causing financial loss to his employer:

- i. by improperly cancelling all "Big Cat Encounter Tours;"
- ii. through actions and threats which required additional security measures for the first respondent, causing expense, and
- iii. by failing to return vehicles and other property which belonged to the respondents.

[10] The respondents seek damages for the losses sustained in relation to the breaches and a compliance order for the return of the vehicles and property identified in the third alleged breach (where the items as set out in an attached schedule, remain in Mr Busch's possession.)

¹ In total the High Court proceedings involve five other defendants.

[11] The issue for determination here is whether the proceedings in the High Court deal with substantially the same questions, such that to continue with the Authority investigation would lead to unnecessary duplication of proceedings.²

Submissions

[12] Mr Busch says that both the claim relating to the Big Cat Encounter Tours and the claim relating to property in Mr Busch's possession overlap with the claim now before the High Court, where he pursues several causes of action related to alleged breaches of agreements in 2006 and 2007 between him and the defendants including the first respondent. (The 2006 agreement is relevant to the present proceedings in that it contained a provision that Mr Busch would enter into an employment agreement.) My attention was drawn to the following extracts from the second amended Statement of Claim in the High Court:

"22. ... In order to give commercial and zoological effectiveness to the 2006 agreement the following terms were necessarily implied:

...

(iii) Craig Busch would have reasonable freedom, and a sufficient allocation of resources (including the provision of vehicles, tools, equipment and finances) to develop the "Lionman" brand and pursue filming and conservation initiatives involving the park..."

[13] The pleadings go on to refer to the defendants having unreasonably required the return of equipment and tools in the possession of Mr Busch and/or belonging to him.

[14] Among the relief sought by Mr Busch in the High Court are the following orders:

² *Dark v Williams & Kettle Limited AC 19/04, 26 March 2004, Colgan J.*

- i. an order for reinstatement as sole shareholder in the first respondent;
- ii. an order to restrain the defendants from “*interfering with or taking possession of any property in the control of Craig Busch*” and
- iii. damages.

[15] Mr Busch says that the issue of the cancellation of the tours falls to be considered in terms of the applicant’s statutory role as MAF approved operator and as such, is capable of review only in the High Court. In addition he says it cannot be considered in isolation from the wider issues associated with the 2006 and 2007 agreements, matters which lie outside the scope of the Authority.

[16] Mr Busch also argues that a stay will not prejudice the respondents since the subject matter of its counterclaim before the Authority could also form the basis of a counterclaim before the High Court.

[17] Similarly with the counterclaim for return of the property he notes that this could form the basis of a claim in tort in the High Court. He says that a key element of the claim will be the issue of who actually owns it, question which he says are best dealt with in the High Court.

[18] For the respondents, Mr Drake argues that:

- i. a counterclaim continues as an independent proceeding when the plaintiff’s proceeding is discontinued;
- ii. the party seeking a stay bears the onus of establishing proper grounds for it;
- iii. the present application does not disclose such grounds;

- iv. the legal and factual issues in this matter are not substantially duplicated by those in the High Court since the latter focus on the interpretation of two commercial contracts (the 2006 and 2007 agreements) and the present case does not involve a tort action;
- v. the timing of the stay allows the inference that it is a tactical device, and
- vi. a stay would result in a serious injustice to the respondents.

Determination

[19] I start by saying that the first two premises advanced by the respondents (relating to continuance and to the onus) are accepted. The default position, as it were, is for the proceedings to continue.

[20] Two points can be disposed of quickly. The second respondent is not party to the High Court Proceedings and cannot be affected by any duplication. There would appear, therefore, to be no basis for stay against the second respondent. As well the applicant has not said how the claim relating to security expenses is addressed in the High Court proceedings or why it should not proceed. That counterclaim, also, cannot be stayed.

[21] In relation to the issue of the Big Cat Encounter Tours, I accept that the scope of the licensed operator's role may be relevant to the issue whether there was any breach associated with the decision to cancel them. The scope of that role is also likely to come up in the High Court proceedings. However, the question of whether Mr Busch breached his obligations to the first respondent will not be resolved by the High Court proceedings as it will not need to be addressed in order to decide whether to reinstate him as sole shareholder of the first respondent. (I note that it is trite that a sole shareholder may also be an employee of his or her own company.)

[22] In addition I note that I do not accept that a position with statutory responsibilities falls outside of the scope of this Authority; employees who hold such positions are frequently party to proceedings here.

[23] As for the relief sought to restrain the defendants from “*interfering with or taking possession of any property in the control of Craig Busch*” this is so broad that I am unable to relate it to the counterclaim. It has not been identified which if any of the items on the respondents’ schedule are being referred to. In relation to this point it cannot be said that the onus has been made out because there is no way of knowing if the same items are in dispute.

[24] To come back to what I indicated at the outset of this determination, I consider the central issue here to be whether the proceedings in the High Court deal with substantially the same questions, such that to continue with the Authority investigation would lead to unnecessary duplication of proceedings.

[25] While some of the same background will be traversed in the two sets of proceedings, the High Court proceedings will not address the issues which are before the Authority. These are the questions about whether the employment agreement was breached, and whether the respondents are entitled to relief.

[26] Unlike the respondents in *Dark v Williams & Kettle Limited*³ the respondents in this case have not embarked on concurrent proceedings themselves. In the event of a stay, should they wish to pursue their claims, they would be required to start all over again with fresh proceedings in the High Court based on actions in tort. In these circumstances it cannot be said that the respondents would not be prejudiced by a stay.

[27] I am not satisfied that the proceedings in the High Court deal with substantially the same questions as those which are before the Authority and I do not consider that to continue with the Authority investigation would lead to duplication of

³ AC 19/04, 26 March 2004, Colgan J.

proceedings. I note also the need to progress this matter which has had an inordinately long history in the Authority.

[28] For these reasons the application for stay has been declined.

Costs

[29] The issue of costs is reserved.

Yvonne Oldfield

Member, Employment Relations Authority.