Employment Court of New Zealand

Cronin-Lampe v Minister of Education [2024] NZEmpC 39 (7 March 2024)

Last Updated: 12 March 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU
[2024] NZEmpC 39
ARC 55/2013 ARC 79/2013 ARC 48/2014
ARC 25/2014

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
AND IN THE MATTER OF	an application for stay of execution and proceedings
BETWEEN	KATHLEEN CRONIN-LAMPE First Plaintiff
AND	RONALD CRONIN-LAMPE Second Plaintiff
AND	MINISTER OF EDUCATION (IN RESPECT OF THE MINISTRY OF EDUCATION) Defendant

Hearing:	On the papers
Appearances:	T Braun, counsel for plaintiffs B Heenan and L Jenkins, counsel for defendant
Judgment:	7 March 2024

INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE B A CORKILL

(Application for stay of execution and proceedings)

KATHLEEN CRONIN-LAMPE v MINISTER OF EDUCATION (IN RESPECT OF THE MINISTRY OF EDUCATION) [2024] NZEmpC 39 [7 March 2024]

Background

[1] This judgment considers whether the fixing of costs should be stayed.

[2] In my judgment of 5 December 2023, I awarded damages against the then defendant; costs were to be considered under a timetable which I established.1

[3] On two subsequent occasions, counsel for the parties sought a variation to that timetable. More latterly, after considering a memorandum filed on 23 January 2024, I approved a timetable as requested by the parties wherein the plaintiffs would file their costs documents by 12 February 2024, the defendant by 11 March 2024, and the plaintiffs in response by 1 April 2024.

[4] The variation was sought because relevant counsel had been unavailable for some parts of January 2024; and Melville High School (MHS) would close and cease to be established on 27 January 2024, with the Ministry of Education assuming all assets, debts and liabilities on 28 January 2024, all of which gave rise to apparent complications.

[5] On 12 February 2024, the plaintiffs filed and served their memorandum as to costs. They sought an award of costs and disbursements of up to $478,725.50, which included costs with regard to an Employment Relations Authority investigation that had been successfully challenged by the plaintiffs.

[6] On the same day, the Minister of Education gave notice of an application to be substituted as defendant in place of the Board of Trustees of MHS.

[7] Ms Heenan, counsel for the defendant, stated in support that on 29 May 2022, notice had been given under s 199(3) of the Education and Training Act 2020 that MHS would close on 27 January 2024. The legal consequence of this step was that the Board would thereby be treated as having been dissolved on that date, and that "all

1. *Cronin-Lampe v The Board of Trustees of Melville High School (No 2)* [2023] NZEmpC 221 at [461].

assets, liabilities, and debts that the board had immediately before dissolution must be treated as assets, liabilities, and debts of the Minister."2

[8] In short, from the close of 27 January 2024, the Crown became responsible for debts and liabilities of the school as well as the conduct of any litigation it had been involved in, including any possible appeal.

[9] Ms Heenan stated that an application for leave to appeal would have been due under the applicable rules by 2 January 2024, but this fell prior to the Minister of Education assuming any legal rights, duties and responsibilities. Accordingly, the Minister had filed an application for leave to appeal and for an extension of time to seek leave on 29 January 2024, being the first working day on which the Crown assumed relevant rights and liabilities.

[10] There was no opposition to the Minister being substituted as the defendant. In a minute dated 27 February 2024, I directed that such an order was plainly appropriate, and it was accordingly granted.3

[11] In addition to the application for substitution, the Minister also sought the following:

> (a) A stay of execution of the award of damages which may be impacted by a wholly or partially successful challenge by the Minister against the Court's substantive judgment. It was stated that the stay was sought in respect of the balance of the judgment sums, totalling $1,435,996.50. being $1,792,317 less the amount of $356,320.50 which had already been paid by the defendant to the plaintiffs on 8 February 2024. That partial payment was said to be in recognition of the orders made in respect the plaintiffs' medical expenses, a payment for hurt and humiliation that would have been awarded for the personal grievances as specified by the Court,4 and a sum equivalent to one year's lost

2 Education and Training Act 2020, s 199(6).

3 *Cronin-Lampe v Minister of Education* ARC 55/2013, 27 February 2024 (Minute) at [2].

4 *Cronin-Lampe v The Board of Trustees of Melville High School (No 2)*, above n 1, at [295]–[297].

income as described in the judgment for the period April 2013 to March 2014, together with interest thereon. The partial payment as to lost income was said to be without prejudice to the defendant's appeal rights.

> (b) A stay in respect of the proceedings in respect of determining costs.

[12] On 26 February 2024, Mr Braun, counsel for the plaintiffs, filed a notice of opposition to the defendant's application, which relevantly opposed the application for stay of execution, and stay of the proceedings for determining costs.

The application for stay in respect of costs

[13] Because the timetable for the filing of submissions by the defendant as to costs was due, on 27 February 2024 I issued a minute dealing with the position concerning the fixing of costs. My minute dealt only with the question of whether the Court should proceed to resolve the timetabled costs issues, not whether there be an order for stay of execution of any such award.

[14] When an application for leave to appeal is brought, it is possible to fix the quantum of costs notwithstanding that application. In my minute I said that the benefit of such an approach is to ensure that costs could be considered in a timely way and with reasonable proximity to the substantive hearing to which the application relates.

[15] I also said that any issue as to enforcement of those costs in light of an appeal would be a separate one. I noted that while there may be a prospect of any such order for costs having to be redetermined ultimately if an appeal succeeded in whole or in part, that consideration may be regarded as being of less importance than fixing costs in a timely way. However, I acknowledge that latter view is not always the case, the Court having a broad discretion as to the timing of costs setting when an appeal is looming; much depends on the circumstances of the case.5

5. *TUV v Chief of the New Zealand Defence Force* [2019] NZEmpC 25 at [4]; citing *Dwyer v Air New Zealand Ltd* [1997] ERNZ 156 (EmpC).

[16] On the basis of these considerations, I said my provisional view was that the above process should be followed; that is, that the application for costs would be considered under the timetable which the parties had agreed and recorded in their memorandum of 23 January 2024. I emphasised that any issue of enforcement of a costs order that may be made could be considered when the Court dealt with the application for stay of execution.

[17] I invited memoranda from counsel as to the pros and cons of proceeding in this way.

Counsel's submissions

[18] Mr Braun submitted that there was no compelling reason why the Court should depart from the described process, and that it should fix costs promptly and in reasonable proximity to the substantive decision.

[19] He accepted that once the Court determined costs, the defendant would likely appeal. However, even in the event of an appeal, the successful party should have (upon the fixing of costs) the benefit of the costs contribution as fixed by the Court. This position would only change should the defendant successfully apply for a stay of execution on payment of the costs being appealed. That issue could be resolved at a later stage.

[20] In developing these points, Mr Braun said that the substantive proceedings had been lengthy and gruelling for the plaintiffs, having commenced in 2012. They had incurred substantial legal costs in pursuing those claims. A stay would not be in the interests of justice in the circumstances.

[21] In addition, a detailed affidavit was filed from Mr Cronin-Lampe which, in summary, outlined the detrimental impacts further delays in finalising the proceeding were causing and would cause for him and Mrs Cronin-Lampe.

[22] For the defendant, Ms Heenan said that whether the Court would grant a stay on costs, pending an appeal being advanced by a party, would be influenced by the particular circumstances of the case. She drew attention to the observations of the

Chief Judge in *Gate Gourmet New Zealand Ltd v Sandhu* where a stay of the determination of costs was ordered. There, the following factors were considered when the Court exercised its discretion:6

(a) It was not desirable to lay additional (potentially unnecessary) costs on the defendants (the parties seeking leave) at that stage;

(b) resolving costs would involve a degree of complexity;

(c) matters could conveniently be dealt with at a later date; and

(d) there was nothing to suggest that the opposing party would be materially prejudiced by a stay in the interim.

[23] Ms Heenan went on to refer to a number of considerations that she argued were relevant in this case. She said that additional costs would be incurred not just by the defendant but also by the plaintiffs in the event the Court did not grant a stay.

[24] She said the litigation had an extremely long and complex history and two lengthy and complicated judgments issued by the Court reflect that complexity.

[25] Ms Heenan emphasised that determination of the appropriate quantum of costs would therefore inevitably be difficult.

[26] She also submitted that whilst the defendant acknowledged that the issue would need to be determined at some stage, it should only be determined once, rather than first now and then again at the conclusion of any appellate process.

[27] The Ministry of Education, on behalf of the defendant, had made a partial payment in relation to the judgment debt (as noted earlier). Ms Heenan said that staying the issue of costs would not materially prejudice the plaintiffs.

6 *Gate Gourmet New Zealand Ltd v Sandhu* [2021] NZEmpC 20 at [6].

[28] The defendant has acted promptly in seeking leave to appeal. The applicable applications had been placed before the Court of Appeal on the first working day after the Crown assumed liability.

Analysis

[29] I agree with Ms Heenan that whether a stay – or partial stay – is granted is dependent on the particular circumstances. The exercise of the discretion is inevitably case specific. As the full Court has said, the ultimate objective of the Court is to do justice between the parties.7

[30] I am assisted by the statement of Judge Holden in *Ioan v Scott Technology Ltd* that costs can be fixed prior to a consideration of a stay application.8 In respect of the case before her, she said that both parties were entitled to know the amount of the costs awarded.9 Judge Holden fixed costs and went on to decline the application for a stay of that costs order.10

[31] By contrast, in *Gate Gourmet* Chief Judge Inglis explained that settling costs in that particular case would not simply involve a calculation according to the guideline scale, given the position which had been adopted by the (successful) plaintiffs as well as broader issues as to the nature of the hearing; also relevant were the respective financial positions of the parties, and the fact that costs remained unresolved in the Authority. Additionally, counsel for the defendant had signalled that a payment into court may be sought if costs were awarded based on concerns about the first plaintiff's financial position.11

[32] These decisions demonstrate the assessment which is required on a case by case basis.

7 *Dwyer v Air New Zealand Ltd*, above n 5, at [158].

8 *Ioan v Scott Technology Ltd*, above n 6.

9 At [9].

10 At [17] and [26].

11 At [4].

[33] I have concluded that it would not be in the interests of justice to stay the fixing of costs in the present case. I also consider it is appropriate to reserve the issue of stay of execution of any such order for subsequent consideration.

[34] The most significant factor here is the reality that this proceeding was the subject of several interlocutory applications, evidence was heard over 14 days, submissions were heard over four whole or part-days, and ultimately the Court was required to issue two lengthy and complex judgments.12

[35] The complexity of the matter and the desirability of resolving the costs issues in a timely way following the issuing of the Court's substantive judgments are significant considerations. In this particular case, the complexities suggest costs should be fixed now; those complexities do not favour delaying the assessment of costs.

[36] Mr Braun has accepted that there is a possibility that the defendant will appeal the Court's order for costs. Given the quantum sought, that is an unsurprising submission. That lends weight to the view that the costs judgment of this Court should, if necessary, be available to the Court of Appeal sooner rather than later.

[37] Mr Cronin-Lampe has outlined the trauma caused by this undoubtedly lengthy litigation, and that delaying the resolution of costs in this Court until some indeterminate point merely contributes to the stress created by the proceeding. I agree that these factors point to a conclusion that, at the very least, the plaintiffs are entitled to know where they stand as to quantum. Whether they can enjoy the fruits of any such award is a separate question I will need to consider when assessing the application for stay of execution.

[38] I also observe that given the scale of the hearing and the quantum of costs sought, it will be preferable to consider the stay of execution issues in light of the Court's assessment of costs.

12. *Cronin-Lampe v The Board of Trustees of Melville High School* [2023] NZEmpC 144, *Cronin- Lampe v The Board of Trustees of Melville High School*, above n 1.

[39] Much is made of the possibility that the Court will need to reconsider costs matters if leave to proceed with the defendant's appeal is granted. That may be so, but in my view, having to return to the issue of costs is outweighed by the factors I have already addressed.

[40] For completeness, I note that Mr Braun submitted that the current applications in the Court of Appeal were late and without merit. In my view, these are not relevant factors for present purposes.

Result

[41] For these reasons, I dismiss the defendant's application for stay of the fixing of costs.

[42] Because the position as to the determination of costs became uncertain whilst this issue was resolved by the Court, I vary the timetable for the filing of costs memoranda as follows:

(a) The defendant's memorandum, together with any relevant supporting documents, is to be filed and served by 4 pm on 21 March 2024.
(b) The plaintiffs' response, together with any necessary supporting documents, is to be filed and served by 4 pm on 8 April 2024.

[43] At the time of filing further submissions, counsel are asked to confirm whether they wish the costs issues to be addressed at a hearing (in person or via VMR) or on the papers.

[44] In the circumstances which have developed, I will defer timetabling the stay of execution issues until after I have resolved the costs issues.

[45] I reserve costs with regard to the present application.

B A Corkill Judge

Judgment signed at 12.30 pm on 7 March 2024
