

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

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

**[2023] NZEmpC 115
EMPC 2/2023**

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

AND IN THE MATTER OF an application for leave to extend time to file
 pleadings

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

BETWEEN CARRINGTON RESORT JADE LP
 Plaintiff

AND TONI MAHENO
 Defendant

Hearing: On the papers

Appearances: W Tan, agent for plaintiff
 A Kersjes, advocate for defendant

Judgment: 27 July 2023

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE KATHRYN BECK
(Application for leave to extend time to file pleadings)
(Application for security for costs and stay of proceedings)**

Background

[1] Carrington Resort Jade LP (Carrington) has challenged a determination of the Employment Relations Authority in which the Authority determined that Ms Maheno was unjustifiably dismissed.¹

¹ *Maheno v Carrington Resort Jade LP* [2022] NZERA 635 (Member Larmer).

Application for extension of time to file statement of defence

[2] Ms Maheno has applied for leave to extend time to file a statement of defence.

[3] A statement of claim seeking a de novo hearing was filed in these proceedings on 4 January 2023. The affidavit of service of Reipa Hita attests that the statement of claim, together with the application for a stay of proceedings, was served on the defendant on 15 January 2023.² On that basis, a statement of defence was due to be filed by 14 February 2023. It was not filed until 20 March 2023, despite Mr Kersjes, advocate for the defendant, being in contact with the Court Registry on 1 February 2023.

[4] Mr Kersjes says the delay was due to a communication breakdown between him and Ms Maheno as to whether she had been served. He appears to have taken the view that, as the defendant's previously notified representative, he should have been served with a copy of the statement of claim. It also seems that he was unclear whether Ms Maheno had been served. In any event, he takes responsibility and apologises for the delay.

[5] The plaintiff opposes the extension of time. Mr Tan, Carrington's representative, says the delay has not been adequately explained. He says that in the circumstances, the plaintiff was entitled to the view that the defendant is not wishing to participate. Mr Tan did not, however, provide an affidavit or any submissions in support of his opposition.

The law

[6] Regulation 19 of the Employment Court Regulations 2000 (the Regulations) states that any defendant who fails to comply with the 30-day time limit for filing a statement of defence may only defend the proceedings with leave from the Court. Further, s 221(c) of the Employment Relations Act 2000 permits the Court to extend the time within which anything is to be done. The exercise of discretion in s 221(c) is

² Dated 22 February 2023 and filed 23 February 2023.

not subject to any statutory criteria, and like any other discretion conferred upon the Court, it must be exercised judicially in accordance with established principles.

[7] The principles applied by the Court when considering applications of this kind have mirrored the principles taken into account when assessing an application for leave to extend time to file a statement of claim challenging a determination of the Authority.³ A non-exhaustive list of potentially relevant factors includes:

- (a) the reason for the omission;
- (b) the length of the delay;
- (c) any prejudice or hardship suffered to any person;
- (d) the effect on the rights and liability of the parties;
- (e) subsequent events; and
- (f) the merits.

[8] In assessing these factors, the ultimate question for the Court is what the interests of justice require.⁴

Analysis

[9] The reason for the statement of defence not being filed is a communication breakdown between the defendant and her representative. As noted by him, it would be unfair if Ms Maheno's ability to defend the challenge was compromised for this reason, particularly in circumstances where the plaintiff has failed to meet timetable orders itself.

[10] The length of the delay is not minor. However, there is no evidence of any hardship or prejudice to the plaintiff.

³ See *P v A* [2017] NZEmpC 92 at [19].

⁴ At [21]; and *Almond v Reid* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

[11] There is no effect on the rights and liabilities of the parties other than the ability of the defendant to defend her success in the Authority. I am satisfied that it is in the interests of justice that she be permitted to do so. The plaintiff has made serious allegations against her as part of its challenge to the Authority's determination. The overall interests of justice weigh in favour of the defendant being able to answer those allegations.

[12] The grounds for the application have been made out, and it is granted.

[13] The statement of defence dated 15 March 2023⁵ is accepted for filing. In an excess of caution, it should be served again on the plaintiff.

[14] While the defendant has been successful, she was seeking an indulgence from the Court. The plaintiff did not take any steps in relation to the application other than to file a notice of opposition.

[15] Accordingly, there is no issue as to costs.

Application for security for costs

[16] Ms Maheno applies for orders that Carrington pay into Court security for costs of \$20,000 and that the challenge brought by the company be stayed until that security has been paid.

[17] The main grounds on which Ms Maheno relies for her application include:

- (a) Carrington failed to pay the sums awarded by the Authority, and Ms Maheno incurred cost in enforcing the determination.
- (b) If Ms Maheno is successful in the substantive proceedings, obtaining any awarded sum of costs from Carrington will be difficult.
- (c) Carrington continues to disregard directions of the Court.

⁵ Filed on 20 March 2023.

- (d) Carrington's claim has a low chance of success and is not brought in good faith.

[18] Carrington has not responded to the application for security for costs.

The law

[19] There are no provisions relating to security for costs in the Employment Court. Accordingly, pursuant to reg 6(2)(a)(ii) of the Regulations, the Court looks to the provisions of the High Court Rules 2016 (the Rules) when dealing with applications for security for costs.

[20] Under r 5.45(1)(a)(i) and (b) of the 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 its proceeding.

[21] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.⁶ An order may be made if it is just in all the circumstances.⁷

Analysis

[22] The Court can only exercise its discretion to order security for costs if it is satisfied that the threshold set out in the Rules has been met. The threshold is that the plaintiff must be either resident outside of New Zealand or would be unable to pay costs if unsuccessful.

[23] However, there is no reason to believe that the threshold is met. In the context of the present proceedings, Carrington was able to pay, even if unwillingly, the awards that were ordered by the Authority. Further, Ms Maheno did not propose in her affidavit that Carrington would be unable to pay.

⁶ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

⁷ High Court Rules 2016, r 5.45(2).

[24] I accept that Carrington has shown itself to be unwilling to comply with orders of the Authority; however, unwillingness to pay is not the same as an inability to pay. The High Court made the following observation when discussing this issue:⁸

The words “will be unable” in r 5.45(1)(b) are concerned with ability to pay, not with financially capable, but constitutionally unwilling, persons – where a stone must be squeezed hard to produce blood.⁹

[25] Therefore, I am not satisfied at the threshold stage that there is an inability to pay on the part of Carrington.

[26] The issues of Carrington’s conduct in these proceedings, and whether the challenge is brought in good faith, are not factors in determining whether security for costs should be paid. However, they will be taken into account when considering the good faith report provided by the Authority.

Conclusion

[27] I dismiss the application for security for costs.

[28] There is no issue as to costs as Carrington took no steps in relation to the application.

Kathryn Beck
Judge

Judgment signed at 1.30 pm on 27 July 2023

⁸ *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [8].

⁹ *Tubbs as Liquidator of Empress Abalone Ltd v McKenzie* HC Christchurch CIV-2005-409-002588, 25 June 2010 at [4]; and *Mu v Body Corporate 312421* HC Auckland CIV-2011-404-4768, 8 December 2011 at [11].