IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 24
EMPC 428/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for a stay of execution
BETWEEN	PACT GROUP Plaintiff
AND	CAREY ROBINSON Defendant

Hearing: On the papers

Appearances: F McMillan, counsel for plaintiff
R Jamieson, advocate for defendant

Judgment: 23 February 2023

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for a stay of execution)

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[1] The plaintiff company is pursuing a de novo challenge to a determination of the Employment Relations Authority dated 16 November 2022.[1] The Authority found that the defendant had been unjustifiably dismissed and ordered the company to pay her $20,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. The Authority subsequently issued a costs determination, ordering the company to pay a contribution to Ms Robinson's costs of $6,000. The company challenges that determination also. The company seeks a stay of execution of the Authority's orders against it. The defendant is opposed to a stay. Both parties have filed memoranda in

1 *Robinson v Pact Group Ltd* [2022] NZERA 598 (Member English).

support of and in opposition to the stay and are content for the application to be dealt with on the papers.

[2] It is apparent from the most recent memorandum filed on behalf of the company that the key concern the plaintiff has is that if its challenge succeeds, Ms Robinson may not be in a position, or be willing, to repay the amounts ordered in her favour. It is submitted that her interests will be adequately protected if the company pays the money into Court pending the outcome of the challenge.

[3] 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. The Court has the power to order a stay. In assessing the application, the overarching consideration is the interests of justice. A range of factors are generally taken into account: whether the challenge will be rendered ineffectual if the stay is not granted; if the challenge is brought and pursued in good faith; whether the successful party at first instance will be injuriously affected by a stay; the extent to which a stay would impact on third parties; the novelty and/or importance of the question involved; any public interest in the proceeding and the overall balance of convenience.

[4] It is the first of these factors that the plaintiff places particular reliance on. There is no suggestion that the challenge is not being pursued in good faith – no broader issues of public interest are engaged and nor is it suggested that third party interests will be affected. The arguments advanced on behalf of the plaintiff are squarely focused on the defendant's financial position and the perceived risk that she may dissipate funds prior to the challenge being resolved.

[5] It remains unclear, on the material before the Court, what the company's concerns about financial capacity are based on and, accordingly, the extent to which their concern may be justified. It is up to an applicant to adequately support an application, including where it is asserted that orders from the Court are necessary to

protect its position. A similar situation arose in *SP Blinds Ltd v Hogan*.[2] There it was said that:[3]

> [11] In order to assess the strength of the company's primary submission, it is necessary to be clear about what is, and is not, required when considering whether its challenge will be rendered ineffectual if no stay is granted. The language which has been adopted in the leading cases is telling. It is not couched in terms of whether a vague risk exists that the defendant may not, at some indeterminate period of time in the future when the case is decided, be in a position to repay the money ordered in their favour at first instance.
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> [12] Mr Donovan, counsel for the plaintiff, submitted that, having raised the issue of risk in respect of financial position, the defendant ought to be obliged to establish that he would likely be in a position to repay the amounts ordered in his favour, if required to do so. There are two difficulties with this. First, it is up to an applicant to establish a reasonable basis for the making of interlocutory orders sought in its favour. Merely raising a red flag, without more, does not suffice. In this case, reference is made to the earnings made by Mr Hogan's company following his dismissal, which were said to fall short of the amounts ordered in his favour by the Authority, and the absence of up-dated information about his company's position. However, there is nothing in the affidavit filed on behalf of the company to suggest that Mr Hogan is without access to finance or that he is otherwise impecunious.

[6] The Court also noted that recent High Court judgments on applications for a stay of execution have adopted a relatively strict approach.

[7] I do not accept that the applicant has shown a sufficient basis for the alleged concern that Ms Robinson will be unlikely to repay the awards made in her favour if the company succeeds on its challenge and if the Authority's orders are reversed. As pointed out in *SP Blinds*, there is always a risk that a party may not be able to satisfy orders against them. Something more than a vague assertion is required. If it was otherwise, stays would be routinely granted.

[8] I accept that if the money was paid into Court it would protect the company. I do not accept that it would present a benefit to Ms Robinson. She would effectively be denied access to money that she has been awarded by the Authority. In other words, it would deny her the immediate fruits of her success. The case has been set down for three days in June 2023; a judgment will likely be reserved and will follow at some later date. That means that if a stay was granted, including on the basis proposed by

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2 *SP Blinds Ltd v Hogan* [2022] NZEmpC 104, [2022] ERNZ 416.
3 At [11]–[12].

the company, she would not have access to the money for quite some time. Compounding this is the fact that she is defending a challenge that the company is pursuing. These points (namely the impact of a stay on Ms Robinson) are relevant to the weighting exercise.

[9] It is submitted that the company's challenge has merit. The Court of Appeal has accepted that the apparent strength of an appeal can be relevant in determining an application for a stay but also indicated in the same judgment that the merits must be sufficiently obvious to be treated as a critical factor.[4] In the present case, the merits of the case are not sufficiently clear as to be relevant.[5]

[10] I am not satisfied that the orders sought by the plaintiff ought to be granted. Ms Robinson is entitled to the fruits of her success in the Authority pending the outcome of the challenge. Accordingly, the plaintiff's application for a stay of execution is declined.

[11] The defendant is entitled to costs on the application. I anticipate that the parties will be able to agree costs but will receive memoranda if that does not prove possible.

Christina Inglis
Chief Judge

Judgment signed at 1.50 pm on 23 February 2023

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4 *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11] and [21]; see also *Kowhai Intermediate School Board of Trustees v West* [2022] NZEmpC 115 at [18]–[20] and [31]–[53]; and *Oasis Network Inc v Douds* [2021] NZEmpC 170 at [56]–[57].

5 Although dealing with an application to bring an appeal out of time, the Supreme Court made helpful observations about the necessarily superficial nature of any consideration of the merits of cases at an interlocutory stage in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39].