

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 27/09
WRC 37/09**

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

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN GRIFFITHS DRILLING (NZ)
 LIMITED
 Plaintiff

AND SELWYN RICHARD JENNER
 Defendant

Hearing: 26 November 2009
 (Heard at Wellington)

Appearances: Wendy Aldred, Counsel for Plaintiff
 Jills Angus Burney, Counsel for Defendant

Judgment: 26 November 2009

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The question for decision today is whether execution of the remedies ordered by the Employment Relations Authority should be stayed until the plaintiff's challenge to that determination is heard and decided.

[2] In a determination issued on 4 September 2009 (WA 127/09), the Authority found that Mr Jenner had been dismissed unjustifiably by Griffiths Drilling (NZ) Limited ("Griffiths Drilling"). It awarded him distress compensation of \$15,000, lost remuneration of an unspecified amount for the period of 3 months from 23 January 2009, and costs. The parties have not agreed on the amount of the remuneration loss and the Authority has not been asked to fix this. Costs have not yet been set by the Authority.

[3] Griffiths Drilling says it is not in a position to pay at once all the monetary awards made by the Authority and will suffer hardship if required to do so. It says that Mr Jenner will not be prejudiced if he has to wait for his monetary awards. None of the evidence about the parties' financial circumstances has been challenged as inaccurate and I have to accept what each says about its/his circumstances.

[4] In support of its argument, the company says that it employs seven employees but that work has been slow since August 2008 and its income has been about one-third of what it was over previous years. Its managing director, Melvyn Griffiths, says that the company struggles to pay its suppliers and other employees and is unable to realise assets to pay its debts. He says that if it was required to sell plant or equipment or vehicles to pay debts, including to Mr Jenner, it would be unable to continue to meet its contractual obligations to customers for such work as can be obtained. Mr Griffiths says that the company owes the Commissioner of Inland Revenue monies for GST on which penalties are accruing and has further significant debts to a hire equipment company and a finance company.

[5] The company rents its yard and office sites and will need to use its bank overdraft facility to meet those payments. Mr Griffiths says that the current recession has hit the drilling industry hard, competitors have dropped their prices, and his company has had to follow suit to compete. Hours of work for employees have been reduced drastically. Mr Griffiths says that if the plaintiff is required to pay or secure the money owed to Mr Jenner, it may well have to lay off other staff.

[6] The plaintiff has now provided more comprehensive financial information than initially about its circumstances. It says that these are difficult but hopefully improving and offers to pay monthly lump sums towards the amounts awarded by the Authority beginning with a payment literally today. I will return to the details of the amounts offered later in this judgment.

[7] Mr Jenner has opposed the application for stay. He says that despite his preparedness to negotiate the method for paying the monies ordered by the Authority, the company has refused to do so or even respond. Mr Jenner says that in mid September he was made redundant from his new post-Griffiths Drilling job and

has received the unemployment benefit since then although has recently managed to obtain some casual night work. He says that to avoid a mortgagee sale of his home, as a result of his inability to meet mortgage payments that he committed to in reliance on a good income with Griffiths Drilling, he has recently sold that property.

[8] Mr Jenner believes that the company does indeed have the resources to make payment of the Authority's awards and ought to have done so. He says that late last October Mr Griffiths sponsored a Rimutaka pig hunting competition to the extent of \$600, and that Mr Griffiths and his wife holidayed in Queensland in September and October. Mr Griffiths has explained those events. He says the competition sponsorship was his personally and that the Queensland holiday was considerably shorter than Mr Jenner believes. Mr Jenner does not agree that being required to pay him will compel the plaintiff to lay off other employees or to sell machinery or assets.

[9] Mr Jenner's financial circumstances are, although different, no less precarious. The loss of his employment with Griffiths Drilling, irrespective of its justification, has clearly affected him very adversely and he wishes to receive the remedies awarded by the Authority.

[10] The statutory scheme for challenges to dismissals which cannot be resolved in mediation includes a first instance, low level investigation and non-legalistic determination by the Employment Relations Authority. Although most parties accept the result or at least do not feel so aggrieved that they appeal, the legislation permits a right of challenge including by hearing de novo as the company has exercised in this case. This means that, in effect, the examination of the justification for dismissal begins anew in this Court with little or no regard being paid to the Authority's determination. That is a process that frequently gives hope to the loser in the Authority and despair and frustration to the winner in that forum. Such sentiments are inherent in a legal system containing rights of appeal. They are probably more marked in cases such as this where the case begins again in all respects.

[11] The reality of the position is that Mr Jenner wishes, for genuine and compelling reasons, to have his remedies to relieve his difficult financial circumstances. However, if he were able to do so but was unsuccessful on the challenge brought in this Court, Griffiths Drilling would probably find it difficult to recover those amounts from him. On the other hand, Mr Jenner fears that unless the sums awarded by the Authority are at least secured, even if not paid to him, and Griffiths Drilling is subsequently unsuccessful on its challenge, it may be very difficult, if not impossible, to obtain money from the company, especially if its current financial circumstances continue.

[12] Trying to balance both of these apparently irreconcilable aspirations, the most just course is to attempt to secure a reasonable and realistic fund that will both protect Mr Jenner's gains and the right of the company to recover the fund if it is successful.

[13] The plaintiff's belated proposal to pay \$3,000 per month into an interest bearing account held by the Registrar is a good start, especially as that has been augmented by counsel for the plaintiff during the hearing. The reality of the position is that its challenge is likely to be heard in about 3 months' time and decided within a further 3 months at most after that.

[14] The proposal now made by the plaintiff is that it will pay the first instalment of \$3,000 to the Registrar today. The second instalment, also of \$3,000, will be paid by 20 December 2009. The plaintiff says that after the Christmas/New Year period its liquidity will be better and it proposes to pay a third instalment of \$4,500 on 26 January 2010 with another instalment of the same amount, \$4,500, on 26 February 2010.

[15] By that stage, the capital sum would have accumulated to \$15,000 which is the amount of the distress compensation awarded by the Authority. Unfortunately, the Authority has not set the amount of remuneration loss or the costs in the Authority. The defendant assesses his remuneration loss to be \$6,000 calculated at the rate of \$500 per week for 12 weeks, being the difference between what he says

he would have earned at Griffiths Drilling if he had not been dismissed and what he did earn in alternative employment for the first 3 months after his dismissal.

[16] The plaintiff's position is that, although it does not necessarily dispute this calculation, it needs to see the documentation evidencing post-dismissal earnings by Mr Jenner so that it can verify what should be offset against what it says should be an averaging of his remuneration from the company for that period.

[17] The company has also proposed that if necessary a chattel security could be taken over company plant or equipment to be available to the plaintiff if recourse to other funds is not in the event that the defendant is successful in Court.

[18] I think those proposals made by the plaintiff meet adequately the interests of justice in attempting to set the balance between the parties' interests referred to earlier. I therefore make orders formally that execution of the remedies awarded by the Authority is stayed upon condition that the plaintiff makes the payments referred to previously in the amounts and on the dates referred to previously and that such monies are held by the Registrar of this Court on interest bearing deposit to be disbursed either by consent of the parties or order of the Court.

[19] I deal now with other interlocutory directions to prepare the challenge for a hearing.

[20] The plaintiff's challenge is by hearing de novo under s179 of the Employment Relations Act 2000. I direct further mediation in an attempt to resolve the differences between the parties and express the hope that this mediation can take place before the Christmas break.

[21] The plaintiff seeks informal disclosure of documents relating to Mr Jenner's post-dismissal employment and counsel are confident that they can deal with these matters informally. The back-up of the formal procedures under the Employment Court Regulations 2000 is, of course, available to them. Ms Angus Burney does not seek disclosure of any documents from the plaintiff at this time.

[22] At the hearing of the challenge the plaintiff will present its case first in justification for Mr Jenner's dismissal, followed by the defendant. The plaintiff intends calling six witnesses and the defendant, three witnesses. Two days should be set aside for the hearing of the challenge.

[23] No later than 14 days before the hearing, the plaintiff will file and serve the evidence-in-chief of its witnesses in the form of sworn affidavits, with the defendant doing likewise no later than 7 days before the hearing. Any additional or unforeseen evidence-in-chief can be led orally before cross-examination of witnesses at the hearing. PDF copies of the affidavits should be transmitted to the Court as well as the originals of those affidavits.

[24] No later than 1 working day before the hearing, the plaintiff will file and serve a common bundle of agreed documents although either party may seek to introduce at the hearing any other document/s on which there may be any dispute about relevance or admissibility. Ms Aldred for the plaintiff has accepted responsibility for the compilation and filing of the bundle of documents after consultation with Ms Angus Burney.

[25] The hearing of the challenge will be in the Employment Court at Wellington beginning at 9.30 am on Monday 8 March 2010 and on the following day, 9 March.

[26] If there is a possibility of reducing the time required for the hearing as a result of discussions between counsel, they will advise the Registrar accordingly.

[27] Leave is reserved to either party to apply for further orders or directions on reasonable notice.

GL Colgan
Chief Judge

Judgment delivered orally at 3.45 pm on 26 November 2009