



Employment Court of New Zealand

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Patel v Sharma [2016] NZEmpC 92 (22 July 2016)

Last Updated: 27 July 2016

IN THE EMPLOYMENT COURT WELLINGTON

[\[2016\] NZEmpC 92](#)

EMPC 26/2016

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 CHETANBHAI PATEL First Plaintiff

AND MOHNAKSHI ENTERPRISES LIMITED TRADING AS TRINITY CRESCENT FOUR SQUARE

Second Plaintiff

AND AMIT KUMAR SHARMA Defendant

Hearing: (on the papers dated 27 June, 4 and 18 July 2016) Appearances: K Lynch-Watson, counsel for the plaintiffs

Defendant in person

Judgment: 22 July 2016

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

Introduction

[1] The issue for consideration in this judgment is whether or not it is appropriate to grant the plaintiffs' application for a stay of execution of the determination by the Employment Relations Authority (the Authority).¹ Mr Sharma opposes that application and says he should not be deprived of the benefit of the determination

pending a decision on the challenge.

¹ *Sharma v Patel* [2015] NZERA Wellington 126.

Background

[2] The relevant background to this application comes from the Authority's determination and can be succinctly stated. Mr Sharma came to New Zealand to study. Eventually he was employed to manage Four Square Trinity Crescent (the Four Square) in Napier. He had started work at the Four Square on a part-time or casual basis in 2012 or 2013. His employment became full-time, as Manager, in mid-October 2013, and he worked in that position until his employment ended on

19 January 2015.

[3] Mr Sharma's proceedings before the Authority were for recovery of wages. He claimed that he was underpaid by the plaintiffs, and was required unlawfully to return to them some of his income, equivalent to the PAYE paid on his behalf. In the Authority Mr Sharma claimed \$27,344.78. Mr Patel and Mohnakshi Enterprises Limited (MEL) denied those allegations and insisted that they had at all times acted lawfully, complying with Mr Sharma's employment agreement.

[4] The evidence given for the plaintiffs and the defendant in the Authority conflicted sharply with issues of credibility being

critical to the determination. The credibility issues the Authority considered relevant involved two subjects: the accuracy of the plaintiffs' time and wage records and why Mr Sharma was making cash payments to Mr Patel. Both issues were decided in Mr Sharma's favour.

[5] The Authority was critical of the time and wage records presented by Mr Patel in evidence especially when compared to a separate private diary kept by him recording different, and higher hours of work for Mr Sharma. Excerpts from that diary were produced by Mr Sharma in the form of photographs he had taken of its pages for the period 12 to 18 November 2012 and 8 July 2013 to 31 August 2014.

The Authority recorded that:²

The diaries reflect a much higher weekly average of hours worked than the weekly timesheets. Given that the success or failure of the respondents' defence depends largely on determining which of the two competing documents reflect Mr Sharma's hours of work, a significant portion of evidence was centred on these documents.

[6] The Authority decided the timesheets were not an authentic record of

Mr Sharma's hours of work.³

[7] The Authority also considered whether Mr Sharma was required to repay a portion of his wages to the plaintiff. Mr Sharma's claim was that his repayments covered two periods of time. In the period up to 1 October 2014, Mr Sharma said he was required to work 49 hours per week, and if he did not work all of those hours he was required to make up the shortfall to the plaintiffs by paying them. After

1 October 2014, Mr Sharma said a new arrangement required him to work approximately 65 hours per week, and he was required to repay \$295 for the PAYE component of his wages at the end of the month. These payments were made in cash.

[8] Mr Patel's explanation for these payments was that Mr Sharma was repaying a loan Mr Patel had made to him, so that Mr Sharma's wife could return to India.

[9] Mr Sharma's evidence was accepted and the Authority made orders jointly and severally against Mr Patel and MEL that they pay Mr Sharma the following amounts:

- a) \$17,851.65 (net) of unpaid wages;
- b) \$4,179.92 (gross) of annual holiday pay;
- c. \$841.30 (gross) as reimbursement for short-paid public holiday entitlements;
- d) \$1,860.10 (gross) in alternative holiday pay;
- e) \$275.40 (gross) to reimburse unpaid sick leave entitlements; and
- f) interest at five per cent per annum of the above sums commencing

19 January 2015 until paid.

[10] On 29 January 2016, the plaintiffs filed their challenge to the Authority's determination. They elected a de novo hearing and, in particular, disputed the adverse findings of credibility against them and the financial award to Mr Sharma. They specifically pleaded that the diary relied on by the Authority to make adverse findings had, in fact, been tampered with by Mr Sharma. Not surprisingly Mr Sharma's statement of defence does not accept the plaintiffs' claims and he strenuously disputes their allegations.

[11] The plaintiffs applied for a stay of execution of the determination on the same day as they filed their challenge. The plaintiffs' application has not been able to be dealt with while two preliminary matters were addressed. The first matter was about service on Mr Sharma overseas and the second was how he would conduct his defence to the challenge given his domicile in India. Both matters were addressed at a telephone directions conference held on 10 June 2016. At that directions conference it was agreed this application would be considered on the papers after the parties had filed any further affidavits and submissions.

[12] Mr Patel filed an affidavit supporting his application and expressed his concern about not being repaid if the amount of the Authority's award is paid to Mr Sharma in India, and Mr Patel and MEL are subsequently successful in their challenge. Mr Patel was referring to the twofold problem of not knowing anything about Mr Sharma's financial circumstances and the practical difficulties of obtaining repayment from him in India. As to the plaintiffs' ability to pay, a copy of MEL's financial

statements for the year ending 31 March 2015 was produced.

[13] In his amended notice of opposition, Mr Sharma submitted that granting a stay would be an injustice to him because he has been waiting for payment for some time and, he considers, the challenge is without merit. However, Mr Sharma also said he had some indebtedness from having borrowed money to study in New Zealand, and it is apparent that some of the money awarded to him will be used to satisfy that debt. Mr Sharma has also acknowledged in his statement of defence that he is domiciled in India.

[14] The legal principles for considering an application for a stay of execution are well known. The plaintiffs relied on the expression of those principles in *Assured Financial Peace Ltd v Pais* which they described in the following way:⁴

- a) If no stay is granted, whether the applicant's right of appeal will be ineffectual.
- b. Whether the appeal is brought and prosecuted for good reasons, in good faith.
- c. Whether the successful party at first instance will be affected injuriously by a stay.
- d) The effect on third parties.
- e) The novelty and importance of the questions involved in the case. f) The public interest in the proceedings.
- g) The overall balance of convenience.

[15] The considerations referred to in *Assured* were directed towards the broad discretion under reg 64 of the [Employment Court Regulations 2000](#) to grant a stay, and if appropriate, to do so on conditions. That broad discretion is to be exercised in the interests of justice as between the parties where the factors to be weighed up are balancing the interests of the successful litigant's rights to the fruits of judgment and the need to preserve the position in case the challenge is successful.

[16] In this case the plaintiffs rely exclusively on their challenge being rendered ineffectual if a stay of execution is not granted.

4 *Assured Financial Peace Ltd v Pais* [\[2010\] NZEmpC 50](#) at [\[5\]](#).

[17] I consider it is just to grant a stay and that the necessary balance between the interests of Mr Patel and MEL, and the interests of Mr Sharma, can be met by requiring that the whole of the amount awarded to Mr Sharma in the Authority be paid into Court subject to conditions.

[18] I accept that if the plaintiffs succeed in overturning the credibility findings in the Authority then the award to Mr Sharma will probably be overturned. If, in the meantime, Mr Sharma has been paid, the plaintiffs will be faced with attempting to recover money from him in India. The associated cost and practical problems of doing so are significant impediments to recovering any payment that may have been made and, in this case, those matters would be compounded by concerns about Mr Sharma's ability to pay given his outstanding loan. There is no evidence Mr Sharma has the financial resources from which he could repay the plaintiffs, if required to do so, and the existence of his unpaid loan suggests he would not be able to do so.

[19] Mr Sharma's interests, at least partly, will be addressed by ensuring that an order staying execution of the Authority's determination is subject to a condition that the whole of that award be paid into Court and held on interest-bearing deposit. If the challenge fails, the interest will go some way to recompensing him for the delay in being able to obtain the amount awarded to him by the Authority.

[20] There is an order with immediate effect staying the execution of the determination of the Authority subject to the following conditions:

- a) The full amount of the determination in the Authority is to be paid to the Registrar of this Court, to be held on an interest-bearing deposit, until disbursed by order of this Court.
- b) Payment under para 20(a) is to be made no later than 4.00 pm on Friday, 5 August 2016 and, in the absence of payment, this order will lapse.
- c. Mr Sharma is granted leave to apply to review this order if there is any undue delay by the plaintiffs in pursuing their challenge.

[21] Costs are reserved.

Judgment signed on 22 July 2016 at 12.30 pm

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