IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 115
EMPC 470/2021

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 proceedings
BETWEEN	KOWHAI INTERMEDIATE SCHOOL BOARD OF TRUSTEES Plaintiff
AND	SHANE WEST Defendant

EMPC 57/2022

IN THE MATTER OF	a challenge to a costs determination of the Employment Relations Authority
BETWEEN	KOWHAI INTERMEDIATE SCHOOL BOARD OF TRUSTEES Plaintiff
AND	SHANE WEST Defendant

Hearing:	7 June 2022 (heard via Virtual Meeting Room)
Appearances:	S Mitchell and J Lynch, counsel for plaintiff K Crossland and T Sung, counsel for defendant
Judgment:	28 June 2022

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application for stay of proceedings)

Introduction

[1] Kowhai Intermediate School Board of Trustees (the Board) seeks an order for stay of orders made against it by the Employment Relations Authority in a substantive determination,[1] and in a costs determination.[2]

[2] The Authority determined that Mr West had established his personal grievances. It then made the following orders:[3]

(a) Mr West was to be paid wages for the period 11 April 2017 to 28 July 2020. From that amount was to be deducted income earned during the period. The Authority anticipated that the parties could finalise the sum involved, but leave was reserved to return, if need be. Although no formal order has been issued to formalise this liability, it was common ground for the purposes of the application that the sum payable under the Authority's direction is $241,974.

(b) Mr West was to be paid the applicable KiwiSaver contributions on the above sum. Again, it was common ground that this figure amounts to $7,259.

(c) Interest was to be paid by the Board on the sums ordered as lost wages and KiwiSaver contributions from the date of the determination until payment is made in full in accordance with the Interest on Money Claims Act 2016.[4]

[3] A penalty of $5,000 was also to be paid to the Crown. No application for stay has been made for this award.

[4] Under the costs determination, the sums for which an application for stay is made are:

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1 *West v Kowhai Intermediate School Board of Trustees* [2021] NZERA 549 (Member E Robinson).
2 *West v Kowhai Intermediate School Board of Trustees* [2022] NZERA 25 (Member E Robinson).
3 At [219].
4 At [175].

(a) $27,000 costs; and

(b) $17,489 disbursements.

[5] On 22 December 2021, the Board initiated a non-de novo challenge in respect of remedies only. In summary, the Board's case is that the amounts awarded were excessive, and that the Authority's assessment of contributory conduct was erroneous. The Board does not challenge liability. It says Mr West is entitled to remedies, but that the amounts awarded were too high.

[6] For his part, Mr West also issued a non-de novo challenge as to remedies, asserting that they were insufficient in the unusual circumstances pertaining to his claim.

[7] The Board's challenge as to costs arises because the Authority ordered that the Board pay a contribution to Mr West's costs in excess of its normal tariff. It says there should have been no uplift from the tariff amount. It also says that the Board should not meet the cost of the disbursements incurred by Mr West for the purposes of the Authority's investigation, which related to work undertaken by an accountant who calculated Mr West's loss. The Board says this was a step that did not need to be taken.

[8] Mr West will argue that the amounts ordered as a contribution to costs were insufficient since they amount to a sum that is only 25 per cent of his actual costs.

[9] He will say the disbursement was properly incurred, with the Authority stating in the costs determination that the accountant's evidence was of assistance.

[10] When the proceedings came before the Court for procedural directions, there was discussion as to the position in the interim, until the application for stay could be heard.

[11] Counsel agreed to a consent order, the terms of which were:

(a) that the Board pay to Mr West the sum of $50,000 immediately; and

(b) that it pay a further sum of $50,000 to the Registrar of the Employment Court, to be held until further order of the Court.

[12] This order was made without prejudice to the parties' respective arguments in connection with the application for stay. The payments were duly made.

Submissions

[13] Mr Mitchell, counsel for the Board, advised that the balance of the sums awarded to Mr West had been placed by the Board in a separate bank account pending resolution of the challenges.

[14] He argued that, in light of Mr West's financial circumstances, there was an issue as to whether he could repay any monies which may be paid to him prior to the hearing of the challenges, if subsequently the Court determined that the remedies and costs were excessive so that repayment was necessary.

[15] He submitted that the Board was acting responsibly in bringing the challenges on a bona fide basis; and that the position it was taking with regard to non-payment of remedies to Mr West was also appropriate for a Crown funded entity.

[16] Mr Crossland, counsel for the defendant, submitted that Mr West should receive the full fruits of the litigation to which he was legally entitled, not least so that he could meet the costs involved in the challenges. It was argued that this was an access to justice issue.

[17] If it was the case that repayment became necessary, Mr West would act in a responsible fashion by meeting any such liability. He had provided a pledge not to sell his residence, which has an equity of some $900,000. He would, if necessary, raise funds on the security of that equity. He submitted that the provision of such a pledge is not unusual in stay cases.

Principles

[18] When considering an application for stay, it is well established that there are a number of factors which may fall for consideration. These include:[5]

(a) whether the challenge will be rendered ineffectual if a stay is not granted;

(b) whether the challenge been brought and prosecuted for good reasons and in good faith;

(c) the effect on third parties;

(d) the novelty and importance of questions involved in the case;

(e) the public interest in the proceeding; and

(f) the overall balance of convenience.

[19] Reference was made to the Court of Appeal's judgment as to stay in *Bathurst Resources Ltd v L & M Cole Holdings Ltd*.[6] There, it was noted that the restraint of orders should be the least necessary to preserve the losing party's position against the prospect of the appeal succeeding. In the case of a money judgment, that would require the judgment debtor to make some concession to the existence of the judgment.[7]

Analysis

[20] The two key points which were the subject of submission related to the merits of the Board's challenges; and as to Mr West's ability to repay if necessary. Although I will discuss other factors which are normally considered, they are not controversial in this case.

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5 *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7]; applying *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 at [9]. See also *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

6 *Bathurst Resources Ltd v L & M Cole Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341.

7 At [19].

Context

[21] However, before discussing any of these issues, it is necessary to say a little more as to what the case is about. The following brief outline is based on the summary given by the Authority in its determination.

[22] Mr West was a teacher at Kowhai Intermediate School (the school) from 1990.

[23] In March 2017, he taught a class during which an incident occurred that gave rise to complaints not only of swearing – which he accepted – but also that he had touched female members of his class inappropriately – which he did not accept.

[24] Soon after, he was dismissed on 11 April 2017. Two days later he raised a personal grievance.

[25] On 28 May 2017, criminal charges were brought against Mr West. These were heard in March 2018. He was acquitted.

[26] Soon after the subject incident, the principal of the school forwarded a mandatory report on the matter to the Education Council (now known as the Teaching Council). In 2018, after the conclusion of the criminal trial, a Complaints Assessment Committee (CAC) conducted an investigation into the classroom incident in light of the acquittal.

[27] There was an issue as to whether the matter could be resolved by an Agreement to Censure, this being the outcome recommended by the CAC. However, because the principal of the school refused to sign a Practicing Certificate at that stage, the matter could not be concluded on this basis. It was therefore necessary for the issue to be considered by the Teachers' Disciplinary Tribunal (the Tribunal).

[28] On 28 July 2020, the Tribunal concluded that Mr West had sworn at students in the classroom. "[By] the very narrowest of margins", it made a finding of misconduct. It said, however, that it was perplexed the matter was even before the Tribunal, and that a teacher with an otherwise blemish-free record had his career end

in this way. The Tribunal considered the issue could have been handled in a far more "mana enhancing way".[8]

[29] For its part, the Authority found that there was a variety of flaws in the process which had been adopted by the Board. Ultimately, it was concluded that the Board had not conducted a fair and reasonable process and that Mr West was therefore unjustifiably dismissed.[9] It also found that the Board had breached its duty of good faith in the circumstances.

[30] The above remedies, and a penalty, were imposed on the basis of these facts.

The merits of the challenges

[31] I deal now with the competing arguments that are raised in respect of each challenge.

[32] I note that because the challenges have been brought on a non-de novo basis, the focus will be on the assessment of remedies made by the Authority, and whether they were within the range of outcomes which were open to the Authority.[10]

[33] I also note that an assessment of merits at this stage is inevitably provisional. No evidence as to the pros and cons of the challenges was placed before the Court. Even if this had been provided, any such evidence would not have been tested. The Court necessarily relied on the facts as described by the Authority. I accept, as Mr Mitchell submitted, that in these circumstances the Court should proceed cautiously.

[34] With regard to lost remuneration, the Board will submit that the appropriate period under this head would have been for 15 months; that is, approximately the time when the CAC concluded that the matter should be dealt with by an Agreement to Censure, and before the case was referred to the Tribunal.

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8 At [81].
9 At [129].
10 This approach was adopted, for example, in *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438 for which leave to appeal was declined: *Zhang v Telco Asset Management Ltd* [2020] NZCA 223.

[35] For his part, Mr West says the remuneration should have extended until the date of the Authority's investigation process, in late 2021.

[36] These positions are to be contrasted with the Authority's conclusion that the appropriate period was from the date of dismissal, 11 April 2017, until the date when the Tribunal released its decision, 28 July 2020.

[37] On any view, this claim is a significant one given the three-month starting point described in s 128 of the Act. However, both parties' positions are well outside that starting point; thus the provisions of the section assume rather less relevance than might usually be the case. The current positions of both parties recognise that the impact of Mr West's disadvantage claim and dismissal claim were significant.

[38] This question could come down to a consideration of the Board's actions when assessed against the necessary counterfactual, as required by the leading authorities on this topic.[11] The Authority did not expressly undertake this exercise.

[39] The counterfactual might well proceed on the basis of what the position would have been if, as was urged on the Board at the time it dismissed Mr West, it had deferred any prospect of termination of employment until after the criminal trial.

[40] Mr Crossland submitted that, given the acquittal, it would at that point have been necessary for the Board to acknowledge that the serious complaints which had been made were not established, and that the only infringement that fell for consideration related to swearing in the classroom. He argued that, under that scenario, dismissal would not have been justified. It followed that the direct consequences of the unjustified dismissal extended beyond that date and until the date of hearing of his claims by the Authority when remedies were fixed.

[41] Mr Mitchell did not advance a counterfactual to support the Board's contention that 15 months was the appropriate measure of loss.

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[11] *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA); *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.

[42] On the information before the Court at this stage, it is difficult to conclude that the Board has a good prospect of establishing that the Authority's assessment was outside a reasonable range of outcomes.

[43] Turning to Mr West's claim for humiliation, loss of dignity and injury to feelings, the Authority awarded $45,000.

[44] The Board will argue that $15,000 should have been awarded on the basis that the amount actually awarded is unusually high.

[45] Mr West will argue that more should have been awarded. Amongst various comparators, Mr Crossland relied on *Waugh v Commissioner of Police*[12] where, in 2004, the employee was awarded $50,000 under this head. Counsel said that the circumstances of that case were very serious, and but not as serious as those involving Mr West.

[46] These competing assertions can be analysed variously. One approach often adopted by the Court would involve a consideration of the three Bands which this Court has said are appropriate for this class of remedy.[13]

[47] The amount referred to by the Board would be approximately in the mid-range of Band 2. The amount advocated for Mr West would be towards the high end of Band 3.

[48] Mr Mitchell submitted that care must be taken not to compensate for the steps taken by a third party agency, the New Zealand Police, in bringing criminal charges against Mr West. That may be so, but it may be difficult to draw a bright line between the period when charges were being prosecuted. In any event, the Authority considered this point before determining $45,000 was the correct figure; arguably, the effect of the criminal trial was taken into account.

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12 *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC).

13 See for example, *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.

[49] At this provisional stage, it may be difficult for the Board to establish that the Authority's assessment for compensation for humiliation, loss of dignity and injury to feelings is so far outside the appropriate range as to be erroneous.

[50] The final issue relates to the assessment of contribution. The Authority concluded that the established misconduct offence, swearing in the classroom, was minor, and did not contribute to the situation giving rise to Mr West's personal grievance of unjustifiable dismissal and disadvantage, so that there should be no deduction for contribution.

[51] A potential reduction of all remedies by 50 per cent for the swearing infringement, as urged by the Board, would appear to be only weakly arguable. At this provisional stage, the conclusion reached by the Authority would appear to be within the range of possible outcomes on that topic.

[52] Standing back, it follows from the foregoing analysis that the challenge as to remedies will face difficulties.

[53] The costs challenge brought by the Board is of comparatively narrow compass and is not a significant factor with regard to the stay application.

Mr West's financial circumstances

[54] It is Mr West's evidence that during the course of the events described earlier, he suffered significant financial stress. He said he had just survived bankruptcy and repossessions, only because of loans from family, assistance from his son for household accounts, and some limited income he was able to obtain. This led to a submission by Mr Mitchell that not granting a stay could lead to the challenge being rendered ineffectual.

[55] The payments Mr West received as a result of the interim Court orders meant that $50,000 was paid to his lawyer's bank account, which was less than a quarter of the amount awarded by the Authority, and less than half of his total legal costs before considering the disbursement.

[56] Evidence was placed before the Court that Mr West's home has a capital value of $1,750,000 and that it has an equity of approximately $900,000. Evidence of loans was also produced.

[57] There is no evidence of further resources, which might become relevant to a subsequent repayment.

[58] Mr Crossland submitted that Mr West had plainly acted responsibly in extremely difficult financial circumstances since 2017, and the Court was entitled to conclude he would continue to do so.

[59] It was submitted by the defendant that he would undertake not to sell or otherwise pledge his home pending the disposal of these proceedings; this was argued to be sufficient to enforce any subsequent judgment given his substantial equity.

[60] Mr Mitchell submitted that the prospect of Mr West raising a substantial sum would plainly be difficult, given an apparent inability to service debt. There was some discussion as to whether a reverse mortgage could, in the circumstances, be obtained, although Mr Mitchell said age may be an impediment. He also said the Board should not be put in the position of having to enforce any debt due to it by having to force the sale of Mr West's home.

[61] As noted recently, the question is not whether a vague risk exists that the challenge will be rendered ineffectual if no stay is granted.[14] It is up to the applicant to establish a reasonable basis for the making of interlocutory orders in its favour.[15]

[62] In my view, Mr West may face some difficulty in repaying monies to the Board if that eventuality arises, but the Court should take into account his pledge, and the fact he would, on present indications, have ability to repay if given a reasonable amount of time to do so. Also relevant is the point made by Mr Crossland that, of the $300,000 awarded, Mr West has received only one-sixth to date.

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14 *SP Blinds Ltd v Hogan* [2022] NZEmpC 104, citing *New Zealand Bloodstock Finance & Leasing Ltd v Jones* [2020] NZHC 1633 at [21]; *Mailley v Legal Complaints Review Officer* [2019] NZHC 132 at [9]; *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZHC 1947 at [17]–[18].

15 *Grove v Archibald* [1997] 2 ERNZ 125 (EmpC).

Other matters

[63] The remaining matters are not dispositive.

[64] I accept the challenge is brought in good faith.

[65] Mr West, as the successful party, would be injuriously affected by a further stay, since the limited amount he has received to date has been applied to costs. At this stage he has not met all his costs and disbursement, and has limited resources to meet the costs of the ongoing litigation. I agree that this factor is an access to justice issue. Given the importance of the case to him, he should be able to put his position fully, as he wishes to do.

[66] As to effects on third parties, the accountant who gave evidence to the Authority is a third party potentially affected by any stay because his invoice remains outstanding. The Court understands Mr West wishes to discharge this liability.

[67] Turning to novelty and importance, the issues between the parties are of course very significant to both parties but beyond that, the case will require the application of orthodox principles. I do not think there are any unusual factors which need to be weighed into the scales for stay purposes.

Overall justice

[68] The total amount of the awards which are challenged total approximately $295,000.

[69] A further stay is sought for costs and disbursements as ordered, which total nearly $25,000.

[70] I bear in mind the dicta from *Bathurst* that the least necessary restraint should be adopted.

[71] I also record that Mr Mitchell did not contest the possibility of the Board making a payment into Court, rather than the retention of funds in a separate bank account.

[72] Standing back, and evaluating the foregoing factors, I consider there should be a continued order of stay subject to these conditions:

(a) that Mr West be paid $200,000, $50,000 of which he has already received, within 21 days; and

(b) that $120,000 be paid to the Registrar of the Court, $50,000 of which has already been paid, within 21 days – this sum is to be held by the Registrar until further order of the Court.

[73] The fixing of these sums should not be taken by the parties as an indication of the ultimate outcome of the challenges one way or the other. All this Court has done is determine on an interlocutory basis where the interests of justice lie with regard to payment of the sums which the Authority ordered the Board to pay.

[74] I reserve costs. These should be discussed in the first instance between the parties. My provisional view is that costs should be considered on a 2B basis. If agreement cannot be reached, an application may be made within 21 days, with a response given within a like period thereafter.

B A Corkill
Judge

Judgment signed at 3.20 pm on 28 June 2022