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Wei v Sunlight JMB Future Limited [2020] NZEmpC 208 (30 November 2020)

Last Updated: 3 December 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 208](#)

EMPC 206/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a stay of execution
AND IN THE MATTER	of an application for security for costs
BETWEEN	WENLI WEI Plaintiff
AND	SUNLIGHT JMB FUTURE LIMITED Defendant

Hearing: On the papers
Appearances: Plaintiff in person
D Fleming, counsel for defendant
Judgment: 30 November 2020

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Applications for a stay of execution and security for costs)

[1] Wenli Wei has challenged a determination of the Employment Relations Authority in which he unsuccessfully sought to claim from his former employer,

Sunlight JMB Future Ltd, money allegedly owed to him.¹

[2] The issues investigated by the Authority were whether he was owed:

¹ *Wei v Sunlight JMB Future Ltd* [\[2020\] NZERA 253 \(Member Robinson\)](#) (second determination).

WENLI WEI v SUNLIGHT JMB FUTURE LIMITED [\[2020\] NZEmpC 208](#) [30 November 2020]

- (a) wage arrears and/or holiday pay;
- (b) payment for rest and meal breaks;
- (c) money for a failure to pay him the minimum wage rate; and
- (d) if the circumstances justified a penalty being imposed on Sunlight.

[3] All of those claims were unsuccessful.

[4] Mr Wei challenged the determination, putting in issue the whole of it. The relief sought was payment to him of all of the sums claimed plus interest, setting aside the costs determination and a remedy for an alleged unjustified dismissal.

[5] The history of the litigation between Mr Wei and Sunlight may explain the extent of the claimed remedies. There have been three Authority determinations but only two of them were challenged. The Authority's first determination was dated 10 January 2020 and it dismissed Mr Wei's claim that he had a personal grievance for unjustified dismissal and an unjustified disadvantage caused by Sunlight.² The proceeding was dismissed because he had not raised the claimed personal grievances within the 90 days allowed by the [Employment Relations Act 2000](#) (the Act).³ Sunlight did not consent to the grievances being raised outside of that limitation period and the Authority declined to grant an extension of time.⁴

[6] On 25 June 2020, the Authority's second determination was delivered, rejecting Mr Wei's claims for wage arrears, holiday pay and other money he alleged was due and owing to him by Sunlight.⁵

[7] Subsequently, on 21 July 2020, the Authority issued a determination in which Mr Wei was ordered to pay costs to Sunlight of \$5,000.⁶

² *Wei v Sunlight JMB Future Ltd* [2020] NZERA 8 (Member Robinson) (first determination).

³ [Employment Relations Act 2000, s 114\(1\)](#).

⁴ See [Employment Relations Act 2000, s 114\(3\)–\(4\)](#).

⁵ *Wei*, above n 1.

⁶ *Wei v Sunlight JMB Future Ltd* [2020] NZERA 282 (Member Robinson) (third determination).

[8] While Mr Wei challenged the second and third determinations, he did not challenge the first one. The difficulty his current pleadings face, therefore, is attempting to seek a remedy for an alleged unjustified dismissal when that matter was resolved by the Authority and the decision about it was not challenged. This difficulty was identified in a telephone conference and in the minute that followed. While Mr Wei was on notice of the problem arising from seeking all of the claimed remedies, no steps have been taken by him to attempt to address it.

[9] Against that background two applications have been made. Mr Wei applied for a stay of execution of the Authority's determinations and Sunlight applied for security for costs.

The stay

[10] While not specified in Mr Wei's application the stay sought is for the Authority's costs determination, because it is the only one of them that can have an immediate effect on him before his challenge is decided. Only one ground was stated to support Mr Wei's application, namely that he had filed a challenge. Subsequently, he filed an affidavit providing explanations for the challenge, and which may have been intended to supply the grounds of this application. Combining the two produces the following summary:

(a) A challenge was filed.

(b) Mr Wei provided personal information, including his IRD number, to Sunlight at the beginning of his job and signed his name every week, when he was paid wages in cash.

(c) He was dismissed when he asked for a day off in 2018 and that the reasons given for his dismissal were "totally not true".

(d) There was no confrontation between him and Sunlight during the employment.

(e) The IRD was deceived by Sunlight.

(f) Sunlight provided falsified wage payment records to deceive the Authority and they have nothing to do with Mr Wei.

(g) The Authority was partial and neglectful so that the result was unfair to him.

(h) There should be orders made for Sunlight to provide the wage payment records with his signatures on them.

[11] Mr Wei's affidavit was more in keeping with arguing the challenge than seeking a stay. There was no information in the application or Mr Wei's affidavit explaining, for example, any adverse consequences that might flow from not granting a stay, beyond the obvious inference that he might be inconvenienced by having to pay the costs ordered.

[12] The application was opposed by Sunlight. It disputed Mr Wei's allegations and criticised the application as having no grounds beyond the existence of the challenge. Underlying Sunlight's opposition was that it is a small business forced to

incur significant expense to defend the claim and, as its director Harry Bei explained, the on-going costs to it are likely to be significant.

Analysis

[13] Filing a challenge does not operate as a stay of a determination but the Court has power to order one.⁷ A range of factors can be taken into account when considering such an application with the overarching consideration being whether granting it would be in the interests of justice. The factors usually assessed include:⁸

(a) Whether the challenge will be rendered ineffectual if the stay is not granted.

⁷ [Employment Relations Act 2000, s 180](#); and [Employment Court Regulations 2000](#), reg 64.

8. *New Zealand Cars Ltd v Ramsay* [2013] NZCA 582 at [7]; applying *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] NZHC 1324; (1999) 13 PRNZ 48 (HC) at [9]; see also *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

(b) If the challenge is brought and pursued in good faith.

(c) The extent to which a stay will impact on third parties.

(d) The novelty and/or importance of the question involved.

(e) Whether the successful party will be prejudiced by a stay being granted.

(f) The balance of convenience.

(g) If there is public interest in the proceeding.

[14] Not all of the factors are relevant in this case.

Will the challenge be rendered ineffectual?

[15] Mr Wei concentrated on the Authority's determination and his belief it was wrong. Consequently, he did not attempt to explain why his challenge will be ineffectual if he is required to satisfy the costs determination.

[16] Mr Fleming, counsel for Sunlight, argued Mr Wei had not discharged the onus on him to demonstrate that there are grounds for a stay.

[17] Often an application for a stay is made where the unsuccessful party is concerned about the possible inability to recover any payment if the challenge succeeds. Mr Wei has not said anything about concerns such as that. The only evidence touching on the ability of Sunlight to repay the costs, if ordered to do so, came from the company. Mr Bei explained that the recent lockdowns placed the company under financial pressure but attributed some of that to the expense incurred in defending itself from Mr Wei's claims.

[18] Mr Bei's concession was entirely appropriate and does not show that there is reason to believe the company lacks the ability to repay. He went no further than acknowledging some difficulties and it would be inappropriate to draw any greater inference than that from his comments.

[19] I am not persuaded that Mr Wei's ability to pursue a claim for unpaid wages, holiday pay, or the other money sought would be frustrated, or compromised, if he is required to meet the costs awarded by the Authority. This factor points away from granting a stay.

Is the challenge brought in good faith?

[20] Nothing in the determinations shows that Mr Wei participated in the investigation meetings in any way other than in good faith.

[21] That said, Mr Fleming drew attention to the brief pleadings and Mr Wei's affidavit which contained strong allegations about Sunlight not paying tax and claiming it supplied and/or held false information. The pleading also contained a bare allegation that the Authority was partial and unfair, without explaining why these claims could be responsibly made.

[22] Mr Wei is representing himself and has, presumably, attempted to put forward the most compelling case he can muster. Even making allowances for his lack of familiarity with what is required to pursue a challenge, some of his pleadings went too far and were ill-advised. Despite those misgivings about the pleadings, I am prepared to give him the benefit of the doubt and to conclude that his challenge, while in some ways off course, was brought in good faith. This factor points in favour of granting a stay.

Will the successful party be prejudiced?

[23] Mr Fleming's succinct submission about prejudice comes down to stating the obvious; the costs order was to defray Sunlight's legal expenses and there is an unreasonable burden on the company while it remains unmet. I agree. This factor points away from a stay.

Third parties, novelty/importance/public interest

[24] These factors require only brief comment. There will be no impact on third parties regardless of the result of this application. The issues are not novel, given that

what is involved is Mr Wei's claim for payment of money and Sunlight's award of costs. While the litigation is important to the parties there is no wider public interest in its outcome beyond the resolution of the dispute.

[25] These factors are neutral.

Balance of convenience.

[26] The only matters to weigh up in assessing the balance of convenience are the inconvenience to Sunlight if it was unable to pursue the costs order, and any inconvenience to Mr Wei if he is required to satisfy it pending the challenge being decided.

[27] Something more than mere disappointment at the result is required to justify a stay and that is, in reality, all Mr Wei seems to be relying on. In contrast, Sunlight continues to be out of pocket for the costs awarded and will have to meet on-going expenses. I consider the balance of convenience favours Sunlight.

Conclusion

[28] Weighing up these factors, Mr Wei has not established that it is in the interests of justice to grant a stay of execution of the Authority's costs determination. The application is dismissed.

Security for costs

[29] Sunlight applied for an order that Mr Wei pay security for costs of \$10,000 or such other amount as the Court fixes and that the proceeding be stayed until it is paid. It relied on the following grounds:

- (a) The Authority's costs determination is unpaid.
- (b) An assertion that Mr Wei's claim lacked merit.
- (c) Mr Wei demonstrated a "marked lack of regard for the Authority's processes".

- (d) The way Mr Wei is pursuing his challenge indicates he will unnecessarily increase Sunlight's costs.
- (e) If Sunlight succeeds, an award of costs by the Court would be at least

\$20,000, based on an indicative assessment made using the Court's Guideline Scale.

- (f) Mr Wei may be unable to pay an award of costs of \$20,000.
- (g) If Sunlight succeeds, and is unable to recover costs from Mr Wei, its financial viability will be adversely affected.
- (h) It would be inequitable for the Court to allow Sunlight to be caused hardship by an unsuccessful claim.
- (i) The overall interests of justice favour an order being made.

[30] Mr Fleming explained that the anticipated costs figure mentioned in the application was based on the Court having provisionally allocated Category 2, Band B, to the proceeding and an assumption that the hearing would take one day.⁹

[31] Mr Wei opposed the application but did not file submissions about it despite having an opportunity to do so.

Analysis

[32] There are no provisions in the Act, or the [Employment Court Regulations 2000](#), dealing with security for costs. The Court, however, is able to rely on r 5.45 of the [High Court Rules 2016](#).¹⁰

[33] Pursuant to r 5.45, the Court has a discretion to order security for costs to be paid, or provided, where there is reason to believe the plaintiff will be unable to satisfy

9. “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 16.

10 Employment Courts Regulations 2000, reg 6(2)(a)(i)–(ii).

a future costs order. Before making an order, the Court must be satisfied that it would be just to do so, especially where that may have the effect of preventing the plaintiff from pursuing the claim. Careful consideration is required in balancing the right of the plaintiff to have access to the Court against the interests of the defendant.¹¹

[34] Mr Fleming acknowledged that Mr Wei’s financial position is not known to Sunlight, beyond a vague comment once made by him to Mr Bei about owning a house and some land. Beyond reporting that comment, no information was supplied by Sunlight to assist in evaluating this application.

[35] Mr Wei did not respond to the comments in Mr Bei’s affidavit. That lack of response led Mr Fleming to invite an inference to be drawn that Mr Wei would be unable to pay costs if they were awarded against him. That submission was elaborated on in these points:

- (a) Mr Wei’s skills and experience were working in catering and the takeaway food industries, which are not highly paid, and have been heavily impacted by the pandemic.
- (b) During his time with Sunlight, Mr Wei commuted from New Lynn to South Auckland to work at a part-time role paying \$16 per hour after tax, suggesting he was not in a strong financial position.
- (c) Mr Wei had filed a notice of opposition to the application but did not include any information demonstrating that he would be able to satisfy an adverse costs award.

[36] As to the remaining grounds of the application, Mr Fleming relied on the recent decision in *Alkazaz v Enterprise IT Ltd* where the Court reiterated that in balancing the rights of the parties, relevant factors can include the merits of the challenge, any issues attaching to the plaintiff’s conduct, and likely difficulties with cost recovery.¹²

11 *A S McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; [2002] 16 PRNZ 747 (CA) at [14]–[16].

12 *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 42.

[37] Mr Fleming described the challenge as unmeritorious or, alternatively, having very little merit. He argued that some protection from vexatious proceedings can be a legitimate purpose of the security for costs regimes.¹³

[38] To attempt to demonstrate that this proceeding lacked merit, Mr Fleming relied on Mr Wei’s pleadings, repeating claims the Authority rejected and a finding by it that he was not a credible witness.¹⁴ Mr Fleming referred to Mr Wei’s claims for arrears of wages and breach of minimum wage entitlements being dismissed because, the Authority held, he produced no supporting documents, could not recall details and provided no plausible explanation for documents produced by Sunlight contradicting his claims. The Authority also dismissed Mr Wei’s claim for payment for public holidays because he did not dispute Sunlight’s evidence that he had not worked on any public holidays.¹⁵ Those claims continue to be made in this challenge.

[39] Despite Mr Fleming’s submissions, it would be wrong to treat Mr Wei’s claims as either vexatious or lacking merit just because he was unsuccessful in the Authority’s investigation. The Authority did not accept Mr Wei’s claims and rejected some of his evidence, but more is needed to get to those thresholds. Mr Wei enjoys the statutory right to challenge the determinations and, having exercised that right, to have the Court reach its own decision on the subject matter of his claims.¹⁶

[40] Mr Fleming’s second argument was that Mr Wei’s conduct was likely to unnecessarily increase costs. Based on the comment in *Alkazaz*, that past conduct is often the best indicator of future conduct, he submitted that Mr Wei missed filing deadlines in the Authority, did not follow directions, provided minimal evidence and did not supply key documents within his control.¹⁷

[41] To indicate that these examples of past conduct may be repeated, comparisons were drawn between the difficulties experienced in the Authority and what has happened in this proceeding. Attention was drawn to Mr Wei:

13 Relying on *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [39]–[40].

14 *Wei*, above n 1, at [36].

15 At [47]–[49].

16 See [Employment Relations Act 2000, s 183\(1\)](#).

17 *Alkazaz*, above n 12, at [13].

- (a) filing claims out of the Court’s jurisdiction or out of time;
- (b) attempting to make submissions to the Registrar;
- (c) filing documents that were unlabelled and of no obvious relevance; and
- (d) failing to serve documents on time.

[42] Mr Wei did not respond to the evidence provided by Mr Bei, describing the problems encountered during the Authority’s investigation.

[43] Based on the difficulties already experienced in this proceeding, I accept there is a risk that it may be unnecessarily protracted and, consequently, more expensive.

[44] The final factor Mr Fleming relied on was the potential for difficulties with cost recovery if Sunlight succeeds. This submission touched on concerns about Mr Wei’s ability to pay and his anticipated resistance to paying. Mr Bei produced Mr Wei’s submissions on costs to the Authority, contained in a brief email. In that email, he described Sunlight’s claim for costs as ridiculous and commented that no one forced the company to hire a lawyer. The view he expressed was that the company should be responsible for its own costs, because of its choice to appoint a lawyer. He coupled that comment with a bold statement that the tax problem the company faces was reported to IRD and that more legal action against the employer would be taken.

[45] I am satisfied that Sunlight has established the appropriateness of ordering security for costs. This decision has been swayed by:

- (a) a concern about Mr Wei’s ability to pay any future costs order given what is known about his work history;
- (b) that he has not paid the costs already ordered;
- (c) the lack of a response to concerns about his ability to pay;
- (d) expectations that the hearing may become unnecessarily protracted; and
- (e) if Sunlight succeeds, there is likely to be resistance to meeting any costs order.

[46] While security should be ordered, I am not satisfied that the amount sought by Sunlight is appropriate. The amount claimed is substantial. If ordered, it may go further than providing some assurance to the company, instead becoming an insurmountable barrier preventing access to the Court. A reasonable sum to order for security for costs is \$8,000.

Conclusion

[47] The application is granted and Mr Wei is ordered to pay or provide security for costs in the sum of \$8,000 subject to the following conditions:

- (a) If the security is provided by payment, the amount is to be held by the Registrar in an interest-bearing account pending further order of the Court.
- (b) Security provided by any other means must be to the satisfaction of the Registrar.
- (c) Security is to be paid or provided no later than 4 pm on 25 January 2021.
- (d) If security is not paid or provided for by the time in [47](c) this proceeding will be stayed until it is paid or provided.
- (e) The stay referred to in [47](d) will be effective without Sunlight making any further application.

[48] Costs are reserved.

K G Smith Judge

Judgment signed at 2.15 pm on 30 November 2020

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