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Caffe Coffee (NZ) Limited v Farrimond [2015] NZEmpC 221 (10 December 2015)

Last Updated: 15 December 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 221](#)

EMPC 198/2015

IN THE MATTER OF an application for a stay of proceedings

BETWEEN CAFFE COFFEE (NZ) LIMITED Plaintiff

AND SUNE FARRIMOND Defendant

Hearing: (on the papers filed on 5, 10, 17, 20 November and 1 December 2015)

Counsel: D Clark, counsel for the plaintiff

C Patterson, counsel for the defendant

Judgment: 10 December 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

[1] This judgment resolves an application brought by Caffe Coffee (NZ) Limited (Caffe Coffee) for a stay of a costs order made in a determination of the Employment Relations Authority (the Authority).¹

[2] The Authority in its substantive determination dismissed an application for a permanent injunction and reserved costs.² Mr Farrimond's subsequent application stated that his actual costs were \$49,003.29; he sought recovery of two-thirds of that sum. The Authority held that the appropriate starting point was the Authority's notional daily tariff, which for a hearing of two days provided a starting point of

\$7,000. The Authority rejected a submission on behalf of Caffe Coffee that principles relating to Calderbank offers do not apply in the Authority. After

considering Calderbank offers made by each party, the Authority determined that the

¹ *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZERA Auckland 328 (costs).

² *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZERA Auckland 186 (substantive).

CAFFE COFFEE (NZ) LIMITED v SUNE FARRIMOND NZEmpC AUCKLAND [\[2015\] NZEmpC 221](#) [10

December 2015]

defendant's offer was clear as to its terms and allowed a reasonable time for

acceptance. Then the Authority stated:³

Given [Mr Farrimond's] *Calderbank* offer gave [Caffe Coffee] the remedies it unsuccessfully sought from the Authority, I take the view it unreasonably rejected the offer made and could have readily settled. Keeping in mind costs awards in the

Authority are to be moderate, the daily tariff should be increased to \$7,000.

[3] Further factors were then considered and the Authority concluded:4 costs could not be used as a form of punishment or as approval of the plaintiff's behaviour;5 although Caffe Coffee had been successful with a breach application the Authority had not been persuaded to award a penalty so that no adjustment should be made in respect of this factor;6 and the daily tariff encompasses costs so that no further allowance should be made to reflect costs incurred when attempting to settle.7

The Authority concluded that Caffe Coffee should pay Mr Farrimond \$14,000 towards his legal costs.8

[4] The application for stay is made by Caffe Coffee on the following basis:

- the costs decision is wrong in law;
 - it failed to apply properly the relevant authorities as to costs awarded in the Authority;
 - if no stay was granted and the costs were paid any successful challenge may be rendered nugatory;
- Mr Farrimond would not be injuriously affected by the stay;
- the challenge was being prosecuted on a bona fide basis; and

3 At [14].

4 At [8].

5 At [15].

6 At [16].

7 At [17].

8 At [18].

- the issues arising from the challenge were important, relating as they do to the scope of preparatory steps of departing employees entitled to take prior to the determination of his/her employment.

[5] The application is opposed for Mr Farrimond on the following basis:

- Whilst a de novo challenge has been brought in respect of the costs determination, no application has been made for an order quashing that determination;
- Caffe Coffee has accepted that it is liable in any event to pay costs on a tariff basis at the daily rate of \$3,500;
- The costs decision is not wrong in law and nor did the Authority fail to properly apply the relevant authorities;
- It was not established that a payment of costs would render any successful challenge nugatory;
- Mr Farrimond is entitled to the fruits of the order made in his favour.

Legal principles

[6] In *North Dunedin Holdings Ltd v Harris* the Court stated: 9

[5] The starting point must be s 180 of the Act:

180 Election not to operate as stay

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.

[6] It is clear from this provision that the orders of the Authority remain in full effect unless and until the Court sets them aside. The defendants are entitled to enforce those orders unless a stay of proceedings is granted. It follows that the plaintiffs are asking the Court to exercise its discretion to intervene in what is a perfectly lawful enforcement process.

[7] The discretion conferred by s 180 is not qualified by the statute but must be exercised judicially and according to principle. I note two key principles. There must be evidence before the Court justifying the

9 *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118.

exercise of the discretion. The overriding consideration in the exercise of the discretion must be the interests of justice.

[7] In *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*,¹⁰

Hammond J cited with approval the statement of Gault J in *Duncan v Osborne*

Buildings Ltd where it was said that:¹¹

In applications of this kind it is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful. Often it is possible to secure an intermediate position by conditions or undertakings and each case must be determined on its own circumstances.

[8] This Court has often been assisted by considering such factors as:¹²

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

ineffectual;

(b) The novelty and importance of the questions involved in the case; (c) The public interest in the proceeding;

(d) Whether the challenge is brought and prosecuted for good reasons, in good faith;

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

(f) The effect of third parties;

(g) The overall balance of convenience;

[9] This range of factors provides a convenient basis for analysing the various submissions made for the parties in this case.

¹⁰ *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; (1999) 13 PRNZ 48 (HC) at

[8].

¹¹ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

¹² See *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

Discussion

If no stay is granted, will the appellant's right of appeal be ineffectual?

[10] Mr Clark, counsel for Caffe Coffee, submits that if both challenges are successful and if costs are then awarded in the Employment Court, the company will be left in a position where it will have to recover from Mr Farrimond such costs as have been paid to him. He submits that whilst this may arguably not render the challenges nugatory, it would impose upon the parties a difficult and perhaps impractical situation which could otherwise be avoided. He went on to submit that no evidence had been provided by Mr Farrimond as to his financial position so that there is uncertainty as to the ability of Mr Farrimond to repay any money if Caffe Coffee succeeds on its challenge.

[11] Counsel for Mr Farrimond, Mr Patterson, submits that the onus is on Caffe Coffee to put forward evidence justifying the granting of the indulgence sought, and that it has failed to do so. He goes on to argue that if the stay were to be granted, not only would Mr Farrimond be denied the fruits of the costs determination, but he would be exposed to a risk that the costs may not be able to be paid by Caffe Coffee in due course. Further, if Caffe Coffee's challenge were to fail, it would be Mr Farrimond who would face the difficulty of attempting to recover not only the amount of the costs determination, but also any costs subsequently awarded.

[12] I accept the submission that Caffe Coffee has an onus which it must discharge on the question of whether its right of challenge would be rendered ineffectual if no stay were granted. No information has been placed before the Court to satisfy it that Mr Farrimond would be incapable of repaying in due course the amount ordered by the Authority to be paid. That said, it is apparent that Mr Farrimond has had, and will continue to have, his own significant cost liabilities. Against that background it is reasonable to conclude that repayment of \$14,000 could be onerous.

[13] I also accept the submission that a related issue is whether Caffe Coffee has the ability to meet its obligation to pay costs. Whilst a profit and loss statement has been produced, there is no statement of assets and liabilities or other financial statements which would provide a complete picture as to Caffe Coffee's position.

[14] However, this issue is one which would be dealt with if an order of stay was granted subject to payment into Court of the sum involved. I shall return to this point later.

The novelty and importance of questions involved in the case/ the public interest in the proceedings

[15] Those factors require an evaluation as to the basis of Caffe Coffee's challenge to the Authority's costs order. Two potential grounds are raised; the first is not specifically pleaded but was raised in Mr Clark's submissions.

[16] It is to the effect that if the challenge to the substantive determination succeeds, the Authority's costs determination could no longer stand. It is necessary, therefore, to consider the grounds of the substantive challenge, whether there is a prospect of the Authority's costs order being imperilled, and if so, whether these raise significant issues.

[17] Mr Clark says that the challenge will focus on what are "lawful preparatory steps" where there are express terms of an employment agreement preventing such steps. It is submitted that a related issue is whether it can be established that Mr Farrimond has used confidential information in breach of the requirements of the employment agreement after his termination of employment. It will be contended for Caffe Coffee that the Authority reached an incorrect conclusion on both issues, and that these are important and significant matters.

[18] For Mr Farrimond, it is submitted that the challenge is relatively straightforward in that it involves a proper interpretation of the employment agreement, and then an application of the obligations of the agreement so construed to the facts; and that these issues are not novel.

[19] It appears that the challenge will focus on the factual circumstances which occurred, both before and after Mr Farrimond's termination. It is difficult to assess these at this interlocutory stage.

[20] I was recently required to consider the issue of disclosure for the purposes of the present proceeding, as a result of which I directed disclosure of further documents.¹³ The short point is that for so long as the process of disclosure is incomplete, it is not currently possible to attempt to assess the relative strengths and weaknesses of the parties' case with any precision.

[21] All that can be said for the purposes of the present application is that the substantive challenge is arguable, and that it raises issues which are important for both parties. On the information before the Court, I do not consider the challenge raises issues which could be characterised as novel.

[22] Were Caffe Coffee's challenge to the substantive determination to succeed, the effect of [s 183\(2\)](#) of the [Employment Relations Act 2000](#) (the Act) would be to set aside the decision of the Authority, and the decision of the Court on the matter would stand in its place. It is likely that this would mean that the basis for the order for costs made in the costs determination could also require review. It would be artificial to proceed on any other basis. I do not consider that the absence of a specific pleading to this effect is fatal at least at this stage.

[23] The second ground raised for Caffe Coffee is that the costs determination of the Authority is wrong. Mr Clark submits that the Authority doubled the notional amount generally awarded in respect of costs, so that it is necessary to examine the Authority's decision to increase costs on the basis of Mr Farrimond's Calderbank letter. Counsel argues that although the issue of Calderbank letters has been argued previously, to double the notional rate was beyond what could be considered reasonable in the circumstances.

[24] Mr Patterson submits that it is difficult to see that this aspect of Caffe

Coffee's challenge is likely to raise any new or novel issues of law which have not

previously been long settled by the Court.

¹³ *Caffe Coffee (NZ) Ltd v Farrimond* [\[2015\] NZEmpC 208](#).

[25] I accept the submission made for Mr Farrimond; the Court of Appeal considered this issue in *Bluestar Print Group (NZ) Limited v Mitchell*.¹⁴ This Court subsequently considered Calderbank issues with regard to costs in the Authority in subsequent cases such as *Mattingly v Strata Title Management Limited*,¹⁵ and the issue was revisited by a full Court recently in *Fagotti v Acme & Co Limited*.¹⁶

[26] While the extent of the uplift from the Authority's starting point is arguable, I do not consider the challenge will require resolution of a significant legal issue, although the point is likely to be significant for both parties.

[27] I am satisfied that each of the two challenges are arguable, and that they raise important issues for both parties; they are not, however, novel. This conclusion suggests that an order of stay could be appropriate, but it is not determinative of the application.

The effect on third parties

[28] Neither party has submitted that this application has implications for any third party.

Whether the challenge is brought and prosecuted for good reasons and in good faith

[29] My earlier consideration of the merits leads to a conclusion that the challenge is being brought for appropriate reasons.

[30] The substantive challenge is scheduled to commence on 22 February 2016. Pre-hearing matters have been fully timetabled. All interlocutory directions have been complied with to this point.

[31] It is my assessment that the challenge to the substantive determination and to the costs determination are both being brought and prosecuted for good reason and in

¹⁴ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

¹⁵ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15, [2014] ERNZ 1 at [25]- [29].

¹⁶ *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [109].

good faith; and that these are factors which suggest an order for stay could be ordered.

Whether the successful party at first instance will be effected injuriously by a stay

[32] Mr Clark submitted that no evidence had been provided by Mr Farrimond to suggest he would be affected by the stay. In response Mr Patterson submits that staying the costs determination will prejudice Mr Farrimond because he will be denied payment of the costs which had been awarded in his favour.

[33] Absent a stay order, Mr Farrimond is indeed entitled to the fruits of the costs award. The filing of a challenge does not operate as a stay. This is normally a factor which tells against the grant of an order for stay. The significance of this point is, however, mitigated by the proximity of the fixture for the substantive hearing.

Overall balance of convenience

[34] Standing back and evaluating the above factors – particularly the proximity of the fixture – I have concluded that although the granting of an order for stay will preclude Mr Farrimond from receiving the award of costs made in his favour by the Authority, there is sufficient merit in this application to grant an order for stay subject to a condition that Caffe Coffee pay the sum involved into Court. That will provide some security for Mr Farrimond in due course if the costs challenge is unsuccessful.

[35] Accordingly, providing the sum of \$14,000 is paid by Caffe Coffee to the Registrar of the Employment Court within 14 days of the date of this judgment, there will be an order of stay of the costs order made by the Authority on 20 October 2015.

[36] This order is to continue until the parties agree otherwise, or until further order of the Court.

[37] Costs are reserved.

B A Corkill

Judge

Judgment signed at 2.20 pm on 10 December 2015