

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

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

**[2023] NZEmpC 125
EMPC 100/2023**

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 SUPERCITY TOWING LIMITED
 Plaintiff

AND SAKALIA HUCH
 Defendant

Hearing: On the papers

Appearances: A Sharp, advocate for plaintiff
 E Brankin, advocate for defendant

Judgment: 11 August 2023

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for stay of proceedings)**

[1] Mr Huch was found by the Employment Relations Authority (the Authority) to have been unjustifiably disadvantaged by actions of Supercity Towing Limited (Supercity).¹

[2] Supercity was ordered to pay Mr Huch \$38,770.40 (gross) lost wages, along with \$8,000 compensation for humiliation, loss of dignity and injury to his feelings.²

¹ *Huch v Supercity Towing Ltd* [2023] NZERA 74 (Member Craig).

² At [50] and [57].

[3] Subsequently, Supercity was ordered to pay Mr Huch \$8,000 as a contribution to his costs and \$71.56 for the Authority's filing fees.³

[4] Supercity has filed a non-de novo challenge to the Authority's substantive determination, which is set down to be heard by this Court on 14 and 15 September 2023. The challenge relates only to a portion of the lost wages component of the Authority's orders, and the costs orders. Supercity has paid Mr Huch \$9,229.60 (gross) for lost wages and the \$8,000 ordered as compensation. The amount at issue, therefore, is \$29,540.80 together with the \$8,071.56 for costs and disbursements.

[5] Supercity now applies for a stay of the Authority's determination in respect of the contested sums, pending resolution of its challenge. Supercity is content that the stay be on the condition that it pays the amounts in contest into Court, pending determination of its challenge.

[6] Notwithstanding the suggestion of that condition and the proximity of the Court hearing, Mr Huch opposes the application for a stay.

The Court can order a stay where appropriate

[7] The starting point is that a challenge does not operate as a stay of the execution of a determination.⁴ A successful party at first instance is generally entitled to enjoy the benefits of their success, notwithstanding a challenge being filed.

[8] The Court does, however, have the power to order a stay.⁵ The overarching consideration on an application for a stay is whether granting a stay will be in the interests of justice. Various factors will be taken into account, including:⁶

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

³ *Huch v Supercity Towing Ltd* [2023] NZERA 137 (Member Craig) at [18].

⁴ Employment Relations Act 2000, s 180.

⁵ Employment Court Regulations 2000, reg 64.

⁶ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

- (b) whether the challenge is brought and being 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 will impact on third parties;
- (e) the novelty and/or importance of the questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

[9] It is for the plaintiff to establish that a stay is warranted.

The parties have filed submissions

[10] Supercity says that its right of challenge will be rendered ineffectual if there is no stay in respect of the portion of the amounts to which the challenge relates. It asserts that, upon investigation, Mr Huch does not appear to have assets which can be readily realised to recoup any overpayment to him if the challenge is successful.

[11] It says that the challenge is brought for good reasons and in good faith. It notes that payment of the undisputed portion of the determination has been made to Mr Huch and that it is prepared to pay the disputed sum into Court.

[12] Supercity also says the case has implications with respect to some of its other employees and that there also is a high level of interest in the substance of the challenge from other employers in a similar position to that of Supercity.

[13] It notes the imminent upcoming hearing and says that the overall balance of convenience favours a stay of the orders of the Authority on the terms sought.

[14] Mr Van Dam, the General Manager of Supercity, has provided affidavits in support of the application. He notes that Mr Huch is apparently working as a drainlayer, and that, although he has a car, that car is subject to a finance agreement.

[15] He deposes that, while in good times Supercity might be able to ride out the loss it would face if Mr Huch did not pay any monies found to have been wrongly ordered by the Authority, the business is in a recovery phase where business is considerably down on what it was pre-COVID-19.

[16] Mr Van Dam also refers to the wider implications of the challenge to Supercity and the interest in the proceedings from other employers.

[17] Mr Huch has not filed any evidence in opposition to the application but says that grounds had not been established by Supercity. In particular, he says that Supercity has not provided sufficient evidence that its challenge could be rendered ineffectual, noting that Supercity accepts Mr Huch is in employment and that the only other evidence provided by Supercity is that Mr Huch has a car subject to a loan agreement.

[18] Mr Huch disputes that the challenge is brought and being prosecuted for good reasons, in good faith, with his representative asserting that Mr Huch believes the true reason for the challenge is to prolong the matter in the hope that Mr Huch will “give up”.

[19] He says he would be injuriously affected by an order in that he would lose his ability to enjoy the benefits of his success at a time when he is having to pay his own costs for the Authority and find funds to defend the challenge.

[20] He disputes that there is any effect on, or interest for third parties, or that the issues in the challenge are novel.

Basis for a stay not made out

[21] As noted, the default position is that Mr Huch, as the successful party before the Authority, is entitled to receive the sum that Supercity was ordered to pay to him.

The question is whether Supercity has established that the default position should be displaced.

[22] For the purposes of this application, I accept that Supercity's challenge is brought in good faith and for good reason. I also accept that the outcome in the Court may have wider implications, both for Supercity and for other employers. Such factors can be influential where it is likely that, absent a stay, a plaintiff may not be able to continue with the litigation. I do not, however, consider that a stay is required here for Supercity to be able to pursue its challenge.

[23] I do not accept that it is established that the challenge will be rendered ineffectual if the stay is not granted; Supercity has not established that it is, or is likely to be, a foregone conclusion that Mr Huch will be unable to repay any monies found to be repayable as a result of the challenge. Mr Huch is in current employment. He has received the amount of \$17,229.60 from Supercity. Of course, he will be aware that Supercity is seeking a reversal in the Court in respect of the remaining orders made against it in the Authority.

[24] In the meantime, Mr Huch is out of pocket in respect of the amounts ordered by the Authority, which impacts him.

[25] On balance, I am not satisfied that Supercity has established a basis for a stay. Mr Huch is entitled to the use of all the monies currently due to him, knowing he may need to repay some or all of the contested portion if the challenge succeeds.

[26] The application accordingly fails.

[27] Given the proximity of the substantive hearing, costs are reserved.

J C Holden
Judge

Judgment signed at 4.40 pm on 11 August 2023