

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

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

**[2024] NZEmpC 4
EMPC 213/2023**

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

AND IN THE MATTER OF an application to dismiss proceedings

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN BREAD OF LIFE CHRISTIAN
CHURCH IN AUCKLAND
Plaintiff

AND XI (ROBERT) CHEN
Defendant

Hearing: On the papers

Appearances: G Pollak and J Peacock, counsel for plaintiff
S Greening and K Hudson, counsel for defendant

Judgment: 16 January 2024

**INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application to dismiss proceedings)
(Application for stay of proceedings)**

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority.¹ This judgment resolves two interlocutory applications before the Court:

¹ *Chen v Bread of Life Christian Church in Auckland* [2023] NZERA 298 (Member Larmer).

- (a) the defendant's objection to jurisdiction which is being treated as an application to dismiss the proceedings on the grounds that the plaintiff has no standing; and
- (b) the plaintiff's application for a stay of proceedings.

Background

[2] The issues in this matter centre around the Bread of Life Christian Church in Auckland (the Church).

[3] There is also a registered charity on the Charities Register of the same name.

[4] The Bread of Life Christian Church in Auckland is also a charitable trust (the Trust) which is incorporated as a board under the Charitable Trusts Act 1957. It is the plaintiff in these proceedings.

[5] The assets of the Trust are comprised of donations made by members of the Church; a building at 75F Apollo Drive, Auckland; and rental income. It is governed by a trust deed.

[6] The Trust Board currently consists of six trustees: Xin Huang; Julia Buhagiar; Jianan Zhang; Jiedan Li; Yang Liu and Xi (Robert) Chen.

[7] The Trust Board is currently unable to make decisions because a conflict has arisen among the trustees, which has led to a 3:3 deadlock.

[8] Three of the trustees, Jiedan Li, Yang Liu and Xi Chen (the defendant trustees), support the defendant's claims and the findings of the Authority. Mr Chen is also the defendant in these proceedings.

[9] The remaining trustees, Xin Huang, Julia Buhagiar and Jianan Zhang (the plaintiff trustees), oppose the defendant's claims and seek to overturn the findings of the Authority.

[10] Mr Chen was appointed by the Church as its pastor.

[11] While the nature of the relationship between the Trust and Mr Chen is disputed,² it is common ground that an agreement was signed on 2 September 2019. However, the plaintiff denies it was involved in this agreement, the implication being that the contractual relationship was between Mr Chen and the Church, not Mr Chen and the Trust. The plaintiff says the Trust paid Mr Chen at the request of the Church.

[12] The plaintiff also says that was a fixed term arrangement which ended on 31 March 2022 and the Trust therefore stopped paying Mr Chen at that time.³

[13] Mr Chen says he was unjustifiably dismissed.

[14] The Authority found that the relationship between Mr Chen and the Trust was an employment relationship and ordered Mr Chen's interim reinstatement within seven days of the date of the determination.⁴

[15] The plaintiff has applied for a stay of that order.

[16] This problem is longstanding – Mr Chen filed his statement of problem in the Authority on 5 July 2022. The proceedings were paused while the parties attempted mediation.

[17] The plaintiff trustees filed proceedings in the High Court in July 2022 seeking that Xi Chen, Yang Liu and Jiedan Li be removed as trustees of the Trust.

[18] The defendant trustees have filed a counterclaim seeking that the plaintiff trustees be removed.

² The plaintiff disputes that he is an employee.

³ The Trust's finances are controlled by the plaintiff trustees, in particular the treasurer, Julia Buhagiar.

⁴ *Chen v Bread of Life Christian Church in Auckland*, above n 1, at [228]–[230].

[19] The latest advice the Court received was that the High Court proceedings are currently at the stage of discovery having been completed and the parties are awaiting a case management conference to be set.

[20] The parties say they will be seeking a fixture at that time. Given the workload of the High Court, there is unlikely to be a hearing in the near future.

[21] In the meantime, Mr Chen says he continues to work unpaid.⁵ He opposes the plaintiff's application for a stay.

[22] He also says that the plaintiff trustees do not have standing or authority to bring these proceedings.

Application to dismiss proceedings/objection to jurisdiction

[23] The defendant objects to the Court's jurisdiction to hear this matter on the grounds that the plaintiff trustees do not have authority to represent the Trust in these proceedings. Mr Chen also says that although they filed a statement in reply resisting his claim, they are not a party to the matter before the Authority and therefore have no standing to challenge the determination.⁶

Legal principles

[24] In order to dismiss the proceeding the Court must first or concurrently strike out the statement of claim.⁷ The reasons a pleading may be struck out are that it discloses no reasonably arguable cause of action; is likely to cause prejudice or delay; is frivolous or vexatious, or is otherwise an abuse of process of the Court.⁸ The application and the defendant's submissions are not clear as to which of these grounds is relied upon.

⁵ The plaintiff trustees believe he is receiving donations directly which they suggest would be an acceptable alternative to reinstatement.

⁶ Citing Employment Relations Act 2000, ss 179(1) and 187.

⁷ See High Court Rules 2016, r 15.1(2); applied via Employment Court Regulations 2000, reg 6.

⁸ High Court Rules 2016, r 15.1(1).

Do the plaintiff trustees have authority?

[25] The issue of who has authority to represent the Trust is a matter of dispute in the High Court.⁹

[26] The defendant is correct that the trust deed requires consensus decision-making (which is currently not possible) and the decision to file this challenge was not made by consensus. However, cl 12 of the trust deed requires that, if consensus cannot be reached, it shall be put to a vote, with the majority being able to make a decision. If the voting is tied then the Chairman shall have the casting vote. Mr Chen claims to be the Chairman, but this is a matter of dispute between the parties. In any case, there is an issue as to whether a conflict of interest arises for him in relation to these proceedings.

[27] The plaintiff submits that as Mr Chen has a financial interest in the outcome of these proceedings, he has a conflict of interest and therefore is not entitled to vote and/or if he purports to vote, such a vote is unlawful and invalid. Mr Peacock, counsel for the plaintiff, says the plaintiff trustees therefore have a majority and the authority to bring these proceedings on behalf of the Trust.

[28] Mr Greening, counsel for the defendant, says that it would be unjust to enable the plaintiff trustees to bring proceedings on behalf of the Trust in the absence of consent from the Trust Board.

[29] The question of whether the plaintiff trustees have the authority of the Trust to bring these proceedings and/or to take any other steps is a live issue before the High Court. It is not a matter for this Court. It is well established that it is undesirable to have the same issues determined in different courts.¹⁰

⁹ See above at [17]–[20].

¹⁰ *Mackay Refined Sugars (New Zealand) Ltd v New Zealand Sugar Co Ltd* [1997] 3 NZLR 476 (HC); *Transpacific All Brite Ltd v Sanko* [2012] NZEmpC 7 at [4] and [9]; *Speed v Board of Trustees of Wellington Girls College* [2017] NZEmpC 74 at [47]; and *Martin v Solar Bright Ltd (in liq)* [2021] NZEmpC 58 at [13].

Is the plaintiff a party?

[30] The Trust itself is clearly a party. It was found to be the employer of Mr Chen and ordered to reinstate him.

[31] For the time being, the plaintiff trustees appear to be in control of the Trust and its assets. They are purporting to make decisions on its behalf and are attending to its day-to-day running. They are choosing who to pay, or not. As noted above, whether they have the authority to do so is not a matter for this Court.

[32] Alternatively, the plaintiff trustees say if they are unable to bring the proceedings as the Trust itself, they are able to challenge the determination as a party in their own right, as trustees. They say that at all times during the Authority proceedings, they were treated, and referred to, as a party. Mr Peacock submits that a liberal approach should be taken to the question of standing so that they meet the requirements of a party under s 179 of the Employment Relations Act 2000 (the Act).¹¹

[33] As has been previously observed, the Act does not define the word “party”, but the High Court Rules 2016 define it as “any person who is a plaintiff or a defendant or a person added to a proceeding”.¹² The plaintiff trustees were not added as a party in the Authority. In the absence of an application for joinder in this Court, it would be inappropriate to treat the plaintiff trustees as a party based purely upon their participation in the Authority proceedings.

[34] In all the circumstances of the present case there appears to be merit in the plaintiff trustees being joined as parties to the proceedings as it would enable the Court to continue to consider the employment relationship problem which is in issue according to the substantial merits and equities of the case.¹³ While the Court may join a party on its own motion, it is appropriate that the parties have an opportunity to be heard on this matter. Accordingly, I direct that a directions conference be convened

¹¹ Citing *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [322].

¹² High Court Rules 2016, r 1.3; applied via Employment Court Regulations 2000, reg 6; as referred to in *Bennett v Employment Relations Authority* [2020] NZEmpC 54 at [39].

¹³ Under s 221 of the Employment Relations Act 2000. See too High Court Rules 2016, r 4.56.

as soon as practicable after 1 February 2024 to determine next steps in relation to this issue.

[35] The defendant has failed to establish a sufficient basis to dismiss these proceedings at this time and I do not consider it is in the interests of justice to do so.

Application for a stay of proceedings

[36] The plaintiff applies for a stay of execution of the Authority's determination. It does so on the grounds that:

- (a) the proposed appeal will be rendered nugatory unless a stay is granted;
- (b) third parties, being donors of the Trust Board, members of the Church, and those with an interest in the High Court proceedings, will be negatively impacted by the lack of a stay;
- (c) detriment to the defendant, if a stay is granted, will be minimal;
- (d) there are novel and important questions involved in terms of –
 - (i) the employment status (or lack thereof) of members of the clergy; and
 - (ii) the interrelationship between churches and trust boards or other entities;
- (e) the plaintiff believes its appeal is strong and that the Authority has failed to engage with a number of important legal arguments;
- (f) the balance of convenience weighs in favour of the plaintiff and, without limiting the generality of the above, the plaintiff says that to pay the defendant in accordance with the determination would force it to operate at a net loss and may lead the Trust into liquidation;

- (g) the Trust has at no time managed Mr Chen as an employee and in light of the current dysfunction within the Trust, it would be unable to manage the interim reinstatement;
- (h) Mr Chen is in a position to solicit donations and if he is doing so, for the Trust to pay him would amount to him being paid twice; and
- (i) the Trust should not be required to apply assets which would undermine the High Court proceedings.

[37] The defendant says that that plaintiff trustees do not have standing to make the application for a stay. I have dealt with the issue of standing above. Presently, it is unclear whether the plaintiff trustees have standing in the absence of a ruling from the High Court. As I have indicated, an application for joinder would ameliorate issues as to standing and would likely succeed. For completeness, I will consider the present application for stay as if the plaintiff trustees have standing.

[38] The defendant also submits that there are grounds to question the bona fides of the challenge and says that the refusal to comply with the order to reinstate is consistent with the attitude and approach of the plaintiff trustees, referred to with concern in the Authority's determination. The defendant says he was successful in the Authority and is entitled to the benefit of the decision. He maintains that he continues in his role unpaid because of his commitment to serve God and the Church. It is, therefore, unfair for the employer to receive the benefit of his labour without payment. On that basis, damages are not an adequate substitution for interim reinstatement because of the spiritual importance of his role to him. The defendant says that the Trust has the ability to pay, that there would be no negative impact on the congregation, and that the balance of convenience weighs strongly in his favour.

Legal Principles

[39] As s 180 of the Act makes clear, a challenge does not operate as a stay of execution. However, the Court has the power to order a stay of proceedings where a

challenge against a determination of the Authority is pursued.¹⁴ Both parties refer to the principles that apply where the Court is considering an application for a stay. The starting point is that the successful party is entitled to the benefit of the judgment they obtained at first instance. The overarching consideration is whether granting a stay will be in the interests of justice, taking into account various factors, including:¹⁵

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

Analysis

Challenge rendered ineffectual if no stay granted?

[40] The plaintiff trustees submit that their challenge will be rendered nugatory unless a stay is granted as the Trust Board will in all likelihood be forced into liquidation on account of not having the funds and not being in a position to raise funds to pay Mr Chen. They are confident they will succeed in their challenge.

¹⁴ Employment Court Regulations 2000, reg 64(1).

¹⁵ *Assured Financial Peace Ltd & Prosper With Us v Pais* [2010] NZEmpC 50; *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA); and see *Jeon v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 114 for a recent statement and application of the law.

[41] There is always the possibility that a challenge will succeed. That is the position that arises on any challenge and does not, of itself, warrant a stay. If it were otherwise s 180 would be worded differently.¹⁶ It is up to the applicant to establish a reasonable basis for making the interlocutory order in its favour.¹⁷

[42] The affidavit evidence provided by the plaintiff does not, on its face, support the submission that there are no funds available to pay Mr Chen. The information provided shows a total balance of around \$33,000 in the various accounts as at 17 August 2023. That is the most recent information available. It is the general account that appears to have been used in the past for the payment of Mr Chen.

[43] In terms of the ongoing financial viability of the Trust, there is a dispute between the parties as to the extent to which trustees are encouraging and/or allowing further donations to be paid into the Trust. Both parties are suspicious of the others' motivation in relation to the receipt and allocation of donations. It is not possible to determine the merits of that dispute on the basis of the information before the Court at present, nor is it necessary to do so. What is apparent from the affidavit evidence filed is that there are currently funds available to pay Mr Chen for the work that he continues to undertake, consistent with the interim reinstatement order of the Authority.

[44] The plaintiff trustees submit that Mr Chen should be able to raise funds directly from what they refer to as his "breakaway congregation". However, that is not the point. The current state of the legal proceedings is that the Authority has determined that Mr Chen was an employee of the Trust. It is not appropriate for him to arrange his own salary. Presumably, any funds that could be raised to pay him directly could otherwise be paid to the Trust, which would mitigate the concern in relation to financial viability.

¹⁶ See *SP Blinds Ltd v Hogan* [2022] NZEmpC 104, [2022] ERNZ 416 at [11]; as referred to in *Jeon*, above n 15, at [11].

¹⁷ *Grove v Archibald* [1997] 2 ERNZ 125 (EmpC) at 128–129; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186 at [19]–[20].

Is the challenge being pursued in good faith?

[45] I accept, based on the information currently before the Court that the Trust's challenge is being pursued in good faith, despite concerns from the defendant as to the bona fides of the plaintiff trustees. It is clear that both parties' positions in relation to how they see the dispute between them is genuine.

Injurious effect on successful party?

[46] If a stay is granted, it will mean that Mr Chen continues to work without remuneration and that he will not obtain the benefit of the Authority's orders in his favour, pending the outcome of the challenge. This is a clear detrimental impact that weighs against the granting of a stay.

[47] While the plaintiff trustees have suggested that they would not take issue with Mr Chen seeking donations directly from his supporters within the congregation of the Church, as I have already noted it is not, on the current state of the proceedings, for Mr Chen (an employee) to arrange his own remuneration.

Any impact on third parties?

[48] The plaintiff trustees say that there will be a significant negative impact on third parties in the event that a stay is not granted. Those third parties are donors to the Trust Board, members of the Church and those with an interest in the High Court proceedings. The plaintiff trustees say they are pursuing a challenge so as to be able to account to the donors.

[49] As already noted above, there is a dispute between the parties as to the extent to which the plaintiff trustees are encouraging and/or allowing donors to continue to donate to the Trust. The plaintiff trustees refer to supporters having donated large amounts to the Trust fund over many years. However, these years also include a period where Mr Chen was receiving remuneration and presumably those donations were made in the knowledge that the Trust was paying the salary of Mr Chen (up until his

termination). Other than the broad point about the reduction in the assets of the Trust by paying Mr Chen, it is difficult to see any evidence of a particular negative financial impact on third parties. This factor does not warrant a stay.

[50] The plaintiff trustees also submit that the High Court proceedings themselves will be undermined if a stay is not granted; I infer they are concerned this will disadvantage third parties that they say have an interest in those proceedings. It is also alleged that Mr Chen primarily influences the income of the Trust and that he has an incentive to minimise the income the Trust receives while the High Court proceedings are ongoing. The basis for this argument is unclear, particularly given that Mr Chen's salary is usually paid out of the Trust. This factor also does not point in favour of a stay.

Importance of questions involved in the challenge?

[51] This case raises a number of legal and factual issues which I accept are of importance to the parties. The plaintiff trustees submit there are novel and important questions involved in terms of the employment status (or lack thereof) of members of the clergy; and the interrelationship between churches and trust boards or other entities.

[52] I do not consider that the second question is necessarily one for this Court but agree the first question in relation to the employment status of clergy, while not novel, is one that has not been considered fully for some time which may weigh in favour of a stay but is not sufficient on its own.

Public interest considerations

[53] Other than the question identified above, there are no public interest considerations that would weigh in favour of a stay being granted.

Merits

[54] While both parties feel strongly about the respective strengths of their cases, it is not possible to assess the merits at this stage. The plaintiff is pursuing a de novo

challenge to the Authority's determination which it is statutorily entitled to do; and I have assumed the plaintiff trustees have the same entitlement for the purposes of dealing with this stay application. The evidence will be heard afresh, and it is difficult to predict with any certainty how the evidence will come out or what the outcome will be.¹⁸

Balance of convenience/interests of justice

[55] I am satisfied, having regard to the material before the Court, that the balance of convenience weighs against the granting of a stay. While I accept that the plaintiff trustees feel strongly that the Authority made a mistake in finding that Mr Chen was an employee and reinstating him on an interim basis, that in itself is not sufficient to justify the grant of a stay.

[56] A review of the material before the Court and contained within the various affidavits filed, and in particular those of Ms Buhagiar, does not sufficiently support the financial concerns that have been raised. The evidence does not support the submission that to reinstate Mr Chen's salary (given that Mr Chen is already working), would place the Trust in dire financial circumstances. On the contrary, they show that the Trust is in funds at the present time, and on the face of it, able to meet any salary payments to him.

[57] On the other hand, Mr Chen's evidence is that he is currently receiving no funds and he is working. I note there has been no suggestion by the plaintiff trustees that he is not undertaking work. He denies the allegation made by the plaintiff trustees that he is receiving donations directly and there is no evidence before the Court that would suggest otherwise. It is not an answer to suggest that Mr Chen should make arrangements to obtain funds himself.

[58] Further, the impact on third party donors can be no different from what was previously the case when Mr Chen was receiving his salary before termination.

¹⁸ The difficulties associated with making a merits assessment at an early stage are notorious and relatively recently emphasised by the Supreme Court in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39](c).

[59] Accordingly, no adequate basis has been made out for the Court to exercise its discretion to grant a stay and it is not in the overall interests of justice to make the order sought.

Conclusion

[60] The application to dismiss the proceedings is declined. The plaintiff has standing as a party and a directions conference will be convened to discuss the possible joinder of the plaintiff trustees as a party/parties in their own right.

[61] The application for a stay of execution of the Authority's determination is declined.

[62] The plaintiff is ordered to:

- (a) Reinstate Mr Chen to the payroll no later than seven days from the date of this judgment.
- (b) Pay Mr Chen salary owing from the date of the determination of the Authority; such payment should be made within 14 days of the date of this judgment.

[63] The parties have had equal success and should bear their own costs.

Kathryn Beck
Judge

Judgment signed at 10.00 am on 16 January 2024