

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

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

**[2023] NZEmpC 164
EMPC 47/2023**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application to strike out proceedings

AND IN THE MATTER OF an application for security for costs and stay
 of proceedings

AND IN THE MATTER OF an application for stay of execution

AND IN THE MATTER OF an application for non-publication order

BETWEEN F & B REMUERA LIMITED
 Plaintiff

AND A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESS, INNOVATION
 AND EMPLOYMENT
 Defendant

Hearing: On the papers

Appearances: W Harris, advocate for plaintiff
 M Brown, counsel for defendant

Judgment: 2 October 2023

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application to strike out proceedings)
(Application for security for costs and stay of proceedings)
(Application for stay of execution)
(Application for non-publication order)

Background

[1] By determination dated 17 January 2023, the Employment Relations Authority made compliance orders against the plaintiff, F & B Remuera Ltd.¹ The compliance orders required the plaintiff to comply with a notice to supply records issued to them by a Labour Inspector under s 229(1)(d) of the Employment Relations Act 2000 (the Act).² The Authority also ordered the plaintiff to pay a penalty of \$5,000 into the Authority.³

[2] The Authority subsequently issued a second determination where it declined to recall its determination of 17 January 2023.⁴ Finally, the Authority issued a costs determination on 22 February 2023, ordering the plaintiff to pay costs to the Labour Inspector of \$1,196.56.⁵

[3] The plaintiff has challenged the Authority's determination of 17 January 2023. This judgment resolves a number of interlocutory applications made by the parties.

[4] The Labour Inspector has applied to strike out the challenge and has applied for security for costs, pending payment, in the alternative.

[5] The plaintiff has applied for a stay of execution of the Authority's determination and has also applied for an interim non-publication order.

[6] I consider each application in turn.

¹ *A Labour Inspector v BRAK Burns Ltd (formerly Burgered Restaurants Auckland Ltd)* [2023] NZERA 19 (Member Arthur).

² At [27](i).

³ At [27](ii).

⁴ *A Labour Inspector v BRAK Burns Ltd (formerly Burgered Restaurants Auckland Ltd)* [2023] NZERA 30 (Member Arthur).

⁵ *A Labour Inspector v BRAK Burns Ltd (formerly Burgered Restaurants Auckland Ltd)* [2023] NZERA 78 (Member Arthur).

The Labour Inspector applies to strike out the claims

Submissions

[7] The Labour Inspector has applied to strike out the plaintiff's challenge on the basis that it does not disclose any reasonably arguable cause of action and because the challenge will prejudice or delay the Labour Inspector's investigation into the plaintiff's compliance with minimum employment standards.

[8] The Labour Inspector also applied to strike out the plaintiff's application for stay of execution and the application for an interim non-publication order. However, as this judgment resolves those applications, it is not necessary to consider the strike-out applications arising in relation to them.

[9] The plaintiff opposes the strike-out application on the basis it is misconceived and an abuse of process. The plaintiff relied on r 15.1 of the High Court Rules 2016 and submitted that the facts are clearly in dispute and that the evidence asserted has not yet been tested.

Legal principles for strike-out application

[10] The Court has power via reg 6(2)(a)(ii) of the Employment Court Regulations 2000 (the Regulations) to strike out all or part of a pleading by means of r 15.1 of the High Court Rules. That rule states:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.

[11] In considering such an application, pleaded facts, whether or not admitted, are assumed to be true. The jurisdiction to strike out on the ground that the pleadings disclose no reasonably arguable cause of action is to be exercised sparingly, and only

in clearly untenable cases.⁶ Special caution is required where a claim involves a developing area of law.⁷

[12] The Court may receive affidavit evidence, but it will not normally consider such evidence if it is inconsistent with the pleadings. However, there may be an exception where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.⁸

Analysis

[13] The Labour Inspector submitted that the plaintiff's pleadings disclose no arguable cause of action because there is strong evidence to support the Labour Inspector's position that the plaintiff kept a record of, and had access to, the employment records which are the subject of the challenge. The Labour Inspector also stated that the plaintiff has not provided evidence to support its pleading. Therefore, it is submitted that because the plaintiff's pleading is so demonstrably contrary to fact, the matter should be struck out.

[14] I consider that these submissions are misconceived. The plaintiff stated in its statement of claim that it had reasonable grounds for failing to comply with the notice because it has been unable to access the records. The Labour Inspector has not submitted that if the plaintiff was in fact unable to access the records, it would not have reasonable grounds for failing to comply. As a result, the central issue is whether the plaintiff's claim that it was unable to access the records is clearly contrary to some indisputable fact. The Labour Inspector's application has not reached that threshold. The facts remain disputable. Therefore, I do not accept that the plaintiff's pleadings do not disclose a reasonably arguable cause of action.

[15] The Labour Inspector also applied for strike-out on the basis that the plaintiff's challenge would prejudice or delay the investigation being carried out. However, in its submissions of 27 April 2023, it indicated that it was no longer relying on that

⁶ *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

⁷ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

⁸ *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

ground as the investigation had been able to continue using records provided by former employees of the plaintiff.

Conclusion

[16] The Labour Inspector's strike-out application is unsuccessful.

The Labour Inspector applies for security for costs

Submissions

[17] The Labour Inspector has applied for security for costs of \$18,403 or such other sum as ordered by the Court in relation to the plaintiff's challenge. The application is made on the basis that the plaintiff has stopped trading, has failed to pay minimum entitlements to its previous employees, and has made submissions in the Authority indicating that it would not be able to comply with an award of costs made against it due to "significant economic distress". It is also submitted that the plaintiff's challenge is without merit, that there is no public interest in the challenge, and that costs are likely to be high because of the plaintiff's unnecessarily complex approach to its challenge.

[18] The plaintiff opposes the security for costs application. It does not deny that it will be unlikely to be able to meet an award of costs. However, it submitted that an order of security for costs could prevent it from exercising its right to challenge the Authority's determination, that there are significant and novel issues to be tried, and that the Labour Inspector is a public body which should make it harder for it to obtain security for costs.

Legal principles in relation to security for costs

[19] There are no particular provisions relating to security for costs in the Employment Court. Accordingly, pursuant to reg 6(2)(a)(ii) of the Regulations, the Court looks to the provisions of the High Court Rules when dealing with applications for security for costs.

[20] Under r 5.45(1)(a)(i) and (b) of the High Court Rules, the Court has a discretion to order the giving of security for costs if a plaintiff is resident out of New Zealand or there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in their proceeding.

[21] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.⁹ An order may be made if it is just in all the circumstances.¹⁰

Analysis

[22] Based on the affidavit provided in support of the Labour Inspector's application, I accept that there is good reason to believe that the plaintiff will not be able to pay an adverse award of costs if it is unsuccessful on its challenge. This is not denied by the plaintiff. Therefore, I am required to balance the interests of both the plaintiff and the defendant in considering whether to order security.

[23] The Labour Inspector submitted that there is no public interest in the proceedings, whereas the plaintiff submitted that the proceedings raise complex issues about the statutory powers of the Ministry of Business, Innovation and Employment (MBIE) in requiring employers to provide records.

[24] I consider that this case is unlikely to give rise to public interest issues as the central dispute is a factual dispute. If the plaintiff can establish that it was unable to access its records, then it may have a defence to the Labour Inspector's claim. As a result, any issues of statutory interpretation will only arise as secondary issues and are unlikely to be the focus of the proceedings.

[25] In light of that finding, I observe the plaintiff submitted that the Labour Inspector should bear its own costs as MBIE is a public organisation. That may sometimes be the case where there is likely to be public interest in the proceedings, but that is not the case here as I have already outlined.

⁹ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

¹⁰ High Court Rules 2016, r 5.45(2).

[26] The Labour Inspector also submitted that the plaintiff has increased costs by taking an unnecessarily complex approach to this challenge. As noted by the Court of Appeal in *McLachlan v MEL Network Ltd*, defendants “must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.”¹¹ However, in light of the Labour Inspector’s strike-out applications which were dealt with above, I find that at least part of the complexity of the present proceedings arose as a result of the Labour Inspector’s approach to this litigation.

[27] Finally, the Labour Inspector submitted that the merits of the plaintiff’s claim are weak. I agree that the plaintiff may have some difficulty in proving its position that it had reasonable grounds for failing to comply with the Labour Inspector’s notice. However, as noted above, the merits of this case are not sufficiently clear as to strike out the matter.

[28] On the other hand, the plaintiff submitted that if security for costs is ordered, it may prevent it from being able to proceed with its challenge. It has not provided evidence in support of that position, but if that is the case, there is a risk that the plaintiff’s right to bring a challenge may be limited. The Court of Appeal has noted that where an order will have that effect, it “should only be made after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied”.¹²

[29] Overall, having balanced the factors above, I consider that it is in the interests of justice for security for costs to be awarded. However, in light of the risk of the order preventing the challenge from being heard, I consider that it would not be in the interests of justice for the full sum of \$18,403 claimed by the Labour Inspector to be ordered. It is likely that an order of that magnitude would bring these proceedings to an end. I consider that a sum of \$7,500 is more reasonable.

¹¹ *McLachlan v MEL Network Ltd*, above n 9, at [16].

¹² At [15].

Conclusion

[30] Accordingly, I order that the sum of \$7,500 be paid into Court as security for costs within 14 days of the date of this judgment. As soon as practicable following receipt, the Registrar of the Employment Court is to place that sum on interest-bearing deposit until further order of the Court. The plaintiff's challenge is stayed until the payment is made or there is a further order of the Court.

The plaintiff applies for a stay of execution of the Authority's determinations

Submissions

[31] The plaintiff applies for a stay of execution of the Authority's determinations on the basis that parts of the challenge would be rendered nugatory without a stay. It also submitted that there are serious issues for determination, that the challenge has merit, and that the Authority did not follow a fair process in reaching a determination. Additionally, it is submitted that the Labour Inspector would not be prejudiced by a stay as they are a government official. Finally, it is noted that the plaintiff is no longer employing staff. Overall, it is submitted that a stay of execution is in the interests of justice.

[32] The Labour Inspector submitted that the plaintiff's challenge lacks merit and that they would be injuriously affected by the Court ordering a stay of execution. They say this is because they require the records which are subject to the order for compliance to provide confidence that the calculations of arrears owed to former employees of the plaintiff are accurate. Further, it is suggested that there is public interest in the Authority's orders being enforced, as the plaintiff's failure to provide the records undermines the Labour Inspector's statutory powers. Alternatively, it is submitted that if a stay is granted, it should be conditional on the plaintiff paying the sums ordered by the Authority into Court.

Legal principles relating to stay of execution

[33] As s 180 of the Act 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 their success. Regulation 64 of the Regulations 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.

[34] The range of factors generally considered relevant in this jurisdiction are well established.¹³ They are borrowed from the approach adopted in the High Court and the Court of Appeal under the relevant rules of both Courts.¹⁴

[35] 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 its 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.¹⁵

[36] 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.

¹³ *Jeon v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 114 at [5].

¹⁴ 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].

¹⁵ *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

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

Analysis

[38] The plaintiff has filed an application in relation to two orders. The first order made by the Authority was a compliance order where it was stated:¹⁶

[The plaintiff] ... must ... comply by no later than 30 calendar days from the date of this determination with the notice to supply records issued to it under s 229(1)(d) of the Act; ...

[39] The Authority further indicated that a failure to comply with the order could lead to the Labour Inspector applying to the Court to exercise its powers to sequester property, impose fines, and sentence a person in default to imprisonment under ss 138(6) and 140 of the Act.¹⁷

[40] The second order made by the Authority related to a penalty for failing to comply with the Labour Inspector's notice. The Authority determined:¹⁸

[The plaintiff] ... must ... pay a penalty of \$5,000 into the Authority by no later than 30 days from the date of this determination.

[41] Additionally, the Authority made an order of costs in relation to its prior determinations. The plaintiff's application for a stay is not entirely clear, but I understand from the parties' submissions that a stay is sought in relation to that costs determination also.

[42] A stay was also sought in relation to the Authority's recall determination of 23 January 2023. However, the Authority did not make any enforceable orders in that determination apart from interim non-publication orders which are in any event superseded by the orders on that issue in this decision. Therefore, I consider that no stay is necessary in relation to that determination.

¹⁶ *A Labour Inspector v BRAK Burns Ltd*, above n 1, at [27].

¹⁷ At [20].

¹⁸ At [27].

[43] The plaintiff stated that it does not have access to the records so that compliance with the Authority's determination is impossible. Therefore, if the Labour Inspector is permitted to enforce the compliance order, they will not necessarily be in a position to obtain the records they seeks. Further, the plaintiff is not a natural person so it cannot be imprisoned pursuant to s 140(6)(c) of the Act. This means the Labour Inspector will likely only be in a position to apply for a fine against the plaintiff or for an order that its property be sequestered.

[44] Ultimately, that means that if a stay is not ordered, the Labour Inspector will only be able to put further financial pressure on the plaintiff. Similarly, if the orders relating to the penalty and costs are not stayed, enforcement of those orders will lead to additional financial pressure on the plaintiff. Additional financial pressure increases the risk of liquidation which would bring an end to these proceedings. Therefore, I consider it possible that if the orders are not stayed, there is a risk that enforcement of those orders could bring an end to these proceedings.

[45] The ordering of a stay will have little impact on the Labour Inspector or third parties. The Labour Inspector has already said they are pursuing their claims against the plaintiff in relation to minimum entitlements on the basis of records provided by the employees. Accordingly, the interests of the employees who provide the ultimate basis for these proceedings will likely be unaffected by the ordering of a stay. Further, the penalty was ordered to be paid to the Crown bank account, not to the Labour Inspector or MBIE, so the Labour Inspector can have little immediate interest in having that enforced. Finally, the order of costs made in favour of the Labour Inspector only amounted to \$1,196.56, so a stay of that order would not have a serious impact on MBIE's financial interests.

[46] In the circumstances, there is no evidence that the challenge is not brought in good faith. However, as I have already noted, the merits of the challenge appear weak. I do not consider that the questions raised by the challenge are novel. As already noted above, there is no public interest in the proceedings.

[47] In weighing the competing factors, I consider that the balance of convenience favours the orders being stayed. However, I consider that the stay should be

conditional on the plaintiff giving security for costs as already ordered in this judgment.

Conclusion

[48] Therefore, I order that the Authority's determinations of 17 January 2023 and 22 February 2023 be subject to an interim stay of execution pending the outcome of the plaintiff's challenge in this Court and conditional on the plaintiff giving security for costs into Court within 14 days of the date of this judgment.

The plaintiff applies for interim non-publication orders

Submissions

[49] The plaintiff has applied for interim non-publication orders in relation to the three determinations of the Authority on the basis that publication would create a material risk of the reputations of those involved being negatively impacted. It is submitted that this could affect their ability to earn income. Additionally, it is submitted that there is a lower bar for interim non-publication orders in comparison to final orders.

[50] The Labour Inspector submitted an applicant for non-publication orders, either interim or permanent, must show specific adverse consequences which displace the presumption in favour of open justice. It is submitted that no adverse consequences or other good reasons have been raised by the plaintiff and that the applications should be rejected.

Legal principles relating to non-publication

[51] Pursuant to cl 12 of sch 3 to the Act, the Court has the power to prohibit publication, including of the name of any party or witness in a proceeding. While the Court has a broad discretion, this must be exercised consistently with applicable principles, including the principle of open justice, which is of fundamental importance.

A party applying for an order must show “specific adverse consequences” that are sufficient to displace the presumption in favour of open justice.¹⁹

Analysis

[52] In a minute dated 14 February 2023, Judge Holden made an interim non-publication order in relation to the first two determinations of the Authority, pending the determination of this application.²⁰ I now need to consider whether that interim order should be extended and expanded to also apply to the costs determination of the Authority.

[53] The plaintiff indicates that publication would have an impact on the reputation and income of some individuals involved in these proceedings. However, the Supreme Court has noted that embarrassment alone is insufficient as a reason to justify non-publication, which indicates that the reputational risks raised by the plaintiff are insufficient.²¹ Further, as submitted by the Labour Inspector, the plaintiff’s suggestion that the income of involved individuals may be negatively impacted is insufficiently specific to displace the presumption of open justice.

[54] I accept that the bar may be lower where an interim non-publication order is sought instead of a permanent order. However, it is still necessary to show some basis for the suggestion that the income of an individual or individuals is likely to be affected. No such basis has been provided.

Conclusion

[55] The plaintiff has not established grounds for a non-publication order, and its application is accordingly denied.

Summary of orders

[56] For the reasons given in this decision, the following orders have been made:

¹⁹ *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2] and [13]; and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

²⁰ *F & B Remuera Ltd v A Labour Inspector of Ministry of Business, Innovation and Employment* EmpC Auckland EMPC 47/2023, 14 February 2023 at [5].

²¹ *Erceg v Erceg*, above n 19, at [13].

- (a) The Labour Inspector's application to strike out the plaintiff's challenge is unsuccessful.
- (b) The plaintiff is to pay the sum of \$7,500 into Court as security for costs within 14 days of the date of this judgment.
 - (i) As soon as practicable following receipt, the Registrar of the Employment Court is to place that sum on interest-bearing deposit until further order of the Court.
 - (ii) The plaintiff's challenge is stayed until the payment is made or there is a further order of the Court.
- (c) The Authority's determinations of 17 January 2023 and 22 February 2023 are stayed, subject to the plaintiff providing security for costs within 14 days as set above at (b) and pending the outcome of the plaintiff's challenge in this Court.
- (d) The plaintiff's application for a stay of execution of the Authority's determination of 23 January 2023 is unsuccessful.
- (e) The plaintiff's application for non-publication orders is unsuccessful.

[57] I direct the Registrar of the Employment Court to send a copy of this decision to the Authority to inform it that there are now no longer any non-publication orders restricting publication of the three determinations.

[58] In light of the mixed success obtained by each party in these matters, I consider that costs should lie where they fall in relation to each application and order accordingly.

Kathryn Beck
Judge

Judgment signed at 11 am on 2 October 2023