

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 372/07
5070812

BETWEEN Ms X
 Applicant

AND BAY OF PLENTY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Marija Urlich

Representatives: Jim Roberts, for Applicant
 Phillip Skelton, for Respondent

Investigation Meeting: 28 November 2007

Determination: 29 November 2007

**DETERMINATION OF THE AUTHORITY AS TO AN APPLICATION FOR
STAY AND/OR ADJOURNMENT**

Employment Relationship Problem

[1] Ms X's application for compliance orders in relation to paid sick leave is scheduled to be heard on 6 and 7 December 2007.

[2] On 22 November 2007 the BOPDHB filed an application to stay these proceedings and/or adjourn the scheduled investigation meeting dates pending the outcome of the Department of Labour's prosecution of it for an alleged offence against section 6 of the Health & Safety and Employment Act 1992. This is a criminal prosecution. The BOPDHB has entered a not guilty plea and the hearing is set down for five days in the week commencing 11 February 2007.

[2] Ms X opposes the stay and/or adjournment of the hearing of her application.

[3] Following a telephone conference with the parties on 27 November 2007 I held an investigation meeting yesterday to hear submissions in support and opposition to the application for stay and/or adjournment. The parties have filed affidavit evidence in support of their respective positions.

Background

[4] On 22 June 2007 Ms X lodged an application for compliance orders to be made reinstating her paid sick leave until she is able to return to work or until her main personal grievance is resolved. The main personal grievance has not been lodged in the Authority though it has been raised with the BOPDHB. Ms X asked that her application be dealt with urgently.

[5] On 25 June 2007 the Authority convened a telephone conference call with the parties. The outcome of which was that an investigation meeting was scheduled for 26 July 2007, a concomitant timetable for filing of evidence and supporting documents was set and the parties were directed to attend mediation in the week commencing 16 July 2007.

[6] On 29 June 2007 the BOPDHB filed a statement in reply.

[7] On 23 July 2007 the parties advised the Authority that they had attended mediation as directed on 20 July 2007, that they had entered a memorandum of understanding reinstating Ms X's paid sick leave and preserving their respective positions until a further mediation scheduled for 9 October 2007 and that the scheduled investigation should be vacated.

[8] The 9 October 2007 mediation did not proceed. From this date Ms X's paid sick leave stopped.

[9] The Authority convened a telephone conference with the parties on 16 October 2007 to discuss rescheduling dates for investigating the compliance application and further mediation. At the outset of the conference call the BOPDHB reserved its position in relation to a stay of proceedings. The parties were directed to attend

mediation in late October and an investigation meeting scheduled was for 6 and 7 December 2007.

Grounds for application

[10] The BOPDHB seeks a stay and/or adjournment on the grounds that the issue of causation of Ms X's ill health has been squarely put before the Authority to determine, that there is considerable factual and legal overlap between this issue and the issues before the District Court and for the Authority to investigate and determine this issue prior to disposal of the criminal proceedings would override BOPDHB's right to silence.

Grounds for opposition

[11] Ms X says she is entitled to have her matter dealt with by the Authority, that she seeks interim orders and not the determination of the substantive issue between the parties, that she can easily meet the arguable case threshold and this means the evidence provided before the Authority can be tailored to avoid any injustice to the BOPDHB, the BOPDHB is estopped from raising a stay because it filed a statement in reply and unreasonably delayed filing a stay of proceedings and the disadvantage to Ms X of being without paid sick leave and the consequent financial hardship she is experiencing outweighs any disadvantage that may be occasioned to the BOPDHB if the investigation of her application proceeds.

Discussion

[12] Counsel referred me to *A Ltd v B* [1999] 1 ERNZ 613 and the applicable guidelines therein¹ for a consideration of a stay/adjournment application. I accept that the approach to be followed by the Authority is an:

*...exercising [of] its discretion and applying its equity and good conscience jurisdiction
...balancing of justice between the parties, taking account of all relevant factors.*

¹ quoted from *ADT Securitas Ltd v Geange* (1992) 6 PRNZ 100

[13] BOPDHB says there is more than merely a notional danger of injustice if the Authority's investigation proceeds; it says it will have to disclose its defence to the criminal prosecution and this will give Ms X an opportunity to rehearse her evidence and that as the accused facing a criminal prosecution it is entitled to invoke its right to silence. It says further that a consideration of "overall justice/damages adequate remedy" favours it; that the "right to silence" cannot be adequately compensated by a damages remedy¹ whereas Ms X's claim for paid sick leave, if resolved in her favour, will rectify her situation. BOPDHB says it is not estopped from seeking a stay/adjournment because Ms X was on notice of its intention to seek a stay at an early stage and attempting to resolve the employment relationship problem by participating in mediation cannot be considered unreasonable.

[14] I accept that Ms X is facing financial hardship; she is not receiving her salary and it is her sole source of income aside from a small pension. I also accept that further delay in resolving her employment relationship problem is an important factor to weigh in this balancing exercise.

Determination

[15] The issue of causation is squarely before the Authority. In her statement of problem Ms X says:

17 The clause states that the respondent may decide not to continue to provide paid leave. As an exception to the general policy (the default position), such a decision must be exercised with care, and in good faith. In this situation, where the applicant's illness is due to the respondent's own breaches of both contract and legislation, it is difficult to see how this decision could be one made in good faith.

18 The medical report arranged by the respondent show the applicant will be unable to work until the identified stressors are no longer present, and her employment relations issues have been resolved...The respondent has made no substantive attempts to resolve either. Accordingly, the applicant's inability to attend work is due to the respondent's actions and inactions, and it cannot rely on these to further disadvantage the applicant."

[16] The respondent does not accept that this is the case. It does not concede that an arguable case has been made out. The issue of causation would have to be determined by the Authority and in either an interim or substantive setting the Authority would be

entitled to investigate the issue of causation and the applicant and respondent would be entitled to put forward evidence in support of their respective positions.

[17] For these reasons I am not satisfied that the issue of causation can be cleaved from the Authority's investigation and that this issue is central to the criminal proceedings faced by the BOPDHB. The stay/adjournment is granted pending the outcome of the criminal proceedings.

Costs

[14] Neither party have asked that costs be reserved in relation to this application.

Marija Urlich

Member of the Employment Relations Authority

ⁱ *Singh v Chief Executive Officer of the Department of Labour* [2005] 1 ERNZ 569