



# Employment Court of New Zealand

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## Franix Construction Limited v Tozer [2014] NZEmpC 112 (30 June 2014)

Last Updated: 4 July 2014

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2014\] NZEmpC 112](#)

ARC 40/14

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

AND IN THE MATTER    of stay of execution

BETWEEN                FRANIX CONSTRUCTION LIMITED  
                                         Plaintiff

AND                        BRYCE TOZER Defendant

Hearing:                On the papers filed on 23 and 27 June 2014 and by  
                                         hearing on  
                                         30 June 2014

Appearances:        D Dickinson, counsel for plaintiff  
                                         H Fulton, counsel for defendant

Judgment:             30 June 2014

### INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff has filed an application for stay of execution of an order for costs made against it by the Employment Relations Authority (the Authority).<sup>1</sup> The order followed a preliminary investigation into whether the defendant was an employee (as he contended) or an independent contractor. The Authority determined that the defendant was an employee and awarded costs of \$3,500 in his favour.

[2] The plaintiff has filed a challenge to the Authority's determination, together with a challenge to its subsequent costs determination. The Authority's investigation into the defendant's substantive grievance is currently scheduled for 24 September

2014. The plaintiff had also pursued an application for removal of the grievance to

<sup>1</sup> *Tozer v Franix Construction Ltd* [2014] NZERA Auckland 222.

FRANIX CONSTRUCTION LIMITED v BRYCE TOZER NZEmpC AUCKLAND [\[2014\] NZEmpC 112](#) [30 June 2014]

this Court. That application was dismissed. At the telephone conference this morning, counsel for the plaintiff, Mr Dickinson, advised that he is awaiting instructions as to whether to challenge the Authority's removal determination.

[3] The issue now before the Court is the plaintiff's application for a stay. The application is opposed by the defendant. Counsel confirmed that the parties are agreeable to the application being dealt with on the papers filed.

[4] A challenge does not operate as a stay unless the Court so orders.<sup>2</sup> As Judge

Couch observed in *North Dunedin Holdings Ltd v Harris*:<sup>3</sup>

The discretion conferred by s 180 is not qualified by the statute but must be exercised judicially and according to principle. I note two key principles. There must be evidence before the Court justifying the exercise of the discretion. The overriding consideration in the

exercise of the discretion must be the interests of justice.

[5] The plaintiff's application is essentially advanced on the basis that if the plaintiff succeeds on its challenge the benefit of that success will be lost. An affidavit has been filed in support of the application. Mr Davies, the plaintiff company's sole director and shareholder, says that he is concerned that if the sums ordered by the Authority are paid to Mr Tozer, he will "never see it again should [he] be successful in the Employment Court". Mr Davies goes on to say that he is aware that Mr Tozer is currently involved in High Court litigation with his siblings. As Mr Fulton, counsel for the defendant, points out, there is nothing before the Court to substantiate Mr Davies' expressed concerns about repayment. Nor is it in the least bit clear what the relevance of concurrent litigation in the High Court is said to be.

[6] While, as Mr Dickinson suggests, the costs order could be adequately secured by payment into the Employment Court's trust account, that is not the invariable practice and the starting point must be that a litigant is entitled to the fruits of their success unless there is good reason to order otherwise. I see no basis, on the material before the Court, for the concern that the benefit of any success that the plaintiff may enjoy, following its challenge, will be lost if a stay is not granted. The

prejudice that the defendant would suffer is, of course, the fact that he has incurred,

<sup>2</sup> [Employment Relations Act 2000, s 180.](#)

<sup>3</sup> *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118 at [7].

and continues to incur, legal costs in relation to these proceedings and would not have the advantage of the sums ordered in his favour pending determination of the challenge.

[7] I do not consider that the subjective, generalised and unsubstantiated views of Mr Davies provide sufficient support for the exercise of the Court's discretion. Nor am I otherwise satisfied that it would be in the interests of justice to grant the application. The application is accordingly declined.

[8] The defendant is entitled to costs. If costs cannot be agreed they may be the subject of an exchange of memoranda, with the defendant filing and serving a memorandum together with any supporting material within five working days of today's date and the plaintiff having an additional five working days to file any response.

Christina Inglis

Judge

Judgment signed at 2.35pm on 30 June 2014