



# New Zealand Employment Relations Authority Decisions

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## Jamieson v McCarthy t/as Christchurch Tours CA171B/10 (Christchurch) [2010] NZERA 917 (8 December 2010)

Last Updated: 23 December 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 171B/10 5286758

BETWEEN SANDRA JAMIESON

Applicant

A N D ROBIN McCARTHY t/as

CHRISTCHURCH TOURS

Respondent

Member of Authority: Representatives:

Submissions Received:

James Crichton

David Beck, Counsel for Applicant Peter Anderson, Counsel for Respondent

25 November 2010 from Applicant 3 December 2010 from Respondent

Date of Determination:

8 December 2010

### FURTHER DETERMINATION OF THE AUTHORITY

#### Introduction

[1] By substantive determination dated 1 September 2010, the Authority disposed of Ms Jamieson's application by determining that she had a personal grievance and was entitled to remedies. Orders were made accordingly.

[2] Mr McCarthy then challenged that determination by filing in the Employment Court on 27 September 2010.

[3] Then, in the normal course, costs were fixed by the Authority in a determination dated 26 October 2010.

[4] Then, by application made on 8 November 2010, Mr McCarthy applied for a stay of proceedings, or in the alternative, for an application under [s.123\(2\)](#) of the [Employment Relations Act 2000](#) for an order that payments be made by instalments. Those last two mentioned applications were made in the alternative; if the Authority was minded to grant the stay, the application under [s.123\(2\)](#) of the Act need not be considered.

[5] On 22 November 2010, the Authority issued a notice of direction timetabling the response to the stay application and, inter alia, making an order prohibiting publication of Mr McCarthy's affidavit in support of his stay application, such order being made pursuant to the power vested in the Authority by Schedule 2 clause 10(1) of the Act.

#### Mr McCarthy's applications

[6] As I have just noted, Mr McCarthy applies in the alternative for an order that payments be made by instalments, in respect of both the substantive determination dealing with remedies for the personal grievance, and the subsequent costs determination. That application is made on the grounds that Mr McCarthy is experiencing financial difficulty and the affidavit evidence before the Authority is advanced in support of that proposition.

[7] Alternatively, Mr McCarthy seeks a stay of proceedings to enable his challenge in the Employment Court to be heard and dealt with. The application is argued for on the basis of the usual rules to be applied where a stay is contemplated: see for instance *NZPPTA v. Attorney-General (No 3)* [1991] NZEmpC 89; [1991] 3 ERNZ 708.

[8] The first question to consider is whether Mr McCarthy's right of appeal to the Employment Court would be rendered nugatory if a stay was not granted. Mr McCarthy's position is that he is in no position to satisfy the Authority's award unless he proceeds to sell down his assets which would have the effect of further reducing his ability to earn income. Furthermore, Mr McCarthy is endeavouring to sell part of his business and, in order to do that successfully, he needs to maintain its overall viability by retaining its present assets.

[9] Moreover, Mr McCarthy notes that Ms Jamieson is also impecunious and thus were he to settle his obligation to her now and then be successful or partially successful in his challenge to the Employment Court, he is fearful that he may not be able to recover moneys paid to Ms Jamieson.

[10] The second question to consider is whether Ms Jamieson would be injuriously affected by the granting of a stay. Mr McCarthy deals with this question by proposing a payment regime by instalments into an appropriate trust account. He is also prepared to undertake that in the event he sells a part of his business he will pay any money required to bring the total amount in trust up to the aggregate figure he has been required to pay to Ms Jamieson.

[11] The third issue is whether Mr McCarthy is bona fide in his challenge. Mr McCarthy sets out the basis for his challenge in his stay application. He identifies the particular aspects of the Authority's decision which he thinks are capable of being attacked.

[12] The final issue is the novelty or importance of the question involved. Mr McCarthy acknowledges that while the issues are of no public moment, they are obviously important to him and the consequences to him of being required to pay the Authority's award before the challenge is heard would have a dramatic effect on his business, because the only way that he could do that is to sell an asset which the business requires to continue trading in its current form.

### **Ms Jamieson's response to the stay application**

[13] Essentially, Ms Jamieson alleges that the stay application is simply a stalling tactic designed to delay the payment to her of the sums ordered by the Authority.

[14] Mr McCarthy is impliedly criticised for engaging counsel to attend to the stay application (and presumably the challenge to the Court) and it is alleged that Mr McCarthy's bona fides are in doubt in respect of the genuineness of the challenge and there is no real importance to the challenge so the proper course is for the application to be struck-out.

[15] In respect of the plan to pay by instalments, it is contended that there is no power for the Authority to order an instalment plan under s.123(2) retrospectively. However, assuming that point is not accepted, it is pointed out that Mr McCarthy has made no attempt whatever to make any payment on account despite Ms Jamieson commencing recovery action.

[16] Ms Jamieson also complains that Mr McCarthy has prepared the financial material in his affidavit without the benefit of professional advice and it is suggested that it is therefore not necessarily able to be relied upon.

[17] Finally, Ms Jamieson seeks an improvement in the speed with which the instalments are paid into trust, assuming that the Authority grants Mr McCarthy's application.

### **Determination**

[18] I think this is a case where the Authority ought to exercise its discretion to grant the application for a stay of proceedings. It follows that the alternative application for an order under s.123(2) of the Act does not need to be considered.

[19] It seems to me incontrovertible that if the Authority does not grant the application for stay, Mr McCarthy's challenge will likely be rendered nugatory either because of the damage to his business from the sale of assets or his subsequent inability to recover moneys paid to Ms Jamieson on account, or both. I accept those arguments advanced on Mr McCarthy's behalf, at face value. They seem to me to be made out.

[20] As to the potential injury to Ms Jamieson by the stay, the proposal advanced by Mr McCarthy effectively protects Ms Jamieson's interests while the challenge is working its way through the Employment Court's process. In that time, Mr McCarthy will be able, by instalments, to pay into trust the total amount owed to Ms Jamieson and there it can remain until

the challenge is dealt with.

[21] I am not minded to seek to change the structure of the payments proposed; the reality is that by the time the Employment Court has dealt with Mr McCarthy's challenge, all of the money owed to Ms Jamieson will be held in trust.

[22] I do not accept Ms Jamieson's complaint about Mr McCarthy's bona fides. The Authority was critical of Mr McCarthy's process in dismissing Ms Jamieson and awarded remedies to Ms Jamieson as a consequence. Mr McCarthy thought some of the Authority's criticisms of him unfair and issued a challenge as he is absolutely entitled to do. The basis of that challenge is set out in the application for a stay, but even if it were not, it seems to me appropriate for the Authority to conclude that the right to challenge a determination of the Authority exists because that is Parliament's intention and unless there is evidence that the motivation is simply a delaying tactic, then bona fides ought not to be in contention. I absolutely reject the argument that Mr McCarthy's challenge is simply to delay; he is entitled to challenge a determination he does not agree with and the fact that he is proposing to put money into trust ensures Ms Jamieson's interests are protected.

[23] It is true that there is no particular novelty in the case from a public interest point of view, but that does not make it unimportant. Plainly it is important to both parties. Particularly, it is important to Mr McCarthy that he not be forced to pay the Authority's award until he has had the benefit of the re-hearing of the matter in the Employment Court.

[24] I am not persuaded that it is fair for Ms Jamieson to complain about the financial information in Mr McCarthy's affidavit; plainly, the affidavit is sworn by Mr McCarthy and not by a financial adviser, but it is none the worse for that. Mr McCarthy gives his evidence in a sworn document and, having interviewed him at the original investigation meeting when I made findings against him, I formed the view that, while he had treated Ms Jamieson unfairly, he was not personally dishonest or lacking in integrity. Furthermore, Ms Jamieson cannot have it both ways; she complains that Mr McCarthy has failed to get accounting advice in the preparation of his affidavit of financial means, but then equally grumbles about the cost of Mr McCarthy obtaining legal advice to deal with his stay application and challenge to the Court.

[25] The Authority grants the application for a stay of proceedings filed by Mr McCarthy and orders that Mr McCarthy:

- (a) Pay \$ 1,000 into the Department of Labour's trust account immediately;
- (b) Make monthly payments of \$500 thereafter until \$10,000 is in trust;
- (c) Give an undertaking not to sell or hire his Toyota Hi Ace van registration XK 6012;
- (d) Undertake that if he sells part of his business, he will pay any money required to bring the amount in trust up to \$10,000 within seven days of settlement.

## Costs

[26] Costs are to lie where they fall.

James Crichton

Member of the Employment Relations Authority