

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

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

**[2020] NZEmpC 121
EMPC 48/2020**

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 leave to extend time to file a challenge
BETWEEN	KAG Plaintiff
AND	HST Defendant

Hearing: On the papers

Appearances: J Lovely, counsel for plaintiff
A Riches, counsel for defendant

Judgment: 10 August 2020

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for a stay of execution and for leave to extend time to file a
challenge)**

[1] On 28 January 2020 the Employment Relations Authority issued a determination in which it concluded that KAG had caused a personal grievance disadvantaging its former employee, HST.¹ The Authority ordered the company to pay its former employee \$14,000 as compensation pursuant to s 123(1)(c)(i) of the

¹ *HST v KAG* [2020] NZERA 33 (Member van Keulen).

Employment Relations Act 2000 (the Act). The Authority dismissed all of HST's other claims.

[2] In a subsequent determination, dated 22 April 2020, the Authority ordered the company to pay to HST costs of \$10,000 and to reimburse her for filing fees and a hearing fee totalling a further \$531.55.²

[3] The company challenged the substantive determination and sought to set it aside. Subsequently, it applied for a stay of execution of the Authority's order made in that determination. It did not challenge the costs determination within time and has not sought a stay of it. The omission to challenge the costs determination has now resulted in an application for an extension of time to take that step.

The stay

[4] The application for a stay was prompted by a demand for payment on behalf of the defendant. The application is opposed. At its core, this opposition relies on the defendant being entitled to benefit from the success she had in the Authority.

[5] Filing a challenge does not operate as a stay of a determination, but the Court has the power to order one.³ A range of factors can be taken into account when considering an application for a stay, including whether the challenge will be rendered ineffectual if it is not granted, whether the challenge is brought and pursued in good faith, the extent to which a stay would impact on third parties, the novelty and/or importance of the question involved, whether the successful party will be prejudiced by a stay being granted, the balance of convenience, and if there is public interest in the proceeding. The overarching consideration is that the decision has to be made in the interests of justice.⁴

[6] The competing considerations in an assessment such as this are the entitlement of the successful party to enjoy the fruits of the judgment, while not frustrating the

² *HST v KAG* [2020] NZERA 160 (Member van Keulen).

³ Employment Relations Act 2000, s 180; conferred by the Employment Court Regulations 2000, reg 64.

⁴ *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7]; applying *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9]; see also *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

unsuccessful party's ability to challenge that decision. The balance between the two is often struck by granting a stay, subject to the condition that money is paid to a stakeholder or the Registrar of this Court.

Challenge rendered ineffectual?

[7] It is common ground that HST made a demand for payment on 23 April 2020 accompanied by a statement that a statutory demand would follow if she was not paid. A statutory demand has not been issued and the Authority's orders remain unsatisfied.

[8] In supporting the application for a stay Mr Lovely, counsel for KAG, concentrated on the financial consequences for the company if it was compelled to satisfy the Authority's determination now. He was referring to the economic uncertainty caused by the COVID-19 lockdown and its impact on the company's cashflow.

[9] The application was supported by two affidavits from the company's Chief Executive that, in combination, gave an overview of its financial position, although a complete set of accounts was not provided. The point being made was that the lockdown had seriously and adversely impacted on the company's work with a flow-on effect for its ability to generate revenue at least in the short-term. However, by taking an extraordinary step and electing not to pay GST in early-May 2020, a contingency fund was created that is available to satisfy the determination if required.⁵ However, KAG would prefer not to be required to pay HST the amount of the determination pending the challenge being heard because of the stress that would place on it as it attempts to recover financially. Despite the lockdown's immediate effect on the company, the Chief Executive anticipated an increase in its specialised area of work as the lockdown restrictions ease and end.

[10] While touched on almost in passing by the company, HST confirmed that she is unlikely to be able to repay the amount of the Authority's award if it is paid to her now and the determination is subsequently set aside. Although she has started her own

⁵ The company has negotiated a payment plan with Inland Revenue to deal with the delayed GST payment.

business, she has limited financial resources and said she would use the money to satisfy a debt to her parents.

[11] In the absence of HST's concession about her financial position, I would not have been satisfied that the company had done enough to justify a stay based on being placed in a potentially compromised position if forced to comply with the determination. The information supplied by the company did not go far enough to justify granting a stay without ordering that the relevant funds be held independently. The acknowledgment that KAG had taken a step, admittedly an extraordinary one, to have funds available indicates it is able to pay.

[12] The remaining factors normally considered can be briefly addressed. I accept that the challenge is being pursued for a bona fide reason. There will be no direct effect on third parties if a stay is granted, despite Mr Riches' attempt to argue that there would be one if HST was unable to repay her parents from the proceeds of the award. There will be a detriment to the defendant, because she will not have access to the funds but that can be offset, at least partially, if a condition is imposed requiring payment into an interest-bearing account. The challenge does not present any novel issues and there are no public interest issues.

[13] Assessing all of these factors, the defendant's inability to repay is determinative and a stay is warranted. That stay is to be subject to the condition that funds are paid to the Registrar of this Court.

[14] Execution of the Authority's substantive determination of 28 January 2020 is stayed on the following conditions:

- (a) the amount of the determination is to be paid to the Registrar;
- (b) the money in [14](a) is to be paid to the Registrar no later than 4 pm on 31 August 2020; and

- (c) the money is to be held in an interest-bearing account and is not to be disbursed except by order of the Court or following agreement of the parties in writing.

Extension of time

[15] The Authority's second determination, dealing with costs, was issued on 22 April 2020. That was after KAG had challenged the January 2020 determination. When the costs determination was issued no steps were taken by it to amend the statement of claim, to incorporate a challenge to the costs determination, within the 28 days allowed by s 179(2) of the Act. That meant there was a timely challenge to the substantive determination but no challenge to the costs determination.

[16] Despite that omission the parties prepared submissions on the application for a stay, and to deal with other procedural matters, as if a timely challenge to the costs determination had been filed. They did so because the statement of claim purported to deal with both the substantive determination and costs. By minute to the parties, dated 24 June 2020, counsel's attention was drawn to this problem and the parties were invited to respond, bearing in mind that HST had also applied for an extension of time.⁶

[17] The plaintiff's response was twofold. Mr Lovely argued that the challenge to the costs determination was actually filed within time, because the subject was addressed in the statement of claim in the challenge to the substantive determination. He submitted that this course was open to KAG and drew attention the obvious problem that would be created if the challenge to the substantive determination succeeded without the costs determination also being set aside.

[18] As a fall-back, KAG filed an application for an extension of time to challenge the costs determination. That application was not supported by an affidavit explaining the situation and how it arose.

[19] I do not accept Mr Lovely's submissions that it is possible to file a challenge in anticipation of an adverse order being made. At the point in time when the challenge

⁶ That application is the subject of a separate decision being issued contemporaneously; *HST v KAG* [2020] NZEmpC 122.

was filed the only determination that existed was the substantive one. The plaintiff should have filed either an amended statement of claim to incorporate the costs determination or, alternatively, a separate challenge within the time allowed by s 179(2) of the Act.⁷

[20] Perhaps fortuitously for KAG, HST has indicated her preparedness to consent to an order granting an extension of time to file a challenge to the costs determination.

[21] Given the position taken by HST the application is granted. A statement of claim (or an amended statement of claim) must be filed within 14 days of the date of this decision.

[22] Costs on both applications are reserved.

K G Smith
Judge

Judgment signed at 4.15 pm on 10 August 2020

⁷ “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 11.