

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 165  
EMPC 60/2024**

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

BETWEEN CARL BERRYMAN  
Plaintiff

AND FONTERRA COOPERATIVE GROUP  
LIMITED  
Defendant

Hearing: On the papers

Appearances: E Lambert, advocate for plaintiff  
R Rendle and M Austin, counsel for defendant

Judgment: 30 August 2024

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**INTERLOCUTORY JUDGMENT OF JUDGE M S KING  
(Application for stay of proceedings)**

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**Background**

[1] Carl Berryman is pursuing a de novo challenge to the Authority's substantive determination.<sup>1</sup>

[2] On 22 April 2024, the Authority issued its costs determination, in which it records that it considered submissions from Mr Berryman's representative that costs should lie where they fall on a number of grounds, including public interest in the

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<sup>1</sup> *Berryman v Fonterra Co-operative Group Ltd* [2024] NZERA 44 (Member Anderson).

matter and inability to pay.<sup>2</sup> Submissions were also made that costs should be set to one side pending Mr Berryman’s challenge of the Authority’s determination to the Court.<sup>3</sup> The Authority exercised its discretion and ordered Mr Berryman to pay the defendant, Fonterra Co-operative Group Limited (Fonterra), \$6,500 as a contribution towards its legal costs.<sup>4</sup>

[3] On 20 May 2024, Mr Berryman filed an application for a stay of proceedings over the costs awarded against him in the Authority, claiming that the execution of the costs determination should wait until the challenge is decided by the Employment Court.<sup>5</sup> On 4 June 2024, Fonterra filed a notice of opposition to the application.

### Legal principles

[4] The starting point is that a challenge to a determination of the Authority does not operate as a stay.<sup>6</sup> That reflects the general position that a successful litigant at first instance is entitled to the fruits of their success.<sup>7</sup> There may, however, be circumstances in which a stay is appropriate, and reg 64 of the Employment Court Regulations 2000 provides that the Court may order a stay of proceedings where a challenge against a determination of the Authority is pursued. It is up to an applicant to satisfy the Court that adequate grounds have been made out, and any orders made must be the least necessary to preserve the position of the challenging party.<sup>8</sup>

[5] The Court’s discretion is wide but must be exercised judicially and according to principle. In determining whether a stay ought to be granted, the Court must balance

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<sup>2</sup> *Berryman v Fonterra Co-operative Group Ltd* [2024] NZERA 233 (Member Anderson).

<sup>3</sup> At [4]–[7].

<sup>4</sup> At [18].

<sup>5</sup> The Court may grant an application for stay even where a separate election under s 179 of the Act, in respect of the costs determination, has not been made, see: *Maheta v Skybus NZ Ltd* [2022] NZCA 516, [2022] ERNZ 1005 at [15]; and Employment Court of New Zealand Practice Directions <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 11(4).

<sup>6</sup> Employment Relations Act 2000, s 180.

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

<sup>8</sup> *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].

the interests of the parties and generally have regard to the following non-exhaustive list of factors:<sup>9</sup>

- (a) whether the challenge will be rendered ineffectual if a stay is not granted;
- (b) whether the challenge is brought for good reasons and being pursued in good faith;
- (c) whether the successful party at first instance will be injuriously affected by a stay;
- (d) the extent to which a stay will impact on third parties;
- (e) the novelty and/or importance of the questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

[6] Other factors, including the likely merits of any related challenge, can also be relevant.<sup>10</sup> Ultimately, the overarching consideration is the interests of justice.

#### **Affidavits and submissions have been filed**

[7] Mr Berryman's evidence in support of his application is brief. He merely confirms that he previously worked for Fonterra, that he has raised a personal grievance against it, and that he supports his application for a stay. Mr Berryman's evidence does not refer to the value of his income or assets, including any property or vehicles held in his name; nor does it disclose the value of any debts or provide other

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<sup>9</sup> *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

<sup>10</sup> *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [34].

reasons why he could not meet the orders of the Authority pending the outcome of his challenge.

[8] The stay application filed by Mr Berryman's representative, Ms Lambert, provides additional information about Mr Berryman's financial circumstances. It refers to him having obtained new employment on less favourable terms. It also refers to Mr Berryman "paying off a large (for them) legal bill" from the Authority proceedings.

[9] The key submissions made on Mr Berryman's behalf include that the stay application has been brought in good faith, granting a stay will not prejudice Fonterra due to its financial circumstances, Mr Berryman's challenge raises novel and important questions of law and there is a public interest in the proceeding. It is submitted that the overall balance of convenience favours the granting of a stay.

[10] Fonterra has not filed any affidavit evidence. Its representative's submissions appear to accept that Mr Berryman's challenge is being brought in good faith. It submits that the evidence before the Court confirms that Mr Berryman's challenge would not be rendered ineffectual if the stay was granted. It disputes that there are any novel and important questions of law or that the challenge raises any matters of public interest. It submits that its ability to enforce the costs award would be prejudiced by a stay, that the overall balance of convenience lies in its favour and that the stay should not be granted.

## **Analysis**

### *Challenge would not be rendered ineffectual if no stay granted*

[11] Mr Berryman submits that he "has not contended his appeal will be rendered ineffectual if a stay is not granted, however he says that he is not in a financial position to pay costs at this time." Mr Berryman has not provided the Court with sufficient evidence of his financial position to support that submission.

[12] Fonterra submits that Mr Berryman's claims of impecuniosity have already been raised and considered by the Authority when it determined whether to award costs against Mr Berryman. Fonterra points to Mr Berryman being represented by the Number 8 Workers' Union of New Zealand Inc (Union) rather than legal counsel or an employment advocate. It observes that the rules of the Union state: "representation will be free to the member unless any fee is set."<sup>11</sup> Fonterra submits that Mr Berryman has not provided any evidence that he is incurring any costs in relation to the challenge or that he will be unable to pursue his challenge if the stay application is not granted.

[13] There is no suggestion that, if the monies were paid to Fonterra, it would not be able to repay them in the event Mr Berryman was successful in his challenge and the costs findings reversed.

[14] The submissions made on behalf of Mr Berryman accept that his challenge will not be rendered ineffectual if a stay is not granted. The evidence Mr Berryman has provided to the Court about his financial circumstances and the impact this could have on his stay application is incomplete and does not satisfy me that a stay is required to protect his challenge rights, or otherwise to protect his interests. This factor points away from the stay being granted.

*The challenge is brought in good faith*

[15] Mr Berryman submits that his challenge is brought in good faith. Fonterra has raised concerns with the merits of Mr Berryman's challenge but accepts there is nothing to suggest that the challenge is not being brought in good faith.

[16] I accept that the challenge has been brought and will be pursued in good faith. This factor is neutral.

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<sup>11</sup> Number 8 Workers' Union of New Zealand Inc "Registered Rules 2022" <[www.number8.org.nz](http://www.number8.org.nz)> at [48.4].

*Whether the successful party will be injuriously affected by a stay*

[17] Mr Berryman submits that Fonterra will not be injuriously affected by a stay. He implies that, because it is a large multinational company that is well funded, it would not be impacted by the granting of the stay.

[18] Fonterra submits that ordering a stay would be contrary to the interests of justice and the general principle that a successful litigant should be entitled to receive the fruits of its success. It also submits that a stay would expose it to additional legal costs in circumstances where it is concerned about its ability to recover the amount due to it under the determination, should Mr Berryman's challenge not succeed.

[19] Mr Berryman's representative submitted that he is not in a position to pay the Authority's costs award at this time. Fonterra submits that Mr Berryman has not provided any evidence that he is impecunious and that his financial circumstances are irrelevant to the challenge where he is not paying for union representation in these proceedings.

[20] On the facts, I accept that Fonterra will suffer minor adverse impact if a stay was granted. In my overall assessment, this factor weakly points away from a stay being granted.

*No effect on third parties*

[21] There is no evidence of any third parties being impacted by this decision.

*Novelty and importance of issues, merits of challenge and public interest*

[22] Fonterra submits that there are no novel or important questions of law involved and the challenge lacks merit. It describes Mr Berryman's challenge as involving straightforward claims of unjustified disadvantage, unjustified dismissal and discrimination.

[23] Mr Berryman disagrees. He submits his challenge raises novel and important questions of law that have not previously been argued in the employment institutions. Mr Berryman's first claim relates to Fonterra's treatment of unvaccinated workers and whether this constitutes unlawful discrimination. His second claim relates to s 36 of the Health and Safety at Work Act 2015 (HSWA) and whether Fonterra was required under this section to have its workforce vaccinated or tested for COVID-19, or required to take any other measures to keep others outside of its workplace safe.

[24] In regard to Mr Berryman's first claim of unlawful discrimination, the submissions of his representative cite the Court of Appeal judgment in *Four Members of the Armed Forces v Chief of Defence Force* which considered the question of whether an individual's unvaccinated status constitutes a disability in the context of a discrimination claim.<sup>12</sup> As this issue has already been authoritatively considered by the Court of Appeal, Mr Berryman's claim in this regard cannot be considered novel and is likely weak unless it can be distinguished from the issues resolved by the Court of Appeal.

[25] In regard to Mr Berryman's second claim raising alleged breaches of the HSWA, Fonterra submits that the Court does not have jurisdiction in respect of this Act.<sup>13</sup> It says the relevant issue for determination by the Court is whether the defendant acted as a fair and reasonable employer.

[26] The Court in *Wiles v Vice-Chancellor of the University of Auckland* confirmed that it had jurisdiction to consider whether an employer has complied with its obligations under the HSWA, particularly where these obligations have been imported into the terms of the employment agreement.<sup>14</sup> Mr Berryman in his statement of claim asserts that Fonterra breached its duties under the HSWA, by requiring workers to be vaccinated, or in the alternative by requiring them to undertake daily rapid antigen

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<sup>12</sup> *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17 at [134]–[138].

<sup>13</sup> Breaches of the Health and Safety at Work Act 2015 (HSWA) are prosecuted in the District Court.

<sup>14</sup> See *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123 at [104]–[109] and [163]–[165] as an example of where the Court has considered an employer's compliance with the HSWA, where a requirement to comply with the HSWA was imported into the terms of the parties' employment agreement.

tests. Mr Berryman claims that the requirements introduced a hazard into his workplace. This argument does not appear to be particularly strong.<sup>15</sup> Mr Berryman's claim nevertheless raises the interesting question of what an employer's obligations are when it disagrees with an employee over whether something constitutes a hazard. This question could be considered an important question of law under s 178 of the Act. This factor points towards a stay being granted.

#### *Public interest*

[27] Mr Berryman submits that because his challenge raises novel and important questions of law, these issues will have wider consequences for both employers and employees in New Zealand. Fonterra submits that there is not public interest in this proceeding which would warrant the granting of a stay.

[28] Given that I have previously found that the challenge does raise a novel and important question of law, I do consider that there is likely to be some public interest in this proceeding which would weigh in favour of a stay application being granted.

#### *Overall balance of convenience*

[29] Turning to consider the balance of convenience. While I have found the challenge is being brought in good faith and that there is a novel or important question of law, I am not satisfied that Mr Berryman's challenge would be rendered ineffectual if the stay is not granted. Further, Mr Berryman has not put his best foot forward by offering any form of concession to preserve Fonterra's interest in the face of his challenge. The costs awarded in the Authority are low in comparison to any costs that would be awarded by the Court, and there is no dispute that Fonterra would be in a position to repay the costs award should it be required to do so. Overall, I am satisfied,

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<sup>15</sup> See generally *Yardley v Minister of Workplace Relations and Safety* [2022] NZHC 291, (2022) 13 HRNZ 109 at [88] and [107]; and *NZTSOS Inc v Minister for COVID-19 Response* [2024] NZCA 74 at [96]–[97]. However, see also *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39](c) where the court acknowledged that it is difficult to assess the merits at the early interlocutory stages of a proceeding.

that having regard to the material before the Court, that the balance of convenience weighs against the grant of a stay.

### **Conclusion**

[30] The application is declined.

[31] Fonterra is entitled to costs. Fonterra will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with Mr Berryman having a further 14 days within which to respond. Any reply should be filed within a further seven days.

M S King  
Judge

Judgment signed at 1.40 pm on 30 August 2024