



were not claimed. A penalty was awarded of \$2,500 payable to the Crown for the failure by Pulse to provide wage and time records when requested.<sup>1</sup>

[2] In a subsequent costs determination Mr Stewart was awarded the sum of \$5,500 as costs for a one-day investigation, disbursements in the sum of \$200, together with reimbursement of the filing fee in the sum of \$71.55.<sup>2</sup>

[3] The amounts awarded to Mr Stewart for costs and compensation, excluding the penalty payable to the Crown, total \$20,621.55.

[4] Pulse has challenged the substantive and costs determinations of the Authority and applied for an application for stay of execution of the Authority's orders in the substantive and costs determinations. The application is opposed by Mr Stewart.

[5] Mr Stewart has filed an application for security for costs and stay of proceedings pending payment into Court of \$20,000 to be held as security for costs. The application is made on the basis that there is a reasonable belief that Pulse will not be able to pay costs if it is unsuccessful. The application is opposed by Pulse.

[6] The parties have agreed that the interlocutory applications be dealt with on the papers.

### **Application for security for costs**

[7] There is no express provision in the Employment Relations Act 2000 (the Act) to order security for costs. Where there is no procedure provided for in the Act, or the Employment Court Regulations 2000, the application is to be dealt with "as nearly as may be practicable" in accordance with the procedure provided for in the High Court Rules 2016.<sup>3</sup>

[8] Rule 5.45(1)(b) and (2) High Court Rules provides that if a Judge is satisfied there is reason to believe that a plaintiff will be unable to pay the costs of the defendant,

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<sup>1</sup> *Stewart v Pulse 2012 Ltd t/a Browne St* [2025] NZERA 241.

<sup>2</sup> *Stewart v Pulse 2012 Ltd t/a Browne St* [2025] NZERA 313. The uplift in daily rate of costs was stated to be because of a Calderbank offer.

<sup>3</sup> Employment Court Regulations 2000, reg 6(2)(a)(ii).

if unsuccessful in its proceedings, the Court may, if just to do so, order a plaintiff to give security for costs.

### **The issues**

[9] The following issues require resolution:

- (a) Is there a reason to believe that Pulse will be unable to meet an award of costs against it if unsuccessful in its challenge?
- (b) Is it just in the circumstances to make an order for security for costs?
- (c) If there is to be an order for security for costs, how much security is appropriate?

### **Is there a reason to believe that Pulse will be unable to meet an award of costs against it?**

[10] Mr Stewart sets out in his affidavit grounds for his belief that Pulse is unable to meet a costs award. He states that he has been forced to take enforcement action through the District Court to secure payment of the Authority awards. Mr Stewart refers to documents filed with the Court by Pulse where the company has admitted to its lack of financial capacity at the current time to make payment of the amounts awarded by the Authority.

[11] Mr Hodges is a director of Pulse. In his affidavit in opposition to the application for security for costs, he states that there has been disclosure of short-term cashflow pressure, not insolvency, and that Pulse continues to trade. The affidavit further stated that Pulse has employees, and it meets its obligations.

[12] Pulse says in its submissions that Mr Stewart bears the onus of establishing that it will be unable to pay costs and that there is no documentary evidence proving there is an inability on the part of Pulse to pay costs. Pulse submits that Mr Stewart relies on “mischaracterised admissions and bailiff activity without proof of its inability to pay costs”.

[13] There should be credible evidence of circumstances from which it may be reasonably inferred that Pulse will be unable to pay costs. Mr Stewart does not have to prove an inability to pay.<sup>4</sup>

[14] Pulse outlined in its application for stay of execution that it did not have the available cashflow to meet the full amount of the Authority costs award “let alone” the amount awarded in the substantive determination. It was stated that compliance would place unsustainable pressure on the viability of the business, staff wages and operational continuity.

[15] There was an attempt by the bailiffs to execute a search warrant after the Court timetabled submissions for determination of the interlocutory applications. Pulse requested that the Court urgently intervene. Mr Stewart agreed to advise the bailiff to place any further enforcement action on hold until the outcome of the stay application, which resolved the urgency.

[16] It was set out by Mr Hodges in a supplementary memorandum to the Court shortly after the attendance by the bailiff at Pulse’s premises that the bailiff took a cash amount of \$2,000 “under threat of asset seizure”. Mr Hodges stated in his memorandum that various items at Pulse’s premises are leased, owned by third parties, or exempt from seizure.

[17] Not being able to pay an amount owing immediately does not necessarily mean impecuniosity and an inability to pay. It is a relevant consideration if, as Mr Hodges states in his affidavit, the difficulties for Pulse are temporary in nature. If a financial position improves, or there are assets that could be realised, the threshold required under r 5.45(1)(b) may not be satisfied.<sup>5</sup>

[18] Mr Hodges has stated that the difficulties are temporary but there is no other disclosure of the financial position of Pulse or its assets and their value. Pulse is not required to disclose its financial position, but the Court cannot be satisfied that this is

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<sup>4</sup> *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* (No 2) [1977] 1 NZLR 516 (SC) at 519.

<sup>5</sup> *Stephenson v Jones* [2013] NZHC 638; and *Keeyes v Peterson* HC Whangarei CIV-2003-488-145, 20 April 2004.

a temporary situation or that cashflow difficulties identified by Pulse could be overcome in other ways.

[19] As such there are reasonable grounds to believe that Pulse will be unable to pay Mr Stewart's costs if unsuccessful in its challenge.

[20] The threshold requirement in r 5.45(1)(b) is satisfied.

### **Is it just in the circumstances to make an order for security for costs?**

[21] The satisfaction of the threshold requirement does not mean that the Court automatically orders security for costs. The interests of the parties need to be balanced.

[22] There are the interests of Pulse in being able to continue with a challenge that has a chance of success without a risk that access to justice is stifled by an award of security for costs.

[23] There are the interests of Mr Stewart in not bearing the financial risk of the challenge, which he says has little chance of success with no prospect of ultimately recovering his costs.

### *Merits*

[24] As will be evident from the above, the merits of the case are a key consideration.

[25] Pulse says that the merits of its challenge are strong. Mr Hodges submits that Mr Stewart's version of events was wrongly preferred over contemporaneous records. There is reference to the obtaining of fresh evidence.

[26] Mr Kersjes submits that the arguments advanced demonstrate a lack of legal knowledge with reference to the representation of Pulse by its director. Further, that Pulse is ignoring the weaknesses of its arguments. He refers to some issues raised by

Mr Hodges about whether wage and time records were provided when requested as illustrative of these weak arguments.

[27] Mr Hodges says that he is representing Pulse to save money. The representation of Pulse is not a key factor in assessing the merits.

[28] The merits of arguments about provision of wages and time records may, on a provisional assessment, not appear strong; however, that is not the main claim. I do not conclude as submitted by Mr Kersjes that it is necessarily indicative of the overall weakness of the challenge.

[29] There are factual differences in the evidence from the Authority determination about material matters relating to the claim of unjustified dismissal. These include what was said prior to, and during, a meeting between the parties on 9 January 2024. There is also a factual dispute about whether Mr Stewart was dismissed at the meeting on 9 January 2024. These factual disputes are referred to by the Authority in its determination along with the reasons given for preferring one account over another.

[30] The challenge is a de novo challenge. The matter will be heard anew. That makes it difficult to provide a provisional view on the merits and any potential outcome. The Court does not conclude that the challenge is without any merit or that it is not brought in good faith. That is not to say that there are not hurdles that will need to be overcome by Pulse.

[31] A provisional impression of the merits does not support that the challenge should be stifled by a significant order for security for costs that may not be able to be met by Pulse.

*Is there a reasonable probability that the financial situation facing Pulse was caused by Mr Stewart?*

[32] Mr Hodges submits that, to the extent there is any impecuniosity for Pulse, it arises from the conduct of Mr Stewart.

[33] A causal link between the actions of Mr Stewart and Pulse's impecuniosity is not evident. A conclusion does not reasonably arise that the actions of Mr Stewart caused Pulse's impecuniosity. That does not count against security being ordered.

*Delay*

[34] There has been no delay by Mr Stewart in applying for security for costs when he had reason to believe that Pulse would not be able to meet a costs award if unsuccessful in its challenge.

*Balancing the respective interest of the parties*

[35] In balancing the interest of the parties and in the exercise of the Court's discretion, it is appropriate to make an order for security for costs but at a level that does not prevent Pulse from pursuing its challenge.

**Quantum of security**

[36] Mr Stewart seeks an award for security for costs based on a two-day hearing of \$20,000 based on category 2B under the Practice Directions Guideline Scale.<sup>6</sup> The calculation includes an allowance for preparation time. Mr Kersjes submits this does not amount to a full indemnity for costs. Mr Hodges questions the fact that the costs are not broken down. A breakdown would have been helpful, but it does not appear to the Court to be an unrealistic calculation of costs for a two-day hearing with a discount.

[37] The order sought for security for costs of \$20,000 may stifle Pulse from pursuing the challenge. In the exercise of the Court's discretion an appropriate and just amount for security for costs in all the circumstances is the sum of \$5,000. The hearing of the challenge is set down for 23 and 24 March 2026. This enables a staged payment of the security for costs, which is appropriate in the circumstances of this case.

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<sup>6</sup> Employment Court of New Zealand "Practice Direction" (1 September 2024) <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 18.

## **Conclusion**

[38] The application for security for costs and a stay of proceedings pending payment is granted.

[39] The Court orders:

- (a) The amount of \$2,500 is to be paid to the Registrar of this Court by no later than 4 pm on 19 December 2025.
- (b) The further amount of \$2,500 is to be paid to the Registrar of this Court by no later than 4 pm on 16 January 2026.
- (c) The money is to be held by the Registrar in an interest-bearing account and is not to be disbursed except by order of the Court.

[40] The challenge by Pulse is stayed until payment is made or there is a further order of the Court.

## **Application for stay of execution**

[41] Pulse seeks an order staying execution of the Authority's substantive and costs determinations pending the outcome of the challenge to the determinations. It says in its application that as there is a challenge pending, enforcement would be premature. Pulse says that there would be serious prejudice to its business if enforcement proceeds before the hearing of the challenges and that there is a lack of financial capacity to comply with the orders made in the determinations at this time.

[42] Mr Stewart says that Pulse has provided no reason why he should be deprived of the fruits of his success and therefore he is entitled to the benefits of the determinations without undue delay.

[43] Section 180 of the Act provides that a challenge does not operate as a stay of the proceedings on the determination of the Authority unless the Court so orders. The Court has the power to order a stay of proceedings.<sup>7</sup>

[44] The Court exercises a judicial discretion whether to order a stay of proceedings. The discretion must be exercised in a principled manner.

[45] The following factors are considered by the Court in the exercise of the discretion as to where the interest of justice lies:<sup>8</sup>

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

[46] Mr Hodges submits that the merits of the challenge are strong for a variety of reasons including factual errors, fresh evidence, and contradictory contemporaneous evidence. As set out earlier, it is difficult to reach a provisional view on the merits of the claim and any potential outcome where the challenge will be heard on a de novo basis afresh. The Court has not concluded in an earlier assessment that the challenge is without any merit. Mr Kersjes submits that the challenge has been brought to avoid

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<sup>7</sup> Employment Court Regulations 2000, reg 64.

<sup>8</sup> *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7].

payment or postpone financial obligations. The Court cannot be satisfied that the challenge was not brought in good faith for other than genuine reasons.

[47] The parties agree that this matter does not impact any third parties. There is no legal novelty. Mr Hodges submits to the effect that there is public interest in enabling challenges where one party is unhappy with a determination of the Authority.

[48] Mr Hodges raises a concern in his affidavit in respect of the challenge being rendered ineffectual because there is a significant risk funds may not be able to be recovered if Pulse is successful in its challenge.

[49] It is not enough to simply assert that there may be future difficulties with recovery if the challenge is successful without a proper basis. Whilst Mr Stewart is in employment, he does not confirm in his affidavit that he would have the resources, such as savings or assets, to pay the money back.

[50] Any concerns in that regard could be readily overcome by the making of a payment into Court until the challenge can be determined. Mr Stewart, whilst opposing a stay, would not object to such an order.

[51] Mr Hodges opposes such an order on the basis that it would be inappropriate and effectively concede liability. I do not agree with that submission. The Court of Appeal has confirmed that where there is a money judgment any restraint of orders should be the least necessary to preserve the losing party's position against the prospect of the appeal succeeding.<sup>9</sup> The Court further stated that where there is a money judgment, such as in this matter, the judgment debtor should make some concession. Payment into Court would be such a concession. Pulse has made no concessions.

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<sup>9</sup> *Bathhurst Resources Ltd v L& M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

*Overall balance of convenience*

[52] Where the interests of justice lie in this matter is quite finely balanced. Mr Stewart has been deprived of the fruits of his success in the Authority coupled with the impact of Pulse's financial situation with respect to payment.

[53] Pulse is a small business and is vulnerable if there is immediate enforcement of the Authority determinations. It has raised concerns about Mr Stewart's ability to repay in the event it is successful in its challenge. In part, these concerns are reduced by the fact that Mr Stewart is in employment. They are not completely answered by the affidavit evidence.

[54] On balance, the interests of justice lie with granting the stay on the basis that the whole of the amount awarded by the Authority, less the sum of \$2,000 paid to the bailiff, be paid to the Registrar of this Court.

[55] The payments will be ordered in a staged manner to assist Pulse to manage its cashflow or to, if necessary, borrow money.

**Conclusion**

[56] The application for a stay of execution of the Authority's determinations is granted subject to the following conditions:

- (a) The amount of \$18,621.55 is to be paid to the Registrar of this Court in the manner set out below:
  - (i) The amount of \$9,310.78 is to be paid to the Registrar of this Court by no later than 4 pm on 31 October 2025.
  - (ii) The amount of \$9,310.77 is to be paid to the Registrar of this Court by no later than 4 pm on 28 November 2025.

- (b) The money set out in paragraph [56](a)(i) and [56](a)(ii) is to be held by the Registrar in an interest-bearing account and is not to be disbursed except by order of the Court.
- (c) If either of the payments referred to in paragraph [56](a)(i) or [56](a)(ii) is not paid on the due date for payment, the stay will lapse without the need for any further application by Mr Stewart.

### **Costs**

[57] Costs are reserved on both applications. The parties have each had a measure of success.

[58] There may be agreement as to costs, failing which, memorandum can be filed.

Helen Doyle  
Judge

Judgment signed at 1 pm on 7 October 2025