

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

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

**[2022] NZEmpC 109
EMPC 105/2022**

IN THE MATTER OF a challenge to determinations of the
Employment Relations Authority

AND IN THE MATTER OF an application for stay of execution

BETWEEN WILSON-GRANGE INVESTMENTS
TRADING AS THE GRANGE BAR
AND RESTAURANT
Plaintiff

AND RICHARD GUERRA
Defendant

Hearing: On the papers

Appearances: J D Turner, counsel for plaintiff
S Greening, counsel for defendant

Judgment: 23 June 2022

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

Background

[1] The plaintiff company is pursuing a non de novo challenge to determinations of the Employment Relations Authority dated 4 March 2022¹ and 25 March 2022.² It has also filed an application for stay of execution of the orders made by the Authority in the defendant's favour. The application for stay is opposed.

¹ *Guerra v Wilson-Grange Investments Ltd* [2022] NZERA 70 (Member Larmer).

² *Guerra v Wilson-Grange Investments Ltd* [2022] NZERA 112 (Member Larmer).

[2] Mr Guerra had been employed by Wilson-Grange Investments Ltd as a member of the front-of-house staff at the Grange Bar and Restaurant. He was contracted to work 35 hours per week but claimed that he had often been rostered on for less. During the COVID-19 lockdown between March 2020 and May 2020 the company paid Mr Guerra the wage subsidy of \$585 per week. Mr Guerra disagreed with the way in which the company dealt with the wage subsidy issue. A number of concerns were raised in relation to Mr Guerra, and he was later dismissed for serious misconduct.

[3] The Authority found that Mr Guerra had been unjustifiably disadvantaged by the company's failure to roster him for the 35 hours guaranteed in his contract; procedural failings in relation to the wage subsidy issue; and the way in which allegations were raised and dealt with. He was awarded \$9,000 compensation for non-pecuniary loss, along with the reimbursement of the difference between the wage subsidy and his contractual entitlement. The Authority found the dismissal was not unjustifiable. In a later costs determination, the Authority considered Mr Guerra to have been the successful party, calculated the tariff and then reduced that amount by 30 percent to account for the company's limited success.³

[4] The company's challenge is directed at the Authority's unjustified disadvantage findings and its costs award.

[5] The stay application is focused on three key issues, namely the basis on which company's challenge is being pursued; concerns with recovery if the challenge succeeds; and broader issues of public interest in respect of the wage subsidy/lockdown issue.

Framework for analysis

[6] A challenge does not operate as a stay of the execution of a determination.⁴ The Court has the power to order a stay.⁵ The approach is well established. The

³ *Guerra v Wilson-Grange Investments Ltd*, above n 2.

⁴ Employment Relations Act 2000, s 180.

⁵ Employment Court Regulations 2000, reg 64.

overarching consideration is the interests of justice. A range of factors are generally taken into account.⁶

- (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.

Discussion

Challenge rendered ineffectual?

[7] The gist of the plaintiff's application is that if no stay is granted its right of challenge may be rendered ineffectual. That is because, it is said, Mr Guerra is a French national, has travelled to France recently, and may return there, making recovery of any amount ordered by the Authority, if the challenge succeeds, difficult. The quantum of the orders made in Mr Guerra's favour are said to support the grant of leave on the basis that the risk of non-payment increases with the quantum of award. *UBP Ltd v Rangitaawa-Kauī*⁷ is referred to in support of this proposition. There the

⁶ *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.

⁷ *UBP Ltd v Rangitaawa-Kauī* [2022] NZEmpC 25.

Court imposed a stay in the context of concerns about a significant sum which would otherwise be paid to the defendant.

[8] Putting aside the fact that the sum in *UBP Ltd* was almost five times larger than the sum in question here, I accept that the size of the sum ordered in a litigant's favour at first instance may be relevant to a determination of an application for a stay. However, the extent to which that is so will be fact specific, and it is important not to lose sight of the wood for the trees.⁸

[9] The focus of the Court's inquiry, in respect of the first consideration, is on assessing risk. It would be a rare case where there was no risk that a defendant might, at some time in the future, be unable to make payment of an award against them. If *any* risk was to be the guiding principle, stays of execution would be routine. They are not, as underlined in the Act itself.⁹ That is because the effect of such an order is to deny the successful party prompt access to awards made in their favour.

[10] An affidavit has been filed in opposition to the application for a stay. The affidavit confirms that Mr Guerra is currently employed on a full-time basis in New Zealand (as is his wife). He confirms that, while he has recently returned to France to visit his mother, he is otherwise living in New Zealand. The affidavit evidence supports the submission that Mr Guerra is in a financially stable position and would likely be able to repay the money awarded in his favour by the Authority in the event that the company's challenge succeeds. I am not satisfied that the challenge would be rendered ineffectual if the stay was not granted. That means that the first factor does not weigh in favour of leave.

Good faith

[11] The plaintiff says that it is bringing its challenge on genuine grounds and in good faith; the defendant suggests otherwise. I am not satisfied, based on the material

⁸ *SP Blinds Ltd v Hogan* [2022] NZEmpC 104 at [12].

⁹ Employment Relations Act 2000, s 180.

before the Court and having regard to the issues raised on the challenge, that the challenge lacks substance, or is being pursued for ulterior motives.

Impact on Mr Guerra

[12] If a stay is granted Mr Guerra will not obtain access to the money ordered in his favour by the Authority. That means that he will not be able to enjoy the fruits of his success at first instance and pending the outcome of the challenge the company is pursuing.¹⁰ I accept that this will have an impact on Mr Guerra and that it weighs against the grant of a stay. I deal with the plaintiff's submission that Mr Guerra's interests are adequately protected when discussing the balance of convenience.

Public interest/importance of question involved

[13] The parties are also at odds as to whether the case raises any novel issues or issues of potential broader importance. Counsel for the plaintiff submits that the Authority's approach to a force majeure clause in the employment agreement (in respect of a COVID lockdown) does amount to an issue of significance. While Mr Greening, counsel for the defendant, doubts that this is so, I accept that it is an issue that may assume some importance on the challenge and which does not appear to have been the focus of any prior judicial consideration within the employment context. In other respects the matters raised by the challenge appear to be unexceptional.

Balance of convenience

[14] I turn to consider the balance of convenience. The plaintiff contends that neither party will be prejudiced if the sum of \$12,501.56 is held on an interest bearing solicitor's trust account, as has occurred. While I accept that such a payment goes some way to addressing issues of prejudice, the point is that Mr Guerra would still be unable to access the money ordered in his favour at first instance, and for an uncertain period of time.

¹⁰ *Dymocks Franchise Systems (NSW) Pty Ltd*, above n 5, at [30].

Conclusion

[15] Standing back and balancing the interests of the parties, and the broader interests identified above, I am not satisfied that it is in the overall interests of justice that the application for stay of execution be granted and I decline to do so.

[16] 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 1.40 pm on 23 June 2022