

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 39/07  
ARC 23/07**

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

AND IN THE MATTER OF of an application for stay of proceedings

BETWEEN                      TOLL NEW ZEALAND  
CONSOLIDATED LIMITED  
Plaintiff

AND                              GARY ROWE  
Defendant

Hearing:            27 June 2007  
(Heard at Auckland)

Appearances: Phillipa Muir, counsel for plaintiff  
Geoff Davenport, counsel for defendant

Judgment:        27 June 2007

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**INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS**

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[1]     The plaintiff (Toll) has applied for a stay of proceedings under Regulation 64 of the Employment Court Regulations 2000. The parties agreed that the application could be dealt with on the papers filed without the need for a hearing. Toll has elected, under s179 of the Employment Relations Act 2000, a de novo hearing of a determination of the Employment Relations Authority dated 12 April 2007. In that determination the Authority ordered that Toll pay to the defendant a sum equivalent to 9 months lost wages (calculated on the basis of average annual earnings of \$66,608.00 gross) and \$15,000 compensation for distress, humiliation and injury to feelings.

[2] Toll has sought a stay of these monetary orders pending the resolution of its de novo challenge, on the following grounds:

- a) If Toll's application for a stay is declined but its challenge is successful the defendant will have the benefit of monetary awards in the interim period that he must then pay back to Toll.
- b) Toll has concerns as to the defendant's financial ability to repay such sums because the evidence he gave to the Authority indicated his current weekly income is low, he is struggling to meet mortgage repayments and cannot meet many of his regular bills.
- c) If the defendant used any portion of the monetary awards to meet the costs of these bills or to supplement his income it is unlikely that he would be in a position to repay Toll in the event of its challenge being successful.
- d) Toll is prepared to pay the judgment sum of \$64,956 into its solicitors' trust account or to the Registrar of the Employment Court in Auckland, to be held on an interest bearing account until the challenge can be determined.
- e) Toll claims that its challenge is bona fide and is being pursued in a diligent and timely manner.
- f) Toll claims that the balance of convenience and the status quo support the stay being granted.

[3] In support of its application Toll has provided an affidavit from Soren Kerry Low, its Regional Manager for Toll Rail Northern. She confirms that the defendant's evidence to the Authority indicated that his financial position is precarious, that he is likely to disburse the judgment sum if it is paid to him and it is unlikely that he will be able to pay it back.

[4] In response the defendant says that he is in a grave and impecunious financial position and that this situation was brought about by the actions of Toll in

terminating his employment. He has subsequently been unable to secure paid employment. He contends that he is entitled to the fruits of his judgment and that this is all the more pressing in the present case given his financial hardship which he claims to have been caused by Toll. He refers to the imbalance to his financial situation and that of Toll, which is a large corporation with significant financial resources. He observes that Toll waited until the 28<sup>th</sup> day after the determination of the Authority to lodge its challenge and made no effort during that time to give effect to the orders of the Authority. He observes that if the stay is granted he will be without the fruits of his judgment for a further and not insignificant period.

[5] He asks if, notwithstanding his submissions, the Court is of a mind to grant the stay, that the judgment sum be paid to the Registrar of the Employment Court to be held in an interest bearing account. Then, subject to any further order of the Court, if Toll's de novo challenge is not successful, or is not entirely successful then the whole or the appropriate portion of the judgment sum should be released to him, together with the proportionate amount of interest relating to the sum released.

[6] He observes that the judgment sum is \$65,106.74 rather than the amount of \$64,956 referred to in Toll's application.

[7] Toll has made out sufficient grounds for its application for a stay. It is pursuing its challenge and the parties have agreed on a date of hearing at the end of August. The case has been given a priority fixture and it is desirable that a judgment on the challenge should be issued expeditiously.

[8] Having read the statement of claim and the statement of defence and counter claim in reply, I have no doubt that it is a bona fide challenge and there are issues which are important to the parties with which the Court must deal. Because of the defendant's admitted impecuniosity, it is unlikely that he will be able to repay the amount of the awards if they are paid out to him and Toll is successful in its challenge.

[9] For all these reasons the stay is granted on the conditions sought by the defendant namely that:

a) The awards which, for present purposes, may be regarded as totalling \$65,106.74, subject to any finding to the contrary, are to be paid into the Registrar of the Employment Court in Auckland and the total sum is to be held in an interest bearing account;

b) Subject to any further order of the Court if Toll's de novo challenge is not successful, or is only partly successful, then the whole or an appropriate portion of the judgment sum is to be released to the defendant together with the proportional amount of interest relating to the sum released.

[10] Costs in relation to the current application are reserved.

[11] The parties' attention will now be directed to the trial and the following directions orders were made following a telephone conference on Wednesday, 27 June:

a) A fixture has been allocated for the hearing of the matter for 3 days with a 4<sup>th</sup> day in reserve commencing on Wednesday, 29 August 2007.

b) I direct that the defendant present his case first. This, I consider, will assist in dealing with his counter claim relating to remedies and also accommodate a witness for the defendant who I understand will not be available after 30 August 2007.

c) The plaintiff, through counsel has no objection to that witness being called for the defendant out of order on 29 August 2007.

d) The defendant is to file and serve his briefs of evidence by 4pm on Friday, 3 August 2007.

e) The plaintiff is to file and serve its briefs of evidence by 4pm on 17 August 2007.

f) The plaintiff has undertaken the burden of preparing the bundle of documents and, if necessary, timetable directions can be made should there be any difficulties.

g) Leave is reserved to the parties to apply for further directions.

B S Travis  
Judge

Interlocutory judgment signed at 4.15pm on Wednesday, 27 June 2007