

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

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

**[2020] NZEmpC 53  
EMPC 238/2019  
EMPC 315/2019**

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	applications for stay of proceedings
AND IN THE MATTER OF	an application for security for costs
BETWEEN	ADVENTURE PLAYGROUND ROTORUA LIMITED Plaintiff
AND	SHAUN ISAAC Defendant

Hearing:	12 March 2020 (by telephone conference) and submissions on 19 and 26 March 2020
Appearances:	Ken Patterson, counsel for plaintiff F Wood, counsel for defendant
Judgment:	28 April 2020

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**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN  
(Applications for stay of proceedings and security for costs)**

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**Both parties have applications before the Court**

[1] Adventure Playground Rotorua Limited (Adventure Playground) challenges two determinations of the Employment Relations Authority (Authority) in which it

was ordered to pay Mr Isaac in total \$62,201.24 for wages, holiday pay and costs.<sup>1</sup> Adventure Playground also failed in its counterclaims against Mr Isaac, and the Authority's findings on those counterclaims are challenged.

[2] Adventure Playground now applies for a stay of proceedings and/or execution of both determinations of the Authority, essentially to prevent Mr Isaac from enforcing the orders made in the determinations. Mr Isaac opposes those applications.

[3] Mr Isaac applies for an order that Adventure Playground pay security for costs in such sum as the Court deems sufficient to pay his costs if Adventure Playground is unsuccessful in its challenges; and that the proceedings be stayed until the security sum is paid in full. While he does not suggest what sum ought to be ordered by way of security for costs, he submits that his actual costs in proceeding through to a defended hearing would be in excess of \$45,000 plus GST and that costs on a Category 2B basis would be in the vicinity of \$26,000. Adventure Playground opposes Mr Isaac's application.

[4] This judgment resolves the applications of both parties.

### **Affidavits have been provided**

[5] Mr Isaac filed an affidavit in opposition to the applications for stay. He also filed an affidavit in support of his application for security for costs.

[6] In relation to the applications for stay Mr Isaac points out that he continues to be deprived of the minimum entitlements that the Authority found were due to him. He acknowledges that he lives onsite with his wife who manages a motel, but points out that he has incurred significant legal costs in pursuing this matter through the Authority, that he has no independent source of income and that his attempts to obtain new employment have been made more difficult because the director of Adventure Playground, Mr Roberts, has a lot of business contacts around Rotorua to whom he has spoken.

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<sup>1</sup> *Isaac v Adventure Playground Rotorua Ltd* [2019] NZERA 377 (Member Crichton) at [135]; and *Isaac v Adventure Playground Rotorua Ltd* [2019] NZERA 488 (Member Crichton) at [9] and [29].

[7] Mr Isaac said he has heard from multiple sources that Mr Roberts was planning to sell the business of Adventure Playground or its assets and that he has seen advertisements of it being for sale.

[8] Mr Isaac is concerned that he would be prejudiced in pursuing his defence if he does not receive the monies currently due to him and says that the challenge does not have the strength suggested by Adventure Playground. Mr Isaac points out that he was almost entirely successful in his claims before the Authority and was entirely successful in defending the counter-claims brought against him by Adventure Playground.

[9] Mr Isaac makes similar points in his affidavit filed in support of his application for security for costs and says he has serious concerns about Adventure Playground's ability to meet any costs award made in Mr Isaac's favour if Adventure Playground is unsuccessful in its challenges.

[10] Mr Roberts filed two affidavits in relation to Adventure Playground's applications for stay, dated 20 September 2019 and 7 October 2019, and an affidavit in opposition to the application for security for costs dated 28 November 2019. Mr Roberts expresses concern that, based on Mr Isaac's present circumstances, if Adventure Playground pays Mr Isaac the money it has been ordered to pay by the Authority, there would be no chance of ever being paid back should Adventure Playground be successful in its challenges. However, he also says in his second affidavit that he had heard that Mr Isaac was working in another business. He also refers to what he says he understands is Mr Isaac's wife's salary.

[11] Mr Roberts says that if Adventure Playground has to pay the monies ordered by the Authority it would represent a serious injustice resulting in a substantial prejudice to Adventure Playground. Mr Roberts says that it is not in a financial position to place the monies on trust without necessary recourse to bank funding, the success of which is uncertain.

[12] He says that Adventure Playground considers that it has a strong case in the Court.

[13] He also claims that Mr Isaac was deceitful in his evidence before the Authority and the Court.

[14] Following the hearing of submissions for these applications on 12 March 2020, counsel for Adventure Playground advised that there were matters on which Adventure Playground should update the Court. Accordingly, Adventure Playground was directed to file and serve a further affidavit. In that affidavit, dated 19 March 2020, Mr Roberts advised that Adventure Playground sold its business on approximately 20 December 2019, but that the sale of the business did not generate surplus funds for Adventure Playground. Mr Roberts, however, says Adventure Playground “has managed to repay all creditors and funders of the company.”

[15] He says the sale has been completed over a period of months with the assignment of the lease being finally executed by all parties on 13 March 2020. He says there are other funds to be used to pay off debts of the company still to be received. However, the company is no longer trading and has no surplus assets.

[16] Although Mr Roberts has said that Adventure Playground has repaid all creditors and funders of the company, that does not include Mr Isaac for whom no provision has been made or is proposed.

[17] In his affidavit of 19 March 2020, in addition to reasserting his stance on Mr Isaac’s working situation and his wife’s apparent salary, Mr Roberts says Mr Isaac and his wife appear to have recently bought a new car.

### **There are well settled principles applying to applications for a stay**

[18] The principles applying to applications for a stay of execution are well settled. The Court has a broad discretion in the interests of justice, which must be exercised judicially and in accordance with principle. In exercising its discretion, the Court must weigh the rights of the successful litigant to have the benefits of any determination being challenged and those of the party challenging a determination to have the position preserved in case the challenge succeeds.<sup>2</sup>

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<sup>2</sup> *ESKA Ltd v Beloous* [2019] NZEmpC 14 at [9].

[19] The considerations that may apply to a greater or lesser extent in any case are:<sup>3</sup>

- (a) if no stay is granted, whether the plaintiff's right of challenge will be ineffectual;
- (b) whether the challenge is brought and prosecuted for good reasons and good faith;
- (c) whether the successful party at first instance will be affected injuriously by a stay;
- (d) the effect on the third parties;
- (e) the novelty and importance of the questions involved in the case;
- (f) the public interests in the proceedings;
- (g) the overall balance of convenience.

[20] Adventure Playground accepts that there is no novelty or importance to the question involved; nor is there any public interest in these proceedings. Mr Isaac essentially agrees with those two points. Adventure Playground also submits there is no obvious effect on third parties; Mr Isaac points to the effect on his wife of him not receiving the monies due to him, meaning that she must financially support him.

[21] Adventure Playground says that it is bona fide in its pursuit of the challenges; Mr Isaac disagrees, pointing to delays and the non-provision of records during the Authority's investigation.

[22] While I acknowledge that there were some delays and other criticism made about Adventure Playground's conduct before the Authority, for the purposes of this

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<sup>3</sup> *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; *New Zealand Post Primary Teachers' Assoc v Attorney-General (on behalf of Ministry of Education) (No 3)* [1991] 3 ERNZ 708 (EmpC) at 709.

judgment I operate on the basis that Adventure Playground is genuine in its challenges.<sup>4</sup>

[23] However, the significant factor in this case is the effect on the respective parties if a stay is, or is not, granted. Adventure Playground says that it would not be able to recover the monies from Mr Isaac if it is successful in the Court. Initially this was based on Mr Isaac being unemployed but, as noted, Mr Roberts now asserts otherwise.

[24] In any event, the most straightforward way for Adventure Playground to deal with its concern about recovery would have been to offer to make payment into Court, which is a usual condition of a stay of execution. Adventure Playground has not made that offer and says it is not in a financial position to do so.

[25] On the other hand, Mr Roberts' affidavit of 19 March 2020 makes it apparent that other creditors have been and continue to be preferred over Mr Isaac, and likely to his disadvantage. I am satisfied that Mr Isaac would be injuriously affected if a stay were to be ordered.

[26] On balance, therefore, the concerns raised by Adventure Playground do not offset the right Mr Isaac has to the benefits of the determinations in his favour.

[27] Accordingly, the applications for stay are unsuccessful. Mr Isaac is free to pursue recovery of the amounts awarded to him in the Authority.

### **Security for costs is appropriate**

[28] There are no particular provisions relating to security for costs in the Employment Court. Accordingly, pursuant to reg 6(2)(a)(ii) of the Employment Court Regulations 2000, the Court looks to the provisions of the High Court Rules 2016 when dealing with applications for security for costs.

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<sup>4</sup> *Adventure Playground Rotorua Ltd v Isaac* [2020] NZEmpC 7.

[29] Under r 5.45(1)(b) of the High Court Rules, the Court has discretion to order the giving of security for costs if there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its proceeding. In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.<sup>5</sup> An order may be made if it is just in all the circumstances.<sup>6</sup>

[30] The evidence demonstrates that Adventure Playground likely would not be in a position to pay an award of costs. The most recent information is that Adventure Playground is no longer trading and has no surplus assets. That this information was not provided to either Mr Isaac or the Court until after the hearing on 12 March 2020 gives further reason for Mr Isaac to be concerned that Adventure Playground would be unable to pay any costs award granted to him should he be successful in defending the challenges.

[31] An order for security for costs is appropriate. Bearing in mind the nature of the proceeding, which includes counter-claims made by the company, security for costs in the sum of \$26,000, being the estimated amount of costs that might be awarded on a Category 2B basis, is appropriate.

[32] Accordingly, Adventure Playground is ordered to pay the sum of \$26,000 as security for costs. That sum is to be paid into Court within 20 working days of the date of this judgment and, as soon as practicable thereafter, will be placed by the Registrar of the Employment Court on interest-bearing deposit, until further order of the Court.

[33] Adventure Playground's challenges are stayed until the payment is made, or there is a further order of the Court.

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<sup>5</sup> *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

<sup>6</sup> High Court Rules 2016, r 5.45(2).

[34] Costs are reserved.

J C Holden  
Judge

Judgment signed at 4.15 pm on 28 April 2020