



Employment Court of New Zealand

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Initiative! Un Limited v Rahman [2016] NZEmpC 119 (15 September 2016)

Last Updated: 20 September 2016

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2016\] NZEmpC 119](#)

EMPC 150/2016

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

AND IN THE MATTER of an application for stay of
proceedings

BETWEEN INITIATIVE! UN LIMITED Plaintiff

AND MOHAMMAD MAHBUBUR RAHMAN
Defendant

Hearing: 15 September 2016
(Heard at Christchurch)

Appearances: P Moore, advocate for plaintiff
R Thompson, advocate for
defendant

Judgment: 15 September 2106

ORAL JUDGMENT OF JUDGE K G SMITH

[1] This is an application seeking to stay a determination of the Employment Relations Authority (Authority) dated 25 May 2016.¹ In that determination the Authority concluded that the employment agreement between the plaintiff and defendant was contrary to [s 67A\(2\)\(a\)](#) of the [Employment Relations Act 2000](#) (the Act). As a result of that finding the Authority then concluded that the defendant had been unjustifiably dismissed from his employment and he was awarded remedies.

[2] The determination awarded the defendant \$7,436 in lost wages, \$8,000 for compensation for humiliation, loss of dignity and injury to feelings under

[s 123\(1\)\(c\)\(i\)](#) of the Act and \$143 gross, being a payment for overtime worked.

¹ *Rahman v Initiative! Un Ltd* [2016] NZERA Christchurch 106.

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Costs of \$3,500 were subsequently determined by the Authority to be payable by the plaintiff to the defendant, with a further award of disbursements of \$71.56.

[3] Both the determination of the Authority and the costs determination have been challenged on a non-de novo basis. That challenge calls into question the determination as it relates to [s 67A\(2\)\(a\)](#) of the Act.

[4] In an amended application for a stay dated 26 July 2016 the grounds given in support of the application canvassed matters that could be described as touching on whether the defendant should be entitled to commence recovery action and the ability of the plaintiff, if it succeeds in its challenge, to recover any funds that might have been paid to him. The grounds of the application for stay include a statement that the defendant is from Bangladesh and came to New Zealand in 2013 on a temporary visa. The defendant has

had an offer of employment in Bangladesh, has no significant assets in New Zealand, and no other family ties to New Zealand that would preclude him from taking up such an offer.

[5] As part of the grounds of that application the plaintiff also referred to the Christchurch rebuild and stated that its financial situation meant it could not afford to write off as a loss the amount of money ordered to be paid in the determination (including costs) and would be materially harmed by being unable to obtain repayment.

[6] That application was supported by a very brief affidavit from Peter Lohead confirming the essence of what had been said in the application. As to the company's financial situation, Mr Lohead's affidavit contains a very general statement that the company is in a state that it could not afford to write off as a loss the amount of money ordered to be paid and would be materially harmed, potentially resulting in job losses, I infer if having to pay that money it was then not able to recover it.

[7] Not surprisingly, the defendant opposes the application. A reasonable summary of the grounds of opposition is that the defendant considers the plaintiff to be impecunious and using the application for stay, and any potential delay that might

follow while awaiting trial of the substantive matter, improperly; essentially that the application is to avoid the obligation to pay. The defendant also argues that it is in the interests of justice that a stay not be granted. However, in a very responsible concession, the defendant says that if funds were placed in either an independent trust account, or held by the Court, then he would not oppose the stay being granted.

[8] The defendant has not sworn an affidavit explaining his circumstances or calling into issue what Mr Lohead has said in his affidavit.

Legal test

[9] The parties more or less agreed on the legal test to apply in considering this application. In *New Zealand Cards Ltd v Ramsay* the Court provided a brief summary as follows:²

The criteria for the grant of a stay of execution are well known. In determining whether or not to grant a stay, the Court must weigh the factors in the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position in case the appeal is successful. Relevant factors include whether the appeal would be rendered nugatory, if the stay were not granted, the bona fides of the applicant as to the prosecution of the appeal, the effect on any third parties, injury or detriment to the respondent if the stay is granted, the novelty and importance of the question involved, the public interest in the proceedings, the strength of the case on appeal and the overall balance of convenience.

[10] That succinct summary also captures the expression of the test in *Assured*

Financial Peace Ltd v Pais referred to by Mr Moore in his submissions.³

[11] Stepping through each of the seven points listed by Chief Judge Colgan in

Assured, Mr Moore submitted that the test favours granting the stay. The seven tests he referred to from *Assured* were:⁴

² *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582, at [7] (footnotes omitted).

³ *Financial Peace Ltd v Pais* [2010] NZEmpC 50.

⁴ At [5].

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

ineffectual;

- whether the appeal is brought and prosecuted for good reasons, in good faith;
- whether the successful party at first instance will be affected injuriously by a stay;
- the effect on third parties;
- the novelty and importance of the questions involved in the case;
- public interest in the proceedings; and
- the overall balance of convenience.

[12] Mr Thompson did not take issue with either relying on the test in *Assured* or the way in which Mr Moore approached that test.

[13] Taking all of these points in turn, Mr Moore first dealt with the argument about whether the challenge would be rendered ineffectual. He argued that the circumstances presented in this case were strikingly similar to what was referred to in *Assured*. Essentially, this argument comes down to submitting that if the plaintiff is forced to pay to the defendant the whole of the determination from the Authority and the costs that were ordered to be paid, there is a risk that the funds will be dissipated and the plaintiff will not be able to recover them. The risk of dissipation is said to be because of the defendant's country of origin being

Bangladesh, his lack of ties to New Zealand, the possibility of a job offer in Bangladesh and, I infer, a lack of information about what the defendant is currently employed to do.

[14] As to good faith, I was informed by Mr Moore that the challenge is pursued for a number of reasons including a concern that the application of [s 67A](#) by the Authority was unduly restrictive on the plaintiff, who it appears is likely to argue at trial that he placed substantial reliance on the website operated by the former Department of Labour (now the Ministry of Business, Innovation and Employment) providing advice as to how to draft an employment agreement.

[15] While Mr Thompson argued that the challenge was brought for an ulterior reason, relating to the solvency of the plaintiff, I am satisfied that the appeal is brought for a proper reason.

[16] Turning to whether the successful party at first instance will be injuriously affected, Mr Moore responsibly conceded that the plaintiff has no information about the defendant.

[17] Similarly, the effect on third parties could be best described as neutral. There are no third parties in the sense I understand that test to have been referred to in *Assured*, although Mr Moore did make a reference to other employees of the plaintiff being impacted if the result of satisfying the determination of the Authority places the company's future in jeopardy.

[18] The next category dealt with was the importance of the question involved in the case. [Section 67A](#) has been examined previously but not in a way that is exhaustive, nor in the circumstances that have been described by the plaintiff in the statement of claim which Mr Moore elaborated on in this morning's submissions. Put shortly, and without wishing to in any way tailor or compromise the way in which the plaintiff will pursue this matter at trial, there is a significant issue about whether the method by which the trial period was expressed in the individual employment agreement does or does not comply with the Act. I am satisfied that is an important question.

[19] For much the same reason, the plaintiff has also established that there is some public interest in the proceeding, not only in elucidating [s 67A](#), but there may be others who have drawn on the website on which the plaintiff relied and for whom a decision on that matter will be important.

[20] That brings me then to the overall balance of convenience. The only evidence before the Court is from Mr Lohead. He has deposed to impacts that his business may suffer if the stay application is not granted, based almost entirely on the risk of dissipation of the funds previously mentioned. The defendant did not file any evidence so it is difficult to attempt to assess how the balance of convenience

may impact on him if a stay is granted. Overall, I think the balance of convenience is in favour of the plaintiff's application but that leaves for assessment whether it would be appropriate to consider conditions on the stay in order to attempt to provide an appropriate balance as referred to in *New Zealand Cards*.

[21] Mr Thompson emphasised that it is quite typical for the Court, when considering granting a stay, to impose as a condition that funds be placed on interest bearing deposit. The financial information I have available about the wherewithal of the plaintiff to be able to satisfy such a condition is scant. From the bar I was told that there have been discussions between the parties over attempting to make private arrangements which have been unsuccessful, I infer possibly because of concerns about liquidity. In the end, I am left with Mr Lohead's affidavit which suggests there may be some financial hardships but does not go so much further as to suggest that those hardships would be dire or place the company in an invidious position.

[22] However, I think it would be remiss not to acknowledge that there is some information in Mr Lohead's affidavit that the company might struggle if it was required to pay the whole of the amount ordered by the Authority immediately and in a lump sum.

[23] I reach the conclusion that it would be appropriate to grant the stay subject to the following conditions:

(a) The full amount of the determination in the Authority (including costs) is to be paid to the Registrar of this Court to be held on interest bearing deposit until dispersed by order of this Court.

(b) The plaintiff is to have 30 days from the date of this judgment in order to make that payment to the Registrar of the Court. In the absence of payment the order will lapse.

(c) The defendant is granted leave to apply to review this order if there is any undue delay by the plaintiff in pursuing its challenge.

[24] Costs are reserved.

KG Smith

Judge

Judgment delivered orally at 12.01 pm on 15 September 2016