

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 160
ARC 42/12
ARC 49/12**

IN THE MATTER OF proceedings removed

BETWEEN SIMON MAXWELL EDWARDS
 Plaintiff

AND TWO DEGREES MOBILE LIMITED
 Defendant

Hearing: 17 September 2012
 (Heard at Auckland)

Counsel: Peter Churchman and Michael O'Brien, counsel for plaintiff
 Harry Waalkens QC, counsel for defendant

Judgment: 18 September 2012

SECOND INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] Following the issue of my interlocutory judgment on 3 September 2012¹ Mr Waalkens QC, counsel for the defendant, filed and served a memorandum in which he submitted that the conditions to the injunction I previously issued² referred to in para [29] of my judgment omitted a point discussed in Court. That was, if there was an overpayment by the defendant to the plaintiff then the extent of such overpayment should be reimbursed by the plaintiff to the defendant. Mr Waalkens was unsuccessful in obtaining the agreement of counsel for the plaintiff to an amendment which would sit as a new sub-paragraph between the existing sub-paragraphs (e) and (f) in [29] of the judgment as follows:

¹ [2012] NZEmpC 149.

² [2012] NZEmpC 111.

For completeness, in the event there is an overpayment by the defendant to the plaintiff then the plaintiff will likewise reimburse the defendant to the extent of such overpayment.

[2] Counsel for the plaintiff took the view that the current judgment dealt with Mr Edwards's obligation to make payment in para [29](d) which dealt with the situation if the defendant's decision to dismiss the plaintiff is found to be substantively justified and therefore the new paragraph was unnecessary.

[3] In response to counsel for the defendant's request that the matter be reconvened before the Court, a hearing was convened by telephone linkage and the matter was argued.

[4] Mr Waalkens confirmed the matters contained in his memorandum. Where the circumstance arose that the plaintiff recovered a monetary award that was less than the amount in the meantime paid by the defendant to the plaintiff in terms of my judgment, it was logical and plainly in harmony with the sentiments expressed in the judgment for a refund to be a condition of the injunction that was granted.

[5] In para [26] of my judgment, relied on by Mr Waalkens, I noted that while there might be some risks in the enforcement of the undertaking, the requirement to pay in the interim could remain but with an undertaking incorporated into the conditions requiring the plaintiff to unconditionally repay those amounts if he is ultimately unsuccessful in establishing that the decision was substantively unjustified. I took the view that this would apply regardless of whether work had been available in the interim and whether or not the plaintiff remained willing to work. I wished to provide for a realistic prospect of the defendant recovering those payments if the defendant was successful.

[6] What was not fully addressed, and was not contemplated by a written undertaking provided at the hearing by counsel for the plaintiff, was the situation in which the plaintiff was successful but failed to recover more than the payments made to him in the interim.

[7] Mr Waalkens accepted that it was a somewhat unlikely event that if the plaintiff was successful he would recover in totality less than what he was being paid on account of salary in the interim but wished to ensure, as a matter of fairness, that that possibility was incorporated as one of the conditions of the interim payment arrangement.

[8] Both Mr Churchman and Mr O'Brien, in their submissions on behalf of the plaintiff, contended that there was an overarching obligation to repay even if the plaintiff was successful, but did not recover by way of remedies more than had been paid in the interim. That was something that the trial Judge could address in exercising the discretion to award compensation.

[9] I accept the submissions of Messrs Churchman and O'Brien. In the somewhat unlikely event of the plaintiff being completely successful but not recovering more than the salary paid to him on an interim basis, it will be open to the defendant to argue that any overpayment should be refunded to it. However, the conditions I imposed in the interim largely dealt with the situation where the defendant was ultimately successful rather than the plaintiff. The general undertaking as to damages could well be sufficient for the defendant to rely on to claim any overpayment, even if the plaintiff is successful but does not recover more by way of awards of reimbursement and compensation than he had been paid. I therefore consider the condition is unnecessary, which is why I did not include it initially in my judgment of 3 September. However, the defendant will have the right to try to recover at trial any overpayment if such should have occurred.

[10] I therefore decline to add the additional condition that the defendant has sought.

[11] The application made by the defendant was pursuant to leave that I reserved to allow such matters to be argued. They could not be properly developed during the course of the interim injunction recall hearing. In these circumstances, I consider that costs should therefore lie where they fall.

[12] At the conclusion of the hearing, we discussed the setting down of a directions conference with the trial Judge to discuss timetabling matters for the substantive hearing set down for 29 October 2012. Mr Churchman indicated that he would be available at 10am on Friday 21 September 2012. Mr Waalkens advised that he would not be available but that his junior counsel, Ms Swarbrick would most probably be available. He will confirm whether or not Ms Swarbrick is able to attend a directions conference at that date or whether another directions conference time will need to be arranged. Counsel will, between themselves, discuss the issue of disclosure, and endeavour to agree on necessary timetable directions for the substantive hearing.

B S Travis
Judge

Judgment signed at 3.30pm on 18 September 2012