



Employment Court of New Zealand

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Solid Roofing Limited v Newman [2018] NZEmpC 135 (13 November 2018)

Last Updated: 16 November 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[\[2018\] NZEmpC 135](#)
EMPC 221/2018

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	SOLID ROOFING LIMITED Plaintiff
AND	SAMUEL NEWMAN Defendant

Hearing: On the papers
Appearances: P Vandenberg, agent for plaintiff
R Tomkinson, counsel for
defendant
Judgment: 13 November 2018

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M E PERKINS (Application for stay of proceedings)

Introduction

[1] These proceedings involve a challenge on a de novo basis against a determination of the Employment Relations Authority (the Authority) dated 12 July 2018.¹ A summary of the background to the matter is contained in the interlocutory judgment of this Court issued on 15 October 2018. This dealt with a good faith report which had been received from the Authority.² Despite the shortcomings of the plaintiff in the Authority proceedings, the challenge was permitted to proceed on a de novo basis.

¹ *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 214.

² *Solid Roofing Ltd v Newman* [\[2018\] NZEmpC 121](#).

SOLID ROOFING LIMITED v SAMUEL NEWMAN NZEmpC AUCKLAND [\[2018\] NZEmpC 135](#) [13
November 2018]

[2] As mentioned in the previous judgment, the plaintiff has filed an application for stay of proceedings. In effect, the plaintiff is seeking a stay of enforcement of the monetary awards made against it in the determination of the Authority. There was a subsequent determination in which the plaintiff was ordered to pay costs to the defendant in the sum of \$5,000.³ No challenge has been lodged to that determination and the time has expired for the plaintiff to file such a challenge.

[3] Following the earlier interlocutory judgment dealing with the good faith report, the defendant was directed to file and serve a statement of defence to the substantive challenge on or before 4 pm on 26 October 2018 and has done so.

Timetabling was set for the filing and service of submissions in support of the application for stay, in support of the notice of opposition to the application and any reply from the plaintiff. It was indicated that the matter would then be dealt with on the papers. Submissions from the parties in respect of the stay application have now been filed.

[4] In addition to filing submissions, the plaintiff has also filed further affidavits. These affidavits place before the Court information primarily directed at the substantive issues between the parties rather than towards considerations which the Court needs to make directly related to the application for stay. Nevertheless, I perceive that the plaintiff relies upon the statements as indicating the merits of the challenge and that the challenge has been made in good faith.

[5] One of the further affidavits is from Mr Peter Vandenberg, who is the sole director and shareholder of the plaintiff. It contains information relating to what Mr Vandenberg asserts is the current financial position of the plaintiff. Annexed to the affidavit is a document which appears to contain entries from a bank statement. Mr Vandenberg refers to this as a readout of the company's operational bank account. That document is totally inadequate to corroborate Mr Vandenberg's assertions as to the financial position of the plaintiff. The printout does not indicate the name of the account holder. It contains information about two transactions in the name of Mr Vandenberg, but certainly there is no information on the document to indicate that it relates to a bank account held by the plaintiff. In any event, if Mr Vandenberg was to

3 *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 254.

assert that the company is in a difficult financial position, which would be a relevant matter in respect of the application for stay, then he should have provided to the Court a great deal more information. Such information would need to include the most recent financial returns for the company, which would disclose its true position.

The application for stay

[6] This was filed with the Court on 31 July 2018, which was also the day of the filing of the challenge. The application for stay has been held in abeyance until the issues relating to the good faith report could be dealt with.

[7] The application states that it is made on the following grounds:

1. The Plaintiff has elected to have the determination by the Employment Relations Authority heard by the Employment Court. See attached Statement of Claim [and annexed documents] for full presentation of grounds, and the affidavit of Sarah Kim Bayly sworn 30 July 2018 in support.
2. Attempted Enforcement of the determination prior to a ruling on the appeal would force the company into voluntary liquidation, see numerous staff lose their employment, and see the Respondent not receive any contribution towards his judgment amounts given the limited assets of the company and the costs of liquidation.

[8] The affidavit of Sarah Kim Bayly sworn on 30 July 2018, referred to in the grounds, consists of six paragraphs containing unacceptable criticisms and disparagement of the Authority Member who made the determination which was the subject of the challenge. While presumably directed at the issue of the merits of the challenge, the affidavit does not really assist the Court to deal with the application for stay.

Notice of opposition

[9] The defendant has filed a notice of opposition to the application for stay. This is supported by an affidavit from the defendant and submissions in support of the opposition from his counsel.

[10] The grounds for the opposition are set out in paragraphs 2-4 of the notice of opposition which state as follow:

2. An order staying the Authority's Determination pending the outcome of the challenge in this case would result in the threshold for the granting of a stay being set too low, and operate contrary to the policy behind section [180 ERA 2000](#).
In particular:
 - a. The defendant is entitled to enjoy the fruits of his judgment in the Authority;
 - b. If no stay is granted, the plaintiff's right of challenge would not be rendered nugatory;
 - c. The defendant would be affected injuriously by a stay. The defendant requires payment of all or part the award to defend the plaintiff's challenge;
 - d. There is no reasonable ground of success in the plaintiff's challenge; and
 - e. There are grounds for concern that the sole director and shareholder of the plaintiff will attempt to wind up the company to avoid payment to the defendant.
3. The overall balance of convenience is in favour of the stay application being dismissed.
4. Appearing in the affidavit of Samuel Allan Barlow Wilkinson Newman sworn on 17 August 2018.

[11] If the Court decides to grant the application for stay of enforcement, the defendant requests that the plaintiff be ordered to pay one half of the total awards to the defendant now and that the balance should be held by the Registrar of the Court pending the outcome of the challenge.

Principles applying

[12] [Section 180](#) of the [Employment Relations Act 2000](#) (the Act) provides that an election under [s 179](#) to challenge the determination of the Authority does not operate as a stay of the proceedings unless either the Authority or the Court so orders. This means that until any stay of enforcement is ordered, the defendant, Mr Newman, remains entitled to take steps against Solid Roofing Ltd to enforce the monetary awards. As no challenge has been made to the costs determination, any order for stay in respect of the first determination of the Authority could not cover the costs

determination. In respect of the first determination of the Authority, it follows that Solid Roofing Ltd is asking the Court to exercise its discretion to intervene in what is a lawful enforcement process.⁴

[13] For the Court to exercise its discretion to order a stay, there must be evidence before the Court justifying the exercise of that discretion. The principles which the Court follows in exercising the discretion were established in *Assured Financial Peace Ltd v Pais*.⁵ The exercise involves a broad discretion in the interests of justice to be exercised judicially and in accordance with principle.⁶ The exercise of the discretion involves the Court weighing carefully the rights of a successful litigant to have the benefits of the judgment being challenged and preserving the position in case the challenge succeeds.

[14] The factors to be considered in accordance with *Pais* are:⁷

- (a) Whether the applicant's right on appeal will be ineffectual if a stay is not granted;
- (b) whether the challenge brought is prosecuted for good reasons and in good faith;
- (c) whether the successful party at first instance will be affected injuriously by a stay;
- (d) the effect on third parties;
- (e) the novelty and importance of the questions involved in the case;
- (f) the public interest in the proceedings; and
- (g) the overall balance of convenience.

[15] In the present case, there is no evidence to suggest that if a stay is not granted Solid Roofing Ltd will not be able to continue with its challenge. Obviously, if a stay is not granted and Mr Newman takes successful recovery steps pending the hearing of

⁴ *North Dunedin Holdings Ltd v Harris* [\[2011\] NZEmpC 118](#) at [\[6\]](#).

⁵ *Assured Financial Peace Ltd v Pais* [\[2010\] NZEmpC 50](#). See also *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [\[1999\] NZHC 1324](#); [\(1999\) 13 PRNZ 48 \(CA\)](#).

⁶ *Hill v Tex Onsite Ltd* [\[2016\] NZEmpC 73](#) at [\[3\]](#).

⁷ *Assured Financial Peace Ltd v Pais*, above n 5, at [\[5\]](#).

the challenge, then Solid Roofing Ltd would need to pursue Mr Newman for recovery of any money from him if the challenge is successful. In the present case, both Solid Roofing Ltd and Mr Newman are claiming to be impecunious, and the ability to seek reimbursement from Mr Newman if the challenge is successful is a material point.

[16] While information is contained in the documents filed by Solid Roofing Ltd, which would obviously be irrelevant to a de novo challenge, there is sufficient information available to satisfy me that Solid Roofing Ltd genuinely believes that the Authority's determination was wrong. I therefore accept that the challenge has been brought in good faith.

[17] Obviously, Mr Newman, who has been successful at first instance, will be affected injuriously by a stay in that he will be deprived of the right to continue with enforcement proceedings. This is a pertinent point in the present case where Solid Roofing maintains that if it is required to pay the monetary awards, it will become insolvent. I express some concern at this suggestion from Mr Vandenberg, in that if the financial position is that precarious, as sole director and shareholder of Solid Roofing Ltd, he has an obligation not to continue trading an insolvent company.

[18] In the present case, there are no novel or important questions involved. The public has no interest in the proceedings. Insofar as the overall balance of convenience is concerned, it seems to me that this must substantially favour Mr Newman. However, his interests can be protected by the making of an order in the usual way in respect of such applications by

requiring the challenging party to make payment of the monetary awards into the Court pending the hearing of the challenge. As stated by Judge Smith in *Pitman v Advanced Personnel Services Ltd*,⁸ the balance of convenience can be influenced by the party seeking the stay paying either the whole of the sum ordered to be paid or a reasonable portion of it to the Registrar of the Court or to a stakeholder. Making a payment in that way is designed to achieve a balance by providing the plaintiff with the assurance that the money is held in such a way that it can be returned if it is successful with the challenge. At the same time, the defendant is provided with assurance that there are funds available in due course if a challenge

⁸ *Pitman v Advanced Personnel Services Ltd* [2018] NZEmpC 74 at [53].

fails. In the present case, I am not satisfied on the evidence provided by Solid Roofing Ltd that it is indeed unable to make payment of the monetary awards of the Authority. It is continuing to trade, and it is significant that it has chosen not to provide financial information which should be easily be available to the Court such as production of the annual accounts.

Conclusion and disposition

[19] Taking account of all the circumstances and having regard to the principles which apply to such an application, on balance I am prepared to grant a stay of enforcement of the Authority's determination. The stay is granted on the condition that the full amount of the awards in favour of Mr Newman under the determination is paid into Court within seven days. In addition, in view of the fact that no challenge has been made to the costs determination, Solid Roofing Ltd is to make payment of the sum of \$5,000 to Mr Newman, also within the period of seven days, to reimburse him for the costs award of the Authority. Failure to make payment into Court and to Mr Newman as directed on or before 4 pm on 20 November 2018 will mean that the order for stay will lapse. Mr Newman will then be entitled to continue with his enforcement actions.

Costs

[20] In view of the fact that Solid Roofing Ltd has been granted an indulgence in respect of its application for stay of enforcement, it is appropriate that there be a costs order against it in any event. The order for costs will be based on Category 2B under the Court's Guideline Scale. If there is any dispute as to the quantification of the award of costs, then it can be referred to the Court by appropriate memorandum.

M E Perkins Judge

Judgment signed at 2.30 pm on 13 November 2018

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