



Employment Court of New Zealand

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QDA v EKD [2021] NZEmpC 1 (21 January 2021)

Last Updated: 26 January 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 1](#)

EMPC 352/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for stay of execution
AND IN THE MATTER	of an application for urgency
BETWEEN	QDA Plaintiff
AND	EKD Defendant

Hearing: 21 January 2021 (by telephone)

Appearances: D Erickson, counsel for plaintiff
Defendant in person

Judgment: 21 January 2021

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Applications for stay of execution and urgency)

[1] On 20 October 2020 the Employment Relations Authority released a determination that held:¹

(a) EKD had been unjustifiably dismissed from his employment with QDA; and

¹ *EKD v QDA* [\[2020\] NZERA 433 \(Member Doyle\)](#) at [65] and [83].

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(b) That QDA must pay him compensation under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act) of \$9,000 and reimburse the Authority's lodgement fee of \$71.56.

[2] In the same determination, the Authority continued an order prohibiting the publication of the names, identities of the parties and location of the workplace.² For the purposes of this decision the Authority's non-publication order is continued, but there should be no assumption that a permanent order will be made.

[3] QDA challenged the Authority's determination and sought to set it aside. In the alternative it sought orders reducing the remedies awarded to EKD. Shortly after filing the challenge it applied for a stay of execution of the Authority's determination. The application was filed on 24 November 2020. It proposed that a stay be granted subject to conditions that:

(a) within 14 days it pays \$9,071.56 into Court; and

(b) the amount paid be held in an interest-bearing account until distributed pursuant to a further order or by agreement of the parties in writing.

[4] At today's hearing Mr Erickson, counsel for QDA, accepted that if the application is granted payment would be made within any reasonable time nominated by the Court.

[5] The grounds of the application relied on were an assertion that, if a stay was not ordered, the challenge would be rendered ineffectual by EKD's impecuniosity, that the challenge was brought in good faith, would be prosecuted expeditiously, and the defendant's position could be protected by the proposed conditions.

[6] EKD opposed the application for a stay. The core of his opposition was that he was entitled to the benefit of his success in the Authority and should be able to use the funds as he sees fit. In particular issue was taken with the accuracy (and perhaps completeness) of two affidavits from QDA's staff members supporting the application.

2 Above n 1, at [1] and [11]. See also *EKD v QDA* [2019] NZERA 609.

[7] In a minute of 8 December 2020 Judge Corkill timetabled an exchange of submissions about the application. Under that timetable the last step was for EKD's submissions to be filed and served by noon on 18 December 2020. The directions were complied with and submissions were filed.

Warrant to seize property

[8] While that timetable was being progressed, on 11 December 2020, a District Court warrant to seize property was issued on EKD's application. The warrant was issued on the basis that EKD was the judgment creditor and QDA a judgment debtor arising from enforcement of the Authority's determination. The warrant authorised a bailiff or constable to collect from QDA the sum of \$9,271.56 and authorised action to be taken including seizing and selling property, and seizing and removing money, bank notes, security for money, bills of exchange, promissory notes or bonds held by QDA as the judgment debtor. The difference between the amount of the Authority's determination and the amount of the warrant was the filing fee for the warrant of \$200.

[9] Steps taken by a bailiff to execute the warrant led to a second application by QDA. On 19 January 2021 a bailiff attended at QDA's premises intending to seize one of its vehicles. The warrant was not executed that day, while the company took advice, but the bailiff explained to one of QDA's employees that he would return in "a couple of days" if the amount in the warrant was not paid. According to QDA's evidence, the bailiff was aware that a challenge to the Authority's determination had been filed but was following his instructions to execute the warrant.

Second application

[10] On 20 January 2021 QDA applied again, for what was described as an "interim stay" of execution and sought urgency because of the bailiff's stated intention to execute the warrant to seize property and to do so in the near future. Urgency was granted on 20 January 2021 and the application was heard this morning. While described as an application for an "interim stay" Mr Erickson accepted that in reality it was a request for an urgent decision on the application filed in November 2020, in light of the attempt to execute the warrant to seize property. EKD agreed that the second application should be treated in that way. Today's hearing encompassed the

original application, this further application, and took into account the submissions filed in December and further submissions made this morning.

[11] EKD remains opposed to the application for a stay.

Principles to apply

[12] Filing a challenge does not operate as a stay of the execution of a determination.³ The Court has power to order a stay.⁴ In assessing the application the overarching consideration is the interests of justice informed by factors such as:⁵

- (a) Whether the challenge will be rendered ineffectual if the stay is not granted.
- (b) If the challenge is brought and pursued in good faith.
- (c) Whether the successful party at first instance will be injuriously affected by a stay.
- (d) The extent to which a stay would impact on third parties.
- (e) The novelty and/or importance of the question involved.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience.

[13] Competing considerations must be taken into account in assessing an application such as this, because the successful party at first instance should be entitled to benefit from the judgment but the unsuccessful party's ability to challenge that

decision should not be unreasonably fettered. Where a monetary award has been made the balance between those two competing considerations is often struck by granting a

3 [Employment Relations Act 2000, s 180.](#)

4 [Employment Court Regulations 2000](#), reg 64.

5. See for example *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [\[1999\] NZHC 1324](#); [\(1999\) 13 PRNZ 48 \(CA\)](#); and *Assured Financial Peace Ltd v Pais* [\[2010\] NZEmpC 50](#).

stay but making it subject to a condition that the money is paid either to a stake holder or to the Registrar of this Court.

[14] In this case the relevant considerations, and where the parties concentrated their submissions, was on whether the challenge would be rendered ineffectual, whether the challenge was being made in good faith and prejudice to the parties.

Challenge rendered ineffectual?

[15] QDA's application was supported by two affidavits. One of them was by the head of its corporate services and the other by a member of its human resources department. In combination these affidavits gave an overview of EKD's financial position as it was known to QDA although, of necessity, the information was limited.

[16] What was known to QDA is that EKD had not obtained replacement employment following his dismissal and, instead, had opted to start his own business. That business appeared to QDA to have had irregular work, at best. It referred to, and relied on, a bank statement sent by EKD to the company's lawyer which showed a very modest credit balance of less than one dollar and statements made to a member of its human resources department to the effect that, without being paid, EKD would be unable to buy food.

[17] From that information Mr Erickson's submission was that the plaintiff had no confidence that it would be able to recoup from the defendant any money paid to him to satisfy the Authority's determination. If that situation arose, it followed, that its challenge would be rendered ineffectual.

[18] EKD did not accept the company's position or that it would be appropriate to deprive him of the Authority's award pending the challenge being heard. He explained that the bank statement sent to QDA's lawyer was intended to provide the account number into which funds could be deposited not to disclose the extent of his financial position. He went on to say that he had other accounts with credit balances and mentioned his KiwiSaver account. It would also appear that he wished to downplay the weight attached to his comments to the human resources employee as hyperbole, to encourage the company to pay up.

[19] EKD acknowledged having taken steps to establish and operate his own business but the information provided was patchy at best. While disputing the company's assertion that he was unemployed immediately after having been dismissed, because he had taken up employment of a seasonal nature with a transport business, it would appear that his post-dismissal income was erratic.

[20] EKD did not provide any information to satisfy me that he would be able to repay QDA if its challenge succeeds. In his submissions he emphasised that the money now owed to him could be applied to help develop and operate his business to meet necessary expenses such as leasing a vehicle. He also alluded to satisfying other financial obligations arising from circumstances outside of his employment. During his submissions EKD also suggested that a compromise might be appropriate where (say) half of the amount ordered by the Authority could be held by the Registrar and the rest paid to him so that it could be used in his business. Despite those submissions details of his earnings, assets, or the potential for his business to provide adequate funds in future were noticeably missing from his response to the application.

[21] QDA's concerns about EKD's financial circumstances, and the candid acknowledgement by him that the money would be applied in the ordinary course of his business without saying how it would be repaid, supports what has been applied for.

[22] I am satisfied that QDA has established a bone fide concern about the ability of EKD to repay and, in turn, that would have an adverse impact on its challenge.

Other factors

[23] The remaining relevant factors can be considered very briefly. I accept that the challenge is being pursued in good faith. I also accept Mr Erickson's submissions that there are no effects on other parties. The issues are important to the parties but have no wider significance. There will be a detriment to EKD if an order is made, but that can be offset, at least partially, by the conditions being proposed for the funds to be held in an interest-bearing account. The challenge does not have any novel

issues and there are no public interest issues. I consider the balance of convenience firmly favours QDA.

[24] The prospect of the challenge being rendered ineffectual outweighs all other considerations and is determinative. A stay is warranted, subject to conditions.

Conclusion

[25] Execution of the Authority's substantive determination dated 20 October 2020 is stayed on the following conditions:

- (a) The amount of \$9,071.56 is to be paid to the Registrar of this Court no later than **4 pm on 28 January 2021**.
- (b) The money referred to in [25](a) is to be held in an interest-bearing account and is not to be disbursed except by order of the Court or following agreement by the parties in writing.
- (c) Leave is reserved to either party to apply to amend or vary this order.
- (d) The costs of the application are reserved.

K G Smith Judge

Judgment signed at 5.15 pm on 21 January 2021

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