



# Employment Court of New Zealand

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## Henderson Travels Limited v Kaur [2022] NZEmpC 34 (8 March 2022)

Last Updated: 11 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 34](#)

EMPC 379/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of execution
BETWEEN	HENDERSON TRAVELS LIMITED Plaintiff
AND	RAJWINDER KAUR Defendant

Hearing: On the papers

Appearances: A Singh, counsel for plaintiff  
J Douglas, counsel for defendant

Judgment: 8 March 2022

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application for stay of execution)

[1] Rajwinder Kaur issued proceedings in the Employment Relations Authority against her former employer, Henderson Travels Ltd, following her dismissal by the company for redundancy.

[2] Ms Kaur successfully claimed that she had been unjustifiably dismissed and that the company owed her a substantial sum for wages, holiday pay and reimbursement for an unlawful premium paid by her.<sup>1</sup>

<sup>1</sup> *Kaur v Henderson Travels Ltd* [\[2021\] NZERA 418 \(Member van Keulen\)](#).

HENDERSON TRAVELS LIMITED v RAJWINDER KAUR [\[2022\] NZEmpC 34](#) [8 March 2022]

[3] In relation to the unjustified dismissal claim Henderson Travels was ordered to pay Ms Kaur:

- (a) \$21,000 pursuant to [s 123\(1\)\(c\)](#) of the [Employment Relations Act 2000](#) (the Act); and
- (b) \$25,480 (gross) for reimbursement pursuant to [ss 123\(1\)\(b\)](#) and [128](#) of the Act.

[4] Ms Kaur established that she was underpaid wages in the amount of \$7,268.10 and was owed \$267.75 for working on a public holiday. Both sums were awarded by the Authority together with holiday pay on them of a further 8 per cent. Although not calculated in the determination the amount comes to \$602.87.

[5] A premium Ms Kaur paid of \$860, in breach of [s 12A](#) of the [Wages Protection Act 1983](#), was ordered to be repaid.

[6] The total amount payable to Ms Kaur for those claims came to \$55,478.72. In addition, Henderson Travels was ordered to

pay a penalty of \$12,000 within 28 days of the determination. Of that penalty \$9,000 was payable to Ms Kaur and the balance to the Crown.

[7] In summary, therefore, the amount which is payable to Ms Kaur arising from this litigation is \$64,478.72.2

[8] Henderson Travels challenged the whole of the determination and has applied for a stay of execution of it. The grounds of that application can be summarised as:

(a) The challenge has merit.

2. The application sought a stay quantifying the amount payable to Ms Kaur as \$66,875.85, but that sum included the penalty payable to the Crown and did not include a calculation for holiday pay as directed by the Authority.

(b) The company is not able to pay the whole of the amount ordered by the Authority so that if Ms Kaur starts enforcement action it will incur a further cost and the present challenge will become pointless.

(c) Half the amount of the determination (as calculated by the company) can be paid into a trust account pending the Court's decision.

(d) There is no prejudice to Ms Kaur if the Authority's determination is stayed pending the Court's decision.

[9] The application for a stay is opposed by Ms Kaur. The grounds of opposition can be summarised as:

(a) She succeeded and should not be deprived of the benefits of that success.

(b) The challenge lacks merit and is intended to cause further delay.

(c) She is in a position to undertake to repay the amount awarded by the Authority if the challenge succeeds.

(d) There is concern about the Henderson Travels' ability to pay if the challenge is unsuccessful.

[10] While Ms Kaur opposed the application her notice of opposition proposed that a stay might be made on certain conditions as follows:

(a) That within seven days Henderson Travels pay to her \$21,000, which was the amount awarded under s 123(1)(c)(i) of the Act.

(b) Within seven days the balance of the determination is paid to the Registrar of this Court to be held in an interest-paid account pending further order.

(c) Henderson Travels must prosecute the challenge in a timely fashion, to be reviewed periodically by the Court.

(d) The order would lapse if the money was not paid within a reasonable time.

(e) The challenge would be stayed if the sums were not paid.

[11] The Court has the power to order a stay.<sup>3</sup> The overarching consideration in assessing an application is whether it is in the interests of justice for a stay to be granted. That decision is informed by factors such as:<sup>4</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.

(g) The overall balance of convenience.

[12] As part of assessing an application the competing considerations of the parties must be taken into account. That is because the successful party at first instance is entitled to the benefit of the decision but the unsuccessful party's ability to challenge that decision should not be unreasonably fettered.

3 [Employment Court Regulations 2000](#), reg 64.

4. See for example *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; [1999] 13 PRNZ 48 (CA); *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50; *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

[13] Where what is primarily in issue is an award of monetary compensation the balance between those competing considerations is often reached by granting a stay subject to a condition that the money is paid to a stakeholder to be held on trust or to the Registrar of this Court.

[14] Henderson Travels' argument concentrated on whether the company would be able to recover any money paid to Ms Kaur if the challenge succeeded, its financial situation and the merits of its case.

[15] Ms Kaur's case concentrated on the strength of her defence to the challenge, her ability to repay, and what was said to be a lack of merit of the company's challenge.

*Will the challenge be ineffectual?*

[16] Mr Singh, counsel for Henderson Travels, concentrated on doubting Ms Kaur's ability to repay if the challenge succeeded. The company's position was not altered in response to the proposal in Ms Kaur's notice of opposition.

[17] Preeti Sikri, a director of Henderson Travels, and Vyom Sikri, until recently a director of the company, both expressed concern about Ms Kaur's personal circumstances stemming from her ability to work in New Zealand being dependant on a visa and her financial circumstances. Beyond expressing those concerns they did not provide evidence about Ms Kaur's financial position.

[18] That information was supplied by Ms Kaur. Her visa enabled her to work at Henderson Travels. After being dismissed she obtained an extension to her visa authorising her to remain in New Zealand until 27 November 2023. She is eligible to apply for residency in March 2022 and intends to do that.

[19] Ms Kaur is employed. She deposed to earning income sufficient to cover her daily living expenses and stated the amount of her savings. Her job, savings and support from her brother and wider family were said to place her in a position to repay Henderson Travels if needed. Ms Kaur's brother did not provide an affidavit confirming his ability and/or preparedness to provide this support.

[20] On the evidence available, if the whole of the Authority's determination was paid to Ms Kaur, and spent, she would not have the ability to repay it from resources immediately available such as her savings. Repayment would require assistance from her family which may, or may not, be readily available.

[21] This assessment factor points towards granting a stay.

*Is the challenge pursued in good faith?*

[22] There is no evidence from which it could be concluded that the challenge is not brought in good faith.

[23] This factor points towards granting a stay.

*Will the successful party be injuriously affected?*

[24] This assessment factor is more finely balanced. As the successful party, Ms Kaur is entitled to the benefit of the determination in her favour. Any delay in payment to her is an injurious effect not entirely offset by earning interest on the delayed payment if she succeeds in this challenge.

[25] There is another matter to consider. In Ms Sikri's affidavit the financial position of Henderson Travels was briefly and incompletely described. The business has been affected by the pandemic and admits to struggling to carry on due to border closures. The evidence was that it was "hit badly" by travel restrictions but no other information about the nature and extent of its business was provided.

[26] Ms Sikri deposed in her affidavit to Henderson Travels having operated for "almost 8 years" and has a plan to "revive" the business but did not provide any information about that plan. The company's accounts were not provided and the extent of its assets and liabilities was not stated.

[27] Mr Singh's submission built, at least partly, on Mr Sikri's evidence that he has interests in two other New Zealand companies, Flight Experts NZ Ltd and Flight N Trips NZ Ltd. They are trading and his evidence was that the income from them

could be used to "pay off the liability" of Henderson Travels. Bank statements from Flight Experts showing a credit balance were exhibited to his affidavit.

[28] To complete this picture, Ms Sikri and Mr Sikri are living in Australia. They did not explain how the New Zealand-based businesses operate with them overseas. While the statement was made that their current living arrangements are temporary no evidence was provided about when they will return to New Zealand.

[29] Henderson Travels' financial situation is a significant issue to consider because it compounds any potential adverse effect on Ms Kaur if she is prevented from taking steps now to satisfy the determination. That effect is only slightly ameliorated by the proposal to pay part of the Authority's determination to the Registrar where it will be secured and earn interest. The company's financial position was behind Mr Singh's submission that, if the stay was granted, it could be subject to a condition to pay

\$33,739.36 to a stakeholder, calculated by the company as half of the determination. But without adequate financial information, or a greater explanation as to the source of the funds, this position is unsatisfactory.

[30] This factor points away from granting a stay.

*Third party/novelty/public interest*

[31] These matters can be dealt with briefly. There are no third parties impacted by the Authority's determination or the challenge to it. The issues raised are important to the parties but do not have any significance beyond resolving their dispute. It follows that there is no public interest in the proceeding beyond having it expeditiously resolved.

[32] These factors are neutral.

*Overall balance of convenience*

[33] The assessment factors produce an equivocal picture. Some weight needs to be placed on Henderson Travels' concern about Ms Kaur's ability to repay. Ranged

against that the company has financial difficulties to the extent that it is being propped up by companies controlled by Mr Sikri who does not live in New Zealand.

[34] The decision is finely balanced. The conclusion I have reached is that it is appropriate to grant the stay. That conclusion is based on Ms Kaur's potential inability to repay. However, the company's proposal to pay less than the full amount is not adequate given the limited financial information disclosed by it and the potential impact on Ms Kaur.

[35] I have decided that the stay should be granted on the basis that the whole of the amount awarded by the Authority to Ms Kaur is paid to the Registrar. An opportunity will be provided for payment to be staged so that the company can manage its cashflow or injection of funds.

**Conclusion**

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

(a) The amount of \$64,478.72 is to be paid to the Registrar of this Court in the following manner:

(i) The sum of \$33,000 must be paid no later than **4 pm on 18 March 2022**.

(ii) The balance is to be paid no later than **4 pm on 14 April 2022**.

(b) The money referred to in [36](a)(i) and [36](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 payment referred to in paragraphs [36](a)(i) and [36](a)(ii) is not paid on the due date for payment the stay will lapse without the need for any further application by Ms Kaur.

(d) Leave is reserved to either party to apply to amend or vary the order.

(e) The costs of the application are reserved.

K G Smith Judge

Judgment signed at 2.25 pm on 8 March 2022