

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

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

**[2023] NZEmpC 53
EMPC 425/2021**

IN THE MATTER OF an application for judicial review

AND IN THE MATTER OF an application to strike out proceedings

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN ALLAN GEOFFREY HALSE
 Applicant

AND EMPLOYMENT RELATIONS
 AUTHORITY
 First Respondent

AND NEW PROGRESS ENTERPRISES
 CHARITABLE TRUST BOARD
 OPERATING AS PROGRESS TO HEALTH
 Second Respondent

AND CULTURES SAFE NEW ZEALAND
 LIMITED (IN LIQUIDATION)
 Third Respondent

Hearing: 10 February 2023
 (Heard at Auckland)

Appearances: Applicant in person
 GM Taylor, counsel for first respondent
 No appearance for second respondent
 No appearance for third respondent

Judgment: 4 April 2023

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE KATHRYN BECK
(Application for stay of proceedings)**

[1] These proceedings involve an application by Mr Halse for judicial review of a decision of the Employment Relations Authority to accept a counterclaim by the second respondent against the applicant and its former employee in the Authority.¹ The counterclaim involved a claim that the former employee breached the employment agreement and that the applicant, Mr Halse, and the third respondent had aided and abetted in that breach.

[2] The second respondent applied to strike out the application for judicial review on various grounds. That application was heard on 13 April 2022 and is awaiting determination but has been paused pending consideration of Mr Halse's application for a stay of the strike-out application.

[3] This judgment deals with that application for a stay.

[4] 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 judicial 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 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.

[5] I made orders that the first respondent be excused from further attendance in the proceedings and that it be served with copies of all documents. Those orders were notified to the parties by way of a minute dated 18 January 2022. It took no part in the strike-out application. It appeared in this application to clarify its position in relation to abiding the decision of the Court in these proceedings. I will come to that below.²

[6] The second respondent has taken no steps in relation to the application for a stay and has advised that it will abide the decision of the Court.

¹ *Nicholson v Progress to Health* EmpC Auckland 3088713, 23 April 2021.

² See below at [11]–[15].

Application for stay

[7] As noted above, the application by the second respondent to strike out the judicial review proceedings has already been heard. The matter was reserved and is awaiting decision. Mr Halse has applied to stay the determination of that strike-out application pending the outcome of separate judicial review proceedings to be filed in the Court of Appeal in relation to *Halse v Employment Relations Authority*.³ These proceedings are yet to be filed. Mr Halse had initially said they would be filed by 31 January 2023, but in this hearing he advised that they would be filed by 28 February 2023. As at the date of this judgment, no proceedings have yet been filed.

[8] I had previously discussed with Mr Halse whether, rather than a stay of proceedings, he was in reality applying for leave to make further submissions and/or file further affidavit evidence in opposition to the application to strike out the proceedings. He advised that he considers the application for a stay to be the appropriate course of action and that he wishes to pursue that action. Accordingly, I have dealt with it on that basis.⁴

[9] The basis for the application for a stay is to prevent what Mr Halse refers to as a miscarriage of justice. He says that this Court made a mistake in law when it granted the Authority's request on the papers to be excused from its obligation to file a statement of defence and 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 proceedings he is attempting to judicially review amount to SLAPP (strategic lawsuit against public participation) litigation against him and that the courts should not be permitting it.

[10] Ms Taylor, counsel for the Authority, filed a memorandum (dated 23 November 2022) in response to the application and appeared for the purposes of providing

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

⁴ *Halse v Employment Relations Authority* [2023] NZEmpC 8 at [5].

clarification of that memorandum for the assistance of the Court but otherwise confirms that the Authority will abide the decision of the Court.

[11] By way of elaboration on its memorandum, the Authority 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.

[12] Ms Taylor further submitted that it was settled practice in this jurisdiction and in other jurisdictions for courts and tribunals, when their decisions are judicially reviewed, to take an abide position and not actively defend their decisions. She submitted that this position is reflected in s 10(2) of the Judicial Review Procedure Act.

[13] Ms Taylor noted that such a position was entirely appropriate because having courts and tribunals entering the fray when that dispute goes to a higher court would be undesirable as they would be seen to favour the interests of one of the parties. This is especially so in a case like this where the matter is still pending before the Authority, and it will eventually have to resume its role as an impartial adjudicator with these parties on this matter. In the circumstances, she said it was entirely appropriate that until the judicial review is resolved, the Authority abides the Court's decision and does not take an active role.

[14] In response, Mr Halse says that the Authority is not a tribunal under the provisions of the Judicial Review Procedure Act and accordingly cannot rely on s 10(2). He says it is an investigative body.

[15] He is correct that it is an investigative body. He is mistaken, however, in saying it is not a tribunal. This is clearly articulated by Glazebrook J in *Claydon v Attorney-General*:⁵

⁵ *Claydon v Attorney-General* [2002] 1 ERNZ 281 (CA) at [112].

... Whether a particular body is characterised as a tribunal or a Court is not to be decided by nomenclature. In this case, however, it is clear, for the reasons given by McGrath J at paras 61–71 of his judgment, that both the Employment Tribunal and the new Employment Relations Authority are tribunals and not Courts.

[16] That, however, is not determinative of the stay application given the grounds relied on by Mr Halse.

[17] Mr Halse has said that he will be filing proceedings in a separate, but similar, case which he says will be seeking remedies for miscarriages of justice resulting from the practice of the Authority in choosing to abide the decision of the Court and, in particular, allowing proceedings that are in the nature of SLAPP litigation.

[18] He says that when this Court sees the substantive arguments in those proceedings, it will understand that it makes sense to wait and not make decisions without the guidance that will be forthcoming from the Court of Appeal. He expects the Court of Appeal to make a ruling on whether or not the Court made a mistake in *Rangiura* by striking out his claim under s 27 of the New Zealand Bill of Rights Act and in excusing the first respondent from filing a statement of defence.⁶ He says the right to freedom of speech arguments in *Rangiura* are similar to those in the case at hand.

[19] A stay may be granted 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 dispositive of substantial issues to be resolved in the proceedings at hand.

[20] The principal consideration for deciding whether there should be a stay of proceedings is the interests of justice in the particular case. In exercising the Court's discretion, the relevant factors include:⁷

⁶ *Halse v Employment Relations Authority*, above n 4.

⁷ *Speed v Board of Trustees of Wellington Girls College* [2017] EmpC 74 at [30], citing *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd* [1997] 3 NZLR 476 (HC). See also *Transpacific All Brite Ltd v Sanko* [2012] NZEmpC 7.

- Which proceedings were commenced first?
- the potential effect on the other proceeding were a stay to be granted;
- the public interest;
- duplicate witnesses;
- duplication and waste;
- state of advancement; and
- multiplicity of proceedings.

[21] All of these factors, however, presuppose that other proceedings have been filed.

[22] As a secondary or alternative argument, Mr Halse submitted that it was in the interests of justice to at least delay issuing a decision on the stay and/or strike-out applications until the end of the month (February), at which point the Court would be able to see the extent of his submissions to the Court of Appeal.

[23] However, as already noted, no such proceedings have been filed to date, and we are now in April.

[24] It is therefore not possible to assess the relationship between those proposed proceedings and the current proceedings before the Court. Nor is it possible to properly assess the factors that have been developed to assist the Court in the balancing exercise that is normally required in such circumstances.

[25] Accordingly, no step has been taken that might justify a stay. It is not in the interests of justice to continue to delay the determination of the strike-out application.

[26] The application for a stay is declined. Therefore, the Court will now move to consider the strike-out application.

Kathryn Beck
Judge

Judgment signed at 5 pm on 4 April 2023