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Go Bus Transport Limited v Hellyer [2015] NZEmpC 212 (1 December 2015)

Last Updated: 4 December 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 212](#)

EMPC 291/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for a stay of proceedings

BETWEEN GO BUS TRANSPORT LIMITED Applicant

AND KEVIN HELLYER Respondent

Hearing: (on the papers filed for the applicant on 1 October and 17

November 2015)

Representation: A Toohey, counsel for applicant

No appearance by the respondent

Judgment: 1 December 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The applicant seeks a stay of orders made by the Employment Relations Authority (the Authority) in a determination of 4 September 2015, wherein it determined that Mr Hellyer had been unjustifiably dismissed from his employment with Go Bus Transport Limited (Go Bus); and that taking a contribution assessment of 40 per cent into account it should pay Mr Hellyer the following:¹

i) The sum of \$4,676.54 gross, being reimbursement of lost wages.

¹ *Hellyer v Go Bus Transport Ltd* [2015] NZERA Christchurch 125.

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ii. The sum of \$374.12 gross, being reimbursement of holiday pay on lost wages.

iii. The sum of \$140.30, being reimbursement of the loss of the benefit of employer contribution to KiwiSaver.

iv. The sum of \$4,800 without deduction being compensation for humiliation, loss of dignity and injury to feelings.

v. Interest at five per cent on the wages, holiday pay and KiwiSaver contribution from 3 February 2015 until the date of payment.

[2] The Authority also made some observations about final pay matters which it invited the parties to resolve by agreement, reserving leave to return to the Authority; and it reserved the issue of costs.

[3] For the purposes of the application for stay an elaboration of the Authority's reasoning is necessary. On 12 August 2014,

Mr Hellyer did not collect a \$2.90 fare from his partner who travelled on a bus he was driving; nor did he subsequently account for the fare to Go Bus.

[4] Mr Hellyer was dismissed after attending an investigation meeting and a disciplinary meeting; the reasons for dismissal were that Mr Hellyer had knowingly and with intent allowed a passenger to ride without collecting a fare and had not recorded that his wife had been a passenger; and that he had failed to notify operations or management about the incident. The letter of dismissal went on to state that there had been previous inconsistencies with cash handling, and that Mr Hellyer had been warned about the importance of following fare revenue policy at a meeting held on 2 July 2014, although this was not in the context of a disciplinary process.

[5] The relationship problem which Mr Hellyer raised asserted that the dismissal was unjustified and that the outcome was disproportionate. A key issue which the Authority considered was whether Mr Hellyer had been discriminated against directly or indirectly because of his involvement in union activities under s 104 of

the [Employment Relations Act 2000](#) (the Act). This issue arose because Mr Hellyer was at the time of his dismissal the Branch President of the New Zealand Tramways and Public Passenger Transport Employees' Union (the Union). The Authority found that Mr Hallyer had been an employee representative at collective negotiations, and had taken an active position with regard to a Union claim for free travel and family passes.

[6] After describing the evidence relating to this participation, and discussion pertaining to it during the disciplinary process, the Authority concluded:

a) Mr Hellyer fell within the definition of involvement in the activities of a union for the purposes of [s 104](#) of the Act; he held the requisite status under [s 107](#) of the Act as he was the Branch President of the Union and a negotiator for employees at collective bargaining within 12 months of his dismissal.²

b) Mr Hellyer's presence at collective bargaining negotiations on

16 July 2014 as an employee representative when a claim for a family pass was discussed was a material reason for Go Bus concluding that his conduct had been intentional rather than careless. Because of these factors, Mr Hellyer was held to a higher standard than would otherwise have been the case;³ he was dismissed in part directly or indirectly because of his involvement in the activities of a union which was a prohibited ground of discrimination.⁴

c) The discrimination under [s 104](#) of the Act flavoured and tainted the reasons for the conclusion reached by Go Bus that Mr Hellyer's actions were intentional, to an extent that the Authority was not satisfied Mr Hellyer could still have been dismissed if his involvement in collective bargaining, and in particular the issue with regard to the

claim for family passes, had not been considered.⁵

² At [52].

³ At [57]-[58].

⁴ At [59].

⁵ At [67].

d) The Authority relied on the following dicta of the Court of Appeal in

Andy Nathan v C3 Limited:⁶

[35] ... We also consider that in terms of [s 103A](#) a fair and reasonable employer could not justify dismissal if the decision made was discriminatory in terms of [s 104](#).

...

[37] The specific provisions in the New Zealand Act proscribing discrimination for involvement in union activities reflect the underlying policy of the legislation that participation and such activities should not be held against employees.

e) The Authority accordingly found under s 103A that Go Bus was unable to justify the decision to dismiss because it was discriminatory in terms of s 104; it determined that Mr Hellyer had made out his personal grievance that he was unjustifiably dismissed, and that he was entitled to remedies as already described.

Procedural history

[7] On 1 October 2015, Go Bus filed a de novo challenge to the determination of the Authority.

[8] Go Bus seeks findings that its dismissal of Mr Hellyer was justified under s 103A and a finding that the decision to dismiss

did not amount to discrimination under s 104.

[9] At the same time, an application for stay of proceedings was filed.

[10] Documents relating to the challenge and to the application for stay were personally served on Mr Hellyer on 9 October 2015. Since then, he has taken no steps with regard to the proceeding.

[11] On 12 November 2015, I held a telephone directions conference with counsel for Go Bus. I directed that Go Bus was entitled to have its application for stay and

6 *Nathan v C3 Ltd* [2015] NZCA 350 referred to in *Hellyer v Go Bus Transport Ltd* above n 1 at

[68]-[69], (footnotes omitted).

challenge dealt with whether or not Mr Hellyer had taken any steps. With regard to the application for stay I directed that Go Bus file and serve evidence in support, and that I would then determine the application on the papers. So as to preserve the status quo, I made an interim order staying execution of the monetary awards made by the Authority in its determination until further order of the Court.⁷ I also directed that a copy of the Court's minute that outlined the procedural steps which were being taken should be served on Mr Hellyer by registered post, and that a further telephone directions conference would be convened 14 days thereafter. A copy of that minute

was accordingly served on Mr Hellyer on 19 November 2015.

[12] In view of the fact that Mr Hellyer had not taken any steps to respond to the challenge, Chief Judge Colgan issued a minute on 25 November 2015 drawing the proceeding to the notice of both the New Zealand Tramways Union and the New Zealand Council of Trade Unions (CTU), since it appeared the issue of union-involvement discrimination would arise in the challenge and either or both bodies may have an interest in the development of the law on that topic. Chief Judge Colgan stated that for a balanced argument to be presented to the Court, either the Union or the CTU (but not both) may wish to consider applying for leave to be represented and heard on the challenge. The minute was to be served on those parties as well as counsel for Go Bus. Chief Judge Colgan will preside over a directions conference on these matters on 7 December 2015.

Evidence and submissions of Go Bus

[13] The Human Resources Manager of Go Bus, Mr Bardsley, filed an affidavit in support of the company's application for stay. He deposed that Go Bus is in a financial position to pay the sum ordered by the Authority to Mr Hellyer; and that it would be prepared to pay that sum into Court pending the final outcome of the substantive proceeding.

[14] Mr Bardsley produced a statement made by Mr Hellyer to the Authority in early August 2015 in which he said that he has undergone substantial financial

hardship since his dismissal and has been unable to secure any form of employment.

⁷ Minute of 12 November 2015, at 5(c).

[15] Counsel for Go Bus, Ms Toohey, in her submissions in support of the application for stay described the background circumstances and relevant legal principles.

[16] Ms Toohey submitted that the right of challenge being exercised by Go Bus would be ineffectual if no stay was granted, having regard to the financial hardship to which Mr Hellyer had referred at the Authority's investigation meeting held in August 2015. It was submitted that even if Mr Hellyer had found employment since then, he would have difficulty in repaying some or all of the sums ordered to be paid by the Authority if his income was similar to that earned at Go Bus, if repayment became necessary.

[17] Next, it was submitted that the challenge was being brought and prosecuted for good reason and in good faith. Counsel submitted that the case for Go Bus was that Mr Hellyer's involvement in union activities was not a reason for his dismissal; it was simply the reason for his attendance at collective bargaining negotiations at which he acquired knowledge that Go Bus would not allow the family of staff members to travel free of charge. It was submitted that the issue was a significant one: the challenge was being brought to clarify the application of the discrimination provisions of the Act.

[18] As to the novelty and importance of the questions involved in the case, Ms Toohey submitted that this was the first case to come before this Court since *Nathan* engaging the issue of discrimination for involvement in union activities. It was a relatively novel point and one that has general importance for employers and unions.

[19] Accordingly, it was submitted that overall the balance of convenience favoured the granting of a stay, and that Go Bus would pay the funds ordered by the Authority into Court pending the outcome of the challenge if so directed.

Legal principles

[20] In *North Dunedin Holdings Limited v Harris* the Court stated: 8

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

[21] In the well known decision of *Dymoocks Franchise Systems (NSW) Pty Limited v Bilgola Enterprises Limited*,⁹ Hammond J cited with approval the statement of Gault J in *Duncan v Osborne Buildings Ltd* where it was said that:¹⁰

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.

[22] Given these principles, I consider Ms Toohey correctly identified the factors which are relevant to the present application for stay.

Discussion

[23] The first issue for consideration is whether the applicant's right of challenge

would be ineffectual if no stay were to be granted. I have considered carefully the

⁸ *North Dunedin Holdings v Harris* [2011] NZEmpC 118.

9. *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; (1999) 13 PRNZ 48 (HC) at [8].

¹⁰ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87 cited in *Dymoocks Franchise*

Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd, above no 9, at [8].

evidence relating to Mr Hellyer's circumstances as described in the witness statements which both he and his partner provided to the Authority's investigation meeting. I have also considered the findings made in that regard by the Authority in its determination. That information establishes that in the period following his dismissal Mr Hellyer suffered significant financial difficulties. In particular, Mr Hellyer has not been in receipt of income from employment, has exhausted his savings, and has had to seek income support from WINZ. Although there is reference to ownership of a vehicle, I have no other information relating to Mr Hellyer's circumstances, particularly as to the extent of his assets or liabilities. However, on the basis of the information which is before the Court I conclude that were Go Bus to pay the amounts ordered by the Authority, Mr Hellyer could have difficulty in repaying those sums if the challenge ultimately succeeds. Against that I must balance the obvious inference that Mr Hellyer is likely to be in need of the sum involved.

[24] The next factor relates to the question of whether the challenge is brought and prosecuted for good reason and in good faith. I find that the challenge does involve a potentially important point as to union-involvement discrimination. Go Bus has appropriately briefed counsel for the purposes of the challenge which relates to a potentially significant issue where the legal principle involved may well have application to other employers and employees. I find that the challenge is being brought and prosecuted for good reason, and that it is being brought in good faith.

[25] Another factor of importance is the willingness of Go Bus to pay the sum involved into Court. This factor suggests a responsible approach to the issue of a stay.

[26] In evaluating all factors, I conclude there could be difficulty in recovering monies from Mr Hellyer in due course, if the circumstances required it. Against that, I must balance the fact that Mr Hellyer is a successful litigant who should otherwise receive the awards he obtained from the Authority. However, Go Bus has brought a challenge on an important issue, as is its right.

Conclusion

[27] I conclude that the application for stay should be granted on terms. Go Bus is to pay the amounts ordered by the Authority (including the interest for which it is liable to the date of payment) into Court within seven days of the date of this judgment. A breakdown of the sum paid is to be provided to the Registrar as at the date of payment. The order for stay will continue until further order of the Court. I reserve leave to Mr Hellyer to apply for a review of this order on seven days' notice.

[28] Costs on this application are reserved.

B A Corkill

Judge

Judgment signed at 12.05 pm on 1 December 2015

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