

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

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

**[2023] NZEmpC 78  
EMPC 2/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	CARRINGTON RESORT JADE LP Plaintiff
AND	TONI MAHENO Defendant

Hearing:	On the papers
Appearances:	W Tan, agent for plaintiff A Kersjes, advocate for defendant
Judgment:	29 May 2023

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

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**Background**

[1] The plaintiff company is pursuing a de novo challenge to a determination of the Employment Relations Authority dated 30 November 2022.<sup>1</sup> The Authority found that the defendant had been unjustifiably dismissed and ordered the company to pay her \$21,000 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). This was reduced from \$30,000 under s 124 of the Act to reflect

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<sup>1</sup> *Maheno v Carrington Resort Jade LP* [2022] NZERA 635 (Member Larmer).

contribution. The Authority subsequently issued a costs determination, ordering the company to pay a contribution to Ms Maheno's costs of \$10,071.56.<sup>2</sup>

[2] Ms Maheno has obtained enforcement orders from the District Court in respect of the \$21,000. The bailiff has executed a warrant to seize property in relation to the judgment debt. The plaintiff has now paid \$21,000 to the Registrar at the District Court. Ms Maheno has indicated that she is contemplating seeking similar orders in respect of the costs order.

[3] The funds have not yet been released to Ms Maheno.

[4] The company seeks a stay of execution of the Authority's orders against it in the substantive determination. Mr Tan, for the plaintiff, has said that funds can be paid into court. I took from that, that the funds currently held in the District Court could be paid into this Court pending the outcome of this proceeding. He seeks to prevent Ms Maheno from receiving the funds. No stay has been sought in respect of the costs determination.<sup>3</sup>

[5] Ms Maheno is opposed to a stay.

[6] Both parties have filed memoranda and affidavits in support of and in opposition to the stay and are content for the application to be dealt with on the papers. Mr Tan was invited to make submissions in support of his application but advised that he was happy to rely on what was already before the Court.<sup>4</sup> Mr Kersjes, for the defendant, made brief submissions in opposition.

[7] The company submits that if it is required to pay the sums to Ms Maheno, there is a real concern that she will be unable to repay those sums should the company be successful in its challenge. Further, it submits that the challenge has been brought in good faith, that its goal is to protect its reputation, and that Ms Maheno will not be

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<sup>2</sup> *Maheno v Carrington Resort Jade LP* [2023] NZERA 27 (Member Larmer).

<sup>3</sup> Any such application would be dealt with in accordance with the legal principles set out at [9] below.

<sup>4</sup> The materials before the Court are the plaintiff's application for stay of proceedings dated 4 January 2023 and an affidavit of William Tan sworn on 10 May 2023. The grounds of the plaintiff's application were repeated verbatim in Mr Tan's memorandum dated 20 April 2023.

disadvantaged by a stay order being made. Finally, it submits that it would willingly comply with any conditions of a stay, including paying the relevant sums into court.

[8] On the other hand, it is submitted for Ms Maheno that the company's challenge is not brought in good faith, that Ms Maheno should be entitled to the fruits of her success in the Authority, and that the company's allegations are spurious and not supported by evidence.

### **Legal principles**

[9] 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.<sup>5</sup> The Court has the power to order a stay.<sup>6</sup> In assessing an application, the overarching consideration is the interests of justice. A range of factors are generally taken into account:<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 would 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>5</sup> Employment Relations Act 2000, s 180.

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

<sup>7</sup> *SP Blinds Ltd v Hogan* [2022] NZEmpC 104, [2022] ERNZ 416.

## Analysis

[10] The company has submitted that its challenge may be rendered ineffectual if the stay is not granted. However, it has not provided any evidence of this beyond unsubstantiated and contested allegations about the limited financial circumstances of Ms Maheno. A similar situation arose in *SP Blinds Ltd v Hogan* where Chief Judge Inglis held:<sup>8</sup>

... 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.

[11] Applying that approach, I do not accept that the company has shown a sufficient basis for the alleged concern that Ms Maheno will be unlikely to repay the awards made in her favour if the company succeeds on its challenge and the Authority's orders are reversed. For completeness, I observe that Ms Maheno has affirmed an affidavit in which she confirmed that she and her partner are employed and "not broke", which gives rise to serious doubts about the accuracy of the company's unsupported allegations.

[12] If the money was paid into court, as suggested by the company, its interests would be protected. However, I consider that this would injuriously affect Ms Maheno. The Authority issued its substantive determination in November 2022. No hearing date has yet been set down for this challenge. A good faith report has been sought from the Authority as a result of the behaviour of the company's representative, Mr Tan, during the Authority's investigation. The content of that good faith report may further delay the setting down of a hearing date if it gives rise to further interlocutory issues. Once a hearing date is established, the decision of the Court will likely be reserved. Altogether, this means that if a stay was granted, Ms Maheno would be prevented from accessing the fruits of her success for a considerable time.

[13] It is submitted that the company's challenge has merit and that it is brought in good faith. 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

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<sup>8</sup> At [12], citing *Grove v Archibald* [1998] 2 ERNZ 125 (EmpC) at 128–129.

judgment that the merits must be sufficiently obvious to be treated as a critical factor.<sup>9</sup> In the present case, the merits of the case are not sufficiently clear as to be relevant.<sup>10</sup> Although there is no evidence before the Court that the challenge has not been brought in good faith, Mr Tan's behaviour in the Authority, which led to a request for a good faith report, does lead to questions about the manner in which the company has pursued these proceedings.

[14] Mr Tan has made serious and disparaging allegations in the documentation filed in the Court about Ms Maheno and her conduct and character. There has been no evidential basis provided for such allegations. This is a factor that counts against the granting of a stay as it brings into question whether the challenge is being pursued in accordance with good faith.

[15] There is no evidence of any impact on third parties. The matters at issue in the proceeding are not novel. There is no public interest factor. I consider these are neutral factors in relation to a stay.

[16] As noted above at [12], the balance of convenience favours Ms Maheno in that she will suffer greater hardship from being deprived of the funds than the plaintiff will from being deprived of security.

## **Outcome**

[17] Overall, when considering the interests of justice, I am not satisfied that there are grounds to grant the orders sought by the company. There is no evidence to support the submission that Ms Maheno would be unable to repay the sums should the company be successful. Ms Maheno is entitled to the fruits of her success in the Authority pending the outcome of the challenge. Accordingly, the company's application for a stay of execution is declined.

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<sup>9</sup> *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].

<sup>10</sup> 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].

[18] There is nothing to prevent the funds currently held in the District Court being released to Ms Maheno on the expiry of the 28-day period.

[19] As the successful party, the defendant is entitled to costs on the application. If they cannot be agreed, Ms Maheno may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The company is to respond by memorandum filed and served within 14 days thereafter with any reply from Ms Maheno filed and served within a further seven days. Costs will then be determined on the papers.

Kathryn Beck  
Judge

Judgment signed at 12.45 pm on 29 May 2023