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## Rossiter v AFFCO New Zealand Limited [2017] NZEmpC 37 (4 April 2017)

Last Updated: 7 April 2017

IN THE EMPLOYMENT COURT WELLINGTON

[\[2017\] NZEmpC 37](#)

EMPC 233/2016

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JOHN ONEPU ROSSITER Plaintiff

AND AFFCO NEW ZEALAND LIMITED Defendant

Hearing: (by memoranda of submissions filed on 27 and 28 March 2017) Counsel: S Mitchell, counsel for the plaintiff

M Williams, counsel for the defendant

Judgment: 4 April 2017

JUDGMENT OF JUDGE B A CORKILL

### Introduction

[1] In interlocutory judgment (No 2),<sup>1</sup> I considered an application for a stay of a challenge which Mr Rossiter had brought to a determination of the Employment Relations Authority (the Authority).<sup>2</sup> In that determination, the Authority had granted AFFCO New Zealand Limited (AFFCO) an order to stay its investigation.

[2] Interlocutory judgment (No 2), issued on 13 March 2017, dealt only with an application brought by AFFCO which sought a stay of the challenge in this Court; the application was dismissed. It did not deal with the position in the Authority itself.

<sup>1</sup> *Rossiter v AFFCO New Zealand Ltd* [2017] NZEmpC 28.

<sup>2</sup> *Rossiter v AFFCO New Zealand Ltd* [2016] NZERA Wellington 108.

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[3] In that judgment, I also invited counsel to consider whether my findings as to a stay of the proceeding in this Court would apply equally to the challenge brought against the Authority's determination that there should be a stay of its investigation.

[4] After the issuing of judgment (No 2), a telephone directions conference was held on 16 March 2017. After hearing counsel, I directed that amended pleadings be filed – this was to address the issue to which I had alluded to in that judgment that Mr Rossiter challenged the Authority's determination of stay only impliedly.<sup>3</sup> I also directed that memoranda be filed by counsel as to whether there were any further submissions which either party could make in relation to the challenge beyond those which had already been considered by the Court. It was agreed that the challenge would then be determined on the papers.

[5] Mr Rossiter filed an amended statement of claim which makes it clear that he brings a de novo challenge to the

Authority's determination that a stay order be granted. AFFCO has filed an amended statement of defence contending that the Authority was correct in granting a stay order.

[6] Submissions have been filed in support of these assertions.

[7] Mr Mitchell, counsel for the plaintiff, stated that there are no additional points which Mr Rossiter sought to raise beyond those which had been set out in his previous submissions relating to the stay application in this Court.

[8] Mr Williams, counsel for the defendant, stated that he resisted any submission that the findings made in judgment (No 2) should apply equally to a consideration of the challenge to the Authority's stay determination. He said that the Authority's determination was appropriate in law and in fact, that it correctly applied the principles relating to a stay, and that it had appropriately exercised its jurisdiction

to determine its own procedure.

3 *Rossiter v AFFCO New Zealand Ltd*, above n 1, at [10].

[9] That said, Mr Williams confirmed that AFFCO had no further submissions in respect of the challenge to the Authority's stay determination; the company relied on the submissions he had advanced previously.

## Discussion

[10] As already mentioned, Mr Rossiter has sought a full hearing of the entire matter, that is, a hearing de novo.

[11] It is accordingly necessary for the Court to consider the issue of whether the Authority's investigation should be stayed, afresh. This is not a case where a challenge has been brought other than on a de novo basis; if that had occurred then it would have been necessary to focus on whether the Authority had erred either in fact or in law.

[12] The question of a stay arises because of various appellate proceedings which are taking place in the senior courts. In judgment (No 2), I summarised these as follows:<sup>4</sup>

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.<sup>5</sup>

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.

[13] The Court has received no further information as to what has occurred in these proceedings since the end of March 2017.

<sup>4</sup> *Rossiter v AFFCO New Zealand Ltd*, above n 1, at [15].

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

[14] Turning to counsel's submissions, Mr Williams argued in essence that it was necessary for these proceedings to be resolved before Mr Rossiter's claim could proceed.

[15] Mr Mitchell submitted that it would be unreasonable for Mr Rossiter to have to wait until the appellate litigation had been resolved. Reliance was placed on the remarks of Chief Judge Colgan in the first interlocutory judgment in this proceeding of 8 November 2016, wherein the prospect of unacceptable delay was discussed.<sup>6</sup>

[16] Mr Mitchell also submitted that Mr Rossiter would not be relying on the

findings of the full Court's judgment which is the subject of appeal.

[17] In judgment (No 2), I considered the submissions which were made by counsel and which are now repeated, and reached the following conclusions as to whether there should be a stay in this Court:<sup>7</sup>

[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".<sup>8</sup>

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.<sup>9</sup>

[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

<sup>6</sup> *Rossiter v AFFCO New Zealand Ltd* [2016] NZEmpC 144 at [28] – [33].

<sup>7</sup> *Rossiter v AFFCO New Zealand Ltd*, above n 1.

<sup>8</sup> *Rossiter v AFFCO New Zealand Ltd*, above n 6.

9. *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, [2016] NZEmpC 7, [2016] ERNZ 20 at [131].

the Supreme Court. Counsel submits 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.

[18] These conclusions apply with equal force to the question of whether the Authority's investigation should proceed.

[19] I am accordingly satisfied that the challenge should be allowed, and that the Authority's determination dated 30 August 2016 should be set aside.

[20] The Authority is not to be criticised for having reached the conclusion that it did. Since the determination was issued,

further steps have been taken in the appellate proceedings which meant that a reconsideration of the stay issue became inevitable; the Court had available to it more information as to the multiple proceedings between the parties than did the Authority.

### The way forward

[21] Counsel will now need to consider the steps which need to be taken to advance this matter. As directed in my minute of 16 March 2017, counsel are to file a joint memorandum summarising their views as to the way forward, in light of the preliminary view I expressed in that minute. Since the stay issue was the only matter

which was before this Court,<sup>10</sup> I indicated that I would expect Mr Rossiter’s claim to

be investigated by the Authority, unless an order for removal is made. I express no view as to that possibility, however, since that would be an issue for the Authority.

[22] Counsel, however, are to file a joint memorandum by 11 April 2017.

[23] Mr Rossiter is entitled to costs with regard to the steps taken in connection with the challenge to this point. Counsel should confer on this topic. If agreement cannot be reached, Mr Rossiter may apply for an appropriate order within 21 days of this judgment; AFFCO may respond within 14 days thereafter. Submissions should address the Court’s Costs Guidelines.

B A Corkill

Judge

Judgment signed at 4.20 pm on 4 April 2017

10 Unlike the situation which was considered by the full Court in *Abernethy v Dynea New Zealand*

*Ltd (No 1)* [\[2007\] NZEmpC 83](#); [\[2007\] ERNZ 271](#).

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