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MGK Homes Limited v Yoon [2023] NZEmpC 22 (22 February 2023)

Last Updated: 28 February 2023

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2023\] NZEmpC 22](#) EMPC 306/2022

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority AND IN THE MATTER OF an application for stay

AND IN THE MATTER OF the nature and scope of the challenge

BETWEEN MGK HOMES LIMITED

Plaintiff

AND BOMI YOON

Defendant

Hearing: On the papers

Appearances: M Beech, counsel for plaintiff

Seungmin Kang, counsel for defendant

Judgment: 22 February 2023

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Application for stay and nature and scope of challenge)

[1] In its determination dated 9 August 2022, the Employment Relations Authority (the Authority) found that the plaintiff, MGK Homes Ltd (MGK), had unjustifiably dismissed the defendant, Ms Yoon. MGK was ordered to pay Ms Yoon \$15,576.84 (gross) as lost wages, \$20,000 pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act), and \$4,544.25 as special damages under [s 123\(1\)\(b\)](#) of the Act.¹

¹ *Yoon v MGK Homes Ltd* [\[2022\] NZERA 377](#) at [\[93\]](#) (Member Blick).

MGK HOMES LIMITED v BOMI YOON [\[2023\] NZEmpC 22](#) [22 February 2023]

[2] Ms Yoon also had sought penalties against both MGK and its director, Mr Kang, who was the second respondent in the Authority. The penalty sought against MGK was in respect of its alleged breaches of Ms Yoon's employment agreement; the penalty sought against Mr Kang was for his alleged aiding and abetting the alleged breaches. No penalties were ordered.²

[3] In its subsequent costs determination, the Authority ordered MGK to pay Ms Yoon a total of \$6,876.31, which included Ms Yoon's translation costs and the Authority filing fee.³

[4] This judgment resolves two issues:

- (a) MGK's application for a stay of the Authority proceedings, effectively staying the Authority's orders as to remedies; and
- (b) the nature and scope of the challenge before the Court.

Ms Yoon would accept a stay on conditions

[5] Ms Yoon is prepared to consent to a stay of the Authority's orders on the basis that MGK pays the amounts due under the substantive and costs determinations into Court.⁴

[6] MGK resists such an order and seeks a stay without conditions.

[7] Mr Kang has provided two affidavits. Relevantly in respect of the stay, he deposes that MGK has net assets of \$1.5 million as at 31 March 2022, but that it only had a slightly positive cashflow position as at 23 November 2022. He says that paying the remedies awarded by the Authority pending the outcome of the Employment Court proceedings would put the company under considerable pressure, irrespective of whether payment is made to Ms Yoon or into Court.

2 At [86] and [87].

3 *Yoon v MGK Homes Ltd* [2022] NZERA 515 at [25] (Member Blick).

4 The costs determination was issued after the application for a stay was filed, but was expected.

[8] Mr Kang provides documents in respect of a residential property in Welcome Bay, Tauranga that is owned by MGK. He includes a valuation report carried out in January 2022 that assessed the market value of the property "as is" to be \$525,000. The property is subject to two mortgages. The first mortgage is to a priority amount of

\$750,000, and the second to a priority amount of \$200,000 plus interest. In his affidavit of December 2022 Mr Kang deposes that the current equity in the property is approximately \$122,300, suggesting that Ms Yoon's position would be preserved by her being given a third mortgage against the property.

The Court will consider various factors on an application for a stay

[9] Filing a challenge does not operate as a stay of a determination.⁵ The successful party at first instance is generally entitled to the remedies ordered.⁶ However, the Court has the power to order a stay where it is in the interests of justice to do so.⁷ The parties largely agree on the factors that the Court will usually consider.

[10] Those include:⁸

- (a) whether the challenge will be rendered ineffectual if the stay is not granted;
- (b) whether the challenge is brought and pursued in good faith;
- (c) whether the successful party at first instance will be injuriously affected by a stay being granted;
- (d) the extent to which a stay will impact on third parties;
- (e) the novelty and/or importance of the question involved;
- (f) if there is public interest in the proceedings; and
- (g) the overall balance of convenience.

5 [Employment Relations Act 2000, s 180](#).

6. *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; (1999) 13 PRNZ 48 (CA), at [30].

7 [Employment Court Regulations 2000](#), reg 64.

8. *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7]; and *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

[11] Not all of these factors are relevant in this case; MGK's application focusses on the factors identified in (a), (b), (c) and (g) above.

[12] MGK submits that if it was required to satisfy the remedies ordered by the Authority prior to the challenge being determined by the Court, that could render the challenge nugatory. That is because if MGK is successful, it would have to seek recovery from Ms Yoon with no guarantee of success, especially if Ms Yoon elected to return to Korea.

[13] As noted, however, Ms Yoon would consent to an order that the monies be paid into Court and that would answer this concern.

[14] In his evidence, Mr Kang also says that he and MGK genuinely believe that the determination is wrong. He says the challenge is being pursued diligently. For the purposes of the application for a stay, I accept that the challenge is brought and will be pursued in good faith.

[15] MGK says that the payment of the remedies at this stage would put further significant pressure on the cashflow of MGK. It says that if a third ranking mortgage were provided to Ms Yoon, she could have confidence that, if the challenge is unsuccessful, there are assets available to satisfy her judgment. I am not satisfied that is a reasonable conclusion. The priority levels of the current mortgages, and the equity stated by Mr Kang, which is based on a valuation in January 2022, puts a significant risk on Ms Yoon that she would be unable to recover any amount ultimately ordered by the Court, even if the property was sold. MGK's proposal also requires Ms Yoon to enter into, and potentially seek to rely on the proposed third mortgage, which is unreasonable. For these reasons, the balance of convenience does not favour a complete stay of the Authority's determination.

[16] In the circumstances, in the interests of justice, I order that a stay be granted over the Authority's substantive and costs determinations, effectively staying the execution of those determinations, for an initial period of one month from the date of this judgment to enable MGK to make arrangements for securing the amounts awarded by the Authority.

[17] If, prior to the end of that month, MGK pays the sum of \$46,997.40 into Court, covering the sums ordered to be paid in the substantive determination and in the costs determination, the stay will continue pending further order of the Court.

Challenge is non-de novo on the matters raised by MGK

[18] MGK's challenge is expressed to be:

... a de novo challenge on all findings against the Plaintiff in the Employment Relations Authority. The Plaintiff is not challenging any findings against the Second Respondent, Mr Mington Kang.

[19] Understandably, MGK does not seek to challenge the Authority's decision not to impose a penalty on MGK.⁹

[20] Mr Kang is not named in the statement of claim as a party to these proceedings. Ms Yoon filed a statement of defence in which she names Mr Kang as the second defendant. In the statement of defence, Ms Yoon contends that, as the matter is a de novo challenge, all issues that were before the Authority are before the Court, including the claims for penalties that she brought against MGK and Mr Kang. In her statement of defence, she says that as well as seeking to uphold the Authority's determination in respect of the unjustifiable dismissal and remedies, she seeks a judgment setting aside the Authority's determination in so far as it declined the penalties sought against MGK and Mr Kang. Ms Yoon seeks an order from the Court that they pay penalties in a sum the Court thinks fit.

[21] MGK submits that, being dissatisfied with the determination, it may challenge the entire matter on a de novo basis in so far as the case was decided against it.

[22] The distinction in the Act between de novo and non-de novo challenges is clear cut; either all matters in the determination are being challenged before the Court – a de novo challenge – or they are not, in which case the challenge is non-de novo. It is not possible for a challenge to be de novo for part-only of a determination.¹⁰

⁹ *Yoon v MGK Homes Ltd*, above n 1, at [86].

¹⁰ *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [13].

[23] Accordingly, the challenge is properly classified as a non-de novo challenge.

[24] Section 179(4) of the Act places requirements on non-de novo challenges, even where the non-de novo nature

of the case arises because more than one issue was before the Authority and not all issues are before the Court. The statement of claim filed by MGK is something of a hybrid. Although it refers to a de novo challenge, it includes assertions of the Authority's alleged errors of law and fact, which are required for non-de novo challenges. MGK is now to file an amended statement of claim as a non-de novo challenge, and complying with s 179(4).

[25] If Ms Yoon wishes to pursue the penalty issue, she will need to apply for leave to file her own non-de novo challenge, given the timeframe issue.

[26] Mr Beech, counsel for MGK, who also represented Mr Kang in the Authority, has advised however, that, if the Court determines the challenge is non-de novo, MGK will consider consenting to Ms Yoon being given leave to cross-challenge if she so wishes.

[27] Once the pleadings are settled, the Court will need to make directions as to the nature and extent of the hearing.¹¹ This will include the extent to which evidence is called, allowing the Court to fully hear the matters in issue, if that is appropriate.¹² The Court then will make its own decision on the matters before it.¹³

Orders made

[28] The Court's orders therefore are:

(a) There is a stay of the Authority's substantive and costs determinations, effectively staying the execution of those determinations, for an initial period of one month from the date of this judgment.

¹¹ [Employment Relations Act, s 182\(3\)\(b\)](#).

¹² *Carter Holt Harvey Ltd v Yukich* CA 42/04, 28 April 2004 at [37]; see also *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [10]–[11]; and *Evans v JNJ Management Ltd* [2020] NZEmpC 181 at [3]–[6].

¹³ [Employment Relations Act, s 183\(1\)](#).

(b) If, prior to the end of that month, MGK pays the sum of \$46,997.40 into Court, the stay will continue pending further order of the Court.

(c) MGK is to file and serve an amended statement of claim as a non-de novo challenge, satisfying [s 179\(4\)](#) of the Act. This is to be done within one month of the date of this judgment.

(d) Ms Yoon must then file and serve a statement of defence to the amended statement of claim within a further 14 days.

(e) If she wishes to pursue the penalty issue, Ms Yoon will need to apply for leave to file her own non-de novo challenge, with any such application also to be filed before the end of this period.

[29] There will then be a directions conference to progress this matter further.

[30] Costs are reserved.

J C Holden Judge

Judgment signed at 11.10 am on 22 February 2023