

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2019] NZEmpC 51
EMPC 33/2019**

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

BETWEEN GOLEMAN WELLINGTON CLEANING
 LIMITED
 Plaintiff

AND MICHAEL NICOLLE
 Defendant

Hearing: On the papers

Appearances: P Pa'u, advocate for plaintiff
 J Sanders, counsel for defendant

Judgment: 3 May 2019

**INTERLOCUTOY JUDGMENT OF JUDGE K G SMITH
(Application for stay of execution)**

[1] Goleman Wellington Cleaning Ltd has challenged a determination of the Employment Relations Authority imposing a penalty on it for failing to comply with a record of settlement pursuant to s 149 of the Employment Relations Act 2000 (the Act).¹ Goleman's counterclaim, seeking a penalty against Mr Nicolle, was dismissed.

[2] Mr Nicolle had applied for a compliance order, to compel compliance with the settlement agreement, because a payment due under it had been withheld by Goleman.

¹ *Nicolle v Goleman Wellington Cleaning Ltd* [2019] NZERA 26.

He also sought a penalty. The company acknowledged withholding payment but maintained that it did so because Mr Nicolle had breached the agreement.² By the time the Authority investigation occurred payment had been made and the only outstanding issues were whether a penalty should be imposed and, if so, its amount.

[3] The Authority decided that a penalty was appropriate and imposed one of \$3,000. Exercising its discretion under s 136(2) of the Act, the Authority awarded the whole of the penalty to Mr Nicolle.³

[4] Goleman seeks to have the determination set aside and an order that Mr Nicolle be penalised for breaching the settlement agreement.

The stay

[5] Goleman has applied for a stay of execution of the determination. The application was supported by an affidavit of David Fuimaono, who is Goleman's National Human Resources and Compliance Manager. Mr Fuimaono described in detail the background to the employment relationship problem that led to the settlement agreement. He concentrated on allegations that Mr Nicolle had breached a non-disparagement clause in that agreement, containing a mutual obligation on the parties not to speak in negative or disparaging terms about each other to any other person or entity.

[6] As to the basis for the stay, Mr Fuimaono stated a concern about Mr Nicolle's ability to repay the amount of the penalty if Goleman succeeds in its challenge. This belief was based on what Mr Fuimaono recounted as having been said by, or attributed to, Mr Nicolle in the Authority investigation meeting about his financial difficulties. Mr Fuimaono's affidavit went no further. Whatever was said, it is not apparent if it was intended to be about Mr Nicolle's personal finances or those of his new business.

[7] Mr Sanders, counsel for Mr Nicolle, filed a memorandum in response to this application. That memorandum was unhelpful, making only two comments. First, Mr Nicolle did not consent to or oppose Goleman's application. Second, Mr Sanders

² At [1].

³ At [21] and [22].

made the point that the application can only relate to the penalty and not to the Authority's subsequent costs order because that had not been challenged.

Analysis

[8] A challenge to a determination does not operate as a stay.⁴ Regulation 64 of the Employment Court Regulations 2000 provides the Court with a wide discretion to grant a stay, but it has to be exercised judicially and in accordance with principle. The overriding consideration is the interests of justice but the factors arising from cases such as *Assured Financial Peace Ltd v Pais* and *New Zealand Cards Ltd v Ramsay* assist in exercising that discretion.⁵ Those factors include:

- (a) if a stay is not granted whether the challenge will be rendered ineffectual;
- (b) whether the appeal is brought for good reasons, in good faith;
- (c) the effect on third parties;
- (d) the novelty and importance of the questions involved in the case;
- (e) the public interest; and
- (f) the overall balance of convenience.

Rendered ineffectual?

[9] Central to this application is Goleman's concern that its challenge will be ineffectual because it may not be able to recover any money paid to Mr Nicolle if it succeeds. Mr Fuimaono's evidence to support this concern was based on what was said by or about Mr Nicolle's financial circumstances at the Authority investigation meeting. The slightness of Mr Fuimaono's evidence may not have been enough to establish this part of the application, but it was sufficient to put Mr Nicolle on notice

⁴ Employment Relations Act 2000, s 180.

⁵ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50; *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

that a response might be expected. Instead of addressing this point, Mr Nicolle's response was not to consent or to oppose the application. He decided to remain silent about his ability to pay if that was required.

[10] On balance, this factor points towards granting a stay.

Impact on third parties?

[11] There is no impact on third parties if a stay is granted. This factor points towards granting a stay.

Good reason, good faith?

[12] The Authority's determination recorded an acceptance by Goleman that it had delayed making a payment to Mr Nicolle. At first blush, the failure to comply with the settlement agreement puts Goleman in a very difficult position and calls into question whether the challenge could be said to have been brought for a good reason and in good faith.

[13] However, despite potential difficulties facing Goleman, it would be wrong to draw an adverse conclusion about the reason for the challenge. It is possible that Goleman might succeed in setting aside the penalty or reducing it. Nor is there a basis to conclude that the challenge has not been brought in good faith. This factor points towards granting the application.

Novelty, importance?

[14] There is nothing novel or important in this case. This factor is neutral.

The public interest

[15] There is no public interest issue raised by Goleman's challenge or its application for a stay of the determination. This factor is neutral.

Balance of convenience

[16] What is most significant in considering the balance of convenience is Goleman's unanswered concerns about Mr Nicolle's financial circumstances. The absence of any information for, or on behalf of, Mr Nicolle to provide to the Court with some assistance in evaluating the balance of convenience means that the only matters able to be considered are those presented by Goleman.

[17] The balance of convenience favours Goleman's application.

Interests of justice

[18] Weighing up all of the factors referred to earlier, I am satisfied that the overall interests of justice favour granting a stay subject to conditions.

Other matters

[19] There is a further matter that needs to be addressed. The application referred to seeking a stay of the costs ordered by the Authority. The challenge anticipated the possibility of a costs determination but, at the time it was filed, the Authority had not made a decision about costs. There has been no subsequent challenge to the Authority's costs determination. This application, therefore, cannot apply to it.

Conclusion

[20] The Authority's determination that Goleman must pay a penalty is stayed subject to the following conditions:

- (a) the amount of \$3,000 is to be paid by Goleman to the Registrar of this Court within 14 days of the date of this judgment;
- (b) the money in [20](a) is to be held in an interest-bearing deposit pending further order of the Court;
- (c) leave is reserved to apply to vary, amend or revoke the stay on reasonable notice; and

(d) costs are reserved.

K G Smith
Judge

Judgment signed at 3.25 pm on 3 May 2019