

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

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

**[2024] NZEmpC 185
EMPC 217/2023**

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

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN GREENTREE NM CATERING LIMITED
 (t/a MASTER BAO)
 Plaintiff

AND LILI WANG
 Defendant

Hearing: On the papers

Appearances: M Lyttelton, advocate for plaintiff
 D Kim, advocate for defendant

Judgment: 27 September 2024

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

Background

[1] Lili Wang was successful with regard to her monetary claims against the plaintiff, Greentree NM Catering Ltd (the company), which were investigated by the Employment Relations Authority.¹ The Authority determined that Ms Wang had established her claims for wages arrears, for working on a public holiday, for an unpaid alternative day, and for holiday pay. It also awarded her costs.²

¹ *Wang v Greentree NM Catering Ltd (t/a Master Bao)* [2023] NZERA 271 (Member Doyle).

² *Wang v Greentree NM Catering Ltd (t/a Master Bao)* [2023] NZERA 320 (Member Doyle).

[2] The company was ordered to pay Ms Wang:

- (a) \$2,112.69 for wages arrears and holiday pay; and
- (b) \$2,446.56 in costs.

[3] The company filed a de novo challenge and is seeking to set aside the Authority's determinations. It has also applied for a stay of proceedings, which is effectively an application for stay of execution of the Authority's orders against it in both the substantive and costs determinations.

[4] Ms Wang filed a notice of opposition to the application for stay. Subsequently, timetabling orders were made by minute for the exchange of evidence and submissions, which has been completed. I now deal with the application.

Legal framework

[5] A challenge does not operate as a stay of proceedings on a determination of the Authority.³ That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success.⁴ There are, however, circumstances in which a stay is appropriate, and the Court may order a stay of proceedings where a challenge against a determination of the Authority is pursued.⁵ The challenging party needs to establish the basis for a stay and can be expected, where a monetary judgment is involved, to make some concession, such as an offer to make a payment into Court pending the outcome of the appellate process.⁶

[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:⁷

³ Employment Relations Act 2000, s 180.

⁴ *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

⁵ Employment Court Regulations 2000, reg 64.

⁶ *Grove v Archibald* [1998] 2 ERNZ 125 (EmpC) at 128–129; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

⁷ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymoocks 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 would 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.

[7] Other factors, including the likely merits of any related challenge, can also be relevant.⁸

Affidavits and submissions have been filed

[8] The company has not filed any affidavit evidence in support of its application or made any offer to make a payment into Court pending the outcome of the Court's proceedings.

[9] Mr Lyttelton, advocate for the company, has filed detailed submissions, which included providing the Court with a copy of the submissions filed by the company in the Authority. In essence, its submissions focus on the merits of the challenge. Its position is that each and every finding made by the Authority was erroneous in either law or fact. It asserts that Ms Wang was not credible and that the Authority was wrong to not take into account an earlier determination that involved Ms Wang and a different employer, where it found Ms Wang not to be credible, when assessing her credibility in the current proceedings. It was submitted that the Authority erred in finding that the company's records were not strictly accurate, and when it refused the company's

⁸ *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [34].

request to deduct the \$1,000 compensation it had paid Ms Wang from the outstanding arrears awarded to her by it. Lastly, Mr Lyttelton submitted that the Authority did not limit its costs award to the actual costs Ms Wang incurred in the Authority.

[10] The company effectively submits that the merits of its case are so strong that the Authority's determination should be stayed until its challenge is determined by the Court, or the parties otherwise settle the matter by agreement.

[11] Ms Wang has filed a brief affidavit in support of her notice of opposition to the application for a stay. Her evidence is that she is a resident of New Zealand, with full employment, and understands that she would need to repay the money awarded to her by the Authority if the company was successful in challenging the Authority's determination and she was found liable to repay the money. She says that she will repay the money if she is found liable to do so.

[12] Mr Kim, advocate for Ms Wang, submits that a challenge to a determination of the Authority does not operate as a stay to the determination. The company has not established that this default position should be displaced. There is no evidence that the company's challenge would be rendered ineffectual if a stay was not granted. It was submitted that Ms Wang is entitled to the fruits of her success in the Authority.

[13] Mr Kim's submissions raise the concern that the company may liquidate to escape liability if it is not successful in its challenge. He points to another case where Ms Wang brought a claim in the Authority against a different employer which was represented by Mr Lyttelton and this occurred. It is otherwise accepted that the company's challenge is brought in good faith and that there are no issues that impact on third parties, novel or important questions of law or issues of public interest.

Analysis

Merits of the challenge

[14] As noted, the default position is that Ms Wang, as the successful party before the Authority, is entitled to receive the sum that the company was ordered to pay her.

The question is whether the company has established that the default position should be displaced.

[15] Despite the company strongly urging that the merits lie with its case, it is not possible to assess them at this stage. The company is pursuing a de novo challenge to the Authority's determinations. The evidence and documentation being relied upon by each party are 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.⁹ 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. This factor is neutral.

Challenge would not be rendered ineffectual if no stay granted

[16] The evidence before the Court is that Ms Wang is in current employment. She has given evidence that she is aware that the company is challenging the Authority's determination and that if it were to be successful, she would repay the money. There is no evidence before the Court that the company's challenge will be rendered ineffectual if the stay is not granted. This factor points away from a stay being granted.

The challenge is brought in good faith

[17] Ms Wang accepts that there is nothing to suggest that the challenge is not being brought in good faith. For the avoidance of doubt, I do not find that there is any evidence to support the concern that the company may place itself into liquidation to escape liability if it is not successful in its challenge. I accept that its challenge is brought in good faith and for good reasons. This factor is neutral.

Whether the successful party will be injuriously affected by a stay

[18] Ms Wang effectively submits that ordering a stay would be contrary to the interests of justice and the general principle that a successful litigant should be entitled to receive the fruits of its success. I accept that Ms Wang would suffer some adverse

⁹ Although dealing with an application to for an extension of time to file an appeal, the Supreme Court made helpful observations about the necessarily superficial nature of any consideration of the merits of cases at an interlocutory stage in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39].

impact if a stay was granted and she was not able to access the monetary awards made by the Authority while the Court is considering the company's challenge. This factor points away from a stay being granted.

No effect on third parties, novelty and importance issues or public interest

[19] There is no suggestion that there are any issues in respect of impact on third-party interests, that the challenge would raise any novel or important issues, or that any issues of public interest arise.

Overall balance of convenience

[20] Turning to consider the balance of convenience, while I have found the challenge is being brought in good faith, I am not satisfied that the company's challenge would be rendered ineffectual if the stay is not granted. Further, the company has not put its best foot forward by offering any form of concession to preserve Ms Wang's interest in the face of its challenge. The monetary sums and costs awarded in the Authority are low in comparison to any costs that would be awarded by the Court, and there is no dispute that Ms Wang would be in a position to repay the costs award should it be required to do so. Overall, I am satisfied that, having regard to the material before the Court, the balance of convenience weighs against the grant of a stay.

Decision

[21] The application for a stay is declined.

[22] Ms Wang is entitled to costs on this application. She will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the company having a further 14 days within which to respond. Any reply should be filed within a further seven days.

M S King
Judge

Judgment signed at 3 pm on 27 September 2024