

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

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

**[2020] NZEmpC 115
EMPC 334/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out proceedings
BETWEEN	BHUMIKA KOHLI First Plaintiff
AND	NZ CLEAN MASTER 2013 LIMITED Second Plaintiff
AND	PALAV BRAHMBHATT First Defendant
AND	HARDIK GEDIYA Second Defendant
AND	MANINDER SINGH Third Defendant
AND	HEMANT DHAMIJA Fourth Defendant

Hearing: On the papers

Appearances: D Jaques, counsel for plaintiffs
D Fleming, counsel for defendants

Judgment: 4 August 2020

**JUDGMENT OF JUDGE J C HOLDEN
(Application to strike out proceedings)**

[1] This judgment resolves an application by the defendants for these proceedings to be dismissed.

[2] In the Court's interlocutory judgment dated 2 March 2020, the plaintiffs were ordered to pay security for costs of \$10,000 into Court within 14 days of the date of the judgment, with the challenge stayed until that was done.¹ The plaintiffs have not paid security for costs into Court and it is that failure that has led to this application.

[3] The Court also made an order staying execution of the Employment Relations Authority's (the Authority) substantive and costs determinations.² This order was on the condition that the plaintiffs would deposit the amounts ordered to be paid by the Authority into the Court within 14 days of the date of the judgment, and that they would pursue their challenge diligently.³ The plaintiffs have not paid the amounts awarded to the defendants by the Authority into Court.

[4] Where a party has failed to comply with an interlocutory order, a judge may order that any pleading of the party in default be struck out.⁴ In considering whether an order striking out proceedings should be made, the Court must make an individual assessment of the competing positions of the parties. This recognises that a strike out has the effect of bringing the proceeding to an end without determining its substantive merits.⁵ Where, as here, the application to strike out is for a failure to comply with an order for security for costs, it generally is only appropriate if the failure to comply with the order is intentional and contumelious.⁶

[5] The considerations that usually are relevant to determining the consequences of such a failure are:⁷

- (a) Its duration.
- (b) Its impact upon the progress of the proceedings as a whole.
- (c) Whether there appears to be any excuse or explanation.

¹ *Kohli v Brahmabhatt* [2020] NZEmpC 20 at [28].

² *Brahmbhatt v Kohli* [2019] NZERA 507 (substantive); *Brahmbhatt v Kohli* [2019] NZERA 557 (costs).

³ *Kohli v Brahmabhatt*, above n 1, at [21].

⁴ Employment Court Regulations 2000, reg 6; High Court Rules, r 7.48.

⁵ *Houghton v Saunders* [2020] NZHC 1088 at [19].

⁶ *Jagwar Holdings Ltd v Fuller Corporation Ltd* (1991) 4 PRNZ 477 (HC) at 578.

⁷ *Smith v Antons Trawling Co Ltd* HC Auckland CL 40/98, 24 March 2000 at [4].

- (d) Whether it continued after reasonable opportunities and reminders, particularly where the Court has already made a fresh order or given a warning, due to earlier non-compliance.
- (e) Whether it has substantially prejudiced the innocent party, whether procedurally or due to some wider impact upon the innocent party's interests and affairs.
- (f) Whether there is any realistic expectation that it will be rectified following further opportunity for compliance.

[6] The defendants submit that the above considerations all favour the granting of the order sought because:

- (a) The duration of the plaintiffs' default has now reached four months.
- (b) The proceedings as a whole have been stayed due to the default.
- (c) The plaintiffs have offered no excuse or explanation.
- (d) The default has continued after reminders were sent by the Employment Court Registry.
- (e) The default has prejudiced the defendants, in that they are unable to fully enjoy the benefit of their success in the Authority while it is still possible that the Authority's determinations may be challenged.
- (f) There is no realistic expectation that the plaintiffs will rectify the default.

[7] There is no question that the delay in complying with the order of the Court is significant. No excuse or explanation has been provided, despite reminders being sent to the plaintiffs by the Employment Court Registry. The plaintiffs have not filed any opposition to the application.

[8] The effect of the plaintiffs' failure to deposit the sums ordered to be paid by the Authority into the Court is that the stay of execution of the Authority's determinations granted by the Court has lapsed. Accordingly, it is now open to the defendants to seek to enforce the Authority's determinations. But, as noted by the defendants, they still have the possible challenge hanging over them.

[9] Without any notice of opposition or evidence from either party, it is not apparent what the reason for the default in paying security for costs is, or whether there is any realistic expectation of them rectifying the default. While the duration of the default is significant, it is not of the same duration as is often seen in applications such as this. Further, the parties attended mediation on 25 May 2020, which indicates that the plaintiffs were, at that stage at least, still engaged with this proceeding.

[10] While it is understandable that the defendants consider that there is little prospect of the plaintiffs rectifying the situation, the failure has not previously been before the Court. In view of the implications of a strike out, and in the interests of justice, the plaintiffs should have a final opportunity to rectify their default. The defendants, however, are entitled to see an end point to this litigation, if indeed security for costs is not to be paid.

[11] Accordingly, an order is made that the plaintiffs' challenge is struck out unless, on or before *4 pm on Monday 5 October 2020*, the plaintiffs provide security for costs as specified in the order made on 2 March 2020.

[12] Costs are reserved.

J C Holden
Judge

Judgment signed at 4 pm on 4 August 2020