

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

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

**[2024] NZEmpC 58
EMPC 2/2024**

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 GARTH CUNNINGHAM
Plaintiff

AND HEALTHALLIANCE NZ LIMITED
Defendant

Hearing: 20 March 2024
(Heard at Auckland)

Appearances: Plaintiff in person
R Upton, counsel for defendant

Judgment: 9 April 2024

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application for stay of proceedings)**

[1] The plaintiff, Garth Cunningham, has applied for a stay of execution of orders made against him by the Employment Relations Authority.¹

[2] In its determination the Authority ordered Mr Cunningham to pay the defendant, HealthAlliance NZ Ltd (the company), \$10,000 as a contribution towards its legal costs.

¹ *Cunningham v HealthAlliance NZ Ltd* [2023] NZERA 771 (Member Tan).

[3] Mr Cunningham is pursuing a de novo challenge to the Authority’s substantive determination and a separate non-de novo challenge to the Authority’s costs determination.

[4] On 21 February 2024, a telephone conference was convened. After hearing from the parties, the Court ruled that Mr Cunningham’s non-de novo challenge to the Authority’s costs determination would be heard on a de novo basis, at the same time as his de novo challenge to the Authority’s substantive determination. Timetabling orders were made by agreement for the filing and service of documentation in support of and in opposition to Mr Cunningham’s application for a stay of the Authority’s costs determination. A submissions-only hearing was held on 20 March 2024.

Legal principles

[5] The starting point is that a challenge to a determination of the Authority does not operate as a stay.² 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 where a money judgment has been obtained in the first instance.³

[6] The Court’s discretion is wide but must be exercised judicially and according to principle. 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:⁴

² Employment Relations Act 2000, s 180.

³ *Grove v Archibald* [1998] 2 ERNZ 125 (EmpC) at 128–129; *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19]–[20]. While this judgment was unrelated to stay applications in this Court, it has been cited with approval in a number of Employment Court judgments, see *Jeon v Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 114 at [6]; and *Pretorius v Board of Trustees of Taupo Intermediate School* [2023] NZEmpC 189 at [42].

⁴ *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 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 questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

Affidavits and submissions have been filed

[7] Mr Cunningham's evidence is that following the termination of his employment with the defendant he was without work for 13 months. During this time he serviced his financial obligations as best as he could and exhausted all of his savings. He has been in permanent employment since September 2021 and is only now recovering financially from being without work for such a period of time. He claims that his current income is fully committed. In his affidavit, he provided financial information in the form of:

- (a) Inland Revenue Department annual income statements for the period 1 April 2019 to 31 March 2022;
- (b) a transaction summary for one bank account covering the period 14 December 2023 to 23 February 2024; and
- (c) the balance of another bank account as at 23 February 2024 (without any transaction information being provided in relation to this account).

[8] Mr Cunningham's affidavit does not refer to the value of his income or assets, including any property or vehicles held in his name; nor does it disclose the value of any debts or provide other reasons why he could not meet the orders of the Authority pending the outcome of his challenges.

[9] Mr Cunningham considers that the company has aggressively pursued full payment of the Authority's costs award. He submits that if a stay is not granted and the company continues to seek the unpaid costs award, that will affect his ability to pursue his challenge which he says is being brought in good faith.

[10] The company's evidence is that it strongly believes Mr Cunningham should pay the costs award. It has incurred considerable costs defending what it considers to be a meritless claim from Mr Cunningham in the Authority. It has taken no steps to enforce the debt against him; rather, it has been awaiting the outcome of the stay application before determining what steps it may take. Its legal counsel has written to Mr Cunningham a number of times seeking to engage with him on debt payment arrangements. However, no response has been received from Mr Cunningham. The company confirms that it has the funds to repay any award of costs should that be required. As a publicly funded employer, it believes it has a responsibility to taxpayers to recover money that is due to it.

Analysis

Challenge rendered ineffectual if no stay granted

[11] Mr Cunningham says that if the Authority's orders against him are not stayed, his ability to continue pursuing his challenge is put at risk. However, he has failed to provide the Court with sufficient evidence of his financial position to support that submission. In his oral submissions he indicated that he was not able to pay the costs award on short notice. However, he acknowledged that he had "options, possibly, but they're not short-term options" to pay the costs award.

[12] The company disputes Mr Cunningham's claim that he could not pay the Authority's costs award on short notice. It observes that the Authority's costs determination was issued on 20 December 2023 and that Mr Cunningham has had more than three months to arrange to pay the costs award.

[13] The company submitted that Mr Cunningham is self-represented and that not granting a stay would not prevent him from pursuing his challenge subject to any consequences of enforcement steps. There is no evidence that enforcement of the costs order could bring an end to these proceedings.

[14] Further, there is no suggestion that, if the monies were paid to the company, it would not be able to repay them in the event that Mr Cunningham was successful in his challenges and the costs findings reversed.

[15] Mr Cunningham has not explained how his challenge would be rendered ineffectual if he was required to pay the amount outstanding. The evidence he has provided to the Court is incomplete and does not satisfy the Court that a stay is required to protect his challenge rights, or otherwise protect his interest.

Is the challenge brought in good faith?

[16] Mr Cunningham submits that his challenge is brought in good faith. The company has suggested that the challenge has not been brought in good faith and points to its concerns over the merits of Mr Cunningham's challenge.

[17] There is nothing before the Court to suggest that the challenge is brought in anything other than good faith. I acknowledge that Mr Cunningham holds genuine and strongly held views about the validity of the Authority's determination; in particular, whether his submissions on hardship were considered by the Authority when making its costs determination.

Whether the successful party will be injuriously affected by a stay

[18] The company incurred costs of \$20,000 when it successfully defended Mr Cunningham's claims over two days in the Authority. It has not recouped any of these costs. As a publicly funded employer, it submits that it has a heightened responsibility to ensure that it treats taxpayer money sensibly and responsibly, including recovering any money that is owed to it.

[19] Mr Cunningham submits that the company is well funded and that it would not be impacted by a stay application.

[20] As the Court of Appeal observed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, orders for a stay should be approached with restraint, being the least necessary to preserve the losing party's position against the prospect of an appeal succeeding. The challenging party needs to establish the basis for a stay and can be expected, where a money judgment is involved, to make some concession, such as an offer to make a payment into court pending the outcome of the appellate process.⁵ Mr Cunningham has made no such concessions.

[21] I accept that, as a publicly funded entity, the company has a responsibility to seek to recover costs. However, on the facts I do not consider it will be adversely impacted if a stay was granted. In my overall assessment, this factor is neutral.

Effect on third parties

[22] There is no evidence of any third parties being impacted by this decision.

Novelty and importance of the questions of law involved

[23] The company submits that there are no novel or important questions of law involved. In its submissions it describes Mr Cunningham's challenges as a "reasonably typical personal grievance". Mr Cunningham disagrees. He submits that his challenges are important. He refers to the merits of his challenges and his belief that the outcome will have broader impacts on others and set legal precedent.

[24] Mr Cunningham further submits that, because he is bringing a non-de novo challenge to the Authority's costs determination rather than a de novo challenge, the parts of the costs determination that were not being challenged would not be overturned by the Court's judgment. He submits that this raises an important point of law. However, I consider this issue is moot given the Court's 21 February 2024 ruling (referred to above) that Mr Cunningham's challenge to the Authority's costs determination would be heard on a de novo basis at the same time as his substantive challenge.

⁵ *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 3, at [19].

[25] Notwithstanding the above, it is apparent from the evidence and submissions that this case raises a number of legal and factual issues which I accept are of importance to the parties; however, I would not describe the proceedings as engaging novel or important questions of law.

Public interest

[26] Mr Cunningham has submitted that the company's status as a publicly funded employer subjects it to a higher level of public interest and scrutiny. He says that his substantive challenge raises health and safety issues in the health sector and concerns about patient safety, which he believes are of public interest.

[27] While I consider the matters raised by Mr Cunningham could generate some interest from the public, I do not consider that interest is of the nature that would weigh in favour of a stay being granted.

Balance of convenience/interest of justice

[28] I am satisfied, having regard to the material before the Court, that the balance of convenience weighs against the granting of Mr Cunningham's stay application. An inadequate evidential basis has been made out for the Court to exercise its discretion to grant a stay, and it is not in the overall interests of justice to make the orders sought.

Conclusion

[29] The application is declined.

[30] The company is entitled to costs. If they cannot be agreed, I will receive memoranda.

M S King
Judge

Judgment signed at 9 am on 9 April 2024