



# Employment Court of New Zealand

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## Kids Republic Playland Limited v Lowe [2017] NZEmpC 134 (6 November 2017)

Last Updated: 9 November 2017

### IN THE EMPLOYMENT COURT WELLINGTON

#### [\[2017\] NZEmpC 134](#)

EMPC 190/2017

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                KIDS REPUBLIC PLAYLAND  
                                 LIMITED  
                                 Plaintiff

AND                      KYLIE JEAN LOWE Defendant

Hearing:                (on papers filed 6 October 2017, and on the  
                                 basis of  
                                 submissions received on 2 November 2017)

Appearances:        S Smith, agent for the plaintiff  
                                 K J Lowe in person

Judgment:            6 November 2017

### INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

#### Introduction

[1] This judgment resolves an application for stay of execution, brought by Kids Republic Playland Ltd (KRPL). The context is a non de novo challenge which KRPL has brought to a determination of the Employment Relations Authority (the Authority).<sup>1</sup>

[2] By way of background, Ms Kylie Lowe was an assistant manager of KRPL, who whilst on annual leave tendered notice. An argument arose as she was

completing her notice period, as a result of which she was placed on garden leave.

<sup>1</sup> *Lowe v Kids Republic Playland Ltd* [2017] NZERA Wellington 53.

[3] The Authority found that Ms Lowe was disadvantaged by the events which occurred on her final working day. This caused her to be humiliated and embarrassed, which justified an award of \$3,000 compensation.

[4] The Authority also found that KRPL did not pay various entitlements, as a result of which a penalty of \$5,000 for breaches of good faith was ordered to be paid.

[5] The Authority also ordered that sums for wage arrears, bonus and holiday pay, totalling \$448.20 should be paid.

[6] The challenge relates to the compensatory award, the penalty, and a bonus of \$250.

[7] KRPL has paid Ms Lowe the sum of \$448.20 which includes the bonus; but it has not paid the compensatory award or the penalty; the application for stay relates to those two sums.

[8] There are two other introductory matters to which reference should be made. The first is that the challenge has now been set down for hearing on 13 December

2017. The second is that Ms Lowe has advised the Court that she will not participate in the challenge. At a telephone directions conference, which I convened on

2 November 2017 in which she did participate, I informed Ms Lowe that she was at liberty, subsequently, to advise the Registrar that she would like to take part in the hearing.

### **Parties' positions**

[9] Mr Stefan Smith, a director of KRPL, has filed written submissions in support of the application for stay. In essence, he alleges that the Authority has proceeded on the basis of unreliable and misleading information, including information which was provided by KRPL to the Authority after the investigation. I infer from these submissions that the Court will be required to carefully review the information which was provided to the Authority, to determine whether it erred in fact or in law by relying on it.

[10] Also, there is a concern that were KRPL's challenge to succeed in whole or in part, and if it had paid the sums in question to Ms Lowe, there would be an overpayment issue.

[11] In an email sent by Ms Lowe to the Court, Ms Lowe was critical of the way in which KRPL is pursuing the challenge. She also said that the claim "was never about monetary gain".

[12] During the telephone directions conference, she said that she wanted the matter to be over, and that she would leave the question of resolution of the application of stay to the Court. I take it, therefore, that she is abiding the decision of the Court.

### **Legal principles**

[13] With regard to the applicable legal principles, I refer to the decision of *North*

*Dunedin Holdings Ltd v Harris* where the Court stated:2

[5] The starting point must be s 180 of the Employment Relations Act

2000:

#### **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.

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

[14] For the purposes of the present case, there are three particular factors on which it is appropriate to comment.

[15] Firstly, I refer to the intended basis of the challenge. Obviously, there are multiple issues. It is very difficult to make any accurate assessment one way or the other at this preliminary stage. The ultimate outcome will depend on an evaluation of the evidence which has yet to be placed before the Court. What I can conclude is that having regard to the contents of the amended statement of claim, it cannot be said that the challenge is frivolous; it will need to be carefully considered by the Court. But that is not to say that it is assured of success.

[16] Secondly, any stay if granted would be for a comparatively short time. The hearing will take place in mid December 2017 and, although the judgment of the Court will then be reserved, I am satisfied that the stay need only be for a relatively short period.

[17] Related to this factor is the prospect of over-payment. Although I have no evidence that Ms Lowe could not repay the sums if they were paid to her by KRPL, the materials before the Court suggest that the parties do not at this stage get on well, and the practical difficulties of dealing with an over-payment are likely to lead to significant frustration.

[18] Finally, I take into account the fact that Ms Lowe is abiding the decision of the Court. The application has not been formally opposed.

[19] Assessing all these factors, I am persuaded that the interests of justice require the making of an interim order of stay in respect of the payments referred to at paras [3] and [4] above, from the date of this judgment until further order of the Court. The order will be reviewed in the judgment which the Court will issue after the substantive hearing.

Judgment signed at 10.00 am on 6 November 2017

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