

[2] The plaintiff filed a challenge to the Authority's determination on 24 October 2023. The defendant filed a statement of defence on 21 November 2023. On the same day, the defendant also applied for the Court to strike out the plaintiff's statement of claim or, in the alternative, to order the plaintiff to give security for costs.

[3] The plaintiff did not file a notice of opposition to the defendant's strike-out and security for costs applications. However, on 22 December 2023, he applied for leave to file a notice of opposition but failed to file an affidavit alongside that application.

[4] On 23 May 2024, the defendant applied for the Court to order that unless the plaintiff files an affidavit in support of his application to file a notice of opposition within seven days, his application for leave to file a notice of opposition would be dismissed and his challenge struck out.

[5] This judgment resolves the following issues:

- (a) Should the plaintiff's application to extend time to file a notice of opposition to the strike-out and security for costs applications be dismissed?
- (b) Should the Court make unless orders?
- (c) Should the plaintiff's challenge be struck out?
- (d) Should the Court order security for costs?
- (e) Are any other orders necessary?

Should the plaintiff's application to file a notice of opposition be dismissed?

[6] After the defendant filed its applications for strike-out and security for costs, the plaintiff had until 5 December 2023 to file a notice of opposition. He missed that deadline. Therefore, he needed to file an application to extend time to file a notice of

opposition. Guidance on such applications are set out in the Court's Practice Directions:⁴

Where an application to extend time is required, the proper procedure is to file the application, together with the proposed draft statement of claim or statement of defence or other intended pleading, and an affidavit explaining the reasons for the delay and any mitigating factors or other relevant information bearing upon the grant or refusal of leave. A memorandum from the applicant or their representative addressing other relevant matters will generally be helpful.

[7] The plaintiff filed an application for leave to file a notice of opposition on 22 December 2023. He said that he had been too busy as a result of representing himself. He also said that he had not been aware of his obligations but that he would be aware of them moving forward. He noted that he planned to file his notice of opposition by Friday 12 January 2024.

[8] However, the plaintiff's application was deficient. It did not include an affidavit in support or a draft notice of opposition. Although he indicated that he would file a notice of opposition by 12 January 2024, he failed to do so. Subsequently, the Employment Court registry has repeatedly reminded him of his obligation to file an affidavit, but he has chosen not to file anything.

[9] On 21 June 2024, the plaintiff was notified that his application for leave had not been processed because of the absence of an affidavit. He was strongly encouraged to file an affidavit setting out the reasons for the delay and for his unresponsiveness. He was also notified that the timetable for the defendant's submissions in support of its applications would stand.

[10] The delay thus far has been inordinate and inexcusable and has undermined the defendant's interest in being able to pursue its applications in a reasonable manner. As the plaintiff has not filed the appropriate documentation after having been repeatedly reminded to do so, I consider that his application remains uncompleted, is frivolous and must therefore be dismissed.

⁴ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 7.

[11] In light of this decision, it is not necessary to consider the defendant's application for unless orders, which sought to have the plaintiff's application for leave dismissed.

Should the plaintiff's challenge be struck out?

[12] The defendant seeks to have the plaintiff's challenge struck out on the basis that he did not engage with the Authority's investigation and because the challenge is frivolous, vexatious, or otherwise an abuse of the processes of the Court.

[13] The lengthy procedural history of the Authority proceedings is set out in the Authority's determination.⁵

[14] I accept that a party's behaviour in the Authority can be relevant to the issue of whether a challenge is brought in good faith; however, I consider that the defendant's application was filed prematurely before any concerns arose in respect of the plaintiff's behaviour in the Court. Where good faith issues arise in the Authority, the Court can seek a good faith report from the Authority and can issue directions as to the nature and extent of the hearing if a party did not participate in the Authority's investigation in a manner that was designed to resolve the issues involved.⁶ At the time when the challenge was filed, that was the pathway that should have been pursued.

[15] Subsequently, the plaintiff has failed to engage with the Court's processes in respect of applications brought by him and the defendant. I accept that his behaviour exhibits a disregard for the Court's processes, but that does not necessarily mean that the challenge itself is frivolous, vexatious, or otherwise an abuse of the Court's processes.

[16] Therefore, the strike-out application must be declined.

⁵ *Byrne v Coverstaff Recruitment Group Ltd*, above n 1, at [10]–[13].

⁶ Employment Relations Act 2000, ss 181 and 182.

Should the Court order security for costs?

[17] Security for costs can only be ordered where the plaintiff is either impecunious or outside of New Zealand.⁷ No evidence has been provided by the defendant to indicate that either situation is true of the plaintiff. The defendant advised that Mr Byrne has failed to pay the Authority's awards. However, there is no evidence of what steps, if any, have been taken to enforce those awards. It is not possible to infer from the failure to pay alone, that he is unable, as opposed to simply unwilling, to pay the awards.⁸ Accordingly, on the evidence available, the application must fail.

Are any other orders necessary?

[18] Section 189(1) of the Employment Relations Act 2000 permits the Court to make, for the purpose of supporting successful employment relationships and promoting good faith behaviour, such orders as in equity and good conscience it thinks fit. The Court may make an interlocutory order even where no party has explicitly sought an order of that nature and may be made subject to any just terms or conditions.⁹

[19] Although I could not be satisfied that the plaintiff's challenge is frivolous, vexatious or otherwise an abuse of process, I accept that the plaintiff's behaviour in the Authority and in these proceedings raises concerns as to whether his challenge is brought in good faith.

[20] These concerns are increased by the plaintiff's failure to pay the amounts ordered by the Authority.¹⁰ Filing a challenge to a determination does not function as a stay of execution of that determination.¹¹ The plaintiff has not applied for a stay of execution in relation to the orders of the Authority. Therefore, those amounts remain outstanding.

⁷ High Court Rules 2016, r 5.45, applied via reg 6 of the Employment Court Regulations 2000.

⁸ *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [8].

⁹ High Court Rules, rr 7.44 and 7.45, applied via reg 6 of the Employment Court Regulations.

¹⁰ See above at [1].

¹¹ Employment Relations Act, s 180.

[21] In light of those concerns and noting the concerns raised by the Authority about the plaintiff's failure to appear, I consider it appropriate to seek a good faith report from the Authority pursuant to s 181 of the Act.

[22] In the meantime, the defendant remains free to take steps to recover the amount awarded by the Authority.

Outcome

[23] The Court makes the following orders:

- (a) The plaintiff's application for leave to file a notice of opposition is dismissed.
- (b) The defendant's applications for unless orders, strike-out and security for costs are declined.

[24] The Court also requests the Authority to submit to the Court a good faith report under s 181 of the Act outlining the extent to which the parties involved in the investigation facilitated rather than obstructed the Authority's investigation and whether the parties acted in good faith towards each other during the investigation.

[25] Pursuant to s 181(3) the Authority will, before submitting its report to the Court, give each party to the proceedings a reasonable opportunity to supply to the Authority written comments on its draft report. Copies of those comments must be served on the other party to the proceedings pursuant to s 181(4).

[26] Pursuant to s 181(5) the Authority must, in submitting the final report to the Court, submit with it any written comments which were received from any party. When the Authority's report is received by the Court, the parties will be given a further opportunity to make submissions on it.

Costs

[27] The defendant may be entitled to costs. If the parties are unable to agree, the defendant will have fourteen days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiff having a further fourteen days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 1.30 pm on 2 August 2024