



Employment Court of New Zealand

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Weston v Fraser WC 2A/07 [2007] NZEmpC 42 (27 April 2007)

Last Updated: 25 May 2007

IN THE EMPLOYMENT COURT
WELLINGTON

WC 2A/07
WRC 22/06

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

AND IN THE MATTER OF an application to strike out the proceedings

BETWEEN FRANCIS WESTON

Plaintiff

AND GARY FRASER

Defendant

Hearing: 27 April 2007

(Heard at New Plymouth)

Appearances: N R Harding, Counsel for the Plaintiff

M W S Nutsford, Advocate for the Defendant

Judgment: 27 April 2007

ORAL JUDGMENT OF JUDGE C M SHAW

[1] Mr Fraser has applied to strike out Mr Weston's challenge to a determination of the Employment Relations Authority given last year.

Background

[2] The Court has previously dealt with an application by Mr Weston for a stay of proceedings because Mr Fraser was threatening to enforce the judgment debt which had arisen as a result of the Employment Relations Authority's determination.

[3] On 13 December 2006^[1], I concluded that I would only stay the proceedings if the Authority's order of costs made in favour of Mr Fraser was paid by Mr Weston by a certain date and that the balance of the Authority's order was paid into the Wellington Employment Court by the same date to be held on trust awaiting the outcome of the challenge. Anticipating that those payments would be made, the challenge was set down for the matter to be heard in late February 2007.

[4] The payments were not made. Mr Weston made a belated attempt to suggest that he could lodge a surety instead of money but I ruled on 5 February 2007^[2] that, because Mr Weston had had a month to find the money and had failed to comply with that or provide an alternative that would give adequate security for the defendant, his application for stay of proceedings had lapsed because he hadn't met the conditions of the stay.

[5] In the course of the 13 December 2006 judgment, I had indicated that non-compliance with the Court's orders may result in the plaintiff's proceedings being struck out. Because the money was not paid, Mr Fraser

instructed Mr Nutsford to apply for an order to strike out.

Strike out application

- [6] Because the [Employment Court Regulations 2000](#) do not provide for such applications, the Court derives its jurisdiction from rule 186 of the High Court Rules via regulation 6 of the [Employment Court Regulations 2000](#). A strike out order is made generally only where the pleadings, that is the documents in support of a plaintiff's claim, disclose no reasonable cause of action, are likely to cause prejudice, embarrassment, or delay in proceedings, or are otherwise an abuse of the Court. The general category of abuse of process includes other grounds for striking out but these also tend to relate to the nature of the pleadings and the proceedings rather than the conduct of the parties. The standard of proof for a person to succeed in obtaining a strike out order is very high.
- [7] The matters which have given rise to this application are really about the conduct of the plaintiff rather than the pleadings in the proceedings. Mr Weston's conduct in question includes not appearing at the Employment Relations Authority meeting and failing to pay the judgment sum and costs as ordered by the Court in the context of his application for stay. Those are the two most relevant and serious of the many complaints made against him by Mr Fraser.
- [8] The position of the plaintiff as I am advised today is that he is said to be living in Australia, that he is attempting to liquidate his assets in New Zealand which comprise a house and a business, and that he says he will pay the sums into Court when he has the money. Unfortunately, the Court has heard this before. He is making more promises when his past conduct has shown that he has not delivered on those promises although Mr Harding did produce a cheque from Mr Weston for the costs payable to Mr Fraser which, when it clears, will satisfy a small part of the money payable.
- [9] Because the formal legal grounds for a strike out application are not available in this case I cannot make such an order. However, having discussed with the parties the nature of the orders that I am going to make and given them time to take instructions, I am prepared to make another order that will place the responsibility for progressing the proceedings onto the plaintiff who has brought them. I am satisfied that the actions of the plaintiff have prejudiced the defendant to date. Beyond the failure to pay the judgment sum as ordered by the Authority and the Court, he has challenged the determination but has not yet taken any steps to prosecute it. That leaves the threat of proceedings hanging over the defendant's head.
- [10] I hold that the challenge will not be able to progress unless and until the judgment sum including the costs order by the Authority are paid. The costs are to be paid directly to Mr Fraser and the judgment sum is to be paid into Court. The judgment sum may be paid in either directly by the plaintiff or by the defendant if he is able to enforce the judgment of the Authority and recover what he is owed. In either event, the money is to be held in the Court's trust account on interest-bearing deposit until the proceedings are concluded.
- [11] Mr Harding submitted that, rather than waiting for the liquidated funds to become available to be paid into Court, the Court should order that the plaintiff provide a surety to the satisfaction of the Court in place of the funds. This would enable the challenge to proceed without further delay. He suggested that such a surety could be registered against the title of Mr Weston's property and would appear on the title. As far as Mr Harding is aware, such a surety would come second probably to the mortgagee. He suggested that, to satisfy the Court as to the validity of this surety, the plaintiff could provide a registered valuation of the property in question in order to satisfy the Court that there is enough equity to meet the judgment.
- [12] I have considered that option. The advantage of it would be of course that it could be done relatively quickly and the challenge could then get on. The disadvantage is that it is not actually very sure. The exercise that the Court would have to undergo in order to satisfy itself that it was adequate surety would be complex and frankly not really something that the Registrar of the Court should have to take responsibility for.
- [13] However, if Mr Harding, on behalf of his client, can produce a surety that Mr Fraser accepts is in fact sure and reliable and dependable, then I am quite happy for Mr Fraser to advise the Court so the order that the money be paid can be substituted by this surety. I leave open the possibility that a surety could be sufficient but that would have to be to the satisfaction of Mr Fraser rather than of the Registrar of the Court.
- [14] The order I make now is that the challenge to the determination of the Employment Relations Authority's determination by Mr Weston is stayed and no steps can be taken on it until he pays into Court the judgment sum as ordered by the Authority and pays the costs of \$2,500 directly to Mr Fraser. Until that has been done or until Mr Fraser accepts that there is an alternative surety to his satisfaction, there will be no further steps taken on the challenge.
- [15] I will not set any time limit for these actions but both parties have leave to apply to the Court on 14 days' notice for any orders that may be required including pre-trial directions.
- [16] The costs on this application are reserved.

Judgment signed at 9.30am on 8 May 2007

[\[1\]](#) Judgment WC 24/06

[\[2\]](#) Judgment WC 2/07

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