

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2023] NZEmpC 58
EMPC 394/2022**

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 MATTHEW LAI
Plaintiff

AND DAVID GRAY
Defendant

Hearing: On the papers

Appearances: A O'Connor, counsel for plaintiff
P Mathews, advocate for defendant

Judgment: 13 April 2023

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for a stay of execution)**

[1] In the Employment Relations Authority David Gray established that he was unjustifiably dismissed by Matthew Lai.¹ The Authority ordered Mr Lai to pay to Mr Gray \$7,500 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a further amount of \$2,280 pursuant to ss 123(1)(b) and 128 of the Act.

¹ *Gray v Lai* [2022] NZERA 528 (Member Cheyne).

[2] Subsequently the Authority ordered Mr Lai to pay costs to Mr Gray of \$2,321.56.²

[3] Mr Lai has challenged both determinations and seeks to set them aside. Both challenges are defended by Mr Gray.

[4] Mr Lai has now applied for an order staying execution of the Authority's determinations.

[5] It is appropriate at this juncture to briefly review the procedural steps that have been taken leading up to the application being filed and this decision. On 8 February 2023, timetable directions were made to enable the application for the stay to be considered and a decision made on the papers. Under that timetable the plaintiff's application for a stay was to be filed no later than 22 February 2023. Other directions were made about filing a notice of opposition and to allow for exchanges of submissions. The parties agreed to the dates on which the directed steps were to occur and to have the application for a stay dealt with on the papers.

[6] On 22 February 2023, the timetable was amended at the plaintiff's request. A brief extension of time was granted until 4 pm on 24 February 2023. Amended directions were also made adjusting the time within which a notice of opposition and any affidavit in support could be filed. No other changes were made to the directions.

[7] The plaintiff's application was filed as directed and it was opposed. The grounds he relied on were not specified in the application. Instead, it cross-referenced to grounds in an accompanying affidavit.

[8] In fact, what the plaintiff filed was in the form of an affidavit but it was unsworn. Despite that difficulty, the plaintiff has not subsequently filed, or sought an opportunity to file, a sworn affidavit.

[9] The grounds appearing in the draft affidavit were said to be that the challenge would be rendered ineffectual if a stay was not granted; the challenge was brought in

² *Gray v Lai* [2022] NZERA 560 (Member Cheyne).

good faith, the defendant would not be affected injuriously and the balance of convenience favoured granting an order.

[10] The directions provided an opportunity for submissions to be filed supporting the application, but they were not filed. On 4 April 2023, I issued a minute informing the parties that the application would be dealt with on the papers that had been filed.

[11] The principles applying to an application for a stay are well established. A challenge does not operate as a stay of the execution of a determination.³ The overarching consideration is whether granting a stay will be in the interests of justice. A range of factors is usually taken into account in that assessment including:

- (a) Whether the challenge will be rendered ineffectual if the stay is not granted.
- (b) Whether the challenge is brought and 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 would impact on third parties.
- (e) The novelty and/or importance of the question involved.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience.

[12] In the absence of submissions for the plaintiff or evidence from him explaining why the application was made and the basis for his views that a stay is appropriate he cannot establish that granting one would be in the interests of justice.

[13] The application is unsuccessful and it is dismissed.

³ Employment Relations Act 2000, s 180.

[14] Costs are reserved.

K G Smith
Judge

Judgment signed at 3.00 pm on 13 April 2023