



Employment Court of New Zealand

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Byrne v New Zealand Transport Agency [2019] NZEmpC 127 (13 September 2019)

Last Updated: 19 September 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 127](#)

EMPC 104/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of execution
BETWEEN	VERONICA BYRNE Plaintiff
AND	NEW ZEALAND TRANSPORT AGENCY Defendant

Hearing: On the papers

Appearances: RM Harrison, counsel for plaintiff
G Cain and RM Butler, counsel for
defendant

Judgment: 13 September 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for stay of execution)

[1] This judgment resolves an application for stay of a costs determination made by the Employment Relations Authority.¹

[2] That determination was issued by the Authority on 14 May 2019. It followed a substantive determination of 27 March 2019.²

[3] The Authority found that New Zealand Transport Agency (NZTA) had not breached a record of settlement it had entered into with Ms Byrne.

1 *Byrne v New Zealand Transport Agency* [\[2019\] NZERA 283](#) (costs).

2 *Byrne v New Zealand Transport Agency* [\[2019\] NZERA 179](#) (substantive).

VERONICA BYRNE v NEW ZEALAND TRANSPORT AGENCY [\[2019\] NZEmpC 127](#) [13 September 2019]

[4] When dealing with costs, the Authority found that NZTA was entitled to a contribution to its costs as the successful party. It concluded that the starting point was the daily tariff of \$4,500, but this was adjusted upwards by \$1,000 because NZTA had to undertake additional attendances, and by a further \$2,000 because Ms Byrne had unreasonably rejected a settlement/Calderbank offer. In the result, Ms Byrne was ordered to pay NZTA \$7,500 towards its legal costs within 28 days of the determination.³

[5] Ms Byrne filed a challenge to the substantive determination on 10 April 2019. The challenge was brought on a de novo basis, asserting that NZTA had breached the relevant record of settlement and that this had affected her ability to hold or obtain employment elsewhere.

[6] Following the issuing of the costs determination, Ms Byrne amended her statement of claim, adding a challenge in

respect of the costs determination. She pleaded that there was no reasonable justification for exceeding the tariff rate, and it was unfairly punitive to have done so. She seeks an order setting aside the costs award.

[7] On 24 June 2019, Ms Byrne applied for a stay, essentially on the basis that she is not in a financial position to meet the costs of \$7,500, and that it would take time for her to build up funds in order to make the payment. The notice of application states that while she is not impecunious, she suffered significant financial hardship because of the alleged breach of the settlement agreement. It asserts that NZTA would not be affected injuriously by a stay, as the amount of \$7,500 is negligible in terms of its size and resources. The application states Ms Byrne's challenge is being prosecuted in good faith and for good reason.

[8] The application was supported by an affidavit from Ms Byrne, explaining her financial circumstances. She confirms she is not in a position to raise funds or extend an overdraft to meet the costs award; she says that to do so would put her family under considerable financial stress. She was, however, confident she could build up reserves in order to meet the Authority's costs award, were it ultimately to be upheld by the Court.

3 *Byrne v New Zealand Transport Agency*, above n 1, at [13], [23]–[25].

[9] NZTA filed a notice of opposition to the application for stay asserting, in summary, that Ms Byrne would not be deprived of the right to challenge the Authority's determination if the stay was not granted; that NZTA was the successful party in the first instance, and it would undoubtedly be injuriously affected by a stay; and that the overall balance of convenience was in its favour.

[10] On 6 August 2019, I invited counsel for the parties to confer directly to see if a pragmatic solution could be reached with regard to the application for stay, having regard to the amount involved. I directed, however, that if the matter could not be resolved, submissions should be filed.

[11] I have now received submissions which confirm that counsel were unable to resolve the matter. In his submissions Mr Harrison, counsel for Ms Byrne, relied on Ms Byrne's evidence to support the application for stay. Mr Cain, counsel for NZTA, submitted, in essence, that the case for a stay had not been made out. He also argued that, short of outright payment to NZTA, there were several other options which could be considered by the Court such as a payment into court; delaying the hearing currently scheduled to commence on 4 November 2019 so as to allow Ms Byrne to make payment into court at the rate she has now offered of \$75 per week; or direct payment into court of an amount to be fixed, such as the tariff sum involved of \$4,500.

[12] The starting point is [s 180](#) of the [Employment Relations Act 2000](#) which provides that a challenge does not operate as a stay. The section confers a discretion, which is not qualified in any way by the statute, but must be exercised judicially and according to principle. The overriding consideration in the exercise of the discretion must be the interests of justice.⁴

[13] The first point I make is that, in the circumstances of this particular case, any stay should potentially relate to the challenge of the costs determination. This is not a case where a stay of execution is sought in respect of remedies awarded under a substantive determination. Nor is there an application before the Court that the substantive determination be stayed. Nor is the amount so significant that a broader stay would be in the interests of justice.

4 *North Dunedin Holdings Ltd v Harris* [\[2011\] NZEmpC 118](#) at [\[7\]](#).

[14] In my view, the issue should be confined to the question of whether the challenge to the costs determination should or should not be stayed.

[15] That means that the present application will not affect the arrangements which have currently been made for the substantive challenge; a fixture of three days has been scheduled.

[16] The issue of the costs, whether in the Court or in the Authority, will not be dealt with at the substantive hearing and will inevitably have to await the Court's resolution of the substantive issues.

[17] The merits of the costs challenge are somewhat difficult to assess. The outcome of that challenge is dependent on the outcome of the substantive challenge. It appears the Court will have to receive a reasonable volume of evidence. At this stage no accurate assessment of prospects of success of the substantial challenge could or should be made.

[18] If the substantive challenge were to succeed, there will be implications for the Authority's costs determination.

[19] If the substantive challenge were not to succeed, issues on the costs challenge will be more limited; they will turn on whether the award was excessive. But even these more limited issues could be affected by the Court's finding when resolving the substantive challenge; for instance, as to the weight to be attributed to any Calderbank offer.

[20] Consequently, factors relating to the prospects of success are not dispositive of the present application.

[21] The next factor requiring consideration relates to Ms Byrne's financial circumstances. These are difficult, but a

payment is not impossible, as she has recognised.

[22] Were the Court to make an order of stay subject to a condition, Ms Byrne's ability to pursue her costs challenge could be affected if the condition was excessively onerous. That is an access to justice issue which I must take into account.

[23] Turning to NZTA's position, I am not satisfied that it would be injuriously affected by a stay. The main point raised in the notice of opposition was that the Agency would incur further costs in defending the plaintiff's challenge if a stay was granted, in a situation where it appears Ms Byrne may be impecunious. This point, however, proceeds on the basis that any stay will relate to both the substantive challenge and the costs challenge, which, as I have explained earlier, is not the position.

[24] It is not suggested that there could be any financial prejudice to NZTA, no doubt because of the sum involved.

[25] Standing back, I am satisfied that there should be a stay of the challenge to the Authority's costs determination on condition that \$2,000 is paid to the Registrar by 1 January 2020 until further order of the Court. This sum is to be paid at the rate of \$500 per calendar month, with the first payment due on 1 October 2019, and each subsequent payment being due on the first day of the following three months. Any default in payment will be advised by the Registry to NZTA.

[26] I reserve leave to NZTA to apply for further directions on reasonable notice in the event of default.

[27] I reserve costs with regard to the present application.

BA Corkill Judge

Judgment signed at 4.15 pm on 13 September 2019

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