

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 17/07
CRC 33/07**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND

IN THE MATTER OF of an application for stay

BETWEEN INNER CITY INTERAGENCY TRUST
Plaintiff

AND MELISSA HOWARD
Defendant

Hearing: By telephone conference call on 19 September 2007
(Heard at Auckland)

Appearances: Raewyn Gibson, advocate for plaintiff
T J Twomey, counsel for defendant

Judgment: 19 September 2007

INTERLOCUTORY ORAL JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff has applied for a stay of proceedings to prevent the defendant from enforcing awards totalling \$10,712 made in her favour in a determination of the Employment Relations Authority, issued on 12 July 2007. The plaintiff is a not-for-profit registered charitable trust, operating a drop-in centre for homeless people in Christchurch. The Authority found that the defendant had been unjustifiably dismissed from her employment with the Trust, as a community support worker.

[2] The Trust has challenged the determination and seeks to have the finding of unjustifiable dismissal vacated and substituted with a finding that the defendant's employment was justifiably ended. In the alternative, it seeks a finding that the

defendant's contribution to her dismissal was 100 percent and that no remedies should be awarded to her.

[3] In support of the application for stay the Trust relies on the criteria set out by Chief Judge Goddard in *NZPPTA v A-G (on behalf of Ministry of Education) (No 3)* [1991] 3 ERNZ 708. It has presented its submissions under those criteria which were taken from *McGechan on Procedure* in relation to the Court of Appeal Rules, and are as follows:

- (i) If no stay is granted will the applicant's right of appeal be rendered nugatory?
- (ii) Will the successful party be injuriously affected by a stay?
- (iii) The bona fides of the applicant as to prosecution of the appeal.
- (iv) The novelty and importance of the question involved (it is common ground that this has no application in the present case).

[4] In support of the application a member of the Trust Board, Gerrard Alexander Walmisley, has sworn an affidavit confirming that the service provided by the Trust is an extremely valuable one which relies upon the continued support of its funders, who are all philanthropic organisations. He has deposed that the centre runs on a minimal budget and that its financial position is such that it is unable to pay the sums awarded to the defendant by way of a lump sum. In the event that it is required to do so, it would almost certainly result in the closure of the centre. He deposes that the centre operated by the Trust can have up to 100 people per day utilising its services and, if the centre was forced to close, this would no longer be available to them. He has provided evidence of the Trust's bank balance and operating expenses. The Trust would be prepared to pay instalments directly to the Employment Court to be held for the defendant at a maximum of \$50 per week pending the outcome of the challenge.

[5] He advises that the Trust Board considered that the Authority's determination was wholly unacceptable. He submits it disregarded, without providing any valid

rationale, two independent complaints which had been made to the Trust by users of the centre about the defendant's conduct, for which she was ultimately dismissed.

[6] He advises that the Trust was extremely fortunate to be given a donation which has been provided on the basis that it is used solely for the purpose of funding the challenge to the Employment Court, and not to satisfy the awards made to the defendant. This has enabled the Trust to initiate the challenge.

If the stay is not granted, the applicant's right of appeal will be rendered nugatory

[7] Miss Gibson referred to the matters contained in the affidavit in support. She submitted if the Trust was required to make payment of the entire amounts awarded to the defendant immediately, either directly to her, or into an account under the control of the Registrar of the Employment Court pending the outcome of the challenge, this would likely result in the Trust's operations being unable to continue. She relied on the evidence that an external donation has been given expressly to fund the challenge and that a condition of the donation is that it is used for that purpose only and not to pay the awards ordered by the Authority to the respondent. On this basis the Trust submitted that its challenge may be rendered nugatory if the application for stay is not granted.

[8] I have some difficulty with the plaintiff's submissions. The Trust may be in financial difficulty but yet it is prepared to continue its operations, notwithstanding the contractual obligations it may have owed to the defendant and a finding, following an investigation by the Authority, that it has breached those obligations. The best I can make from the evidence is that the outside donation is apparently enabling the Trust to continue its dispute with the defendant, requiring her to expend further costs, without any apparent risk to the Trust. It therefore does not follow that the challenge would be nugatory if the Trust is required, as it says it may be required, to close the centre. Indeed its funds could then be used to meet any obligations that might follow if its challenge is unsuccessful.

[9] Mr Twomey, counsel on behalf of the defendant, submitted that the Trust is using its status and purpose as a charitable Trust to influence and direct the Court's

decision. He observed that the Trust cannot absolve itself of its legal duties as an employer. If a stay is granted, the Trust will be able to have the defendant's personal grievance heard de novo, without fear of failure. He observed that whereas the donation looks after the Trust's legal fees, the defendant is left in a hopeless situation, having already been put to the considerable expense of obtaining a determination in her favour from the Authority. He submitted that the defendant's position will be rendered nugatory if the stay is not granted.

Will the successful party be injuriously affected by a stay?

[10] Miss Gibson submitted the defendant will not be injuriously affected by a stay. The Trust refers to a brief of evidence filed by the defendant in the Authority in which she stated that she has subsequently obtained employment with a higher salary than that which she received from the Trust. It is therefore submitted that she will not be injuriously affected by a stay to any greater extent than has already been the case. Conversely if the stay is not granted, it would almost certainly result in the closure of the centre. This will injuriously affect not only the Trust but also those individuals who rely on the service it provides.

[11] In response, Mr Twomey provided from the bar, there being no affidavit filed in opposition, but the information not challenged by the Trust, that the defendant is a solo parent and she has been declined legal aid. He referred to outstanding legal fees relating to the Authority's proceedings which she is currently paying off at the rate of \$50 per week. Her legal fees in the Authority exceeded \$8,500 and she is awaiting a costs determination from the Authority. He advised the defendant has been put to further cost by having to file a costs memorandum in the Authority and in relation to the costs of defending this application for stay.

[12] I accept Mr Twomey's submission that the defendant will be injuriously affected if this stay is granted, if it is not granted on terms which require payment into Court of the amount of the award. The defendant is clearly at risk of having a funded challenge against her which, if it is unsuccessful, will still leave her in a position where the awards have not been paid and she has incurred the costs of defending it. There is a current liability of the Trust for the awards of the Authority,

and, on the evidence provided by the Trust, no real prospect of the Trust being able to pay the amounts awarded.

[13] I have also given consideration to this matter as though it was an application for security for costs. It is likely that such an application would follow. In the circumstances such an application would be likely to be successful because the Trust is clearly impecunious and the defendant is likely to suffer severe financial consequences even if she successfully defends the challenge.

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

[14] As to the bona fides of the Trust in the prosecution of its appeal, Miss Gibson advises that the Trust will co-operate fully in having the matter heard by the Employment Court at its earliest convenience. Counsel have agreed that the matter will take approximately 2 days and would be ready for hearing in the new year. I have no reason to doubt the bona fides of the Trust in pursuing the challenge and assisting in its expeditious determination.

Further criteria

[15] Miss Gibson referred to two additional criteria which, although not referred to in the *PPTA* case, are contained in *McGechan* under the commentary to the Court of Appeal (Civil) Rules 2005, Rule 12. These are the public interest in the proceeding, and the overall balance of convenience in the status quo. It is also noted in the commentary that the strength of the case on appeal is not one of the relevant factors, although it has been considered relevant by the English Court of Appeal.

Public interest in the proceeding

[16] Miss Gibson submitted that the nature of the services provided by the Trust and the public interest favoured the granting of the stay pending the outcome of the challenge.

[17] Mr Twomey submitted that the service provided by the Trust does not qualify as a public interest in these proceedings and there are no issues that can be described as novel or important. The defendant's grievance was a "*run of the mill*" unjustified

dismissal case and the Authority determined that the Trust had failed on an objective basis to act as a fair and reasonable employer when dismissing the employee.

[18] I accept Mr Twomey's submission and do not find there is a compelling public interest in maintaining an impecunious trust, at the expense of the competing public interest of upholding employment agreements and awards of the Employment Relations Authority. This is not a factor which favours the applicant for the stay.

The overall balance of convenience and the status quo

[19] The overall balance of convenience was said by Miss Gibson to favour the granting of the application for stay because it will allow the Trust to continue operating its centre.

[20] Mr Twomey points out that the defendant is entitled to receive the awards without further delay and is not to be disadvantaged by not being able to apply for security for costs incurred in this Court. He referred again to the serious disadvantage the defendant will be put to in opposing the challenge without receiving any assurance that the monies awarded to her have been secured and that she will have any redress for costs.

[21] As I have noted this is a case in which an application for security for costs may well succeed. It is not in my view a case in which the common direction that the plaintiff should pay the amount awarded by the Authority into Court should be dispensed with. The suggestion that \$50 a week is sufficient to satisfy the award of \$10,700 is illusory.

[22] I consider that the stay should be granted only on condition that the amount of the award be paid into Court. I am prepared to consider varying that condition to allow it to be paid by more substantial instalments over the next 4 months.

[23] Because this case has the overtones of an application for security for costs where the plaintiff employer is clearly impecunious I would have considered a condition staying the challenge from being prosecuted until an amount of say \$2,000 is paid into Court. However this was a matter that was not properly before the Court

today and Ms Gibson should not be disadvantaged from obtaining instructions and so I will not impose the condition relating to security for costs. I would hope that the parties will take on board my indication of how that is likely to be disposed of, should an application be so required.

[24] For these reasons the application for stay is granted but only on condition that the full amount of the award of the Authority of \$10,712 is paid into an interest bearing trust account at the Employment Court over the next 4 months. That leaves the parties in a position where by the beginning of the new year, if the amounts have been paid into Court, the matter will then be able to be set down for an early fixture.

[25] In the present circumstances I consider that the question of costs on the application should be reserved and I will grant leave to the parties to apply for further directions.

B S Travis
Judge

Judgment delivered orally at 9.55am on 19 September 2007