IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 55
EMPC 206/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for unless orders
BETWEEN	WENLI WEI Plaintiff
AND	SUNLIGHT JMB FUTURE LIMITED Defendant

Hearing: On the papers

Appearances: Plaintiff in person
K Singleton and D Fleming, counsel for defendant

Judgment: 30 March 2022

INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH
(Application for unless orders)

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[1] Wenli Wei challenged a determination of the Employment Relations Authority where he was unsuccessful in his claims to have been unjustifiably dismissed and to recover money alleged to be owed to him by his former employer, Sunlight JMB Future Ltd.[1]

[1] *Wei v Sunlight JMB Future Ltd* [2020] NZERA 253 (Member Robinson).

[2] The whole of the Authority's determination was challenged. The relief sought included compensation and to set aside the Authority's determination requiring him to pay costs.[2]

[3] On 30 November 2020 Sunlight was granted an order that Mr Wei pay or provide security for costs.[3] The amount of the security was set at $8,000 subject to conditions. One condition was that the proceeding would be stayed if security was not paid or provided by 4 pm on 25 January 2021.

[4] Mr Wei did not pay or provide the security by that date and the challenge was therefore stayed. Against that background Sunlight has applied for "unless" orders in the following terms:

> Unless security for costs is paid into Court within 1 month of the date of the order, the proceedings brought by the respondent Wenli Wei and numbered 206/2020 will be dismissed…

[5] The application relied on r 7.48 of the High Court Rules 2016,[4] *Reid v Ngāti Rangi Trust*[5] and an affidavit provided by a director of Sunlight.

[6] The grounds for the application can be simply stated. They are that Mr Wei has not paid or provided the security for costs or paid the costs awarded against him by the Authority. He has been placed on notice by Sunlight that if compliance does not occur within a reasonable time an application would be made to the Court to have the proceeding dismissed.

[7] Mr Wei is opposed to an unless order being made. His response was that he is securing the funds to provide the security and, once he has done so, the litigation should continue.

[8] Providing for security for costs is the only outstanding matter between the parties. There are no other orders or directions that have been made and not complied with.

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2 *Wei v Sunlight JMB Future Ltd* [2020] NZERA 282 (Member Robinson).
3 *Wei v Sunlight JMB Future Ltd* [2020] NZEmpC 208.
4 As applied by Employment Court Regulations 2000, reg 6(1)(a)(ii).
5 *Reid v Ngāti Rangi Trust* [2021] NZEmpC 18.

[9] Ms Singleton, counsel for Sunlight, made the following submissions in support of the application:

(a) Under r 7.48 of the High Court Rules 2016 where a party has failed to comply with an interlocutory order a Judge may make any order that he or she thinks just including one that any pleading of the party in default be struck out.[6]

(b) Mr Wei has not complied with the Court's order by 25 January 2021.

(c) The assessment factors usually taken into account in considering whether an order ought to be made all favour granting the application.

[10] The assessment factors referred to were derived from *Kohli v Brahmbhatt*.[7] Those factors were said to be:

(a) The duration of the failure to comply.

(b) Its impact on the progress of the proceedings as a whole.

(c) Whether there appears to be any excuse or explanation for the failure to comply.

(d) Whether it continued after reasonable opportunities and reminders.

(e) Whether it has substantially prejudiced the innocent party, procedurally or due to some wider impact.

(f) Whether there is any realistic expectation that the failure will be rectified following a further opportunity for compliance.

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6 Applied by Employment Court Regulations 2000, reg 6(1)(a)(ii).

7 *Kohli v Brahmbhatt* [2020] NZEmpC 115 at [5]; and see the discussion in *Houghton v Saunders* [2020] NZHC 1088 at [22].

[11] *Kohli* was relied on to illustrate the sort of case where the orders applied for might be made. In that case seven months and three days had elapsed since the plaintiff was ordered to pay security for costs.

[12] Ms Singleton also referred to and relied on *Houghton v Saunders*.[8] That case was described as one where the High Court made an unless order when security for costs had not been provided a year after it was due. Ms Singleton noted the Court stated that the length of time was generous, something the Court of Appeal subsequently agreed with.[9]

[13] The delay attributed to Mr Wei was 362 days. To give weight to that submission attention was drawn to the challenge to the Authority's determination being filed in July 2020 and to the events which gave rise to the employment relationship problem occurring between 2017 and 2018.

[14] Ms Singleton submitted that Mr Wei had provided no reasonable excuse or explanation for not satisfying the order. The evidence was that he had not communicated with Sunlight or the Court for a considerable length of time; about 22 weeks. When he did communicate it was brief, and not informative, confined to a comment to the effect that he would contact the Court when ready. Subsequently, as recently as January this year, Mr Wei advised Sunlight that he was gathering the money to comply with the order but that would take further time.

[15] That sequence of events led to a submission that Sunlight was prejudiced by this delay. An inference invited to be drawn was that there is no realistic prospect that Mr Wei will be able to rectify the default.

[16] The summary position adopted in submissions was that it is not in the interests of justice for the Court to allow a situation to continue where the defendant was successful in the Authority but was left out-of-pocket and facing an on-going proceeding.

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8 At [84].
9 *Houghton v Saunders* [2020] NZCA 638 at [85].

Analysis

[17] I do not accept that it is appropriate to make an unless order in the terms sought. In relying on r 7.48 the application is based on the premise that Mr Wei has failed to comply with an order of the Court in such a way as to expose his case to potential sanctions. I disagree. The relevant part of the rule provides:

> **7.48 Enforcement of interlocutory order**
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> (1) If a party (the **party in default**) fails to comply with an interlocutory order or any requirement imposed by or under subpart 1 of Part 7 (case management), a Judge may, subject to any express provision of these rules, make any order that the Judge thinks just.

[18] The rule is the basis for making unless orders that are regarded as peremptory; to order that, unless specified action is taken by a specified time, the stated sanction will result automatically. Where an unless order is made no further steps are required to be taken to enforce it.[10]

[19] The difficulty with the present application is characterising what has happened as such a failure that Mr Wei should face the prospect of his claim being struck out. I do not think it is appropriate to see what has happened as the type of conduct that would result in an order under r 7.48. Mr Wei was ordered to provide security for costs, but the terms of that order contained a built-in sanction, in his proceeding being stayed if security was not provided. That is what happened. In a sense, Sunlight is seeking to impose a further sanction relying on the same circumstances that led to the first one, to stay the proceeding, but with no other failure by Mr Wei.

[20] *Houghton* does not support Sunlight's application. In that case the plaintiff was ordered to pay security for costs because the case was supported by a litigation funder. The plaintiff repeatedly promised to satisfy the order but failed to do so. The defaults delayed the litigation and forced the Court to adjourn the hearing twice resulting in wasted costs orders and lost Court time. The defendants applied to strike out the proceeding. In response, the Court was satisfied that the failures were inexcusable but provided a final opportunity to the defaulting plaintiff to secure

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[10] See for example *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 at [29].

funding but in a controlled way by making an unless order; unless the funds were provided the claim would be struck out. That is not the situation presented here.

[21] In this Court the situation in which an unless order may be made is well demonstrated by *Reid* referred to in the application.[11] In that case the Court was dealing with multiple breaches of timetabling directions and orders. The chronology in the judgment showed that at least five orders over several months were not complied with, the Court vacated a rescheduled hearing because of further failures to comply, and subsequently the plaintiff did not comply with an extension granted to file briefs of evidence. The circumstances in *Reid* stand in stark contrast to what has happened in this case.

[22] In *SM v LFDB* the Court of Appeal held that an unless order is one of last resort.[12] It is properly made only where there is a history of failure to comply with earlier orders. But, even then, justice may require that the party in default be relieved of the consequences if the breach resulted from something for which that party should not be held responsible.

[23] This case could not be described, at this stage, as being troubled by a history of inexcusable failures to comply with orders or directions.

[24] However, even if that assessment is wrong, I would not make the order sought. There has been only one breach which, based on the examples provided by *Houghton* and *Reid*, is not so significant that it would warrant placing Mr Wei's challenge in jeopardy.

[25] There is a possibility that the application is intended to be one brought under r 15.2 of the High Court Rules, as seeking to dismiss the proceeding because the plaintiff has failed to prosecute it to trial and judgment. I agree with Ms Singleton that a substantial amount of time has elapsed since this challenge was filed and the application for security for costs succeeded. However, I am not satisfied it would be

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11 *Reid*, above n 5.
12 *SM*, above n 10, at [31].

reasonable to characterise the time from then until now as an unacceptable or inordinate delay sufficient to justify dismissing the proceeding.

Conclusion

[26] The application is unsuccessful and it is dismissed.

K G Smith
Judge

Judgment signed at 2.20 pm on 30 March 2022