

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

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

**[2021] NZEmpC 131
EMPC 49/2019**

IN THE MATTER OF proceedings removed in full from the
Employment Relations Authority

AND IN THE MATTER of an application for stay of proceedings

BETWEEN BAY OF PLENTY DISTRICT HEALTH
BOARD
Plaintiff

AND CULTURES SAFE NEW ZEALAND
LIMITED
First Defendant

AND ALLAN HALSE
Second Defendant

AND ANA SHAW
Third Defendant

Hearing: On the papers

Appearances: M Beech and C McGregor, counsel for plaintiff
No appearance for first and second defendants
C Sawyer advocate for third defendant

Judgment: 16 August 2021

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL
(Application for stay of proceedings)**

Background

[1] In my first interlocutory judgment of 10 December 2020, I dealt with an application for stay of the balance of issues which require determination in this

proceeding.¹ Those issues relate to applications for contempt findings and for the imposition of penalties against each defendant. The stay is sought in light of the fact there is a relevant application for judicial review of a preliminary judgment issued in this proceeding, brought in the Court of Appeal.

[2] When the application for stay was brought, I was advised there was also an application for stay of this proceeding before the Court of Appeal. I concluded it was preferable for that Court to resolve the stay application rather than this Court, since the application would have to be determined in light of the proceedings which are before it.

[3] Accordingly, I adjourned the application brought in this Court, indicating I would review the position in April 2021. In mid-March 2021, Mr Beech, counsel for the plaintiff, advised the Court that a strikeout application in respect of the judicial review proceedings was also to be heard by the Court of Appeal. The date for the hearing of both applications was 14 April 2021.

[4] The Court was then advised as to issues which had arisen concerning the representation of the defendants. Ms Sawyer advised that she continued to hold instructions from Ms Ana Shaw, but not from Mr Allan Halse. It appeared she no longer held instructions for CultureSafe New Zealand Ltd (CultureSafe) either.

[5] In a minute dated 13 May 2021, I sought confirmation as to the representation of the first and second defendants in this proceeding. Subsequently, Mr Halse confirmed by email that he would represent himself and the first defendant.

[6] The Court was also advised that the interlocutory applications which had been scheduled for hearing in the Court of Appeal in April 2021 had been adjourned, since Ms Sawyer was no longer representing the plaintiffs in that proceeding.

[7] Because no advice had been given to the Court as to when the interlocutory matters in the Court of Appeal would be rescheduled, in a minute of 4 June 2021 I requested clarification of this issue from the parties.

¹ *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2020] NZEmpC 223.

[8] From the memoranda which were then filed, it was apparent the parties did not agree that the balance of the proceeding in this Court should be deferred pending resolution of the interlocutory applications in the Court of Appeal. I therefore indicated it would now be appropriate for the Court to resolve the application for stay which had been placed before it previously. I directed the filing of submissions.

Submissions

[9] Mr Beech submitted that it was expected the outstanding interlocutory matters in the Court of Appeal would take some months to resolve. The parties to the judicial review proceedings had agreed that submissions in relation to the outstanding matters would be filed by the end of July, and a hearing date allocated thereafter for the two interlocutory matters before that Court.

[10] Mr Beech acknowledged this Court's preference for the Court of Appeal to resolve the issue as to stay. He submitted, however, that in light of the delays and uncertainty as to when the interlocutory applications could be heard by the Court of Appeal, it would be preferable for the balance of the current proceeding to proceed.

[11] Ms Sawyer filed a memorandum, in which she appeared to suggest that the balance of the proceeding in this Court should be stayed until the interlocutory issues in the Court of Appeal have been resolved.

[12] Mr Halse did not file a memorandum on the topic.

Analysis

[13] In considering an application for stay, the Court is ultimately guided by the interests of justice. Stay principles are normally applied in this Court where an application for leave to appeal is sought.² The present case does not involve an application for leave to appeal but involves judicial review proceedings which a litigant may bring as of right and without obtaining prior leave. That said, the normal

² For example, *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 143.

principles which relate to appeals may still assist this Court in assessing the interests of justice. They include:

- (a) If no stay is granted, whether the right to seek judicial review relief will be rendered ineffectual;
- (b) whether any party will be injuriously affected by a stay;
- (c) whether the judicial review proceedings are being pursued in good faith; and
- (d) the novelty and importance of the questions involved in the case.

[14] As a preliminary point, I express no view as to the potential merits of the judicial review proceedings which relate, as the Court understands it, not only to the findings made by the Court in this proceeding but to other judgments of the Employment Court and to determinations of the Employment Relations Authority. The judicial review proceedings are potentially complex, and prospects of success are not clear on the materials before the Court.

[15] I am satisfied that if no stay is granted, the right to bring judicial review proceedings will not be rendered ineffectual. However, the outcome of the Court of Appeal proceedings could impact on the way in which the balance of the proceedings in this Court should be heard.

[16] A potentially dysfunctional situation could arise were this Court to proceed on a different basis from that ultimately sanctioned by the Court of Appeal.

[17] Whether prejudice would arise, were the Court to consider the balance of the proceedings in the near future, again depends on the question of whether the Court of Appeal's conclusions may impact on issues to be considered in this proceeding. Needless expense might arise for both parties if this Court were to proceed in the meantime. That said, the Court is in no position to make an assessment as to the likelihood of this occurring.

[18] Next, I consider whether the judicial review proceedings are being pursued in good faith. I have no evidence that this is not the case; accordingly, I do not regard it as a material factor in the present application.

[19] With reference to the novelty and importance of the questions which arise, it is arguable that significant observations may be made by the Court of Appeal in the course of its deliberations. This factor may indicate it is preferable for the Court not to proceed, at least in the meantime.

[20] Finally, I recognise that the grant of any order of stay will lead to delay in the resolution of the issues in this Court. But this factor is not straightforward either. On the one hand, the plaintiffs are entitled to have the present litigation resolved, since it has been on foot for some time. On the other hand, the issues are important insofar as they may impact on the defendants, being proceedings involving potential punitive outcomes.

[21] Standing back, I consider that the interests of justice are best addressed by granting an interim order of stay until such time as the interlocutory applications in the Court of Appeal have been resolved. I will review the position further at that time.

[22] On the face of it, if the judicial review proceedings are struck out, it would seem the way would be clear for resolution of the balance of the present proceedings. If they are not, I would need to consider any order the Court of Appeal itself may have made as to stay, or comments on that topic.

[23] The parties are asked to keep the Court informed as to the timing of the hearing in the Court of Appeal and the outcome of the interlocutory applications.

[24] I reserve costs.

B A Corkill
Judge

Judgment signed at 1.20 pm on 16 August 2021