

[2] In a subsequent determination (AA 35/10 dated 28 January 2010) the Authority ordered that Ms Kelleher pay the sum of \$9000 to Wiri Pacific as a contribution to its costs.

[3] On 21 January 2010 Ms Kelleher filed an application in the Employment Court for leave to challenge the Authority's substantive determination out of time. Leave was subsequently granted by the Court and, on 11 February 2010 Ms Kelleher filed a challenge in the Court against the Authority's substantive determination.

[4] On 5 March 2010 Wiri Pacific obtained a bankruptcy notice in Ms Kelleher's name from the High Court and on 1 April 2010 filed a statement of defence against Ms Kelleher's challenge in the employment Court.

[5] On 23 April 2010 Ms Kelleher filed an application in the Authority for stay of the cost determination and on 13 May 2010 she filed an application in the High Court to set aside the bankruptcy notice.

[6] On 17 May 2010 Ms Kelleher paid the sum of \$9000 into her Counsel's instructing solicitor's trust account. They, on same day wrote to Wiri Pacific's Counsel advising that they had *received a bank cheque in the amount of \$9000 and that (they) undertook to hold that sum undistributed in the trust account pending agreement of the parties or order of the Employment Court.*

[7] On 29 July 2010 Mr Ropati, for Wiri Pacific, filed submissions in opposition to the stay of the Authority's costs decision.

The submissions

[8] In the application for stay Ms Kelleher says that Wiri Pacific has applied to the High Court for an order of bankruptcy against her and Mr Ryan has since advised that the High Court will hear this application on 15 August 2010. In the interests of ensuring that this determination is issued as quickly as possible, I have summarised only the main points of the Ms Kelleher's application and Wiri Pacific's submissions in response.

[9] In an affidavit accompanying her application Ms Kelleher says that the fact that she has paid the costs awarded into her solicitors trust account is evidence that she can pay the amount ordered. She says that the termination of her employment with Wiri Pacific was acrimonious and that their actions during the latter part of her employment and subsequently leads her to believe that Wiri Pacific is pursuing a personal agenda against her. She says that the actions of Wiri Pacific have caused her real concerns as to their attitude towards paying damages to her if she is successful in a challenge in the Court. She says that she believes that if a stay is not granted then the fruits of any potential success in the Employment Court would be frustrated by Wiri Pacific. Finally she says that she can see no prejudice to Wiri Pacific if a stay is granted and that the undertaking from her solicitors should provide comfort to Wiri Pacific that if she is unsuccessful in her challenge then the \$9000 will be paid to them.

[10] Mr Ropati says that Ms Kelleher has provided no evidence in support of her assertion that her challenge would be rendered nugatory if a stay is not granted. He says that Ms Kelleher has filed no evidence to explain why she has so far refused to comply with the order of the Authority to pay costs and why she did not communicate with the company when invited to make payment. He says that Ms Kelleher has failed to discharge the onus upon her and her application should be dismissed. Mr Ropati cites [1977] 2 NZLR 41 (CA) also *Phillip Morris (NZ) Ltd v Liggett & Myers Tobacco (NZ) Ltd* to support his submission that in the exercise of its discretion (in this case whether or not to grant a stay) the Court, or the Authority, will engage in a balancing exercise weighing up the position of both parties.

Discussion and determination

[11] In *Koia v A-G in respect of the Chief Executive of the Ministry of Justice* [2004] 1 ERNZ 116, Chief Judge Colgan said:

[14] Where there is a challenge to an Authority determination and the defendant to that challenge nevertheless seeks payment of the costs awarded in the Authority, not only are such applications for stay, as Mr Koia has made, both common and appropriate, but the Court frequently requires as a condition of the stay that a sum be paid to an independent stakeholder to be held on interest bearing deposit until the challenge is determined or the

parties otherwise agree. That is a fair and appropriate way of dealing with the situation in this case.

[12] As Mr Ropati has correctly pointed out, whether to grant a stay is a matter for the Authority's discretion and therefore a matter of balancing the position of both parties. As the Chief Judge said in *Koia*, applications to stay the Authority's costs decision in circumstances such as the present case are *both common and appropriate*. Given that Ms Kelleher has already lodged the \$9000 with an *independent stakeholder* I cannot see how there can be any prejudice against Wiri Pacific nor any danger that Ms Kelleher will not be able pay the amount owing should she be unsuccessful in her challenge. Ms Kelleher has not been tardy in pursuing her challenge against the substantive determination. It is not clear from the papers I have seen whether Ms Kelleher has filed an amended statement of claim in the Court, as is the usual practice, incorporating a challenge to the Authority's costs decision. (ref. *Koia* at paragraph [10] and [11].) If this has not yet been done a condition of any stay will be that Ms Kelleher immediately file an amended statement of claim in the Court in these terms.

[13] Exercising my discretion in terms of s. 180 of the Employment Relations Act 2000, and having weighed the interests of the parties, **the order that Ms Kelleher pay \$9000 to Wiri Pacific as a contribution to their costs, as set out in Authority Determination AA 35/10 dated to 28 January 2010, is stayed on the following conditions**

- The \$9000 held in Ms Kelleher's solicitors' (Haigh Lyon) trust account is to continue to be held in that account pending agreement between the parties or order of the Employment Court.
- If it has not yet been done Ms Kelleher is to immediately file an amended statement of claim in the Court incorporating her challenge to the Authority's costs determination.
- Ms Kelleher is to continue to prosecute her challenge as expeditiously as is practical.

Costs

[14] Costs on this application are reserved on the basis that they are best dealt with by the Court as part of its disposition of Ms Kelleher's challenge.

James Wilson

Member of the Employment Relations Authority