

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 20/08  
ARC 18/08**

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

AND IN THE MATTER OF an application for stay of execution of  
remedies

BETWEEN PAUL EDWARD ROEBECK  
First Plaintiff

AND DAVID JOHN PAKIETO  
Second Plaintiff

AND BRADFORD TRUST LIMITED  
Defendant

Hearing: 26 May 2008  
(Heard at Auckland)

Appearances: Frank Godinet, Counsel for Plaintiffs  
Philip Skelton, Counsel for Defendant

Judgment: 30 May 2008

---

**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN**

---

[1] Pending decision of the plaintiffs' challenge by hearing de novo to the determination of the Employment Relations Authority requiring them to pay damages to Bradford Trust Limited and penalties, should the company be stayed from enforcing the Authority's awards?

[2] The court has called for what is known colloquially as a good faith report from the Employment Relations Authority under s181 of the Employment Relations Act 2000. This is a report that addresses the conduct of the parties in the litigation in the Authority and may affect the nature and scope of the challenge that is brought. That report from the Authority has been received only very recently and has not been the

subject of direction by the Court. It is not favourable to the plaintiffs. It concludes they did not facilitate the Authority's investigation. However, at worst for the plaintiffs, it may circumscribe their challenge but will not result in their being denied a challenge altogether, so that the issue of stay of execution of the Authority's remedies still needs to be dealt with.

[3] The plaintiffs' stated grounds for a stay include the following:

- The Employment Relations Authority did not act independently of the judgment of the High Court in associated proceedings.
- The Authority's award of damages is contrary to the principles of contract law.
- It is in the interests of justice that a stay be granted pending determination of the challenge.
- If a stay is not granted, their rights of appeal will be rendered nugatory.
- The benefit of a successful appeal will be lost to the plaintiffs if a stay is not granted.
- The defendant will not be affected injuriously if a stay is granted.

[4] The defendant's grounds of opposition to the stay include that the plaintiffs have been taking steps to restructure their business dealings and dissipate their assets to make it difficult for the defendant to enforce the Authority's determination. The defendant says it wishes to commence bankruptcy proceedings against the plaintiffs and to then request the Official Assignee to set aside dispositions of property made with intent to defeat the plaintiffs' creditors.

[5] The plaintiff's application for stay of execution of the Authority's remedies is very weakly supported. Only on the last working day before the hearing was any affidavit evidence at all filed in support of the application. This was a brief affidavit

sworn by Mr Pakieto. Although it states Mr Pakieto's authorisation to make the affidavit also on Mr Roebeck's behalf, the affidavit neither explains the complete absence of any evidence from Mr Roebeck nor sets out any of his relevant circumstances.

[6] Mr Pakieto says baldly that neither he nor Mr Roebeck has the "*wherewithal*" to make any payment of the sums ordered by the Employment Relations Authority, whether the compensatory damages, the penalties payable to the Crown, or even the costs awarded by the Authority. Mr Pakieto says that unless a stay is granted, the plaintiffs will not be able to prosecute their challenges or continue to defend the associated proceedings in the High Court against them and their companies. Mr Godinet for the plaintiffs said nothing about the merits of his clients' challenges but conceded that their real dispute is with the amount of damages awarded for the breaches. Counsel conceded that it would be difficult, in light of the Authority's specific findings, to challenge its conclusions on liability for breach and that some losses would probably have been incurred by the defendant as a result of those breaches.

[7] As already mentioned, there are concurrent proceedings in the High Court at Auckland brought by Bradford Trust against Messrs Roebeck and Pakieto for breaches of their fiduciary obligations against their companies, or companies with which they have been closely associated, for damages. In early December 2006 Venning J granted interlocutory injunctive relief to Bradford Trust restraining Messrs Roebeck and Pakieto and their companies from certain defined economic activity for a period of 4 months. A substantive fixture in that litigation is awaited but is unlikely to take place until 2009.

[8] As Mr Skelton pointed out, the High Court's judgment, that I was invited to read without objection, is as scathing of the plaintiffs' credibility and conduct in that proceeding as it is probably possible to be on an interlocutory application for injunctive relief. Entirely consistent with that, the Employment Relations Authority Member who determined the claims in that forum was similarly or even more scathing about the plaintiffs' credibility and general bona fides in the litigation.

[9] Mr Pakieto says simply that he has no money or other assets with which to give security for the amounts due. Mr Roebeck has not deposed to his ability to do so but Mr Pakieto purports to say that he too has no money. However, the evidence establishes that Mr Pakieto has recently engaged in property transactions that may have the effect of, irrespective of the intent to, rendering him as an individual “*judgment proof*”.

[10] I accept that there appears to be a real risk that if the plaintiffs are unsuccessful on their challenge, the defendant will be unable to both recover the damages already awarded and to recover existing and further costs that will not be insignificant. As against that, the absence of a stay is likely to prevent the plaintiffs from litigating further.

[11] Despite the apparent weakness of the plaintiffs’ case and the minimal support of the application for stay, there are two factors that have finally persuaded me to grant an order for stay although on conditions. The first relates to the unique nature of employment litigation in the Employment Relations Authority. Although it is unnatural to describe this sort of litigation (common law claims for damages for breach of contractual duties against former employees competing in business) as an employment relationship problem, Parliament has nevertheless invested the informal investigative Authority with the first instance jurisdiction. The option for adversarial litigation by which such proceedings are conventionally dealt with, is reserved to dissatisfied parties and should not be lightly withheld, especially where there may be difficult questions of causation of loss, calculation of economic loss and, in the process, discovery and analysis of relevant documents. To not grant a stay would be to deprive the plaintiffs of what Parliament has said should normally be their right in these circumstances.

[12] The second influential element is the knock-on effect of a refusal to grant a stay, to the concurrent High Court litigation between these parties. It seems clear that if a stay is not granted, the defendant will seek to bankrupt the plaintiffs and to ask the Official Assignee to unwind certain trust and relationship property transactions to enforce the Authority’s award. But such an inevitable course will also have the effect of bringing the High Court proceedings to an end but other than

on their merits. This Court should be wary of taking steps that may have such a collateral result. It is unfortunate that what I and other Judges have described as a problematic jurisdictional demarcation between the Employment Relations Authority and, in some instances, this Court on the one hand, and the courts of ordinary jurisdiction on the other, results in duplicate parallel proceedings in different jurisdictions that will inevitably, also as here, move at different rates of progress. The plaintiffs may regard themselves as the fortunate beneficiaries of legislative failure to address comprehensively and logically the jurisdictional questions alluded.

[13] In these circumstances I have concluded that the following is the most just course. If, as the plaintiffs say, they dispute principally the amount of damages awarded, I will require them to pay into Court, as a condition of the stay granted, a proportion of those damages. Because of the plaintiffs' failure to address the merits of these questions as they are obliged to on an application such as this, I will simply have to fix that amount as best as I can in all the circumstances.

[14] The conditions attaching to the stay will include the payment into an interest bearing account controlled by the Registrar of this Court of a sum equivalent to two-thirds of the damages plus the whole of the costs awarded by the Authority plus the whole of the penalties awarded against the plaintiffs. That sum should also include interest on the damages and costs components, but not the penalty components, calculated from the date of the Authority's determination to the date of payment in at the rate of 8 percent per annum. By my calculation, two-thirds of the damages is the sum of \$149,000. Added to this will be the sum of \$15,000 costs, coming to a subtotal of \$164,000 on which interest is to be calculated and added. The additional amount required to be paid in but that will not bear interest is the sum of \$5,000 from each of the plaintiffs individually.

[15] So, as a signal of their good faith in the prosecution of their challenges, but acknowledging the strength of the defendant's opposition to them, the plaintiffs must now pay in some but not all of the amounts directed by the Authority or must otherwise give security for these amounts to the satisfaction of the Registrar. If there is any dispute about the giving of alternative security, leave is reserved to refer the matter back to me for determination.

[16] The plaintiffs should be clear that the stay of execution of the Authority's determination that is granted forthwith is conditional upon these payments in being made within 30 days of the date of this judgment. If those conditions are not satisfied, the stay will lapse and the defendant will be at liberty to take steps to enforce the Authority's determination. The other condition that will attach to the granting of stay is that the plaintiffs must prosecute expeditiously their challenge.

[17] The sums paid to the Registrar are to be held on interest bearing deposit and released only by agreement between the parties (except as to the penalties) or pursuant to a judgment or order of this Court.

[18] Although I have been persuaded to grant a stay, albeit on conditions, the defendant really has been put needlessly to the cost of defending this application and has been in large measure successful in view of its consistent preparedness to agree to a stay upon payment in. The plaintiffs have been derelict in the performance of their obligations to support a stay. For example, it was only when the defendant filed and served an affidavit in opposition to the unsupported application for stay that the plaintiffs, or at least one of them, filed very belatedly an inadequate affidavit in support. In these circumstances the defendant will be entitled to an order towards its costs that is payable jointly and severally by the plaintiffs and irrespective of the outcome of the challenge.

## **Orders**

[19] There will be a stay of execution of the orders of the Employment Relations Authority pending delivery of judgment on the plaintiffs' challenge upon the following conditions:

- that, within 30 days of the date of this judgment, the plaintiffs give security for, or pay to the Registrar of the Employment Court at Auckland to be held on interest bearing deposit and for disbursement either by agreement of the parties or according to the judgment of the Employment Court, the sum of \$164,000 plus interest on that sum at the rate of 8 percent per annum

calculated from the 26<sup>th</sup> day of February 2008 to the date of payment in or of other provision of security;

- that each of the plaintiffs pays to the Registrar of the Employment Court at Auckland, to be held on interest bearing deposit and for disbursement according to the judgment of the Employment Court, the sum of \$5,000;
- that the plaintiffs prosecute expeditiously their challenge.

[20] If these conditions are not fulfilled or lapse, the order for stay will either not crystallise or will terminate.

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

[22] The defendant is entitled to costs on the plaintiff's application for stay of execution in the sum of \$1,500.

[23] The plaintiffs may have the period of 14 days within which to file and serve any submissions as to what the Court should direct under s181 and s182(2) of the Employment Relations Act 2000 based on the Authority's "good faith report" dated 20 May 2008 and the defendant may have a period of 14 days thereafter to make its submissions by memorandum. Upon receipt of those written submissions the Court will determine the nature and extent of the hearing of the challenge under s182(3).

GL Colgan  
Chief Judge

Judgment signed at midday on Tuesday 3 June 2008

