IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 89
EMPC 377/2015
EMPC 277/2016
EMPC 215/2017

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER	of an application for stay, timetabling and unless orders
BETWEEN	PETER D'ARCY LORIGAN Plaintiff
AND	INFINITY AUTOMOTIVE LIMITED Defendant

Hearing: 6 August 2018
(heard at Auckland)

Appearances: P Lorigan in person
R Towner and B Norrie, counsel for defendant

Judgment: 8 August 2018

INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE B A CORKILL: APPLICATIONS FOR STAY, TIMETABLING AND UNLESS ORDERS

Introduction

[1] An urgent hearing was convened to consider an application by Mr Lorigan that the proceedings he has instituted be stayed, or alternatively, to consider a variation of the Court's timetabling directions. Infinity Automotive Ltd (Infinity) opposed these applications and applied for an unless order; it also sought a variation of the existing timetabling directions which affect it, if Mr Lorigan's application to extend time is granted.

[2] Special leave was necessary for these applications to be heard; this was granted as they are all relevant to an imminent procedural hearing, scheduled to take place on 3 - 6 September 2018.

[3] The background to the proceedings which are before the Court are summarised in *Lorigan v Infinity Automotive Ltd*, issued very recently; it is unnecessary to repeat the details here.[1]

Application for stay

Outline of the parties' positions

[4] Mr Lorigan says there has been serious criminal conduct on the part of persons associated with Infinity, and that these are issues which should be dealt with by the police, and other law enforcement agencies.

[5] In previous judgments, I have referred to Mr Lorigan's contentions that he believed a witness for Infinity was "cynically continuing to conceal crimes", and that there had been "witness-tampering", as well as perjury.[2] On those occasions, it was made clear that proper evidence needed to be filed before such serious allegations could be considered.

[6] For the purposes of the present application, Mr Lorigan filed an affidavit repeating his allegations, and annexing a range of documents. These included transcripts of conversations he apparently had with various individuals some of whom share his beliefs; a document styled as a complaint to the police; and a letter from the Office of the Ombudsman.

[7] Mr Lorigan contends that since other agencies are actively dealing with his complaints, the Court should stay the proceedings before it until such time as those matters have been addressed.

---

1 *Lorigan v Infinity Automotive Ltd (No 3)* [2018] NZEmpC 88.
2 Referred to at [48]-[49].

[8] Infinity strongly opposes the application for stay. It says there is simply no reliable evidence to suggest that any external agency is engaged in considering or progressing Mr Lorigan's concerns.

[9] The evidence for Infinity was given by Head of HR for the Sime Darby companies with which Infinity is associated, Mr Leathley. He stated in his affidavit that no relevant individual within the company or its holding company, or colleagues at the Sime Darby Group Head Office in Malaysia, has been contacted by any of the regulatory authorities to which Mr Lorigan refers, namely the New Zealand Police, the Serious Fraud Office, the Financial Markets Authority, the Malaysian Securities Commission and the Australian Securities Commission; none of these authorities have taken any step to action Mr Lorigan's complaints.

[10] Mr Leathey stated that the Financial Markets Authority was first contacted by Mr Lorigan in April 2016, and the New Zealand Police and Serious Fraud Office were first contacted by Mr Lorigan in October 2016.

[11] Mr Leathley also stated that Mr Lorigan had previously complained to the New Zealand Law Society concerning the lawyers who acted for Infinity, and that a Standards Committee had dismissed Mr Lorigan's complaint without requiring either of the lawyers involved to respond to that complaint. It is understood that Mr Lorigan requested the decision of the Standards Committee to be reviewed, but the review officer has not to date taken any step in relation to that complaint.

Principles

[12] From time to time, the Court is required to consider whether proceedings in this Court should be stayed. On such occasions, the principle consideration is whether, having regard to the interests of justice in the particular case, such an order should be made.

[13] Where there is a proper evidential foundation for considering whether the Court should stay its proceedings because there are relevant civil proceedings in another Court, requires a balancing of a range of factors.[3]

[14] There are also numerous cases where issues have arisen concerning a stay of civil proceedings because criminal proceedings involving the same events are pending and may be affected by a determination of the civil proceedings. One of the leading authorities is *Jefferson Ltd v Bhetcha*, where the Court stated that relevant considerations are whether there is a real, and not merely a notional, danger of injustice in the criminal proceedings.[4] Relevant factors include the possibility of publicity that might reach and influence jurors; the proximity of the criminal hearing; the possibility of miscarriage of justice, for example, by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses or interference with defence witnesses; the burden on the defendant of preparing for both sets of proceedings concurrently; whether the defendant has already disclosed his evidence to the allegation; and the conduct of the defendant, including his own prior invocation of civil process when it suited him.[5]

[15] It should also be noted that s 405 of the Crimes Act 1961 provides that no civil remedy shall be suspended on the grounds that it relates to an act or omission that amounts to a criminal offence. Thus, there is a presumption against a stay of civil proceedings in the circumstances described by s 405.[6]

[16] This is the legal context, then, within which Mr Lorigan's contentions must be assessed.

---

3 The jurisdictional basis for making such orders was reviewed in *Rossiter v AFFCO New Zealand Ltd (No 2)* [2017] NZEmpC 28 at [24]-[27]. Examples of such balancing are found in *Transpacific All Brite Ltd v Sanko* [2012] NZEmpC 7 and *Eden Group Ltd v Jackso*n [2017] NZEmpC 53.

4 *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898; [1979] 2 All ER 1108 (CA).

5 At 1113. These principles were subsequently reviewed and accepted in *McMahon v Gould* (1982) ACLR 202 (NZWSC) at 203.

6 *General Distributors Ltd v Hilliard HC Auckland* CIV 2008-404-1057, 16 July 2008, at [35]-[36].

Analysis

[17] In this section of my judgment, I explain why I have concluded that the evidence given by Mr Lorigan as to the apparent existence of external procedures is vague and unreliable.

[18] He has placed a document before the Court dated 5 September 2016, which is headed: "2016-09-05 BASIS OF POLICE COMPLAINT: Subject: Fraudulent SIME DARBY/CITY NISSAN Dealership transactions in New Zealand".

[19] As already mentioned, Mr Leathey's evidence is that a complaint was indeed made to the New Zealand Police and the Serious Fraud Office in October 2016. Whether the complaint forwarded to those agencies is the document annexed to Mr Lorigan's affidavit is unknown. Nor is there any evidence to confirm what, if anything, then occurred.

[20] Mr Lorigan submitted orally that the police were "actively considering" his complaint. However, bald assertions of this kind do not qualify as evidence. In the absence of any reliable evidence that there is an actual investigation of criminal matters and/or a likelihood of charges being laid and heard, there is no possible basis for considering a stay on this ground.

[21] I turn to the position of other agencies. A letter was produced by consent at the hearing, from the Office of the Ombudsman to Mr Lorigan dated 22 June 2016. It records Mr Lorigan's assertions of alleged fraud in his workplace. It states that Mr Lorigan had previously referred his concerns to the Serious Fraud Office, who had advised that it did not intend to investigate as it did not meet their criteria for investigation. It also stated that he had raised the matter with the Financial Markets Authority and the Human Rights Commission but neither had investigated.

[22] Then the letter referred to various parts of the Protected Disclosures Act 2000 (PDA), explaining how the statute extends protections to employees in both the public and private sector where qualifying disclosures are made. It went on to explain that where retaliatory action is taken by an employer for making a disclosure under the PDA, the appropriate remedies are either a personal grievance, or a complaint to the

Human Rights Commission. It concluded by stating that if Mr Lorigan believed that retaliatory action was taken against him for making a disclosure about alleged fraud, it would be open for a personal grievance on that ground to be raised.

[23] It was also explained that an Ombudsman could only investigate disclosures that relate to public sector agencies. Infinity is not a public-sector agency. I infer that the Office of the Ombudsman is not therefore taking the matter any further.

[24] Mr Lorigan also placed before the Court a letter from Mr Towner to the Human Rights Commission dated 21 December 2016, which was a response to complaints made to that agency by Mr Lorigan; in the letter, mediation was proposed. Mr Towner made it clear that Infinity (as well as its directors, and its holding company) were not willing to participate in a mediation meeting. There is no evidence that any other process has been undertaken by the Human Rights Commission.

[25] In summary, there is no basis for concluding at this stage that there is any external process dealing with Mr Lorigan's concerns, such as would justify the Court considering that a stay of his proceedings should be considered.

[26] For completion, I record that Mr Lorigan suggested there were other grounds for stay, namely that he believes his employment agreement with Perry's Automotive Ltd/Infinity is null and void. As I explained to Mr Lorigan at the hearing, if that is now his assertion (contrary to allegations contained in his pleadings), that is a matter that can be considered at the ultimate substantive hearing which will consider the merits of his claims.

[27] He also asserted that a stay should be granted because, in summary, he believed witnesses called for the company at the investigation meetings before the Employment Relations Authority perjured themselves. That is not a ground for staying the proceeding. Any issues relating to previous evidence, if raised properly, can if necessary, be considered by the Court at a merits hearing in due course.

[28] Accordingly, I dismiss Mr Lorigan's application for stay of proceeding.

Timetabling issues/application for an unless order

[29] The second application brought by Mr Lorigan, in the alternative, was for a direction that the time for him to file and serve his briefs of evidence and documents relevant to the issues which will be considered at the upcoming hearing, should be extended to January 2019.

The background

[30] Some background is necessary. On 17 April 2018, after a hearing that took place the previous day, I issued a minute making various directions relating to the hearing of challenges EMPC 377/2015 and EMPC 277/2016.

[31] The first of these challenges relates to the question of whether Mr Lorigan raised a disadvantage grievance within the 90 days required under s 114 of the Employment Relations Act 2000 (the Act). The focus of the issue will be on a letter written by his then lawyer to Infinity on 28 January 2010. In short, was a disadvantage grievance raised with the necessary degree of particularity in that letter?

[32] The second challenge raises an alternative scenario. If the letter of 28 January 2010 did not raise a disadvantage grievance, should leave be granted to Mr Lorigan to pursue a disadvantage grievance out of time under s 114 of the Act? This contention is raised upon the grounds that:

a) The failure to raise a disadvantage grievance was caused by exceptional circumstances, namely that reasonable arrangements were made to have the grievance raised by Mr Lorigan's lawyer, but she unreasonably failed to ensure the grievance was raised within the required time; and

b) it is just to grant leave in those circumstances.

[33] In my minute, I made clear that a hearing on those two procedural issues only would take place on 3 – 6 September 2018. This was obviously on the basis that at a subsequent point, the Court would hold a second hearing to consider a disadvantage grievance if one was properly before the Court, and the dismissal grievance which is

without doubt before the Court; in other words, the second hearing would address the merits raised by Mr Lorigan's claims.[7]

[34] At the time the direction was made, there were outstanding issues as to pleadings and disclosure. Accordingly, a long period of time was allowed for preparation; this was to be followed by a timetable for the filing of documents for the September hearing, then the filing and serving of briefs of evidence of witnesses.

[35] In the same minute, I made directions requiring Mr Lorigan to comply with an earlier direction of 6 December 2017 as to the provision of proper particulars, and disclosure of documents.[8]

[36] In the Court's interlocutory judgment (No 2) of 1 June 2018, I noted that Mr Lorigan had still not filed all the further and better particulars he had been directed to provide.[9]

[37] At the same time, lawyers for Infinity filed a two-volume bundle of documents for the purposes of the September hearing, explaining that Mr Lorigan had not co-operated in agreeing its contents. Apparently, Mr Lorigan disputes the inclusion of some of the documents contained in the bundle. If there are admissibility issues, Mr Lorigan has had ample opportunity to file a memorandum to that effect. Indeed, he can still do so. The Court would resolve any such issues at the hearing.

[38] Mr Lorigan's briefs of evidence were due for filing and service on 2 July 2018, but this did not occur.

[39] On 11 July 2018, I directed Mr Lorigan to file and serve his briefs of evidence for himself and his witnesses as a matter of the utmost urgency.

[40] On 24 July 2018, Mr Lorigan filed his application for extension of time to file and serve his evidence, and I infer, his documents.

---

7 As well as a claim brought by Infinity against Mr Lorigan, as to whether he had breached his individual employment agreement.

8 *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153.

9 *Lorigan v Infinity Automotive Ltd (No 2)* [2018] NZEmpC 63 at [25].

[41] At the hearing of this application, he said it was physically impossible for him to meet the requirements of the timetable. He stated that he had been under considerable pressure in dealing with disclosure issues, which amounted to a consideration of some 30,000 documents in electronic form. He said there were other personal circumstances which limited the time he had available to attend to these matters. As mentioned, he told the Court he would need until January 2019 to complete his preparation.

[42] Mr Towner submitted that there was no real reason why the September hearing could not proceed. Mr Lorigan had in fact filed a comprehensive affidavit for the purposes of the applications dealt with in this judgment, at fairly short notice. This indicated that when he chose to, Mr Lorigan could and would prepare documents promptly.

[43] He emphasised that the matters before the Court related to circumstances which occurred nearly 10 years ago, and that they now needed to be resolved promptly.

[44] Evidence from Infinity stated that since April 2018, it had been planning and preparing for the hearing. Witnesses had been arranged, and there was a risk of these being unavailable if a new date was established. There was a concern that a deferral of the hearing would inevitably lead to additional costs. It was also stated that the more this proceeding was prolonged, then the longer Mr Lorigan had a platform for making irresponsible and baseless allegations against the company and individuals associated with it.

[45] Also before the Court was Infinity's application for an unless order. That application set out the multiple failures of Mr Lorigan to comply with orders of the Court, and sought an order that unless Mr Lorigan filed and served his evidence within a limited timeframe set by the Court, the challenges which are about to be heard be struck out.

The three options

[46] During the hearing of the parties' submissions, it emerged there were three potential options.

[47] The first is that the September hearing proceed, subject to a revised timetable. Mr Towner submitted that this was still feasible, providing the comprehensive affidavit filed by Mr Lorigan for the purposes of the present hearing was taken as his evidence for the September hearing; on this basis, the company would file and serve its evidence on 14 August 2018, and Mr Lorigan would have the opportunity of filing evidence in reply, and documents, on 24 August 2018. No objection would be taken to new points being raised at that stage.

[48] Mr Towner said that if Mr Lorigan accepted directions to this effect, then Infinity would not pursue its application for an unless order. However, Mr Lorigan did not agree that his evidence should be taken as being contained in his affidavit, and did not agree that the matter should proceed in September. He said he needed to analyse further documents, and it would be impossible for him to proceed at that time.

[49] The second option is to vacate the September fixture and reschedule it for a later point in time, subject to fresh pre-hearing directions. Mr Towner said that an unless order would in these circumstances be necessary. I will return to this possibility shortly.

[50] The third option, raised by Mr Lorigan, is that there be one hearing only, which would deal not only with the two procedural issues identified earlier,[10] but also with the merits. Mr Towner opposed this possibility, making the point that the two challenges raised discrete procedural issues, which needed to be heard separately.

[51] I agree with Mr Towner. The position is not unlike that which arose in *Skinner v Stayinfront Inc*.[11] There, the Court of Appeal stated that it was logical and sensible to determine a preliminary issue ahead of a merits hearing, in the particular circumstances of that proceeding.

[52] For the purposes of this case, I remain of the view, as was agreed with the parties in April 2018, that the procedural issues should be determined first. Then the

---

10 See [31]-[33] above.
11 *Skinner v Stayinfront Inc* [2007] NZCA 152, [2007] ERNZ 229 at [10].

merits hearing can proceed with the parties and the Court being clear as to what causes of action require resolution.

[53] I consider the appropriate way forward is to proceed on the basis of the second option referred to above. It requires a consideration of the making of an unless order. The principles were conveniently summarised by the Court of Appeal in *SM v LFDB*.[12] There, the court emphasised that whilst an unless order is ordinarily one of last resort, it is properly made where there is a history of failure to comply with earlier orders.

[54] That is the situation here. Mr Lorigan has been directed on multiple occasions to provide further particulars of his claims, to provide disclosure, to file and serve evidence, and to engage with Infinity's lawyers as to a common bundle. There has been continued non-compliance with all these directions, but particularly serious is the failure to file evidence and documents as directed.

[55] I do not overlook the fact that Mr Lorigan says he has personal difficulties in conducting his preparation; but against that must be balanced the legitimate entitlement of the other party to have the case heard sooner rather than later, especially as the relevant circumstances are so dated. There has been ample time for appropriate preparation. I also take into account the fact that the first hearing is on relatively confined points of procedure.

[56] Balancing the matters which the Court must consider, Mr Lorigan will be given further time for preparation, and a final opportunity to meet his obligations for the procedural hearing. If he does not do so, then the two challenges raising those procedural issues will be struck out.

[57] In a minute which I issued on 7 August 2018 following the hearing, I vacated the fixture for September, and informed the parties of the timetable and orders which would now apply.

[58] I repeat the relevant directions and make the appropriate orders, as follows:

---

12 *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 at [31].

a) The fixture relating to the two procedural issues is now rescheduled to take place on **10 – 13 December 2018**.

b) Mr Lorigan is to file and serve his brief of evidence, briefs of evidence of any other witnesses he intends to call, and documents pertaining to that hearing, by **5.00 pm on 5 November 2018**, time being strictly of the essence.

c) Unless those briefs of evidence and documents are filed and served by that time and date, Mr Lorigan's challenges with regard to the procedural matters in EMPC 377/2015 and EMPC 277/2016 will be struck out. The Court will then receive any relevant application as to costs.

d) If Mr Lorigan's briefs of evidence and documents are filed and served by **5.00 pm on 5 November 2018**, Infinity's briefs of evidence are to be filed and served by **5.00 pm on 19 November 2018**.

e) Mr Lorigan may file and serve any briefs of evidence in reply, strictly in reply, no later than **5.00 pm on 26 November 2018**. Unless evidence in reply is filed and served by that time and date, it will not be received by the Court.

Costs

[59] Infinity seeks costs in relation to the applications dealt with in this judgment.

[60] Mr Lorigan's application for stay was misconceived, and Infinity is entitled to costs for dealing with it.

[61] Mr Lorigan's application for an extension of time was allowed, but that was an indulgence. It is occasioned by a failure to meet the directions of the Court. The company adopted a responsible attitude in relation to it. In my view, it is also entitled to costs with regard to the timetabling issues considered in this judgment.

[62] In the result, Mr Lorigan is to pay Infinity costs with regard to the matters resolved in this judgment on a Category 2, Band B basis.

B A Corkill
Judge

Judgment signed at 3.20 pm on 8 August 2018