Employment Court of New Zealand

Fleming v Attorney-General [2021] NZEmpC 143 (7 September 2021)

Last Updated: 12 September 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 143
EMPC 340/2019

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for a stay of proceedings
AND IN THE MATTER OF	an application for a stay/interim relief in the nature of a stay
BETWEEN	CHRISTINE FLEMING Plaintiff
AND	THE ATTORNEY-GENERAL sued on behalf of THE HONOURABLE CARMEL SEPULONI in her capacity as THE MINISTER OF SOCIAL DEVELOPMENT and MINISTER FOR DISABILITY First Defendant
AND	THE ATTORNEY-GENERAL sued on behalf of THE HONOURABLE ANDREW LITTLE in his capacity as MINISTER OF HEALTH Second Defendant
AND	JUSTIN JAMES COOTE by his litigation guardian Luke Meys Third Defendant

Hearing:	On the papers
Appearances:	P Dale QC, counsel for plaintiff S McKechnie and T Bremner, counsel for first and second defendants L Meys, counsel (litigation guardian) for third defendant
Judgment:	7 September 2021

CHRISTINE FLEMING v THE ATTORNEY-GENERAL sued on behalf of THE HONOURABLE CARMEL SEPULONI in her capacity as THE MINISTER OF SOCIAL DEVELOPMENT and MINISTER FOR DISABILITY [2021] NZEmpC 143 [7 September 2021]

INTERLOCUTORY JUDGMENT (NO 4) OF CHIEF JUDGE CHRISTINA INGLIS

(Application for a stay of proceedings) (Application for a stay/interim relief in the nature of a stay)

[1] A judgment was issued by this Court in respect of the plaintiff's claim on 26 May 2021 (the substantive judgment).[1] Issues relating to remedies were reserved. The Court's judgment is now subject to cross-applications for leave to appeal to the Court of Appeal. Remedies have yet to be decided.

[2] An application for a stay of proceedings and orders in the nature of a stay of proceedings has been filed on behalf of the first and second defendants. It has two limbs. First, that remedies should be decided after the appellate process has come to an end. Second, that a stay/interim relief should be granted making it clear that the first and second defendants are not required to give effect to the judgment pending the outcome of the appeals currently on foot. The parties agreed that the applications could be dealt with on the papers.

Stay: determination of remedies

[3] The Court has the power to order a stay pending the outcome of an appeal to the Court of Appeal.[2] In considering an application the Court is ultimately guided by the interests of justice. The usual factors considered relevant are:[3]

(a) if no stay is granted, whether the right to appeal will be rendered ineffectual;
(b) whether any party will be injuriously affected by a stay;
(c) whether the appeal is being pursued in good faith; and

1 *Fleming v The Attorney-General* [2021] NZEmpC 77.

2 Employment Relations Act 2000, s 214(6).

3. *New Zealand Post Primary Teachers' Assoc v Attorney-General (on behalf of Ministry of Education)* (No 3) [1991] NZEmpC 89; [1991] 3 ERNZ 708 (EmpC) at 709. See also *Z v Attorney-General* EmpC Wellington WRC 33/02, 22 July 2003 at [9].

(d) the novelty and importance of the questions involved in the case.

[4] I deal with each in turn.

[5] I accept that, if no stay is granted, and the Court proceeds to decide remedies, the first and second defendants' right to pursue the appeal will not be rendered ineffectual.

[6] Proceeding to decide remedies does, however, run the risk of inefficiency. That is because the outcome of the appellate process may impact on the way in which the balance of the proceedings in this Court will be dealt with. The most obvious point is that if the Court of Appeal finds that Ms Fleming is not, and never has been, an employee of the second defendant (contrary to this Court's finding), then the issue of remedies does not arise and does not need to be dealt with. The parties' time, energy and resources would have been wasted. So would the Court's.

[7] That segues into the issue of prejudice. The plaintiff essentially contends that deciding remedies would be a relatively straightforward exercise, occupying no more than a half-day of hearing time. The first and second defendants are less optimistic. I share that view. I anticipate that a number of issues will arise for consideration.

[8] I do not overlook the energy, commitment and resilience it takes to pursue claims such as this, and the inevitable toll that further delays will likely have on Ms Fleming. And I accept that it would be preferable to resolve remedies promptly in light of the ongoing financial pressures and health and safety issues being faced. I also accept a submission made on Justin's behalf that it is in his interests to bring these proceedings to a close. The point is, however, that proceeding to decide remedies in this Court is unlikely to bring the closure that is sought. The applications for leave to appeal, advanced by the plaintiff and first and second defendants, reflect the almost inevitable trajectory of this matter.

[9] I note a further point which is relevant to the weighting exercise. Counsel for the Minister of Health advises that the Ministry has been exploring practical steps to mitigate Ms Fleming's financial position, including by way of funding via

Individualised Funding without prejudice to the appeal process. That would likely go some way to meeting the concerns that have been identified on her, and Justin's, behalf.

[10] I accept that the parties, including the first and second defendants, are pursuing their appeals in good faith.

[11] It is a matter for the Court of Appeal, on the leave applications, to decide whether the appeals raise issues of general or public importance or there is any other reason that leave ought to be granted.[4] For the purposes of this application I am satisfied that the matters at issue are significant, both to the parties but more generally, and that this weighs in favour of a stay.[5]

[12] Standing back, while I accept that a stay will inevitably cause some prejudice to Ms Fleming and Justin, I consider that it is in the broader interests of justice to grant one pending the outcome of the appellate process.

[13] The plaintiff seeks the imposition of a number of conditions if a stay is granted, all of which are opposed. The first condition sought relates to urgency. Counsel for the first and second defendants point out that the plaintiff has applied for urgency in the Court of Appeal and that they have given notice that they abide the Court's decision on the application. In these circumstances I agree that an urgency condition is not required. The matter is already before the Court of Appeal, and it will decide the urgency or otherwise it accords to the application for leave to appeal, and any appeal if leave is granted.

[14] The remaining proposed conditions relate to remedies, namely requiring the Crown to respond to the quantum sought by Ms Fleming; fixing a date for determination of that claim; and setting a timetable for a costs determination to follow the remedies hearing. Each of these proposals puts the cart (issues to do with a remedies hearing and costs) before the horse (the outcome of the appellate process). They are more appropriately dealt with, if required, after any appeal has been decided.

4 Employment Relations Act 2000, s 214(3).

5 *Bay of Plenty District Health Board v CultureSafe NZ Ltd* [2021] NZEmpC 131 at [19].

[15] I note for completeness that Mr Dale QC, counsel for the plaintiff, invited me to consider referring the application for a stay to the Court of Appeal for resolution. I have considered it appropriate to deal with it myself. That does not, of course, preclude the plaintiff from taking further steps in the Court of Appeal in relation to the stay if that is considered appropriate.

[16] The proceedings in this Court are stayed pending the outcome of the appellate process in the Court of Appeal.

Stay: steps in relation to findings of the substantive judgment

[17] The first and second defendants have also applied for a stay/other interim relief to make it clear that no steps need to be taken in relation to the findings of the substantive judgment pending the outcome of the appellate process.

[18] The genesis for the application appears to be correspondence written by Ms Carrigan (a non-party) and Mr Dale (counsel for the plaintiff) expressing dissatisfaction with the Ministry's response to the judgment and pushing for it to make immediate changes to its policies; and associated communications with the Minister, Ministry, organisations and individuals (including other family caregivers) which are said to be causing confusion.

[19] Counsel for the first and second defendants submit that, because the declarations as to employment status made by the Court are declaratory, not executory, no steps are required to be taken by the Ministry until the appellate process is concluded. It is said that a stay/interim orders are necessary because the plaintiff does not accept that position, confusion is being caused within the sector and it is desirable for the Court to provide clarity that no further steps need to be taken by the Ministry in the meantime. The plaintiff and third defendant oppose the application.

[20] Stripped back to its fundamentals, the effect of the orders sought would be to injunct Mr Dale (counsel) and Ms Carrigan (non-party) from communicating with others, by expressing views (which the Ministry disagrees with) as to the steps the Ministry ought to be taking in light of this Court's judgment. More broadly, it would

have the effect of staying potential claims, for example focussed on breach of health and safety obligations. That would, in my view, be premature. Even if I was to accept that the Court has the power to make the orders of the nature and scope sought in the context of the current proceedings (which I doubt), I consider it unnecessary to do so.

[21] Finally, I note that the Court's substantive judgment decided an application for declaration as to employee status advanced by Ms Fleming. As s 6 of the Employment Relations Act 2000 makes clear, the assessment of whether a particular worker is an employee is intensely factual. Any declaration made is tied to the particular worker. There will be cases decided under s 6 which prompt other workers to seek a declaration, including in what are said to be similar circumstances; or prompt reflection and changes within a broader workforce. The point remains that the Court declared Ms Fleming only to be an employee. It could not have done otherwise.6

[22] No further orders are required and the application for a stay/interim relief is declined.

[23] Costs on both applications are reserved.

Christina Inglis Chief Judge

Judgment signed at 2.15 pm on 7 September 2021

6 *Fleming*, above n 1, at [95].