

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

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

**[2024] NZEmpC 103
EMPC 322/2023**

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

AND IN THE MATTER OF an application for stay of proceedings

AND IN THE MATTER OF an application for security for costs

AND IN THE MATTER OF an application for leave to extend time to file
opposition to application for stay

BETWEEN CARRINGTON RESORT JADE LP
Plaintiff

AND GRAHAM MAHENO
Defendant

Hearing: On the papers

Appearances: W Tan, agent for plaintiff
A Kersjes, advocate for defendant

Judgment: 13 June 2024

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Good Faith Report; Application for stay of proceedings;
Application for security for costs; Application for leave to extend time to file
opposition to application for stay)**

Background

[1] Carrington Resort Jade LP (Carrington) has challenged a determination of the Employment Relations Authority (the Authority).¹

¹ *Maheno v Carrington Resort Jade LP* [2023] NZERA 445 (Member Dumbleton). The details of the Authority's determination and Carrington's challenge are set out below at [32].

Is there jurisdiction to issue a stay?

[2] On 15 August 2023 the Authority issued its determination in which it ordered Carrington to pay Mr Maheno \$14,342.41 (judgment sum).

[3] On 15 September 2023 Mr Maheno obtained a warrant to seize property which authorised a bailiff or constable to collect the judgment sum.

[4] On 27 September 2023 Carrington served Mr Maheno with its application to stay the Authority's determination.

[5] Mr Maheno's advocate was not aware of the application for stay being served on his client and a notice of opposition was not filed in time. On 13 November 2023 an application for leave to extend time to file a notice of opposition to the application for stay was made.

[6] On 14 November 2023 the bailiff collected the judgment sum from Carrington. On 20 November 2023 the bailiff released the judgment sum to Mr Maheno.

[7] The evidence from Mr Maheno is that there have been communication issues between his advocate, Mr Kersjes, and Carrington's agent, Mr Tan. Mr Tan has not included Mr Kersjes in communications, and this has led to the confusion around Carrington's stay application and the concurrent execution of the Authority's orders.

[8] At a directions conference on 6 December 2023, Mr Tan indicated that Carrington was still seeking a stay and that Mr Maheno should now be directed to pay the sum involved into this Court.

[9] After that directions conference, the Court issued a minute directing the parties to file submissions on the stay application and on the related application by Mr Maheno for leave to extend time to file a notice of opposition to the application for stay. Carrington was to file submissions by 13 December 2023 and reply submissions by 24 January 2024.²

² *Carrington Resort Jade LP v Maheno* EmpC Auckland EMPC322/2023, 7 December 2023 at [7].

[10] Carrington's key submissions included raising concern over Mr Maheno's financial situation and the risk that its challenge would be rendered ineffectual if the stay application was not granted. It submitted that in the circumstances, to ensure fairness, the Court ought to exercise its broad discretion and order Mr Maheno to repay the judgment sum he had received from the bailiff to the Court Registrar. Mr Maheno's submissions focused on the fact that the judgment ordered by the Authority was paid and suggested that there was no order for the Court to stay. It was submitted that the Court was unable to issue an order requiring Mr Maheno to pay the Authority's judgment sum to the Court.

Analysis

[11] A challenge does not operate as a stay of execution.³ The Court has the power to order a stay of proceedings under a determination of the Authority where that determination has been challenged.⁴ However, a stay can only act to suspend proceedings or enforcement. A stay cannot be used to unwind enforcement proceedings which are already completed.

[12] Carrington appears to take a dim view of Mr Maheno continuing to enforce the Authority's determination, in spite of its application for a stay of execution being made. However, from the facts it would appear that Mr Maheno's advocate obtained the warrant to collect the judgment sum in advance of the application for stay being made. Carrington's failure to communicate with Mr Maheno's advocate led to confusion about the stay application and concurrent enforcement of proceedings. However, applying for a stay does not prevent execution.

[13] Carrington could have avoided this situation if it had applied for urgency when making its stay application, or at the very least, it should have immediately applied to the Court to deal with its application urgently once it became aware that enforcement proceedings were underway in the District Court. Carrington's failure to pursue its stay application with urgency has been fatal to its application.

³ Employment Relations Act 2000, s 180.

⁴ Employment Court Regulations 2000, reg 64.

[14] Additionally, even if the Court did have jurisdiction, no basis for a stay has been provided to the Court.⁵ The stay application suggests that Mr Maheno may be impecunious, but no evidence was filed in support of that supposition; there is nothing to suggest that the challenge could be rendered ineffectual without a stay.⁶ Mr Maheno remains entitled to the fruits of his success in the Authority, and his interests would be adversely affected by a stay.⁷ Therefore, the balance of convenience and the interests of justice strongly favour the application being unsuccessful.

No jurisdiction to order a stay

[15] On that basis, Carrington's application for a stay cannot succeed. In these circumstances it is not necessary to resolve Mr Maheno's application for leave to extend time to file a notice of opposition to the stay application.

[16] In light of Mr Maheno's failure to file a notice of opposition to the stay application, costs shall lie where they fall.

Application for security for costs

[17] Mr Maheno applies for orders that Carrington pay into Court security for costs of \$15,000 and that the challenge brought by Carrington be stayed until that security has been paid. The key grounds on which Mr Maheno relies for his application include:

- (a) A belief that Carrington is in financial strife and the fact that the Inland Revenue Department has commenced liquidation proceedings against it.
- (b) Carrington refused to pay the sums awarded by the Authority until a distress warrant was issued in regards to the same.

⁵ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

⁶ See *Grove v Archibald* [1998] 2 ERNZ 125 (EmpC) at 128–129; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19]–[20].

⁷ *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

- (c) If Mr Maheno is successful in the substantive proceedings before the Court, obtaining any further awards of costs from Carrington will be difficult given Carrington's previous conduct, which he says has increased costs in the Authority and has required Mr Maheno to take enforcement action to secure the awards made by the Authority.

[18] Carrington has not responded to the application for security for costs.

The law

[19] There are no provisions relating to security for costs in the Employment Court. Accordingly, pursuant to reg 6(2)(a)(ii) of the Employment Court Regulations 2000, the Court looks to the provisions of the High Court Rules 2016 (the Rules) when dealing with applications for security for costs.

[20] Under r 5.45(1)(a)(ii) and (b) of the Rules, the Court has a discretion to order the giving of security for costs if a plaintiff is a corporation incorporated outside of New Zealand, or if there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its proceeding.

[21] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.⁸ An order may be made if it is just in all the circumstances.⁹

Analysis

[22] The Court can only exercise its discretion to order security for costs if it is satisfied that the threshold set out in the Rules has been met. The threshold is that the plaintiff must be either a corporation incorporated outside of New Zealand or would be unable to pay costs if unsuccessful.

[23] Mr Maheno's application focuses on Carrington's ability to pay costs if it is unsuccessful in the proceedings. Mr Maheno's affidavit raises concern that Carrington

⁸ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

⁹ High Court Rules 2016, r 5.45(2).

is in financial trouble and may be liquidated shortly which could mean he would not receive any money towards his costs if this occurred.

[24] On 16 August 2023 a public advertisement was placed in the New Zealand Gazette by the Commissioner of Inland Revenue regarding its application for putting Carrington Resort Jade LP into liquidation. As far as the Court is aware in this proceeding, the application remains on foot more than nine months later. Carrington has not filed any opposition to the application for security for costs, or responded to Mr Maheno's claims over its inability to pay costs if it is unsuccessful.

[25] Carrington's failure to engage in the proceedings and provide any evidence about the ongoing liquidation proceedings, or its financial position, places it in a disadvantageous position. It effectively invites the Court to infer that it will not be in a position to pay an award of costs should Mr Maheno be successful in defending its challenge.¹⁰

[26] I turn to the remaining concerns in Mr Maheno's application. Mr Maheno has raised concerns over Carrington's unwillingness to pay the Authority's awards and its conduct in the proceedings to date. I accept that Carrington has shown itself as unwilling to comply with orders of the Authority. It was only when it was faced with the warrant to seize property that it complied with and paid the amount ordered. The payment appears to indicate that Carrington has the ability to pay when required. However, no evidence has been filed from Carrington on its ability to pay, or on the status of the liquidation proceedings. Given the evidence before the Court in this case, I find the ongoing liquidation proceedings to be credible evidence from which it may reasonably be inferred that Carrington will be unable to pay any costs awarded against it despite its earlier payment of the Authority's awards.

[27] I consider Mr Maheno's final concern, regarding the issues surrounding Carrington's conduct in these proceedings, and whether the challenge is brought in good faith, are factors that should more appropriately be taken into account when considering the good faith report provided by the Authority.

¹⁰ *Monnery v Parsons* [2021] NZHC 2854 at [52].

Security for costs ordered

[28] In exercising my discretion, I consider the evidence before the Court supports that there is a basis for the concern that Carrington would be unable to pay Mr Maheno's costs should it be unsuccessful in its challenge. Carrington's failure to respond to this application means that there has been no evidence to challenge the basis of this concern.

[29] On balance, I consider that it is just in all the circumstances for there to be an order for security for costs. Bearing in mind the nature of the proceeding, security for costs in the sum of \$15,000, being sought in Mr Maheno's application, is appropriate. The amount of security sought is reasonable when compared to the estimated amount of costs that might be awarded on a category 2 band B basis if the proceeding continued through a normal defended hearing process, in accordance with the Employment Court's Costs Guideline Scale.¹¹

[30] Accordingly, Carrington is ordered to pay the sum of \$15,000 as security for costs. That sum is to be paid into Court within 20 working days of the date of this judgment and, as soon as practicable thereafter, will be placed by the Registrar of the Employment Court on interest-bearing deposit, until further order of the Court.

[31] Carrington's challenge is stayed until the payment is made or there is a further order of the Court.

Good faith report

[32] Carrington challenges de novo the determination of the Authority, in which it determined that:¹²

- (a) Mr Maheno raised his personal grievance within 90 days of his resignation.

¹¹ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

¹² *Maheno v Carrington Resort Jade LP*, above n 1, at [30] and [40].

- (b) Mr Maheno was not consulted about wage deductions made by Carrington in breach of the Wages Protection Act 1983.

[33] The Authority ordered Carrington to pay:¹³

- (a) Mr Maheno outstanding wages and holiday pay in the sum of \$3,345.41 and interest on that amount;
- (b) Mr Maheno \$4,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);
- (c) a penalty of \$4,000 under the Wages Protection Act, with \$2,000 paid to Mr Maheno;
- (d) a penalty of \$2,500 for failing to provide wage and time records in breach of s 130 of the Act, with \$1,000 paid to Mr Maheno;
- (e) a penalty of \$1,500 for obstructing and delaying the Authority's investigation under s 134A of the Act;
- (f) Mr Maheno's costs of \$3,750 and reimbursement of the Authority's filing fee of \$71.56.

[34] In its determination, the Authority recorded in some detail the procedure that preceded the investigation meeting, noting numerous occasions where it says Carrington and Mr Tan, its agent, failed to meet timetabling obligations, either as prescribed in legislation or as set out by the Authority.¹⁴

[35] As a result of those findings, the Court sought a report from the Authority under s 181 of the Act giving the Authority's assessment of the extent to which Carrington acted in good faith towards Mr Maheno during the investigation.¹⁵ The purpose of a

¹³ At [115].

¹⁴ At [67]–[78].

¹⁵ Employment Relations Act 2000, s 181(1).

good faith report is so that the Court can consider possible directions limiting the nature and extent of the challenge.¹⁶

[36] As required by s 181(3) of the Act, the Authority provided the parties with a copy of its report in draft for comment before submitting its final report to the Court. No comments were received by the Authority. The good faith report was completed without any input from the parties. After the Court received the report, the parties were given an opportunity to file and serve submissions on any directions they considered the Court should make on the nature and extent of the hearing of the challenge. Both parties provided submissions on those matters.

[37] The good faith report observed that Carrington's attendance and conduct at the investigation meeting held on 20 April 2024 satisfactorily met the requirements for the Authority for that part of the investigation.

[38] However, the good faith report details a number of directions and orders that were made at various times throughout the Authority's investigation, which Carrington failed or refused to comply with; these included:

- (a) On 6 September 2022 the Authority directed Carrington to:
 - (i) provide Mr Maheno with copies of documents relating to his employment, including wages and time and holiday and leave records, his final pay advice and his written resignation (Relevant Documents) by 20 September 2022;
 - (ii) seek leave by 16 September 2022 for lodging a statement in reply, which it had not done within the prescribed 14 days after the statement of problem was lodged; and
 - (iii) attend mediation within 30 days.

¹⁶ Section 182(3).

- (b) On 28 September 2022 further directions were given extending the time for Carrington to lodge a statement in reply until 30 September 2022; it also noted its previous direction to Carrington to provide the Relevant Documents to Mr Maheno by 30 September 2022.
- (c) On 8 November 2022 the Authority observed that its above directions had not been complied with. Carrington had not attended mediation, which was agreed to take place on 3 October 2022. No explanation for Carrington's absence was given. Carrington had not provided the Relevant Documents or lodged a statement in reply as directed.
- (d) On 23 February 2023 the Authority made an order requiring Carrington to comply with its earlier directions by 16 March 2023.
- (e) On 15 March 2023 Carrington lodged a statement in reply, an application to strike out, and it also filed some pay records. Mr Maheno's written resignation and other documentation which Carrington was directed to provide to the Authority in earlier directions, were not provided.
- (f) On 29 May 2023 the Authority directed that any submissions were to be filed by 8 June 2023 by Carrington and Mr Tan as to:
 - (i) whether they had obstructed or delayed the Authority in its investigation; and
 - (ii) whether a MYOB payroll record was a wages and time record required to be kept under s 130 of the Act.
- (g) No submissions were received.

[39] Accordingly, the Authority found Carrington had failed to fully facilitate the investigation. In its assessment, Carrington had failed to act in good faith towards Mr Maheno when, without excuse, it did not attend mediation when directed. Parties

directed to attend mediation are required under s 159(2) of the Act to comply with the direction and attempt in good faith to reach an agreed settlement of their differences.

[40] It also assessed that Carrington had failed, deliberately and without explanation, to comply in a full and timely way with the Authority's directions set out above. Those directions were given to enable the investigation to proceed and be concluded efficiently and effectually. Carrington's failure to observe its directions was found to have amounted to obstruction or delay of the Authority, and the Authority imposed a penalty of \$1,500 on Carrington.

[41] Having reviewed the good faith report and the Authority's determination, the Court agrees with the Authority's view of Carrington's conduct. I find that Carrington did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

Should directions be made as to the nature and extent of hearing?

[42] Where a Court is satisfied that a party who has challenged a matter on a de novo basis did not participate in the Authority's investigation in a manner that was designed to resolve the issues involved, it may direct that the matter not be heard on a de novo basis. When such a direction is made, it must also direct the nature and extent of the hearing in relation to the issues involved in the matter.¹⁷

[43] The Court now needs to determine what, if any, directions should be made as to the nature and extent of the hearing, bearing in mind the issues raised.

[44] Carrington's submission is that there is no basis to limit its challenge to the Court. The submissions also focus for a large part on irrelevant and unsubstantiated allegations against the Authority which are entirely inappropriate.

[45] Mr Maheno's submission as to the appropriate directions on the nature and extent of the hearing is that the hearing be limited to the unjustified disadvantage personal grievance, and any remedies on that issue.

¹⁷ Employment Relations Act, s 182(3).

[46] I am satisfied in the circumstances of this case that a just and fair result can be achieved by making directions restricting the parameters of Carrington's challenge. I direct that Carrington's challenge shall be limited to:

- (a) the unjustified disadvantage personal grievance, as to whether Carrington's deductions from Mr Maheno's pay had disadvantaged his employment and whether Carrington had acted without justification in making them, and any remedies on that issue; and
- (b) the Authority's finding that Carrington had obstructed or delayed the Authority in its investigation.

[47] I consider that such a direction would be fair in the circumstances; the main finding of unjustified disadvantage and the Authority's finding that Carrington obstructed or delayed the investigation will remain able to be challenged, but Mr Maheno will not be put to the costs of defending the Authority's findings with respect to his personal grievance being brought in time.

[48] Accordingly, the case will proceed on a non-de novo basis in relation to the finding that Carrington unjustifiably disadvantaged Mr Maheno and whether Carrington obstructed or delayed the Authority's investigation. The remedies for Mr Maheno's unjustified disadvantage will also be in contest should the challenge to the finding of justified disadvantage be unsuccessful.

Outcome

[49] Carrington's application for a stay is dismissed. Mr Maheno's application for leave to extend time to file a notice of opposition is resolved. Costs shall lie where they fall.

[50] Mr Maheno's application for security for costs is successful. Security for costs is ordered for \$15,000, which Carrington is to pay to the Employment Court Registry within 20 working days of the date of this judgment and, as soon as practicable thereafter, will be placed by the Registrar of the Employment Court on interest-bearing

deposit, until further order of the Court. If security is not paid or provided by the time specified, this proceeding will be stayed until it is paid or provided, without Mr Maheno having to make any further application.

[51] Directions are made that Carrington's challenge will proceed on a non-de novo basis in relation to the following issues:

- (a) whether Carrington unjustifiably disadvantaged Mr Maheno and if so what remedies (if any) are justified; and
- (b) whether Carrington obstructed or delayed the Authority's investigation.

[52] Once Carrington has paid the security for costs awarded, a directions conference will be convened by the registry to progress the matter towards a hearing.

Costs

[53] Mr Maheno has incurred costs in relation to his application for security for costs and the issues raised in the good faith report. He is entitled to an award of costs. If the parties are unable to reach an agreement, he is invited to apply to the Court by memorandum filed and served within 10 working days of the date of this judgment. Any memorandum in response from Carrington is to be filed and served within a further 15 working days, with Mr Maheno entitled to file and serve a memorandum in reply within a further five working days. Costs on this matter will then be determined on the papers.

M S King
Judge

Judgment signed at 9.45 am on 13 June 2024