

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

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

**[2020] NZEmpC 20
EMPC 334/2019**

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 security for costs
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: 2 March 2020

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for stay of proceedings and application for security for costs)

There are two applications before the Court

[1] Ms Kohli, the first plaintiff, and NZ Clean Master 2013 Limited (NZ Clean), the second plaintiff, apply for a stay of proceedings, essentially to prevent the defendants from enforcing the orders in the determinations that are now under challenge.¹ That is opposed by the defendants.

[2] The defendants apply for an order that the plaintiffs pay \$10,000 into Court for security for costs. They seek a stay of proceedings until security is paid. The plaintiffs oppose this application.

[3] This judgment resolves both applications.

[4] The Authority found that each of the defendants was an employee of NZ Clean throughout all the time they worked for the company and that NZ Clean had to pay:

- (a) \$70,908.02 (gross) to Ms Brahmabhatt, the first defendant;
- (b) \$12,933.02 (gross) to Mr Gediya, the second defendant;
- (c) \$5,634.13 (net) to Mr Singh, the third defendant; and
- (d) \$4,284.82 (net) to Mr Dhamija, the fourth defendant.

[5] In addition, the Authority ordered both NZ Clean and Ms Kohli to pay penalties – NZ Clean a penalty of \$20,000 under s 134(1) of the Employment Relations Act 2000 (the Act) for breaches of the defendants' employment agreements and Ms Kohli a penalty of \$10,000 under s 134(2) of the Act for aiding and abetting breaches of the defendants' employment agreements. A proportion of those penalties was to be paid to the defendants.

[6] The plaintiffs were also required to pay the defendants \$10,500 as a contribution to their costs of representation and reimburse them \$71.56 for the fee paid

¹ *Brahmbhatt v Kohli* [2019] NZERA 507 (substantive); *Brahmbhatt v Kohli* [2019] NZERA 557 (costs).

to lodge their application in the Authority, with NZ Clean and Ms Kohli jointly and severally liable for those sums.

Affidavits have been provided

[7] Mr Gediya has filed an affidavit in support of the defendants' position on both the application for stay and the application for security for costs.

[8] He confirms his concern that, if the order for a stay is granted without conditions, the defendants may never receive payment of the amounts ordered by the Authority. He says that NZ Clean appears to be operating under new names and he is concerned that the company may be closed down.

[9] He provides evidence of the plaintiffs' solicitor advising that, before the plaintiffs served the Court proceedings, they would "prefer to wait until [the defendants] seek to enforce/seek compliance".

[10] Ms Kohli provided evidence on her own behalf and on behalf of NZ Clean. Her affidavit is filed in opposition to the defendants' application, but is referred to in submissions for both applications. In her affidavit, she says that the solvency of both NZ Clean and herself will not change in any material respect during the course of the challenge. She has provided NZ Clean's end of year financial records for the year ending 31 March 2018, which disclose that the company then had assets of \$67,270 and no liabilities. However, she says that NZ Clean's turnover has since dropped and it is now loss-making. She says neither NZ Clean nor herself have a very high cash position; NZ Clean is unable simply to pay the wages ordered in the interim and that it would cause both NZ Clean and herself hardship if they were required to pay \$10,000 (or any sum) as security for costs.

Submission filed on plaintiffs' application for a stay

[11] The grounds upon which the plaintiffs seek a stay are that they do not have the ability to pay the sums ordered; there are serious questions of fact and law to be determined that go to the heart of the determination; each defendant has advised they

have no money and, if the sums were ordered to be paid to them, and the plaintiffs were successful on their challenge, it would be highly unlikely they would be able to recover the money paid. The plaintiffs understand that each defendant is on a visa to be in New Zealand and could leave the country at any time, further making any ability to recover any overpayment difficult.

[12] The plaintiffs take issue with the approach taken by the Authority to the case, including to the time taken to issue the determination. They say NZ Clean is a small business with a negative cash flow and little cash. They submit it therefore would cause hardship to NZ Clean to pay the amounts ordered by the Authority at this time. They express concern about recovery of any amounts paid, at least in respect of Ms Brahmbhatt, as she is said to no longer reside in New Zealand.

[13] The plaintiffs submit that a stay should be granted to permit a full and proper hearing of the matter and the defendants will not be in any worse position, as they will not be able to spend any of the award from the Authority until the Court has determined if it is properly owing.

[14] In opposition, the defendants say the Court should either decline the application for a stay, or in the alternative, make it a condition of any stay that the plaintiffs pay the amounts ordered by the Authority into an interest-bearing bank account administered by the Court.

[15] The defendants submit that the financial information provided to the Court demonstrates that NZ Clean already has insufficient funds to pay the amounts ordered by the Authority, and that its ability to pay continues to deteriorate. They point out that Ms Kohli's affidavit expresses that she does not have much surplus in her earnings or very much in the way of cash reserves or savings as she has to pay her lawyer to represent her in her challenge. However, they note that she has not given any indication of what assets she owns, which could be sold or borrowed against, with her simply commenting that having to sell assets in order to make payment would be "a hardship" for her (and for NZ Clean).

[16] The defendants refer to the factors identified in *Shalini Ltd v Labour Inspector* and say that those factors lead to the conclusion that the orders sought by the plaintiffs should not be granted:²

- (a) Any concern that the plaintiffs may be unable to recover funds from the defendants could be addressed by ordering that the monies be paid into an interest-bearing bank account administered by the Court. There is no evidence that having to pay the sums owing would leave the plaintiffs unable to proceed with their challenge.
- (b) The plaintiffs have not prosecuted the challenge in good faith or in a timely manner.
- (c) The defendants would be injuriously affected if a stay is granted.
- (d) There is no evidence that third parties would be injuriously affected if the application for a stay is declined.
- (e) There are no novel questions of law to be determined.
- (f) It is in the public interest that the application be declined given that the plaintiffs were found to have failed to pay minimum employment entitlements.
- (g) The overall balance of convenience does not favour the granting of a stay.

A stay with conditions is appropriate

[17] Regulation 64 of the Employment Court Regulations 2000 gives the Court the power to order a stay of proceedings, which may be subject to conditions.

² *Shalini Ltd v Labour Inspector* [2019] NZEmpC 170 at [12].

[18] The starting point in considering the application is that the defendants were successful in the Authority and have the right to have the benefit of the determinations being challenged. However, that right must be balanced against the right of the plaintiffs to have the position preserved in case the challenge succeeds. The ultimate consideration is the interests of justice.³

[19] Having considered the evidence before the Court, I am satisfied that the key difficulty here is the real risk that, if the stay is granted without conditions, the defendants may find at the end of the Court proceeding that such funds and assets the plaintiffs presently have will be dissipated and any sums due difficult, or impossible, to recover. There is no reason why the defendants ought to carry that risk.

[20] With that in mind, I consider it appropriate for a stay to be ordered but conditional on the plaintiffs paying the full amount ordered by the Authority into Court. Such an order preserves the defendants' position, but also protects the plaintiffs in the event they are successful before the Court.

[21] There will, accordingly, be an order staying execution of the Authority's substantive and costs determinations on the following conditions:

- (a) Within 14 days from the date of this judgment, the plaintiffs will deposit the sums ordered to be paid by the Authority into the Employment Court:
 - (i) arrears of wages of \$95,000.00;⁴
 - (ii) penalties of \$20,000 (NZ Clean) and \$10,000 (Ms Kohli);⁵
 - (iii) costs and disbursements of \$10,571.56.⁶

³ *ESKA Company Ltd (formerly known as ESKA Ltd) v Belous (No 2)* [2019] NZEmpC 138 at [5]-[7]; *Stonewood Group Ltd v McAlpine* [2019] NZEmpC 82 at [8].

⁴ This figure allows for the fact that some of the figures set out in [4] are net of tax. *Brahmbhatt* (substantive), above n 1 at B.

⁵ *Brahmbhatt* (substantive), above n 1 at C. and D.

⁶ *Brahmbhatt* (costs), above n 1 at A. and B.

- (b) The amounts referred to in [21](a) are to be held by the Registrar in an interest-bearing account and will be paid out, with interest, on further order of the Court or on receipt by the Court of a joint memorandum signed by both parties' representatives.
- (c) If the amounts referred to in [21](a) are not paid into Court within the 14 days allowed, the order staying execution lapses.
- (d) The challenge is to be pursued diligently.

Submissions filed on defendants' application for security for costs

[22] The defendants submit that security for costs ought to be ordered because there is reason to believe the plaintiffs would not be able to pay any costs ordered by the Court. Again, the defendants point to the evidence of the plaintiffs' financial position.

[23] In terms of the amount sought, they note the proceedings involve four defendants and some complexity. They submit that this means that an amount higher than ordered in *Mani v Sharma* of \$8,000 is warranted.⁷

[24] The plaintiffs oppose the making of an order for security for costs. They say that, although they are not able to readily pay the sums ordered by the Authority, there is no reason to suspect they will not be able to pay costs should they be ordered by the Court.

An order for security for costs is warranted

[25] The Court has jurisdiction to order a party to pay security for costs and to stay proceedings until that is attended to.⁸

⁷ *Mani v Sharma* [2018] NZEmpC 155 at [17].

⁸ Employment Court Regulations 2000, reg 6(2)(a)(ii); High Court Rules 2016, r 5.45.

[26] While the plaintiffs will have to pay a significant sum into Court if they wish the Authority's determinations to be stayed, that is a separate matter from the application for security for costs.

[27] There is ample basis for the defendants' concerns regarding recovery of costs. The plaintiffs' financial position is clearly precarious. An order for security for costs at the level sought is just in all the circumstances.

[28] The Court therefore makes the following orders:

- (a) The plaintiffs are to pay security for costs of \$10,000 into Court within 14 days, to be held by the Registrar on interest-bearing deposit, pending further order of the Court or on receipt by the Court of a joint memorandum signed by both parties' representatives.
- (b) The challenge is stayed until security for costs is paid.

[29] A further directions conference will be convened once security for costs is paid in accordance with paragraph [28](a).

[30] Costs are reserved.

J C Holden
Judge

Judgment signed at 11.30 am on 2 March 2020