

**ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING
DETAILS IN THE CONTEXT OF THIS JUDGMENT**

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

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

**[2023] NZEmpC 169
EMPC 155/2023**

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
AND IN THE MATTER OF	an application for security for costs
BETWEEN	BDX Plaintiff
AND	PZY Defendant

Hearing: On the papers

Appearances: A Mapu, advocate for plaintiff
C Rowe, advocate for defendant

Judgment: 4 October 2023

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application for stay of proceedings and security for costs; interim non-
publication order)**

[1] BDX has challenged a determination of the Employment Relations Authority (the Authority) that found that BDX had raised their personal grievances for unjustified disadvantage and unjustified dismissal outside of the 90-day time period prescribed by s 114(1) of the Employment Relations Act 2000 (the Act).¹ The

¹ *BDX v PZY* [2023] NZERA 160 (Member Larmer) at [76].

Authority declined BDX's application for leave under s 114(3) of the Act to raise their personal grievance claims out of time.²

[2] The Authority ordered BDX to pay PZY a contribution of \$1,500 towards their legal costs.³

[3] There are now two applications before the Court:

- (a) an application for a stay of the Authority proceedings from BDX, which is effectively an application for stay of execution of the Authority's costs orders; and
- (b) an application from PZY for security for costs in the amount of \$20,000 and that proceedings are stayed until security has been given. PZY's application also seeks to review this amount in the future.

[4] Both applications are opposed.

Affidavits have been filed

[5] The parties have each filed affidavits in relation to the two applications. PZY's evidence is that they have now sold their business due to health issues and they do not have the resources to fund unnecessary litigation. PZY expresses concern that BDX will be unable to pay their costs if BDX is unsuccessful in the Employment Court proceedings; they say that this is inequitable and prejudicial to PZY; and that BDX's claim is vexatious.

[6] BDX's evidence contains information from medical practitioners of the impact the workplace had on their health during and post-employment, including their ability to work and bring proceedings.

² At [78].

³ At [82].

Application for stay of execution

[7] As the successful party in the Authority, PZY is entitled to the fruits of their success unless good grounds have been established otherwise, in which case the Court may order a stay.⁴

[8] It is common for a stay to be ordered or made by consent on the basis that the party applying, pay the sums awarded by the Authority into Court. The usual reason for that condition is a concern that the other party would not be able to repay the award if the challenge succeeds. BDX has not raised any concerns with PZY's ability to repay the award. There is no reason for an order with such a condition here, and it has not been suggested by either party.

[9] The principles for applications for a stay are well established and are set out in the judgment of her Honour Judge Beck in *UBP Ltd v Rangitaawa-Kaui*:⁵

[6] A challenge to the determination of the Authority does not function as a stay of execution of the determination.⁶ The Court has the power to order a stay but must first be satisfied that to do so would be in line with the overarching consideration of the interests of justice.⁷

[7] A number of well-established factors are to be considered such as:⁸

- (a) whether the challenge will be rendered ineffectual if the 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;
- (d) the extent to which a stay would impact on third parties;
- (e) the novelty and/or importance of the question involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

⁴ *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA) at [30].

⁵ *UBP Ltd v Harley Rangitaawa-Kaui* [2022] NZEmpC 25 at [6]–[7].

⁶ Employment Relations Act 2000, s 180.

⁷ Employment Court Regulations 2000, reg 64.

⁸ See for example *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9]; and *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50.

[10] The key issues here are those identified in (a) and (c) above. Although PZY submits that BDX's challenge has limited prospects of success and is vexatious, for the purposes of the application before me, I accept that the challenge has been brought and will be pursued in good faith.

[11] BDX has failed to provide evidence that their challenge will be rendered ineffectual if the stay is not granted. BDX's evidence and their representative's submissions were more in keeping with arguing the challenge than seeking a stay. There was no information in BDX's affidavit explaining, for example, any adverse consequences that might flow from not granting a stay. BDX has not raised any concerns about the possible inability to recover any payment from PZY if their challenge succeeds.

[12] Requiring PZY to defend the challenge, while not allowing them to seek payment of the monies due under the determination, cuts across their entitlement to the fruits of their success. BDX has not established that it is in the interest of justice to grant a stay of execution of the Authority's costs awarded in the determination.

[13] The application for a stay is unsuccessful. The amounts awarded to PZY in the Authority continue to be payable by BDX, and PZY is free to pursue recovery of those amounts.

Application for security for costs

[14] There are no particular provisions relating to security for costs in the Employment Court. Accordingly, pursuant to reg 6(2)(a)(ii) of the Employment Court Regulations 2000, the Court looks to the provisions of the High Court Rules 2016 when dealing with applications for security for costs. Under r 5.45(1)(b) of the High Court Rules, the Court has discretion to order the giving of security for costs if there is reason to believe that the plaintiff would be unable to pay the costs of the defendant, if the plaintiff is unsuccessful in its proceeding. 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

[15] PZY applies for an order that BDX give security for costs and that proceedings are stayed until the security has been given. PZY relies on the following grounds:

- (a) an assertion that BDX's claim lacks merit;
- (b) BDX may be unable to pay any award of costs if their challenge is unsuccessful;
- (c) if PZY succeeds and is unable to recover costs from BDX, it will be inequitable and prejudicial to PZY; and
- (d) BDX's claim is vexatious.

[16] BDX opposed the application. The submissions filed in support of the opposition stated that BDX paid a \$750 costs award relating to separate determination in the Authority involving the same parties. BDX did not challenge that determination. BDX's representative also asserted that he would guarantee to pay any costs the Court ordered against BDX and offered to provide an affidavit to that effect if the Court required. However, he was not agreeable to security for costs as it relates to the Court holding monies until a future date.

[17] PZY has not filed any evidence that BDX will be unable to pay costs awarded against them if unsuccessful in the proceedings. PZY refers to a memorandum from BDX's representative seeking non-publication of the Authority's proceedings that referred to BDX being unemployed and concerned about their prospect of employment since their resignation from PZY in February 2022.

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

¹⁰ High Court Rules 2016, r 5.45(2).

[18] These references are being relied on in support of the security for costs application on the basis that BDX has not been working and would be unable to pay any future costs order.

[19] However, it is accepted that BDX has paid the earlier costs award ordered by the Authority. There is also the possibility that BDX could obtain money from other sources to pay any costs awarded against them if they were unsuccessful in these proceedings.

[20] Ultimately, a balancing exercise is required. I am not satisfied, based on the material before the Court and after having carefully considered the submissions advanced by each party that it would be just to order security for costs in the particular circumstances of this case.

[21] PZY's application for an order for security for costs and a stay is dismissed.

Interim non-publication order

[22] BDX's representative has advised that BDX wishes to apply for non-publication orders. However, no formal application has been made. Given the nature of the allegations made by BDX, the sensitive medical information provided by them and the fact that the Authority determination being challenged is subject to an interim non-publication order, an interim non-publication order is made in this Court to cover the names of the parties and information that would identify them. The randomly generated letters used in the Authority for the parties' names are applied in this judgment.¹¹ The interim nature of the non-publication order means it will be revisited by the Judge who hears and decides the substantive challenge, and they may determine whether a final non-publication order is to be made if this is sought.

M S King
Judge

Judgment signed at 11 am on 4 October 2023

¹¹ *BDX v PZY*, above n 1, at [8]–[9].