IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 207
EMPC 308/2023

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	THE PHO HOUSE LIMITED T/A ZEKE Plaintiff
AND	TYLER BRANFORD Defendant

Hearing: On the papers

Appearances: N King, counsel for plaintiff
S Greening and K Hudson, counsel for defendant

Judgment: 21 November 2023

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for a stay of proceedings)

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[1] The Pho House Ltd (the company) has applied for a stay of a determination of the Employment Relations Authority under which it was ordered to pay to the defendant $2,110.84 by way of lost wages and $10,800.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).[1] The Authority found that the company had unjustifiably dismissed Ms Branford; the company does not seek to challenge that aspect of the determination. Instead, it has filed a non-de novo challenge to the Authority's determination, seeking a reduction in remedies to zero. In

[1] *Branford v The Pho House Ltd* [2023] NZERA 427 (Member Craig).

essence the company says that a stay is necessary to protect its challenge rights. The application is opposed by the defendant.

[2] The parties have filed submissions and affidavits in support of, and in opposition to, the application. It was agreed that the application could be dealt with on the papers.

[3] The approach to applications of this sort is well established. As the Act makes clear, a challenge does not operate as a stay. A formal order must be obtained from the Court, otherwise the Authority's orders remain enforceable and must be complied with.[2]

[4] The Court may order a stay where it considers it appropriate to do so.[3] The overarching consideration is the interests of justice, guided by the Court's equity and good conscience jurisdiction conferred by s 189 of the Act. The Court will generally have regard to factors such as whether the challenge will be rendered ineffectual if the stay is not granted; whether the challenge is brought and pursued in good faith; whether the successful party at first instance will be injuriously affected by the stay; the extent of any impact of granting it on third parties; the novelty and/or importance of the question involved; the public interest in the proceeding and the overall balance of convenience, including balancing the parties' respective interests.[4] Infusing the exercise of the Court's discretion will be consideration of the underlying objectives of the Act.

[5] As I have said, the thrust of the company's application centres on a claim that if no stay is granted its challenge rights will be rendered ineffectual. That is because, it is said, it will be difficult to recover of the moneys ordered in the defendant's favour if the challenge succeeds. The repayment concern is not borne out by the affidavit evidence put before the Court by either the plaintiff or the defendant. The company's director, Mr Nguyen, says, in essence, that he considers repayment unlikely but does

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2 Employment Relations Act 2000, s 180.
3 Employment Court Regulations 2000, reg 64.
4 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [8] and [9]; *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [4]; and *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7].

not specify why that is said to be so. In contrast Ms Branford confirms that she is currently employed and appends bank statements to her affidavit which reflect her current financial position. That material supports the submission made on her behalf, that she would be in a position to repay the amounts ordered in her favour if subsequently required to do so. There is insufficient evidence to support the company's submission that its right of challenge will be rendered ineffectual if no stay is granted.

[6] A successful party at first instance is entitled to the fruits of their success, absent good reason.[5] In the present case the defendant's affidavit evidence disclosed that she will be adversely impacted from a financial perspective if a stay is granted.

[7] I accept, based on the material currently before the Court, that the challenge is being pursued in good faith. I accept too that the company has a strong view about the merits of the challenge; of the defendant's ability to repay, as detailed in Mr Nguyen's affidavit; and of the defendant's veracity, as alluded to in submissions made on its behalf. But in a case such as this there are significant difficulties with inviting the Court to factor into the assessment exercise the asserted strength of a challenge; it is simply too difficult to weigh the merits at such an early stage with any certainty.[6] Having said that, I observe that while there have been some instances in which an unjustifiably dismissed employee has received no relief, such cases are rare.[7]

[8] I have considered the Court's judgment in *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust*, referred to by Mr King, counsel for the plaintiff.[8] I understood the submission to be that a stay may more readily be granted where a defendant will not remain out of pocket pending the outcome of the challenge, for example where penalties and damages have been awarded in the defendant's favour at first instance.[9] Mr King submits that the defendant is in a similar position in respect of the compensatory award made by the Authority, described as "pure additional funds", and that this supports the grant of a stay.

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5 *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87. As cited in *Dymocks*, above n 5, at [8]; *New Zealand Cards*, above n 5, at [7].
6 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39(c)].
7 *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136 at [216].
8 *CultureSafe NZ Ltd v Turuki Healthcare services Charitable Trust* [2018] NZEmpC 115.
9 Referring to [18].

[9] I am unaware of any authority for the proposition that the Court should be slow to grant a stay in circumstances where compensation for humiliation, loss of dignity and injury to feelings has been awarded to a defendant. And I agree with Mr Greening, counsel for the defendant, that the characterisation of such awards as "pure additional funds" overlooks their real nature or purpose, being to compensate loss. It is arguable that the imposition of a penalty, not payable to the defendant in whole or in part, might more readily attract a stay, depending on all other relevant factors. That is not the situation here.

[10] For completeness, it is clear that the award for lost wages was not "pure additional funds", but rather was a reimbursement for losses, meaning the defendant would remain out of pocket until the outcome of the challenge were a stay to be granted.

[11] While I accept that the plaintiff considers that important issues are at stake on the challenge, I do not accept that the challenge raises issues of broader public interest or importance. Nor do I accept, based on the material before the Court, that third party interests are engaged.

[12] The balance of convenience firmly favours the defendant, as do the overall interests of justice.

[13] The application for a stay is declined. Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 10.45 am on 21 November 2023