



# Employment Court of New Zealand

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## Smartlift Systems Limited v Armstrong [2020] NZEmpC 80 (8 June 2020)

Last Updated: 11 June 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2020\] NZEmpC 80](#)

EMPC 419/2019

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

AND IN THE MATTER    of an application for stay of  
proceedings

BETWEEN                SMARTLIFT SYSTEMS LIMITED  
Plaintiff

AND                        BROCK ARMSTRONG  
First Defendant

AND                        GRAEME HAIKA  
Second Defendant

Hearing:                (on the papers)

Appearances:        L Mathieson, advocate for plaintiff  
R Thompson, advocate for  
defendants

Judgment:            8 June 2020

### INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for stay of proceedings)

#### Introduction

[1] Smartlift Systems Ltd (SSL) has challenged a determination of the Employment Relations Authority which dealt with issues arising from a decision to terminate the employment of Mr Armstrong and Mr Haika because they were redundant.<sup>1</sup>

<sup>1</sup> *Armstrong v Smartlift Systems Ltd* [\[2019\] NZERA 592 \(Member van Keulen\)](#).

SMARTLIFT SYSTEMS LIMITED v BROCK ARMSTRONG [\[2020\] NZEmpC 80](#) [8 June 2020]

[2] Mr Armstrong and Mr Haika both claimed that SSL unjustifiably dismissed them as a result of the restructuring process which was undertaken. The Authority found that the restructure was substantively justified, but there were procedural flaws. It also considered issues relating to an alleged failure on the part of the employer to keep a copy of Mr Haika's signed employment agreement. The Authority determined:<sup>2</sup>

- a. The company had unjustifiably dismissed both Mr Armstrong and Mr Haika, and should therefore pay:
  - i. To Mr Armstrong, \$12,000 as compensation for humiliation, loss of dignity and injury to feelings.
  - ii. To Mr Haika, \$10,000 as compensation for humiliation, loss of dignity and injury to feelings.
- b. The company had failed to keep a signed copy of Mr Haika's employment agreement and should therefore pay a penalty of \$500 to the Crown.
- c. The Authority also found that Mr Armstrong and Mr Haika had breached a duty of fidelity and must pay penalties to SSL of \$4,000 each.

[3] SSL filed its statement of claim on 13 November 2019; on the same day it applied for a stay of proceedings, which if granted would have the effect of preventing enforcement of the monetary orders. An amended application was filed on 19 November 2019 and served thereafter on the defendants.

[4] The defendants filed a statement of defence within the period allowed for doing so, on 17 December 2019; on the same day they filed an application for leave to file a notice of opposition to the amended application for stay out of time as it was at that point realised the latter document had not been filed within 14 days of service of the notice of application.

2 At [85]–[87].

[5] In a subsequent minute on 1 April 2020, I granted leave for the filing of the notice of opposition, for these reasons:

- a. The notice of opposition had been filed late due to a representative's incorrect understanding of the applicable timeframe for filing. It had been assumed the notice of opposition could be served at the same time as the statement of defence. There was no evidence the delay was caused by the defendants themselves. They should not be prejudiced by their representative's inadvertent error.
- b. The delay had to be seen in context. A notice of opposition was in fact due two weeks before the statement of defence was due to be filed.
- c. The amended application for stay could not realistically have been considered until the statement of defence was filed, since only then would it have been clear what the issues in the challenge would be. Further, the submissions of the parties which had been filed on this point suggested no attempt had been made to enforce the sum which the Authority had ordered for payment.
- d. I also noted that no evidence had been filed in support of the amended application for stay; nor had any consideration been given on behalf of the plaintiff to the sum involved being paid to the Registrar to be held in an interest-bearing account, as is often ordered. In short, the amended application for stay in its then form was not straightforward.

[6] The defendants then filed a notice of opposition which addressed conventional factors. Key points were that SSL had not provided any evidence as to its financial circumstances; that the defendants were open to the possibility of the full sum involved being paid into Court; and that the plaintiff's intended case was not strong.

### **Legal framework**

[7] The applicable principles for a stay of execution are well known. The Court has a broad discretion which must be exercised judicially and in accordance with

principle. In doing so, the Court should weigh the rights of the successful litigant to have the benefits of any determination being challenged and those of the party challenging a determination to have the position preserved in case the challenge succeeds.<sup>3</sup>

### **Evidential issues**

[8] The parties provided affidavit evidence and submissions.

[9] Initially, the defendants' opposition to the amended application for stay focused on the point that, prima facie, they were entitled to the money awarded by the Authority.

[10] But it was also submitted on their behalf that requests had been made for SSL to make payment into a trust account; this had not occurred. Although the defendants could have enforced the sums they had been awarded, they chose not to do so until the interlocutory application was resolved.

[11] It was also suggested that if the money was not paid into a trust account or similar, there would be a concern that the company could face liquidation and the defendants' current entitlements would be rendered nugatory.

[12] In an allied submission, it was submitted that no supporting evidence or information had been provided as to the company's financial means.

[13] On the topic of ability to pay, SSL filed an affidavit from its director, Craig Burrell. He said that the company would prefer not to make any payment into Court; if it was required to do so, this would cause a financial burden on the company's construction business. He said that its preference was to retain the funds for cash-flow purposes, and to enable it to retain employees during the challenging COVID-19 lockdown period. He also said, however, that if the Court did so order, the company would endeavour to comply with the Court's directions. He also noted that if the

3. *ESKA Ltd v Belouos* [2019] NZEmpC 14 at [9]; see also *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [4]–[5]; and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; [1999] 3 NZLR 239 (HC).

company was required to pay money into Court, then the defendants should also pay into Court the sums they were directed to pay to SSL, which at that stage were unpaid.

[14] In light of these factors, on 18 May 2020, I convened a telephone directions conference to discuss the various issues raised.

[15] Following that conference, I issued a minute confirming that Mr Burrell should, in the unusual circumstances which pertained, have an opportunity of providing more precise evidence relating to the company's financial circumstances than had been filed to that point.

[16] At the conference, Mr Thompson, advocate for Mr Armstrong and Mr Haika, confirmed that his clients had not paid the penalties due to SSL. I expressed the provisional view that if the Court were to conclude a stay should be ordered subject to a condition of payment of some or all of the judgment sum, it would appear consideration should be given to the possibility of taking those sums into account, so that the starting point for the Court's consideration would be \$14,500.

[17] Subsequently, further information was filed on behalf of SSL. It showed significant debt, and a constrained ability to pay the sum involved, in part because of lockdown issues, which are ongoing. There is also evidence that SSL is owed monies by Mr Armstrong as the result of a Disputes Tribunal hearing in respect of which weekly repayments have been agreed but not always adhered to.

## Discussion

[18] It is convenient to begin by considering the issues which are in fact raised by the challenge. It focuses on three aspects only of the Authority's determination:

- a. Whether the findings made that there were flaws in the process of consultation for redundancy was correct, either in fact or in law.
- b. Whether the Authority erred, as a matter of fact, by not finding that s 103A(5) of the [Employment Relations Act 2000](#) (the Act) applied, to the effect that any flaws in the process leading to the decision to

terminate the defendants' employment agreements were minor and did not cause prejudice.

- c. Whether the Authority erred on matters of fact when determining compensation issues under [s 123\(1\)\(c\)\(i\)](#) of the Act.

[19] I also note that none of the penalty findings made by the Authority are challenged by either party.

[20] Whilst SSL submits that its prospects of success at the hearing of the challenge are strong, the defendants submit that they are weak. I am not persuaded that either characterisation is correct having regard to the information contained in the Authority's determination. It is plain that the challenge is brought in good faith, but it is also clear that the outcome may well turn on factual determinations which cannot be accurately assessed on the limited information the Court has as to the merits at this early stage.

[21] I also observe that the issues involved do not raise significant legal issues, and nor do they raise matters of public importance. The dispute is essentially a private one, and of fairly narrow compass. There is no evidence that the interests of third parties will be affected.

[22] It is common in cases of this kind to direct that a sum be paid into Court. This protects the plaintiff's position, because there are no issues of recovery from a defendant if the challenge succeeds. It also provides a measure of security to a defendant, because a fund will be available to them if the challenge fails. Such an outcome balances the parties' respective positions.

[23] In my view, that is the appropriate step in this case. The real issue relates to the correct amount, and whether such a sum should be paid in one sum or in instalments. As noted earlier, the sum involved, at most, is \$14,500.

[24] There is no doubt that SSL is in a difficult financial situation at present, catalysed by lockdown issues. I also take into account the fact that the period for

which funds may be held by the Registrar is confined – the hearing is currently scheduled to take place on 7 and 8 September 2020; the judgment will be issued as soon as is practicable thereafter.

## Outcome

[25] Standing back, I am satisfied the Authority's determination should be stayed in respect of all the sums it awarded to the parties to be paid; this order is subject to SSL making three equal payments of \$4,400 on 1 July, 3 August and 1 September 2020 to the Registrar; those sums are to be held in an interest-bearing account until further order of the Court.

[26] I reserve leave to either party to apply for further directions. I also reserve costs.

B A Corkill Judge

Judgment signed at 11.45 am on 8 June 2020

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