

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

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

**[2020] NZEmpC 116
EMPC 19/2018**

IN THE MATTER OF	an application for the exercise of powers under sections 142B, 142E, 142J, 142W and 142X of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for stay of proceedings (of an application for consequential orders and further directions as to costs)
BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Plaintiff
AND	NEW ZEALAND FUSION INTERNATIONAL LIMITED (in administration) First Defendant
AND	SHENSHEN GUAN Second Defendant

Hearing: On the papers

Appearances: ML Brown, counsel for plaintiff
M Lyttelton, agent for first defendant
Second defendant in person

Judgment: 4 August 2020

**INTERLOCUTORY JUDGMENT (NO 2)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for stay of proceedings)**

[1] The two defendants (NewZealand Fusion International Ltd (in administration) and Ms Guan) apply for a stay of proceedings pending the determination of their

application for rehearing. The stay application is directed at an application for consequential orders filed by the Labour Inspector. The application for consequential orders is made in the context of a series of orders made against the defendants by the Employment Court in a judgment dated 11 December 2019.¹ The orders were for pecuniary penalties; compensation orders; and an order banning each of the defendants from employing any person for a period of 18 months.

[2] The rehearing application is set down for 7 September 2020. A stay of the application for consequential orders is sought on the grounds that neither defendant is in a position to meet any orders made against them and that the rehearing application has merit and is likely to result in the original orders being set aside. The Labour Inspector opposes any stay.

[3] In considering an application of this sort, the Court is ultimately guided by the interests of justice. The factors generally considered relevant are well established. In the context of the current application for a stay of the Labour Inspector's application for consequential orders they include:²

- (a) if no stay is granted, whether the right to apply for a rehearing will be rendered ineffectual;
- (b) whether the application for a stay is brought and prosecuted for good reasons and in good faith;
- (c) whether the Labour Inspector will be affected injuriously by a stay;
- (d) the effect on third parties;
- (e) the novelty and importance of the questions involved in the case;
- (f) the public interest in the proceedings; and

¹ *A Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* [2019] NZEmpC 181.

² *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]. See also *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

(g) the overall balance of convenience.

[4] I deal with each of these factors in turn.

[5] The defendants say that their financial position is precarious and that consequential orders made against them will likely send the second defendant into bankruptcy. That would render their application for a rehearing ineffectual. This submission was unsuccessfully advanced in support of the defendants' earlier application for a stay pending the outcome of their application for a rehearing.³ The reasons why I declined that application are relevant to an assessment of whether the defendants' most recent application ought to be granted.

[6] The financial material put before the Court in support of the application is incomplete and is not up-to-date. I do not accept that the defendants' right to seek a rehearing, have that application determined, and a rehearing (if ordered) dealt with by the Court, would be rendered ineffectual if no stay is granted. The company is in voluntary administration, but the administrator has given approval for the company to continue with these proceedings. It is said that Ms Guan might face bankruptcy (a point that appears speculative in light of the material before the Court) but, even if the High Court makes an order for bankruptcy, the proceedings may still be advanced. They would simply require the consent of the Official Assignee.

[7] The defendants contend that their application for a rehearing has significant merit. The merits are said to weigh in favour of a stay

[8] As I have previously observed, it is not appropriate to reach any concluded views as to the merits of application for a rehearing. That is because I have yet to hear full argument on it. Nor is it appropriate to express a concluded view on the Labour Inspector's application for consequential orders. In relation to the first point it is convenient to repeat the observations made in the judgment declining a stay of execution, in respect of where, at this stage, the relative merits might lie on the strength spectrum:

³ *A Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd (in administration)* [2020] NZEmpC 21.

[9] The first factor relied on by the applicants relates to alleged factual errors underpinning the finding that the three workers were employees. As the Court has emphasised numerous times, the real nature of a relationship is an intensely factual inquiry. The inquiry in this case included contemporaneous documentation and exchanges between the second applicant and the workers, which were found to point squarely to an employment relationship. While the second applicant gave evidence as to what she said the factual situation was, credibility findings were effectively made against her.

[10] Second, the applicants contend that evidence was given by the Labour Inspector in breach of s 229(5A) of the Employment Relations Act 2000. As the applicants say, this provision prohibits information provided to the Labour Inspector being given in evidence against a person. The likely difficulty with this aspect of the application is the extent to which that evidence made any material difference to the conclusions reached by the Court. The applicants also appear to suggest that the Court's judgment is a nullity because of the s 229(5A) issue, and this too supports the grant of a rehearing. No authority is cited for this proposition and the argument appears to be weak.

[11] The third point which had earlier been advanced in support of the application, and which I refer to for completeness, relates to allegedly new evidence. It is well established that fresh evidence may support an application for a rehearing but there are a number of hurdles that must be overcome before the Court will be persuaded to make such an order.⁴ This includes the extent to which the evidence could have been obtained at the relevant time. That hurdle would likely present difficulties for the applicants in this case. Further difficulties might well arise from the requirement that the new evidence be of such character that it would appear to be conclusive, and that there be a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.

[12] Further, the alleged errors identified by the applicants are ones which usually give rise to an appeal, not a rehearing. The sort of difficulties identified in *Yong, (T/A Yong and Co Chartered Accountants) v Chin*, in seeking to pursue a rehearing when a right of appeal exists, is likely to weigh against the application.⁵ As Judge Couch observed, it is only in exceptional circumstances that any Court has entertained an application for a rehearing on grounds that the judgment contained an error of law.⁶

[13] While not reaching a concluded view on the merits of the application for a rehearing, because to do so would be premature, I conclude that the relative merits of the application for a rehearing appear (at this stage at least) to be weak.

[9] At this stage, and based on the evidence currently before the Court, there appears to be merit in the application for consequential orders. The first defendant is in voluntary administration and appears to have insufficient assets to meet the orders

⁴ *Davis v The Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27 at [11]–[14].

⁵ *Yong, (T/A Yong and Co Chartered) Accountants v Chin* [2008] ERNZ 1 (EmpC).

⁶ At [27].

made against it. As the Employment Relations Act 2000 makes clear, in such circumstances, the Labour Inspector may apply to the Court for consequential orders seeking orders against the second defendant.⁷ The fact that such orders may present difficulty for the second defendant will likely be but one part of the analysis. It is unlikely to be determinative. As counsel for the Labour Inspector points out, liability and enforcement are two different things.

[10] The effect of the application is to seek to delay enforcement. It is made against a number of other applications, including the application for a rehearing (which has yet to be determined) and a notice of appeal (which was subsequently withdrawn). Having said that, I accept that the quantum of orders made against the defendants is significant and that the second defendant, in particular, has strong views about the factual findings made against her which she considers will be relevant to a determination of the rehearing application.

[11] While the Labour Inspector does not point to any direct prejudice that would be suffered in the event that a stay was granted, it is clear that the three employees, who were found to have been exploited during the terms of their employment with the first defendant, and at the hands of the second defendant, would be injuriously affected. That is because there would be further ongoing delays in enforcing the orders made in their favour. Effectively they would need to wait for the outcome of the application for a rehearing and, if that application succeeds, the outcome of the rehearing itself. I note that no concern was raised that there would be difficulties in recovering any amounts paid in the event that the defendants ultimately succeed in reversing the outcomes against them.

[12] In terms of any likely negative impact of a stay, I also have regard to the ongoing negative impact of delays in terms of non-pecuniary loss suffered by the three employees and the broader impact on their families.

[13] These proceedings have raised, and continue to raise, a number of points that have not been fully explored by the Court. There is a broader public interest in

⁷ Employment Relations Act 2000, s 142J(2).

proceeding to hear and determine the matters at issue, including in clarifying the operation of pt 9A of the Act and, in particular, s 142J(2).

[14] I am satisfied that the balance of convenience weighs against the grant of a stay. Standing back, it is not in the overall interests of justice that a stay is granted, and I decline to do so. The application is dismissed accordingly.

[15] The parties are encouraged to agree costs. If that does not prove possible, I will receive memoranda, with the Labour Inspector filing and serving her memorandum within 21 days, and the defendants filing their memorandum within a further 14 days.

Christina Inglis
Chief Judge

Judgment signed at 2.30 pm on 4 August 2020