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Rossiter v AFFCO New Zealand Limited [2017] NZEmpC 28 (13 March 2017)

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Rossiter v AFFCO New Zealand Limited [2017] NZEmpC 28 (13 March 2017)

Last Updated: 17 March 2017

IN THE EMPLOYMENT COURT WELLINGTON

[\[2017\] NZEmpC 28](#)

EMPC 233/2016

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 JOHN ONEPU ROSSITER Plaintiff

AND AFFCO NEW ZEALAND LIMITED Defendant

Hearing: (by memoranda of submissions filed on 7 and 15 December

2016)

Appearances: S Mitchell, counsel for the plaintiff

M Williams, counsel for the defendant

Judgment: 13 March 2017

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves an application for stay of a challenge brought by Mr John Rossiter. The challenge relates to an order of stay made by the Employment Relations Authority (the Authority), because it was persuaded that Mr Rossiter's claim should not proceed while there are unresolved appellate issues between AFFCO New Zealand Ltd (AFFCO) and the New Zealand Meat Workers and

Related Trades Union Inc (the Union), of which Mr Rossiter is a member.¹

¹ *Rossiter v AFFCO New Zealand Ltd* [2016] NZERA Wellington 108.

AFFCO NEW ZEALAND LIMITED v JOHN ONEPU ROSSITER NZEmpC WELLINGTON [2017] NZEmpC

28 [13 March 2017]

Background

[2] In his statement of problem lodged in the Authority, Mr Rossiter claimed he was dismissed by AFFCO when it failed to engage him for the 2015/2016 season at AFFCO's Wairoa plant.

[3] Mr Rossiter says that he was employed at Wairoa on an individual employment agreement based on the terms of an expired collective agreement (based-on iea) between the Union and AFFCO, until the conclusion of the 2014/2015 season.

[4] He alleges that prior to the commencement of the 2015/2016 season, AFFCO told him that he was not an employee, and if he wished to recommence work at the plant he would need to sign a new individual employment agreement which it had prepared (the company IEA). He signed the document accordingly.

[5] When he became aware that other members of the Union to which he belonged had not agreed to sign such an IEA, he told AFFCO he was not happy with the document and did not wish to be covered by it. He was not called back to work either on the basis of the company IEA, or the based-on iea. He alleges that AFFCO has accordingly breached multiple obligations which were owed to him which should have resulted in his re-engagement. He seeks reinstatement to his employment, lost wages, compensation for humiliation, loss of dignity and injury to feelings as well as costs.

Authority's determination of AFFCO's stay application

[6] As already mentioned, the Authority considered an application for stay brought by AFFCO. The application was made on the basis that Mr Rossiter's claim relied on two decisions of this Court, both of which were at the time subject to appellate consideration in the Court of Appeal.

[7] The first appealed judgment was a decision of a full Court that Union members such as Mr Rossiter were employees of AFFCO during the off-season and,

separately, that AFFCO had unlawfully locked out such employees.² When the Authority's determination was issued on 30 August 2016, the Court of Appeal had reserved its judgment following an appeal hearing, but its decision had not yet been issued; that occurred subsequently on 6 October 2016.³

[8] The second relevant judgment was a decision of this Court issued on

11 February 2016 (the February judgment).⁴ It related to a claim for compliance orders compelling AFFCO to re-engage workers who had been illegally locked out at Wairoa; the February judgment proceeded on the basis of the findings as to illegal lockout made by the full Court in its judgment. An application for leave to appeal this decision was subsequently filed with the Court of Appeal, but that had yet to be heard at the time when the Authority heard the application for stay.

[9] The Authority determined that it was appropriate to stay Mr Rossiter's relationship problem until such time as the Court of Appeal had determined the appeals of the above Employment Court judgments.⁵

[10] Mr Rossiter brought a challenge to that determination. In his statement of claim Mr Rossiter impliedly challenges the Authority's determination of the stay application; and seeks substantive findings and relief as sought originally in his statement of problem. AFFCO asserts that the order of stay was appropriately made by the Authority and disputes that there is a basis for concluding there has been an unjustified dismissal, or that Mr Rossiter is entitled to reinstatement or other remedies.

A section 179(5) problem?

[11] The first issue which required resolution in this Court was whether

Mr Rossiter's challenge was precluded by s 179(5) of the Employment Relations Act

2. *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [\[2015\] NZEmpC 204](#), [\(2015\) 10 NZELC 79-057](#).
3. *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [\[2016\] NZCA 482](#), [\(2016\) 10 NZELC 79-067](#).
4. *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [\[2016\] NZEmpC 7](#), [\[2016\] ERNZ 20](#).

⁵ *Rossiter v AFFCO New Zealand Ltd*, above n 1, at [22] and [26].

(the Act); in particular, was the making of the order a matter of procedure for which there was no right of challenge?

[12] In an interlocutory judgment of 8 November 2016, Chief Judge Colgan resolved this issue in the following passage:⁶

[30] I conclude that a stay of its investigation meeting by the Authority, in the circumstances of these parties and this case, is not precluded from challenge by s 179(5). Although the current stay has a limited duration, it is at least possible, if not probable, that another order for stay of its investigation to be sought by AFFCO and made by the Authority, will operate both indefinitely and for many months to come. That would be contrary to the parliamentary purposes outlined above of expeditious disposal of proceedings before the Authority.

[31] To adopt the language of the judgments of this Court and the Court of Appeal which have interpreted and applied s 179(5), to prohibit Mr Rossiter's challenge by categorising the Authority's order for stay as a matter of its procedure will not expedite its investigation and determination of his claims. The stay, and its potentially indefinite duration especially if renewed, is an outcome of the case in the Authority. It is in this case particularly important to have regard to the effect of the Authority's decision rather than the nature of the power being exercised. To prohibit a challenge to the Authority's stay order, and the real possibility of an extension of it, would be to remove the focus of the proceedings from the immediate employment relationship problem itself. To invoke s 179(5) in the circumstances of this case would be to put up a barrier to access to justice for a plaintiff such as Mr Rossiter. Prohibiting his challenge by invoking s

179(5) would have, if not an irreversible consequence, then a significant substantive effect. Dismissed employees cannot wait indefinitely in the hope that their proceedings will eventually be investigated and determined: the need for an income, not to mention the dignity of work to end the indignity of unemployment, should not mean that access to justice must be forgone because of interminable delay.

[32] Further, the Authority must apply the law as it stands and not as it might be depending on the outcome of an appellate process. At present, the law is as the Court of Appeal concluded in its 6 October 2016 judgment.⁷

The Authority will not be able to be criticised justly for applying that law, even if it is subsequently changed by an appeal to the Supreme Court or by the outcome of the judicial review proceedings currently before the Court of Appeal.

[33] Interminable delay in having the plaintiff's case determined is not simply a matter of the Authority's procedure that can be remedied eventually on a justiciable challenge. The potential delay is a substantive and substantial consequence that cannot be later corrected or ameliorated. Mr Rossiter has been out of work with his former employer, that offered him work and presumably wants him to work, for almost 18 months. It would

⁶ *Rossiter v AFFCO New Zealand Ltd* [2016] NZEmpC 144.

⁷ *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc*, above n 3.

engage serious access to justice questions if the Authority's stay orders were to be extended, as seems likely.

[34] Mr Rossiter's challenge is not, therefore, precluded by s 179(5).

[13] It will be necessary to consider these observations later in this decision.

Stay of proceedings in this Court?

[14] On 29 November 2016, I conducted a telephone directions conference with counsel regarding the further steps to be taken in this Court. By then, there were further developments with regard to the litigation between AFFCO and the Union in the senior courts, which I shall summarise shortly. In the course of the conference, counsel for AFFCO, Mr Williams, raised an issue as to whether Mr Rossiter's challenge should itself be stayed. I made timetable directions so as to allow consideration of this issue. Subsequently AFFCO filed an application for stay of the challenge in this Court, asserting that due to the various unresolved proceedings in the senior courts, such an order was necessary. For his part, Mr Rossiter opposes this application. In summary he says that he is currently without work and that his claims should not be delayed further; and in any event, he will not be relying on the challenged findings of this Court.

Current position in the senior courts

[15] The current position with regard to the proceedings in the senior courts is as follows:

a) AFFCO has brought an application for judicial review of the full Court judgment in the Court of Appeal; it is now the subject of an application for strike out. I am informed that there is a timetable for the filing of submissions with regard to that application, and that the hearing of the application will take place on 23 March 2017.

b) AFFCO has brought an application for leave to appeal the decision of the Court of Appeal to the Supreme Court. On 9 March 2017, that leave was granted.⁸

c) The application made in the Court of Appeal for leave to appeal the February judgment stands adjourned for review in light of all other proceedings until the end of March 2017.

Submissions with regard to the application for stay in this Court

[16] In his submissions, Mr Williams outlined the current circumstances of the appellate proceedings as already described.

[17] He then submitted that r 12 of the [Court of Appeal \(Civil\) Rules 2005](#) would be of assistance to the Court in exercising its discretion. The rule relevantly provides that the court appealed from, or the Court of Appeal, may order a stay of the proceeding in which the decision was given.

[18] With reference to cases which have considered the rule, he submitted that the

factors to be taken into account in the exercise of the Court's discretion are:⁹

- a) Whether the appeal would be rendered nugatory by the absence of a stay;
- b) The bona fides of the appellant as to the prosecution of the appeal;
- c) Whether the successful party would be injuriously affected by the stay;
- d) The effect on third parties;
- e) The novelty and importance of questions involved;
- f) The public interest in the proceeding; and g) The overall balance of convenience.

8. *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [\[2017\] NZSC 30](#).

9 These factors are derived from *Keung v GBR Investment Ltd* [\[2010\] NZCA 396](#), [2012] NZAR

17 at [11].

[19] Mr Williams submitted in summary that the factors described in sub-paras (b), (c), (d), (e), (f) and (g) of the previous paragraph all pointed strongly to the necessity of an order of stay of Mr Rossiter's challenge. He emphasised that the issues arising from the full Court decision and the February judgment were potentially very important questions of law which should be determined before Mr Rossiter's claims are heard.

[20] Mr Williams submitted that given the range of unresolved issues in the senior courts, there would be difficulties in resolving Mr Rossiter's claim, that AFFCO would suffer prejudice if Mr Rossiter's claim proceeded for these reasons, and prejudice would be avoided by an order of stay being granted.

[21] Mr Mitchell, counsel for Mr Rossiter, submitted that his grievance was straightforward. He had been entitled to be re-

engaged at the commencement of the

2015/2016 season. That was the basis on which he had signed the company's employment agreement. The company was subject to obligations of good faith and implied terms of reasonable treatment. The ongoing refusal to provide work to Mr Rossiter was unjustified. He had been treated differently from other employees, and not returned to the terms and conditions of the based-on iea following the issue of the February judgment, unlike other Union members at the Wairoa plant. In short, it was submitted that Mr Rossiter's grievance would not depend upon the outcome of the current litigation in the appellate courts between the Union and AFFCO.

[22] Then Mr Mitchell submitted that to wait until the appellate litigation had been resolved would be wholly unreasonable. Mr Rossiter had filed his grievance in the Authority in early April 2016, and he was still awaiting resolution. Reliance was placed on the remarks of Chief Judge Colgan in the interlocutory judgment of 8 November 2016 to which I referred earlier.

[23] Mr Mitchell said in summary that a further delay of Mr Rossiter's claim pending further appellate judgments would lead to an entirely unfair result for Mr Rossiter. Furthermore, he would not be relying on the findings of the full Court judgment which are the subject of appeal. In particular, the following findings would not be relied on: that workers remained as employees in the off-season, and

that they were subject to an alleged lockout at the time they were required to sign a new agreement in order to return to work.

Relevant principles

[24] There are several provisions in the Act and the Employment Court

Regulations 2000 (the regulations) which provide for the making of stay orders.

[25] Regulations 64 to 67 apply where an application is made to stay a determination, in whole or in part; and/or as to execution of orders of the Authority. Although the application filed by AFFCO refers to reg 65, this regulation is not applicable for present purposes since the stay sought in this case is of a challenge instituted in the Court.

[26] Section 214(6) of the Act refers to a stay of an Employment Court judgment, pending an appeal – it is in that circumstance that r 12 of the [Court of Appeal \(Civil\) Rules 2005](#), to which I referred earlier, applies. Although AFFCO relies on two challenges to judgments of this Court to support its current application, r 12 is not directly on point since neither of the judgments under appeal arise from Mr Rossiter's claim.

[27] In the past, stay orders have been granted in other circumstances under s 189(1) of the Act, in reliance of the Court's equity and good conscience jurisdiction. An example of such an approach is found in *Mann v Alpinewear (New Zealand) Ltd*, where it was concluded that an Employment Tribunal could decide not to adjudicate on a personal grievance while criminal proceedings on the same facts were pending.¹⁰ This was held to be a discretion exercised as part of the Tribunal's equity and good conscience jurisdiction, and one which must take account of all relevant factors.¹¹ *Quality Pizzas Ltd v Canterbury Hotel Employees' Industrial*

Union is another example.¹² There the Arbitration Court held that it had the power

as a matter of equity and good conscience to grant a stay pending a judicial review of a relevant clause.

¹⁰ *Mann v Alpinewear (New Zealand) Ltd* [1996] 1 ERNZ 248 (EmpC).

¹¹ See also *A Ltd v B* [1999] 1 ERNZ 613 (EmpC).

¹² *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] ACJ 383.

[28] I consider the present application should be assessed under the Court's equity and good conscience jurisdiction. In the exercise of the discretion bestowed by that section, the various factors raised by counsel for each party may thereby be considered. As in all cases where a stay application is made, the ultimate object is to ensure that a just balance of the parties' interests is maintained.

Discussion

[29] I deal first with the submission made for Mr Rossiter relating to delay.

[30] If an order for stay was granted on the basis that the challenge would be stayed until such time as the appellate litigation was resolved, it is likely that Mr Rossiter's challenge and then claim would not be heard this year and possibly not until some way into 2018. In that regard I respectfully adopt the dicta of Chief Judge Colgan, who emphasised that since Mr Rossiter had been out of work with his former employer since late 2015, there would be serious access to justice questions if

there were to be "interminable delay".¹³ This factor points strongly to a conclusion

that an order for stay should not be granted.

[31] A further consideration is that to grant a stay would give rise to disparity of treatment in respect of other persons who were affected by the lockout. Notwithstanding the pursuit of an appeal of the judgment of the full Court, the application to re-engage 164 workers at the Wairoa plant proceeded on the basis of the findings of that earlier judgment, and without any suggestion that it should be stayed. No reason has been advanced as to why Mr Rossiter should be treated differently from the workers whose circumstances were considered in the February

judgment which determined they were entitled to be re-engaged.¹⁴

[32] On the basis of Mr Mitchell's submissions, it appears that Mr Rossiter's position could be stronger than those of the 164 applicants, because it is contended that his case does not in fact rely on findings which are at issue in the proceedings

that are now before the Court of Appeal and the Supreme Court. Counsel submits

¹³ *Rossiter v AFFCO New Zealand Ltd*, above n 6.

¹⁴ *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 4, at [131].

that Mr Rossiter's claim is based on the particular events which led him to sign an individual employment agreement at the commencement of the 2015/2016 season, and that AFFCO was unjustified in not offering him work thereafter. However, while that argument differs from the case made for other workers who sought relief from the Court, I do not place too much weight on this point because the context for Mr Rossiter's claim does arise from the circumstances relating to the lockout, the status of which is under challenge.

[33] Although the other points raised for AFFCO more appropriately arise when a stay is sought with regard to an appeal in a proceeding of which a respondent is a party, I deal with them briefly.

[34] It could not be said that the judicial review and appeal proceedings initiated by AFFCO in the Court of Appeal and Supreme Court would be rendered nugatory if a stay was not granted in this proceeding. The proceedings in the senior courts relate to circumstances which are apparently different from those which require resolution in Mr Rossiter's claim; and the

outcome of those proceedings could potentially affect many workers other than Mr Rossiter. Those proceedings would not be rendered nugatory by the grant of a stay order in this proceeding.

[35] The next factor relates to whether the appellate proceedings are being pursued on a bona fide basis. Whilst AFFCO's bona fides is not challenged in this proceeding, that is not a sufficient reason in and of itself for granting an order of stay in this proceeding.

[36] A further potential factor is whether the successful party would be injuriously affected by the stay. Since no determination of the merits has been made to this point in Mr Rossiter's claim, this factor is not relevant.

[37] Another possible consideration relates to the effect of a stay on third parties. No evidence has been placed before the Court suggesting that there are other persons whose circumstances are the same as those of Mr Rossiter. Accordingly, this factor is not relevant.

[38] The next two factors relate to the novelty and importance of questions involved in the appellate proceedings, and the public interest in them. There is no doubt that the issues before the senior courts meet these tests, but I do not regard them as being dispositive of the present application, given the basis on which Mr Rossiter's claim is being advanced.

[39] The final factor relates to the overall balance of convenience. For the reasons discussed earlier relating to Mr Rossiter's circumstances, I am satisfied that the balance of convenience lies with Mr Rossiter's right to have his claim dealt with as soon as possible, given the delays which have already occurred.

[40] AFFCO's application for a stay of Mr Rossiter's challenge is accordingly

dismissed.

The way forward

[41] Any consideration of Mr Rossiter's substantive claim must proceed on the basis of the law as it stands at present in this Court; this is because the full Court and February judgments have not been stayed.

[42] If Mr Rossiter is able to establish his claim, and if it transpires that the claim is in fact based on findings made in the full Court judgment and/or the February judgment, then consideration may need to be given to the staying of any financial remedies, once made, although not to any order of reinstatement which may be made.

[43] A similar approach has been adopted in other proceedings relating to the claims of the 164 Wairoa workers who are the subject of the February judgment. In that case, the Court prioritised the claims for compliance orders. Upon the Court's indication that such orders would be made, those workers were re-engaged, notwithstanding the appellate proceedings which had by then been instituted. The Court has gone on to deal with methodology issues relating to their financial claims, but this is on the basis that the points of challenge raised in the senior courts will have to be resolved before any enforceable orders are made.

[44] It may be necessary to adopt the same approach as to financial remedies in this proceeding. That, however, is a matter which can be considered subsequently, if need be.

[45] Counsel should now consider whether the findings of this judgment apply equally to the challenge brought against the Authority's determination that there should be a stay of its investigation.

[46] I wish to discuss this issue, and any necessary timetabling matters, with counsel at a telephone directions conference which the Registrar is now directed to establish.

[47] Costs are reserved.

B A Corkill

Judge

Judgment signed at 10.30 am on 13 March 2017

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