

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2019] NZEmpC 48
EMPC 7/2017
EMPC 317/2017**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER OF applications for stay of proceedings

BETWEEN CAROLINE SAWYER
Plaintiff

AND THE VICE-CHANCELLOR OF VICTORIA
UNIVERSITY OF WELLINGTON
Defendant

EMPC 144/2017

IN THE MATTER OF an application for leave to extend time to
file a challenge to a determination of the
Employment Relations Authority

BETWEEN CAROLINE SAWYER
Applicant

AND THE VICE-CHANCELLOR OF
VICTORIA UNIVERSITY OF
WELLINGTON
Respondent

Hearing: On the papers

Appearances: C Sawyer, in person
M Scholtens QC and G Davenport, counsel for defendant

Judgment: 2 May 2019

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Applications for stay of proceedings and related orders)**

[1] On 14 January 2019, Caroline Sawyer applied for a stay of three proceedings she has with the Vice-Chancellor of Victoria University of Wellington in EMPC 7/2017, 144/2017 and 317/2017.¹ The grounds relied on are the same for each proceeding. The university is opposed to any stay being granted.

[2] Dr Sawyer has sought stays pending resolution of a proceeding she filed in the High Court on 20 July 2018 against the university and four lawyers. Three of those lawyers acted for Dr Sawyer, at one time or another, in her dispute with the university.²

[3] The applications rely on the following grounds:³

- (a) The facts and legal issues raised in the High Court are essentially the same as those before this Court.
- (b) The proceeding in the High Court is more advanced than proceedings in this Court.
- (c) The High Court is being asked to review this Court's judgment on a preliminary issue dated 22 June 2018, about the lawfulness of a record of settlement made pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[4] Dr Sawyer's application sought other orders as follows:

- (a) Directions for leave to amend her pleadings to include fraud and to pursue disclosure on the grounds that:
 - (i) The university's case was tainted with "fraud throughout".
 - (ii) Natural justice requires disclosure.

¹ This application replaced earlier applications for stay dated 20 November 2018.

² Proceeding CIV 2018-485-491; second amended statement of claim.

³ *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2018] NZEmpC 71, (2018) 16 NZELR 76.

- (iii) There has been a deliberate concealment of evidence relevant to her claim for constructive dismissal.
- (b) Directions confirming the parties to these proceedings on the grounds that:
 - (i) Counsel for the defendant act for the Vice-Chancellor, and Victoria University of Wellington, and they are different legal entities with conflicting interests.
 - (ii) Victoria University of Wellington was not a proper party to the proceeding.
 - (iii) The process requires clarity about the parties.
- (c) Directions as to whether counsel representing the Vice-Chancellor can continue to act, based on an allegation that there is a conflict of interest.

[5] Dr Sawyer supported her applications with a detailed affidavit of her belief about what happened to explain why she is pursuing her High Court proceeding.

The proceedings in this Court

[6] It is necessary to briefly describe the litigation in this Court in EMPC 7/2017, EMPC 144/2017 and EMPC 317/2017 to place these applications into context. The following description comes from the Court's judgment on the preliminary issue about the lawfulness of the record of settlement between Dr Sawyer and the university.⁴

[7] The university employed Dr Sawyer as a lecturer in the law faculty. In early March 2014, she complained about behaviour she attributed to two named senior employees in her faculty. A full and independent investigation was requested. In the meantime, she reserved all her rights, including the ability to raise a personal grievance.

⁴ *Sawyer v The Vice-Chancellor of Victoria University of Wellington*, above n 3.

[8] The university responded by conducting an investigation. Witnesses were interviewed, and statements were made. Copies of the statements were sent to Dr Sawyer for comment, and she was interviewed.

[9] The result of this investigation was a draft report about the complaint, a copy of which was sent to Dr Sawyer for comment. This draft concluded that her complaint lacked evidence and was not supportable. It contained a comment that there was evidence Dr Sawyer had perpetuated some of the behaviour attributed to others and that her credibility had been damaged. A concluding remark was made by the report's author that the trust and confidence of the parties in the employment relationship had been eroded to such an extent that it was hard to see how it could be rebuilt.

[10] The production of this draft report was a catalyst for the parties to attend mediation with a mediator appointed by the Chief Executive of the Ministry of Business, Innovation and Employment. Mediation took place on 24 July 2014. At its conclusion Dr Sawyer, and Robert Miller, the university's Acting Director Human Resources, signed a record of settlement pursuant to s 149 of the Act. That settlement agreement recorded the terms on which Dr Sawyer's employment would end.

[11] As is required by s 149, the mediator signed the settlement agreement and, in doing so, gave a certificate about it. She certified having explained the effects of ss 148A, 149(1) and (3) of the Act to the parties, and to being satisfied they had been understood. Section 149(3) makes the terms of a certified agreement final, binding, and enforceable so that it cannot be cancelled under ss 36 to 40 of the Contract and Commercial Law Act 2017.⁵

[12] Sometime later, Dr Sawyer issued a proceeding against the Vice-Chancellor in the Employment Relations Authority alleging unjustified dismissal and challenging the settlement agreement as being a nullity. The Authority determined that the settlement agreement was lawful and binding.⁶ Dr Sawyer's response was to challenge the determination, pleading she had been constructively dismissed and

⁵ At the time the reference was to the Contractual Remedies Act 1979, s 7.

⁶ *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2016] NZERA Wellington 158 at [75].

unjustifiably disadvantaged. This challenge is EMPC 7/2017. The university denied those claims and pleaded the settlement agreement as a barrier to her action. That pleading gave rise to a preliminary issue about the lawfulness of the settlement agreement.

[13] In a judgment dated 22 June 2018, the Court held that the settlement agreement was lawful and binding.⁷ It was a full and final agreement resolving the employment relationship problems at the time it was signed. Dr Sawyer unsuccessfully sought leave to appeal the judgment to the Court of Appeal.⁸

[14] The Court's judgment on the preliminary issue dealt with most of Dr Sawyer's proceeding but not all of it. The settlement agreement provided for Dr Sawyer's employment to end on 25 February 2015. A few days beforehand, on 20 February 2015, she resigned, claiming to have been constructively dismissed.⁹ The judgment on the preliminary issue did not extend to what happened immediately before Dr Sawyer resigned. Whether or not her resignation was a constructive dismissal is yet to be decided.

[15] The second proceeding is EMPC 144/2017, which was an unsuccessful application by Dr Sawyer for leave to extend the time to challenge the Authority's determination granting a compliance order by consent.¹⁰ In seeking leave, she contended that her lawyer had acted without instructions and without her knowledge.¹¹

[16] The Court found that Dr Sawyer had instructed her lawyer to act as he did. The Court's decision also considered the length of the delay in making the application, prejudice or hardship to the Vice-Chancellor, the substantive merits of the case on a broad-brushed basis, and other grounds advanced by Dr Sawyer, such as claims that the Authority had failed to consider the Protected Disclosures Act 1993 and the Bill of Rights Act 1993. The only unresolved issue in this proceeding is costs.

⁷ *Sawyer v The Vice-Chancellor of Victoria University of Wellington*, above n 3, at [74].

⁸ *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2018] NZCA 533.

⁹ *Sawyer v The Vice-Chancellor of Victoria University of Wellington*, above n 3, at [75].

¹⁰ *The Vice-Chancellor of Victoria University Wellington v Sawyer* [2017] NZERA Wellington 14; *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2018] NZEmpC 72.

¹¹ At [6].

[17] In EMPC 317/2017, Dr Sawyer sought to challenge a penalty the Authority imposed on her for breaching the compliance order compelling her to comply with the settlement agreement. The Vice-Chancellor applied for a penalty, claiming she had made disparaging remarks, contrary to the order and the settlement agreement.¹² The Authority agreed. She was ordered to pay a penalty of \$8,500 within 28 days. Some of the penalty was directed to be paid to two persons about whom the remarks were made. The balance was payable to the Crown.¹³

[18] This proceeding has been in abeyance while awaiting the outcome of the preliminary issue in EMPC 7/2017. If Dr Sawyer had succeeded on the preliminary issue, so that the settlement agreement was set aside, subsequent enforcement action taken in reliance on it would have fallen away. The circumstances which led to this litigation being temporarily in abeyance no longer exist.

Applicable principles for a stay

[19] The Court has jurisdiction to grant a stay where that course of action is in the interests of justice. Dr Sawyer did not analyse the principles to apply to her applications in her submissions.

[20] The submissions for the Vice-Chancellor referred to reg 64 of the Employment Court Regulations 2000, and principles from cases such as *Assured Financial Peace Ltd v Pais*.¹⁴ Regulation 64 applies to applications to stay proceedings where a challenge has been filed under s 179(1). That regulation is not relevant where the stay is sought to enable a proceeding to be progressed in another Court.

[21] The principles to apply are those from *Transpacific All Brite Ltd v Sanko* applying *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Company Ltd*.¹⁵ *Mackay* involved considering whether a proceeding in New Zealand should be stayed because there was an existing proceeding between the parties in Australia covering the

¹² *The Vice-Chancellor of Victoria University of Wellington v Sawyer* [2017] NZERA Wellington 106.

¹³ At [65].

¹⁴ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

¹⁵ *Transpacific All Brite Ltd v Sanko* [2012] NZEmpC 7; *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd* [1997] 3 NZLR 476. See also *Rooney Earthmoving Ltd v McTague* HC Christchurch CIV 2009-476-471, 30 April 2010.

same subject matter. The High Court held that it had the power to order a stay of the New Zealand proceeding because, in doing so, it was controlling its own procedure to avoid an abuse of process.¹⁶

[22] The factors taken into account in *Mackay* were:¹⁷

- (a) which proceeding was commenced first;
- (b) whether the termination of one proceeding is likely to have a material effect on the other;
- (c) the public interest;
- (d) the undesirability of two courts competing to see which of them determines common facts first;
- (e) consideration of the circumstances relating to witnesses;
- (f) whether work done on the pleadings, particulars, discovery, interrogatories and preparation might be wasted;
- (g) the undesirability of a substantial waste of time and effort if it becomes common practice to bring actions in two courts involving substantially the same issues;
- (h) how far advanced the proceedings are in each court;
- (i) the law should strive against permitting multiplicity of proceedings in relation to similar issues; and
- (j) generally balancing the advantages and disadvantages to each party.

¹⁶ At 481.

¹⁷ At 482. See also *Rooney Earthmoving Ltd v McTague*, above n 24, at [14].

[23] A necessary first step, before embarking on an analysis like the one in *Mackay*, is to consider the proceedings in each Court to assess if there is some connection between them to justify a stay in the interests of justice.

[24] In this Court, the litigation is about an employment relationship problem between Dr Sawyer and the university. It encompasses the mechanism they used to resolve that problem, subsequent claims of constructive dismissal and unjustified disadvantage, and enforcement of the settlement agreement.

[25] Dr Sawyer's High Court proceeding, in a general sense, is capable of being divided into two parts. The first part comprises her action against the university, resulting from allegedly fraudulent behaviour she says it is liable for, culminating in the settlement agreement signed in July 2014. She is alleging in that proceeding that she was the victim of the use of altered, manipulated or false documents to discredit or disadvantage her. The allegation is that this behaviour, and illegitimate pressure brought to bear on her, led to her signing the settlement agreement.

[26] The second part is described by Dr Sawyer as a supervening fraud involving allegations that others wrongly covered up the original fraud. The lawyers who acted for her are said to have either been complicit in this action, or failed to protect her interests, or to have breached their fiduciary duties to her.

[27] Dr Sawyer's affidavit goes into extensive detail providing her explanation for how she claims this alleged activity occurred, who was responsible, and its consequences. She does so by stating her belief that these events have taken place. Her conclusion is that the High Court is the appropriate forum in which she can pursue her allegations. The High Court is also said by her to be the best forum to determine whether the settlement agreement is lawful. Her amended statement of claim in the High Court seeks as relief a declaration that the settlement agreement is void and/or ineffective because it is an illegal contract.

[28] This Court does not have jurisdiction to consider Dr Sawyer's claims against her former lawyers because there were no employment relationships between them. It also has no jurisdiction over what appears to be claims against the university based in

tort. That is not the situation with her High Court claims against the university where she seeks to revisit her employment problem and how her employment ended, including attempting to impugn the settlement agreement.

[29] There is no basis for a stay of proceedings in this Court pending Dr Sawyer pursuing her claims about the settlement agreement in the High Court. First, the lawfulness of the settlement agreement arose in Dr Sawyer's employment relationship problem she pursued in the Authority and in this Court as part of the challenge to a determination. That challenge, and all of the issues it raised, are within the exclusive jurisdiction of this Court.¹⁸ Second, the lawfulness of the settlement agreement has already been dealt with in this Court. The High Court does not have power to review this Court's decision which has, in any event, already been the subject of an unsuccessful application for leave to appeal to the Court of Appeal.¹⁹

[30] Had it been necessary to consider the factors from *Mackay*, they would have pointed towards the litigation in this Court continuing and against stays being granted. Dr Sawyer's proceedings in this Court were filed in 2017, well before her proceeding in the High Court. All of the proceedings are at an advanced stage. The public interest is in the outstanding proceedings in this Court being resolved expeditiously. Dr Sawyer has not suggested any of the witnesses she may require will be compromised in some way. The work done on the pleadings and other interlocutory steps is well advanced in this Court, and all of these proceedings can either be set down in the immediate future or dealt with on the papers. All of the other factors, such as the potential to avoid a waste of time and striving to avoid a multiplicity of issues, favour proceedings in this Court continuing and being concluded. The balance falls firmly in favour of this litigation continuing and against the applications being granted.

[31] Dr Sawyer's submissions concentrated on the litigation in EMPC 7/2017, but the analysis applies to all three proceedings.

¹⁸ Employment Relations Act 2000, s 187

¹⁹ Employment Relations Act 2000, ss 193 and 213.

Leave to amend

[32] Dr Sawyer's second application was for leave to amend the second amended statement of claim in EMPC 7/2017 to plead fraud with, presumably, an application about disclosure to follow.

[33] Technically, leave is not required to file an amended statement of claim because the proceeding has not been set down for hearing. However, if Dr Sawyer amends her pleading to better express her constructive dismissal claim, any amendment cannot seek to call into question the lawfulness of the settlement agreement or invite reconsideration of issues dealt with in the judgment on the preliminary issue.

Directions as to the parties and counsel

[34] The third and fourth applications can be dealt with together. Dr Sawyer sought a direction to confirm the identity of the parties to the proceeding. The grounds of her application are that counsel for the university acknowledge acting for the Vice-Chancellor and Victoria University of Wellington. They are different legal entities, and Dr Sawyer says they are "in conflict". The second part to this application is for directions about whether counsel can continue to represent them. Effectively, she is seeking an order disqualifying counsel from continuing to act in this litigation.

[35] These applications are misplaced. What lies at the heart of them is the repetition of Dr Sawyer's assertion that the settlement agreement was not signed by her employer and is, therefore, not enforceable. She has consistently maintained that her employer was the Vice-Chancellor and, therefore, it was erroneous for the settlement agreement to refer to Victoria University of Wellington. That issue was dealt with in the Court's judgment on 22 June 2018 and cannot be re-litigated.²⁰

[36] There is no need to identify the parties because they are described adequately in the pleadings. Furthermore, the only conflict of interest that might be considered is if the Vice-Chancellor's counsel had previously acted for Dr Sawyer, but that is not the case. For the avoidance of doubt, I am satisfied that no conflict of interest would

²⁰ *Sawyer v The Vice-Chancellor of Victoria University of Wellington*, above n 3, at [67]-[71].

arise even if it transpired that the Vice-Chancellor's counsel also acts for, or have acted for, Victoria University of Wellington.

Updated application

[37] On 14 March 2019, Dr Sawyer sent a letter to the Registrar stating that an application she had made had been overlooked.

[38] After further inquiries were made, Dr Sawyer provided to the Court an undated document called an application for a "General Stay" and an affidavit dated in November 2018. That document was never filed, and its content is irrelevant. However, it was overtaken by the subsequent application dated 14 January 2019.

Audiotapes

[39] That leaves Dr Sawyer's application for access to a copy of the Court's audio tape of the closing submissions in a hearing conducted in April 2018. I had intended to deal with that application in this judgment. On 27 March 2019, Dr Sawyer advised the Registrar, by text message, that she may no longer be interested in pursuing that application. If it is to be pursued, Dr Sawyer is to advise the Registrar.

Conclusion

[40] The applications for a stay of each of the proceedings and for other orders are unsuccessful and are dismissed.

[41] The Registrar is requested to schedule a telephone conference to enable directions to be issued for all outstanding matters in all of these proceedings.

[42] Costs are reserved.

K G Smith
Judge

Judgment signed at 3.20 pm on 2 May 2019