

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2012] NZEmpC 196  
CRC 37/12**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority  
AND  
IN THE MATTER OF      an application for a stay of execution  
BETWEEN                      SUPERIOR MOTOR CYCLES LIMITED  
   Plaintiff  
AND                              ROBERT STANLEY PATTERSON  
   Defendant

Hearing:                      on the papers - submissions received 2 November and 12 November  
   2012

Appearances: T S Brito, counsel for the plaintiff  
   Lynda Ryder, counsel for the defendant

Judgment:                      21 November 2012

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**INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH**

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[1]      The defendant was employed by the plaintiff as a motor cycle salesman from October 2007 until he was dismissed on grounds of redundancy on 22 April 2011. He pursued personal grievances alleging that his dismissal was unjustifiable and that, prior to his dismissal, his employment had been affected to his disadvantage by the unjustifiable actions of the plaintiff. The Employment Relations Authority sustained the defendant's claims and awarded him remedies totalling \$18,750.<sup>1</sup>

[2]      The plaintiff has challenged the whole of that determination and seeks a hearing de novo. The plaintiff has also applied for a stay of execution of the

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<sup>1</sup> [2012] NZERA Christchurch 199.

Authority's orders pending the outcome of the challenge. I decide that application for stay in this judgment.

[3] As set out in the application, the grounds relied on by the plaintiff are:

3. The Applicant's financial position is precarious.
4. The company simply does not currently have sufficient surplus funds to meet payment of the judgment debt, or any award of costs in favour of the Respondent arising from the determination.
5. The Applicant's principal, Chris Bellamy, is in the process of applying to his business bank manager for an extension of the company's credit and loan facilities. However, any finance application must be approved by the company's bank.

[4] To establish these grounds, the plaintiff relies on evidence contained in an affidavit sworn by Mr Bellamy, the managing director of the plaintiff. In summary, Mr Bellamy says that the plaintiff has not been trading profitably in recent times, that it is greatly indebted and that it has exhausted its loan facilities. To illustrate this position, Mr Bellamy produces a copy of the plaintiff's draft accounts for the year to 31 March 2012 and a series of loan statements from its bank. These show that the plaintiff had a net deficit of nearly \$50,000 during the trading year and that its liabilities exceeded its assets by nearly \$47,000 at the end of the year. The principal liabilities of the plaintiff included bank loans of more than \$670,000 and floor plan finance of nearly \$300,000.

[5] Based on this information, Mr Bellamy says that he believes that a requirement to pay \$18,750 could jeopardise the ability of the plaintiff to continue trading. Mr Bellamy then suggests that, if it was required to make such a payment, the plaintiff "may also not be able to pursue its appeal". He does not explain in any detail the basis for these beliefs other than to refer generally to the plaintiff's financial position.

[6] In his submissions, Mr Brito begins by referring to the essential principles I applied in *North Dunedin Holdings Ltd and Booth v Harris and Cousins*<sup>2</sup>:

[5] The starting point must be s 180 of the Act<sup>3</sup>:

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<sup>2</sup> [2011] NZEmpC 118.

<sup>3</sup> The Employment Relations Act 2000.

### **180 Election not to operate as stay**

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.

[6] It is clear from this provision that the orders of the Authority remain in full effect unless and until the Court sets them aside. The defendants are entitled to enforce those orders unless a stay of proceedings is granted. It follows that the plaintiffs are asking the Court to exercise its discretion to intervene in what is a perfectly lawful enforcement process.

[7] The discretion conferred by s 180 is not qualified by the statute but must be exercised judicially and according to principle. I note two key principles. There must be evidence before the Court justifying the exercise of the discretion. The overriding consideration in the exercise of the discretion must be the interests of justice.

[7] Applying these principles, Mr Brito submits that the evidence of Mr Bellamy's beliefs provide sufficient material for the Court to exercise its discretion to grant a stay. He then submits that it is in the interests of justice to grant a stay. In support of that broad submission, Mr Brito refers to a number of decided cases about ordering security for costs. This switch of focus is largely unexplained and, as Ms Ryder points out in response, the defendant has not sought security for costs. Those detailed submissions by Mr Brito do not assist me.

[8] Towards the end of his submissions, Mr Brito addresses the possibility that the Court may order a stay on condition that the plaintiff pay money into Court. He says that, if such an order were made, the plaintiff may be able to make payment either by borrowing further from its bank or by making payments over time prior to a hearing.

[9] In her submissions, Ms Ryder refers to *The Chief Executive of the Ministry of Agriculture and Forestry v Hughes*<sup>4</sup> where Judge Colgan summarised what he described as "the traditional tests for a stay of remedies". I do not set that passage out in full as most of the tests described are not applicable to this case.

[10] In most cases, the basis on which a stay is sought is that the defendant is impecunious and the plaintiff is concerned that, if the remedies awarded by the Authority are paid, the defendant may not be able to repay them if the challenge is successful. That is not suggested in this case. Rather, the plaintiff relies on its own

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<sup>4</sup> [2004] 2 ERNZ 18

financial position to say that payment may put it out of business and/or make it financially impossible to pursue its challenge.

[11] That raises three questions which do not ordinarily arise in considering an application for stay of execution:

- Would payment of \$18,750 seriously affect the plaintiff's ability to carry on its business?
- Would payment of \$18,750 prevent the plaintiff from pursuing its challenge?
- Would granting a stay prejudice the defendant?

[12] Ms Ryder addresses these questions in her submissions. She questions the degree of financial difficulty being experienced by the plaintiff and submits that \$18,750 is not a large sum in the overall context of the plaintiff's business which has an annual turnover of nearly \$2.5million and continues to trade. She also submits that, if the plaintiff is in the precarious financial position described by Mr Bellamy, the defendant may be deprived of his remedies if a stay is ordered.

[13] Ms Ryder submits that the Court should either not grant a stay or grant a stay on condition that the full amount of remedies awarded by the Authority be paid into Court.

[14] I accept Ms Ryder's submission that, if the plaintiff is in financial difficulty, that militates against the grant of a stay. Otherwise, if the matter is drawn out, the defendant faces the possibility that the plaintiff will be placed in receivership or liquidation before he has a chance to obtain payment of the remedies awarded to him by the Authority. In that event, he would be an unsecured creditor and highly unlikely to receive his full entitlement.

[15] I also agree with Ms Ryder that the evidence provided on behalf of the plaintiff does not support the dire consequences of payment feared by Mr Bellamy. In particular, the financial statement shows that shareholders' accounts with the company are overdrawn to the extent of more than \$350,000. In effect, that means that the plaintiff has lent that much money to its shareholders. Those shareholders

are Mr Bellamy's family trust and Mr Bellamy personally. In the last year alone, Mr Bellamy has taken additional drawings of more than \$132,000. It would be a very straightforward matter for the company to source the \$18,750 required to pay the defendant by having Mr Bellamy repay that amount.

[16] The reason the Court frequently grants a stay of execution on condition that money is paid into Court is that this protects the plaintiff against the consequences of the defendant's impecuniosity. As noted earlier, there is no suggestion in this case that the defendant would not be able to repay some or all of the \$18,750 in question if the plaintiff's challenge were successful. The only practical effect of granting a stay on such a condition, therefore, would be to assist the defendant in executing the Authority's orders. That would be an improper reason to exercise the discretion to grant a stay.

[17] Overall, I conclude that it is in the interests of justice that a stay not be granted. The application is declined.

[18] Costs are reserved.

A A Couch  
Judge

Signed at 4.30pm on 21 November 2012.