



# Employment Court of New Zealand

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## Hill v Tex Onsite Limited [2016] NZEmpC 73 (14 June 2016)

Last Updated: 1 July 2016

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2016\] NZEmpC 73](#)

EMPC 37/2016

IN THE MATTER OF      a challenge to a determination of  
                                 the  
                                 Employment Relations Authority

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

BETWEEN                GRAEME HILL Plaintiff

AND                        TEX ONSITE LIMITED Defendant

Hearing:                On the papers filed on 21 April and 5, 18 and 26 May  
                                 2016

Appearances:        G Pollak, counsel for plaintiff  
                                 M Dew, counsel for defendant

Judgment:            14 June 2016

### INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] Mr Hill was employed by Tex Onsite Limited. Following his departure Tex Onsite took a claim against Mr Hill in the Employment Relations Authority (the Authority), including for breach of confidentiality and for breach of the non-solicitation clause in his employment agreement. The Authority found in the company's favour and ordered Mr Hill to pay a total of \$110,058 plus interest.<sup>1</sup> This figure included \$18,000 by way of penalties, payable directly to the company. The Authority subsequently issued a costs determination awarding \$48,236.63 to the

company by way of costs and disbursements.<sup>2</sup>

<sup>1</sup> *TEX Onsite Ltd v Hill* [2016] NZERA Auckland 25.

<sup>2</sup> *TEX Onsite Ltd v Hill* [2016] NZERA Auckland 67.

[2] Tex Onsite has issued a demand for payment of the amounts ordered against Mr Hill, namely for \$158,294.63. Mr Hill is currently liable to pay those amounts but has declined to do so. Rather he has filed a challenge to the Authority's determinations and has applied for a stay. The application is opposed by the company. The parties agreed to the application being dealt with on the papers, and requested that it be determined prior to a Judicial Settlement Conference which is currently scheduled for 5 July 2016.

### Approach

[3] A challenge does not operate as a stay unless the Court so orders.<sup>3</sup> The discretion is wide but must be exercised judicially and in accordance with principle. There are a number of factors which are likely to be of particular relevance in considering an application for a stay.<sup>4</sup> These can be summarised as follows:

- Prejudice to the applicant if no stay is granted.

- Prejudice to the respondent if a stay is granted.
  - Impact on third parties.
  - The reasons why the applicant’s challenge is being pursued.
  - Likely merits of the challenge.
- The importance and/or novelty of the questions involved on the challenge.

[4] In weighing the competing factors, regard will be had to where the balance of convenience lies. Overarching consideration will then be given to the overall interests of justice.

[5] Mr Hill’s application is primarily focussed on prejudice. He says that if a stay is not granted, and Tex Onsite makes good on its indication that it will take steps to enforce the Authority’s orders, he will likely be forced into bankruptcy. It is said that this, in turn, will significantly undermine his ability to pursue his challenge and redress the negative consequences of the Authority’s determination, including to his

reputation. It is further said that the challenge has merit and that it is in the overall interests of justice that a stay be granted.

[6] The defendant’s opposition is based on a number of grounds. It is said that there is insufficient evidence to support the claims of financial hardship and, assuming Mr Hill’s assertions to be correct, that ought to weigh against the grant of a stay. It is further said that the company will be exposed to unwarranted prejudice if a stay is granted, that there is little discernible merit in the challenge, and that the balance of convenience and the interests of justice favour the application for stay being declined. Alternatively, the company submits that if a stay is granted, it ought to be on condition that Mr Hill pay all, or a substantial part, of the Authority’s awards into Court pending the outcome of the challenge.

## **Analysis**

### *Prejudice to Mr Hill?*

[7] The company submits that there is insufficient evidence to justify a stay, particularly in relation to the evidence of financial hardship. There are cases, as Ms Dew points out, in which a stay has been declined in the absence of sufficient evidence as to an applicant’s claimed financial position. *Superior Motor Cycles Ltd v Patterson* is one such example.<sup>5</sup> In that case Judge Couch concluded, on the basis of the evidence filed in support of the application, that it would be a “very straightforward matter” for the applicant company to source the money awarded against it by the Authority (a figure of \$18,750).<sup>6</sup> The evidence in the present case does not support a similar conclusion, including having regard to the significantly higher amounts at issue and Mr Hill’s apparent assets, liabilities, incomings and outgoings.

[8] If no stay is granted, it is probable that the company will move to enforce the Authority’s orders, as it is perfectly entitled to do. I accept, based on the affidavit evidence before the Court, that if this occurs it would place a significant financial

burden on Mr Hill, which he currently appears to be ill-equipped to meet. This, in turn, would likely undermine his ability to pursue his challenge, thereby compromising the opportunity to argue that the Authority’s orders ought to be set aside or diminished, and to clear his name.

### *Prejudice to the company*

[9] It is true that if a stay is ordered, the company will not be in a position to immediately enjoy the fruits of its success in the Authority. Given Mr Hill’s claimed financial circumstances it will also be exposed to the ongoing costs of litigation, with a questionable prospect of recovery of those costs and the amounts ordered in its favour by the Authority in the event that it succeeds in defending the challenge.

### *Impact on third parties*

[10] The application raises no identifiable prejudice to third parties, other than a flow-on impact on Mr Hill’s family in having to meet the Authority’s orders immediately if no stay is granted.

### *Why is the challenge being brought?*

[11] There is a suggestion in the affidavit filed on behalf of the company that Mr Hill may be bringing his challenge as a simple device to avoid payment. While it is possible to speculate that the challenge may, at least in part, be motivated by an attempt to put off the evil hour, the evidence and material filed by Mr Pollak on behalf of Mr Hill suggests otherwise. There is insufficient material before the Court to conclude that the challenge is not being pursued for good reason and in good faith.

### *Merits*

[12] Mr Hill expresses confidence in his challenge. He points out that he did not have the benefit of legal representation during the Authority’s investigation meeting and that he has now instructed senior counsel. Mr Hill also says that additional witnesses will be called in Court, although their identity and details of what they might say remains unspecified.

[13] Because Mr Hill has elected to challenge the Authority’s determinations by hearing de novo, the evidence will be heard afresh and

will be tested in an adversarial setting. Contested issues of fact will almost certainly arise, including in relation to the nature and extent of the company's claimed losses and the degree to which they were attributable to any established breach by Mr Hill. It is difficult to predict with any degree of certainty how the evidence will come out at hearing. However, what can be said is that the contemporaneous documentation currently before the Court appears to present difficulties for Mr Hill's substantive challenge.

[14] There may be some merit in the costs challenge, including having regard to the basis for the substantial uplift applied by the Authority, the extent to which Mr Hill's conduct may be said to warrant an increase and the interrelationship between that factor and the basis on which the penalty of \$10,000 for obstructing the Authority was imposed in its substantive determination.

#### *Questions involved*

[15] Although the issues are of obvious importance to the parties, I do not accept that they are of such novelty or importance that this is a factor that, of itself, would weigh in favour of the grant of a stay.

#### *Balance of convenience*

[16] It is not unusual for the various factors to point both ways. This is one such case. However, by a slim margin, the balance of convenience lies in Mr Hill being able to progress his challenge. Given his circumstances as they currently emerge, I am satisfied that if a stay was not granted Mr Hill would be significantly compromised in his ability to do so.

#### *Overall interests of justice*

[17] I have considerable sympathy for the position Tex Onsite finds itself in, and the spectre of facing ongoing legal and other costs which it may have difficulty recovering in the event that it successfully defends Mr Hill's challenge. While I

consider that it is in the overall interests of justice that a stay be granted, it will be on conditions. This will go some way to address the legitimate concerns identified on the company's behalf. The conditions are set out below.

#### **Order**

[18] There is an order staying execution of the determinations of the Employment Relations Authority pending the outcome of Mr Hill's challenge to the Employment Court on the following conditions:

- (a) Mr Hill is to pay the sum of \$50,000 to the Registrar of the Employment Court within a period of 20 working days from the date of this judgment. Such sum to be held in an interest-bearing account and to be paid out on the written consent of both parties or by an order of a Judge of the Employment Court;
- (b) Mr Hill is to pursue his challenge diligently;
- (c) In the event that the conditions of this stay are not met the stay will immediately lapse and the orders of the Authority will become enforceable.

[19] Costs on this application are reserved.

Christina Inglis

Judge

Judgment signed at 10.30 am on 14 June 2016