

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 137
EMPC 267/2019**

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

AND IN THE MATTER of an application for a stay of execution

BETWEEN INDEPENDENT PROSPERITY LIMITED
 Plaintiff

AND QISHAN HUANG
 Defendant

Hearing: On the papers

Appearances: J Nguy, counsel for plaintiff
 B Hinchcliff, counsel for defendant

Judgment: 8 October 2019

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for a stay of execution)**

[1] On 22 July 2019 the Employment Relations Authority issued a determination resolving an employment relationship problem between Qishan Huang and Independent Prosperity Ltd. The Authority held that Ms Huang had been unjustifiably dismissed from her employment with Independent Prosperity and that there had been breaches by the company of the Employment Relations Act 2000 (the Act) and the Holidays Act 2003.¹

¹ *Huang v Independent Prosperity Ltd* [2019] NZERA 433.

[2] Independent Prosperity was ordered to pay Ms Huang the following amounts:

- (a) \$30,000 compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings.²
- (b) \$13,846.15 gross for lost remuneration under s 128(2) of the Act.³
- (c) The net amount of \$22,108 for wages she had been unlawfully required to repay to Independent Prosperity.⁴
- (d) 14 weeks of unpaid wages totalling \$13,461.53 gross.⁵
- (e) \$4,548.07 gross for holiday pay.⁶

[3] The determination has been challenged by Independent Prosperity and the company is seeking to have a hearing of the whole matter.

[4] Independent Prosperity has applied for a stay of execution of the Authority's determination. There were two grounds to the application; the first of them merely repeated the fact that the whole determination had been challenged. The second ground was that Independent Prosperity would face "...undue financial hardship..." if a stay is not granted pending the hearing of its challenge.

[5] The application for a stay is opposed.

[6] The proceeding has been set down for a hearing on 19-21 February 2020.

The application for a stay

[7] Filing a challenge to a determination does not operate as a stay.⁷

² At [57].

³ At [59].

⁴ At [63].

⁵ At [64].

⁶ At [65].

⁷ Employment Relations Act 2000, s 180.

[8] The power to grant a stay is contained in reg 64 of the Employment Court Regulations 2000. The Court has power to stay the execution of the whole determination, or part of it, and may do so subject to conditions.⁸

[9] The principles to apply are well known and can be referred to briefly. Granting a stay involves a broad discretion, in the interests of justice, to be exercised judicially and in accordance with principle.⁹ What must be weighed carefully are the rights of a successful litigant to the benefits of the determination being challenged and preserving the position in case that challenge succeeds.

[10] Factors typically taken into account in exercising this discretion include:¹⁰

- (a) If a stay is not granted whether the challenge will be rendered ineffectual.
- (b) Whether the challenge is brought and prosecuted for good reasons, 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 questions involved in the case.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience.

[11] The application was supported by an affidavit from the company's sole director and shareholder, Angela Churchill. Her affidavit stated the grounds for the application

⁸ Regulation 64(1) and (3).

⁹ *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7]; applying *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 at [9]. To similar effect see *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50.

¹⁰ See *New Zealand Cards Ltd*, above n 9, at [7]; and to similar effect *Pais*, above n 9, at [5].

slightly differently, because she said that if a stay was not granted the result would cause her company "...significant financial hardship...". Nothing material turns on the differences between those statements.

[12] Each of the factors assisting an assessment are discussed below.

Challenge ineffectual?

[13] This factor is the predominant one relied on by Independent Prosperity. Mr Nguy concentrated on the financial impact on the company. His submission was that Independent Prosperity's challenge would be rendered ineffectual because it was reasonably foreseeable the company risked being put into liquidation if it was required to satisfy the determination immediately.

[14] The basis for that submission rests entirely on Ms Churchill's evidence where she stated that concern. The total amount the Authority ordered Independent Prosperity to pay was \$83,963.75. Ms Churchill's evidence was that the company is not able to pay this amount immediately but is solvent and will be able to pay it in future if the challenge fails.

[15] Exhibited to Ms Churchill's affidavit was a copy of the company's unaudited, and unsigned, financial accounts as at 31 March 2019. She deposed that, for the year ending 31 March 2019, the company's expenses exceeded its income by \$102,567. It had income for that financial year of \$686,581 and expenses of \$789,148. She explained that the company was operating at a loss as at the end of March 2019 because it had acquired debt to fund rapid growth. The company is an insurance broker. To achieve that growth it purchased some insurance business from another company. The purchase required expenditure in the financial year ending March 2018 of \$113,731.12 and in the financial year ending 31 March 2019 of another \$57,667.77.

[16] Ms Churchill's affidavit contained little information about the company's performance between 31 March 2019 and mid-September 2019 when her affidavit was sworn. What information was provided gave only a partial picture of the company's present financial strength. She borrowed money and injected it as capital into the

business to pay for the purchase of the other insurance business mentioned earlier. She also said that buying the insurance business would generate revenue. That was because the company would receive a portion of the ongoing insurance premiums paid, by each of the clients whose business had been acquired, as policies were renewed.

[17] Ms Churchill deposed to the company having a steady revenue stream and was "...now profitable..." and, by the end of the financial year as at 31 March 2020, it would have enough earnings to pay the amount of the Authority determination if the challenge was unsuccessful.

[18] Explaining Independent Prosperity's solvency, she gave as an example that it is expecting to receive a windfall of \$159,120.22 in commissions. She projected a surplus from that windfall in the near future of \$50,000. That evidence implied \$50,000 would be available and could be used, at a future time, to at least partly satisfy the determination if necessary. What was not explained was the make-up of the expenses that would reduce the available funds from the windfall by about two-thirds.

[19] The overall impression conveyed by this information is of a company growing rapidly, acquiring income-earning assets and with expected ongoing profitability. Against that background the balance of Ms Churchill's affidavit was puzzling. She deposed to the company possibly incurring significant cashflow problems if it had to satisfy the determination immediately. Concerns were expressed for the on-going employment of several staff and contractors. She described the book value of the company's assets as limited, amounting to about \$117,000 as at 31 March 2019. This seemingly weak position would be compounded because, Ms Churchill said, she was not able to inject more money into the company and was unsure of her ability to raise a loan.

[20] I am not persuaded that Independent Prosperity has demonstrated it would face "undue financial hardship" in the absence of a stay. I am not satisfied that the financial information justified the expression of concern that the company faces the risk of liquidation if it has to satisfy the determination before the challenge is decided. That information was reasonably detailed up to 31 March 2019 but was insufficient for

subsequent months. Ms Churchill's affidavit was notably silent about the company's existing cashflow, or recent trading.

[21] The concern for the company's future was at odds with its stated growth and solvency. Nothing was said about the company's assets after 31 March 2019 which, presumably, included the value of the portfolio of insurance clients it completed buying by the end of March 2019. The assets referred to in the accounts included a Maserati car, furniture and fittings and office equipment but there was no indication as to whether the book value represented their market value. There was no evidence that the business has any difficulty meeting its liabilities as they fall due or is under financial pressure for any reason aside from its present indebtedness to Ms Huang. Strikingly, despite Ms Churchill's concern about the company's ability to borrow, there was no evidence about that beyond her statement. Given her other statements about its growth, reduced liability having completed payments to the other insurance broker and the substantial windfall due shortly, more was required.

[22] Finally, for completeness, Mr Nguy's submissions referred to Ms Huang's financial position. She deposed to her indebtedness to friends and family incurred over the time she was employed by Independent Prosperity. That is irrelevant. The application was based on undue hardship to the company, not concerns about an ability to recoup money paid to Ms Huang if the challenge succeeds.

[23] This factor points away from granting a stay.

Brought in good faith?

[24] Mr Nguy submitted that the appeal was brought in good faith. He emphasised that the company had cooperated in the Authority investigation and in the timetabling for the challenge so that it can be disposed of expeditiously.

[25] I accept that the challenge has been brought in good faith.

[26] This factor points towards granting a stay.

Will the successful party be injuriously affected by a stay?

[27] Independent Prosperity acknowledged that granting a stay would affect Ms Huang, because she will be deprived of the benefits of the determination in the meantime. Its case was that this factor should not be given much weight because, while she disclosed her indebtedness, there was no indication that her debts were due for payment urgently or attracted interest.

[28] Those arguments are not persuasive. A stay, even one for a reasonably short time, will deprive Ms Huang of the use of the money the Authority ordered Independent Prosperity to pay her.

[29] This factor points away from granting a stay.

Other factors

[30] There are no effects on third parties. The proceeding does not raise a novel and important question and there are no public interest considerations that need to be taken into account.

[31] These factors are neutral.

Overall balance of convenience

[32] Stepping back, Independent Prosperity is seeking an opportunity to continue to trade, with no disruption to its business, pending the outcome of the hearing scheduled for February next year. It is not proposing in any way to attempt to assume any inconvenience to itself while expecting that Ms Huang continues to be deprived of the benefit of the determination in her favour and, as a result, the opportunity to use the money which the Authority ordered to be paid to her. In summary, Independent Prosperity's application wants the Court to order the maintenance of the status quo, as it was before the determination, to its advantage.

[33] On the other hand, Ms Huang succeeded in the Authority and is out of pocket for a considerable sum. She has obligations to satisfy which she cannot do until, and

unless, Independent Prosperity pays her. I am satisfied that the balance of convenience favours Ms Huang.

Outcome

[34] Weighing up these factors, the overall interests of justice are met by declining the application and it is dismissed.

[35] Costs are reserved.

K G Smith
Judge

Judgment signed at 4.55 pm on 8 October 2019