

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

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

**[2024] NZEmpC 69
EMPC 94/2024**

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 MAGNUM HIRE LIMITED
First plaintiff

AND LIAM FIELD
Second plaintiff

AND DAVID PARKER
Defendant

Hearing: 23 April 2024
(Heard at Auckland)

Appearances: A Evans and C Joy, counsel for plaintiffs
CW Stewart and J Whyte, counsel for defendant

Judgment: 6 May 2024

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

Background

[1] The plaintiffs, Magnum Hire Ltd (Magnum) and Liam Field, have applied for a stay of execution of orders made against them by the Employment Relations Authority.¹

¹ *Parker v Magnum Hire Ltd* [2024] NZERA 85 (Member Blick).

[2] In its determination dated 14 February 2024, the Authority ordered Magnum to pay the defendant, David Parker, the following sums:²

- (a) \$105,000 in compensation under s 123(1)(c)(i);
- (b) \$32,463.68 (gross) in lost income;
- (c) \$5,071.50 for psychologist fees; and
- (d) \$1,000 by way of a penalty.

[3] The Authority also ordered Magnum to pay an additional \$3,000 penalty to the Crown bank account, made recommendations to Magnum, and ordered the parties to confer regarding bonus entitlements, holiday pay and interest for the purpose of resolving those matters without further determination.³

[4] The amounts were ordered to be paid within 21 days – by 6 March 2024. On 5 March 2024, counsel for Magnum advised counsel for Mr Parker that they had instructions to challenge the determination and apply for a stay of execution. Magnum sought Mr Parker’s agreement to the stay on the basis that the funds would be paid into court. There was no agreement.

[5] On 7 March 2024, Mr Parker filed an application in the Authority for a compliance order on the basis that the Authority’s awards remained unpaid. On 13 March 2024, Magnum and Mr Field filed a de novo challenge to the determination of the Authority, an application for stay of execution in relation to the Authority’s awards, and an application for urgency – in light of the enforcement steps being taken by Mr Parker. Urgency was granted on the stay application on 22 March 2024.⁴

[6] Originally, the plaintiffs’ stay application also sought a stay of the Authority’s investigation⁵ of the outstanding issues in respect of bonus entitlements, holiday pay,

² At [102] and [134].

³ At [135]–[137].

⁴ *Magnum Hire Ltd v Parker* EmpC Auckland EMPC94/2024, 22 March 2024.

⁵ The application sought to stay the “future determination on costs and remedies”.

interest, special damages, and costs. The Court likely does not have jurisdiction to stay an investigation being carried out by the Authority.⁶ In relation to the remaining proceedings, Magnum then filed an amended application seeking, in the alternative, a stay of execution of remedies and costs once awarded by the Authority and a direction that those (at that point undetermined remedies) be paid into court.

[7] However, subsequent events have superseded that part of the plaintiffs' application as the Authority issued a second substantive determination on 22 April 2024 in which it ordered Magnum to pay Mr Parker the following additional sums:⁷

- (a) \$100,000 in bonus entitlements;
- (b) \$8,000 in annual holiday pay;
- (c) interest from 21 May 2016 on the bonus entitlements and holiday pay;
- (d) \$1,897.50 for psychologist fees; and
- (e) \$20,500 in costs.

[8] Finally, Mr Field was ordered to pay Mr Parker \$1,000 in costs.⁸

[9] The plaintiffs now seek a stay of execution of both determinations of the Authority. Although no challenge has been filed to the second determination, the Court has jurisdiction to issue a stay in relation to that determination due to its derivative nature.⁹ The parties agreed that it was appropriate to consider whether a stay should be ordered in respect of both determinations. The application proceeded on that basis.

⁶ *Citadel Capital Ltd v Miles* [2024] NZEmpC 51 at [7]–[11].

⁷ *Parker v Magnum Hire Ltd* [2024] NZERA 231 (Member Blick) at [27] and [59].

⁸ At [60].

⁹ *Maheta v Skybus NZ Ltd* [2022] NZCA 516, [2022] ERNZ 1005; *Allstar Roofing Ltd v Liu* [2024] NZEmpC 53 at fn 5; and Employment Relations Act 2000, s 189.

Legal framework

[10] A challenge does not operate as a stay of proceedings on a determination of the Authority.¹⁰ That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success.¹¹ 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.¹² 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.¹³

[11] In determining whether a stay ought to be granted, the Court must balance the interests of the parties and generally has regard to the following non-exhaustive list of factors:¹⁴

- (a) whether the challenge will be rendered ineffectual if a stay is not ordered;
- (b) whether the challenge is brought for good reasons and being pursued in good faith;
- (c) whether the successful party at first instance would 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.

¹⁰ Employment Relations Act, s 180.

¹¹ *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

¹² Employment Court Regulations 2000, reg 64.

¹³ *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].

¹⁴ *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).

[12] Other factors, including the likely merits of any related challenge, can also be relevant.¹⁵ Ultimately, the overarching consideration is the interests of justice.

Submissions

[13] The plaintiffs submitted that if their stay application is not granted, there is a risk that Mr Parker will not be able to repay the sums awarded in the event they are successful. They submitted that the size of the sum ordered can be relevant to whether a stay is appropriate, and in this instance the sums that have been ordered are significant.¹⁶ At the hearing, counsel for the plaintiffs acknowledged that the size of the sums must also be considered relative to the defendant's financial position but suggested that insufficient evidence had been provided about Mr Parker's financial position.

[14] The plaintiffs submitted that the challenge is brought in good faith and that Mr Parker has not provided sufficiently specific evidence of the degree to which he and his family would be injuriously impacted by a stay. Additionally, the plaintiffs submitted that there are novel and important questions around how remedies ought to be calculated, the application of the banding approach for compensatory awards, whether s 113 prevented Mr Parker from bringing a breach of contract claim for failure to provide a safe workplace, and whether a claim can be brought for legal fees as special damages. These questions were also said to go to the merits of the challenge. The plaintiffs suggested that there is considerable public interest in the issues surrounding the quantum and assessment of remedies in this case.

[15] In assessing the balance of convenience, the plaintiffs emphasised that there is a risk that Mr Parker will be unable to repay the large sums awarded to him if no stay is granted and that the sums owing can be paid into court by the first plaintiff.

¹⁵ *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [34].

¹⁶ Citing *Wilson-Grange Investments t/a The Grange Bar and Restaurant v Guerra* [2022] NZEmpC 109 at [8].

[16] The second plaintiff, Mr Field, also filed an affidavit in which he questioned Mr Parker's financial capacity to repay any sums paid to him, spoke briefly to the merits of the case, and noted the public interest in the case.

[17] Counsel for Mr Parker submitted that he was in a strong financial position and that the plaintiffs had not provided sufficient evidence to establish that he was impecunious, so that there are not grounds to suggest that their challenge will be rendered ineffectual without a stay. This was supported by an affidavit from Mr Parker, confirming that he owns his own mortgage-free home worth \$1,925,000, that he currently earns around \$180,000 per annum, and that he will be able to repay any sums received by him if necessary.

[18] Counsel for Mr Parker also submitted that the challenge is not being brought in good faith and lacks merit in light of the second plaintiff's actions, the comprehensive findings of the Authority and the timing of the application for a stay.¹⁷ In terms of whether a stay would injuriously affect anyone, counsel for Mr Parker said that if a stay is issued, he will need to take on substantial debt or liquidate assets to support his defence of the challenge, which would impose financial difficulties on his family and could further undermine his fragile mental health, whereas the plaintiffs are clear that they will have no financial difficulty in paying the awards. Counsel also submitted that there are no novel or important issues or public interest arising from these proceedings, apart from the public interest in a bullied employee receiving the awards to which they are entitled.

[19] In assessing the balance of convenience, counsel for Mr Parker argued that it would make no difference to the plaintiffs whether they pay the remedies to Mr Parker or into court, whereas Mr Parker will be seriously inconvenienced if he is denied access to the sums awarded by the Authority.

¹⁷ The application was made after the payments were due.

Analysis

Effect of no stay on challenge

[20] At the hearing on 23 April 2024, the parties agreed that the amount owing by the plaintiffs to Mr Parker, once interest payments were calculated, was \$303,803.10, with an additional \$3,000 owing to the Crown.

[21] Counsel for the plaintiffs submitted that insufficient evidence has been provided to prove that Mr Parker would be able to repay any sums if ordered to do so by the Court. Counsel noted that no evidence was provided to the Court (for example, from his bank) that he would be able to obtain a mortgage over his property. However, I do not accept that level of evidence is necessary in the circumstances, given Mr Parker's financial position, which is clearly strong.

[22] Based on the affidavits provided by Mr Parker, I find that he is earning \$140,000 per year with additional commission payments on top of that sum, which added a further \$40,000 to his salary last year. He also owns a mortgage-free home worth approximately \$1,925,000. If no stay is ordered, Mr Parker will receive an additional sum of \$303,803.10, some of which no doubt will be dissipated to pay his legal costs, but the remainder ought to provide him further financial security should repayment of any sums be required. Overall, I am satisfied that he has the means to repay the sums should he be ordered to do so in the future.

[23] Therefore, I find that there is no reason to believe the challenge will be rendered ineffectual if a stay is not ordered.

Good faith

[24] Counsel for Mr Parker suggested that the challenge filed by the plaintiffs is not being brought in good faith. However, I do not accept that there is evidence of bad faith.

[25] The allegations made about Mr Field sending emails to Mr Parker's new employer are unproven. However, I note it would be of grave concern if there was evidence of attempts by a former employer to impact the ability of a former employee

to earn a living. A previous statement by Mr Field that he would spend a million dollars fighting any employee who complained about him in court is alleged to have been made in a different set of circumstances and at a time that was unrelated to this case. Accordingly, it is not relevant to these proceedings. These factors are insufficient to establish that the challenge in question is being brought and pursued in bad faith.

[26] In respect of the other alleged instances of bad faith, the challenge was brought within the statutory timeframe and the application for a stay was filed at the same time. In this case the Authority ordered payment within 21 days. It is reasonable to expect a party to apply for a stay before the funds are payable. However, in this instance there was a change of counsel; they advised a stay would be sought before payment was due (albeit only by a day), and the delay was seven days. The process has not been perfect, but the evidence does not indicate bad faith.

Effect of stay on successful party

[27] Mr Parker incurred litigation costs in the Authority which need to be paid. If a stay is ordered, he has provided evidence that he will need to take on substantial debt or liquidate assets to meet those obligations. That will clearly inconvenience him and could further undermine his mental health.

[28] The plaintiffs' submissions were somewhat inconsistent. They suggested that Mr Parker would not be inconvenienced by a stay because he has sufficient funds to meet his legal costs by liquidating assets, but then also submitted that he had not provided sufficient evidence that he had sufficient assets to repay any sum received by him if required to do so.

[29] I find the opposite of both propositions to be the case. Mr Parker has sufficient assets and income to meet any repayment obligations that may arise – there is no risk of the challenge being rendered ineffectual by the absence of a stay. Similarly, I consider that he likely has sufficient assets and income to meet any financial obligations that he may have incurred in taking and now defending these proceedings, but meeting those obligations will likely cause him inconvenience. That inconvenience, in these circumstances, is barely relevant to whether the challenge will

be rendered ineffectual, but it does illustrate that a stay will have a negative effect on him.

Effect on third parties

[30] As previously noted, Mr Parker has stated that the financial inconvenience caused to him by a stay would also affect his family. I accept that any inconvenience caused to him may also have some effect on his family. However, in the absence of specific evidence on the point, I do not accord it any weight.

Novelty and importance of issues and merits of challenge

[31] The plaintiffs submitted that there are a number of important issues that arise in this case, particularly in relation to the assessment and quantum of remedies. The defendant submitted that the issues identified by the plaintiffs are not important enough to justify a challenge and said further that the challenge lacks merit.

[32] Before assessing whether there are any novel or important issues, it is worth briefly observing that it is generally difficult to assess the merits of a challenge at an interlocutory stage, particularly where a de novo challenge has been filed.¹⁸

[33] Turning to the issues raised, as this is a de novo challenge, the Court will not be required to assess whether the Authority was correct to order compensation separately or whether it should have applied the Court's banding approach. Therefore, although the compensation sought by Mr Parker is high, if it is necessary to consider the issue of remedies, the Court will simply apply standard principles, including the banding approach and globalisation where appropriate. That analysis is unlikely to give rise to any novel or important issues.

[34] The other issue said to be novel or important was whether Mr Parker was prevented from making a breach of contract claim by s 113 of the Employment Relations Act 2000 and thus whether the awards of special damages made by the

¹⁸ Although dealing with an application to bring an appeal out of time, the Supreme Court made helpful observations about the necessarily superficial nature of any consideration of the merits of cases at an interlocutory stage in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39].

Authority were lawful. However, I observe that of the sums awarded by the Authority, only \$6,969¹⁹ hang on this issue, being the special damages awarded in relation to the psychologist fees. Therefore, even if there were a novel or important issue here, the sums connected to that issue are relatively inconsequential in comparison to the whole and would not by themselves support the plaintiffs' application for a stay.

Public interest

[35] I accept that there is some public interest in these proceedings in that it involves serious allegations of bullying. I also accept that there is public interest in ensuring access to justice for those alleging that they have suffered serious harm as a result of bullying. Finally, there is some public interest in any award of damages for bullying, particularly where the awards being sought are high, as this may help to incentivise those who have been subjected to bullying to come forward. However, although this case may give rise to some public interest, it is not immediately clear that the public interest arising clearly favours either side in this application.

Balance of convenience/interests of justice

[36] It is for the applicant to establish that a stay is in the interests of justice.²⁰ That requires a balancing of the various factors considered above.

[37] I do not consider that the absence of a stay would render the challenge ineffectual. The evidence illustrates that Mr Parker will be able to repay the sums if necessary. The plaintiffs have indicated that there are no financial difficulties on their part and have appropriately offered to pay the sums ordered into court. However, Mr Parker would be put at some disadvantage if the Authority's awards are not paid. He is entitled to the fruits of his success. He should not be put to the inconvenience and cost of liquidating assets, or borrowing funds to pay legal bills and fund his defence, when there are funds available to him.

[38] Accordingly, I consider that the balance of convenience and the interests of justice do not favour the granting of a stay.

¹⁹ See above at [2](c) and [7](d).

²⁰ See above n 13.

Outcome

[39] The application for a stay is declined.

[40] Mr Parker is free to continue to enforce the Authority's determinations as they come due.

[41] Mr Parker is entitled to costs, and the parties are encouraged to agree. I previously indicated that the appropriate costs categorisation was on a category 2B basis under the Employment Court's guideline scale.²¹ In light of the comprehensive approach taken to this application by the parties, I consider that indication to remain appropriate.

[42] However, if the parties are unable to agree on the issue, Mr Parker will have fourteen days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiffs having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 9.30 am on 6 May 2024

²¹ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.