IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 51
EMPC 100/2024

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	CITADEL CAPITAL LIMITED First Plaintiff
AND	FORTLAND CAPITAL LIMITED Second Plaintiff
AND	EOIN MILES Defendant

Hearing:	21 March 2024 (Heard at Auckland via AVL)
Appearances:	G Credo, counsel for plaintiffs O Wensley, advocate for defendant
Judgment:	22 March 2024

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application for stay of proceedings)

Background

[1] The plaintiffs, Citadel Capital Ltd and Fortland Capital Ltd, apply for a stay of an investigation meeting set down by the Employment Relations Authority for 26 and 27 March 2024.

[2] The stay application arises as a result of an email issued by the Authority relating to the filing of evidence by the plaintiffs. The timeline of the events leading up to the email is:

(a) The proceedings were filed in the Authority in February 2023.

(b) In August 2023, an investigation meeting was scheduled for 16 January 2024. This was vacated.

(c) A second investigation meeting date for February 2024 was initially agreed to, but this was changed, and an investigation meeting was then set down for 26–27 March 2024. (There is a dispute as to why these dates were changed.)

(d) Issues arose in relation to the inclusion of both plaintiffs in the proceeding. Once this was resolved by a determination of the Authority, the defendant filed his witness statements the following day on 19 December 2023. This was later than timetabled, and the plaintiffs were given until 7 January 2024 to file their witness statements.

(e) This was subsequently extended until 22 January 2024.

(f) A further extension was granted until 27 February 2024.

(g) The plaintiffs filed two witness statements on 1 March 2024.[1] There was no communication in regard to the reasons for the delay or the status of any other witness statements.

(h) Later on 1 March 2024, the defendant sought directions from the Authority. In response (and without hearing from the plaintiffs), the Authority wrote to the parties via email as follows:

> The Member notes that there have been two witness statements filed but no others.
>
> On the basis that the two witness statements filed are outside the agreed timetable (and the indulgence of extensions to file), she is concluding that no others will be filed and directs that the matter will proceed on the evidence filed to date.

[1] They had indicated previously they would be calling up to seven witnesses.

(i) The plaintiffs did not communicate further with the Authority or the defendant.

(j) A challenge and an application for a stay of the investigation meeting were filed in the Court on 15 March 2024.

[3] The plaintiffs seek to challenge the determination of the Authority that no other witness statements be filed and that the matter proceed on the evidence filed to date, on the basis, amongst other things, that the Authority cannot pre-emptively determine not to hear evidence, given its statutory nature, especially not without hearing from the affected party. They seek to stay the Authority's investigation meeting pending the resolution of their challenge.

[4] The application for stay was granted urgency,[2] and a hearing of the application took place via telephone on 21 March 2024.

[5] During the hearing, Mr Credo, counsel for the plaintiffs, provided further helpful information. He advised that they had been intending to call four further witnesses in the Authority.[3] Two witness statements were in final draft form, one witness had only just returned from leave, and the fourth had been unable to be contacted. No witnesses had been summonsed.

[6] Mr Credo also advised that as a result of the direction from the Authority, the witnesses had been told they would no longer be allowed to give evidence and so were not required at the investigation meeting. There was no evidence as to whether they would be able to make themselves available for the hearing if the situation changed.

Jurisdiction to issue a stay

[7] Section 180 of the Employment Relations Act 2000 (the Act) states that a challenge to a determination of the Authority does not operate as a stay of proceedings on the determination. However, reg 64 of the Employment Court Regulations 2000 provides that a stay may be pursued where a challenge has been filed:

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2 *Citadel Capital Ltd v Miles* EMPC100/2024, 18 March 2024.

3 He confirmed their names which do not need to be recorded here.

> **64 Power to order stay of proceedings**
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> (1) If an election is made under section 179 of the Act, the Authority and the court each have power to order a stay of proceedings under the determination to which the election relates.
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> (2) If an application for a rehearing is made under clause 5 of Schedule 3 of the Act, the court has power to order a stay of proceedings under the decision or order to which the application relates.
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> (3) An order under subclause (1) or subclause (2)—
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> (a) may relate to the whole or part of a determination or decision or order, or to a particular form of execution; and
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> (b) may be made subject to such conditions, including conditions as to the giving of security, as the Authority or the court thinks fit to impose.

[8] Section 180 and reg 64 apply to situations where the Authority has issued a determination. Those provisions permit the Court to stay the determination to which the challenge relates. However, it is not clear that the Court has jurisdiction under those provisions to stay an investigation meeting of the Authority that is related to the determination.

[9] Regulation 64(3) indicates that the focus of the power to issue a stay in s 180 and reg 64 is on stays of execution rather than anything broader. In that regard, I agree with the approach of Judge Shaw in *Smith v Sovereign Ltd*.[4] In that case, the applicant sought a stay over the Authority to prevent it from determining the issue of costs after having issued the substantive determination. The Court found that it did not have jurisdiction on the issue, stating:[5]

> In accordance with regulation 64 of the Employment Court Regulations 2000 and s184 of the Employment Relations Act 2000 this Court has no jurisdiction to order the Employment Relations Authority to stay the consideration and issuing of a determination. The power of stay is expressly defined in regulation 64 and requires that the Court may only intervene once a determination or order has been made by the Authority. There has been no such determination or order. As there is no jurisdiction to consider this application it must be dismissed.

[10] Additionally, s 188(4) of the Act clearly states that it is not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers, and jurisdiction or in relation to the procedure it adopts. Further, a stated object of the Act is to "ensure that investigations by the specialist decision-making

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4 *Smith v Sovereign Ltd* EmpC Auckland AC10/04, 1 March 2004.

5 At [9].

body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations".[6] To construe s 180 or reg 64 in a manner which would permit the Court to intervene into the timing or manner of conduct of an investigation by the Authority would be entirely inconsistent with ss 143(fa) and 188 and is not an approach that is open to the Court.[7]

[11] The Court lacks jurisdiction to issue a stay in respect of an investigation meeting in these circumstances.[8] Therefore, I consider that the stay application must be declined.[9]

Grounds for stay

[12] In the alternative, even if the Court does have jurisdiction to order a stay of the investigation meeting, I consider there is no basis for such a stay being ordered.

Principles

[13] When considering whether to issue a stay, the Court balances the interests of the parties and normally considers the following principles:[10]

(a) whether the challenge will be rendered ineffectual if a stay is not granted;

(b) whether the challenge is brought and pursued in good faith;

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6 Employment Relations Act 2000, s 143(fa).

7 See similar observations in *Maheta v Skybus New Zealand Ltd* [2020] NZEmpC 236 at [31]–[33]. Although the Court of Appeal in *Maheta v Skybus NZ Ltd* [2022] NZCA 516, [2022] ERNZ 1005 subsequently reversed the central decision in that case, paragraphs [31]–[33] were not affected by the appeal as the Court of Appeal was focusing on the issue of whether a challenge was required before a stay could be issued in respect of a determination on costs.

8 But see *Nisha v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 162, [2013] ERNZ 626; and *Jacks Hardware and Timber Ltd v First Union Inc* [2018] NZEmpC 87 where the specific jurisdictional issues assessed in this case were not addressed.

9 For completeness, this decision would not prevent a party from seeking a stay/adjournment from the Authority itself or from challenging the Authority's determination on that issue; however, any such challenge would be subject to s 179(5), see generally: *X v Bay of Plenty District Health Board* [2007] ERNZ 781 (EmpC); and *Rossiter v AFFCO New Zealand Ltd* [2016] NZEmpC 144, [2016] ERNZ 387.

10 *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

(c) whether the successful party at first instance will be injuriously affected by a stay;

(d) the extent to which a stay will impact third parties;

(e) the novelty and/or importance of the questions involved;

(f) any public interest in the proceeding; and

(g) the overall balance of convenience.

[14] This list is not intended to be comprehensive. Other factors, including the likely merits of any related challenge, can also be relevant.[11] Ultimately, the overriding consideration is the interests of justice.

Will the challenge be rendered ineffectual without a stay?

[15] This is an application for a stay pending the determination of a challenge.

[16] The plaintiffs have challenged the Authority's direction which concludes that no further witness statements will be filed and directs that the matter proceed on the evidence filed to date. The remedy sought is that the determination be set aside.

[17] That raises the question of what would happen if the challenge was successful? The Court cannot direct the Authority in relation to the exercise of its powers, or the procedure that it has followed, is following or intending to follow.[12] It cannot direct how any future investigation meeting should proceed. Accordingly, even if the determination is set aside, the Court cannot direct that the witness statements be included.

[18] The challenge is likely to be ineffectual whether a stay is granted or not.

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11 *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [34].
12 Employment Relations Act, s 188(4).

Is the challenge being pursued in good faith?

[19] Ms Wensley submitted this application is a tactic to further delay an already delayed hearing of the defendant's case.

[20] In light of the extensive delays attributed to the plaintiffs thus far (some of which are disputed), the approach adopted by them is of some concern. There was no engagement with the Authority to raise concerns about the determination, or to provide an explanation for the delay and information about when the witness statements would be able to be filed. I agree with Ms Wensley that the wording of the Authority's email left room to seek clarification. Even in the documentation filed in this Court (two weeks after the event), there is no explanation for the extensive delays.

[21] Where a stay is sought, it is normally appropriate for the applicant to make some kind of concession – to put their best foot forward.[13] In the present circumstances, a stay is being sought in relation to an investigation meeting which the plaintiffs do not want to go ahead without having an opportunity to file further witness statements. However, it is apparent from the hearing that only two of the (now) four witness statements are in final draft form at this point in time. Accordingly, the defendant's concern that the plaintiffs are simply seeking to delay the investigation meeting is not without merit.

[22] However, while those factors may raise questions as to whether these proceedings were brought in good faith, the plaintiffs' concern that an adverse decision was made about the manner of hearing, without them having the opportunity to be heard, is genuine and strongly held.

[23] While there are concerns about the delay that has occurred, there is insufficient evidence to make a finding that the challenge is not being pursued in good faith.

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[13] That is the case where a stay of execution is being sought for money judgments, see *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19]. However, I consider that the same principle also applies more broadly.

Would the successful party at first instance be affected injuriously by a stay?

[24] The plaintiffs say that there has been no substantive determination so that there is no successful party at first instance that would be affected injuriously by a stay. Frankly, this submission supports the Court's concern that there is no jurisdiction to consider this stay application.

[25] If we were to contort the facts to find a "successful party", it would be the defendant. His representative sought and received the direction from the Authority. Arguably, the direction is in his favour.

[26] It is clear that the defendant will be negatively affected if the investigation meeting, which is due to start next week, is stayed. A stay would delay the matter from being heard, which would be unfortunate given that the investigation meeting has already been delayed previously. Ms Wensley advised that leave has been arranged and flights and accommodation booked. Any delay would increase the defendant's costs in pursuing his claim in the Authority and would result in significant inconvenience.

[27] The defendant would be injuriously affected by a stay.

Will a stay negatively impact any third parties?

[28] Neither party made submissions on this point. This factor is not engaged.

Does the challenge involve novel or important questions of law and is there any public interest?

[29] The plaintiffs say that novel and important questions of law arise in the challenge in relation to the Authority's powers to manage its own procedure. I do not agree. While the scope of the Authority's powers and the manner in which those powers are exercised can give rise to important and interesting issues, those issues are not normally justiciable by the Court. Therefore, for the reasons set out below, the questions of law raised by the plaintiff lack sufficient merit to be considered novel or important.

Does the claim have any merit?

[30] When the merits of a case are considered at an interlocutory stage, they are ordinarily only relevant at a superficial level. The Court will only reach conclusions about them where they are obviously very strong or very weak.[14] In the present case, I consider that the plaintiffs' claim is very weak.

[31] Section 179(5)(a) states that a challenge cannot be brought against "a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow". The scope of this provision was discussed by the full Court in *H v A Ltd*:[15]

> [26] A refusal to make a non-publication order does not fall within s 179(5), not because such an order directly impacts on a party's rights or obligations but rather because the denial of such an order has an irreversible and substantive effect. It cannot have been Parliament's intention that a litigant in the plaintiff's shoes would have such an important issue (non-publication) determined at first and last instance by the Authority, with no recourse to the Court to review the Authority's refusal.
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> [27] In this regard, it is evident that the new sections introduced by the 2004 amendments are not intended to deny a party access to justice, but are rather intended to facilitate the resolution of employment relationship problems through providing a forum that is not unduly preoccupied with legal technicalities. Section 179(5) operates to *defer*, in order to give effect to the important policy imperatives underlying the provisions, but not *deny* access to the Court. To apply subs (5) to the circumstances of this case would be to deny access to justice.
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> [28] Accordingly, a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review.

[32] The Court further held that the Authority's investigative provisions should generally be uninterrupted by challenges.[16]

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[14] Although dealing with an application to bring an appeal out of time, 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].

[15] *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 (citation omitted) (emphasis in original); and approved in *Bowen v Bank of New Zealand* [2023] NZCA 512 at [23]–[32].

[16] *H v A Ltd*, above n 15, at [17].

[33] Additionally, the Court can consider questions of jurisdiction. These are distinguishable from procedural questions in that they concern whether the Authority has the power to do something and not how it goes about it.[17]

[34] The plaintiffs say that to exclude evidence is not a matter of procedure as it goes to the heart of the role of the Authority as factfinder in an inquisitorial system. They say that the Authority cannot perform its role without relevant information. Further, they say that the Authority does not have power to make a determination that witness statements containing relevant evidence be excluded.

[35] In the present case, the challenged matter relates at least partially to the Authority's procedure in that it is connected to how the Authority intends to investigate the matter. Judge Holden stated in *Bowen v Bank of New Zealand*:[18]

> [23] It is for the Authority, as part of its investigative role, to determine how it investigates an employment relationship problem before it. That includes determining what evidence and other information it needs to receive and who it needs to hear from. It would be inconsistent with the scheme of the Act for the Authority's determination that it should not, and need not, hear the disputed evidence as part of its investigation to be able to be challenged.

[36] I consider that same principles will likely apply in the current case. There is no indication that the Authority's direction will have a substantive and irreversible effect on the parties. Any defect in the Authority's process will be able to be remedied by way of challenge or subsequent review. Therefore, insofar as the challenge relates to the Authority's procedure, it likely cannot succeed as the Court lacks jurisdiction.

[37] On the other hand, the statement of claim also says: "The question of law to be resolved is whether the Authority had the power to make the Determination." That appears to raise the issue of whether the Authority has jurisdiction to direct that evidence be excluded. If that is the case, a challenge would not be prevented by s 179(5) as a challenge about the Authority's jurisdiction is not a challenge about the Authority's procedure.

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17 *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 (EmpC) at [55]; and *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221 (EmpC) at [47]–[52].

18 *Bowen v Bank of New Zealand* [2023] NZEmpC 29, [2023] ERNZ 76; and approved in *Bowen v Bank of New Zealand*, above n 15, at [26].

[38] However, if the plaintiffs intend to argue that the Authority did not have jurisdiction to issue the direction that it issued, that claim likely also could not succeed. Section 160(f) states that the Authority may, when carrying out an investigation, "follow whatever procedure the Authority considers appropriate". The fact that it may call for evidence and information and may take into account evidence and information as in equity and good conscience it thinks fit does not prevent it from excluding evidence under s 160(f).[19] If procedure adopted by the Authority is unfair or breaches natural justice, the substantive determination can be challenged and the Court is free to adopt its own procedure for the purposes of that challenge.

[39] Therefore, I conclude that the plaintiffs' challenge is weak, either because the Court likely lacks jurisdiction to hear it or because the Authority likely had jurisdiction to make the direction in question.

Overall balance of convenience

[40] Turning to consider the balance of convenience, it is clear that a stay would not be in the interests of justice. The challenge will likely be ineffectual irrespective of whether a stay is ordered. The circumstances of these applications is of some concern, as is the plaintiffs' state of readiness for a hearing. A stay would have an injurious impact on the defendant. There are no novel or important questions of law. Further, despite the concerns at not having an opportunity to be heard, the merits do not rest with the plaintiffs; the claims that have been raised are clearly weak. Overall, there are no compelling reasons to issue a stay.

Conclusion

[41] I decline the plaintiffs' application for a stay of the Authority's investigation meeting as sought. The Court does not have jurisdiction to order a stay of an investigation meeting, and even if it did, there is no basis for ordering a stay in this case.

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[19] Employment Relations Act, s 160(1)(a) and (2).

[42] The defendant is entitled to costs. He will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiffs having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 5 pm on 22 March 2024