IN THE COURT OF APPEAL OF NEW ZEALAND

CA431/2017
[2017] NZCA 434

BETWEEN	BROADSPECTRUM (NEW ZEALAND) LIMITED Appellant
AND	JASON ARAMIHA NATHAN Respondent

Hearing:	13 September 2017
Court:	Cooper, Winkelmann and Clifford JJ
Counsel:	J O Upton QC for Appellant T P Cleary for Respondent
Judgment:	13 September 2017 at 3.30 pm
Reasons:	4 October 2017

JUDGMENT OF THE COURT

A The application for a stay of proceedings and execution is declined.

B The appellant must pay the respondent costs for a standard application on a band A basis with a 50 per cent uplift, and usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] Mr Nathan, the respondent, is a registered lines mechanic employed by the appellant, Broadspectrum (NZ) Ltd, at its Glover Street premises in Wellington. Broadspectrum dismissed Mr Nathan in August 2013 but in October 2016 the

Employment Court ordered his reinstatement to his old position and active duties.[1] Although nearly 12 months has elapsed since the making of that order, Broadspectrum has yet to allow Mr Nathan to return to active duties. On 6 June 2017 the Employment Court issued a compliance order requiring Broadspectrum to do so.[2] Then on 28 July 2017, on Mr Nathan's application, the Employment Court found that Broadspectrum was in breach of that compliance order and imposed a fine of $10,000.[3]

[2] Broadspectrum filed a notice of appeal in this Court against the 28 July 2017 decision. It continued to refuse to allow Mr Nathan to return to active duties, raising concerns about safety. It said Mr Nathan has to undergo competency testing before he can return to active work.

[3] Pending the hearing of its appeal, Broadspectrum applied for interim relief. It sought a stay of the proceedings or, alternatively, a stay of execution of the 28 July 2017 decision. Broadspectrum said it needed the stay because so long as the judgment stands, it remains in contempt of the Employment Court's orders.

[4] Following the hearing we advised the parties that the application for a stay was declined. We now give our reasons for doing so.

Background

[5] It is necessary to explain the history of this proceeding in some detail to place the interim relief Broadspectrum sought in its proper context.

[6] Mr Nathan began working for Broadspectrum in July 2008. At the time of his dismissal in August 2013 he was an acting team leader with responsibility for providing repairs and maintenance services for the trolley-bus electric-lines network operated by Wellington Cable Cars Ltd (Wellington Cable). He was dismissed following an incident which occurred during a callout to the network. In the course of that callout, one of Mr Nathan's team members received an electric shock,

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1 *Nathan v Broadspectrum (New Zealand) Ltd* [2016] NZEmpC 135, (2016) 10 NZELC 79-070 [Reinstatement decision] at [86].
2 *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 72 [Compliance decision] at [33].
3 *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 90 [Breach decision] at [79].

described as a "tingle". Broadspectrum conducted a disciplinary investigation into the incident, which lead to Mr Nathan's dismissal.

[7] Mr Nathan then pursued a personal grievance claim for unjustified dismissal. He sought reinstatement to his old position of acting team leader. His complaint was that incorrect information had been used in Broadspectrum's investigation and that his manager had drawn erroneous conclusions. Mr Nathan also alleged that the outcome of the investigation was predetermined. Throughout the investigation, and in these proceedings, Mr Nathan has maintained that he took all appropriate steps to ensure the lines were not energised when the incident occurred. Mr Nathan says that Broadspectrum failed to properly investigate the cause of the incident. Mr Nathan wishes to return to work so that his mana may be restored.

[8] A hearing was scheduled before the Employment Relations Authority on 1 and 2 December 2015 at which 11 witnesses were to be called. As it happened, the hearing was only partially completed when Broadspectrum offered a proposal for resolution. That occurred in the following circumstances.

[9] Broadspectrum called two witnesses from Wellington Cable. Their evidence was to the effect that, whatever the outcome of the hearing before the Authority, it was not practicable or reasonable to reinstate Mr Nathan to his former job with Broadspectrum as an acting team leader — the incident in which he had been involved was too serious and it raised significant issues about his competence. Their evidence was based upon the findings recorded in the version of Broadspectrum's investigative report which was before the Authority. However, during the evidence of the next witness, a Broadspectrum employee, it emerged that there was another version of the Broadspectrum investigation report in circulation, possibly the final version. In that version, Mr Nathan's alleged misconduct was described differently and less seriously than in the report before the Authority.

[10] The hearing adjourned at that point to enable settlement discussions. When it resumed, although no agreement had been reached between the parties, Broadspectrum offered a proposal which it said met Mr Nathan's request for reinstatement. The proposal was to reinstate Mr Nathan to a different position to that

he had previously held, but one no less advantageous to him. The Authority then made orders in accordance with that proposal, stating that no useful purpose would be served by reinstating Mr Nathan to his former position.[4] It issued its decision without recalling the two witnesses from Wellington Cable to clarify which version of the report they viewed before giving their evidence that Mr Nathan could not work on their network.

[11] Because of a knee injury, Mr Nathan could not perform the new role to which he was appointed and was dismissed from that position without taking up his duties. He did not challenge that dismissal. Rather, he brought a non-de novo appeal in the Employment Court in respect of the Authority's ruling. The principal ground of appeal was that the Authority had erred in law by relying upon the evidence from the two Wellington Cable witnesses, when that evidence was tainted because it was based upon the wrong version of the investigation report. The relief sought by Mr Nathan on the appeal was reinstatement as an acting team leader.

[12] The hearing of the non-de novo appeal took place in May 2016, with judgment given on 28 October 2016.[5] Judge Smith found that the Authority had erred in accepting Broadspectrum's case about reinstatement (that it was not practicable and reasonable to reinstate Mr Nathan to his former position as an acting team leader).[6] This was because of the weight the Authority placed on the evidence of the two witnesses from Wellington Cable. The Authority had failed to clarify which version of the report those witnesses had relied upon when giving their evidence, even though it was on notice that the version before it may have misstated or overstated the incident.[7]

[13] Having found an error of law, the Judge then considered the appropriate remedy. In addition to ordering costs and payment of lost wages, Judge Smith made orders as follows:

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4 *Nathan v Transfield Services (New Zealand) Ltd* [2015] NZERA Wellington 120 as cited in Reinstatement decision, above n 1, at [1].
5 Reinstatement decision, above n 1.
6 At [69].
7 At [68].

> [86] Pursuant to s 183(2) of the [Employement Relations Act 2000] the determination of the Authority is set aside and in its place I order that:
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> 1. Mr Nathan is to be reinstated to his former position as Acting Team Leader for the defendant at Glover Street, subject to the following:
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> (a) His wages are to be reinstated from the date of this judgment but;
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> (b) His return to active duties at the defendant's Glover Street premises is deferred for 14 days from the date of this judgment to allow for an orderly resumption of duties and for any other necessary administrative steps to be taken by Broadspectrum; and
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> (c) Further, Mr Nathan is to fully cooperate in undertaking any training required of him by Broadspectrum which, for the avoidance of doubt, may take place during the time period referred to in 1(b) or such other time as Broadspectrum may direct.
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> …

[14] On 17 November 2016 Broadspectrum applied to this Court for leave to appeal the 28 October 2016 judgment. The Employment Court stayed the orders pending the hearing of that application.[8] On 23 May 2017 this Court declined Broadspectrum's application for leave to appeal, finding that the questions of law proposed by Broadspectrum did not raise issues of general or public importance and nor were they seriously arguable in context.[9] The Court said the process followed by the Authority was flawed because it failed to meet the requirements of s 157(1) of the Employment Relations Act 2000 — to make a liability determination before imposing a remedy when "remedies were very much in issue".[10] This Court noted that the consequence of the flawed procedure the Authority followed was that Mr Nathan's evidence was not even heard in that forum.[11]

[15] As a consequence of this Court's refusal of leave, the stay issued by the Employment Court came to an end. Mr Nathan's solicitors then entered into correspondence with Broadspectrum's lawyers to secure his return to active duties. Broadspectrum's position was as follows. First, in terms of the Employment Court's reinstatement order, it had 14 days to return Mr Nathan to active duties, maintaining

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8 *Broadspectrum (New Zealand) Ltd v Nathan* [2016] NZEmpC 162 [First EC stay decision].
9 *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 202.
10 At [10].
11 At [10].

that the 14 days should run from the date that the Court of Appeal refused leave. Second, Broadspectrum required Mr Nathan to undertake a medical examination before he returned to active duties. Finally, Broadspectrum required Mr Nathan to complete induction and health-and-safety training before active duties commenced, although it conceded that some of those requirements could be met "on the job".

[16] On 30 May 2017 Mr Nathan applied for a compliance order on the grounds that the further 14-day deferral period, the requirement for a medical examination, and training or vetting as conditions precedent to reinstatement to active duties, were not in accordance with the 28 October 2016 judgment ordering his reinstatement. Mr Nathan's position was that, while he would participate in induction before commencing active duties, he did not agree that Broadspectrum might dictate training, especially as to competence such as with a new employee, *before* active duties commenced.

[17] In its notice of opposition to the application for a compliance order and related correspondence, Broadspectrum initially maintained that it was entitled to require Mr Nathan to undertake basic induction training. All the indications from Broadspectrum were, however, that the training could be completed in a short timeframe. In a letter dated 1 June 2017, Broadspectrum's counsel Mr Richard Upton suggested that, if Mr Nathan was certified medically fit and if he completed the induction training, he could be back at work within a few days. By letter dated 2 June 2017, Mr Richard Upton clarified the nature of the training further:

> In your communications you have suggested that this is training "as to competence". That is not the case – it is the standard induction training. For someone with Mr Nathan's experience, it should not pose an obstacle – but it is important that this be undertaken to ensure that Mr Nathan's skills remain up to date. That is particularly so given his four year absence.

[18] It seems that it was because of these reassurances that the issue of whether competence training for Mr Nathan was within the contemplation of the 28 October 2016 judgment was not argued before Judge Smith at the hearing of the application for a compliance order on 6 June 2017. In his judgment, which was given the same day, Judge Smith rejected the argument that requiring a medical certificate was an

appropriate condition to impose prior to the resumption of active duties.[12] He said the time to address Mr Nathan's fitness to resume active duties had been during the Authority hearing, and the conditions stipulated in his October 2016 judgment did not include or refer to Mr Nathan first being declared fit to work.[13] The Judge referred to the 14-day delay on the part of Broadspectrum, observing that the 14 days had in fact expired by 11 November 2016 and that Broadspectrum had enjoyed ample time to take whatever steps might be necessary to ensure that Mr Nathan was able to resume active duties.[14]

[19] Judge Smith was satisfied that not only had Broadspectrum failed to comply with the order reinstating Mr Nathan, but that it had shown it would continue to do so.[15] Therefore, making a compliance order was necessary "even at this stage, to draw home to Broadspectrum that it is not entitled to place barriers in the way of Mr Nathan resuming work".[16] He ordered Broadspectrum to comply with the orders contained in his judgment of 28 October 2016 by returning Mr Nathan to active duties at Glover Street no later than 7 June 2017 at 8 am.[17]

[20] On 8 June 2017 Mr Nathan filed an application in the Employment Court alleging that Broadspectrum was breaching the compliance orders of 6 June 2017 by not returning him to active duties and instead requiring him to undertake competence testing. Mr Nathan's evidence was that when he returned to work on 7 June he spent the day being inducted as a new employee. He was told that the induction would carry on until 9 June, at which point he would be assessed. If he passed that, he would spend the next two weeks doing a skills matrix and again be assessed as to competency. Only if he was then assessed as competent would Wellington Cable allow him to work on its lines as a new employee.

[21] In the judgment finding breach dated 28 July 2017, the Employment Court summarised the balance of Mr Nathan's evidence as follows:[18]

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12 Compliance judgment, above n x, at [23].
13 At [25].
14 At [17] and [20].
15 At [29].
16 At [29].
17 At [33].
18 Breach decision, above n x.

> [26] Aside from the initial induction on Wednesday, 7 June 2017, and perhaps for a day or two afterwards, Mr Nathan has spent the entirety of his working day completing these skills assessments. Not surprisingly, he objects to undertaking them and has participated under protest. Although Mr Nathan has been absent from Broadspectrum's workplace for several years he is still a qualified lines mechanic and considers that his competency ought not to be in question in this way now.
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> [27] Since 7 June 2017 Mr Nathan has been essentially left alone to complete these assessments. He has not been provided with all of the reference material needed to be satisfied about his answers in the assessments and, for the most part, has been left to source that material from wherever he can locate it within the company. Part of Mr Nathan's uncertainty, and possibly his concern, about being subjected to this testing is that it is inconsistent with what was said in correspondence between his lawyer and Broadspectrum's lawyer where any substantive training was said to be "provided on the job".

[22] The 28 July 2017 judgment, the subject of the current underlying appeal, relates to Mr Nathan's application regarding breach. Judge Smith framed the central issue for him as being whether Broadspectrum's stance, that it is entitled to be satisfied about his competency before allowing him to work on the lines, breached the 6 June 2017 compliance order.[19] The Judge concluded that Broadspectrum had taken an unjustified approach to the compliance order by requiring Mr Nathan to complete assessments which were a barrier to his return to active duties. He said:

> [52] Mr Cleary made the point that Mr Nathan established his competency during the trial, that was the time when any concerns about whether it was practicable and reasonable to reinstate Mr Nathan ought to have been raised including, if appropriate, his competency. None were raised at trial. In fact, in the Employment Relations Authority Broadspectrum conceded that Mr Nathan ought to be reinstated. That concession must have included an acceptance that Mr Nathan was and is competent.
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> (Footnote omitted.)

[23] The judgment concludes as follows:

> [79] For the foregoing reasons I conclude:
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> (a) There has been a breach of the compliance order made on 6 June 2017.
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> (b) Broadspectrum is fined $10,000 for that breach.
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> (c) Of that $10,000 fine, $5,000 is to be paid to Mr Nathan.

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19 At [4].

[24] The current appeal was filed in early August 2017. Broadspectrum contends that the Employment Court erred in finding it in contempt of the compliance orders, as an employer is entitled to test the competency of an employee who will work in a potentially dangerous situation before allowing the employee to return to active duties.

[25] On 25 August 2017 Judge Smith declined Broadspectrum's application for a stay of proceeding or of execution of the decision.[20] Broadspectrum then sought a stay from this Court.

Evidence in support of application for stay

[26] Broadspectrum filed an affidavit from Mr Craig MacDonald, General Manager (Power) for Broadspectrum. Mr MacDonald said that Broadspectrum was concerned about Mr Nathan's competence because of his four-year absence and because they could not "ignore that there was an incident in 2013". He claimed that Mr Nathan was assessed and that those assessments were marked by an independent assessor. Mr Nathan failed 24 of the assessments he was required to complete, including receiving 20 out of 100 for the "switching" module — a critical part of ensuring that relevant parts of the network are deactivated.

[27] Mr MacDonald said that the health and safety of Mr Nathan, Broadspectrum's other employees and the public is of paramount importance to Broadspectrum. He said that if Mr Nathan or any employee makes a mistake on the network, an accident or even a fatality may result. He said of the failed modules:

> Broadspectrum wants to provide further training to [Mr Nathan] on these topics, in anticipation that he will pass them. However, we believe that [Mr Nathan] will refuse to undergo any training and re-assessment on the basis that the initial test should not have occurred in the first instance based upon the recent judgment. That then leaves us completely hamstrung.

[28] Mr MacDonald concluded that Mr Nathan was not declared "competent" and so Broadspectrum could not certify and warrant his competency. It is a requirement of the contract between Broadspectrum and Wellington Cable that an employee be declared competent before the employee may work on the network.

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[20] *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 104 [Second EC stay decision].

[29] Mr John Upton QC said for Broadspectrum that if the stay is granted, Mr Nathan could continue to be paid while undergoing further competency testing.

[30] In Mr Nathan's affidavit in opposition to the stay he disputed claims he failed assessments and said he was not shown any marked papers. He claimed that at the 20 July 2017 hearing of the contempt application, Mr MacDonald showed him the results of his testing on a cellphone. Mr Nathan said that the screen was covered in green shading and that Mr MacDonald told him he had passed all of the papers shown. It was only later, after the contempt judgment had issued, that Mr Nathan was told he had failed 24 papers. Mr Nathan also said that the person who administered the competency testing to him is not independent and is neither a registered lines mechanic nor a trained New Zealand Qualifications Authority assessor. He is an employee of Broadspectrum.

[31] Mr Nathan said he is willing to go through any reasonable training but not if it is a barrier to active duties. He said that he is paid a lot less because he is not on active duties.

Relevant principles

[32] The application for stay and execution of proceeding was made in reliance upon r 12(3) of the Court of Appeal (Civil) Rules 2005.[21] As Mr Upton pointed out, it was not necessary for Broadspectrum to apply to stay enforcement of the payment of the fine as that is automatically stayed on appeal by reason of s 349 of the Criminal Procedure Act 2011. It was therefore the finding of breach that Broadspectrum sought to stay.

[33] Mr Cleary for Mr Nathan argued that there was no power to grant a stay of proceedings because what Broadspectrum was in effect seeking to stay was the order for reinstatement dated 28 October 2016, but leave to appeal that decision was declined by this Court. Although we did not hear full argument on the point,

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[21] The underlying appeal is brought under s 217 of the Employment Relations Act 2000 as an appeal against the imposition of a fine under s 140(6) of that Act. Such an appeal, pursuant to s 217, is as if the appellant were a defendant who had been convicted on a charge and sentenced by the High Court. By reason of s 336(1) of the Criminal Procedure Act 2011, this Court may exercise any power that may be exercised by the Court in respect of civil appeals. Accordingly the application for stay was brought under r 12 of the Court of Appeal (Civil) Rules 2005.

r 12(3)(a) of the Civil Rules would appear to provide sufficient jurisdiction. The key issue on this application was not whether there is jurisdiction, but whether that jurisdiction should have been exercised. Rule 12(3) grants very broad powers but it is clear that they are to be used for the purpose of preserving the position of the parties pending appeal.[22]

[34] The well-known starting point when addressing an application for stay is that the successful party is entitled to the benefit of the judgment they have obtained. However, that is to be balanced against the interest the appellant has in preserving its position in case the appeal succeeds.[23] Relevant factors to be accounted for when balancing these two competing interests include:[24]

(a) whether the appeal may be rendered nugatory by the lack of a stay;

(b) the effect on any third parties;

(c) injury or detriment to the successful party/respondent if the stay is granted;

(d) the bona fides of the appellant as to prosecution of the appeal;

(e) any public interest in the proceedings;

(f) novelty and importance of the questions involved;

(g) the strength of the case on the appeal; and

(h) the overall balance of convenience.

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22 *Fullers Bay of Islands Ltd v Otehei Bay Holdings Ltd* HC Auckland CIV-2009-404-7207, 23 February 2011 at [22].

23 *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

24 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9]; and *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11].

Analysis

Will the appeal be rendered nugatory if stay not granted?

[35] Broadspectrum said it has genuine safety concerns regarding Mr Nathan's re-engagement on active duties. It said refusing the stay would mean that genuine concerns and risks would not be addressed because Broadspectrum would be required to return Mr Nathan to active duties.

[36] In reality then, Broadspectrum attempted to protect the position that was ruled upon, against it, in the 28 October 2016 judgment. Broadspectrum's position was that it could not be obliged to return Mr Nathan to active duties until satisfied that he is competent. But the 28 October 2016 judgment is not, and cannot be, the subject of the appeal, and it is not therefore properly the subject of interim orders.

[37] We were not persuaded the appeal from the 28 July 2017 judgment would be rendered nugatory by a refusal of stay. Without the stay, Broadspectrum retains the ability to argue that it was not in breach of the compliance order when it insisted upon competency testing and that a fine should therefore not have been imposed.

Interests of third parties/public interest

[38] Broadspectrum said that it is not sure Mr Nathan is safe to work on the lines and, if he is not, a return to active duty may result in serious accident. It pointed to obligations under the Health and Safety at Work Act 2015. But Mr Nathan is registered and licensed to undertake active duties.

[39] Moreover, we doubted the genuineness of Broadspectrum's safety concerns given the late point in the proceedings at which they were raised. If there were real concerns, it is inconceivable Broadspectrum would have agreed, before the Authority, to Mr Nathan's reinstatement or that, having had several months more to reflect upon the issue, it would have failed to raise these same safety concerns before the Employment Court when that Court addressed Mr Nathan's application for reinstatement. We also note that even after further significant passage of time,

Mr Richard Upton expressly reassured Mr Nathan's lawyer that the training proposed for Mr Nathan did not include competency training.

[40] Broadspectrum relied upon the 2013 incident to lend weight to its safety concerns. The time for it to address its concerns regarding that incident was before the Authority or before the Employment Court during the non-de novo appeal — on both occasions the appropriate remedy for Mr Nathan was at issue. As Mr Cleary for Mr Nathan submitted, Mr Nathan's competence was assumed when the Authority issued its orders and was proved by Mr Nathan before the Employment Court without any corresponding challenge from Broadspectrum.

[41] Broadspectrum also relied upon the evidence of Mr MacDonald to make out its case that there were safety issues engaged, but not only were these raised very late — the evidence was unconvincing on its own terms. There was no reassurance as to the basis upon which these tests were completed and, in particular, if the tests were administered to Mr Nathan under the same conditions as they are administered to other employees. Nor was there any reassurance as to the qualification, skill or independence of the person administering and marking those tests. Mr Nathan's evidence was that he was not provided the resources required to complete the tests, that the person who administered them was neither independent nor properly trained to administer them, and that he had earlier been told that he had passed the tests. There was no substantial rebuttal of Mr Nathan's evidence on these matters.

[42] As to the interests of the third party, Wellington Cable, the suggestion in the Authority hearing that Wellington Cable would not allow Mr Nathan to return to work on its network was not the subject of any new evidence. Broadspectrum relied on its own concerns that he is not safe. We have already in this judgment expressed our views on those concerns.

[43] There was force in Broadspectrum's point that Mr Nathan has been away from work for over four years and may need to refresh his knowledge. Moreover, as was clear from the evidence, procedures have changed in that time. However, we considered that on-the-job training can address any deficiencies in Mr Nathan's knowledge. A refusal of stay would not prevent Broadspectrum providing this

training to Mr Nathan — the kind which was originally contemplated in the orders made by the Employment Court in October 2016. Mr MacDonald said "we believe that [Mr Nathan] will refuse to undergo any training", but Mr Nathan's evidence was that he has always agreed to undertake training on the job. The extent of his cooperation with Broadspectrum to date, even when it was imposing conditions upon him outside the terms of the October 2016 orders, assured us that Mr Nathan will participate in such training.

The impact upon Mr Nathan if stay granted

[44] If we granted a stay, Mr Nathan would have been kept from active duties. Mr Nathan has pursued proceedings since 2013, challenging the effect of a wrongful dismissal and seeking as a remedy that he be able to do the work he was doing before that dismissal. He seeks restoration of his mana through being able to do this work. A stay would have denied that to him, at least in the near future.

[45] Broadspectrum's resistance to his return to active duties has also had, and continues to have, financial implications for him. When he is subject to the competency testing he receives less pay than if he were on active duties.

The bona fides of the applicant as to the prosecution of the appeal

[46] During the course of the hearing of the application for stay we raised with Mr Upton our concern that the application for stay was an abuse of process, because it was an attempt to revisit issues already ruled upon by the Employment Court and by this Court when declining leave to appeal the decision of October 2016. Mr Upton submitted that the application was not an abuse because the relevance of Mr Nathan's competence to his return to active duties was not before the Employment Court until the contempt hearing.

[47] Nevertheless, we concluded that the current application for stay is an abuse of process. As highlighted above, the issue of Mr Nathan's competence to perform the tasks involved in his role as an acting team leader was at issue in the initial proceedings before the Authority. Broadspectrum in effect withdrew its concerns regarding Mr Nathan's competence at the point it proposed Mr Nathan's

reinstatement. Broadspectrum then had a further opportunity to raise those issues when Mr Nathan brought a non-de novo appeal against the Authority's ruling in the Employment Court. In those proceedings Mr Nathan sought reinstatement to his former role and Broadspectrum could, and should, have raised its concerns about his competence if it had them at that point.

[48] Moreover, Broadspectrum's solicitors expressly eschewed any requirement for competency training prior to Mr Nathan resuming active duties. For that reason, the issues as to whether Broadspectrum could insist upon such training were not traversed during the compliance order hearing before the Employment Court. Broadspectrum itself altered the course of the proceedings.

[49] It is incumbent upon a party to litigation to raise every point that is relevant to the issues before the court in that litigation. This proposition is often traced to the following passage from the judgment of Sir James Wigram VC in *Henderson v Henderson:*[25]

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[50] If a party does not raise an aspect of its case in litigation, but then in a later proceeding attempts to introduce it as relevant to the same issue between the parties, that can amount to an abuse of procedure. Lord Bingham put the matter as follows in *Johnson v Gore Wood & Co (a firm)*:[26]

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that

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[25] *Henderson v Henderson* (1843) 3 Hare 100 at 114, (1843) 67 ER 313 at 319 (Ch).
[26] *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at 31.

> there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.

[51] Broadspectrum attempted to introduce an issue which should have been raised much earlier in the same proceeding. By doing so it attempted to reopen issues finally disposed of when this Court declined leave to appeal the October 2016 judgment ordering that Broadspectrum reinstate Mr Nathan to his earlier position.

Novelty and importance of the questions involved in the case

[52] Broadspectrum said the issues raised in the underlying appeal are important. It contends in the appeal that it is surely implicit in any employer-employee relationship that the employer is entitled to test the employee for competency — particularly where there has been a work incident involving the employee which led to a formal investigation, where the employee has been off active duty for some four years and company procedures and structures have changed in the meantime, and where the working environment is inherently dangerous. It says these issues go to the heart of the employment relationship.

[53] The difficulty with this argument is that the general right of employers to ensure the competence of their employees does not arise on the appeal. The appeal will necessarily be limited to consideration of whether Judge Smith erred in his finding that Broadspectrum was in breach of the enforcement order and in the penalties he imposed. At its widest that will involve consideration of whether the competence testing and training proposed by Broadspectrum as a pre-condition to a return to active duties is within what was contemplated in the original order for reinstatement made in October 2016.

Strength of case on appeal

[54] In light of this articulation of the issue on appeal, which is far narrower than Mr Upton would have had us frame it, we were not persuaded that the appeal has strong prospects of success.

The overall balance of convenience

[55] The overall balance of convenience clearly favoured the refusal of a stay in these circumstances. Mr Nathan was kept out of his work for over four years by Broadspectrum's wrongful reliance upon the 2013 incident as a basis for dismissing him. We considered that on-the-job training could address any legitimate concerns Broadspectrum has regarding Mr Nathan's technical knowledge and skills. For all the foregoing reasons, we rejected Broadspectrum's application.

Costs

[56] We asked the parties at the hearing for submissions as to costs. Mr Cleary sought an uplift on standard costs on the basis that this Court has no jurisdiction to grant the stay order, because that order was made in the October judgment which is not the subject of this appeal. We understand his submission to be in substance, if not articulation, that the application is an abuse of process for the reasons we have outlined. As discussed above, our view is that there is jurisdiction under r 12 to stay the proceedings, but that the application was an abuse of process as it is an attempt to revisit issues already ruled upon by the Employment Court and this Court in decisions outside the scope of this appeal.

[57] Given the view we take of the application, we are satisfied it is appropriate to make an award of increased costs in Mr Nathan's favour. The application for a stay was inherently unlikely to succeed.[27] We apply the approach taken by the majority in *NR v MR*:[28]

> [52] In a case such as this, we do not consider that there needs to be a blow by blow comparison between time properly taken in respect of a particular step and the appropriate uplift for each such step. All of the steps

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27 Court of Appeal (Civil) Rules 2005, r 53E(2)(b)(ii).
28 *NR v MR* [2014] NZCA 623, (2014) 22 PRNZ 636.

> that have been necessary to oppose the application are steps that should not have been necessary, and have been taken at a cost that it should not have been necessary to incur.

[58] In our assessment, an uplift set at 50 per cent of standard costs appropriately reflects the fact the application was always unlikely to succeed.

Result

[59] The application for a stay of proceedings and execution is declined.

[60] The appellant must pay the respondent costs for a standard application on a band A basis with a 50 per cent uplift, and usual disbursements.

Solicitors:
AJO Legal, Auckland for Appellant
Charles McGuinness, Wellington for Respondent