IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 50
ARC 35/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay
BETWEEN	ASSURED FINANCIAL PEACE LIMITED AND PROSPER WITH US LIMITED Plaintiffs
AND	BRYCE PAIS Defendant

Hearing: 5 May 2010
(Heard at Auckland)

Appearances: Ajay Bhatt, Agent for Plaintiffs
Brian Rooney, Counsel for Defendant

Judgment: 5 May 2010

Reasons: 7 May 2010

REASONS FOR JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] Should execution of the monetary remedies granted by the Employment Relations Authority be stayed until the challenge to its determination can be heard and decided in this Court?

[2] Execution was stayed on conditions set out in the oral judgment of 5 May 2010.[1] The issues and the background to them are particularly unusual and

[1] [2010] NZEMPC 49.

complicated and because they warrant some elaboration, I elected to give my reasons in writing in this subsequent judgment.

[3] The power of the Court to stay execution of its proceeding or of those of the Employment Relations Authority that are the subject of challenge, is set out in reg 64 of the Employment Court Regulations 2000 which provides:

> **64 Power to order stay of proceedings**
> (1) If an election is made under section 179 of the Act, the Authority and the Court each have power to order a stay of proceedings under the determination to which the election relates.
> (2) If an application for a rehearing is made under clause 5 of Schedule 3 of the Act, the Court has power to order a stay of proceedings under the decision or order to which the application relates.
> (3) An order under subclause (1) or subclause (2)—
> (a) may relate to the whole or part of a determination or decision or order, or to a particular form of execution; and
> (b) may be made subject to such conditions, including conditions as to the giving of security, as the Authority or the Court thinks fit to impose.

[4] The discretion is broad and the ultimate test is the interests of justice as between the parties. Guidelines for the exercise of the discretion are well established and set out, by way of recent example, in the judgment of this Court in *Hanover Group Ltd v Finnigan.*[2] The guidelines are taken from a judgment of the Court of Appeal in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*[3]. Emphasising a balancing approach to determine the justice of any given case, Hammond J said:

> In applications of this kind it is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful. Often it is possible to secure an intermediate position by conditions or undertakings and each case must be determined on its own circumstances.

[5] The following seven considerations may apply, to a greater or lesser extent, in a particular case.

---

[2] AC41/06, 31 July 2006.
[3] (1999) 13 PRNZ 48.

- If no stay is granted, whether the applicant's right of appeal will be ineffectual;

- whether the appeal is brought and prosecuted for good reasons, in good faith;

- whether the successful party at first instance will be affected injuriously by a stay;

- the effect on third parties;

- the novelty and importance of the questions involved in the case;

- the public interest in the proceedings; and

- the overall balance of convenience.

[6] Hammond J in *Dymocks* emphasised that this is not a comprehensive list of factors or an exercise in which all those boxes must be ticked, and decision of this case is a good illustration of that.

[7] Mr Pais worked for (to use a neutral phrase) and was at the same time a client of, the plaintiff financial services companies. He says that in the former capacity he was their employee. They now say that he was an independent contractor so that the provisions of the Employment Relations Act 2000 (the Act) and other related employment legislation did not apply to him. Mr Pais earned income based on commissions from the plaintiffs and also borrowed money from them as a customer or client. When the parties fell out, Mr Pais claimed that he was owed remuneration and issued proceedings in the Employment Relations Authority to recover this. The plaintiffs filed a statement in reply and the Authority directed the parties to mediation.

[8] Pursuant to s 149(3)(b) of the Act, the terms of the mediated settlement may be considered by the Court in this proceeding that is for their enforcement. No

objection was taken by either party to the disclosure to the Court of how the mediated settlement between them came about. Both spoke freely about it at the hearing. In these circumstances I have inferred the consent of the parties to this exception to confidentiality under s 148(1) of the Act.

[9] The plaintiffs were then represented by counsel but Mr Pais was unrepresented. The companies acknowledged that they owed Mr Pais a balance of $23,500 for unpaid commissions or otherwise as remuneration. I was told that the mediator estimated that the income tax on this sum would be about $6,500 and suggested to the parties that if the companies paid Mr Pais a compensatory sum of $17,500 under s 123(1)(c)(i) of the Act, the claim might be able to be settled. The parties accepted this proposal and a mediation settlement document under s 149 of the Act was prepared by the mediator and the parties. This provided for a number of other elements in contention between the parties that do not require recitation here.

[10] The material terms of the settlement contained in the s 149 record are as follows:

> - That Assured Financial Peace Ltd and Prosper With Us Ltd will pay Bryce Pais, on a without prejudice and denial of liability basis, the compensatory sum of $17,000.00 in terms of the provisions of s.123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid to the Applicant by way of direct credit and in accordance with the following;
>   - **i.** $3000.00 will be paid within 7 days of the Respondents receiving written confirmation that the case has been withdrawn from the Employment Relations Authority, and that the complaint has been withdrawn from the Institute of Financial Advisors (and which the Applicant will not subsequently relodge at any time);
>   - **ii.** The balance of $14,000.00 to be paid to the Applicant within 6 months of the date hereof;
>
> …
>
> … This is full and final settlement of all matters that are or may be outstanding between the parties arising out of the employment relationship between the applicant and respondent.
>
> We request a Mediator from the Department of Labour to sign these terms because the employment relationship problem(s) between us have been resolved and we wish them to be final, binding and enforceable on us.

[11] Mr Pais duly wrote to the institute withdrawing his complaint against the plaintiffs but noting that he still maintained the allegations that formed the

foundation of that complaint. It appears that in these circumstances the institute continued to investigate these issues, perhaps of its own volition, but ultimately found no impropriety on the part of the plaintiffs.

[12] In the meantime, however, the plaintiffs discovered what they regarded as Mr Pais's unsatisfactory, equivocal and non-compliant withdrawal of his complaint and refused to pay him. Significantly, also, the plaintiffs then applied to the Employment Relations Authority seeking its order requiring Mr Pais to comply with the condition relating to his complaint. The orders sought by the companies were:

> 1. Please instruct the respondent to withdraw the complaint in its entirety including all allegations as agreed during mediation and comply with the Record of Settlement.
> 2. Instruct him to refrain from providing any assistance to IFA as mentioned in his email dated 21st March 2009, since the complaint is withdrawn and the mediated settlement is binding.
> 3. Payment of Agreed $3000.00 be made within 7 days of Applicant receiving confirmation of withdrawal of allegations by the respondent from IFA as required by the Record of Settlement

[13] Mr Pais then engaged Mr Rooney as his lawyer who defended the application for a compliance order against his client including on the basis that the Authority had no jurisdiction to make the orders sought.

[14] It appears that in the course of this application for compliance order before the Authority, the plaintiffs asserted, contrary to their previous acquiescence, that Mr Pais was not an employee although accepting that they did owe him $23,500. The plaintiffs' concern, then and now, was that if Mr Pais was classified as an employee, the companies had paid too little tax on his earnings (withholding tax as opposed to PAYE) and in these circumstances they might be liable to the Commissioner of Inland Revenue for increased tax payments and, conversely, Mr Pais would have been enriched unjustly by the amounts paid to him.

[15] The Employment Relations Authority dealt with all of these issues on the papers, that is without an investigation meeting. It did not deal expressly in its determination with Mr Rooney's challenge to its power to make the orders that had been sought by the companies and, in spite of what is now a veritable barrage of documentary evidence put forward by Mr Bhatt in support of his contention that Mr

Pais was an independent contractor, simply noted for clarification that it found the defendant was an employee. Although the Authority did not make the orders claimed by the companies (outlined above) which were the matters before it, it appears to have made a compliance order against them which was not sought by Mr Pais. Section 138 permits the Authority to make compliance orders of its own motion but there appears to have been no indication to the parties that the Authority was so inclined or any opportunity to be heard.

[16] On 17 March 2010 the Authority made an order[4] requiring Assured Financial Peace Limited and Prosper With Us Limited (AFPL and PWUL) to pay Bryce Pais the sum of $17,000, less any part of that sum already paid, within 14 days of that date. The plaintiffs' challenge and application for stay of that compliance order were filed within that period of 14 days.

[17] Applying the guidelines or criteria which are relevant to this case, I conclude, first, that if a stay is not granted, the plaintiffs' challenge will be meaningless. The defendant has already issued notices of demand that may form the basis of liquidation proceedings against the companies. Although, in such circumstances, it is by no means certain where Mr Pais would rank as a creditor and therefore how much, if any, of his entitlements he may receive if he continues to be successful, the test relates to the plaintiffs' right in practice to prosecute its challenge which would then be very academic.

[18] I do not think it can be said that the challenge is brought in bad faith or otherwise for ulterior motives. Although the companies acknowledge that they owe Mr Pais $23,500, there is, on the documentation produced, a real question as to whether the defendant was their employee. Determination of that question will, in turn, affect questions of taxation liability although these are not themselves for decision by the Court.

[19] Next, although Mr Pais will be affected injuriously by an order for stay, I am satisfied that this consequence can be mitigated by the condition imposed for payment in of the disputed sum.

---

[4] AA124/10.

[20] The final consideration applying to this case is the overall balance of convenience or overall justice. I am satisfied that a stay on the conditions made is the most just course until the case can be determined, hopefully at the judicial settlement conference that is available to the parties if they take up this offer which I commend strongly to them.

GL Colgan
Chief Judge

Judgment signed at 4.45 pm on Friday 7 May 2010