



# Employment Court of New Zealand

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## Shalini Limited v A Labour Inspector [2019] NZEmpC 170 (22 November 2019)

Last Updated: 26 November 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 170](#)

EMPC 194/2019

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	SHALINI LIMITED Plaintiff
AND	A LABOUR INSPECTOR Defendant

Hearing: On the papers  
Appearances: M Keall, counsel for plaintiff  
M Urlich and Martin Denyer, counsel for defendant  
Judgment: 22 November 2019

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

**(Application for stay of execution)**

[1] The plaintiff, Shalini Ltd (Shalini), applies for orders staying the enforcement of a determination of the Employment Relations Authority (the Authority) dated 6 June 2019.<sup>1</sup>

[2] The defendant Labour Inspector opposes Shalini's application.

[3] The proceedings in the Authority involved an application by the Labour Inspector against Shalini for penalties arising from breaches of the [Minimum Wage Act 1983](#) and the [Holidays Act 2003](#). Shalini accepted that it breached those Acts and

1 *A Labour Inspector v Shalini Ltd* [2019] NZERA 334.

SHALINI LIMITED v A LABOUR INSPECTOR [\[2019\] NZEmpC 170](#) [22 November 2019]

accepted liability for penalties. The matter proceeded before the Authority, purely on the basis of the quantum of the penalties.

[4] Following the commencement of the proceedings against Shalini in the Authority, Shalini entered into arrangements to repay the employees involved for their arrears of minimum wages and holiday pay resulting from the breaches. Agreement of the quantum of these arrears was contained in a record of settlement between the parties. The record of settlement also contained details of an agreement between the parties as to a broad approach which would be submitted to the Authority in respect of quantifying penalties. The Labour Inspector indicated that it would seek total penalties up

to \$50,000. Shalini agreed that the imposition of penalties was warranted but should be no more than \$20,000 to \$30,000 in total.

[5] In the determination of the Authority, the Authority Member properly indicated that she was not bound by any agreement or understanding between the parties as to quantification of penalties. The Authority imposed penalties totalling \$100,000.

[6] The challenge to the determination is primarily based on an assertion that the Authority Member has misread the financial information which was provided by Shalini as to its overall financial situation and ability to pay any penalties. In the face of the likelihood of enforcement proceedings by the Labour Inspector, Shalini has sought an order staying execution of the penalties awarded, pending the hearing of its challenge.

[7] The Labour Inspector opposes the application for stay on the grounds that there is insufficient evidence to establish Shalini's inability to pay. An additional ground is that the effect of a stay would have an adverse effect on the employees involved. While 50 per cent of the penalties levied was to be paid to the Crown, the other 50 per cent was to be divided equally between the affected employees.

[8] The application for stay of execution is supported by affidavits in support and reply from Venu Mohan Reddy Beerapu, who is the sole director and shareholder of Shalini. The notice of opposition is supported by an affidavit from Maria Anne Jordan, a Labour Inspector. The Labour Inspector requests that if a stay is to be granted it be

on the condition that Shalini make a payment into Court pending the hearing. The hearing of the challenge is now set down for one day in the Employment Court at Auckland on 24 February 2020 commencing at 9.30 am. The challenge is to be heard on a non-novo basis and considering the quantum of penalties only.

[9] A challenge does not operate as a stay unless the Court or the Authority so orders.<sup>2</sup> Absent a stay, the Labour Inspector is entitled to enforce the determination of the Authority.<sup>3</sup>

[10] The power to grant a stay is contained in reg 64 of the [Employment Court Regulations 2000](#). The Court has power to stay the execution of the whole determination, or part of it, and may do so subject to conditions.

[11] The principles applying to such an application are now well established. Granting a stay involves a broad discretion, in the interests of justice, to be exercised judicially and in accordance with principle. What must be weighed carefully are the right of a successful litigant to the benefits of the determination being challenged and the importance of preserving the position in case that challenge succeeds.

[12] Factors typically taken into account in exercising the discretion include:<sup>4</sup>

- (a) If a stay is not granted, whether the challenge will be rendered ineffectual.
- (b) Whether the challenge is brought and prosecuted for good reasons, and good faith.
- (c) Whether the successful party at first instance will be affected injuriously by a stay.

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

<sup>3</sup> *ESKA Ltd v Beloous* [2019] NZEmpC 14 at [8].

<sup>4</sup> See *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7]; applying *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; (1999) 13 PRNZ 48 at [9]. See also *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; *New Zealand Post Primary Teachers' Assoc v Attorney-General (No 3)* [1991] NZEmpC 89; [1991] 3 ERNZ 708 (EmpC) at 709.

(d) The effect on third parties.

- (e) The novelty and importance of questions involved in the case.
- (f) The public interest in the proceedings.
- (g) The overall balance of convenience.

[13] Having regard to those factors which are relevant in the present circumstances, and on an inferential basis only, Shalini appears to be bringing and prosecuting the challenge for good reasons and in good faith. Whether or not it will be able to establish its position when the challenge is heard will depend on the strength of evidence presented. Of course, the Court would need to be assisted by expert evidence as to the true financial position of the company.

[14] Shalini alleges that if the stay is not granted and the penalties at the level set by the Authority are enforced, then its financial viability will be put in question and it will be placed in a position where the challenge will be rendered ineffectual.

[15] If a stay is granted, the employees as third parties will be deprived of their share in the penalties until the challenge

is heard. The arrears of minimum wages and holiday pay, however, have not yet been fully paid. If the company went into liquidation, then obviously that would be an undesirable further consequence for the employees which needs to be taken into account in the overall balance of convenience.

[16] As indicated earlier, Mr Beerapu, on behalf of the company, does not dispute that the imposition of penalties is appropriate in all the circumstances. He simply disputes the quantum of the penalties imposed.

[17] On balance and considering what appears on an inferential basis to be a financially difficult position for Shalini, there is a need to ensure that it continues to trade, not only in the interests of its present employees, but also the interests of the employees who suffered from the breach. On balance, therefore, I consider that an order staying enforcement of the determination is appropriate, but on the basis that part of the amount of the penalties awarded by the Authority is paid into Court.

[18] There will, accordingly, be an order staying execution of the Authority's determination on the following conditions:

- (a) Within 14 days from the date of this judgment, Shalini will pay the sum of \$30,000 to the Registrar of the Employment Court.
- (b) The monies paid into Court will be held in an interest-bearing account and be paid out on further order of a Judge of the Court.
- (c) The order staying execution of the determination will lapse if the monies ordered to be paid into Court are not paid within the time specified.
- (d) Shalini continues to abide by the conditions of the record of settlement requiring repayment of arrears of wages and holiday pay.

[19] Costs on this application are reserved.

M E Perkins Judge

Judgment signed at 1 pm on 22 November 2019