



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2018](#) >> [\[2018\] NZEmpC 146](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Lorigan v Infinity Automotive Limited [2018] NZEmpC 146 (6 December 2018)

Last Updated: 12 December 2018

IN THE EMPLOYMENT COURT AUCKLAND

[\[2018\] NZEmpC 146](#)

EMPC 377/2015

EMPC 277/2016

IN THE MATTER of challenges to determinations of the Employment Relations Authority

AND IN THE MATTER of an application for stay of proceedings pending appeal

BETWEEN PETER D'ARCY LORIGAN Plaintiff

AND INFINITY AUTOMOTIVE LIMITED Defendant

Hearing: 5 December 2018
(by telephone)

Appearances: P Lorigan, in person
R Towner and B Norrie, counsel for defendant

Judgment: 6 December 2018

INTERLOCUTORY JUDGMENT (NO 6) OF JUDGE B A CORKILL: (Application for a stay of proceedings pending appeal)

Introduction

[1] Earlier this week, I issued an interlocutory judgment dealing with applications as to admissibility of evidence, and for a stay of a compliance order.¹ In the course of that judgment I dismissed what in my view amounted to an application by Infinity Automotive Ltd (Infinity) that Mr Lorigan should be regarded as having breached an unless order by filing an application for leave to file supplementary evidence, and that

his two challenges should be dismissed.

¹ *Lorigan v Infinity Automotive Ltd (No 5)* [\[2018\] NZEmpC 143](#).

PETER D'ARCY LORIGAN v INFINITY AUTOMOTIVE LIMITED NZEmpC AUCKLAND [2018] NZEmpC 146 [6 December 2018]

[2] Infinity immediately filed an application for leave to appeal that finding to the Court of Appeal on the basis that the conclusions of the Court were wrong in law, and that there are questions that by reason of their general or public importance ought to be submitted to the Court of Appeal for decision.²

[3] Because a four-day fixture has been set down to hear Mr Lorigan's two challenges next week, an urgent application to stay the proceeding in this Court was filed by Infinity. I made directions to enable that application to be dealt with promptly at a telephone

submissions-only hearing, held yesterday.

[4] It is necessary to outline the context. In an earlier interlocutory judgment of

8 August 2018, I made an unless order directing Mr Lorigan to file and serve briefs of evidence for himself and any other witnesses he intended to call, and documents pertaining to the hearing of his challenges, by 5.00 pm on 5 November 2018, time being strictly of the essence.³ This order was necessary having regard to a succession of previous timetabling issues, as outlined in that judgment.

[5] I went on to direct that unless Mr Lorigan's briefs of evidence and documents were so filed, the challenges which the Court is about to hear would be struck out.

[6] In fact, Mr Lorigan did file a brief of his intended evidence and documents, on

5 November 2018. In my view, there was thereby compliance with the timetabling order, so that the unless order did not take effect.

[7] However, on 14 November 2018, Mr Lorigan sought leave to present evidence with regard to alleged "Crimes in the workplace", evidence that such "Crimes were concealed" by various named individuals, and evidence relating to what he described as "falsehoods, perjury, witness tampering and threats" by various named individuals. In the interlocutory judgment issued earlier this week I dismissed that application on

the grounds the material was not relevant in a legal sense, nor reliable.⁴

2 [Employment Relations Act 2000, s 214\(3\)](#).

3 *Lorigan v Infinity Automotive Ltd (No 4)* [2018] NZEmpC 89.

4 *Lorigan v Infinity Automotive Ltd*, above n 1, at [25].

[8] Infinity had contended that the attempt to file evidence after the date recorded in the unless order meant that it took effect automatically.

[9] In my judgment, I recorded that as Mr Lorigan's applications to have such evidence admitted had been dismissed, there was no current and live issue as to the admissibility of further evidence. I concluded that it was not appropriate for

Mr Lorigan's challenges to be regarded as struck out pursuant to the unless order.

[10] Infinity's concerns could have become relevant if I had not dismissed

Mr Lorigan's application. If I had ruled that his material was potentially relevant and reliable, it would have been necessary to consider whether the evidence should be admitted given the unless order. Implicit in Infinity's position was the possibility that the Court would need to consider whether it was in the interests of justice to extend the unless order to that material; that was why I considered Infinity had placed an application before the Court. Since that situation did not arise, I dismissed the application which had, in effect, been brought by Infinity.

[11] I have now been provided with a copy of the application for leave, as filed in the Court of Appeal. It raises questions of law which, summarised, relate to an issue as to whether the Court erred by not striking out Mr Lorigan's challenges as an automatic consequence of Mr Lorigan's asserted failure to comply with the Court's unless order to file and serve all his evidence by 5 November 2018.

Submissions

[12] Mr Towner submitted that the criteria for the grant of a stay of execution pending appeal was well known, and appropriately summarised by the Court of Appeal in *New Zealand Cards Ltd v Ramsay*.⁵ The Court said:

[7] The criteria for the grant of a stay of execution are well known. In determining whether or not to grant a stay, the Court must weigh the factors in the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position in case the appeal is successful. Relevant factors include whether the appeal would be rendered nugatory, if the stay were not granted, the bona fides of the applicant as to the prosecution of the appeal, the effect on any third parties, injury or detriment to the

5 *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

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 on appeal and the overall balance of convenience.

(footnotes omitted)

[13] Mr Towner addressed these factors, submitting that an evaluation of them suggested a stay of proceeding should be granted, which would have the effect of next week's fixture having to be vacated.

[14] The essence of Mr Towner's submissions was that not to grant a stay would render Infinity's appeal rights nugatory, that the application for leave had been made on a bona fide basis, and that there could be no material prejudice for Mr Lorigan were the Court to grant such an order.

[15] Mr Lorigan strongly opposed the application for stay. However, his submissions focused on a substantive matter, which was whether Infinity was ever his employer. He did not address the matters outlined by the Court of Appeal in *Ramsay* in any detail.

[16] I asked Mr Lorigan to clarify whether he was intending to advance his own application for leave to appeal to the Court of Appeal, a matter which I touched on in my judgment earlier this week. He said he had yet to decide whether he would do so.

Discussion

Rendered nugatory?

[17] Were Infinity to obtain leave to appeal, and were it then to argue successfully that the unless order should have taken effect automatically when Mr Lorigan sought to introduce further evidence, his challenges would be deemed to be struck out. There would in those circumstances be no point in conducting the hearing next week. Logically, the issue raised by Infinity must first be resolved.

[18] This is a strong factor in favour of a stay, since not to grant such an order would render the appeal right nugatory.

Has the application for leave to appeal been brought in good faith?

[19] Infinity has a right to seek leave of the Court of Appeal to appeal, by satisfying the criteria of [s 214](#) of the Act. It has exercised that right. Mr Towner assures the Court that he has irrevocable instructions to pursue the application diligently.

[20] Mr Lorigan submitted that the step was being taken for an ulterior purpose, and so as to avoid a hearing in this Court where wrongful conduct on the part of witnesses to be called by Infinity would be exposed. I have no evidence that this is the reason for instituting the application for leave to appeal, and find that it is being brought on a bona fide basis. This factor supports the granting of a stay.

Detriment to Mr Lorigan if stay is granted

[21] If the appeal succeeds, then Infinity is entitled as a matter of law to whatever result is considered appropriate by the Court of Appeal. Were leave to be declined, or were the appeal to fail, then this Court would reschedule the hearing promptly, thus allowing an opportunity for the challenges to be heard. However, there would in that event be delay in the hearing of Mr Lorigan's challenges.

[22] There has already been significant delay in the advancing of those challenges. But much of that delay has been caused by significant non-compliance by Mr Lorigan of the Court's directions on such matters as the filing and serving of further and better particulars, the provision of disclosure of documents, as well as the filing and serving of his evidence and documents for the hearing; such non-compliance resulted in a previous fixture having to be vacated. Mr Lorigan to this point has created much of the previous delay which has occurred. This is the context within which I must consider the apparent detriment to Mr Lorigan if the fixture does not proceed next week.

[23] In all the circumstances, I conclude that delay is not a factor which should tell against the grant of a stay.

Novelty importance and public interest

[24] It is not for this Court to express a view on whether leave to appeal should be granted on a point of law which is of importance, or on whether an appeal would succeed if leave were to be granted. I regard this factor as neutral.

Overall justice

[25] I accept Mr Towner's submission that a further factor which should weigh into the scales is potential unnecessary cost and inconvenience in having to participate in a four-day fixture, which may prove to be unnecessary if, as a matter of law, the challenges no longer exist.

[26] I also take into account the possibility that Mr Lorigan may yet decide to pursue his own application for leave to appeal the Court's earlier interlocutory judgment of

8 August 2018; were that to occur, there would then be a yet further reason for the proceedings in this Court to be stayed whilst his application was considered.⁶

[27] These factors point to the necessity for a stay.

Conclusion

[28] In the interests of justice, I grant an order of stay of the proceedings which are before the Court, subject to the following conditions:

- a) Leave is reserved to apply to vary, amend or revoke the stay, on reasonable notice.
- b) Counsel for Infinity is to forward to the Registrar a copy of any judgment issued by the Court of Appeal with regard to the application for leave, as soon as that is received.

c) Costs are reserved.

[29] The effect of this order is that the fixture will not proceed next week.

⁶ *Lorigan v Infinity Automotive Ltd*, above n 3.

[30] It is my expectation that the parties draw this judgment to the attention of the Court of Appeal, in case its contents are considered relevant to context.

B A Corkill

Judge

Judgment signed at 2.55 pm on 6 December 2018

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)
URL: <http://www.nzlii.org/nz/cases/NZEmpC/2018/146.html>