

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 118
CRC 13/11**

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 proceedings

BETWEEN NORTH DUNEDIN HOLDINGS
LIMITED AND MAITLAND COLIN
BOOTH
Plaintiffs

AND KAREN HARRIS AND ROBYN
COUSINS
Defendants

Hearing: 26 September 2011 by telephone conference

Appearances: Maitland Booth in person and as agent for North Dunedin Holdings
Limited
Janie Kilkelly and Nicholas Eketone-TeKanawa, counsel for
defendants

Judgment: 26 September 2011

JUDGMENT OF JUDGE A A COUCH

[1] On 17 June 2011, the Employment Relations Authority issued a compliance order requiring the plaintiffs to pay the defendants \$20,000 together with interest.¹ Payment was required to be made within 14 days. Previously, the Authority had also ordered the plaintiffs to pay the defendants costs of \$1,500.²

[2] The compliance order was to enforce the terms of a settlement agreement made between the parties pursuant to s 149 of the Employment Relations Act 2000 (the Act).

¹ [2011] NZERA Christchurch 86

² [2011] NZERA Christchurch 71

[3] The plaintiffs challenge the whole of the determination in which the compliance order was made and seek a hearing de novo. The plaintiffs also seek a stay of proceedings pending the hearing of that challenge. That application for stay was the subject of the hearing I conducted by telephone conference today.

[4] In support of the application, Mr Booth swore an affidavit which was filed on 18 August 2011. Ms Harris and Ms Cousins swore a joint affidavit in opposition which was filed on 1 September. Mr Booth then swore an affidavit in reply dated 7 September 2011. The substantive proceeding was originally set down for hearing on 9 September 2011. Had it proceeded then, it may have been unnecessary to determine the application for stay. Due to unforeseeable events, however, the matter could not proceed that day and is now set down for hearing on 9 November 2011. As the defendants are in the process of enforcing the Authority's order, the plaintiffs wish to have their application for stay heard.

[5] The starting point must be s 180 of the Act:

180 Election not to operate as stay

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.

[6] It is clear from this provision that the orders of the Authority remain in full effect unless and until the Court sets them aside. The defendants are entitled to enforce those orders unless a stay of proceedings is granted. It follows that the plaintiffs are asking the Court to exercise its discretion to intervene in what is a perfectly lawful enforcement process.

[7] The discretion conferred by s 180 is not qualified by the statute but must be exercised judicially and according to principle. I note two key principles. There must be evidence before the Court justifying the exercise of the discretion. The overriding consideration in the exercise of the discretion must be the interests of justice.

[8] In his affidavit, Mr Booth implies that the reason for seeking a stay is that he and Dunedin Holdings Ltd are impecunious. He does not, however, say that

explicitly or provide any accounts or other evidence of the financial position of the plaintiffs. Mr Booth describes two offers of payment made to the defendants. One was to postpone the date for payment of the principal debt and to pay interest in the meantime at the rate of \$250 per month. The second offer was to compromise the Authority's orders by payment of \$10,000 on 3 October 2011, that money being obtained from a third party. Both offers were rejected by the defendants and the plaintiffs have made no payment at all.

[9] In their affidavit, the defendants say that they believe Mr Booth has access to funds sufficient to satisfy the Authority's orders and provide a number of documents in support of that assertion. The defendants also say that they both have very limited income and no savings. This suggests that the defendants might have difficulty repaying the sums in question if the plaintiffs were successful in their challenge. The plaintiffs do not rely on such a proposition but I must nonetheless take it into account.

[10] Another factor to be taken into account is the apparent strength of the plaintiff's challenge. There is very little evidence of this. In his affidavit, Mr Booth suggests that the defendants were involved in misconduct in the course of their employment but, as the settlement was of all matters arising out of the employment relationship, it is difficult to see how this could be relevant. Mr Booth also suggests in a memorandum that he entered into the settlement agreement under duress but does not elaborate. The plaintiffs also face the hurdle of overcoming s 149(3)(b) of the Act which provides that, except for enforcement purposes, no party to a settlement may seek to bring the terms of settlement before the Authority or the Court "whether by action, appeal, application for review, or otherwise".

[11] Having regard to the limited evidence before me, I am satisfied that it is appropriate to make an order for stay but only on condition that the plaintiffs pay a substantial amount into Court. There will be a stay of proceedings effective immediately and continuing until 4pm on Monday 3 October 2011. If the plaintiffs have by that time paid into Court the sum of \$11,500, the stay shall continue in effect until further order of the Court. Otherwise the stay shall lapse and the defendants

will be free to continue enforcement action. The order is also subject to the following conditions:

- (a) Payment into Court shall be made by way of a bank cheque, solicitor's trust account cheque or bank transfer not subject to recourse.
- (b) Once paid into Court, the Registrar shall place the money into an interest bearing account. That money shall be disbursed only by order of the Court.
- (c) If payment into Court is not made by 4pm on Monday 3 October 2011, subsequent payment will not revive the stay of proceedings.

[12] Costs in relation to the application for stay of proceedings are reserved for consideration after the challenge is decided.

Signed at 1.00pm on 26 September 2011.

AA Couch
Judge