

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Neil Richard Taylor (Applicant)

AND eCom New Zealand Limited (Respondent)

REPRESENTATIVES Neil Taylor in person.
Chris Patterson for respondent.

MEMBER OF AUTHORITY Ken Raureti

INVESTIGATION MEETING By way of conference calls & receipt of written submissions.

DATE OF DETERMINATION 30 January 2007.

DETERMINATION OF THE AUTHORITY

Application for stay of proceedings on Determinations AA 29A/06 and AA 29B/06.

[1] The life of Mr Taylor's employment relationship problem with eCom New Zealand Limited commenced in the Authority in October 2005 as an urgent application for interim reinstatement. To resolve his alleged problem, the Authority has had three investigation meetings, and has issued five Determinations.

[2] The first determination (AA 474/05) was in respect of the interim reinstatement application. The Authority determined that Mr Taylor had an arguable case and the balance of convenience and overall justice of the case favoured him. The Authority ordered interim reinstatement on a garden leave basis.

[3] The second determination (AA 47/06) was to resolve an application from eCom seeking an order that the Mr Taylor comply with the it's lawful and reasonable instruction that he return a laptop computer belonging to the company which he had in his possession. eCom also sought reasonable legal costs associated with bringing it's claim. The matter of the laptop was resolved during conference with the Authority, and Mr Taylor was ordered to pay eCom disbursements of \$623.26.

[4] The third determination (AA 29/06) was in respect of the substantive matter surrounding Mr Taylor's dismissal and suspension. Mr Taylor had been suspended twice during the disciplinary process. The Authority determined that the two suspensions in the matter were unjustified; however the decision to dismiss Mr Taylor was one which a reasonable employer could have taken in the circumstances. In respect of the suspensions, Mr Taylor gave no evidence regarding the effect of the suspensions on him, therefore, in light of that no award for humiliation or distress was made.

[5] The fourth determination (AA 29A/06) was in respect of a claim Mr Taylor made saying he was owed \$88,904.00 in unpaid commissions. He tabled twelve customer accounts to which he claimed commission was due. The Authority investigated each of the claims separately and

found that he was not entitled to any commission at all. AA 29A/06 also addressed eCom's request for reimbursement of the wages paid to Mr Taylor for the interim period of reinstatement. The Authority referred to the signed undertaking Mr Taylor made as to damages when he applied for interim reinstatement, and ordered Mr Taylor to pay those damages (\$8,836.94) plus interest to eCom.

[6] The fifth determination (AA 29B/06) is a Costs determination, requiring Mr Taylor to pay eCom \$7500.00 as a contribution toward the reasonable costs it has incurred.

[7] Mr Taylor has made an application to the Authority for a stay of proceedings of Determinations AA 29A/06 and AA 29B/06.

Summary of grounds relied on for application.

[8] Mr Taylor has applied to the Employment Court for a hearing de novo of both determinations. He has indicated that his preference in respect of the orders in those determinations is to hold any payments until the matters have being heard in the Employment Court.

[9] Mr Taylor also relies on his financial circumstances to further support his application. In his application he has provided a statement of his financial means and summarised his current status. The summarised current status of his application indicates that he and his wife are both employed, although she is pregnant and will stop work shortly and return to part-time work after about 3 months off work. Her current salary is advised at \$65,000.00 per annum.

[10] In February 2006, he and his wife purchased a house in St Heliers for \$840,000.00. To achieve that, they have taken out a \$598,000.00 mortgage, and on top of that he has outstanding legal fees of \$16,000.00.

[11] Mr Taylor says he can pay the amounts ordered by way of monthly instalments over time, but his preference is to hold any payments until the matters have been heard in the Employment Court.

Summary of eCom's opposition to the application.

[12] eCom says that in respect of the damages relating to Mr Taylor's interim reinstatement, he provided a written undertaking to the Authority in the standard form as set out in Form 2 of the Employment Relations Authority Regulations 2000, specifically agreeing to abide by any order that the Authority may make in respect of damages. In doing so, eCom says that Mr Taylor waived any right to a stay of application of damages.

[13] eCom says that Mr Taylor did not expeditiously file the applications to challenge the determinations. The application for AA 29A/06 was made almost three months after the date of the determination, and almost six weeks after the Authority's second determination (AA 29B/06). Whilst Mr Taylor's application was filed out of time, eCom says it consented to leave being granted to avoid further delays and minimise costs.

[14] In respect of Mr Taylor's financial position, eCom says that Mr Taylor proceeded to purchase a house valued at over twice the national medium price despite having lost his job and being a party to the present proceedings. eCom says Mr Taylor is repaying his other creditors thereby affording them preferential treatment over the orders of the Authority.

[15] eCom says that Mr Taylor's statement of financial means does not disclose his current employment and details of his current remuneration package. It says that in the absence of such relevant information little weight should be placed on the accuracy of the statement.

[16] eCom advised that it is not its intention to place Mr Taylor under financial distress, nor does it intend to seek enforcement by way of an attempt to bankrupt him, it is merely seeking enforcement by way of an attachment order at a level ordered by the District Court.

Principles applying.

[17] The principles for granting a stay pending an appeal are summarised in *Weston v Fraser*, 13 December 2006, Shaw J, WC 24/06, page 3, paragraph [13]:

- (a) *Whether the successful party would be injuriously affected.*
- (b) *The bona fides of the applicant as to prosecution of the appeal.*
- (c) *The novelty and importance of the question involved.*
- (d) *The public interest in the proceedings.*
- (e) *The balance of the status quo.*

[18] Neither party's submissions specifically addressed the above principles, albeit that some areas of their submissions touch on them. In terms of *whether the successful party would be injuriously affected*, it is not apparent as to how injurious such an order may have; therefore in the absence of any submissions about such an affect, I conclude that it is neutral.

[19] Whilst eCom have raised a point saying that Mr Taylor did not expeditiously file the applications to challenge the determinations, one was filed within the statutory timeframe, while the other was apparently 1 day out of time, apparently occasioned by circumstances surrounding his wife's pregnancy. The parties have been engaged in various disputes and proceedings for the last 15 months and are faced with further legal proceedings in the Employment Court. Both parties have been *the applicant party* in the various matters, and a decision of the Court may not necessarily be the end of the litigation between them. However, in respect of the challenges to the two determinations, I am satisfied that they are being actively progressed in the Court without undue delay on Mr Taylor's part. Mr Taylor has indicated that his matter may be given an April hearing date in the Court, however, that is a matter for the Court.

[20] The novelty and importance of the question, and the public interest lean towards the weight and significance of the Form 2 written undertaking Mr Taylor made in respect of damages. In the Determination AA 29A/06 the Authority Member *made it clear to Mr Taylor at the time of hearing the interim reinstatement application that if I were to grant interim reinstatement and make an order that the interim reinstatement be on a garden leave basis that a consequence, if he was ultimately unsuccessful in his personal grievance, could be that he would have to abide by the undertaking he had given.* Mr Taylor had professional legal representation when he applied for interim reinstatement, and the Authority clarified the nature of his undertaking and its possible implications to him. In respect of the balance of convenience of the status quo, the Authority is to *"carefully weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful"*.

Discussion.

[21] Mr Taylor relied predominantly on the challenges to the Authority determinations, and the status of his financial affairs. While he placed a large part of his application on his financial affairs, he also says that he can pay the amount on a monthly instalment basis. Upon reviewing the information provided to me, and on his own admission and willingness to pay, I am satisfied that his financial situation allows scope for him to pay eCom the amounts ordered.

[22] Mr Taylor's other primary ground relates to his challenge to the Authority's determinations. The Employment Relations Act 2000 is clear at s. 180 that an election to challenge a determination does not operate as a stay.

[23] Seeking a stay on the grounds of impecuniosity may be successful in certain situations, however, for the reasons outlined I am satisfied that in this case Mr Taylor's financial circumstances are not that of impecuniosity. He has scope to pay the outstanding amounts.

[24] In respect of the Form 2 written undertaking, such undertakings should not be entered into lightly. It forms part of the legal framework that must be complied with in order for an application for interim reinstatement to be able to proceed. The Authority placed considerable importance and drew attention to the implications of the undertaking. In my view, it is important to maintain the confidence of the employer community that such an undertaking is serious and in normal circumstances is enforceable.

[25] With regards to the ongoing litigation between the parties, it is my view that eCom, who at this stage has been successful in all proceedings bar the application for interim reinstatement has a right to expect the fruits of that success. .

Determination.

[26] An application for a stay is a discretion of the Authority. Standing back and considering all of the information, **Mr Taylor's application for a stay is declined.**

Costs.

[27] eCom seeks an award of costs because it says that it has been put to further expense associated with Mr Taylor's indulgence. While it may appear to eCom that the ongoing litigation is an indulgence, Mr Taylor has certain rights, and he is exercising those rights through the appropriate legal avenues.

[28] This matter was attended to by way of two conference calls, and receipt of written submissions. The submissions were very brief, and no detail was provided to the Authority as to a breakdown of how the costs were incurred. This is a matter where, in my view costs shall lie where they fall.

Ken Raureti
Member of Employment Relations Authority