

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

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

**[2023] NZEmpC 113
EMPC 35/2023**

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 KENNETH SNOWLING
 Plaintiff

AND SCOTT TECHNOLOGY LIMITED
 Defendant

Hearing: On the papers

Appearances: A Oberndorfer, advocate for plaintiff
 J Cowan, counsel for defendant

Judgment: 26 July 2023

**INTERIM JUDGMENT OF JUDGE K G SMITH
(Application for stay)**

[1] On 11 January 2023, the Employment Relations Authority released a determination resolving a dispute between Kenneth Snowling and Scott Technology Ltd arising from his employment by the company.¹

[2] The dispute involved financial claims the parties made against each other. The Authority made findings about those respective liabilities and set them off against each

¹ *Snowling v Scott Technology Ltd* [2023] NZERA 8 (Member Dallas).

other. The result was a conclusion that Mr Snowling owed Scott Technology \$262,884.80 as restitution and an order was made accordingly.²

[3] The Authority subsequently ordered Mr Snowling to pay a contribution to Scott Technology's costs of \$4,500.³

The challenge

[4] Mr Snowling challenged both determinations. He sought a full hearing of the entire matter and orders requiring Scott Technology to pay him redundancy compensation, holiday pay, an "ex-pat" allowance, certain bonus payments, and a contribution to his tax-related expenses.

The application for a stay

[5] Mr Snowling applied for a stay of execution of the Authority's determinations pending his challenge being decided. Summarised, the grounds of his application were:

- (a) to meet the Authority's award he would be required to sell his house, jointly owned with his wife;
- (b) if his challenge succeeded the potential sale of the house now would be disproportionately detrimental to him and his family;
- (c) the Authority:
 - (i) gave inappropriate weight to his working hours without an evidential basis for its conclusion;
 - (ii) did not consider the jurisdiction of the "various contracts" or the "contractual principles attached to multiple concurrent contracts";

² At [32].

³ *Snowling v Scott Technology Ltd* [2023] NZERA 290 (Member Dallas).

- (iii) misconstrued calculations of payments, money withheld and expenses and failed to account for Scott Technology withholding the “ex-pat” allowances and bonuses;
- (d) his claim is meritorious;
- (e) the detriment of not granting a stay would significantly outweigh any detriment of a delay in payment to Scott Technology if it succeeds;

[6] Mr Snowling supported his application with evidence that his house is his only valuable asset sufficient to meet the Authority’s orders.

[7] Scott Technology opposed the application.

Test to apply

[8] The test to apply is well-established. The fact that Mr Snowling challenged the determinations does not operate as a stay.⁴ The Court, however, has power to order one.⁵ In exercising that power the overarching consideration is whether an order is in the interests of justice.⁶ That assessment is usually informed by factors such as:

- (a) whether the challenge will be rendered ineffectual if the stay is not granted;
- (b) whether the challenge is pursued in good faith;
- (c) whether the successful party at first instance will be injuriously affected by the stay;
- (d) the extent of any impact of granting a stay on third parties;

⁴ Employment Relations Act 2000, s 180.

⁵ Employment Court Regulations 2000, reg 64.

⁶ See *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC); *Assured Financial Peace Ltd and Pais* [2010] NZEmpC 50; and *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

- (e) the novelty and/or importance of the question involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

[9] In assessing an application the competing interests of the parties need to be carefully weighed up; the successful party at first instance is usually entitled to the benefit of that decision, but the unsuccessful party's ability to challenge it should not be unreasonably fettered.

[10] Before discussing the parties' submissions it is necessary to set out some further background to the dispute to place into context the discussion that follows.

The parties' dispute in more detail

[11] The following discussion is drawn from the determination and the parties' untested affidavits.

[12] Scott Technology is an automation and robotic company with overseas subsidiaries.⁷ Mr Snowling began working for the company in January 2000. He worked for its Chinese subsidiary between 2012 and 2016 and for its German subsidiary between 2012 and 2019. He returned to New Zealand in January 2020 and his employment came to an end in May that year because of a restructuring.⁸

[13] Scott Technology accepted it owed Mr Snowling money for redundancy and holiday pay but denied his other claims. However, it withheld the money it admitted owing, attempting to set off that amount against the claim it made against him to return alleged overpayments of wages, various amounts associated with overseas tax liabilities, and for reimbursement of management time, penalties and interest.⁹

⁷ *Snowling*, above n 1, at [1].

⁸ At [9].

⁹ At [3].

Mr Snowling denied that he was indebted to the company or that his actions should be sanctioned by a penalty.¹⁰

[14] While the Authority was dissatisfied with the company's self-help remedy of withholding payment of statutory and contractual sums owed to Mr Snowling, it decided to set off what it determined the parties owed each other to arrive at a net position. Consequently, Mr Snowling was ordered to pay the balance to Scott Technology.¹¹

[15] Scott Technology has taken steps to enforce the Authority's decision and has lodged a charging order over Mr Snowling's interest in the house he owns jointly with his wife.

Plaintiff's submissions

[16] Many of the grounds advanced by Mr Snowling are about the substantive merits of his challenge that were only briefly touched on in the parties' affidavits and cannot be assessed at this interlocutory stage. As to the stay application, Ms Oberndorfer's submissions relied on the consequences for Mr Snowling and his family if the Authority's orders must be satisfied before the challenge is decided. She accepted that the challenge would not become ineffectual, in the sense that it would become pointless. Instead, she concentrated on the impact of the potential loss of the family home.

[17] In supporting the application, Mr Snowling did not provide any information about the value of his interest in the house. As to his financial resources generally, he is working but did not initially disclose where or provide information about his income beyond supplying a screenshot of some bank account summaries, one of which lists a salary payment. That limited financial disclosure showed very modest bank account balances and a credit card debt.

¹⁰ At [3].

¹¹ At [32].

[18] Mr Snowling has since disclosed his employment and income in an affidavit filed in response to Scott Technology's recent application for security for costs.

Defendant's submissions

[19] Mr Cowan submitted that the grounds for a stay were not established. That was because:

- (a) Mr Snowling would still be able to pursue the challenge without an order being made; and
- (b) if he succeeded, there was no doubt that Scott Technology's financial strength meant it has the resources to repay him.

[20] Mr Cowan also relied on evidence provided by Scott Technology, about Mr Snowling's allegedly substantial income for several years immediately before his employment ended. While the company accepted some of that income reflected payments by it to him that were the subject of the Authority's investigation, the thrust of this evidence was to query the completeness of the finance information Mr Snowling supplied.

Discussion

[21] There was no disagreement about the test to apply. The parties diverged in the application of the test to the circumstances Mr Snowling described.

[22] If this application turned on whether the challenge would be rendered ineffectual in the absence of a stay it would have failed.

[23] There will, obviously, be significant personal inconvenience if it transpires that the only way to fund the Authority's award to Scott Technology is for the house to be sold to realise Mr Snowling's interest in it. That is, however, a consequence of having been unsuccessful in a monetary claim. The resulting inconvenience, no matter how great, does not assist in elevating this assessment factor to the point where it could support the application.

[24] None of the other factors referred to assist Mr Snowling. The only one that is possibly relevant, but at a stretch, is the potential impact on Mrs Snowling's interest in the house. Obviously, Mrs Snowling is not liable for Mr Snowling's debt, so I assume any compulsory sale will need to address preserving her interest in some way. That is not a factor that tips this assessment in favour of granting a stay.

[25] There is, however, a related evaluation that is material. As mentioned earlier, Scott Technology has applied for security for costs. It has done so in response to the disclosures made by Mr Snowling when he filed his application for a stay. The company now believes he may not be able to meet a future costs award if one is made against him.

[26] The application for security for costs is at an early stage. Mr Snowling has just filed an affidavit explaining in more detail his financial circumstances and submissions are being exchanged.

[27] The contemporaneous existence of the applications for a stay and for security for costs presents a potential difficulty. The existence of the charging order may compromise Mr Snowling's ability to pursue his challenge if it inhibits access to the available equity in the house that might, otherwise, assist in funding it, or resisting the security for costs application.

[28] I have decided that it is necessary to preserve the position temporarily until the situation is clearer.

[29] I raised with Ms Oberndorfer and Mr Cowan the possibility that a decision on the application for stay might be made on an interim basis, to be reviewed one way or the other when the security for costs case is argued. I understood them to accept that an interim decision was appropriate in the circumstances.

Outcome

[30] The application for a stay is granted subject to the condition that it will be reviewed at the conclusion of, and in conjunction with, the application for the security for costs.

[31] Costs are reserved.

Judgment signed at 2.45 pm on 26 July 2023

K G Smith
Judge