

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2018] NZEmpC 161
EMPC 432/2018**

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 and
urgency

BETWEEN ASLAN FARMS LIMITED
Plaintiff

AND PAUL JOHNSTONE
Defendant

Hearing: 21 December 2018
(by telephone)

Appearances: A Twaddle and A Jackman, counsel for plaintiff
K Wilson and B Edwards, counsel for defendant

Judgment: 21 December 2018

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for a stay of execution and urgency)**

[1] This afternoon I have heard at short notice two applications by the plaintiff arising from a determination of the Employment Relations Authority reinstating the defendant on an interim basis.¹

[2] The plaintiff has sought a stay of execution of the Authority's determination and urgency.

[3] The way in which this application has been dealt with, requiring extreme urgency, was the product of the timing of the determination by the Authority and the

¹ *Johnstone v Aslan Farms Ltd* [2018] NZERA Auckland 406.

extremely brief opportunity provided for the parties to address the orders that had been made.

[4] On 6 December 2018 the Authority conducted an investigation into an application made by the defendant in this proceeding for interim reinstatement pursuant to s 127 of the Employment Relations Act 2000 (the Act). The Authority issued a determination on 19 December 2018 granting the application and ordering the defendant be reinstated to his former position as Farm Manager for the plaintiff. As a condition of that order the plaintiff was to restore the defendant to his former position on the same terms and conditions of employment pending the hearing of his personal grievance claim.

[5] The Authority order suspended the reinstatement for two days to enable arrangements to be made for the defendant to return to work. He was also ordered by the Authority to fully cooperate with any reasonable requirements of the plaintiff necessary to facilitate his return to work. The timing of the determination meant the plaintiff was required to restore the defendant to his position as Farm Manager either on, or perhaps immediately after, 21 December 2018.

[6] The determination for interim reinstatement has been challenged. The need for an application for a stay of execution was explained as involving, at least partly, not only an intention to seek to overturn the determination but because of practical difficulties said to arise in complying with the orders.

[7] The plaintiff maintains that it has lost confidence in the defendant, that it has serious concerns about his ability to be reintegrated into the workplace, and that there are practical difficulties if he was reinstated on this basis, at this time of year, particularly over supervision of his work.

[8] An enormous affidavit from the plaintiff's director, Richard Luxton, was filed in support of the application. Mr Luxton deposed to the plaintiff's concerns about the order for reinstatement which has just been mentioned, and its timing. He effectively repeated the evidence he gave to the Authority and deposed that the trust and confidence required in their employment relationship had been destroyed.

[9] Mr Luxton used strong expressions in his evidence seeking to draw into question the defendant's credibility, character and trustworthiness and what he considers to be errors made by the Authority in the determination which is being challenged. The thrust of this evidence was that reinstatement should not have been ordered because it was not practicable and reasonable to reinstate the defendant.

[10] In the brief time available this afternoon, it has not been possible for the defendant to take steps in this proceeding by filing a notice of opposition or an affidavit. However, at the hearing, he was represented by Ms Wilson and Mr Edwards who had taken instructions. It is apparent from those instructions that the application for a stay will be contested and what Mr Luxton has deposed to will be strongly disputed.

Application for stay

[11] Filing a challenge does not operate as a stay of a determination.² Conventionally applications for a stay rely on evaluating the criteria discussed in cases such as *Assured Financial Peace Ltd v Pais*.³ In summary, an application for a stay involves exercising a broad discretion in the interests of justice, which is to be exercised judicially and in accordance with principle.⁴ The Court must weigh carefully the rights of a successful litigant to have the benefits of the judgment being challenged and preserving the position in case that challenge succeeds.

Analysis

[12] Given the necessity to hear this application at extremely short notice it was not possible for the parties to develop submissions to address the factors normally taken into account such as those referred to in *Pais* above.

[13] Comments in *Pais*, and in *Dymocks*, about the rights of a successful litigant to the fruits of the judgment, and the need to preserve the position for a challenge, are

² Employment Relations Act 2000, s 180; Employment Court Regulations 2000, reg 64.

³ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50. See also *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

⁴ See, for example, *Hill v Tex Onsite Ltd* [2016] NZEmpC 73.

directed at achieving a balance between competing interests. In this case, those competing interests are the right the defendant has to be reinstated to his former position as ordered and the plaintiff's assertion that the Authority's order will create significant practical problems if implemented in the meantime. In the circumstances, when a full hearing has not been possible, a pragmatic outcome is required to attempt, so far as possible, to balance the interests of both parties pending a full hearing.

[14] In the plaintiff's application for a stay it proposed that, if a stay was granted, it would pay the amount the defendant would otherwise be paid as wages, into a solicitor's trust account, or into an account under the control of the Registrar of this Court, pending the outcome of that challenge.

[15] In this afternoon's hearing Ms Wilson did not have instructions enabling her to consent to this application or the plaintiff's proposed conditions. However, she had instructions to submit that, if a stay was to be granted subject to conditions, the defendant should be paid his usual salary rather than for the money to be held in trust and that the service tenancy for a farm house he has as part of his employment agreement should not be terminated until the challenge is resolved.

[16] Bearing in mind the requirements of *Pais* and *Dymock*, I consider the circumstances of this case require a stay to be granted to hold the position until the plaintiff's application can be fully considered.

[17] The following orders are made:

- (a) The application for urgency is granted.
- (b) There will be a stay of execution of the Authority's determination on the following conditions that:
 - (i) The defendant is immediately reinstated to the plaintiff's payroll and continues to receive his usual salary from the plaintiff until further order of the Court.

- (ii) All of the terms and conditions of the defendant's employment will continue to apply, including his service tenancy, but he is not to undertake any of the duties, or discharge any of their responsibilities, of his position as Farm Manager.
- (c) The stay will be reviewed at a hearing to be conducted on 30 January 2019 beginning at 10:30 am and will lapse on that day unless extended or renewed.
- (d) The defendant's notice of opposition to the application for a stay and any affidavits are to be filed and served no later than 18 January 2019.
- (e) The defendant's statement of defence is to be filed and served no later than 18 January 2019.
- (f) The plaintiff's affidavit in reply (if any) is to be filed and served no later than 25 January 2019.
- (g) Each of the plaintiff and defendant are to file and serve a synopsis of submissions no later than 28 January 2019.
- (h) Unless directed otherwise, the hearing on 30 January 2019 will be by AVL link.
- (i) The parties are directed to mediation. A copy of this minute may be provided to the mediation service to assist in obtaining the earliest possible mediation date.
- (j) Leave is reserved to either party to apply for further or other directions.
- (k) Costs are reserved.

K G Smith
Judge

Judgment signed at 5.10 pm on 21 December 2018