

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2013] NZEmpC 138  
ARC 43/12**

IN THE MATTER OF      an application for stay of proceedings

BETWEEN                CATHERINE TAN  
                                 Plaintiff

AND                        MORNINGSTAR INSTITUTE OF  
                                 EDUCATION LTD T/A MORNINGSTAR  
                                 PRESCHOOL  
                                 Defendant

Hearing:                On the papers filed on 11 and 18 July 2013

Appearances:        Garry Pollak, counsel for plaintiff  
                                 Paul Pa'u, advocate for defendant

Judgment:            19 July 2013

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**JUDGMENT OF JUDGE M E PERKINS**

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[1]     The plaintiff in this matter was successful in a de novo challenge to a determination of the Employment Relations Authority.<sup>1</sup> The judgment of this Court in favour of the plaintiff is dated 16 May 2013.<sup>2</sup>

[2]     The defendant has now filed an appeal to the Court of Appeal against this Court's judgment. The plaintiff has consented to leave being granted and the parties are now awaiting the Court of Appeal's decision regarding whether or not leave will in fact be granted.

[3]     In the meantime, the defendant has filed an application with the Court for a stay of execution of the judgment until matters are ultimately determined by the Court of Appeal. While such a stay is opposed by the plaintiff, counsel for the

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<sup>1</sup> [2012] NZERA Auckland 208.

<sup>2</sup> [2013] NZEmpC 82.

plaintiff has indicated, in a memorandum, that if a stay is to be granted, then conditions for such stay should be imposed. The conditions proposed are that the defendant should lodge the sum of \$18,553.66, being one half of the total awards in favour of the plaintiff, into the Employment Court's trust account. These would then only be disbursed following conclusion of the matters currently before the Court of Appeal. In the event that leave is not granted, or if it is granted and the appeal is not successful, then the funds (including interest) would be disbursed to the plaintiff. Similarly, such funds would be disbursed to the plaintiff in the event of the defendant abandoning or withdrawing the appeal.

[4] In its application and in the affidavit in support, the defendant indicated that it would suffer considerable financial hardship if it were required to deposit all, or most, of the awards made in the Employment Court's judgment as a condition of the granting of the stay. The defendant indicated that it will be making payment of the security for costs in the Court of Appeal within the time prescribed.

[5] The grounds of the stay application are that, unless the stay is made, the defendant considers that its appeal would be rendered nugatory. The defendant submits that the grounds of appeal and chances of success are strong. A basis for that submission is set out in the documents filed. It submits that it would be contrary to the interests of justice for a stay not to be granted and that the plaintiff would suffer no undue prejudice by such a stay.

[6] The approach usually adopted by this Court to applications in these circumstances is that, where stay is considered to be appropriate, it is granted on the condition that the whole of the monetary awards of the Court are paid into court to be held on an interest bearing deposit. Alternatively, the funds can be lodged with an independent bond holder pending the outcome of the appeal. In this particular case, the plaintiff has indicated that it would agree to only one-half of the judgment sum being deposited and that is a reasonable proposal.

[7] Accordingly, the Court considering that a stay of the judgment in this case is appropriate, there will be an order staying execution of the judgment. This will continue until further order of the Court and pending the outcome of the application

to the Court of Appeal for leave to appeal and, if granted, the Court of Appeal's decision on the appeal. That order is made on the following conditions:

- a. The defendant is to lodge security for costs with the Court of Appeal within the time prescribed for it to do so.
- b. Half of the judgment of this Court (being \$18,553.66) is to be deposited to the Employment Court's trust account on or before 4 pm on Wednesday 24 July 2013 and held on interest bearing deposit. Such sum is to be dispersed as the Employment Court determines following the conclusion of the matters before the Court of Appeal.
- c. However, if leave is not granted by the Court of Appeal to hear the appeal, the said sum is to be immediately disbursed to the plaintiff.
- d. If leave is granted, the sum is to be disbursed by further order of this Court in a manner consistent with the decision of the Court of Appeal.
- e. In the event that the appeal is abandoned or withdrawn, the said sum is to be immediately disbursed to the plaintiff together with any interest earned on it.

ME Perkins  
Judge

Judgment signed at 11 am on Friday 19 July 2013