



Employment Court of New Zealand

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ESKA Limited v Beloous [2019] NZEmpC 14 (12 February 2019)

Last Updated: 16 February 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 14](#)

EMPC 334/2018

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	ESKA LIMITED Plaintiff
AND	OLGA BELOOUS Defendant

Hearing: On the papers

Appearances: S Strizheva, agent for plaintiff
L Clapham, advocate for defendant

Judgment: 12 February 2019

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(An application for stay of proceedings)

[1] The plaintiff, ESKA Ltd applies for a stay of proceedings of the Employment Relations Authority (the Authority). In effect, ESKA Ltd is seeking a stay of enforcement of monetary awards made against it in two determinations of the Authority.

[2] In the substantive determination, the Authority found that there was no enforceable trial period applying to the employment by ESKA Ltd of the defendant, Ms Beloous, and that Ms Beloous was unjustifiably dismissed. The Authority ordered ESKA Ltd to pay Ms Beloous lost wages, compensation for humiliation, loss of dignity and injury to Ms Beloous' feelings, holiday pay and a shortfall in notice. The

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awards total \$10,907.20.1 In a later determination Ms Beloous was awarded costs of \$2,000.2

[3] ESKA Ltd has challenged the determinations on a de novo basis. This means if the challenge proceeds before the Employment Court (the Court), there will be a full hearing of the entire matter.³ The Court then will make its own decision, which will stand in place of the determinations of the Authority.⁴

[4] Although framed differently in the amended application for a stay, in essence the grounds upon which the application is made are:

- ESKA Ltd was not in breach of the [Employment Relations Act 2000](#) (the Act) and has filed its challenge to defend its

rights.

- It is the publisher of a science magazine for children and works with schools. If the determinations are enforced, that would stop ESKA's work and prevent it from fulfilling its obligations to schools and to the readers of the magazine.
- Ms Beloous has failed to act in good faith and has provided false information to the Authority.
- Granting a stay would protect the legitimate rights of ESKA Ltd.

[5] Ms Beloous opposes the application for a stay. The principal grounds for opposing the application are:

(a) The Authority has found that ESKA Ltd did not comply with the requirements of the Act.

1 *Beloous v Eska Ltd* [2018] NZERA Auckland 316.

2 *Beloous v Eska Ltd* [2018] NZERA Auckland 335.

3 [Employment Relations Act 2000, s 179\(3\)\(b\)](#).

4 [Employment Relations Act 2000, s 183](#).

(b) ESKA Ltd has been a reluctant participant from the commencement of the proceedings in the Authority and continues to seek to avoid responsibility for its actions.

(c) Ms Beloous strongly refutes any suggestion that she has acted otherwise than in good faith or that she provided false information to the Authority.

(d) She is concerned that ESKA Ltd will not comply with the determinations of the Authority or any judgment of the Court.

(e) The Authority's determinations ought to stand.

(f) The claim of lack of funds is not credible.

[6] Ms Strizheva, the director of ESKA Ltd, provided an affidavit in support of ESKA Ltd's application. She also provided submissions on ESKA Ltd's behalf. Her affidavit simply attached a one page document, apparently from the Bank of New Zealand, confirming customer details for ESKA Ltd as at 18 December 2018. That document shows that ESKA Ltd's account "MyMoney for Business" had a ledger balance of \$9.58 DR with an available credit of \$100.42.5

[7] Mr Clapham, Ms Beloous' representative, filed submissions on her behalf. He provided a document that appears to be a print out from ESKA Ltd's internet site and also provided a list of companies that he says have Ms Strizheva listed as a shareholder and director. He says he obtained this information from a search of the Companies Office website. However, no affidavit has been filed by Ms Beloous or on her behalf. In the event, this application can be dealt with without reference to the material Mr Clapham supplied.

5. An affidavit filed by Ms Strizheva previously, in support of an application for urgency, attached a similar document, but as at 1 November 2018. That showed a ledger balance of \$112.73 and available credit of the same amount.

The applicable principles are well settled

[8] [Section 180](#) of the Act provides that an election under [s 179](#) does not operate as a stay of proceedings unless either the Authority or the Court so orders. That is the starting point. Absent a stay being ordered, Ms Beloous is entitled to enforce the determinations of the Authority. Therefore, ESKA Ltd is asking the Court to exercise its discretion to prevent what is a lawful enforcement process.⁶

[9] The principles that apply to applications for a stay are well settled. The Court has a broad discretion in the interests of justice which must be exercised judicially and in accordance with principle.⁷ In exercising its discretion, the Court must weigh the rights of the successful litigant to have the benefits of any determination being challenged and those of the party challenging a determination to have the position preserved in case the challenge succeeds.

[10] Considerations that may apply in an application for a stay were set out in *Assured Financial Peace Ltd v Pais*.⁸ In the context of a challenge, those considerations are:

- (a) Whether the challenge will be ineffectual if a stay is not granted.
- (b) Whether the challenge is prosecuted for good reasons and in good faith.
- (c) Whether the successful party at first instance will be affected injuriously by a stay.
- (d) The effect on third parties.
- (e) The novelty and importance of the questions involved in the case.
- (f) The public interests in the proceedings.

6. *Solid Roofing Ltd v Newman (No 2)* [2018] NZEmpC 135 at [12]; *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118 at [6].

7 *Hill v Tex Onsite Ltd* [2016] NZEmpC 73 at [3].

8 *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

(g) The overall balance of convenience.

The evidence does not support a stay

[11] The Court will base its decision on the evidence before it. As noted, there is very little evidence filed in this case. There is no evidence that, without a stay, ESKA Ltd would not be able to continue with its challenge.

[12] Although Ms Beloous has raised concerns over ESKA Ltd's conduct, for present purposes, I am prepared to accept that it is acting in good faith in pursuing the challenge.

[13] Ms Beloous could be affected injuriously if a stay were to be granted. The evidence provided by ESKA Ltd shows ESKA Ltd is in a precarious financial position. There is no evidence that the situation will improve. This means if ESKA Ltd is unsuccessful in the challenge, it is likely Ms Beloous will have incurred more cost with less chance of recovery.

[14] Although ESKA Ltd says in its application that, if the determinations are enforced, ESKA Ltd will need to stop its work and will not be able to fulfil its obligation to schools and to its readers, in its submissions it says that over the school holidays schools do not buy anything and that magazine subscriptions are not being sold. ESKA Ltd also says it has already stopped printing its magazine due to a lack of funds. Given its apparent financial position, it is not clear how ESKA Ltd is proposing to operate in the future, regardless of the challenge. In any event, there is insufficient evidence of any obligation to schools and readers, or of the impact that non-publication of the magazine would have on those third parties, for any finding that they are likely to be injuriously affected by the orders of the Authority being enforced.

[15] No one has suggested there are novel or important questions involved in the case, and none are apparent. There is no public interest in the proceedings.

[16] ESKA Ltd has not offered to pay the amounts ordered by the Authority into Court, and its evidence does not demonstrate that it would be able to do so. The balance of convenience does not favour a stay.

[17] In conclusion, taking account of the evidence and submissions placed before the Court and the principles that apply to an application for a stay, I find there is no basis for a stay to be granted. I decline to make the order sought by ESKA Ltd.

[18] Ms Beloous is therefore entitled to continue with enforcement action against ESKA Ltd to obtain the monies ESKA Ltd was ordered to pay to her by the Authority.

Costs on this application also are due

[19] Ms Beloous also is entitled to costs on this application. If those were calculated with reference to the Court's Guideline Scale, even based on a Category 1A classification, that would suggest costs of over \$1,000.9 I consider a more modest award is appropriate here where the notice of opposition and written submissions were brief. I award \$350 costs payable by ESKA Ltd to Ms Beloous.

J C Holden Judge

Judgment signed at 10 am on 12 February 2019

9 Employment Court of New Zealand "Practice Directions" (14 December 2018)

<<https://www.employmentcourt.govt.nz/assets/Documents/Publications/EMPLOYMENT-COURT-PRACTICE-DIRECTIONS-as-published-on-EC-Website20181214.pdf>> at 18-22.

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