

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 107
EMPC 175/2019**

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

AND IN THE MATTER OF an application for stay of proceedings

AND IN THE MATTER OF an application for leave to extend time to file
 a notice of opposition to the application for
 stay of proceedings

BETWEEN SUNCORP NEW ZEALAND
 EMPLOYEES LIMITED
 Plaintiff

AND ANDREW TIMMS
 Defendant

Hearing: On the papers

Appearances: JM Roberts and S Houliston, counsel for plaintiff
 RM Harrison, counsel for defendant

Judgment: 26 August 2019

**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for stay of proceedings)
(Application for leave to extend time to file a notice of opposition to application
for stay of proceedings)**

[1] There are two related applications currently before the Court – an application for a stay of proceedings and an application for leave to extend time to file a notice of opposition to that application. The applications arise in the context of a challenge filed by the plaintiff in respect of a determination of the Employment Relations Authority.¹

¹ *Timms v Suncorp New Zealand Employees Ltd* [2019] NZERA 255.

The Authority found that Mr Timms was entitled to receive redundancy compensation from the plaintiff. It reserved leave for the parties to return to the Authority if they were unable to resolve issues relating to quantum, and it reserved costs. The plaintiff seeks a stay of proceedings in the Authority pending determination of the challenge.

[2] The defendant wishes to oppose the application but failed to file a notice of opposition within time. The defendant has sought leave to extend the time to file the notice of opposition. The plaintiff opposes the granting of leave.

[3] The parties agreed that the two applications could be dealt with on the papers. I deal with the application for leave to extend time first.

Application to extend time to file notice of opposition

[4] The reasons why the notice of opposition was not filed within time are set out in counsel's memorandum. Essentially it is said that the delay, which amounted to approximately one week, resulted from an oversight exacerbated by counsel's work commitments leading into a period away from the office overseas. It is submitted that while the delay is regrettable, there has been no prejudice to the plaintiff. Conversely, Mr Timms (who was not personally at fault) would be prejudiced because he would lose the opportunity to oppose the company's application for a stay, which he wishes to do.

[5] The plaintiff submits that the reasons for the delay have been neither adequately explained nor explained in an appropriate form (namely an affidavit); that it has been prejudiced through increased costs; and that, in the absence of filing a notice of opposition, it was entitled to consider that the matter was resolved.

[6] The Court may extend time and, in exercising its jurisdiction, will be guided by the interests of justice. I have no difficulty concluding that it is just to grant leave in the particular circumstances and to proceed to deal with the application for a stay on its merits rather than disposing of it on the basis of a failure to file a notice of opposition within time. Counsel has explained the reasons for the delay and I am prepared to accept that explanation. It was inadvertent, and Mr Timms himself had

nothing to do with it. Any prejudice suffered by the plaintiff can be dealt with by an order for costs. Any prejudice to the defendant could not otherwise be dealt with. While the plaintiff says it was entitled to consider that the matter was concluded, it could only have reached that view if the Court had actually dealt with the application for a stay – it did not do so before the defendant realised the oversight and applied for leave. The basic point is that, even if the application had proceeded on an unopposed basis, there is no guarantee that the Court would have granted it.

[7] The extension of time is granted, and the defendant's notice of opposition will be treated as having been filed within time.

Application for stay

[8] The Court has a broad discretion to stay proceedings.² The discretion, while broad, must be exercised according to principle. A number of factors will generally be relevant, including:

- (a) whether the applicant's right of challenge will be rendered ineffectual if no stay is granted;
- (b) whether the challenge is brought and pursued in good faith;
- (c) the extent to which a stay would impact on third parties;
- (d) the novelty and/or importance of the question involved;
- (e) whether the successful party will be injured or prejudiced by a stay;
- (f) the balance of convenience; and
- (g) the public interest in the proceedings.

² Employment Court Regulations 2000, reg 64.

[9] The overarching consideration is the interests of justice.³

[10] The plaintiff's application is advanced on the following grounds. The Authority determined that the plaintiff did not comply with a clause in the defendant's employment agreement and that he should be entitled to redundancy compensation. Leave was granted to apply if the quantum issue could not be resolved. The plaintiff says that its challenge is directed at liability and that it would be an inefficient use of both the parties' time and the Authority's resources to apply to the Authority in respect of quantum while a challenge to liability is on foot. Further, the Authority has not yet determined costs and may not need to do so depending on the outcome of the challenge. It is also submitted that the challenge has merit. Finally, it is said that the defendant will not be injuriously affected by a stay.

[11] The defendant says that working out quantum is a straightforward exercise and would simply involve payment of the amount into an interest-bearing account, rather than to Mr Timms personally. If there is disagreement about the amount (which is said to be unlikely as it is to be calculated according to a formula), it would be helpful to have the Authority's views on that. If the plaintiff's challenge is upheld, the defendant accepts that the company would not be liable for payment of the redundancy compensation and the money could be returned to the plaintiff from the trust account without issue.

[12] I accept that the challenge is being pursued in good faith and the issue of liability is considered by the plaintiff to be of broader potential application within its organisation. Having said that, there is no suggestion that its right of challenge would be rendered ineffectual if no stay was granted. There is no suggested adverse impact on third parties and there is no novelty or more general importance or broader public interest attaching to the issues involved. Nor, on the basis of the information before the Court, would there be any difficulties with repayment if the challenge was to succeed (which is often the case in situations where a party applies for a stay). I am not satisfied that the plaintiff will suffer any real detriment if no stay is granted.

³ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]. See also *Dymocks Franchise System (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 at [10] (HC).

[13] The starting point must be that the defendant is entitled to the fruits of his success. He has succeeded on the liability issue, and it is not immediately apparent to me why he should not be entitled to apply to the Authority and have the quantum issue determined if that proves necessary. The company can then consider matters and take steps considered appropriate in the event it is dissatisfied with any consequent determination. For completeness, I do not regard an in-depth assessment of the likely merits as being helpful or necessary, for the reasons touched on by the Supreme Court in *Almond v Read*.⁴

[14] The plaintiff's application for a stay is declined.

Conclusion

[15] The defendant's application for leave to extend time to file a notice of opposition to the plaintiff's application for a stay is granted. The plaintiff's application for a stay is dismissed.

[16] Costs on both applications are reserved at the request for the parties.

Christina Inglis
Chief Judge

Judgment signed at 11.30 am on 26 August 2019

⁴ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.