

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

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

**[2024] NZEmpC 7  
EMPC 299/2023**

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	AMAZONIA MIDCO 1 HOLDINGS LIMITED Plaintiff
AND	RICHARD HARDING Defendant

Hearing: On the papers

Appearances: P Wicks KC and B Edwards, counsel for plaintiff  
S J Corlett, counsel for defendant

Judgment: 23 January 2024

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

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**Background**

[1] Ziwi Ltd is a premium pet food producer based in New Zealand. Ziwi is a wholly owned subsidiary of the plaintiff, Amazonia Midco 1 Holdings Ltd (Amazonia). Amazonia and Ziwi operate a management co-investment scheme and an employee share option plan. The defendant, Mr Harding, was employed by Ziwi, and through his employment he received share options in Amazonia. On 12 April 2023, Mr Harding raised a personal grievance. Mr Harding's legal counsel negotiated the terms of his exit from employment with the legal counsel acting for Ziwi and

Amazonia. As a result of the negotiations, legal counsel for Ziwi and Amazonia put an unsigned settlement agreement to Mr Harding. Mr Harding signed the settlement agreement and returned it. Ziwi signed the settlement agreement. However, Amazonia then refused to sign the settlement agreement. Mr Harding applied in the Employment Relations Authority (the Authority) for a declaration that the settlement agreement was binding on Amazonia and ordered that Amazonia perform the agreed terms. Orders were made in the Authority against Amazonia in a substantive determination dated 1 August 2023 and a costs determination dated 16 October 2023.<sup>1</sup>

[2] Amazonia has filed a de novo challenge to the Authority's determinations. It has also applied, for a stay of proceedings of the Authority's orders against it. The application is supported by an affidavit affirmed by Benjamin Paul Boase, director of Amazonia. The defendant, Mr Harding, is opposed to the application. Timetabling orders were made for the exchange of submissions, which they have done. I proceed to deal with the application on the papers.

[3] The formal notice of the application relies on five grounds, namely:

- (a) Amazonia's de novo challenge will be rendered ineffectual if it is required to issue and transfer shares to Mr Harding in breach of Amazonia's statutory obligations under the Companies Act 1993.
- (b) The challenge is being pursued in good faith.
- (c) Mr Harding will not be affected injuriously if the application for stay was granted.
- (d) Granting the application for stay will not affect any third parties.
- (e) The challenge relates to novel and important issues of fact and law.

### **Framework for analysis**

[4] As s 180 of the Employment Relations Act 2000 (ERA) makes clear, a challenge does not operate as a stay of proceedings on a determination of the Authority. That reflects the principle that a successful litigant is ordinarily entitled to the fruits of

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<sup>1</sup> *Harding v Ziwi Ltd* [2023] NZERA 409 (Member English) (substantive); and *Harding v Ziwi Ltd* [2023] NZERA 602 (Member English) (costs).

their success. Regulation 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. A stay may relate to the whole or part of a determination or to a particular form of execution and may be subject to conditions (including as to the giving of security) as the Court thinks fit. The Court's discretion is wide but must be exercised judicially and according to principle.

[5] The range of factors generally considered relevant in this jurisdiction are well-established.<sup>2</sup> They are borrowed from the approach adopted in the High Court and the Court of Appeal under the relevant rules of both Courts.<sup>3</sup>

[6] The starting point is that the successful party is entitled to the benefit of the judgment they have obtained at first instance. As the Court of Appeal has confirmed, orders for stay should be approached with restraint, being the least necessary to preserve the losing party's position against the prospect of the appeal succeeding. The interests of the successful party are to be balanced against the interest the challenging party has in preserving its position in case their challenge succeeds. 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.<sup>4</sup>

[7] There are additional factors which may be relevant to the assessment process, including the likely merits, impact on non-parties, the importance of the matters at issue, and whether the challenge is brought in good faith. Depending on the particular circumstances, some factors may carry less or more weight; there may be other factors which ought to be taken into account – it is not a tick-box exercise. In some cases, for example, it will not be possible to make an informed assessment of the merits; in others, no question of public interest, novelty or importance will be engaged.

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<sup>2</sup> Noting that the Court of Appeal has not had the opportunity to consider this Court's stay powers, including the issues raised in cases such as *Hanover Group Ltd v Finnigan* EMPC Auckland AC 41/06, 31 July 2006, as to whether the nature of the Authority's powers to investigate and determine matters may be relevant to the weighting exercise.

<sup>3</sup> See *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733, applying *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11], and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

<sup>4</sup> *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

[8] In weighing the competing factors, regard will be as to the balance of convenience. Overarching consideration will then be given to the overall interests of justice.

## **Analysis**

[9] I turn to consider the factors engaged in this case.

### *Challenge rendered ineffectual if no stay granted?*

[10] The Authority determined that the settlement agreement was binding and enforceable on Mr Harding, Ziwi and Amazonia and ordered that should be performed in accordance with its terms. The settlement agreement required Amazonia to:

- (a) pay Mr Harding the sum of \$200,000 and forgive all amounts owed by him to Amazonia pursuant to a loan agreement and a specific security deed between the parties, in consideration for Mr Harding transferring to Amazonia 400,000 non-voting shares he currently holds in Amazonia;
- (b) “gift and transfer” 308,000 shares in Amazonia to Mr Harding and do “all things necessary to facilitate gifting of these shares”; and
- (c) keep Mr Harding indemnified from any tax implications he may suffer or incur as a result of the above transaction.

[11] Amazonia’s challenge to the Authority’s determination is primarily based on the assertion that compliance with the terms of the settlement agreement will require it to issue shares to Mr Harding:

- (a) without certainty of the class of shares to be issued;
- (b) in breach of its contractual obligations under the loan agreement and specific security deed; and

- (c) in breach of Amazonia, and its directors', statutory obligations in ss 47 and 107(2) of the Companies Act 1993, the breach of which could amount to offences under that Act.

[12] In the face of the threat of enforcement proceedings, Amazonia has sought an order staying the proceedings in the Authority, pending the hearing of its challenge. Amazonia's application for a stay primarily focuses on the potential legal consequences arising if it was required to comply with the terms of the settlement agreement.

[13] Mr Harding disputes that Amazonia's challenge would be rendered ineffectual if a stay was not granted. Mr Harding submits that Amazonia and Ziwi presented him with an unconditional offer, in the form of a draft settlement agreement and that counsel for Amazonia and Ziwi advised him that, if their offer was acceptable, he should sign and return the document for execution by Amazonia and Ziwi. The companies represented to Mr Harding that they had taken or would be able to take all steps necessary (including any internal compliance or regulatory requirements) to meet their respective settlement obligations in the event the offer was accepted.

[14] Despite both parties urging that the merits lie with their cases, it is not possible to assess the merits at this stage. Amazonia is pursuing a de novo challenge to the Authority's determination. The evidence and written correspondence being relied upon by each party is yet to be considered by the Court, so it is difficult to predict with any certainty how the evidence will unfold or what the outcome will be.

[15] Notwithstanding my findings in relation to the merits, there is always a possibility that the challenge will succeed. However, that does not of itself warrant a stay. Amazonia has submitted that not granting a stay would, in its view, require it to commit an offence under the Companies Act in issuing shares pursuant to the terms of the settlement agreement and that this cannot be undone if its challenge subsequently succeeds.

[16] Given the uncertainty over the merits of each parties' case and the evidence before the Court on the legal implications of enforcing the settlement agreement, I

accept that there is a risk that the challenge may be rendered ineffectual if the stay is not granted.

*Is the challenge being pursued in good faith?*

[17] I accept, based on the information currently before the Court, that Amazonia's challenge has been brought and will be pursued in good faith.

*Injurious effect on successful party?*

[18] Mr Harding says he would be injuriously affected by a stay in that he would:

- (a) not have the use of the \$200,000 Amazonia was required to pay him, nor the benefit of the remaining loan balance due under the loan agreement being waived in return for him returning his 400,000 non-voting shares in Amazonia under the terms of settlement;
- (b) not be gifted the 308,000 shares and therefore loses the benefit of being able to immediately deal with those shares. Amazonia has refused to provide Mr Harding with an undertaking that it will preserve its shares pending the Court's determination. Mr Harding has raised concerns that Amazonia may act to dissipate or divest its shares so as to defeat any benefit to him should its challenge be unsuccessful;
- (c) not receive the \$4,500 in costs awarded to him in the Authority; and
- (d) not be earning interest on the monies awarded to him by the Authority in the interim.

[19] Amazonia submits that Mr Harding will not be injuriously affected by a stay. It submits that if the stay is ordered:

- (a) Mr Harding will retain the 400,000 non-voting shares that he currently holds in Amazonia while the challenge progresses. Whilst he will not receive the \$200,000 payment or the waiver of his liability in the loan

agreement, the payment and waiver are in consideration for him transferring the 400,000 shares in Amazonia which he currently holds.

- (b) The gifting of 308,000 shares to Mr Harding, did not require him to give any concession in return for the gift. The granting of a stay will leave Mr Harding in the position he is currently in and will not disadvantage him.
- (c) Mr Harding already holds 400,000 shares in Amazonia, 92,000 more shares than he is to receive under the terms of the settlement agreement, and he will continue to hold these shares whilst the challenge is being pursued. This shareholding effectively negates any risk of Amazonia dissipating or divesting itself of the shares that are to be transferred to Mr Harding.

[20] Amazonia submits that any disadvantage to Mr Harding of the stay not being granted is outweighed by the disadvantage to it, if it was required to comply with the terms of the settlement agreement and breach the Companies Act. This would result in Amazonia's directors being at risk of committing an offence under the Act.

[21] Mr Harding has gone on the front foot to address Amazonia's concern regarding its compliance with the Companies Act. Mr Harding has offered to consent to a stay on the condition that Amazonia agrees to:

- (a) preserve 308,000 shares in favour of Mr Harding pending determination of its challenge or pays \$308,000 into Court to be placed on an interest-bearing account;
- (b) pay \$204,500<sup>5</sup> into Court to be placed on an interest-bearing account;  
and
- (c) diligently prosecute its challenge.

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<sup>5</sup> Comprising of the \$200,000 due to Mr Harding under the terms of the settlement agreement (see [10](a)) and the \$4,500 in costs awarded to Mr Harding by the Authority.

[22] Amazonia has rejected Mr Harding's offer. It submits that the Authority's substantive determination is not strictly a money judgment, it relates to serious concerns regarding Amazonia's statutory obligations, meaning any concession offering to pay a sum of money into the Court or otherwise would not be appropriate. Further, it submits that the conditions sought by Mr Harding, being the preservation of 308,000 shares and the payment of \$204,500 to the Court, are not feasible or are otherwise unwarranted in the circumstances.

[23] Mr Harding was successful in the Authority and is entitled to the benefit of the decision in his favour. I accept that any delay in him receiving the fruits of his success in the Authority will have an adverse effect on him.

[24] I consider a stay granted with conditions could equitably address the concerns of both parties. It would ensure that the plaintiff's challenge is not rendered ineffectual, and it addresses the plaintiff's concerns that its directors would be at risk of committing an offence under the Companies Act if it was required to perform the terms of the settlement. At the same time, a stay with conditions which involved the payment of a sum of money into Court would ensure Mr Harding's interests in the awards given in the Authority are preserved, including by ensuring the accumulation of interest on the sums awarded.

*The extent to which the stay will impact on third parties?*

[25] Amazonia submits that, if a stay is granted, there will be no impact on third parties. However, it submits that if a stay is not granted, there may be serious adverse effects on the directors of Amazonia, who will be required to act in breach of the Companies Act and commit offences under that Act. Its directors would be personally liable under s 47(7) of the Companies Act and face conviction and a fine set out in s 373(1) of that Act.

[26] Mr Harding submits that the directors are, for all intents and purposes, one and the same as Amazonia. Mr Harding has not disputed that compliance with the settlement agreement would result in Amazonia and its directors breaching the Companies Act. However, Mr Harding submits that, in making an unconditional settlement offer, Amazonia and its directors are taken to have done all things necessary



(including compliance with its internal and/or regulatory requirements) to meet Amazonia's side of the bargain.

[27] Given the uncertainty over the merits of each parties' case and the evidence before the Court on the legal implications of enforcing the settlement agreement, I accept that there is a risk that, in not granting a stay, Amazonia would be required to issue shares to Mr Harding, which could have an adverse impact on its directors.

*Novelty and important issues of fact and law?*

[28] Amazonia submits that its challenge raises novel and important issues of law and that the Court has not previously been asked to consider the intersection between section 149 of the ERA, the Companies Act and the Contract and Commercial Law Act 2017.

[29] Mr Harding submits that there are no novel or important questions of law. The matters at issue primarily relate to the law of contract (including its formation and offer and acceptance), all of which is well known and settled. There is no public interest in the proceeding.

[30] I do not consider that the challenge raises novel or important issues of law. The settlement agreement was not certified by a mediator under s 149 of the ERA. While the Court has not dealt specifically with s 47 of the Companies Act and the impact on settlement agreements, it has considered a number of cases which involved intersection between the ERA, the Companies Act and the Contract and Commercial Law Act.

*Balance of convenience*

[31] I have accepted that there is a risk of the challenge being rendered ineffectual and a risk of adverse consequences to Amazonia and its directors if a stay is not granted. I am satisfied, having regard to the material before the Court, that the balance of convenience lies in favour of Amazonia.

[32] I am satisfied that the granting of a stay on the following conditions would address the prejudice to Mr Harding and equally address the concerns raised by Amazonia in this matter:

- (a) Mr Harding retains the 400,000 shares he currently holds in Amazonia, which he was required to transfer to Amazonia under the terms of the settlement agreement in consideration for the payment of \$200,000 by Amazonia. Amazonia will pay the amount of \$200,000 into the Court's trust account.
- (b) Mr Harding will continue to carry the loan liability for his shareholding above. Any consequential losses arising from this liability may be raised in any claim for remedies Mr Harding may have against Amazonia.
- (c) Amazonia will not be required to gift Mr Harding 308,000 shares in Amazonia, as required under the terms of the settlement agreement. The Court considers Mr Harding's retention of the 400,000 shares he currently holds in Amazonia (as above), effectively negates any risk of Amazonia dissipating or divesting itself of the shares that are to be transferred to Mr Harding until the challenge is determined.
- (d) Amazonia is to pay the \$4,500 in costs awarded by the Authority in favour of Mr Harding into Court.
- (e) Amazonia is to diligently prosecute its challenge.

## **Conclusion**

[33] There is an order staying execution of the Authority's determinations dated 1 August 2023 and 16 October 2023 on the following conditions:

- (a) Within 14 days from the date of this judgment, Amazonia will pay the sum of \$204,500 to the Registrar of the Employment Court.

- (b) The monies paid into Court will be held in an interest-bearing account and be paid out on further order of a Judge of the Court.
- (c) The order staying execution of the determinations will lapse if the monies ordered to be paid into Court are not paid within the time specified.
- (d) Amazonia is to pursue its challenge diligently.
- (e) Leave is reserved to either party to apply to amend or vary this order.

[34] Costs are reserved. If they cannot be agreed, memoranda may be filed seeking direction for an exchange of submissions.

M S King  
Judge

Judgment signed at 3.25 pm on 23 January 2024