

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

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

**[2024] NZEmpC 47  
EMPC 408/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of execution
BETWEEN	HAVEN FALLS FUNERAL HOME LIMITED Plaintiff
AND	KIM TEPANIA Defendant

Hearing: On the papers

Appearances: J Duckworth, counsel for plaintiff  
A Kersjes, advocate for defendant

Judgment: 19 March 2024

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

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[1] The plaintiff, Haven Falls Funeral Home Ltd (Haven Falls), has applied for a stay of execution of orders made against it by the Employment Relations Authority.<sup>1</sup> In its determination the Authority ordered Haven Falls to pay the defendant, Ms Tepania:<sup>2</sup>

- (a) compensation in the sum of \$18,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);

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<sup>1</sup> *Tepania v Haven Falls Funeral Home Ltd* [2023] NZERA 587 (Member Lynch).

<sup>2</sup> At [136].

- (b) reimbursement of lost wages in the sum of \$4,830 (gross) under s 123(1)(b) of the Act; and
- (c) holiday pay in the sum of \$386.40 (gross), being eight per cent of the six weeks' lost remuneration, under s 123(1)(b) of the Act.

[2] While urgency was not initially sought in relation to the application for a stay, in the face of enforcement action taken by the defendant, the plaintiff then sought that its application be treated with urgency. A directions conference was convened, and orders were made by consent by Judge King granting urgency and staying the execution of the Authority's determination on an interim basis pending this judgment.<sup>3</sup>

#### *The law*

[3] A challenge to a determination of the Authority does not operate as a stay.<sup>4</sup> That reflects the general position that a successful litigant at first instance is entitled to the fruits of their success. There may, however, be circumstances in which a stay is appropriate, and reg 64 of the Employment Court Regulations 2000 provides that the Court may order a stay of proceedings where a challenge against a determination of the Authority is pursued. It is up to an applicant to satisfy the Court that adequate grounds have been made out.

[4] In determining whether a stay ought to be granted, the Court generally has regard to the following factors (to the extent they are engaged in a particular case):<sup>5</sup>

- (a) whether the challenge will be rendered ineffectual if a 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;

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<sup>3</sup> *Haven Falls Funeral Home Ltd v Tepania* EMPC 408/2023, 15 December 2023.

<sup>4</sup> Employment Relations Act 2000, s 180.

<sup>5</sup> *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 (HC) at [9].

- (d) the extent to which a stay will impact third parties;
- (e) the novelty and/or importance of the questions involved;
- (f) any public interest in the proceeding; and
- (g) the overall balance of convenience.

### *Analysis*

[5] Third parties are not a factor in this proceeding, and public interest is not engaged.

[6] The plaintiff asserts it is unlikely the defendant will be able to refund any money in the event that the proposed challenge is successful. It also refers to what it says is a novel or important question of law. The affidavit evidence from the company primarily contains criticisms of the Authority's approach and its ultimate decision.

[7] The plaintiff proposes two alternative arrangements: that it pay the full amount owed into court or its solicitor's trust account to be held on appropriate undertakings; or alternatively, that it pay the amount that is owed for wages and holiday pay to Ms Tepania, and the amount owed as compensation into court or its solicitor's trust account.

[8] The second option is proposed on the basis that the plaintiff acknowledges the defendant would be able to repay the wages and holiday pay award from her current earnings should that be necessary but says she could not repay the larger compensation amount. A focus of its submissions was that the quantum of the award of compensation is excessive.

[9] Mr Duckworth, counsel for the plaintiff, also submits that the proceedings raise an important question of law as to how awards of compensation are made by the Authority and, in particular, whether or not the Authority is bound by the banding approach used by this Court. He says the Authority Member did not apply the banding approach and did not provide any explanation for the basis of his award.

[10] Counsel submits that the plaintiff's proposal to pay some of the award into court or a solicitor's trust account, and some to the defendant is sensible and practical. He argues that if the compensation award were to be paid to the defendant, then it would take a significant period of time to repay this from her wages. There is no evidence in support of this assertion.

[11] Mr Duckworth submits that it is in the interests of justice for a stay to be granted and that the balance of convenience favours the plaintiff. Finally, he argues that because the defendant is working, she would suffer no hardship if the amounts were not paid to her.

[12] Mr Kersjes, advocate for the defendant, submits that there is nothing to suggest that the challenge would be rendered ineffectual if a stay is not granted. He refers to the defendant's affidavit confirming that she is in work and sees no issue with repaying any sums that may need to be repaid in the future.

[13] Mr Kersjes submits that the challenge is not being brought in good faith and is simply a tactic to negotiate down the remedies.

[14] In relation to whether there are any novel issues of law arising, Mr Kersjes' submission is that there is nothing new or interesting in the proceedings and that the challenge is without merit and unlikely to succeed.

[15] Referring to balance of convenience, Mr Kersjes argues that no good reason has been made out for a stay and that the plaintiff's dissatisfaction with the Authority's determination is not sufficient to displace the defendant's right to the fruits of her success.

### *Discussion*

[16] The plaintiff's assertion in relation to the defendant's ability to pay is just that: an assertion. It is not supported by any evidence.

[17] The defendant says she is offended by the suggestion that she would not be able to repay any money if required. She states that there is no basis for the plaintiff's

submission. She is earning more now than when she worked for the plaintiff, and she has savings. She says the refusal to pay what she is owed deepens and lengthens the harm to her.

[18] I conclude that the evidence does not support a finding that the challenge would be rendered ineffectual if a stay is not granted.

[19] Payment by the plaintiff in the amounts set out at [1](a)–(c) above was ordered to be made within 28 days of the date of the determination, so payment was due on 8 November 2023. It failed to make any payment, and while it filed its challenge on that date, it only applied for a stay on 7 December 2023 when contacted by a bailiff.

[20] However, there is nothing before the Court to suggest that the challenge is brought in anything other than good faith. I note that the plaintiff appears to have genuine and strongly held views about the determination; in particular, the award of compensation.

[21] In relation to whether there is a novel or significant question of law, Mr Duckworth acknowledges that the banding approach to the setting of compensation is well established and is not new. However, he says it is the approach of the Authority to banding that is important. I do not disagree. However, this is a *de novo* challenge. Accordingly, the issue of whether the Authority erred is not before the Court. It will not be necessary to consider the Authority's approach as the matter will be heard afresh.

[22] Mr Duckworth's argument is perhaps more directed to the merits of the plaintiff's case. He says the award of compensation is excessive. However, while both parties feel strongly about the respective strengths of their cases, it is not possible to assess the merits at this stage. As already noted, this is a *de novo* challenge. The evidence will be heard afresh, and it is difficult to predict with any certainty how that evidence will come out or what the outcome will be.<sup>6</sup>

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<sup>6</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].

[23] The Court of Appeal observed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* that orders for stay should be approached with restraint, being the least necessary to preserve the losing party's position against the prospect of an appeal succeeding.<sup>7</sup> The challenging party needs to establish the basis for a stay, and in this case it has not done so.

[24] The balance of convenience favours Ms Tepania. While the plaintiff has made an appropriate concession in offering to pay a portion of the amount ordered to her and the balance into court or into its solicitor's trust, that must be weighed against the defendant's evidence that she would be in a position to repay monies if required to do so.

[25] In the circumstances, I am not satisfied that a stay ought to be granted, and I decline to do so. That means that the Authority's determination in Ms Tepania's favour remains enforceable. The interim order for a stay of execution made by Judge King on 15 December 2023 is now discharged and of no effect.

#### *Outcome*

[26] The application for a stay of execution is declined.

[27] The defendant is entitled to costs on the application for a stay. The parties are encouraged to seek to agree costs. If they are unable to do so, the defendant will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiff having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck  
Judge

Judgment signed at 11.30 am on 19 March 2024

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<sup>7</sup> *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].