

[2] In the costs determination Mr Cunningham was ordered to pay healthAlliance \$10,000 as a contribution towards its legal costs in the Authority. Mr Cunningham filed a de novo challenge to the costs determination and underlying substantive determination. On 5 January 2024, Mr Cunningham applied for a stay of execution of the orders made in the costs determination. On 9 April 2024, the Court declined the stay application.³ This then led to healthAlliance returning to the Authority and obtaining compliance orders against Mr Cunningham to pay the costs orders made by the Authority on 20 December 2023.

[3] Mr Cunningham now challenges the Authority's determination to issue compliance orders against him. On 5 September 2024, Mr Cunningham also applied to the Authority to reopen the investigation that led to the costs determination. Mr Cunningham has filed an application for a stay of execution over the Authority's determination granting healthAlliance compliance orders.

Legal principles

[4] Section 180 of the Employment Relations Act 2000 (the Act) provides that an election under s 179 to challenge a determination of the Authority does not operate as a stay of proceedings unless the Authority or Court so orders. Regulation 64 of the Employment Court Regulations 2000 (the Regulations) provides that the Court has the power to order a stay of proceedings:

- (a) over a determination of the Authority if an election has been made to challenge that determination under s 179 of the Act; or
- (b) over a decision or order of the Court if an application for rehearing has been made in respect of that decision or order.

[5] Despite Mr Cunningham's previous application for a stay of execution relating to the costs determination being declined by the Court, and the Authority issuing compliance orders in respect of the same, there is no jurisdictional bar to prevent

³ *Cunningham v healthAlliance NZ Ltd* [2024] NZEmpC 58.

Mr Cunningham from making a further application for stay in relation to the compliance order.

[6] The Court's discretion when deciding an application for a stay of execution is wide, but it must be exercised judicially and according to principles. When considering whether to issue a stay, the overarching consideration is whether it would be in the interests of justice, taking into account various factors including:⁴

- (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.

[7] The above factors were considered by the Court when hearing Mr Cunningham's earlier stay application. The judgment of 9 April 2024, declining Mr Cunningham's previous application to stay the Authority's costs determination, sets out the Court's analysis of the relevant factors at that time.⁵

Mr Cunningham's submissions in support of the stay

[8] Mr Cunningham's key submissions in support of his application were:

⁴ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

⁵ *Cunningham v healthAlliance NZ Ltd*, above n 3.

- (a) He had challenged the costs determination and the compliance order determination. He submitted that his challenges were in effect a judicial review of the determination of the Authority and that a failure to stay the compliance order would be inconsistent with his rights under s 27(2) of the New Zealand Bill of Rights Act 1990. I do not consider s 27(2) of that Act applies; Mr Cunningham has not applied for any judicial review. In the circumstances where Mr Cunningham has filed two challenges related to the costs determination and applied to reopen the Authority's costs determination, it is clear that he has been able to fully exercise his right to justice under the New Zealand Bill of Rights Act.

- (b) Mr Cunningham submits that it is manifestly unjust for determinations to be made on the costs determination without his challenge first being determined. Section 180 of the Act is clear; a challenge does not operate as a stay of proceedings. Mr Cunningham has acknowledged that and previously filed an application to stay the costs determination, but that application was declined by the Court. In those circumstances, I do not consider this submission carries any weight.

healthAlliance's opposition to granting a stay

[9] healthAlliance advised at the hearing that it is waiting for what the Court would say before it takes any further enforcement action. I commend healthAlliance for taking such a responsible approach.

[10] healthAlliance submits that there are no grounds as to why a stay should be granted. It submits that Mr Cunningham's challenge will not be rendered ineffectual if a stay is refused. It says Mr Cunningham has the funds to pay the costs determination and comply with the compliance order but that he refuses to pay. It submits that Mr Cunningham's challenge lacks merit and that he is simply seeking to avoid paying the awards determined by the Authority. It says granting a stay will assist him with this improper objective and undermine the compliance orders made by the

Authority. It submits that it is in the interests of overall justice to decline the application for a stay.

Analysis

[11] From the evidence, the only material changes in circumstances since the Court's judgment of 9 April 2024, in which it declined Mr Cunningham's earlier application for a stay, are the Authority's determination which made compliance orders and Mr Cunningham's application of 5 September 2024 to reopen the Authority's investigation meeting in respect of costs.

[12] The Court's jurisdiction when issuing a stay under reg 64 is limited to issuing stays of execution where a determination has been challenged under s 179, or where there is an application for a rehearing of a Court proceeding under sch 3 of the Act. Regulation 64 does not provide the Court with jurisdiction to issue a stay of execution over a matter in the Authority that is subject to an application for reopening.

[13] On that basis, I consider that the reopening application is of limited relevance to the stay of execution application currently before the Court. If Mr Cunningham wants a stay of execution for reasons relating to the reopening application, he ought to have applied to the Authority for a stay.⁶

[14] Now I turn to considering the standard principles that apply to an application for stay of execution in the current circumstances.

Will the challenge be rendered ineffectual if the stay is not granted?

[15] The application and affidavit evidence do not identify any factors indicating that the challenge will be rendered ineffectual. The fact that healthAlliance has obtained a compliance order does not change this factor.

⁶ Employment Relations Act 2000, sch 2 cl 4(1).

Whether the challenge is brought for good reasons and is being pursued in good faith?

[16] Based on Mr Cunningham's own admissions the challenge appears unsustainable. Mr Cunningham does not claim that he has paid the money owed to healthAlliance, so the compliance orders must be correct.

[17] Given the weak merits of the challenge, it would appear that Mr Cunningham is seeking to delay any payment of the Authority's costs determination until the Court hears his de novo challenge to the Authority's substantive determination and costs determination. This does tend to raise questions over whether the challenge is being brought in good faith.

Whether the successful party at first instance will be injuriously affected by a stay?

[18] If the stay was granted, healthAlliance would be unable to pursue an application for orders under s 140(6) of the Act or take other enforcement action to enforce its compliance orders. I accept that this would have an adverse impact on healthAlliance, which has gone to the effort and expense of obtaining compliance orders.

The extent to which the stay will impact on third parties, novelty and/or importance of the questions involved, the public interest in proceeding.

[19] I do not consider that these factors are engaged in this application.

The overall balance of convenience.

[20] The overall balance of convenience weighs against granting a stay, particularly where the Court has previously refused a stay over the costs determination and given my finding that the reopening application is not relevant to this proceeding.

[21] In the circumstances it is not in the overall interests of justice to make the orders sought.

Conclusion

[22] The application for stay of execution is declined.

[23] healthAlliance is entitled to costs. If they cannot be agreed, I will receive memoranda.

M S King
Judge

Judgment signed at 3 pm on 24 January 2025