



[2] In general terms, the challenge relates to the Authority's finding that Mr Hogan, the defendant, had been unjustifiably dismissed for redundancy, and what are described as the "large" orders made in his favour.

[3] In finding that Mr Hogan had been unjustifiably dismissed, the Authority criticised the restructuring process undertaken by the plaintiff company and found that the only reason Mr Hogan had been selected for redundancy was because he was in a relatively new position with a relatively high salary, and that the company failed to consider alternatives. The Authority also found that Mr Hogan had been unjustifiably disadvantaged because the company opted to pay him 80 percent of his usual salary during the first lockdown without first consulting him or getting his agreement. No challenge is pursued to the Authority's finding that Mr Hogan had been unjustifiably disadvantaged.

[4] In relation to remedies, the Authority awarded Mr Hogan one year's lost wages; Mr Hogan had started a business, and the small profit made by that business was taken into account when determining the wages lost. A further \$20,000 was added for non-pecuniary losses on a global basis (covering both the unjustified disadvantage and unjustified dismissal grievances). The Authority applied a daily tariff in assessing costs but added \$1,000 because it found that the company could have been more co-operative. The total costs figure arrived at by the Authority, and awarded in Mr Hogan's favour, was \$5,500.

[5] The company's challenge is directed at alleged errors of fact and law in respect of the Authority's finding that Mr Hogan was unjustifiably dismissed and the way in which the reimbursement and compensation awards were arrived at. It is also said that the award of costs of \$5,500 was too high.

[6] The plaintiff has applied for stay primarily on the ground that there is a risk that Mr Hogan will not be in a position to repay the amounts awarded in his favour if the company succeeds on its challenge and the Authority's determination is reversed. It is said that Mr Hogan's interests will adequately be met by steps the company has taken in relation to the awards, namely by way of payment into the company solicitor's trust account pending the outcome of the challenge.

[7] While counsel for the defendant, Mr Turner, had indicated that the defendant was content for the plaintiff's application to be dealt with on the papers, the plaintiff wished to have a hearing in person. The Registrar was accordingly directed to set the matter down for a hearing via Audio Visual Link. In advance of the hearing, affidavits were filed, and counsel for the plaintiff filed written submissions.

### **Framework for analysis**

[8] There is no dispute as to the principles applying to an application of this sort. They can be summarised as follows.

[9] A challenge does not operate as a stay of the execution of a determination.<sup>3</sup> The Court has the power to order a stay.<sup>4</sup> In assessing the application, the overarching consideration is the interests of justice. A range of factors are generally taken into account:<sup>5</sup>

- (a) Whether the challenge will be rendered ineffectual if the stay is not granted.
- (b) If the challenge is brought and pursued in good faith.
- (c) Whether the successful party at first instance will be injuriously affected by a stay.
- (d) The extent to which a stay would impact on third parties.
- (e) The novelty and/or importance of the question involved.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience.

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<sup>3</sup> Employment Relations Act 2000, s 180.

<sup>4</sup> Employment Court Regulations 2000, reg 64.

<sup>5</sup> *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA); *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50; *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

[10] There is no suggestion that the plaintiff's challenge is not being pursued in good faith, and the plaintiff has undertaken to pursue its challenge diligently. Nor is there any suggestion that the case raises issues of broader public interest, or that third party interests will be affected. The arguments advanced on behalf of the plaintiff are squarely focused on the first factor identified above – the defendant's financial position and the perceived risk that he may dissipate funds. The risk is, it is said, heightened by the fact that the amounts ordered against the company are substantial.

## **Discussion**

[11] In order to assess the strength of the company's primary submission, it is necessary to be clear about what is, and is not, required when considering whether its challenge will be rendered ineffectual if no stay is granted. The language which has been adopted in the leading cases is telling. It is not couched in terms of whether a vague risk exists that the defendant may not, at some indeterminate period of time in the future when the case is decided, be in a position to repay the money ordered in their favour at first instance.<sup>6</sup>

[12] Mr Donovan, counsel for the plaintiff, submitted that, having raised the issue of risk in respect of financial position, the defendant ought to be obliged to establish that he would likely be in a position to repay the amounts ordered in his favour, if required to do so. There are two difficulties with this. First, it is up to an applicant to establish a reasonable basis for the making of interlocutory orders sought in its favour.<sup>7</sup> Merely raising a red flag, without more, does not suffice. In this case, reference is made to the earnings made by Mr Hogan's company following his dismissal, which were said to fall short of the amounts ordered in his favour by the Authority, and the absence of up-dated information about his company's position. However, there is nothing in the affidavit filed on behalf of the company to suggest that Mr Hogan is without access to finance or that he is otherwise impecunious.

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<sup>6</sup> And see, for example, the discussion in relatively recent High Court judgments which suggests that a relatively strict approach is adopted: *New Zealand Bloodstock Finance & Leasing Ltd v Jones* [2020] NZHC 1633 at [21]; *Mailley v Legal Complaints Review Officer* [2019] NZHC 132 at [9]; *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZHC 1947 at [17]-[18].

<sup>7</sup> *Grove v Archibald* [1997] 2 ERNZ 125 (EmpC).

[13] Second, if I did accept that Mr Hogan was obliged to satisfy the Court that he would likely be able to repay the money awarded in his favour by the Authority, he has confirmed in his sworn affidavit that he will be, and goes on to refer to the company he owns and property he holds with his wife (in which substantial equity is held). I do not accept the submission advanced on behalf of the plaintiff that further evidence needs to be provided by Mr Hogan to establish how his share of the property might be accessed (the suggestion being that his wife could have filed an affidavit confirming that she would be supportive of a loan being taken out over the property).

[14] There is always, of course, a risk that a party may not be able to satisfy orders against them. Mr Donovan suggests that the higher the quantum the higher the risk, and that this weighs in favour of a stay being granted. I do not accept the proposition that, where a litigant has a substantial success in the Authority, the opposing party may more readily obtain a stay of execution. The facts of each case will necessarily inform the assessment and, as I have said, something more than the existence of a risk is required to cut across a litigant's right to orders made in their favour.

[15] The plaintiff did not seek to rely on any of the other factors, but I turn to consider the defendant's interests and the balance of convenience for completeness.

[16] While it is true, as Mr Donovan points out, that the payment of the moneys ordered by the Authority into a solicitor's trust account will go some way to protecting Mr Hogan's interests, the fact is that he succeeded at first instance and is entitled to the fruits of his success unless good grounds have been established otherwise.<sup>8</sup>

[17] No dates have yet been set for the hearing of the challenge, but urgency has not been sought and it is unlikely that the plaintiff's challenge will be heard until later this year at the earliest. That means that if a stay was granted Mr Hogan would effectively be placed in limbo for a considerable period of time. He is defending a challenge that the company is pursuing and is incurring ongoing costs associated with his representation. It would not be consistent with the broader interests of justice if his ability to effectually defend the company's challenge was compromised by an

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<sup>8</sup> *Dymocks Franchise Systems (NSW) Pty Ltd*, above n 5, at [30].

order that the money ordered in his favour be withheld from him until and if he succeeds in defending the challenge, absent good reason. As I have said, I can discern no good reason in this case.

## **Outcome**

[18] It will be apparent that I am not satisfied that the orders sought by the plaintiff ought to be granted. Mr Hogan is entitled to the fruits of his success in the Authority pending the outcome of the challenge. Accordingly the plaintiff's application for a stay of execution is declined.

[19] The defendant is entitled to costs on the application. I anticipate that counsel will be able to agree costs. If that does not prove possible I will receive memoranda.

Christina Inglis  
Chief Judge

Judgment signed at 4.30 pm on 17 June 2022