

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

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

**[2023] NZEmpC 68  
EMPC 270/2022**

IN THE MATTER OF                      a challenge to a determination of the  
Employment Relations Authority

**EMPC 69/2023**

IN THE MATTER OF                      proceedings removed in full from  
Employment Relations Authority

AND IN THE MATTER OF              an application for stay of execution

BETWEEN                                  VIETNEW CORPORATION LIMITED T/A  
SAIGON RESTAURANT & BAR PALMY  
Plaintiff

AND    JASON SHAND  
Defendant

Hearing:                                  On the papers

Appearances:                              J McGuire, counsel for plaintiff  
P Drummond, counsel for defendant

Judgment:                                28 April 2023

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

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[1] In the Employment Relations Authority (the Authority), the defendant, Mr Shand, succeeded in his claim that he had been unjustifiably dismissed by the plaintiff, Vietnew Corp Ltd (Vietnew). The Authority also accepted that Mr Shand was due unpaid wages.

[2] As a result, Vietnew was ordered to pay Mr Shand:<sup>1</sup>

- (a) \$6,200 gross as recompense for wages lost as a result of the dismissal;
- (b) \$12,000 as compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);
- (c) \$1,874.97 gross being wages due as a result of Vietnew's failure to pay the minimum wage on occasion;<sup>2</sup> and
- (d) \$6,321.56 for costs.<sup>3</sup>

[3] Accordingly, as a result of the action in the Authority, Mr Shand is currently due \$26,396.53.

[4] Vietnew has challenged the first and second determinations on a de novo basis. It now applies for an order that the Authority's determinations be stayed. Vietnew says that if the stay is not granted:

- (a) its right of challenge will be nugatory;
- (b) Mr Shand will not be injuriously affected by a stay in and of itself, because a stay effectively only causes a consequential delay to enforce the Authority's orders if the challenge is unsuccessful;
- (c) the challenge is genuine and has been properly prosecuted – it has not been filed just to delay the inevitable;
- (d) the challenge has some merit; and
- (e) an order is in the interests of justice.

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<sup>1</sup> *Shand v Vietnew Corp Ltd t/a Saigon Restaurant & Bar Palmy* [2022] NZERA 318 at [64]–[65] (Member Loftus) [*First Determination*].

<sup>2</sup> *Shand v Vietnew Corp Ltd t/a Saigon Restaurant & Bar Palmy* [2022] NZERA 336 at [10] [*Second Determination*].

<sup>3</sup> *Shand v Vietnew Corp Ltd t/a Saigon Restaurant & Bar Palmy* [2022] NZERA 393 at [12] [*Costs Determination*].

[5] Mr Shand neither consents to nor opposes the application. He says that it is for Vietnew to satisfy the Court that the criteria for a stay have been met. If the Court is satisfied that the criteria have been met, then Mr Shand says that any stay should be conditional on the sum outstanding of \$26,396.53 being paid into the Employment Court to be held by the Court pending further order or direction of the Court.

[6] Mr Shand notes that Vietnew has closed one of its two restaurants, which infers there may be financial issues and that the Authority had expressed concern about Vietnew's ability, or at least willingness to pay, especially in the longer term, should a stay without conditions be granted.<sup>4</sup>

[7] Mr Shand also points to the delay between the release of the Authority's determinations in July and August 2022 and Vietnew's application for a stay.

[8] The starting point is that a challenge does not operate as a stay of the execution of a determination.<sup>5</sup> The Court does, however, have the power to order a stay.<sup>6</sup> The overarching consideration is whether granting a stay will be in the interests of justice, taking into account various factors including:<sup>7</sup>

- (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 will impact on third parties;
- (e) the novelty and/or importance of the question involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

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<sup>4</sup> *Vietnew Corp Ltd t/a Saigon Restaurant & Bar Palmy v Shand* [2023] NZERA 85 at [9].

<sup>5</sup> Employment Relations Act 2000, s 180.

<sup>6</sup> Employment Court Regulations 2000, reg 64.

<sup>7</sup> *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

[9] In his submissions for Vietnew, Mr McGuire, Vietnew's solicitor, refers to the law on security for costs. There is no application here for an order for security for costs.

[10] Mr Do, who is a director of Vietnew, has filed an affidavit in support of the application for a stay. In his affidavit, Mr Do confirms that the de novo challenge has been filed. He notes that, on 6 December 2022, Mr Shand served a statutory demand on Vietnew, which is currently the subject of proceedings in the High Court. Mr Do suggests Mr Shand is using the fact of the debts in the Authority as a basis for his statutory demand, which may lead to liquidation of the company before Vietnew is able to challenge the determinations. No other evidence has been provided on Vietnew's current financial position.

[11] For the purposes of this application, I accept the challenge has been brought and is being pursued in good faith.

[12] Based on what has been filed in the Court, it seems that Mr Shand may be injuriously affected by a stay, or at least a stay with no conditions. This is because there is a suggestion that Vietnew's financial position is precarious, and there is no suggestion that position is likely to improve before the proceedings are completed. This raises a risk that, if Mr Shand successfully defends the challenge, he will have difficulty recovering the amount awarded to him by the Authority. In the meantime, he will have incurred further legal fees.

[13] There are no identified impacts on third parties. Nor are there any novel or important questions involved, or public interest in the proceeding.

[14] As noted, Mr Shand does not oppose the application, provided it is on conditions. I consider that to be the appropriate course. It allows Vietnew to progress its challenge without the need to defend itself against a statutory demand and protects Mr Shand in the event the challenge is unsuccessful.

[15] Accordingly, the application for a stay is granted, initially for a period of 14 days from the date of this judgment. If the sum of \$26,396.53 is paid into the

Employment Court trust account within that time, the stay will continue thereafter until further order of the Court. I also direct the Registrar of the Employment Court to transfer any moneys paid by Vietnew into an interest-bearing account as soon as practicable following receipt.

[16] If payment of \$26,396.53 is not made within the 14-day timeframe, the stay will cease, and Mr Shand will be entitled to pursue the debt due to him.

[17] Costs on the application are reserved.

J C Holden  
Judge

Judgment signed at 10 am on 28 April 2023