

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Pero Tamarua (applicant)

AND Toll NZ Consolidated Limited (respondent)

REPRESENTATIVES David McLeod for the applicant
John Hannan for the respondent

MEMBER OF AUTHORITY Denis Asher

SUBMISSIONS RECEIVED by 14 March 2006

DATE OF DETERMINATION 26 April 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In my substantive determination dated 1 November 2005 (WA 171/05) I found against Pero Tamarua's, claim that Toll NZ Consolidated Limited, had unjustifiably dismissed him.
2. In my costs determination dated 30 January 2006 (WA 9/06) I awarded costs of \$1,500 against Mr Tamarua in favour of the Company.

3. By way of an amended statement of claim filed in the Employment Court on 20 February by Mr Tamarua's advocate, Mr David McLeod, the applicant challenged both the Authority's substantive and costs determinations.
4. By application received on 15 March Mr Tamarua confirmed he was asking the Authority to stay proceedings in respect of the costs award against him.

Respondent's Position

5. The Company opposes the application for stay in respect of the Authority's costs determination of 30 January 2006. It relies on the principles set out *NZPPTA v A-G (on behalf of Ministry of Education) (No.3)* [1991] 3 ERNZ 708. It says, amongst other things, that this is not a case where failure to grant the stay will render the applicant's right of challenge under s. 179 of the Act nugatory. The Company has the financial means to pay Mr Tamarua should he be successful. In the event that Mr Tamarua's challenge to costs determination is unsuccessful and a stay has been ordered the applicant may not be in a financial position to pay the original costs award together with any costs award made by the Employment Court in relation to the challenge: the Company should at least have an assurance of a costs award for the Authority's investigation in the event that his challenge is unsuccessful.
6. As the applicant says he would find it impossible to pay the award if no stay is ordered, presumably if a stay is awarded he would also find it impossible to pay the initial costs award of the Authority as well as any further costs award made by the Employment Court. The applicant's actions have the effect of the respondent carrying all the financial risk and the applicant none. The application for stay appears to be solely about Mr Tamarua's liability to pay: he does not say the award is erroneous in fact or in law. These are not *bona fide* reasons for a stay.
7. The application is not *bona fide*: no grounds are given in the statement of claim commencing the challenge other than that he cannot afford to pay. Mr Tamarua is not properly prosecuting the challenge to the substantive decision: he failed to file a challenge in time, delayed nearly two months in filing an affidavit in support of his application for leave to bring the challenge out of time and provided no explanation for this delay.

8. Mr Tamarua's case is not marginal: it is a clear cut theft case, which he has admitted. There is every likelihood his challenge to the Employment Court will be unsuccessful and he will be unable to pay any costs in either the Authority or the Court.
9. In the event that a stay of the costs award is granted the Company asks that Mr Tamarua be ordered to pay the amount awarded by the Authority in to an interest-bearing account in the mean time and provided Mr Tamarua diligently prosecutes the challenge to the costs and (if leave is granted) the substantive determinations.

Applicant's Position

10. In advancing his client's claim, Mr David McLeod, relies on the respondent's size and its financial resources, "*the precarious financial predicament*" of Mr Tamarua, that failure to pay will not impact on the Company whereas having to pay – directly to the Company or to an interest-bearing account – would create considerable hardship for the applicant, the latter's willingness to diligently pursue his challenge and that the only fair and reasonable approach is for the Authority to stay its order until the Court determines the application for leave out of time.
11. I record here that while some detail as to Mr Tamarua's current earnings are set out in his Amended Statement of Claim to the Employment Court no information has been provided to the Authority as to his situation or as to other means of support he may have or as to his actual outgoings.

Discussion

12. Despite the brevity of evidence available to the Authority, I accept the claim advanced by his advocate that the applicant's financial situation is precarious.
13. I find that if no stay is granted Mr Tamarua's challenge will be unaffected: it will not be rendered nugatory.
14. I do not accept the respondent, if it succeeds in the substantive challenge will be injuriously affected by a stay. This is because it is a Company of some means and substance, whereas Mr Tamarua – should he succeed – would be injuriously affected

by having to pay costs that at present he says he cannot afford. The Company raises a legitimate concern as to the applicant's ability to pay any costs at all. However, I am not aware that it is pursuing in the Court security of costs (an option not available in the Authority). Mr Tamarua therefore remains able to pursue his claims notwithstanding the real issue of recovering costs should he not succeed.

15. Despite Mr Tamarua's failure to challenge within time the Authority's substantive determination (and that he is now seeking the leave of the Employment Court for the same) I have no reason to question Mr Tamarua's *bona fides* as to the prosecution of his challenge, particularly as Mr McLeod has committed his client to "*a diligent pursuit of his claim*" (submission received on 15 March).
16. I am unaware of any novel or important questions raised in the applicant's various claims or by the Company's defence.
17. The practical reality is that Mr Tamarua is marshalling his limited resources in an attempt to best address the various challenges he faces. The Company, irritated by what it sees as unmeritorious challenges, is however well placed to wait for the Court's decision on these matters. Besides, should I decline his stay application, practical steps to recover costs against Mr Tamarua are likely to take longer than the Employment Court's decision(s).

Decision

18. I am satisfied that the applicant, Pero Tamarua, has successfully made out his application in respect of determination WA 9/06 dated 30 January 2006 (WA 9/06) and it is therefore stayed pending his diligent pursuit of challenge proceedings currently before the Employment Court. Leave is granted to the respondent, Toll NZ Consolidated Limited, to return this matter to the Authority in the event it is of the genuinely held view that the applicant is in breach of his undertaking to diligently pursue his challenges.

Denis Asher

Member of Employment Relations Authority

