

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

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

**[2020] NZEmpC 21  
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 execution
BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Plaintiff
AND	NEWZEALAND FUSION INTERNATIONAL LIMITED (in administration) First Defendant
AND	SHENSHEN GUAN Second Defendant

Hearing: On the papers

Appearances: R Denmead, counsel for plaintiff  
M Lyttelton, agent for first defendant  
Second defendant in person

Judgment: 3 March 2020

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**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS  
(Application for stay of execution)**

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[1] The two applicants (NewZealand Fusion International Ltd (in administration) and Ms Guan) apply for a stay of execution of orders made against them by the

Employment Court in a judgment dated 11 December 2019.<sup>1</sup> The application for stay is made in the context of an application for a rehearing, currently set down for 22 April 2020. The stay is essentially sought on the grounds that enforcement of the Court's orders would have a significant financial and personal impact on the applicants and their business and the application for a rehearing has merit. The application is opposed by the Labour Inspector.

[2] In considering an application for a stay, the Court is ultimately guided by the interests of justice. It must weigh carefully the rights of the successful litigant (in this case the Labour Inspector, including on behalf of three persons found to have been employees of the first applicant company) to have the benefits of the judgment in its favour and to preserve the position in case the rehearing application is granted and the original judgment is reversed or the orders otherwise modified in their favour. The factors generally considered relevant are well established. In the context of the current application for a rehearing they include:<sup>2</sup>

- (a) If no stay is granted, whether the applicants' right to apply for a rehearing will be ineffectual;
- (b) whether the application for a rehearing is brought and prosecuted for good reasons and in good faith;
- (c) whether the successful party at first instance 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;

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<sup>1</sup> *A Labour Inspector of the Ministry of Business, Innovation and Employment v NewZealand Fusion International Ltd* [2019] NZEmpC 181.

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

(f) the public interest in the proceedings; and

(g) the overall balance of convenience.

[3] The applicants say that their financial position is precarious and enforcement of the orders made against them will likely send the second applicant into bankruptcy. There are a number of difficulties with this submission. First, the financial material put before the Court in support of the application is incomplete and is not up to date. Second, I do not accept that the applicants' 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.

[4] I further note that, unlike many other cases in which a stay of execution is sought in this jurisdiction, no concern has been raised about the recovery of any money if the applicants do succeed on their application for a rehearing, a rehearing is granted and the awards made against them are reduced or extinguished.<sup>3</sup>

[5] I do not accept that the applicants' right to seek a rehearing would be rendered ineffectual if no stay was granted.

[6] The applicants contend that their application for a rehearing is being pursued for good reason and in good faith. The grounds for the application for a rehearing appear to me to be weak (for reasons I will come to) and the effect of the application, which had previously been coupled with an appeal in the Court of Appeal (since abandoned) is to seek to delay enforcement. Having said that, I accept that the quantum of orders made against the applicants is significant and that the second applicant, in particular, has strong views about the factual findings made against her.

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<sup>3</sup> See, for example, *Canterbury Westland Kindergarten Assoc Inc v Barnes* [2020] NZEmpC 3.

[7] It is clear that if a stay is granted, the three employees, who were found to have been exploited during the terms of their employment with the first applicant, and at the hands of the second applicant, would be injuriously affected. That is because there would be ongoing delays in enforcing the orders made against the applicants and enjoying the fruits of the Labour Inspector's claim. There are also the three employees' families to consider – they have been out of pocket for a considerable period of time, for reasons set out in the Court's judgment. It is also likely that the non-pecuniary losses sustained by the three employees as a result of the applicants' breaches will be exacerbated by ongoing delays in securing payment for their unpaid wages and other entitlements, including compensatory awards.

[8] The applicants contend that their application for a rehearing has significant merit and that this supports the imposition of a stay. It is not, of course, 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. I do, however, make the following observations in assessing where, at this stage, the relative merits might lie on the strength spectrum.

[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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

[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.

[14] Weighing all matters before me (including the interests of the parties and the three employees), I am not satisfied that it is in the overall interests of justice that a stay of execution be 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

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

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

<sup>6</sup> At [27].

memorandum within 21 days, and the applicants filing their memorandum within a further 14 days.

Christina Inglis  
Chief Judge

Judgment signed at 1 pm on 3 March 2020