



# Employment Court of New Zealand

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## TD Drilling 2014 Limited v Crichton [2016] NZEmpC 88 (12 July 2016)

Last Updated: 15 July 2016

IN THE EMPLOYMENT COURT WELLINGTON

[\[2016\] NZEmpC 88](#)

EMPC 75/2016

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN TD DRILLING 2014 LIMITED Plaintiff

AND TD DRILLING LIMITED Second Plaintiff

AND DAVID CRICHTON Defendant

Hearing: (on the papers dated 8 and 16 June 2016) Appearances: R Simon, counsel for the plaintiffs

P McBride, counsel for the defendant

Judgment: 12 July 2016

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

### Introduction

[1] The plaintiffs have applied for a stay of execution of a determination by the Employment Relations Authority (the Authority) pending the Court hearing their challenge which is confined to the discrete issue of the identity of the defendant's employer.<sup>1</sup> The defendant, Mr Crichton, opposes the application.

### Background

[2] On 3 March 2016, the Authority issued a determination that Mr Crichton had been unjustifiably dismissed and unjustifiably disadvantaged in his employment as a

result of events which took place between 29 January 2015 and 4 March 2015. The

<sup>1</sup> *Crichton v TD Drilling 2014 Ltd* [2016] NZERA Wellington 28.

Authority decided that Mr Crichton was employed by both of the plaintiffs and, as a result, they were held jointly and severally liable. They were ordered to pay to him

\$11,115 net as recompense for wages lost as a result of his dismissal and a further

\$12,000 as compensation for humiliation, loss of dignity and injury to feelings pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act). In addition the plaintiffs were ordered to pay an amount to the Inland Revenue Department for PAYE.

[3] In determining that Mr Crichton was employed by both of the plaintiffs the

Authority took into account several matters including:

a) Their common directors, shareholding and registered office.

b) From Mr Crichton's perspective, there was no difference between the

two companies and they were referred to collectively as TD Drilling.

c) The names of both of the plaintiff companies were in the employment agreement signed by Mr Crichton.

d) When Mr Crichton's personal grievance was raised with both companies, the response was sent on behalf of TD Drilling (that is, not differentiating between the plaintiff companies).

[4] The Authority decided:2

I conclude on the evidence before me, the fact the grievance was raised with both, and neither responded to enquiries aimed at resolving the issue, that neither company appears concerned with differentiating themselves and the fact both are identified in the employment agreement, they shall be held jointly and [severally] liable for the awards that are going to be made in this determination.

[5] On 31 March 2016, the plaintiffs filed their non de novo challenge to the Authority's determination. The plaintiffs elected to confine their challenge to the issue of whether the second plaintiff, TD Drilling Ltd, should have been joined to the

proceedings before the Authority and, subsequently, to have been held jointly and

2 At [34].

severally liable. There is no challenge to the determination that Mr Crichton was unjustifiably dismissed or unjustifiably disadvantaged in his employment. Nor is there a challenge to the liability of TD Drilling 2014 Ltd or to the amount awarded to Mr Crichton.

[6] On the same day the plaintiffs jointly applied for a stay of execution of the Authority's determination. That application was deficient. On 7 April 2016, Chief Judge Colgan issued a minute identifying deficiencies in the application and providing the plaintiffs with a brief opportunity to rectify them. In that minute the plaintiffs were also made aware that, in some cases, if a stay is granted it might be subject to conditions such as for the amount of any award to be held in a solicitor's trust account with an undertaking that it not to be disbursed until agreement has been reached or by order of the Court or, alternatively, for the amount to be paid to the Registrar of the Court to be held in an interest-bearing account until disbursed by order of the Court.

[7] On 6 May 2016, the plaintiffs took two steps to rectify the deficiencies in their application. The first step was filing an affidavit by Ms Sarah Tweeddale in support of the application. The second was a voluntary payment of the whole amount of the determination to the Registrar of this Court.

[8] Ms Tweeddale's affidavit provides evidence that is likely to be material to the Court when considering the challenge but she did not say anything to justify a stay being granted or to explain which of the plaintiffs had made the voluntary payment. Ms Tweeddale produced a copy of the signed employment agreement, and copies of payslips for Mr Crichton in the name of TD Drilling 2014 Ltd. She also explained how employment was available with TD Drilling 2014 Ltd because that company had secured a contract for certain work with Transfield Services (New Zealand) Ltd. According to Ms Tweeddale, Mr Crichton was employed by TD Drilling 2014 Ltd so that company could meet its contractual obligations to Transfield Services (New Zealand) Ltd.

[9] Ms Tweeddale's evidence was disputed by Mr Crichton in his affidavit in opposition. He said that in all of his dealings with Ms Tweeddale, and Mr Tweeddale, they referred to the plaintiff companies interchangeably. He had applied for a job advertised by TD Drilling, that is, without reference to either "Limited" or "2014 Limited". He said when interviewed by Mr Tweeddale he was offered a job working for TD Drilling; equipment used at his workplace belonged to TD Drilling, but the truck and a digger he operated had TD Drilling Ltd written on them. Mr Crichton said that he did not get any of the payslips produced by Ms Tweeddale while he was employed. Mr Crichton also said that deposits to his bank account for wages paid to him were by TD Drilling (that is, without differentiation). The only mention of the payment into Court was by Mr Crichton who produced a bill payment from the Bank of New Zealand Limited showing the deposit from an account held in the name of "TD Drilling (new)".

[10] Mr Crichton gave evidence that if the application is refused, and the amount he was awarded is paid to him, he can repay it if required. He was referring to the possibility that TD Drilling Ltd might pay the amount awarded by the Authority and subsequently be found by this Court not to be his employer, in which case that company would have to be repaid. Mr Crichton is employed (although not earning what he was previously earning with either or both of the plaintiffs), his partner is also employed and, between them, they have an asset in a family home that could be used to make funds available if required.

[11] Finally, Mr Crichton said that he had taken steps to enforce the Authority's determination by obtaining a sealed judgment in the District Court. Statutory demands under the [Companies Act 1993](#) had been served on the plaintiffs.

[12] It was agreed by the parties that this application could be decided on the papers following an exchange of submissions.

### **The plaintiffs' submissions for a stay**

[13] Ms Simon's submissions for the plaintiffs concentrated on what will, eventually, be the substantive decision of this Court on their challenge. The plaintiffs addressed what they consider shows Mr Crichton's employer was TD

Drilling 2014 Ltd. Those submissions concentrated on [ss 5](#) and [6](#) of the Act and relied on *Vince Roberts Electrical Ltd v Carroll*.<sup>3</sup>

[14] They conceded documents before the Authority caused confusion about the identity of Mr Crichton's employer, but relied on the contract between TD Drilling

2014 Ltd, and Transfield Services (New Zealand) Ltd, to explain why Mr Crichton was employed by that plaintiff and not by TD Drilling Ltd or both plaintiffs.

[15] Strikingly, given that the plaintiffs applied for a stay, they did not make submissions about the test to be applied. The plaintiffs did not explain which of them (or whether both of them) paid the whole amount of the determination into the Court, nor did they propose any condition relating to that payment.

### **The defendant's submissions**

[16] Mr McBride's submissions picked up on the absence of submissions filed on behalf of the plaintiffs. Aside for arguing that the plaintiffs had failed to establish any grounds upon which a stay could be granted, he submitted that there was no basis for a stay drawing on the following:

- a) A dispute as to the bona fides of the plaintiffs.
- b) The challenge will not be rendered nugatory if a stay is not granted. c) Mr Crichton will be injuriously affected by a stay.
- d. The overall justice and balance of convenience favour not making an order.

[17] Mr McBride's submissions relied on reg 64 of the Employment Court

Regulations 2000 (the Regulations) and *New Zealand Cards Ltd v Ramsay*.<sup>4</sup>

<sup>3</sup> *Vince Roberts Electrical Ltd v Carroll* [\[2015\] NZEmpC 112](#).

<sup>4</sup> *New Zealand Cards Ltd v Ramsay* [\[2013\] NZCA 582](#).

### **Discussion**

[18] The power to grant a stay is in reg 64 of the Regulations which reads:

#### **64 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.

[19] *New Zealand Cards* contains a convenient summary of the criteria for granting a stay as follows:<sup>5</sup>

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 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.

[20] That succinct statement of the test is similar to the decision of this Court in

64 as giving a broad discretion with the ultimate test being the interests of justice as between the parties.<sup>7</sup>

[21] In this case, it is appropriate to begin with Mr McBride's submission that the plaintiffs have failed to support their application for a stay either evidentially or by relevant submissions. They have not explained why a stay has been sought or

<sup>5</sup> *New Zealand Cards Ltd v Ramsay*, above n 4, at [7] (footnotes omitted).

<sup>6</sup> *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50.

<sup>7</sup> At [4].

provided any submissions from which the Court could undertake an assessment of any of the criteria conventionally used in making such a decision. The plaintiffs' failure to support their own application is fatal. The only matter favouring the plaintiffs, and which might save the application, is the payment into Court. However, that payment is not determinative and the lack of information about it raises potentially complex issues. The bill payment just refers to TD Drilling (new), in a sense repeating the lack of differentiation that led, at least partly, to the Authority's determination. It is not clear whether payment was by one or both plaintiffs. Nor is it clear if the money was intended to be available to satisfy the outstanding judgment regardless of the outcome of the challenge. That is puzzling because TD Drilling 2014 Ltd, did not challenge the Authority's determination that it employed Mr Crichton and is liable to him, and it could have satisfied its obligations by paying him directly.

[22] In those circumstances it would also have been helpful to have had submissions explaining why the plaintiffs consider a stay is appropriate, especially where one of them acknowledges it employed Mr Crichton and is liable to him. Granting a stay to both plaintiffs in those circumstances would be a novel application of reg 64 and would have been assisted by careful argument about the regulation, and the appropriateness of making such an order.

[23] Turning to the other matters raised by Mr McBride, it would be inappropriate to make any comment about the bona fides of this challenge at this early stage beyond noting there is nothing in what Ms Tweeddale has said to lead to a conclusion the challenge is anything other than a genuine attempt to address a finding by the Authority that is disputed.

[24] Far more compelling is the submission that the plaintiffs' challenge will not be rendered nugatory if a stay is refused. This case is different from other cases where a stay on conditions is designed to achieve a balance between the parties' interests as referred to in *New Zealand Cards*.<sup>8</sup> The only issue in this challenge will be the identity of Mr Crichton's employer. That debate is not adversely affected if

Mr Crichton is able to pursue the award in his favour in the determination.

<sup>8</sup> *New Zealand Cards Ltd v Ramsay*, above n 4, at [7].

Technically, TD Drilling Ltd may have said it could be faced with having to meet a judgment now that it may not ultimately be liable for, but that risk is addressed by Mr Crichton's ability to repay the company if required.

[25] Conversely, Mr Crichton will be injuriously affected if a stay is granted. He would be prevented from having the benefits of the determination. It is difficult to see any satisfactory explanation for Mr Crichton being deprived of those benefits until the challenge is heard and decided. That is exacerbated where one of the plaintiffs acknowledges it is liable to him. While it might be possible to say some of that detriment may be off-set, if Mr Crichton is successful, by interest earned on any money ordered to be held on deposit, the fact remains that he would not have had the actual use of that money.

[26] I also consider the overall balance of convenience favours declining the application. Mr Crichton is in a financial position to repay if he enforces the judgment against, for example, TD Drilling Ltd and it subsequently transpires that that company was wrongly determined to be his employer.

## Conclusion

[27] Weighing up these matters, I consider it would not be in the interests of justice to make an order for a stay of execution of the Authority's determination and the application is dismissed. The plaintiffs' failure to support their application means it was inevitable that the application would be dismissed. In any event, the criteria for assessing the application favour Mr Crichton not being restricted by a stay.

[28] Mr Crichton sought an order that, if the application for a stay was dismissed, the money paid into Court be paid to him. I doubt I have the power to make such an order. The money paid by TD Drilling (new) is not subject to an order about its retention or disbursement at the direction of the Court. It follows that the Court has no power to direct that it be paid out as requested. Even if I am wrong in that assessment, I do not think it would be appropriate to make such an order in the absence of submissions from the plaintiffs.

[29] Having been successful, Mr Crichton is entitled to costs. In the absence of agreement the defendant may file a memorandum within 15 working days and the plaintiffs may have a further 15 working days to reply.

K G Smith

Judge

Judgment signed on 12 July 2016 at 4.10 pm.

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