



Employment Court of New Zealand

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Lyttelton Port Company Limited v Arthurs [2017] NZEmpC 44 (4 May 2017)

Last Updated: 11 May 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2017\] NZEmpC 44](#)

EMPC 85/2017

IN THE MATTER OF a challenge to a determination
 of the
 Employment Relations
 Authority

AND IN THE MATTER of a stay of proceedings

BETWEEN LYTTELTON PORT COMPANY
 LIMITED
 Plaintiff

AND CHRIS MILES ARTHURS
 Defendant

Hearing: By joint memorandum of counsel filed on 28 April
 2017

Appearances: T Mackenzie, counsel for plaintiff
 D Beck, counsel for defendant

Judgment: 4 May 2017

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

Introduction

[1] The plaintiff has applied for a stay of proceedings of the determination of the Employment Relations Authority (the Authority) pending the Court deciding its challenge to that determination.¹

Background

[2] The following background information is taken from the Authority determination. Mr Chris Arthurs was employed by Lyttelton Port Company Ltd

¹ *Arthurs v Lyttelton Port Co Ltd* [2017] NZERA Christchurch 53.

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(LPC) as a cargo handler from 2000, until his employment was terminated on 8

December 2015 for medical incapacity.

[3] The determination records in some detail a complex set of circumstances leading to Mr Arthurs's dismissal which began when LPC introduced its "Drug and Alcohol Impairment Free Workplace" policy. On 28 November 2014 Mr Arthurs was selected for a random test under that policy which he initially refused to undertake. Eventually he agreed to undertake the test but appears to have had reservations about signing the consent form that was necessary for him to complete. Issues about privacy, and perhaps also about

whether the consent form complied with LPC's own policy, lay behind that refusal. This incident precipitated his absence on sick leave. Eventually, Mr Arthurs was absent from the workplace on sick leave, supported by medical certificates, for approximately 12 months before his employment was terminated.

[4] Mr Arthurs's difficulties in completing the consent form (and perhaps also in the reservations he had in undertaking the random test) appear to have had their origins in him suffering from post-traumatic stress disorder (PTSD). The Authority heard that Mr Arthurs was diagnosed with PTSD after witnessing the death of a co-worker at the port in 2008. This diagnosis was made on 12 September 2014, shortly after a close personal friend, and workmate, of Mr Arthurs had also been killed at the port. The medical certificate supporting this diagnosis noted that Mr Arthurs struggled with PTSD and it affected his personal and work life. The Authority also heard that PTSD impacted on his decision making.

[5] Throughout Mr Arthurs's absence on sick leave, there was reasonably regular communication between him and LPC. On 29 July 2015 LPC sought further information about Mr Arthurs's condition from him. By 19 November 2015 LPC had received a report from its own medical practitioner into two issues which were identified as impacting on Mr Arthurs's work capacity; the PTSD and injuries which were non-work related which he had suffered to his right shoulder and right elbow. The Authority's determination says, in relation to this evidence:

[34] ... Overall it did not appear the PTSD would prevent a return to work. The major issues preventing his return to work [were] his right

shoulder and right elbow injury. He was not currently fit to return to his usual range of work activity. However he was regarded as fit for light or alternative duties which do not involve elevation of the right upper limb and did not involve any forceful loading to the right shoulder. ...

[6] The Authority records that following receipt of the report, LPC wrote to Mr Arthurs on 25 November 2015, setting out a preliminary view that he may be dismissed for medical incapacity. As has already been noted, he was dismissed on 8

December 2015.

[7] The Authority concluded that LPC's decision to dismiss Mr Arthurs was not justified because the company did not approach the decision in a fair and open-minded way. In reaching that conclusion the Authority said that the expert opinion available to LPC, that he could return to work, was disregarded; no return to work was investigated despite LPC's policy to do so, and the finding made by LPC that there were no light duties available to him was never put to Mr Arthurs. The Authority concluded that there were light duties available and that numerous medical certificates were not unusual in situations of long-term medical incapacity. The determination was that LPC could have accommodated Mr Arthurs's return to work after a lengthy absence and had done so for several other injured employees in the same work area.

[8] The Authority held that the deficiencies it had identified were not minor. As a result the conclusion reached by the Authority was that Mr Arthurs was unjustifiably dismissed. The Authority also determined that it was appropriate for him to be reinstated to his former position as a cargo handler. His reinstatement was subject to four conditions as follows:

a. He must file two medical certificates one from his physiotherapist GN and one from his doctor treating his PTSD within 20 working days of the date of this decision. The medical certificates should state whether he is fit to resume work as a cargo handler at the Lyttelton Port Company and the date this should occur;

b. Reinstatement shall take place upon a date to be determined by the

Lyttelton Port Company Limited;

c. Mr Arthurs is to fully cooperate with any retraining required to meet any changed conditions of the workplace during his absence; and

d. During the first six months of his return to employment, he is to present himself twice for random drug and alcohol tests to be determined by Lyttelton Port Company's drug testing agency. He is to sign the written consent forms. He is not required to undergo the rehabilitation programme unless he refuses to undergo or fails the drug testing.

[9] The Authority ordered LPC to pay Mr Arthurs \$20,000 compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act).

[10] LPC has challenged that determination and is seeking a hearing de novo. The remedies it is pursuing are a finding that the dismissal was justified, as well as seeking "a reversal of any costs order" that might be made by the Authority, and costs.

Application for stay

[11] The application for a stay was filed on 18 April 2017. The grounds of that application are:

a. If no stay is granted, the applicant's right of appeal will be ineffectual as the respondent will have returned to the workplace;

b. The appeal is brought and prosecuted for good reasons and in good faith.

c. The respondent will not be injuriously affected by a stay as the respondent remains on ACC and is not incurring lost wages.

- d. There are novel and important questions involved in the case particularly regarding disparity in medical incapacity, what steps a reasonable employer is obliged to take to encourage a return to work, what engagement is required in an incapacity process from an employee, and whether the Authority can disregard an employer's reliance on a drug testing policy.
- e. There is a public interest in the safe operation of the applicant's workplace, which may be compromised by the return of the respondent.
- f. The overall balance of convenience favours a stay being granted.

[12] On 28 April 2017 a joint memorandum was filed by counsel for the parties in which they requested that a stay be granted by consent subject to the following conditions:

- a) The defendant is returned to the payroll of the plaintiff on 7 May 2017 at the current base pay rate for 40 hours per week for his role. This will include restoration of his superannuation payments & the employer contribution and union fee deductions. For the avoidance of doubt the defendant will not be required to attend work.
- b) Condition (a) will continue until the outcome of the Court challenge is known.
- c) Despite conditions (a) and (b) above, the parties seek that leave be reserved for the parties to apply to cancel or modify the stay and/or the conditions of it if either party apprehends that the challenge is not being pursued with reasonable diligence.
- d) Regardless of the outcome of the challenge the plaintiff represents that it will not seek to recover the remuneration paid in condition (a).
- e) The defendant reserves the right in the Court proceedings to recover any additional overtime/shift allowance remuneration should his reinstatement be ordered by the Court.
- f) The \$20,000 compensation award is to be paid into the Employment Court's trust account by the plaintiff and kept on an interest bearing deposit pending the outcome of the challenge. Any release of these monies will only occur by order of the Court.
- g) Costs are reserved.

Discussion

[13] The power to grant a stay is conferred by reg 64 of the [Employment Court Regulations 2000](#). Pursuant to reg 64(3) any stay may be made subject to conditions the Court considers fit to impose. In *Assured Financial Peace Ltd v Pais* Chief Judge Colgan observed that reg 64 gives a broad discretion with the ultimate test

being the interests of justice as between the parties.²

[14] I am satisfied that the interests of justice are met by granting the application and imposing the conditions proposed by the parties. However, condition (f) needs to be modified so that the payment is made within 14 days of the date of this decision and notice of that payment is provided to the Registrar.

[15] On that basis the application is granted subject to the conditions as modified.

² *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [4].

[16] Leave is reserved for either party to apply to vary or alter the stay. [17] Costs are reserved.

KG Smith

Judge

Judgment signed at 1 pm on 4 May 2017