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Quality Consumables Limited v Haannah [2017] NZEmpC 114 (26 September 2017)

Last Updated: 29 September 2017

IN THE EMPLOYMENT COURT AUCKLAND

[\[2017\] NZEmpC 114](#)

EMPC 120/2017

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 QUALITY CONSUMABLES LIMITED
 Plaintiff

AND NICOLE MAREE HANNAH
 Defendant

Hearing: 5 September 2017

Appearances: M Ryan, counsel for plaintiff
 G Pollak and J Lynch, counsel for
 defendant

Judgment: 26 September 2017

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS APPLICATION FOR STAY OF PROCEEDINGS

Introduction

[1] These proceedings involve a de novo challenge to a determination of the Employment Relations Authority dated 8 May 2017.¹ There was a subsequent costs determination dated 8 June 2017.² The costs determination has not been challenged.

[2] In the determination of the Authority dated 8 May 2017, the plaintiff was ordered to pay Ms Hannah within 28 days of the date of the determination:

¹ *Hannah v Quality Consumables Ltd* [2017] NZERA Auckland 138.

² *Hannah v Quality Consumables Ltd* [2017] NZERA Auckland 166.

QUALITY CONSUMABLES LIMITED v NICOLE MAREE HANNAH NZEmpC AUCKLAND [\[2017\] NZEmpC 114](#) [26 September 2017]

(a) \$21,572.62 as arrears of wages;

(b) \$1,725.80 as holiday pay due on those wages;

(c) \$899.58 as interest on the arrears of wages and holiday pay for the period from 30 July 2016 until 8 May 2017.

[3] In addition to the amount due as arrears of wages and holiday pay, if the sum was not paid within 28 days of the determination, then interest would continue to accrue at the rate of five per cent per annum until payment was made in full. Ms Hannah's claim to have been constructively dismissed was upheld by the Authority and the plaintiff was also ordered to pay (within 28 days of the

determination) the following:

(a) \$7,921.50 as reimbursement for lost wages;

(b) \$8,000 as compensation for humiliation, loss of dignity and injury to feelings

[4] Costs were reserved in the first determination and in the costs determination of 8 June 2017, the plaintiff was ordered to pay a contribution towards Ms Hannah's costs amounting to \$7,000.

[5] The challenge to the determination of 8 May 2017 was filed with the Court on 2 June 2017. When a challenge is filed it does not operate as a stay,³ and Ms Hannah took enforcement proceedings in the High Court against the plaintiff to have it placed in liquidation. Those proceedings were called in the High Court, but Ms Hannah did not appear. The petition to wind up the plaintiff was accordingly dismissed and costs were awarded against Ms Hannah. It appears that her non-appearance on the day of the hearing in the High Court was as a result of oversight

on the part of her legal advisors, who have now accepted responsibility for the costs

award against her.

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

The application for stay

[6] The plaintiff has now made an application for stay of proceedings, which in effect seeks an order staying Ms Hannah from enforcing the determination. That application for stay of enforcement was filed with the Court on 12 July 2017, over two months after the substantive determination was delivered by the Authority. The grounds of the application are that if a stay is not granted, the plaintiff's right of appeal will be rendered nugatory, the defendant will not be injuriously affected by the stay and the plaintiff has reasonable grounds of success in its challenge to the determination. Mr Allan McCormick, who is the sole director of the plaintiff company, has sworn and filed an affidavit in support of the application for a stay. In addition to simply repeating the grounds set out in the application, Mr McCormick states that Ms Hannah has taken enforcement proceedings in respect of the determination.

The notice of opposition

[7] The defendant has filed a notice of opposition to the application for stay. This is accompanied by an affidavit from Ms Hannah. The grounds of opposition are:

(a) declining the stay will not render the right of appeal nugatory;

(b) the defendant has been and continues to be injuriously affected by the plaintiffs' unwillingness to pay the awards;

(c) there are no reasonable grounds of success in the challenge; (d) the challenge is merely a stalling tactic;

(e) there are grounds for concern that the sole director and shareholder of the plaintiff will attempt to wind up the company to avoid payment.

[8] Ms Hannah seeks to have the costs determination included in the consideration as to whether a stay should be granted or not. This would only be a consideration in relation to any payment into Court, or providing security, or part-payment to Ms Hannah. Presently, she remains free to take steps to enforce the costs award as it is not subject to the application for stay and in any event, no challenge has been made within time to the determination making the award.

[9] In her affidavit in support Ms Hannah sets out facts and allegations to support her notice of opposition. These can be summarised as follows:

(a) she undertakes to repay to the plaintiff any amount awarded should the Court overturn the determination. Therefore, a refusal to grant a stay will not render the appeal nugatory;

(b) she continues to be injuriously affected by the dismissal, unpaid wage arrears and her inability to undertake full-time work while suffering stress and anxiety. She is in serious financial need of some or all of the awards;

(c) even if the challenge is dismissed, the plaintiff, through its director, will disregard the judgment and refuse to pay;

(d) the chances of success in the challenge are very limited;

(e) the interests of justice are best served by preserving the status quo. [10] Ms Hannah then sets out in her affidavit the facts which support the

contention that the director of the plaintiff will obstinately and stubbornly refuse to pay her even if ordered to do so by the Court. She also sets out facts relating to the plaintiff's cash flow problems that she observed while working for the plaintiff. This included attempts by the director Mr McCormick to delay payment to creditors, persuade suppliers to continue to supply products needed by the business when the company was not in a position to make payment, and delays in receiving her wages. Her own financial position resulting from this unsatisfactory position, she states,

seemed to be of no concern to Mr McCormick, the director. She also refers to the plaintiff's previous default in payments to the Inland Revenue Department. This is confirmed by a contemporary document annexed to the affidavit and is not disputed in reply evidence

from Mr McCormick.

The affirmation in reply

[11] In an affirmation in reply dated 14 August 2017, Mr McCormick attempts to rectify the serious deficiencies in his earlier affidavit in support, which failed to provide sufficient information to the Court. In his later affirmation he disputes the assertions made by Ms Hannah as to the way he treated her and creditors of the company. He remains of a view that Ms Hannah's difficult financial position, which she confirms in her own affidavit, means she would be unable to repay the awards in the event of a successful appeal. He refers to circumstances surrounding the liquidation proceedings. He points out that if, as Ms Hannah alleges, he may liquidate the company to avoid payment, then he would have done so by allowing a petition to wind up to proceed unopposed.

[12] Of concern, however, is the presentation of information attached to Mr McCormick's affidavit, which confirms the plaintiff's own present impecunious position.

[13] Mr McCormick, in his notice of opposition and affirmation in reply, expresses reluctance to making payment into Court pending the challenge being heard, or any other conditions being attached to the stay if it is granted. However, in submissions presented to Court, Mr Ryan, counsel for the plaintiff, indicated that the plaintiff is not now opposed to a stay being granted with conditions attached, but with consideration to the company's financial position.

Legal principles applying

[14] Counsel in their submissions referred to the appropriate principles which the Court needs to take into account in considering an application of this kind. The power of the Court to stay proceedings, including stay of execution of any

determination of the Authority, is authorised by a combination of [s 180](#) of the [Employment Relations Act 2000](#) (the Act) and reg 64 of the [Employment Court Regulations 2000](#) (the Regulations). Section 180 of the Act provides as follows:

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.

[15] Regulation 64 the Regulations reads as follows:

Power to order stay of proceedings

(1) If an election is made under [section 179](#) of the Act, the Authority and the court each have power to order a stay of proceedings under the determination to which the election relates.

(2) If an application for a rehearing is made under [clause 5 of](#) Schedule

3 of the Act, the court has power to order a stay of proceedings under the decision or order to which the application relates.

(3) An order under subclause (1) or subclause (2)—

(a) may relate to the whole or part of a determination or decision or order, or to a particular form of execution; and

(b) may be made subject to such conditions, including conditions as to the giving of security, as the Authority or the court thinks fit to impose.

[16] In respect of the power contained in s 180 of the Act, the Employment Court in *North Dunedin Holdings Ltd v Harris* stated:⁴

[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.

[3] Whether a determination of the Authority should be stayed (particularly one, as here, where there is an order for reinstatement) is broadly discretionary and the interests of justice are to be the determiner. [Section 180](#) of the [Employment Relations Act 2000](#) ... provides only that "*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.*" Stay is an interim order and the Court needs to balance the interests of, and prejudices to, the parties in determining what will be the most just course for that period. One important question is its likely duration, not only until the challenge can be heard but, even more importantly, until it can be decided.

[18] Counsel have both submitted on the basis of these authorities that the Court has a broad discretion in dealing with such an application and that ultimately, the determining principle is the interests of justice between the parties.

[19] Counsel also referred to the decision of *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*.⁶ In the employment context, the Court of Appeal in *New Zealand Cards Ltd v Ramsay*⁷ cited *Dymocks* with approval. In *Dymocks*, Hammond J at first instance had stated:

[8] I begin with a brief discussion of principle. It is routinely said that, at the end of the day, the test for a stay of execution is one of the justice of the given case. In the broadest sense, that must be so. But a formula which, with respect, more accurately indicates the essential nature of the balancing approach which must be adopted, is set out in the decision of Gault J in *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85. His Honour said (at p

87):

"In applications of this kind it is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful. Often it is possible to secure an intermediate position by conditions or undertakings and each case must be determined on its own circumstances."

[20] In *Ramsay*, the Court of Appeal held:

[7] 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

⁵ *Secretary for Justice v Dodd* WC28/09, 22 December 2009 (EmpC).

⁶ *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; (1999) 13 PRNZ 48 (HC).

⁷ *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7].

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.

(footnotes omitted)

[21] Both counsel also referred to this Court's decision in *Assured Financial Peace Ltd v Pais*.⁸ Chief Judge Colgan in *Pais* defined the principles from both *Dymocks* and *Ramsay* to summarise the position as follows:

[5] The following seven considerations may apply, to a greater or lesser extent, in a particular case.

- 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;
- the public interest in the proceedings; and
- the overall balance of convenience.

[22] As Mr Pollak stated in his written submissions for the defendant, not all of the considerations set out in *Pais* apply to the present case. There are no third parties affected by these proceedings. There is not anything particularly novel or important in the questions involved in the case. There may be some peripheral public interest in the proceedings and insofar as the other guidelines are concerned, he submitted they all apply, and each of them favours the defendant Ms Hannah's opposition to the application.

[23] In considering whether the challenge to the determination is soundly based, the Court can only make an inferential assessment based on the pleadings, the determinations and any other documentary evidence which may have been provided. The plaintiff now asserts that the defendant's resignation was a genuine resignation and not part of a constructive dismissal. There is also a dispute as to the assessment of and calculation of arrears of wages and holiday pay. It is difficult to assess the strength of these allegations prior to hearing evidence at trial, where such evidence will be properly tested. Presently, it would not be possible to say that the challenge is without merit.

[24] As to the application for stay itself, there are inconsistencies in the positions which both parties have taken. Ms Hannah has submitted that the appeal will not be rendered nugatory or ineffectual if she recovers payment of the awards now because she has undertaken to repay in the event that the position is reversed when the challenge is heard. However, in setting out her own impecunious position she has, in a sense, confirmed the assertions of Mr McCormick that she would be unable to repay the awards in the event that the appeal is successful. Her financial position is likely to deteriorate further as time progresses. I also accept Mr McCormick's position that, if he were intending to wind up the company, as Ms Hannah alleges, he would have allowed her petition to the High Court to proceed and not taken steps to set aside the statutory demand. Nevertheless, the plaintiff's own position is also somewhat contradictory. Mr McCormick disputes the assertion of Ms Hannah as to the plaintiff's precarious financial state, and yet the evidence provided by Mr McCormick himself clearly shows that the company is in difficulties with cash-flow. This is confirmed by the

plea that, as a result of its financial difficulties, the company, while seeking a stay, has no ability to pay the entirety of the awards into Court to provide security pending the outcome of the challenge.

[25] It clearly needs to be accepted that Ms Hannah, being the successful party in both determinations of the Authority, would normally be entitled to the fruits of her success. With the company in financial jeopardy, there is a risk that delaying

payment any further may well prevent her from ever recovering her remedies.⁹ She is clearly placed in financial difficulties by the failure of the plaintiff to pay the awards. The delay in commencing the application for stay was unacceptable and was clearly only made to the Court in the face of enforcement proceedings taken by Ms Hannah.

[26] In carrying out the balancing exercise and having regard to the overall interests of justice, I am of the view that the plaintiff's application for a stay of enforcement of the determinations should be granted. However, because Ms Hannah will be deprived of her entitlement to enforce the determinations by the stay, the following conditions apply:

(a) On or before 4 pm on 3 October 2017, the plaintiff is to pay Ms Hannah the sum of \$15,000. This figure incorporates the award of compensation of \$8,000 and the costs award by the Authority of

\$7,000.

(b) On or before 4pm on 3 October 2017, the plaintiff is to pay to the Registry of the Employment Court the balance of the awards, amounting to \$32,119.50. This sum is to be held by the Registrar in an interest bearing account pending further order of the Court.

(c) The plaintiff is required to prosecute its challenge in a timely fashion, and this will be reviewed periodically by the Court.

(d) If the sums directed above are not paid to Ms Hannah and the Registrar within the time specified, then the order for stay will lapse and Ms Hannah will be free to take such enforcement action as she chooses.

[27] As the plaintiff has been granted an indulgence by the Court, which has precluded Ms Hannah from obtaining a substantial proportion of the awards made by the Authority, it is appropriate that the plaintiff should pay Ms Hannah costs in any event on its application for stay. Such costs are to be calculated in accordance with the Court's Guideline Scale pursuant to classification 2B. Any dispute as to the calculation of such costs, or failure by the plaintiff to pay such costs within a reasonable time, may be referred to the Court by appropriate memoranda for resolution and, if necessary, further orders. In the event that the plaintiff fails to pay the costs, Ms Hannah will be free to take such enforcement proceedings in respect of them as she chooses.

ME Perkins

Judge

Judgment signed at 2.15 pm on 26 September 2017

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