



# Employment Court of New Zealand

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## Stonewood Group Limited v McAlpine [2019] NZEmpC 82 (5 July 2019)

Last Updated: 14 July 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 82](#)

EMPC 131/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an interlocutory application for stay
BETWEEN	STONEWOOD GROUP LIMITED Plaintiff
AND	EMMA MCALPINE Defendant

Hearing: On the papers

Appearances: G Bennett, advocate for plaintiff  
D Gelb, advocate for defendant

Judgment: 5 July 2019

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

### (Application for stay)

[1] The plaintiff, Stonewood Group Ltd (Stonewood), applies for orders staying the execution of two determinations of the Employment Relations Authority (the Authority).

[2] The defendant, Ms McAlpine, opposes Stonewood's application. This judgment resolves that application.

[3] The Authority found that Ms McAlpine was unjustifiably dismissed by Stonewood and ordered Stonewood to pay her \$48,077 for lost wages and \$18,000 as

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compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).<sup>1</sup> In a subsequent determination the Authority ordered Stonewood to pay \$5,675 towards Ms McAlpine's costs and reimbursement of the filing fee of \$71.56.<sup>2</sup> Accordingly, the total amount outstanding to Ms McAlpine is \$71,823.56.

[4] Stonewood challenges both determinations on a de novo basis. A challenge does not operate as a stay unless the Court or the Authority so orders.<sup>3</sup> Absent a stay,

Ms McAlpine is entitled to enforce the determinations of the Authority.<sup>4</sup>

[5] The principal grounds on which Stonewood seeks the orders staying the execution of the Authority's determinations are:

- (a) The Authority operated on the incorrect basis that Ms McAlpine's income was \$125,000 per annum when in fact it was \$85,937.54 per annum, resulting in a miscalculation of the lost earnings.
- (b) If Stonewood pays Ms McAlpine the amounts awarded to her the de novo challenge will become ineffectual as Ms McAlpine is impecunious.
- (c) Any delay will be minimal as the de novo challenge is being sought and prosecuted as quickly as possible.
- (d) Stonewood considers that Ms McAlpine was not unjustifiably dismissed and therefore is not entitled to any compensation.
- (e) Stonewood also says that, by tape recording conversations between her and Stonewood, Ms McAlpine acted in an egregious manner, which would have a significant impact on the amounts awarded to her.

1 *McAlpine v Stonewood Group Ltd* [2019] NZERA 217 (substantive).

2 *McAlpine v Stonewood Group Ltd* [2019] NZERA 300 (costs).

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

4 *ESKA Ltd v Beloous* [2019] NZEmpC 14 at [8].

(f) The issues surrounding the tape recordings are matters of public interest.

(g) The overall balance of convenience lies with Stonewood.

[6] Stonewood has suggested that the stay be conditional on it paying \$20,000 into Court.

[7] In summary, the main points Ms McAlpine makes in opposing the application are:

- (a) The figure for lost wages was explained before the Authority, and not challenged.
- (b) The non-payment of the amounts due to her is causing her and her family financial hardship.
- (c) If she is unsuccessful in the Court she can refinance her home to repay the sums ordered.
- (d) Stonewood failed to participate properly before the Authority and its challenge is nothing more than a stalling tactic.
- (e) The public statements of Stonewood's Director, Mr John Chow, indicate Stonewood will withhold payment to her of any amounts ultimately found to be due to her by the Court. She also is concerned that Stonewood may cease trading before the case is resolved.
- (f) There is no novelty or public interest in the case; the issue of secret recordings has previously been considered and not found to be a breach of goodwill or trust and confidence, or in breach of the [Privacy Act 1993](#).
- (g) The balance of convenience favours her.

### **The principles applying to applications for a stay are well settled**

[8] The principles applying to applications for a stay of execution are well settled. The Court has a broad discretion in the interests of justice, which must be exercised judicially and in accordance with principle. In exercising its discretion, the Court must weigh the rights of the successful litigant to have the benefits of any determination being challenged and those of the party challenging a determination to have the position preserved in case the challenge succeeds.<sup>5</sup>

[9] The considerations that may apply to a greater or lesser extent in any case are:<sup>6</sup>

- (a) If no stay is granted, whether the plaintiff's right of challenge will be ineffectual.
- (b) Whether the challenge is brought and prosecuted for good reasons, in good faith.
- (c) Whether the successful party at first instance will be affected injuriously by a stay.
- (d) The effect on third parties.
- (e) The novelty and importance of the questions involved in the case.
- (f) The public interest in the proceedings.
- (g) The overall balance of convenience.

5 *ESKA Ltd v Beloous*, above n 4, at [9].

6. *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; *New Zealand Post Primary Teachers' Association v Attorney-General (No 3)* [1991] NZEmpC 89; [1991] 3 ERNZ 708 (EmpC) at 709.

### **Stay appropriate on basis of full payment into Court**

[10] Ms McAlpine's immediate financial position is difficult. She gives evidence of debts and of outgoings she is having

trouble meeting. However, she says she has equity in her property that she could access to meet the amount of the orders, should she be paid now and then not succeed before the Court. Presumably that option is also available to her now. This makes her financial position overall neutral.

[11] Stonewood and Mr Chow did not fully participate in the Authority's investigation. Nevertheless, for present purposes, I am prepared to accept the challenge is genuine and has been brought in good faith.

[12] However, I do not consider that the challenge raises any issues of importance or of particular public interest.

[13] Mr Chow has made inappropriate public statements about Ms McAlpine and the case. Significantly for present purposes, those statements include ones reported in the National Business Review that Stonewood has no intention of complying with the Authority's order and that "The money is not due as far as we are concerned".

[14] Although not her first preference, Ms McAlpine says she is prepared to agree to a stay if the full sum due to her is paid into Court.

[15] Mr Brent Gilchrist, Stonewood's Chief Operating Officer, asserts that Stonewood is "highly solvent". There is no reason to believe Stonewood would have difficulty in raising the full amount of the Authority's awards. There is no basis for Stonewood to pay a lesser sum into Court.

[16] On balance, I consider an order staying execution of the substantive and costs determinations of the Authority is appropriate, but on the basis that the full amount ordered by the Authority is paid into Court.

[17] There will accordingly be an order staying execution of the Authority's substantive and costs determinations on the following conditions:

- (a) Within 14 days from the date of this judgment, Stonewood will deposit the sum of \$71,823.56 into the Employment Court.
- (b) The monies referred to in [17](a) will be held in an interest-bearing account and will be paid out on further order of a Judge of the Court or on receipt by the Court of a joint memorandum signed by both parties' representatives.
- (c) Stonewood's challenge is to be pursued diligently.

[18] Costs on this application are reserved.

J C Holden Judge

Judgment signed at 3.15 pm on 5 July 2019

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