

**ORDER FOR INTERIM NON-PUBLICATION OF NAME AND
IDENTIFYING DETAILS.**

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

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

**[2024] NZEmpC 20
EMPC 114/2023**

IN THE MATTER OF	an application by the plaintiff for stay of proceedings
AND IN THE MATTER OF	an application by the defendant for security for costs
BETWEEN	VXO Plaintiff
AND	TE WHATU ORA IN RESPECT OF THE FORMER NORTHLAND DISTRICT HEALTH BOARD Defendant

Hearing:	On the papers
Appearances:	VXO, Plaintiff D Grindle, counsel for the Defendant
Judgment:	16 February 2024

**INTERLOCUTORY JUDGMENT (No 2) OF JUDGE J C HOLDEN
(application by the plaintiff for stay of proceedings; application by the
defendant for security for costs)**

[1] This judgment resolves two interlocutory matters:

- (a) An application by VXO for a stay of the Employment Relations Authority's costs determination, effectively staying the order that VXO

pay the sum of \$18,000 as costs to Te Whatu Ora Health New Zealand (in respect of the former Northland District Health Board).¹

- (b) An application by Te Whatu Ora for security for costs in the sum of \$18,000, with an application for a stay of proceedings until payment has been made.

VXO has challenged the Authority's determinations

[2] VXO was employed as a Senior Medical Officer by the Northland District Health Board until he was dismissed for medical incapacity. The background to his dismissal is set out in some detail in the determination of the Authority.²

[3] Before the Authority, VXO claimed that his dismissal was unjustifiable. He also claimed that an investigation and disciplinary process, which resulted in a preliminary decision of termination, unjustifiably disadvantaged him. Further, he claimed that the Northland District Health Board was in breach of its duty of good faith towards him.

[4] None of VXO's claims were successful. He now challenges both the substantive and the costs determinations on a de novo basis.

The Court may order a stay of proceedings where it considers that to be justified

[5] A challenge does not operate as a stay of an Authority determination.³ The Court may, however, order a stay of proceedings when it considers that to be justified.⁴ In considering whether to order a stay, the overarching consideration is whether that would be in the interests of justice, taking into account various factors, including:⁵

¹ *VXO v Northland District Health Board* [2023] NZERA 210.

² *VXO v Northland District Health Board* [2023] NZERA 97 at [17]–[115].

³ Employment Relations Act 2000 s 180.

⁴ Employment Court Regulations 2000, r 64.

⁵ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymocks Franchise Systems (NSW) PTY Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

- (a) whether the challenge will be rendered ineffectual if a stay is not granted;
- (b) whether the challenge is brought for good reasons and being pursued in good faith;
- (c) whether the successful party at first instance would 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 questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

Grounds for a stay are not established

[6] VXO's grounds for his application for a stay effectively amount to an attack on the process followed by the Authority and on the outcome.

[7] He claims there is public interest in the proceeding to allow scrutiny of the methods that the defendant used to influence the outcome of its investigation. He raises some other issues which he says makes the proceeding in the public interest, suggesting there may have been systemic disadvantage for various reasons. VXO also claims that he is owed backpay from Te Whatu Ora totalling \$16,850.

[8] VXO is self-represented. He says he has been forced to represent himself after multiple members of the legal profession were seemingly unable to follow his instructions, and to introduce highly relevant evidence from eyewitnesses and trained investigators.

[9] It is VXO's right to represent himself, but that does not mean he is excused from providing proper evidence. The Court granted him extra time to do so and

advised him that the further evidence needed to focus purely on evidence relevant to why he seeks a stay of the cost determination and opposes Te Whatu Ora's application for security for costs. He was advised that it was not an opportunity for him to again file evidence in respect of his substantive challenge. Notwithstanding that advice, VXO's further affidavit provided no evidence of his financial position or any reason why the challenge might be rendered ineffectual if a stay is not granted. That is fatal to his application.

[10] Accordingly, although I accept that VXO is genuine in his claim against Te Whatu Ora, and that he considers it raises some important issues, I am not satisfied that there is a basis for a stay of the Authority's costs determination.

[11] His application for a stay is unsuccessful.

Security for costs may be ordered if there are concerns about ability to pay costs and it is just in all the circumstances

[12] As there are no provisions relating to security for costs in the Employment Court, the Court looks to the provisions of the High Court Rules 2016 when dealing with applications for security for costs.⁶ Under r 5.45(1)(b) of the High Court Rules, the Court has a discretion to order the giving of security for costs if there is reason to believe the plaintiff will be unable to pay the costs to the defendant if the plaintiff is unsuccessful in its proceeding. The Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.⁷ An order may be made if it is just in all the circumstances.⁸

No basis here for an order of security for costs

[13] In Te Whatu Ora's application for security for costs, it says there is reason to believe VXO will be unable to pay the costs of Te Whatu Ora if VXO is unsuccessful in the proceeding. Te Whatu Ora relies on the non-payment of the \$18,000 costs awarded in the Authority and points to comments made by VXO of his unwillingness to pay the costs awarded. No other matters are raised.

⁶ Employment Court Regulations, r 6(2)(a)(ii).

⁷ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

⁸ High Court Rules 2016, r 5.45(2).

[14] Security for costs is to protect a defendant against further costs; an order does not operate as a de facto debt recovery process in respect of a previous Court (or Authority) order. VXO may well be unwilling to pay costs, and Te Whatu Ora may need to take steps to enforce the Authority's order as to costs, as well as any order as to costs made by the Court, but that does not provide a basis for an order that VXO pay security for costs. Te Whatu Ora needs to show that there is reason to believe that VXO would be *unable* to pay Te Whatu Ora's costs if he is unsuccessful in his proceeding.⁹ It has not done so. Indeed, in opposing VXO's application for a stay, Te Whatu Ora suggests he is not impecunious. It notes he remained on Te Whatu Ora's payroll (on a Senior Medical Officer's salary) for a considerable time while he was absent from work due to illness and was paid two months' notice. The evidence filed by Te Whatu Ora in support of its application also notes that VXO's wife works as a medical professional in a private practice.

[15] The application for security for costs is unsuccessful.

No order for costs

[16] There is no order for costs on these applications.

J C Holden
Judge

Judgment signed at 9.15 am on Friday 16 February 2024

⁹ *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [8].