

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 106
ARC 76/10**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN FONTERRA COOPERATIVE GROUP
 LIMITED
 Plaintiff

AND DOUGLAS TE STROET
 Defendant

Hearing: 13 August 2010
 (Heard at Auckland)

Appearances: John Rooney and Jenna Rennie, Counsel for Plaintiff
 Helen White, Counsel for Defendant

Judgment: 13 August 2010

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] I am going to allow an adjournment of this part-heard application for the following reasons, on the following conditions, and in the following circumstances.

[2] First, I appreciate that many people have come here today expecting that the matter will be able to be concluded and where possible the Court tries to do that. There are, however, important aspects of this case and of the evidence that are not sufficiently before the Court at the moment so that a just decision can be made on the application for stay. That is particularly as it will be some months before the Court can consider the substantive challenge that Fonterra has brought to the Authority's determination.

[3] As I have already discussed with counsel, medical evidence, and particularly prognostic evidence, is at the heart of the question of reinstatement and, therefore, whether or not it should be stayed for a period of a number of months. Some of the medical evidence is before the Court at present but not all of it. From what she has told me I think Ms White accepts that there should ideally be more complete medical evidence so that the Court, in determining the application for stay, can be confident that the right result can be reached.

[4] This hearing will be adjourned until Tuesday 31 August 2010. That is a relatively short period (really the only day within the foreseeable future on which the hearing can resume) but I imagine that getting medical evidence, which must probably follow examination and report writing, will not be a quick exercise. Because the Court cannot deal with the matter after 31 August 2010, and because the parties are entitled to a prompt decision, on balance that period of just over two weeks is really the best that can be accommodated.

[5] Mr Rooney has indicated that he wishes to submit further affidavit evidence about what is known as the DAS position, and I think in fairness that the plaintiff should be entitled to do that. It may be that the defendant also wishes to call more comprehensive evidence about the nature of the position to which Mr Te Stroet says he can be reinstated.

[6] Any further affidavit evidence and any medical reports will need to be filed and served no later than 4 pm on Friday 27 August 2010. The same position, as has occurred today with regard to cross-examination of witnesses, will apply to that evidence and the resumed hearing on the following Tuesday 31 August 2010. That is, as much notice as possible of an intention to cross-examine any witness should be given.

[7] I now need to deal with what is to happen in the meantime. Mr Rooney has proposed some interim arrangements which I think will assist to cover the present position. First, the plaintiff undertakes that the role in DAS will remain open until the Court determines whether there should be a reinstatement to that role. The second condition attaching to the adjournment is that, as from today, Mr Te Stroet

must be restored partially to the Fonterra payroll. The defendant will be remunerated at a rate between Mr Te Stroet's current ordinary time earnings in his job he is presently performing and will retain, and what he would have earned had he not been dismissed from the position with Fonterra. That will necessitate an arrangement being put in place so that Fonterra is notified of Mr Te Stroet's weekly earnings with his present employer so that it can calculate the top up pay for that period.

[8] In those circumstances and on those conditions, I am prepared to make an interim order staying otherwise the Authority's orders for reinstatement. That order that I have just made will be an interim order and will apply only until the next hearing on Tuesday 31 August 2010.

[9] Ms White has pointed out that the terms of the Authority's reinstatement order are very broad and are not limited to the DAS position. The opportunity to call further evidence will extend to an opportunity to give evidence about other positions that may be available within Fonterra.

[10] The other thing I wish to say is that counsel and the parties, and those who have been in Court, will have heard some remarks I made earlier about the necessity to comply with Authority orders. The adjournment will also provide an opportunity now for further negotiation so that other employment options within the company can be explored between now and 31 August 2010. I urge the parties to address those possibilities seriously as well as preparing for the next hearing.

GL Colgan
Chief Judge

Judgment delivered orally at 12.20 pm on Friday 13 August 2010