IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 51
EMPC 381/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for costs
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	ALLAN GEOFFREY HALSE Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	TE WHATU ORA – HEALTH NEW ZEALAND (IN RESPECT OF THE FORMER BAY OF PLENTY DISTRICT HEALTH BOARD) Second Respondent
AND	CULTURESAFE NZ LIMITED (IN LIQUIDATION) Third Respondent
AND	ANA SHAW Fourth Respondent

Hearing:	10 February 2023 (Heard at Auckland and via AVL)
Appearances:	Applicant in person GM Taylor, counsel for first respondent (via AVL) M Beech and A Pearce, counsel for second respondent No appearance for third and fourth respondents
Judgment:	4 April 2023

JUDGMENT OF JUDGE KATHRYN BECK
(Application for costs stay)
(Application for stay of proceedings

[1] By judgment dated 18 August 2022,[1] the Employment Court struck out Mr Halse's application for a judicial review of directions issued by the Employment Relations Authority and its determination removing the matter to the Court.[2] Costs were reserved.

[2] The second respondent, Te Whatu Ora – Health New Zealand, applied for costs on the strike-out application, and Mr Halse has filed submissions in response.

[3] At the outset of these proceedings, counsel for the Authority filed an appearance abiding the decision of the Court in respect of Mr Halse's application for review, reserving its position on the question of costs should any person seek costs against it, and requesting that it be served with copies of all documents filed. It also reserved its rights in the event that another person became a party to the proceedings or a party took a step in the proceedings that was against its interests.

[4] I made orders accordingly, and this was notified to the parties by way of a minute dated 18 January 2022.

Application for stay

[5] Mr Halse has now applied to stay determination of the costs application pending the outcome of judicial review proceedings to be filed in the Court of Appeal in relation to a separate case which he is involved in.[3]

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1 *Halse v Employment Relations Authority* [2022] NZEmpC 149, [2022] ERNZ 717.

2 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 May 2017; *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 March 2018; *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 3 December 2018; *Shaw v Bay of Plenty District Health Board* [2018] NZERA Auckland 390.

3 *Halse v Employment Relations Authority* [2023] NZEmpC 38. Those proceedings involved the Rangiura Trust Board.

[6] Those proceedings are yet to be filed. Mr Halse had initially said that they would be filed by 31 January 2023. In this hearing he advised that they would be filed by 28 February 2023. As at the date of this judgment, no proceedings have been filed.

[7] The basis for the application for a stay is to prevent what Mr Halse refers to as a further miscarriage of justice. He says that this Court made a mistake in law when it granted counsel for the Authority's request, on the papers, to be excused from its obligation to file a statement of defence and to abide the decision of the Court. He says in taking such a position, the Authority sought to defeat his right under s 27 of the New Zealand Bill of Rights Act 1990 to a judicial review hearing against the decision maker, which imposed a liability on him, and is a breach of the Judicial Review Procedure Act 2016. Mr Halse also says that the initial proceedings in this case were an example of SLAPP (strategic lawsuit against public participation) litigation against him and that the courts should not be permitting it.

[8] Te Whatu Ora opposes the application for a stay. It says that the proceedings to be brought in the Court of Appeal do not relate to the parties in these proceedings. It notes that these proceedings have not been appealed, nor can they be because the time limit for doing so has passed. In relation to its application for costs, it says that it is a public body with responsibility for recovering costs, it was successful, and is entitled to have its application for those costs determined. It says that the grounds and legal tests required to be met for a stay are not met and that there is no proper basis to grant one.

[9] Mr Beech's primary submission was that if Mr Halse wanted to appeal the decision of this Court to strike out the judicial review proceedings, he could have done so. He says that even if there is an important or novel question of law to be addressed in respect to non-related proceedings,[4] that cannot be relevant to these proceedings. Further, given that those proceedings have not yet been filed, neither the second respondent nor the Court is able to make a proper assessment either in relation to importance or the extent to which the proceedings are related.

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4 As submitted by Mr Halse.

[10] Consistent with its position on the costs application,[5] the Authority also took no position on the application for a stay and advised it would abide the decision of the Court. It also noted that, as the decision maker that is named in the judicial review under s 9(3) of the Judicial Review Procedure Act, its filing of a statement of defence is governed by s 10(2), rather than s 10(1), of that Act which provides a discretion, not an obligation, to file a statement of defence.

[11] Ms Taylor, counsel for the Authority appeared at the hearing to provide clarification in relation to its position for the assistance of the Court.

[12] Ms Taylor submitted that it is the usual practice in judicial review proceedings where a court or tribunal is being reviewed for the court or tribunal not to actively defend its decision but to abide the court's decision. This is in keeping with its role as an impartial adjudicative body and because it is not appropriate for such a body to enter the fray and actively defend one side or the other. Its decision needs to stand for itself, and it should not be seen to be favouring the interests of one or other of the parties. This is especially the case when matters between the parties are still pending before the Authority. Counsel submitted that s 10(2) of the Judicial Review Procedure Act makes it clear that there is a discretion on the part of the court or tribunal as to whether they file a statement of defence and that the Authority, as a tribunal, is covered by this provision.[6]

Analysis

[13] The purpose of a stay in normal circumstances is to preserve the position of the parties pending a successful appeal or review of a judgment in question. As Mr Beech noted, the factors to be considered in such an application are well established.[7]

[14] However, Mr Halse has not taken any steps to challenge the judgment of this Court, nor does he intend to do so.

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5 See [3] above.
6 See *Claydon v Attorney-General* [2002] 1 ERNZ 281 (CA) at [61]–[71]; [94]–[96]; and [112].
7 *Dwyer v Air New Zealand Ltd* [1997] ERNZ 156 (EmpC) at 158 and *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7].

[15] Accordingly, there has been no application for leave to appeal the Court's decision as required for a stay of proceedings and execution to be granted under r 12 of the Court of Appeal (Civil) Rules 2005.

[16] A further situation where a stay may be granted is where there are similar proceedings currently before the courts and there are common issues of fact or law which will be determined in the similar proceedings and those determinations are likely to be determinative of substantial issues to be resolved in the proceedings at hand. The argument is often that the parties would incur unnecessary expense and it would be a potential waste of judicial resources if the current proceedings were to proceed prior to the delivery of the Court of Appeal's judgments.[8]

[17] Mr Halse has said that he will be filing proceedings in a separate (but similar) case.[9] He says that in that case he will be seeking remedies for miscarriages of justice resulting from the practice of the Authority in choosing to abide the decision of the Court, in particular, where the proceedings are in the nature of SLAPP litigation. Mr Halse says that he has a legal team preparing those proceedings, together with extensive affidavits in support. He submits that by ordering costs in these proceedings this Court would, in effect, perpetuate what he considers to be an ongoing miscarriage of justice[10] which the Court of Appeal will recognise and so it is in the interests of justice that the matter be stayed until the Court can have the benefit of the Court of Appeal's judgment in the other proceedings.

[18] However, as already noted, no such proceedings have been filed.

[19] It is therefore not possible, as noted by Mr Beech, to assess the relationship between those proceedings and the current proceedings before the Court. A further issue is that the decision in relation to the strike-out has already been made. The only remaining matter is one of costs. It is difficult to see how the Court of Appeal

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8 *Martin v Solar Bright Ltd (in liquidation)* [2021] NZEmpC 58 at [13].

9 *Halse v Employment Relations Authority*, above n 3.

10 Mr Halse also says that if the Court was to make a costs award in this case and the second respondent sought to enforce it, then it would be added as a party in the proceedings he intends to file. However, that is not a matter that the Court can properly consider as part of its deliberations.

proceedings in another matter could impact a costs decision in this matter even if there were similarities between the two cases.

[20] It is fundamental to Mr Halse's application that proceedings be filed in the Court of Appeal. Despite a substantial period of time having passed, no such proceedings have been filed and accordingly no step has been taken that might justify the consideration of an application for a stay.

[21] It is not in the interests of justice to continue to delay the determination of the costs application.

[22] Accordingly, the application for a stay is declined, and I now move to consider costs.

Application for costs

[23] The second respondent has applied for costs following its successful application in striking out the judicial review proceedings brought by the applicant.

[24] The parties have not been able to agree costs and have filed submissions.

[25] The first respondent submits that as it was the successful party, it is entitled to costs on a Category 2B basis.[11]

[26] Applying the guideline scale to each relevant step, the second respondent's assessment is that it is entitled to $6,811.50. This includes an allocation for preparation of written submissions regarding costs. The second respondent says that being a publicly-funded health service provider, it has a fiscal obligation to recover costs where costs are payable. It says it has been entirely successful and has incurred significant unnecessary costs. It is on that basis that it now seeks an order for $6,811.50.

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[11] See "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

[27] The applicant says that the decision to strike out his claim was mistaken and that should the employer succeed in being awarded costs, a miscarriage of justice will occur. He requested that the issue of costs be reserved pending a decision by the Court of Appeal. I have already dealt with that submission above and have determined that it is not appropriate to stay these proceedings.

[28] In the event that the Court determines to proceed with making a decision on costs, the applicant submits that Category 2B is not an appropriate setting for the proceedings and that Category 1A is more applicable due to the proceedings being of a relatively straightforward nature, with a comparatively small amount of time being required.

Law

[29] The starting point for costs in the Court is cl 19 of sch 3 to the Employment Relations Act 2000. That provision confers a broad discretion as to costs as augmented by reg 68(1) of the Employment Court Regulations 2000, which enables the Court to have regard to the conduct of the parties tending to increase or contain costs. As noted above by both parties, a guideline scale has been adopted to guide the setting of costs.[12] As the guideline scale makes clear, it is intended to support (as far as possible) the policy objective that the determination of costs be predictable, expeditious and consistent. However, it is not intended to replace the Court's ultimate discretion as to costs.

Analysis

[30] In a minute dated 14 December 2021, this matter was provisionally assigned Category 2B for costs purposes under the guideline scale. I consider that this remains the appropriate allocation. These proceedings were of average complexity, requiring a representative of skill and experience considered average in the Employment Court, with a normal amount of time being required in terms of preparation and delivery.

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[12] See above n 11.

[31] The hearing took less than half a day with both parties speaking to their written submissions. The background was complicated, but the proceedings' complexity was within the normal range and the principles to be applied well established.

[32] Applying the guideline scale to each relevant step, costs on a Category 2B basis are as follows:

Step	Particulars	Allocated Days at $2,390	Amount
28	Filing a notice of opposition to interlocutory application	0.6	$1,434.00
30	Preparation of written submissions	1	$2,390.00
32	Attendance at hearing of defended application	0.25	$597.50
	Total Costs	1.85	$4,421.50

[33] Mr Beech sought a one-day allocation in respect of the preparation of written submissions regarding costs. While costs on applications for costs are sometimes awarded, that is not the general position. In the present proceedings there was only an exchange of memoranda which was not complicated.[13] There is no basis for an award of costs for the application for costs.

Outcome

[34] Mr Halse is ordered to pay the second respondent $4,421.50 as a contribution to its costs. That payment is to be made within 14 days of the date of this judgment.

[35] The parties are encouraged to agree costs in relation to the stay application. If that does not prove possible, the second respondent may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The applicant is to respond by memorandum filed and served within 14 days thereafter with any reply

[13] Brief (six pages) on the part of Te Whatu Ora.

from the second respondent filed and served within a further seven days. Costs will then be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 12.30 pm on 4 April 2023