

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2018] NZEmpC 27
EMPC 337/2017**

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

AND IN THE MATTER of an application to stay proceedings

BETWEEN TALBOT AGRICULTURE LIMITED
Applicant

AND FRANKLYN WATE
Respondent

Hearing: On the papers filed on 13 , 22 and 26 March 2018

Appearances: D Caldwell and C O'Connor, counsel for the applicant
J Horan, advocate for the respondent

Judgment: 28 March 2018

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH -
STAY**

[1] Talbot Agriculture Ltd has challenged a determination of the Employment Relations Authority that it unjustifiably dismissed Franklyn Wate.¹ The Authority ordered Talbot Agriculture to pay the following amounts of money to Mr Wate within 28 days of the determination:

- (a) three months' gross pay as reimbursement for lost wages;
- (b) \$10,000.00 as compensation for humiliation, loss of dignity and injury to feelings;

¹ *Wate v Talbot Agriculture Ltd* [2017] NZERA Christchurch 181.

- (c) for the period 2 May 2016 to 11 June 2016 minimum wages of \$3,751.50 and holiday pay of \$300.12; and
- (d) for the period of 12 June 2016 to 29 July 2016 gross wages of \$6,750.00 and \$540.00 as gross holiday pay.

[2] A threshold issue the Authority determined was whether Mr Wate had been dismissed relying on a trial provision in his employment agreement.² The Authority concluded it did not apply because Mr Wate had already started work for Talbot Agriculture before signing the employment agreement containing that provision.³

[3] The Authority held that Talbot Agriculture offered Mr Wate employment on 4 May 2016 with the individual employment agreement being signed by him on 5 May 2016, and by one of the directors of the company on 6 May 2016.

[4] The process of preparing and signing the employment agreement was preceded by Mr Wate undertaking what was described as an “assessment of his abilities” between 2 May and 4 May 2016. It was this assessment that led the Authority to conclude Mr Wate had been working for Talbot Agriculture before the employment agreement was signed so that s 67A did not apply.

The stay

[5] Talbot Agriculture has challenged the determination and is seeking a full hearing. On 28 November 2017, Talbot Agriculture applied for a stay relying on three grounds that:

- (a) it was seeking a hearing de novo of the determination;
- (b) the determination contains errors of fact and law; and

² Permitted by s 67A of the Employment Relations Act 2000.

³ Authority determination at [35].

- (c) Mr Wate is a Solomon Islands citizen and the company was (at the time of the application) unaware if he was residing and working in New Zealand.

[6] It took some time for Talbot Agriculture to support the application with an affidavit, but one from Jeremy Talbot was eventually filed on 23 February 2018. The grounds for this application for a stay have been explained in more detail by that evidence.

[7] The company has sought a stay because it is concerned that, if it pays the full amount awarded to Mr Wate by the Authority, he will be unlikely to be in a position to repay if its challenge succeeds. It is also concerned about the impracticality of attempting to recover any money from Mr Wate if he returns to the Solomon Islands. It now proposes to pay the amount awarded by the Authority into an account under the control of the Registrar of the Court to be held on interest-bearing deposit.

[8] Mr Talbot undertook some inquiries between the date of the application for a stay and when his affidavit was sworn because he deposed to knowing that Mr Wate and his wife were living on the West Coast. Otherwise he had no information about Mr Wate, his income or assets.

[9] Complicating this situation is that Talbot Agriculture accepts it owes money to Mr Wate for wages and holiday pay forming part of the determination, but a dispute has arisen about payment to him. Mr Talbot says that a combined total of \$7,290 is due and owing and the company is willing to pay immediately. However, attempts to pay have been frustrated because, according to Mr Talbot, there has been a lack of co-operation from Mr Wate over supplying information to make a payment to a bank account. A solicitor's trust account cheque sent to Mr Horan, who is the advocate representing Mr Wate, was returned. It has subsequently transpired that attempts to pay have been rejected because there is a dispute about calculating the amount owed.

[10] Technically this application is opposed, but the submissions from Mr Horan and Mr Wate's affidavit contain contradictory statements. Both state opposition to a

stay being granted, but support the proposal to pay the full amount ordered by the Authority to the Registrar of this Court. Aside from that confusing situation, Mr Wate acknowledged being present in New Zealand on a work visa and said he intends to seek to extend that visa in due course. He did not provide any evidence about his current employment, financial situation, or an ability to repay Talbot Agriculture if that was ordered.

Analysis

[11] Filing a challenge to a determination does not operate as a stay of proceedings.⁴ The power to order a stay is conferred by reg 64 of the Employment Court Regulations 2000. The criteria to consider have been referred to in several cases such as *Assured Financial Peace Ltd v Pais*,⁵ but they are captured succinctly in the following passage from the Court of Appeal judgment in *NZ Cards Ltd v Ramsay* relied on by Mr O'Connor in his submissions:⁶

“The criteria for the grant of a stay of execution are well known. In determining whether or not to grant a stay, the Court must weigh the factors in the balance between the successful litigant’s rights to the fruits of a judgment and the need to preserve the position in case the appeal is successful. Relevant factors include whether the appeal would be rendered nugatory, if the stay were not granted, the bona fides of the applicant as to the prosecution of the appeal, the effect on any third parties, injury or detriment to the respondent if the stay is granted, the novelty and importance of the question involved, the public interest in the proceedings, the strength of the case on appeal and the overall balance of convenience.”

Rendered nugatory?

[12] While Mr O'Connor’s submissions addressed each of the criteria referred to in *NZ Cards*, the nub of this application is a claim that the challenge will be rendered nugatory if an order is not made. Primarily, what is at issue is the monetary award to Mr Wate and the difficulties Talbot Agriculture considers will be encountered in obtaining repayment if the challenge succeeds. That concern has not been put to rest by Mr Wate’s affidavit or submissions from Mr Horan.

⁴ Employment Relations Act 2000, s 180.

⁵ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50.

⁶ *NZ Cards Ltd v Ramsay* [2013] NZCA 582 at [7] (footnotes omitted).

[13] Talbot Agriculture does not have information about Mr Wate's financial circumstances, or his ability to repay. Despite being placed on notice of a concern about both of those matters Mr Wate's affidavit is silent about them.

[14] The analysis of this criteria favours the granting of a stay.

Is the challenge brought in good faith?

[15] Mr O'Connor submitted that the challenge is brought in good faith and that Talbot Agriculture is advancing its challenge in a timely and co-operative manner.

[16] Despite the passage of time between the dates when the application for a stay was filed and Mr Talbot's supporting affidavit, the company's conduct of this challenge indicates it is acting in good faith in the way it is pursuing the challenge.

Effect on any third parties

[17] There is no evidence of an adverse effect on third parties if a stay is granted.

Detriment to the respondent if the stay is granted

[18] There is a potential detriment to Mr Wate if the stay is granted because he will not have the benefit of the use of the money he was awarded until the challenge is decided and/or any stay is revoked. That is, in some measure, offset if the funds are placed on interest-bearing deposit.

[19] Given Mr Wate's evidence that he prefers the money to be held by the Registrar, the analysis of this criteria favours granting a stay.

Novelty, importance, public interest

[20] The remaining criteria referred to in *NZ Cards*: novelty, the importance of the question involved, the public interest, and the strength of the case on appeal, do not need extensive discussion. The issues raised are important to the parties. However, the litigation is not novel. It could not be properly characterised as involving matters

of public interest beyond the resolution of a dispute. The Court is not able to make any observation about the merits of the case at this stage.

Overall balance of convenience

[21] Mr Wate is lawfully in New Zealand and entitled to work but the absence of any information about the expected duration of his stay, income, or any information about his ability to repay Talbot Agriculture if ordered to, point towards the balance of convenience being in the company's favour. Given Mr Wate's agreement to a payment into Court there is little, if anything, counter-balancing this assessment.

[22] Granting a stay serves the dual purpose of ensuring that Talbot Agriculture's challenge is not rendered nugatory and Mr Wate's position is preserved, so far as it can, because funds will be held by the Court.

[23] I have reached the conclusion that it is in the interests of justice to grant a stay subject to the following conditions:

- (a) the full amount ordered by the Authority to be paid to Mr Wate is to be paid to the Registrar of this Court within 14 days of the date of this judgment, to be held on interest-bearing deposit; and is not to be disbursed except to comply with an agreement in writing signed by the parties or by order of the Court;
- (b) leave is reserved to apply to vary, amend or revoke the stay, on reasonable notice; and
- (c) costs are reserved.

K G Smith
Judge

This judgment is signed at 1.00 pm on 28 March 2018.