

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2019] NZEmpC 25
EMPC 6/2018**

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

BETWEEN TUV
 Plaintiff

AND CHIEF OF THE NEW ZEALAND
 DEFENCE FORCE
 Defendant

Hearing: On the papers

Appearances: A Douglass, counsel for plaintiff
 J Boyle, counsel for defendant

Judgment: 12 March 2019

**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
[Application for stay of proceedings]**

[1] The plaintiff's challenge was dismissed by way of judgment dated 18 December 2018.¹ Costs remain outstanding. The plaintiff has filed an application for leave to appeal to the Court of Appeal. The defendant has consented to the application on the grounds that the proposed appeal raises important issues of public interest. The Court of Appeal has granted leave and the appeal has yet to be heard.² The plaintiff seeks an order staying the determination of costs pending the outcome of the appeal process. The parties are content for the application to be dealt with on the papers.

¹ *TUV v WXY* [2018] NZEmpC 154.

² *TUV v WXY* CA4/2019, 8 February 2019 (minute).

[2] Counsel for the defendant has filed a memorandum abiding the decision of the Court on the plaintiff's stay application but goes on to submit that costs should be awarded in its favour. The defendant's approach suggests that it misapprehends the nature of the plaintiff's application – it is for a stay of the *determination* of costs, not a stay of *execution* of costs.

[3] Counsel for the defendant submits that setting costs at this stage would be consistent with previous judgments of the Court, although only one judgment (*Ioan v Scott Technology NZ Ltd t/a Rocklabs*) is cited in support of this broad submission.³ There are other judgments of the Court which favour a different outcome. *White v Reserve Bank of New Zealand* is one such example.⁴

[4] The key point is that previous judgments of the Court reflect the broad discretion in setting costs, and the timing of the costs-setting exercise when an appeal is looming.⁵ Much depends on the circumstances of the case. In *Ioan* Judge Holden exercised her discretion to fix costs, on the basis that both parties were entitled to know the amount of costs awarded and fixing those costs would not have been an overly complex exercise. She went on to decline a stay of execution of the costs award. In *White* Judge Ford declined to determine costs pending an appeal to the Court of Appeal. He considered that course to be preferable to putting the parties to the expense of arguing a matter that might never need to be determined, or might be determined differently depending on the outcome of the appellate process.

[5] I understood the defendant to submit that determining costs in this case is a straightforward exercise because the plaintiff failed in her challenge and costs should simply follow the event, applying the daily rate approach set out in the Court's guideline scale. I doubt that the methodology will boil down to such a basic formula, given the outcome of the case and a number of other potentially relevant factors which I would wish to hear submissions on. The defendant's primary argument as to the impact of s 149 of the Employment Relations Act 2000 (the Act), including in claims of mental incapacity, was rejected. I also found, contrary to the defendant's position

³ *Ioan v Scott Technology NZ Ltd t/a Rocklabs* [2018] NZEmpC 58 at [8], [2018] NZEmpC 154.

⁴ *White v Reserve Bank of New Zealand* [2012] NZEmpC 125.

⁵ For instance, *Dwyer v Air New Zealand Ltd* [2012] NZEmpC 125.

at trial, that the first limb of the *O'Connor v Hart* test for mental incapacity was satisfied;⁶ that the plaintiff was mentally incapacitated at the time she signed the settlement agreement and later when the mediator telephoned her. I accepted the defendant's argument that the second limb of the *O'Connor* test was not made out on the facts, because it had not been shown that the defendant knew or ought reasonably to have known of the plaintiff's incapacity. It was this finding that led to the plaintiff's challenge being dismissed.

[6] It is evident from the Court of Appeal's minute granting leave, that the s 149 issue has been drawn into the appeal. The issue of whether actual or imputed knowledge is required in this jurisdiction will also be before the Court. It appears that the only issue which will not be subject to the appeal is whether the plaintiff was in fact mentally incapacitated at the time she entered into the settlement agreement and it was counter-signed by a mediator (*O'Connor* limb one).

[7] I accept that a party is generally entitled to enjoy the fruits of a judgment in its favour, even when an appeal has been filed. Setting costs but then ordering a stay of execution pending the outcome of the appeal process would not provide any fruit for the defendant to enjoy.

[8] The appeal is bona fide. There is a broad public interest in the appeal, a point acknowledged by the defendant in consenting to the application for leave to appeal, and by the Court of Appeal in granting leave. Unlike the position in *Ioan*, setting costs in this case would not be a straightforward exercise, and the outcome of the appeal may, in any event, impact on how costs are assessed.

[9] There is nothing to suggest that the defendant will be injured or prejudiced by a stay of the determination of costs. Nor, on the other hand, would the plaintiff's right of appeal be rendered nugatory if no stay of determination was granted, costs were set, but a stay of execution was granted. Both parties referred to the plaintiff's financial position. I do not accept that she is impecunious, and nor did I understand her to be suggesting that she was. There was no suggestion, as is often the case, that a condition of any stay of execution be coupled with an order that the money be paid into Court.

⁶ *O'Connor v Hart* [1983] NZLR 280.

[10] For completeness I note a point which NZ Defence Force appears to be making in support of a submission that the Court should set costs at this stage, which is that the plaintiff continues to incur costs which she cannot hope to recover. That is because, it is said, if she succeeds she has no prospect of recovering an amount which will have made the proceedings, including the appeal, financially viable. That observation needs to be considered in light of NZ Defence Force's acceptance that the issues raised on the appeal are matters of broad public interest, worthy of ventilation in, and determination by, the Court of Appeal.

[11] It is worth emphasising that employment litigation is not akin to purely commercial litigation. It is not unknown for successful litigation involving employment disputes, including claims of unjustified dismissal, to be cost-neutral or worse having regard to the legal costs involved in pursuing litigation in this jurisdiction. Nor is it uncommon for employment litigation to be advanced for non-financial reasons. That is because there will often be broader interests engaged, including in relation to job security, reputation and self-worth.

[12] Finally, the Courts have a range of options available in cases involving financial capacity, including orders for security for costs. I do not regard it as appropriate, in the circumstances of this case, to take up the defendant's submission of setting costs but staying execution.

[13] For the above reasons, I grant a stay of the determination of costs. The determination of costs in the Employment Court is accordingly stayed pending the outcome of the appeal to the Court of Appeal. That leaves costs in the Authority to be dealt with.⁷ They were stayed, by consent, pending the outcome of the challenge in the Court. I will receive further memoranda on this issue if the matter cannot otherwise be dealt with by agreement.

⁷ *TUV v WXY* [2018] NZERA Christchurch 61.

[14] Costs on the application are reserved.

Christina Inglis
Chief Judge

Judgment signed at 10 am on 12 March 2019