



Employment Court of New Zealand

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Solid Roofing Limited v Newman [2018] NZEmpC 141 (29 November 2018)

Last Updated: 4 December 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[\[2018\] NZEmpC 141](#)
EMPC 221/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to state case to the Court of Appeal and stay
AND IN THE MATTER OF	an application to recall and amend judgment
BETWEEN	SOLID ROOFING LIMITED Plaintiff
AND	SAMUEL NEWMAN Defendant

Hearing: On the papers
Judgment: 29 November 2018

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE M E PERKINS

(Applications for case stated to Court of Appeal and stay and application to recall and amend judgment)

[1] These proceedings involve a challenge on a de novo basis against a determination of the Employment Relations Authority (the Authority) dated 12 July 2018.¹ This judgment is now the third interlocutory judgment issued in this matter. The background to the proceedings is contained in previous interlocutory judgments dated 15 October 2018² and 13 November 2018.³

[2] The present applications arise from Interlocutory Judgment (No 2). That judgment dealt with the plaintiff's application for a stay of enforcement of the

1 *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 214.

2 *Solid Roofing Ltd v Newman* [\[2018\] NZEmpC 121](#) (good faith).

3 *Solid Roofing Ltd v Newman (No 2)* [\[2018\] NZEmpC 135](#) (stay).

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Authority's determination awarding monetary remedies to the defendant. The plaintiff has now filed the following applications:

- (a) for a case to be stated to the Court of Appeal and for a stay pending the Court of Appeal hearing; and
- (b) that this Court recall and amend its judgment of 13 November 2018.

[3] Both applications appear to relate primarily to the order contained in the stay judgment that the plaintiff reimburse the defendant for costs of \$5,000 awarded in his favour by the Authority in a second determination issued subsequent to the first determination.⁴

[4] The plaintiff argues that its challenge to the first determination of the Authority also includes a challenge to the second determination of the Authority on costs. This cannot be the position. The statement of claim initiating the challenge to the first determination was filed with the Court on 31 July 2018. The subsequent determination of the Authority on costs was dated 15 August 2018. If the plaintiff had wished to challenge that costs determination, it would have needed to do so by adherence to the Court's practice directions by filing an amended statement of claim, or alternatively filing a separate challenge to the second determination.⁵ Either of these steps would have needed to have been taken within the time limit specified. The plaintiff did not file an amended statement of claim or challenge to the costs determination within time and has not done so to date. The time for doing so has now well and truly expired and no application has been made by the plaintiff for leave to file a challenge out of time.

[5] Insofar as the stay of enforcement granted in the stay judgment is concerned, this stay was conditional not only upon the plaintiff satisfying the costs award of the Authority in its second determination, but also paying into court the monetary awards of the Authority in its first determination. No such payment has been made and the order for stay of enforcement has now lapsed.

⁴ *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 254.

5. Employment Court Practice Directions at 12: <www.employmentcourt.govt.nz/legislation-and-rules>.

[6] In respect of the applications now made by the plaintiff, I do not require the defendant to incur further legal costs in this matter by responding.

[7] The application to state a case and the unsigned supporting memorandum indicate that the procedure the plaintiff asks the Court to adopt is tantamount to submitting to the Court of Appeal an appeal by way of case stated. The questions posed relate to mixed questions of fact and law and would require the Court of Appeal to re-traverse all of the findings in the judgment in question. This is not an appropriate use of [s 211](#) of the [Employment Relations Act 2000](#) (the Act) and would circumvent the limited basis upon which an appeal from a judgment of this Court may be made to, and considered by, the Court of Appeal pursuant to [s 214](#) of the Act.

[8] There is no basis for the Court to state a case to the Court of Appeal pursuant to [s 211](#) of the Act. Nor is there any reason for the Court to recall and amend the judgment which granted the stay of enforcement subject to conditions.

[9] It is hard to avoid the conclusion that the applications have been filed by the plaintiff for the purpose of delaying the advancement of the substantive proceedings or putting further pressure as to legal costs on the defendant. If this is so, it would be an abuse of process. For this reason, and because the proposal would be an inappropriate use of [s 211](#) of the Act, the applications are dismissed.

[10] In the unsigned memorandum accompanying the application for the Court to state a case, the plaintiff correctly indicates that it has a right to seek leave to appeal to the Court of Appeal against the judgment. Indeed, a draft of a proposed application for leave to appeal is attached to the memorandum. If the plaintiff disagrees with the Court's judgment of 13 November 2018, then the appropriate course is for it to seek leave to appeal to the Court of Appeal. Without further order, such an application for leave does not operate as a stay of the proceedings before this Court.

[11] In the interests of both parties it is now essential that the substantive de novo challenge to the Authority's first determination by the plaintiff proceeds to a hearing as soon as possible. The proceedings are accordingly set down for hearing. Now that a statement of defence has been filed following the first interlocutory judgment of the

Court dated 15 October 2018 dealing with good faith, a directions conference is to be convened so that a date of hearing can be allocated and timetabling directions can be made to enable the fixture to proceed. The parties have been informed that a directions conference will be held in court for chambers at 10 am on Wednesday 19 December 2018 for this purpose.

M E Perkins Judge

Judgment signed at 12.30 pm on 29 November 2018