

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

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

**[2023] NZEmpC 111
EMPC 9/2023**

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

AND IN THE MATTER OF an application for stay of proceedings

AND IN THE MATTER OF an application for security for costs and stay
 of proceedings

BETWEEN DE KAI LU
 First Plaintiff

AND YUZHEN QIU
 Second Plaintiff

AND REBECCA YOUNG
 Defendant

Hearing: On the papers

Appearances: First plaintiff in person and as agent for second plaintiff
 P Matthews, advocate for defendant

Judgment: 24 July 2023

**INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application stay of proceedings)
(Application for security for costs and stay of proceedings)**

Background

[1] The plaintiffs, Mr Lu and Ms Qiu, have challenged a determination of the Employment Relations Authority, which made compliance orders against Bourson Ltd (Bourson), a company with which they were both previously associated, along with

orders against them under s 137(2) of the Employment Relations Act 2000 (the Act) to take the steps necessary to meet the company's obligations.¹

[2] The Authority made the following orders:

- (a) Bourson was to comply with two Authority determinations by paying the defendant, Ms Young, \$10,000 compensation, \$7,500 costs, and \$71.56 for the Authority's filing fee.²
- (b) The plaintiffs were to take the steps necessary to ensure that Bourson met its obligations to make such payments under s 137(2) of the Act.
- (c) Bourson was to pay interest on the sums owing.
- (d) Bourson and the plaintiffs were to be jointly and severally liable and to pay:
 - (i) \$1,437.50 as costs; and
 - (ii) \$71.56 for the filing fee.

[3] The plaintiffs say that the Authority's determination was unfair and that there was no evidence to support the findings made. They further say that the directions about the steps they have been ordered to take are unclear.

[4] There are now two applications before the Court:

- (a) the plaintiffs' application for a stay of execution of the Authority's orders; and
- (b) an application by the defendant for security for costs in the sum of \$3,100, which is her calculation of 50 per cent of scale Employment

¹ *Young v Bourson Ltd* [2022] NZERA 648 (Member Craig).

² *Young v Bourson Ltd* [2021] NZERA 113 (Member Craig); and *Young v Bourson Ltd* [2021] NZERA 174 (Member Craig).

Court costs, and a stay of proceedings until such time as security, if ordered, is paid.

[5] Both applications are opposed.

[6] Both parties have filed memoranda (the defendant having also filed a brief affidavit in support of, and in opposition to, the various applications) and are content for them to be dealt with on the papers.

Plaintiffs' application for a stay

[7] The only ground provided by the plaintiffs was that they had challenged the determination. In their submissions, they expanded on this to say that Bourson is not trading and cannot afford to pay anything. They say they are also facing difficulty with cashflow but would be able to pay the amount of \$1,006.04 (being 67 per cent of the amount for which they were found to be jointly and severally liable) into the Court's trust account.

[8] The defendant says that the stay would deny her the fruits of her success and place her under financial strain, particularly as she now has to fund the defence of this challenge.

The law

[9] The principles applying to an application of this sort are well established and can be summarised as follows. A challenge does not operate as a stay of the execution of a determination.³ The Court has the power to order a stay.⁴ In assessing an application, the overarching consideration is the interests of justice. A range of factors are generally taken into account:⁵

- (a) whether the challenge will be rendered ineffectual if the stay is not granted;

³ Employment Relations Act 2000, s 180.

⁴ Employment Court Regulations 2000, reg 64.

⁵ *SP Blinds Ltd v Hogan* [2022] NZEmpC 104, [2022] ERNZ 416 at [9].

- (b) whether 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; and
- (g) the overall balance of convenience.

Analysis

[10] As already noted above, the grounds for the application are that the plaintiffs have challenged the determination (which they consider to be unfair) and cannot afford to pay the full amount in any case. No evidence has been provided as to their financial position other than their statement that they have cashflow difficulties.

[11] As noted by this Court in *BR & SL Porter Ltd v Higgs*, something more than disappointment at the result in the Authority is required to justify a stay of execution.⁶

[12] Turning to the factors set out above, there is no evidence that, if the stay is not granted, the plaintiffs' right of appeal will be rendered ineffectual. I accept that the challenge has been brought and will be pursued in good faith.

[13] There is no effect on third parties; nor are there novel or important questions involved in the case. Further, there is no public interest in these proceedings.

[14] In looking at the overall balance of convenience, requiring Ms Young to defend the challenge, while not allowing her to seek payment of the monies due under the determination, cuts across her entitlement to the fruits of her success and, as she has noted, exposes her to additional legal costs. Further, by the plaintiffs' own admission,

⁶ *BR & SL Porter Ltd v Higgs* [2020] NZEmpC 76 at [6].

there is a real risk that such costs will not be able to be recovered should the challenge not succeed. That is not in the interests of justice.⁷

[15] The application for a stay is unsuccessful. The amounts awarded to Ms Young in the Authority continue to be payable by the plaintiffs, and Ms Young is free to pursue recovery of those amounts.

Defendant’s application for security for costs and stay of proceedings until costs are paid

[16] The defendant’s application is based on the grounds that the second plaintiff, Ms Qiu, is resident outside of New Zealand and that, when applying for the stay, both plaintiffs have reported to the Court that they have cashflow difficulties.

[17] Ms Young’s representative also submits that the merits of the challenge are “dubious” and that while the plaintiffs rely heavily on the notion that the compliance order was unfair, such order was against the company (Bourson), which is not named as a party to the proceedings.

[18] Ms Young says that she has already incurred costs of more than \$10,000 with respect to the two Authority proceedings which she has not recovered despite orders from the Authority. Anticipated costs for the current matter are \$6,201, based on the guideline scale. Her representative notes that while such an amount might be considered relatively modest, it is still significant to her.

[19] Ms Young seeks that 50 per cent of the anticipated costs (being \$3,100) be paid into court by way of security for costs.

[20] The plaintiffs say that it is their right to challenge the decision which should not be affected by financial cost. They accept that Ms Qiu resides in China but note that she holds a New Zealand resident visa and would be able to reside in New Zealand legally, which negates that ground for security for costs. They say that the business ceased operating on 25 February 2019 and paid all other creditors, including the Inland

⁷ *People Media Group Ltd v Galligan* [2023] NZEmpC 13 at [16].

Revenue Department, at that time. The Authority decision came after the business had already closed.

[21] They also submit that the defendant's advocate has a policy of "no win, no fee" and that, therefore, there should not be any fees for the defendant to pay.⁸

The law

[22] As stated by this Court previously, there are no particular provisions relating to security for costs in the Employment Court.⁹ Accordingly, pursuant to r 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.

[23] Under r 5.45(1)(a)(i) and (b) of the High Court Rules, the Court has a discretion to order the giving of security for costs if a plaintiff is resident out of New Zealand or there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in their proceeding.

[24] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.¹⁰ An order may be made if it is just in all the circumstances.¹¹

Analysis

[25] The plaintiffs have stated that they currently have cashflow difficulties. As noted already, they have not provided details of their financial circumstances. Accordingly, it is reasonable to be concerned that they may not be in a position to pay costs should they be unsuccessful in their challenge.

[26] Further, it is agreed that Ms Qiu, one of the plaintiffs, is resident overseas.

⁸ Presumably, this is on the assumption that the defendant would be unsuccessful in defending this challenge.

⁹ *People Media Group Ltd v Galligan*, above n 7, at [18].

¹⁰ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

¹¹ High Court Rules 2016, r 5.45(2).

[27] Accordingly, the threshold for ordering security for costs is met. The question is whether, on balancing the interests of both parties, an order would be just in all the circumstances.

[28] If the plaintiffs are successful in their challenge, then they forego the liability to pay the defendant. They would also, presumably, be entitled to a costs award. If, however, they fail in their challenge, it seems that there is a significant risk that Ms Young would not receive either her substantive award or any costs award. Such a situation is not just in all the circumstances.

[29] Accordingly, an order for security for costs is appropriate.

[30] The plaintiffs have not raised any issue with Ms Young's calculations in relation to her likely costs. The amount sought by Ms Young is fair and reasonable.

[31] Accordingly, I order that the sum of \$3,100 be paid into court as security for costs within 14 days of the date of this judgment. As soon as practicable following receipt, the Registrar of the Employment Court is to place that sum on interest-bearing deposit until further order of the Court. The plaintiffs' challenge is stayed until the payment is made or there is a further order of the Court.

Costs

[32] As the successful party, Ms Young is entitled to costs on these applications. If they cannot be agreed, she may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The plaintiffs are to respond by memorandum filed and served within 14 days thereafter, with any reply from Ms Young to be filed and served within a further seven days. Costs will then be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 9.45 am on 24 July 2023