IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 58
WRC 12/10

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	STUDENT MANAGEMENT SOFTWARE SOLUTIONS LIMITED Plaintiff
AND	PAUL GORDON Defendant

Hearing: 12 May 2010
(Heard at Wellington)

Appearances: Paul McBride and Guido Ballara, Counsel for Plaintiff
Graeme Ogilvie, Advocate for Defendant

Judgment: 17 May 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] The question for decision now is whether execution of the Authority's determination of awards in favour of Paul Gordon should be stayed until Student Management Software Solutions Limited's (SMSSL's) challenge to that determination can be heard and decided.

[2] In its determination issued on 31 March 2010[1] the Authority held that Mr Gordon had been dismissed unjustifiably and awarded remedies including compensation for lost remuneration from the date of dismissal to 9 March 2010 (less earnings obtained elsewhere during that period) and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) of $10,000. The

[1] WA56/10.

Authority directed, however, that each of these sums be reduced by 5 percent to reflect Mr Gordon's contributions to the circumstances that gave rise to his dismissal pursuant to s 124 of the Act.

[3] SMSSL has challenged the Authority's determination by hearing de novo so that all matters that were before the Authority are again at issue in this Court. In the meantime, the company says that it should not be required to pay those sums ordered by the Authority to Mr Gordon. That is because it says it is a small company that is also a registered charity and which has limited financial means. SMSSL says that if it is required to pay these sums to Mr Gordon, it will be harmed irreparably and also that if it is subsequently successful on its challenge, there is really no prospect of their reimbursement to the company by Mr Gordon.

[4] Mr Gordon says that the plaintiff is owned by 11 tertiary educational institutions (principally, if not entirely, polytechnics) indirectly as shareholders of Artena Society Limited (Artena) which owns the shares in SMSSL. Artena is a body corporate under the Industrial and Provident Societies Act 1908. The evidence is that the plaintiff employs about 12 people.

[5] Mr Gordon is concerned that his principal witness in the Authority, who would also give evidence in this Court on the challenge and who was formerly his manager at SMSSL, has now been threatened with legal proceedings by SMSSL and Artena, including in connection with his activities at the company which contributed to the Authority's conclusion that Mr Gordon had been dismissed unjustifiably.

[6] One difficulty is that the Authority has not specified the amount of the remuneration arrears awarded to Mr Gordon. That, in turn, will not allow him to enforce that aspect of the Authority's award against SMSSL, at least until the Authority has quantified that amount as it has now been asked to do.

[7] The other difficulty, this one for the plaintiff, is that its assertions of impecuniosity, going so far as to say that it will not survive if required to pay out remedies to Mr Gordon, are unsupported by the evidence of the sort that the Court expects in such cases. There are no details of the company's asserts, cash flow,

accounts, or even of the opinion of a knowledgeable professional such as an accountant. That is more significant where, as has been disclosed by the defendant, the company is backed by substantial entities (polytechnics) and operated, in effect, by them.

[8] Mr Gordon has been frank about his need for the monetary remedies awarded by the Authority. He has a "leaky home" that he wishes to have repaired and needs the money for this purpose. Although he says that this will enhance the value of his home, that may be problematic if the money is to be used to repair and restore a house to what would otherwise be its market value. I accept that it may be difficult for the plaintiff to recover money paid out and expended in this way.

[9] Mr McBride for the plaintiff identified comprehensively a number of elements of the Authority's determination that he submitted were erroneous and has, in my assessment, established arguable cases for challenge that satisfy the test of genuine and substantial grounds of appeal. These include challenges to the sums ordered to be paid by the plaintiff to the defendant even if, contrary to its assertion, dismissal is found to have been unjustified. In these circumstances the extent of the remedies may be reduced.

[10] Mr McBride accepted that the plaintiff could, if required as a condition of a stay, pay into court the sum of $30,000. That equates roughly to remuneration lost for the first 14 weeks after Mr Gordon's dismissal and at the end of which the evidence establishes that he obtained alternative employment, albeit for a fixed term. That is also, coincidentally, about the equivalent of the three month period that the statute assumes will be the subject of remuneration loss compensation in the first instance. That amount of $30,000 is approximately the same as I had in mind to require to be paid in as a condition of granting a stay.

[11] For the foregoing reasons, I make an order staying execution of the Authority's determinations on condition that within 14 days of the date of this judgment the plaintiff pays to the Registrar of the Employment Court at Wellington the sum of $30,000 to be held on interest bearing deposit and to be disbursed either

at the written request of both parties or in accordance with the judgment of this Court on the challenge.

[12] Leave is reserved for either party to apply for any further orders or directions on notice. I reserve costs on this application for stay.

[13] The hearing of this application for stay was also used as a call-over of the case so that it can be set down for hearing. The following are the directions made as a result of that call-over.

[14] The plaintiff's challenge is by hearing de novo. The defendant will file and serve an amended statement of defence in compliance with reg 20 of the Employment Court Regulations 2000 no later than 14 June 2010.

[15] There is a direction to further mediation that should be undertaken as soon as possible.

[16] The plaintiff anticipates requiring disclosure of some further documents by the defendant and will write informally to Mr Ogilvie within the next 14 days in an attempt to resolve these issues but will thereafter use the statutory disclosure procedure.

[17] Each party anticipates having three witnesses although Mr Ogilvie has signalled the possibility of an additional expert IT witness for the defendant. If Mr Ogilvie elects to do so, he and the expert witness must comply with the requirements for expert witnesses set out in the High Court Rules. The written report of the defendant's expert which will form the basis of that person's evidence must be supplied to the plaintiff no later than 42 days before the hearing. The report of any expert the plaintiff intends to engage on those issues must be supplied to the defendant within the following 21 days. The expert witnesses will then have to meet and identify areas of commonality and dispute in preparation for the trial.

[18] The plaintiff will present its case first at the hearing followed by the defendant. It is agreed that two days will be required.

[19] The representatives will confer as to whether evidence-in-chief is to be filed and served in advance either in the form of unsworn briefs of evidence, or sworn or affirmed affidavits. In either event, the plaintiff will file and serve its evidence-in-chief no later than 28 days before the start of the hearing with the defendant doing likewise within the following 14 days.

[20] The plaintiff will collate, index and provide to the Court, a bundle of common documents no later than 7 days before the start of the hearing.

[21] The challenge will be heard in the Employment Court at Wellington beginning at 9.30 am on Thursday 9 September 2010 and on the following day.

[22] Leave is reserved for either party to apply for any further orders or directions on reasonable notice.

GL Colgan
Chief Judge

Judgment signed at 9am on 17 May 2010