

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

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

**[2024] NZEmpC 256
EMPC 379/2023**

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

BETWEEN VGM
 Plaintiff

AND JXC
 Defendant

Hearing: On the papers

Appearances: S Mitchell KC and A Drumm, counsel for plaintiff
 M Dew KC and D Josephs, counsel for defendant

Judgment: 23 December 2024

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M S KING
(Application for stay of proceedings)**

[1] This judgment resolves an application by VGM, the plaintiff company, for an order staying execution of the costs awards made against it in the Employment Relations Authority (the Authority).

Background

[2] On 26 September 2023 the Authority issued a determination resolving an employment relationship problem between the plaintiff and JXC, the defendant, who is a former employee of the plaintiff.¹ The Authority held that the defendant was

¹ *JXC v VGM* [2023] NZERA 554 (Member Doyle).

sexually harassed in their employment by a shareholder and director of the plaintiff, referred to as XOZ, and that the dismissal of the defendant was unjustified.² The plaintiff was ordered to pay the defendant the following amounts:³

- (a) \$8,505 in lost wages;
- (b) \$15,000 as compensation for unjustified dismissal; and
- (c) \$25,000 as compensation for sexual harassment.

[3] On 30 October 2023 the Authority ordered the plaintiff to pay the defendant \$11,438.28 in costs and disbursements.⁴ In total the plaintiff has been ordered to pay the defendant \$59,943.28.

[4] The plaintiff has filed a de novo challenge to the Authority's 26 September 2023 determination. It denies the allegations of sexual harassment and claims that the defendant's dismissal was justified, it claims that the Authority's findings that the dismissal was unjustified are wrong in fact and law, and that if there was an unjustified dismissal, the defendant contributed to the circumstances giving rise to the dismissal. However, the plaintiff has accepted in its evidence that it dismissed the defendant without any proper process.

[5] On 25 October 2023 the defendant first demanded payment of the Authority's full award.

[6] On 5 December 2023 the defendant applied for security for costs and sought an order requiring the plaintiff to pay part or all of the sums ordered by the Authority in addition to the defendant's estimated legal costs in defending the plaintiff's challenge.

[7] In its judgment of 1 July 2024, the Court declined to order payment of the Authority's awards as part of an application for security for costs and observed that

² At [148].

³ At [176].

⁴ *JXC v VGM* [2023] NZERA 636.

there were other mechanisms which were available to the defendant to enforce payment of any awards made in the Authority.⁵ The Court went on to order the plaintiff to pay \$18,000 as security for costs into Court within 14 days of the judgment date.⁶ The Court observed that there was reason to believe that the plaintiff was impecunious because the substantial awards in the Authority were unpaid. Therefore, the Court also ordered that if the plaintiff paid the outstanding awards from the Authority proceedings, the order for security for costs would lapse.⁷

[8] On 25 July 2024 the defendant took steps to enforce payment of the Authority's awards by issuing a statutory demand on the plaintiff.

[9] On 5 August 2024 the plaintiff belatedly paid the security for costs into Court. Due to payment being made late, the hearing date of 5–9 August 2024 was lost. A new hearing date from 10–12 February 2025 has been scheduled.

[10] On 6 August 2024, the plaintiff applied to set aside the statutory demand issued by the defendant. This application was heard by the High Court on 9 September 2024. The High Court proceedings were adjourned to allow the plaintiff to apply for a stay of the Authority's determination.

[11] On 11 October 2024 the plaintiff applied for a stay of the Authority's determination. In its affidavit in support of its application the plaintiff offered to pay a further sum of \$11,438.18 into Court. This is a sum almost equivalent to the award of costs and disbursements ordered by the Authority. The defendant has rejected the offer and believes the plaintiff should pay the full amount of the awards made by the Authority to them or at least to the Court prior to the hearing of the plaintiff's challenge.

[12] The plaintiff's key submissions included that a stay is in the interests of justice and will ensure that the plaintiff's challenge is heard. It submits failure to grant a stay will allow the defendant to delay or avoid proceedings and could lead to liquidation proceedings for the plaintiff. The plaintiff has proposed that the security for costs sum

⁵ *VGM v JXC* [2024] NZEmpC 115 at [39].

⁶ At [45].

⁷ At [44] and [46].

of \$18,000 held by the Court be paid to the defendant and that a further sum of \$11,438.28 be paid to either the Court or the defendant.

[13] The defendant's key submissions in opposition to the stay application include that it is not in the interests of justice for a stay to be granted. It says the plaintiff has had more than a year to either pay the Authority's award or seek a stay and has delayed in doing so. Further, it notes the plaintiff has not provided any evidence to support its claims about its financial position and that the evidence given by its director as to the financial position of the plaintiff and the health and financial position of the directors of the plaintiff is inconsistent. The defendant submits that there is no evidence that the challenge will be rendered ineffectual by the stay. It submits the merits of the plaintiff's challenge are weak, that the challenge has not been brought in good faith, and that the defendant will be injuriously affected by a stay.

Legal framework

[14] A challenge does not operate as a stay of proceedings on a determination of the Authority.⁸ That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success.⁹ There are, however, circumstances in which a stay is appropriate, and the Court may order a stay of proceedings where a challenge against a determination of the Authority is pursued.¹⁰ The challenging party needs to establish the basis for a stay and can be expected, where a monetary judgment is involved, to make some concession, such as an offer to make a payment into Court pending the outcome of the appellate process.¹¹

[15] The Court's discretion is wide but must be exercised judicially and according to principle. In considering whether to order a stay, the overarching consideration is whether that would be in the interests of justice, taking into account various factors, including:¹²

⁸ Employment Relations Act 2000, s 180.

⁹ *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

¹⁰ Employment Court Regulations 2000, reg 64.

¹¹ *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].

¹² *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).

- (a) whether the challenge will be rendered ineffectual if a stay is not granted;
- (b) whether the challenge is brought for good reasons and is 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.

[16] Other factors, including the likely merits of any related challenge, can also be relevant.¹³

Analysis

Merits of the challenge

[17] I observed in my judgment dated 1 July 2024 that it is difficult to assess, at this early stage, the merits of the plaintiff's challenge. However, the plaintiff's decision to file a de novo challenge, despite it accepting in its evidence that its dismissal of the defendant was procedurally unfair, does pose some difficulty for the merits of the challenge and weighs against the granting of this application.¹⁴

Will the challenge be rendered ineffectual?

[18] The plaintiff's submissions and evidence on this factor are that the plaintiff is presently trading profitably and will be able to pay the Authority's awards over time;

¹³ *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [34].

¹⁴ *VGM v JXC*, above n 5, at [25]–[27].

however, it submits that if a stay is not granted, it may be liquidated, which it says would render the challenge ineffectual. The plaintiff also submits that evidence relating to its director's other business interests is irrelevant to its financial viability.

[19] I am not persuaded by the plaintiff's submissions or evidence that it just needs time to pay the Authority's awards. The plaintiff has had more than 12 months to either pay the Authority's awards or apply for a stay of execution. If the plaintiff only needs time to pay the defendant the Authority awards, the plaintiff does not address in its evidence why it did not do this during the intervening period. Alternatively, if it had other concerns about paying the awards to the defendant, it fails to explain why it did not raise these in an application for a stay of execution sooner.

[20] I accept the defendant's submission that the plaintiff's evidence and submissions in relation to its financial position has oscillated between characterising the plaintiff's position as not profitable, to avoid payment of security for costs, while later describing the plaintiff as profitable when seeking to persuade the Court that it can meet an award.

[21] Importantly, the plaintiff has failed to provide any financial statements, or evidence providing detail of its financial position and means to pay the Authority's awards, to support its claims that it may be placed into liquidation if a stay is not granted. This is unsatisfactory. Apart from the existence of the High Court proceedings, the claim that the plaintiff is facing liquidation is speculative and unsupported by the evidence. Based on the evidence before me, I am not satisfied that the plaintiff's challenge will be rendered ineffectual if a stay is not granted. This factor points away from a stay being granted.

The challenge is brought in good faith

[22] The defendant's submissions in relation to the merits of the plaintiff's challenge and its failure to pay, or make arrangements to pay the Authority's awards, have already been addressed above at [17] and [19]. However, on reading the pleadings and the evidence, I accept that the plaintiff seeks to challenge factual findings made by the Authority and that its challenge is brought in good faith and for good reasons. This factor is neutral.

The successful party will be injuriously affected by a stay

[23] It has already been over a year since the Authority made monetary awards in favour of the defendant. The defendant has been put to the effort of seeking to enforce the execution of the awards in the High Court. A stay would further delay the defendant from receiving the fruits of their success. Based on the evidence before the Court, further delay prior to the Court hearing the challenge will have a significant impact on the defendant. This factor points away from a stay being granted.

No effect on third parties, novelty, important issues or public interest

[24] I do not consider that there are any issues in respect of impact on third-party interests, that the challenge would raise any novel or important issues, or that any issues of public interest arise.

Overall balance of convenience

[25] Turning to consider the balance of convenience, while I have found the challenge is being brought in good faith, I am not satisfied that the plaintiff's challenge would be rendered ineffectual if the stay is not granted. In all of the circumstances, I find that it is not in the interests of justice to deprive the defendant of the fruits of their success. If a stay were to be granted, the defendant would lose the opportunity to use the money which the Authority ordered to be paid to them, while the plaintiff would be permitted to continue to trade profitably and unaffected by the awards. I am satisfied that the balance of convenience favours the defendant.

Outcome

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

[27] In accordance with [44]–[46] of my judgment of 1 July 2024, if the plaintiff pays in full the sums awarded to the defendant by the Authority, the order for security for costs will lapse, and the security paid into Court will be repaid to the plaintiff.¹⁵

[28] Costs are reserved.

M S King
Judge

Judgment signed at 1 pm on 23 December 2024

¹⁵ At [44]–[46].