

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2023] NZEmpC 114
EMPC 168/2023**

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

BETWEEN VICTORIA JEON (AKA JONG AI
PARK), JOSEPH JEON AND MISUN
LEEM, AS TRUSTEES OF THE
JESUS AROMA CHURCH TRUST
Applicants

AND A LABOUR INSPECTOR OF THE
MINISTRY OF BUSINESS,
INNOVATION AND EMPLOYMENT
Respondent

Hearing: On the papers

Appearances: S Kang, counsel for applicants
G La Hood, counsel for respondent

Judgment: 27 July 2023

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

Background

[1] The applicant, Victoria Jeon, is a trustee of the Jesus Aroma Church Trust. Orders had been made against her in that capacity by the Employment Relations Authority in a determination dated 13 April 2023.¹ Ms Jeon has filed a de novo

¹ *A Labour Inspector v Jeon (aka Park)* [2023] NZERA 175 (Member Cheyne).

challenge to the Authority's determination and has filed an application for a stay of proceedings and a stay of execution of the Authority's orders against her. The application is supported by an affidavit affirmed by Ms Jeon. The respondent is opposed to the application. Timetabling orders were made for the exchange of submissions. The parties were directed to file sequential submissions, which they have done. Counsel for the applicant has advised the Court that the applicant does not intend to file any submissions in reply. I proceed to deal with the application on the papers.

[2] The formal notice of application relies on four grounds, namely that the applicant's de novo challenge is being pursued in good faith; that if the applicant is wholly successful on her challenge, she will not be liable for anything; that important questions of law are raised by the challenge; and that it engages the public interest.

[3] It is apparent from the submissions filed on behalf of the applicant that there is now a further ground relied on. In this regard it is submitted that if no stay is granted, the challenge will be rendered nugatory. That is because, it is said, there are insufficient funds in both the Trust's and Ms Jeon's personal bank account to meet the orders made in the Authority. If the Labour Inspector enforced the determination, it would likely result in Ms Jeon's bankruptcy. If she faces bankruptcy, she will be unable to pursue her challenge.

Framework for analysis

[4] As s 180 of the Employment Relations Act 2000 makes clear, a challenge does not operate as a stay of proceedings on a determination of the Authority. That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success. Regulation 64 of the Employment Court Regulations 2000 provides that the Court may order a stay of proceedings where a challenge against a determination of the Authority is pursued. A stay may relate to the whole or part of a determination or to a particular form of execution and may be subject to conditions (including as to the giving of security) as the Court thinks fit. The Court's discretion is wide but must be exercised judicially and according to principle.

[5] The range of factors generally considered relevant in this jurisdiction are well established.² They are borrowed from the approach adopted in the High Court and the Court of Appeal under the relevant rules of both Courts.³

[6] The starting point is that the successful party is entitled to the benefit of the judgment they have obtained at first instance. As the Court of Appeal has confirmed, orders for stay should be approached with restraint, being the least necessary to preserve the losing party's position against the prospect of the appeal succeeding. The interests of the successful party are to be balanced against the interest the challenging party has in preserving its position in case their challenge succeeds. The challenging party needs to establish the basis for a stay and can be expected, where a money judgment is involved, to make some concession, such as an offer to make a payment into Court pending the outcome of the appellate process.⁴

[7] There are additional factors which may be relevant to the assessment process, including the likely merits, impact on non-parties, the importance of the matters at issue, and whether the challenge is brought in good faith. Depending on the particular circumstances, some factors may carry less or more weight; there may be other factors which ought to be taken into account – it is not a tick-box exercise. In some cases, for example, it will not be possible to make an informed assessment of the merits; in others, no question of public interest, novelty or importance will be engaged.

[8] In weighing the competing factors, regard will be had to the balance of convenience. Overarching consideration will then be given to the overall interests of justice.

² Noting that the Court of Appeal has not had the opportunity to consider this Court's stay powers, including the issues raised in cases such as *Hanover Group Ltd v Finnigan EmpC* Auckland AC 41/06, 31 July 2006 as to whether the nature of the Authority's powers to investigate and determine matters may be relevant to the weighting exercise.

³ See *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733, applying *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11], and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

⁴ *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

Analysis

[9] I turn to consider the factors engaged in this case.

Challenge rendered ineffectual if no stay granted?

[10] As I have said, Ms Jeon is pursuing the challenge as a trustee of the Jesus Aroma Church Trust. The Authority had made orders against her as trustee. I accept that if Ms Jeon wholly succeeds on her challenge the orders made by the Authority will be set aside and she will not be obliged to meet them. Two points can, however, be made.

[11] First, there is always a possibility that a challenge will succeed. That is the position that arises on any challenge and does not, of itself, warrant a stay. If it were otherwise s 180 would likely be worded differently.⁵

[12] Second, it is up to the applicant to establish a reasonable basis for the making of an interlocutory order in its favour.⁶ That requires the Court to assess the grounds on which the application is advanced, as well as the evidence relied on in support of those grounds. It is this factor that presents difficulties for the applicant.

[13] Ms Jeon says that if the Authority's orders against her are not stayed it will lead to her bankruptcy and her challenge rights would be rendered nugatory. The orders made against Ms Jeon are relatively sizeable and meeting them would, no doubt, cause a degree of discomfort to her. However, a review of the material contained within and annexed to her affidavit does not sufficiently support the financial concerns that have been raised. In particular, and as counsel for the Labour Inspector observes, Ms Jeon's affidavit does not refer to any assets or other income she has, including any property

⁵ See *SP Blinds Ltd v Hogan* [2022] NZEmpC 104, [2022] ERNZ 416 at [11], referring to recent High Court judgments which suggest 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]; and *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZHC 1947 at [17]–[18].

⁶ *Grove v Archibald* [1997] 2 ERNZ 125 (EmpC) at 128–129; and *Bathurst*, above n 4, at [19]–[20].

she owns or vehicles held in her name. Nor does the material disclose any debts or other reasons why she could not meet the orders of the Authority pending determination of the challenge.

[14] In summary, the evidence before the Court is incomplete and does not satisfy me that a stay is required to protect Ms Jeon's challenge rights, or to otherwise protect her interests.

Is the challenge being pursued in good faith?

[15] I accept, based on the information currently before the Court, that Ms Jeon's de novo challenge is being pursued in good faith.

Injurious effect on successful party?

[16] I accept that the Labour Inspector will not be injuriously affected if a stay is granted. However, the reality is that the Labour Inspector pursued the claim in the Authority on behalf of two employees. Their interests are relevant to the assessment. If a stay is granted, it will mean that they will not obtain the benefit of the Authority's orders in their favour pending the applicant's challenge. Ordinarily this would lead to a detrimental impact which would weigh against a stay.⁷ The point, however, needs to be viewed in context. That is because it appears from the submissions filed on behalf of the Labour Inspector that the intention is to hold the moneys in the Ministry of Business and Innovation and Employment trust account until the challenge is resolved. If that is so, the two employees (and their families) will not see the benefit of the money in the interim in any event.

[17] I infer that the Labour Inspector is concerned that if Ms Jeon's financial position is as she says, and if the orders are stayed, she may not be in a position to comply with them if the challenge fails. There appears to be some strength in the concern having regard to the material currently before the Court. Nor has Ms Jeon

⁷ *A Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd (in administration)* [2020] NZEmpC 21 at [7].

gone on the front foot to address the concerns that reasonably arise, such as by way of offering to make a payment into Court.

Impact on third parties?

[18] Ms Jeon refers to the potential negative impact on the two other trustees if a stay is not granted. Those individuals were proceeded against in the Authority and orders were made against them. Neither has filed a challenge to the determination insofar as it impacts them. But even assuming that their interests are relevant in the way suggested, there is insufficient detail provided in respect of the claimed prejudice. And as I have already said, the mere fact that a party may be obliged to meet orders made against them does not, of itself, warrant a stay.

Importance of questions involved on the challenge?

[19] While it is apparent that this case raises a number of legal and factual issues which I accept are of importance to the parties, I would not describe the proceedings as engaging novel or important questions.

Public interest considerations

[20] While these proceedings appear to have generated some public interest, I have been unable to identify any of a nature that would weigh in favour of a stay being granted.

Merits

[21] It is not possible to assess the merits at this stage. The applicant is pursuing a de novo challenge to the Authority's determination which she is statutorily entitled to do. The evidence will be heard afresh, and it is difficult to predict with any certainty how the evidence will come out or what the outcome will be.⁸

⁸ The difficulties associated with making a merits assessment at an early stage are notorious and relatively recently emphasised by the Supreme Court in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39](c); and *Keung*, above n 3, at [21].

Other relevant factors?

[22] Reference is made to an apparent history of failing to comply with employer obligations, including minimum employment standards, as reflected in two determinations of the Authority (which have not been challenged).⁹

[23] While I do not exclude the possibility that there may be cases where such matters are of broader relevance, it is not immediately clear how Ms Jeon's prior breaches are relevant to the immediate issue before the Court, namely whether a stay should be granted.

Balance of convenience/interests of justice

[24] I am satisfied, having regard to the material before the Court, that the balance of convenience weighs against the grant of leave. An inadequate basis has been made out for the Court to exercise its discretion to grant a stay and it is not in the overall interests of justice to make the orders sought.

Conclusion

[25] The application is declined.

[26] The respondent is entitled to costs. If they cannot be agreed, I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 1.00 pm on 27 July 2023

⁹ *Choi and Elev 8 Global Ltd* [2020] NZERA 194; and *A Labour Inspector v Elev 8 Global Ltd* [2023] NZERA 223.