IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 119
3001459

	BETWEEN	CARL FINDLAY Applicant
	AND	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Mitchell, Counsel for the Applicant Kevin Patterson, Counsel for the Respondent
Investigation Meeting:	On the papers and by telephone conference with counsel on 18 April 2017
Determination:	19 April 2017

SECOND DETERMINATION OF THE AUTHORITY

A. The application of Ports of Auckland Limited (POAL) for postponement of the Authority's substantive investigation in this matter, pending the decision of the Employment Court on a challenge to a determination of the Authority on an interim issue, is declined for reasons given in this determination.

B. Costs are reserved.

Application for stay of Authority proceedings

[1] Ports of Auckland Limited asked the Authority to postpone an investigation meeting scheduled for 24 and 25 May 2017 until the Employment Court has decided a challenge to an earlier Authority determination. The determination under challenge made an order, in the form of an interim injunction, that POAL could not continue a disciplinary inquiry until the Authority had investigated and determined a personal grievance claim raised by Carl Findlay, a stevedore employed by POAL. Mr Findlay

claimed he was unjustifiably disadvantaged by POAL seeking to carry out or continue its inquiry.

[2] POAL's application for postponement of the late May investigation meeting sought a stay order under s 180 of the Employment Relations Act 2000 (the Act). Its application has been determined on the papers and after hearing oral submissions from counsel by telephone conference.

[3] On 23 March 2017 the Authority ordered POAL to take no further steps in its disciplinary inquiry until the Authority had investigated and determined whether Mr Findlay had been unjustifiably disadvantaged.[1] The Authority has the power to grant interim injunctions in cases within its jurisdiction under s 161 of the Employment Relations Act 2000 (the Act).[2] The Authority's exclusive jurisdiction includes making determinations about personal grievances: s 161(1)(e) of the Act.

[4] On 31 March counsel for Mr Findlay and for POAL attended an Authority case management conference which confirmed the investigation meeting dates and set timetable directions for the parties to lodge witness statements and relevant documents. The key dates were that Mr Findlay's witness statements were directed to be lodged by 21 April, with POAL's witness statements to then be lodged by 12 May.

[5] Later in the afternoon of 31 March, following the conference call, POAL filed a challenge to the Authority's 23 March determination.

[6] At an Employment Court telephone conference with counsel for the parties on 4 April Judge Inglis set timetable directions for the parties to lodge affidavits and submissions during April for a hearing on 1 May. The Judge's Minute described the heart of POAL's challenge as an argument that the Authority had no jurisdiction to grant interim orders halting a disciplinary process and, even if it did, it should not have done so in the circumstances.

[7] On 12 April POAL applied for a stay of the Authority proceedings. The effect of a stay would be to suspend the timetable directions made on 31 March and to postpone the investigation meeting notified for 24 and 25 May to uncertain future

[1] *Findlay v Ports of Auckland Limited* [2017] NZERA Auckland 80.
[2] *Credit Consultants Debt Services v Wilson (No 2)* [2007] ERNZ 205 at [66].

dates. On the Authority's present calendar alternative later dates would likely be during one week in late June or one week in late July.

Principles regarding a stay application

[8] An election by a party to challenge a determination of the Authority does not operate as a stay of proceedings on the determination of the Authority unless the Court or the Authority so orders: s 180 of the Act. Where the stay seeks to have the Authority postpone its investigation until the Court has heard the challenge and issued its decision, the following principles generally guide the Authority's exercise of its discretion on whether or not to grant the application.[3] In determining whether or not to grant a stay, the Authority must balance the successful party's rights to the fruits of a determination and the need to preserve the position in case the challenge is successful. Relevant factors include whether the challenge would be rendered nugatory if the stay were not granted; the bona fides of the application; the effect on any third parties; injury or detriment to the respondent if the stay is granted; the novelty and importance of the question involved; the public interest in the proceedings; the strength of the case and the overall balance of convenience. The overriding consideration in the exercise of the discretion must be the interests of justice.[4]

Mr Findlay's application presently before the Authority

[9] The starting point for assessment must be the nature of the claim Mr Findlay presently has before the Authority. By statement of problem lodged in the Authority on 23 December 2016 he sought an investigation of a personal grievance for unjustified disadvantage. The statement of problem was amended on 4 April 2017 to add a claim for distress compensation but was not changed in any other material way.

[10] He claimed he was subject to an unjustified action by POAL seeking to continue, from 12 December 2016, a disciplinary inquiry into an incident that occurred in the work mess on 30 July 2016. The incident was an argument with another worker. The other worker, Jake Rua, made a complaint of intimidation. Mr Findlay later made his own complaint about what Mr Rua had said that day. POAL had an independent investigator carry out interviews about the incident and complaints and provide a report. The investigator's inquiry began in August. He provided a report to POAL in late November. After getting the report POAL wrote to

[3] *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7].
[4] *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118 at [7].

the two men, Mr Findlay on 12 December and Mr Rua on 19 December, advising each that it had initiated a disciplinary inquiry into their respective complaints about one another.

[11] Mr Findlay's first disciplinary meeting was held on 20 December. Through counsel, he raised his disadvantage grievance soon after that meeting. His reasons for doing so were detailed in the earlier determination.

[12] His application to the Authority sought three findings and three orders. The findings sought can be paraphrased as follows:

(i) That POAL acted unjustifiably in continuing to investigate the 30 July 2016 incident, by initiating on 12 December 2016 its disciplinary inquiry of Mr Findlay's conduct and by what was then said at the disciplinary meeting with him on 20 December; and

(ii) That what had occurred amounted to a personal grievance of unjustified disadvantage; and

(iii) That he was entitled to compensation for humiliation, loss of dignity and injury to feelings as a result.

[13] The three orders he sought were:

(i) An order requiring POAL to not continue its investigation; and

(ii) An interim order to stop POAL continuing its inquiry until the Authority had investigated and determined his grievance application; and

(iii) That POAL pay his costs for pursuing his grievance.

[14] POAL's statement in reply denied it acted unjustifiably. It described Mr Findlay's personal grievance as premature, misconceived and without merit. It asked the Authority to dismiss his application. It also opposed his application for interim relief. It submitted its disciplinary inquiry "ought to be allowed to continue to its natural conclusion".

What has the Authority done so far?

[15] To date the Authority has determined only one aspect of Mr Findlay's application – his request for an interim order. This earlier determination was made after an investigation conducted under the usual procedure for an interim injunction of that type. Evidence was by way of affidavit only. Submissions were made on

whether there was an arguable case and where the balance of convenience and overall justice appeared to lie from the time of the issuing of the determination about the requested interim order until the Authority could investigate and then issue its determination on the substantive issues in Mr Findlay's claim.

[16] The order then issued, for that interim period, in that earlier determination was made in reliance on an undertaking as to damages made by Mr Findlay.

[17] It follows from this that the matter before the Court is limited to the Authority's determination of the application for an interim order. It does not relate to the substantive issues. Investigation of those substantive issues would, broadly, require answers to three questions. Firstly, as far as it has got in its disciplinary inquiry into Mr Findlay's conduct, had POAL acted justifiably or not? Secondly, depending on the answer to the first point, could Mr Findlay validly raise a personal grievance about what POAL had done and how it did it, so far? Thirdly, if the answer to the second point was yes, could the Authority make the order Mr Findlay sought, stopping POAL from going on with its disciplinary inquiry? The jurisdictional issue, of whether the Authority has the power, in appropriate circumstances, to order an employer not to go ahead with further steps in a disciplinary inquiry, is an integral part of that third substantive question.

[18] Those substantive issues are very much yet to be investigated. The Authority has yet to receive and test all the evidence it will need to be able to do so. Neither has it yet heard and considered any submissions the parties may then make about that evidence and the application of the relevant legal principles to that evidence.

[19] The Authority's planned procedure to consider those substantive issues is set out by its timetable direction to lodge witness statements and documents and then hold an investigation meeting on 24 and 25 May.

The challenge to the determination on the interim order

[20] POAL's challenge to the interim order determination sought a hearing de novo of the entire matter. Its statement of claim sought "amongst other things, to quash the interim stay imposed by the … Authority". In that respect, one of the grounds advanced for doing so was unremarkable. It said the Authority had erred in determining that Mr Findlay, in applying for interim relief, had an arguable case and

the balance of convenience and overall justice of the circumstances favoured granting the interim relief. It was an orthodox argument that the Authority got the evaluation and assessment wrong so the Court should look at the interim issue anew and make a different decision.

[21] In two other respects, the challenge was not orthodox.

[22] Firstly, it referred to the Authority having made a number of findings or rulings that were wrong in law or on the facts. However, as counsel for Mr Findlay submitted, it was not accurate to describe the contents of the Authority determination in that way. The determination had accepted a number of propositions in Mr Findlay's case were arguable, strongly arguable or seriously arguable. It had not gone so far as making findings of fact on those propositions. And, even if the Authority had done so, it was not clear why such supposed "findings" by the Authority would be relevant to the Court's consideration in a *de novo* hearing.

[23] Secondly, one ground POAL advanced in support of its challenge was that the Authority "lacked the requisite jurisdiction and/or authority" to grant the interim order made. This differed from what POAL had said in its submissions to the Authority investigation of the interim application. On that earlier occasion it submitted: "[POAL] does not dispute that the Authority has the power to make an interim injunction in these circumstances". While accepting the power existed, POAL had also submitted at the interim investigation meeting that the Authority should be loath to make such an order and pointed to some further criteria which limited when such order might be available. Those earlier submissions were in line with the content of POAL's statement in reply. The reply described Mr Findlay's application as premature and wrong in principle and submitted no relief, interim or otherwise, was warranted or should be granted, but it did not suggest the Authority could not make such an order. Rather it stated POAL intended to continue its disciplinary inquiry, "save for any direction by the Authority to the contrary".

The grounds advanced for a stay of the Authority's investigation

[24] POAL's application for a stay said its pleadings in the s 179 challenge before the Court raised significant issues of law and fact. It said the Court's decision was likely to impact "in one way or another on the Authority's investigation currently underway". There were hearings timetabled before both the Court and the Authority

arising from the same matter. POAL submitted it was "sensible" for the Authority to suspend its investigation (including the timetabling directions made) until the Court reached a final decision on the challenge before it.

[25] The application did not explain why suspending the investigation was sensible but an attached letter from POAL's counsel to Mr Findlay's counsel suggested two reasons that might be so. Firstly, it said the challenge in the Court "may result in material changes to the way in which the Authority investigation progresses, if at all". Secondly, it said a stay "would result in both parties saving, or as the case may be, wasting time and costs".

[26] On the first point, this determination has already noted the matter before the Court on challenge relates only to the interim order made, not the substantive issues which the Authority has yet to investigate. The Court could come to a different view on whether the interim order should have been made. It could agree with POAL that there was no jurisdiction to make it or, that if there was jurisdiction, the Court's evaluation of whether there was an arguable case for such an order and its assessment of the balance of convenience and overall justice might reach a different conclusion. In those circumstances it could quash the order. The effect would be to free POAL to continue its disciplinary inquiry without waiting for the outcome of the Authority determination of Mr Findlay's unjustified disadvantage claim. However it is difficult to see how that could change the obligation still on the Authority to investigate and determine the substantive issues in his claim. There is a question, at least one POAL now wants to pursue further, over whether the Authority would even have jurisdiction to make a permanent order of the kind that Mr Findlay has sought. But the Authority has not yet determined that issue so it is too early for it to be before the Court for review, revision or reversal, if such an order was eventually made.

[27] On the second point, there is some additional cost to both parties because some of the time of preparation for the Court hearing on the interim order overlaps with the timetable for preparation for the Authority investigation. However, as noted in its statement of claim to the Court, POAL anticipated the challenge being decided largely on the documents already before the Authority, so the costs of preparation would be relatively limited. The content of affidavits and submissions the parties were required to file under the Court's timetable orders could, for the most part, be

copied from material already used in the earlier Authority investigation on the interim matter. Much of that material could also be replicated in witness statements it was required to prepare for the Authority's investigation of the substantive issue. Most, if not all, documents had already been provided but, under the Authority's timetable directions, were being collated into a common bundle for easier reference. And, on my assessment of the distinction between the interim and substantive aspects of the investigation, both parties would need to prepare for the substantive investigation at some stage any way. On that basis, there was no sound argument that a stay of the Authority investigation would save costs or avoid waste of time and costs.

Assessing the application for a stay to postpone the Authority's investigation

[28] Counsel for Mr Findlay submitted that the questions typically asked in considering an application for stay were more apt where it related to a determination of substantive issues, rather than as here, a pause in the proceedings. He referred to the questions summarised by the Court of Appeal in *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582, an employment case where an employer sought stay of orders to pay remedies. While that observation was correct, those questions still provided a useful framework and check for determination of the present application for a stay.

Is the challenge rendered nugatory if a stay is not granted?

[29] POAL conceded its challenge to the interim order would not be rendered nugatory if the Authority declined to grant the stay sought. The Court could quash the interim order but the Authority would still need to investigate and determine those substantive issues.

Is the application for a stay made in good faith?

[30] There was no evidence or information to suggest it was not.

Is there any relevant effect on third parties?

[31] POAL has suspended a parallel disciplinary inquiry into conduct by Mr Rua until the situation in respect of its inquiry about Mr Findlay is resolved. In that way Mr Rua is also affected by any delay in the overall process. It may be assumed he would prefer to know what was going to happen sooner rather than later. This factor weighed against granting the stay.

Is there any injury or detriment to Mr Findlay if the stay is granted?

[32] This question in part relates to the notion that a successful party in the determination under challenge is entitled to enjoy the fruits of that determination and suffers a detriment if that were delayed by a stay. It does not really apply to the present circumstance because the interim order is separate in effect from the subject of the investigation, that is on the substantive issues, which would be delayed by the stay. There is an inherent detriment to Mr Findlay of further delay in that investigation, due to doubt or anxiety about what may happen. All parties are entitled to prompt progress on matters in which they are involved in the Authority, to the extent that can be achieved in light of its resources and statutory obligations relating to its powers and procedures.[5] This factor weighed against granting the stay.

Is the question novel or important or is a stay needed to protect some public interest?

[33] Counsel for POAL submitted the questions in the challenge were novel, important and there was a public interest in them that should be protected by a stay. For reasons already given in this determination I have not agreed with that submission. The submission relied on the notion that the challenge on the interim order could result on a decision by the Court that would "impact" on the Authority's investigation of the substantive issues. I doubt that is correct. POAL's submissions to the Authority on the interim order referred to case law on the making of orders that might affect an employer's disciplinary process. It is not a novel question. The contents of the Authority's determination on that point were important to the parties but not of wider significance. If the Court reached a different conclusion in its *de novo* consideration of the interim order and then quashed the Authority's earlier order, it would change an outcome in a single case rather than mark any sea change in the law or how it should be applied.

How strong is the case for the challenge?

[34] POAL's case on challenge must have some prospect of success, on whether or not the interim order made should have been made. The Court's judicial evaluation of whether Mr Findlay had an arguable case for his grievance and its exercise of its discretion to assess the balance of convenience and overall justice may produce a

[5] Employment Relations Act 2000, s 160 and s 173. See also Employment Relations Authority Regulations r 4.

different result than that reached in the Authority. Numerous examples show that is the nature of such evaluations and exercise of discretion by decision makers in different forums in the dispute resolution continuum.

[35] However, for reasons already given, a different conclusion on the interim order does not mean the Court's decision on the challenge over that matter will necessarily affect the Authority's investigation of the substantive issues. Whatever strength POAL's case in its present challenge to the interim order may have is not a factor weighing in favour of stay of the Authority's substantive investigation.

[36] In reaching this view I also agreed with a submission from counsel for Mr Findlay that the earlier determination on the interim order did not make the whole of his unjustified disadvantage claim open to the Court to now hear and decide, at this stage anyway. It was not the kind of situation found in *Asure New Zealand Ltd v New Zealand Public Service Association (No 1)* [2005] ERNZ 747 or *Abernethy v Dynea NZ Limited* [2007] ERNZ 271 where a determination of the Authority on a preliminary or jurisdictional issue was said to have had the effect of disposing of the whole employment relationship problem before it, so that Court was able to then hear and decide the whole case on challenge. Rather Mr Findlay's case was in the other category described by the Court in *Abernethy* where the Authority had only determined a preliminary point, but the substance of the problem was still before the Authority for resolution.[6] The litigation was not disposed of on a preliminary or interim point. The Authority had not completed its statutory functions.[7] The interim order in Mr Findlay's case determined nothing about the substance of his claim, that is whether he really had a grievance and if so, if the Authority could make the orders that he sought about what his employer could or should not do.

Where does the balance of convenience lie if the stay is or is not granted?

[37] Cost and delay were two factors to consider in the balance of convenience.

[38] Counsel for POAL submitted that the postponement sought was relatively brief because the Court's hearing of the challenge was scheduled for 1 May. However that is not the only factor to weigh in the potential delay caused by a postponement. Even if the Court's decision were delivered very promptly after 1 May, the parties

[6] *Abernethy at* [62]. See, for example, *Ale v Kids At Home Limited* [2015] NZEmpC 209 at [43].
[7] *Abernethy* at [57].

would be unlikely to then have enough time to lodge their witness statements so the investigation meeting could go ahead on 23 and 24 May. The current timetable directions have three steps – firstly, Mr Findlay's witness statements, secondly, POAL's witness statements and thirdly, reply witness statements from Mr Findlay. The reality is that granting the stay sought by POAL risks pushing the investigation meeting, at its earliest, back to late June or late July. Other dates are already committed to investigations in other matters. The Authority had earlier tried to hold its substantive investigation meeting in late April but this was not suitable for POAL's counsel who sought dates after mid-May.

[39] The assessment of the balance should also consider the prospect that the Court might agree with POAL and quash the interim order made. In those circumstances POAL would be free to continue with its disciplinary inquiry. Mr Findlay would then have a strong interest in having the Authority determining his substantive claim as soon as possible. Conversely, if the interim order is left undisturbed by the challenge, POAL has an interest in the Authority proceeding as promptly as possible to determine those substantive issues. It will want to know if it has got anything wrong to date and if it can get on with the steps it planned to take in its disciplinary inquiry. For both parties the balance of convenience on that score does not weigh in favour of the stay sought by POAL because of the considerable further delays that would result in the Authority's substantive investigation.

[40] The parties have to bear the cost of preparing for and participating in both the Court hearing on the interim matter and the Authority investigation of the substantive issues in any event. It was not a factor weighing in favour of a stay.

And, as a final check, what are the overall interests of justice?

[41] The overall interests of justice lie with declining POAL's application to postpone the Authority's investigation of the substantive issues. Declining the stay sought does not damage POAL's prospects in its challenge over whether the interim order should or should not have been made. And because that challenge relates solely to the interim order, neither party benefits from any further delay of the Authority's investigation and determination of the substantive issues.

[42] There is a further check or protection for POAL on whether this conclusion, to decline the stay, is correct or not. As its application for that order has been

determined and disposed of entirely, on what may be said to be more than a matter of the Authority's procedure, it could arguably now challenge, under s 179 of the Act, this determination not to grant a stay. The Court has its own power to grant a stay under s 180 if its assessment of the factors were different than the one I have reached.

Costs

[43] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority