

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

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

**[2025] NZEmpC 212  
EMPC 185/2024**

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

AND IN THE MATTER OF an application for stay of execution

AND IN THE MATTER OF an application to dismiss a proceeding

AND IN THE MATTER OF an application for security for costs

BETWEEN KAMO LANDSCAPE & QUARRY  
SUPPLIES LIMITED  
Plaintiff

AND JAMES CASWELL  
Defendant

Hearing: On the papers

Appearances: J Robinson, agent for plaintiff  
J Hobcraft, advocate for defendant

Judgment: 18 September 2025

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**INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK  
(Application for stay of execution)  
(Application to dismiss a proceeding)  
(Application for security for costs)**

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[1] The plaintiff, Kamo Landscape & Quarry Supplies Ltd (Kamo), has filed a de novo challenge to two determinations of the Employment Relations Authority.

[2] On 3 May 2024, the Authority dismissed Kamo's counterclaim against the defendant, Mr Caswell, and ordered it to pay the following sums:<sup>1</sup>

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<sup>1</sup> *Kamo Landscape & Quarry Supplies Ltd v Caswell* [2024] NZERA 261 at [25].

- (a) \$2,250 toward Mr Caswell's costs; and
- (b) \$250.70 for disbursements.

[3] On 16 October 2024, the Authority found that Mr Caswell was unjustifiably disadvantaged and unjustifiably dismissed. It ordered Kamo to pay Mr Caswell \$91,839.97 being:<sup>2</sup>

- (a) \$4,000 distress compensation for Mr Caswell's unjustified disadvantage;
- (b) \$22,000 distress compensation for Mr Caswell's unjustified dismissal;
- (c) \$2,134 two weeks' unpaid notice as "reasonable notice";
- (d) \$27,742 six months' lost remuneration under s 128(3) of the Employment Relations Act 2000 (the Act);
- (e) \$4,000 in breaches for failing to keep and produce proper documentation, with \$3,000 to be paid directly to Mr Caswell and \$1,000 to the Crown bank account; and
- (f) \$31,963.97 in wage arrears, and interest on the arrears until they are paid in full.

[4] Kamo seeks a stay of execution of those orders. Mr Caswell has applied for dismissal of Kamo's proceedings or, in the alternative, security for costs. This judgment resolves all three applications.

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<sup>2</sup> *Caswell v Kamo Landscape & Quarry Supplies Ltd* [2024] NZERA 621 at [261].

## Stay of proceedings

### *Legal framework*

[5] A challenge does not operate as a stay of proceedings on a determination of the Authority.<sup>3</sup>

[6] That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success.<sup>4</sup> However, there are 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.<sup>5</sup> The challenging party must satisfy the Court that adequate grounds have been made out.<sup>6</sup> Any orders made must be the least necessary to preserve the position of the challenging party, and that party 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.<sup>7</sup>

[7] In determining whether a stay ought to be granted, the Court must balance the interests of the parties and generally have regard to the following non-exhaustive list of factors:<sup>8</sup>

- (a) whether the challenge will be rendered ineffectual if a stay is not ordered;
- (b) whether the challenge is brought for good reasons and being 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 will impact on third parties;

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<sup>3</sup> Employment Relations Act 2000, s 180.

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

<sup>5</sup> Employment Court Regulations 2000, reg 64.

<sup>6</sup> *Grove v Archibald* [1998] 2 ERNZ 125 (EmpC) at 128–129.

<sup>7</sup> *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

<sup>8</sup> *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).

- (e) the novelty and/or importance of the questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

[8] Other factors, including the likely merits of any related challenge, can also be relevant.<sup>9</sup> Ultimately, the overarching consideration is the interests of justice.

### *Submissions*

[9] Kamo relies on an affidavit filed by its agent and director, Mr Robinson, for its application for a stay, opposition to security for costs and opposition to the application for dismissal.

[10] Kamo submits that Mr Caswell has no ability to pay any costs awards that may result from a successful challenge. However, the basis for the company's stay application rests largely on its own impecuniosity.

[11] Mr Robinson says that a stay is necessary to prevent the extreme financial hardship Kamo would face if it were required to pay the awards ordered by the Authority. In its submissions, the company states that it has significant debts including a mortgage over the company land in excess of \$700,000, rate arrears in excess of \$25,000 and Inland Revenue Department arrears estimated at \$70,000. According to Kamo, its primary source of financial support is derived from Mr Robinson's superannuation and personal income. In light of its debt and limited resources, enforcement of the sums ordered by the Authority would force the company into voluntary liquidation.

[12] At the time of making the application, Kamo anticipated that its financial position would alter in the next 18 months, by April 2026, with the commencement of full quarry operations, the injection of capital and a discharge of the mortgage over the company land.

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<sup>9</sup> *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [34].

[13] In relation to the merits of the challenge, Kamo submits that there are material errors in the Authority's determination. These appear to concern whether Mr Caswell was an employee, whether his personal grievances were filed out of time, and the significance of personal property disputes between him and the plaintiff. It also considers that Mr Caswell was paid in excess of his entitlements, still holds personal items belonging to Mr Robinson and, as such, is not entitled to "one cent more".

[14] Mr Caswell submits that as the successful party, he is entitled to the fruits of his success. He says he will be injuriously affected by any further delay in receiving the sums ordered, particularly in relation to his wages. Further, he argues it is inappropriate to grant a stay in relation to minimum entitlements.

[15] Mr Caswell has proposed that if the Court is minded to grant the stay, a sufficient order for security for costs is necessary to protect his position, given Kamo's likely liquidation and its assertions that he is not entitled to the sums awarded.

[16] In relation to whether the challenge will be rendered ineffectual if a stay is not granted, Mr Caswell has indicated in an affidavit that he is struggling financially, currently living on a benefit, and is concerned that he may be unable to attend hearings.

[17] He also disputes Kamo's claims of financial hardship, particularly in relation to his minimum entitlements which he argues should have been paid in the ordinary course of business. He says that the plaintiff has failed to provide evidence of impecuniosity and emphasises that it has land holdings, an active business, machinery and equipment, access to lending (with security to offer), and a home owned by Mr Robinson and his wife. Mr Caswell also says Mr Robinson frequently takes trips to Vanuatu.

[18] Lastly, Mr Caswell argues that Kamo's de novo challenge is brought without merit and only has the effect of delaying his entitlements, including substantial unpaid wages. He submits that the Authority was correct in fact and law and does not accept that there are any jurisdictional issues, given that his personal grievances were all raised within time. He also disputes the personal property issues raised and notes that these were dismissed in the Authority and fall outside of this jurisdiction.

[19] In response to Mr Caswell's claims, Mr Robinson says he does not own a home in his own right. He maintains that there is no capacity to arrange funding or sell assets as Kamo operates with outdated machinery, and the only functioning equipment is estimated to be valued at less than \$5,000. Mr Robinson also states that his trips to Vanuatu are primarily for medical reasons, and the business he conducts there is not profitable. He says that this can be demonstrated by his business accounts, although the company has yet to provide any evidence of these accounts.

## **Analysis**

*Will the challenge be rendered ineffectual if a stay is not granted?*

[20] Whether the challenge will be rendered ineffectual if a stay is not granted relates to whether, if the plaintiff is ultimately successful, its success will be ineffectual due to the defendant's precarious financial position.

[21] The principal ground raised in support of the application for a stay is Kamo's financial hardship and its belief that the defendant is not owed any award. However, as the Court has previously noted, something more than disappointment at the result in the Authority is required for a stay to be justified.<sup>10</sup>

[22] Although Kamo has not provided any material to substantiate its claims of financial hardship, such assertions count against a stay that does not provide security to Mr Caswell. It is difficult to ascertain the veracity of these claims when the company has failed to provide the Court with any evidence of its financial position, such as audited financial accounts disclosing its annual income and assets, the value of the company land (which is inconsistently recorded in Kamo's pleadings), or the value of any property, plant, or machinery it owns.

[23] On the other hand, the information Mr Caswell has provided to the Court also counts towards granting a stay. Mr Caswell has not stated whether he would be able to repay any sums if the plaintiff's challenge were successful, and it is unclear whether he would be able to do so.

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<sup>10</sup> *BR & SL Porter Ltd v Higgs* [2020] NZEmpC 76 at [6].

[24] However, Mr Caswell's position is understandable, given that a significant amount of the orders in his favour are for wages owing. There is therefore an equally legitimate concern as to whether his defence of the challenge will be ineffectual if the stay is granted on the terms currently sought.

*Was the challenge brought for good reasons, and is it being pursued in good faith?*

[25] Mr Caswell suggests that the purpose of the challenge is to delay his entitlements. It is clear that Mr Robinson has strong feelings about the findings in the determination. However, there is no evidence that the challenge is brought by Kamo other than in good faith and for genuine reasons.

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

[26] The starting point is that Mr Caswell is entitled to the fruits of his success. Given his financial position and the time that has elapsed since the determinations, it is axiomatic that he would be disadvantaged if the Authority's awards are not paid. He is also understandably concerned about the dissipation of assets between now and any hearing, particularly given that the plaintiff has indicated the possibility of voluntary liquidation.

*Will the stay have an impact on third parties?*

[27] The plaintiff has not identified whether a stay will have an impact on any third parties. However, any delay in receiving the fruits of his success may impact Mr Caswell's son.

*Are there any novel and/or important questions involved in the challenge?*

[28] None of the parties has suggested that there are novel or important questions arising in this challenge, although of course they are necessarily important to each of them.

*Is there any public interest in the challenge?*

[29] None of the parties has suggested that there is any particular public interest in this challenge other than the public interest in an employee being able to recover minimum entitlements and premiums paid. A significant portion of the amount owing relates to the enforcement of the defendant's minimum entitlements. The sums also cover penalties relating to breaches by Kamo for failing to keep and produce proper records in relation to those minimum entitlements. However, the issues are not new.

*Are the merits of the plaintiff's challenge clear enough to be relevant?*

[30] It is difficult to assess the merits of a challenge at an interlocutory stage, particularly where a de novo challenge has been filed.<sup>11</sup> At this stage it is sufficient to note that Mr Caswell's personal grievance claims appear to have been raised in time. The Authority found that Mr Caswell initially raised his personal grievances within 14 days of them arising, well within the 90-day time limit required by s 114(1) of the Act.<sup>12</sup> Therefore, Kamo's argument that the Authority did not have jurisdiction to hear the personal grievances is likely to be unsuccessful. Further, the wage awards were carefully calculated with reference to Mr Caswell's bank records, and information from Mr Robinson where credit was given for some agreed cash payments. Given the lack of wage and time records, the merits in relation to that aspect of the claim do not support a stay.

*Balance of convenience/interests of justice*

[31] Considering the balance of convenience, I do not consider that Kamo has established the basis for a stay. Mr Caswell is entitled to the fruits of his success and should be aware that he may need to repay sums if Kamo's challenge succeeds. However, there are competing interests at play. It is necessary to balance the defendant's right to the fruits of his success against the risk that he is unable to pay such sums if the plaintiff succeeds in its challenge. It is then necessary to balance the

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<sup>11</sup> 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].

<sup>12</sup> *Caswell v Kamo Landscape & Quarry Supplies Ltd*, above n 2, at [216].

plaintiff's precarious financial circumstances against the interests of justice in having the defendant's awards secured.

[32] Accordingly, I consider that the balance of convenience and the interests of justice favour a compromise. Mr Caswell is stayed from enforcing the Authority's determinations, except in relation to the wage arrears, being the requirement to pay \$31,963.97 plus interest from 28 February 2023. He is free to take steps to enforce that debt.

[33] The balance of the awards of the Authority is stayed, but on the terms set out below:<sup>13</sup>

- (a) penalties of \$4,000, \$3,000 of which are payable to Mr Caswell;
- (b) \$4,000 compensation under s 123(1)(c)(i) for unjustified disadvantage;
- (c) \$2,134 two weeks' unpaid notice; and
- (d) \$51,876.00 remedies for his unjustified dismissal.

**Security for costs can be ordered if there is reason to believe that a plaintiff may not be able to pay costs**

[34] There is no express provision relating to security for costs in the Court. Accordingly, pursuant to reg 6(2)(a)(ii) of the Employment Court Regulations 2000 (the Regulations), the Court looks to the provisions of the High Court Rules 2016 when dealing with applications for security for costs.

[35] 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 outside 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.

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<sup>13</sup> See below at [42] and [52].

[36] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.<sup>14</sup> An order may be made if it is just in all the circumstances.<sup>15</sup> Where an order for substantial security may effectually prevent a plaintiff from pursuing their claim, security should only be ordered where the plaintiff's claim has little chance of success.<sup>16</sup> If the defendant's actions, being the subject of the litigation, have caused the plaintiff's impecuniosity, that will count as a factor against security being granted.<sup>17</sup>

[37] Mr Caswell says that the plaintiff should pay into court adequate security of costs should its challenge be allowed to proceed. He highlights Kamo's own evidence of its financial situation as the basis for the application, and emphasises the attitude displayed by Mr Robinson, including statements that he does not intend to pay the defendant "one cent". Mr Caswell also believes that it is more likely than not that the plaintiff would be liquidated so as to avoid making payment of his awards.

[38] Mr Caswell says that Mr Robinson has the capacity and means by which to arrange security and proposes that the sum of \$15,0000 be paid into court to ameliorate any injury or prejudice.

[39] Mr Robinson opposes the application for security. He considers that Mr Caswell is motivated by a desire to avoid a substantive hearing on the challenge and rejects the suggestion that he would liquidate Kamo simply to avoid payment. He maintains that the defendant "is owed and deserves nothing" and that liquidation remains a live possibility due to the Authority determinations.

[40] If Kamo's statements of financial hardship are to be taken seriously, then there is reason to believe it will be unable to pay the defendant's costs if it is unsuccessful. Although the company suggests its financial position may improve overtime, by and large it has demonstrated it may be unable to comply with any costs awards issued against it.

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<sup>14</sup> *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

<sup>15</sup> High Court Rules 2016, r 5.45(2).

<sup>16</sup> *McLachlan v MEL Network Ltd*, above n 14, at [15].

<sup>17</sup> *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC) at 461.

[41] The Court is mindful to strike a balance that is just in the circumstances, despite the company's own admissions of financial hardship. It accepts that Kamo may have insufficient resources until further capital injections and the commencement of full quarry operations which, according to the company, should occur by April 2026.

[42] In lieu of security for costs, Kamo's de novo challenge is to be stayed until Mr Caswell's wage arrears plus interest have been paid to him and the balance of the amounts owing under the determinations are paid into court, to be held in an interest-bearing account pending further order of the Court. This will also provide time for the company's financial position to improve, such that liquidation is no longer a live issue.

### **Dismissal of proceedings**

[43] Mr Caswell has also applied to dismiss the proceedings.

[44] Rule 15.1 of the High Court Rules sets out the situations where the Court may strike out proceedings. It applies to the Court via reg 6 of the Regulations.<sup>18</sup> It provides:<sup>19</sup>

#### **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.

[45] The principles applying to an application to strike out are well settled and apply in the Employment Court.<sup>20</sup> The pleaded allegations of facts, whether admitted or not, are assumed to be true. The jurisdiction to strike out a pleading on the ground that it discloses no reasonably arguable cause of action is to be exercised sparingly, and only in clearly untenable cases.<sup>21</sup> Special caution is required where a claim involves a developing area of the law.<sup>22</sup>

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<sup>18</sup> Employment Court Regulations 2000, reg 6.

<sup>19</sup> High Court Rules 2016, r 15.1.

<sup>20</sup> *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

<sup>21</sup> *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

<sup>22</sup> *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[46] The applicant must meet a high threshold to strike out a claim prior to a substantive hearing. As the Supreme Court stated in *Couch v Attorney-General*:<sup>23</sup>

It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be “so certainly or clearly bad” that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

[47] Mr Caswell relies on r 20.12 of the High Court Rules which provides for the Court’s ability to dismiss or stay an appeal or cross-appeal where there are, inter alia, failures to comply with certain judicial directions under r 7.15.

[48] Mr Caswell says that the plaintiff has failed to comply with timetabling directions which resulted in service being improperly effected. He also notes that the plaintiff has identified to the Court that it and its officers are impecunious, unable to meet any orders and also unwilling to meet any orders. Mr Caswell says he will be put to extreme and undue hardship if the challenge is allowed, which will deny the receipt of his wage arrears which are now approximately two years overdue. He says that if Kamo is permitted to continue with non-compliance, assets may be depleted or disposed of to his prejudice. For those reasons, he says the plaintiff’s challenge should be dismissed.

[49] Kamo opposes the application for dismissal and argues that the challenge is the only avenue of recourse for what it deems to be unjustified and biased Authority determinations. It is suggested that Mr Caswell’s application for dismissal is also an attempt to prevent the matter being heard.

[50] The application to dismiss is genuine and does not appear to be brought as a delaying tactic. By Kamo’s own admission, it cannot pay the awards ordered in the Authority and is facing the prospect of liquidation. Mr Caswell is understandably concerned about the prejudice this may cause if Kamo is unsuccessful in its challenge. However, procedural errors and omissions in relation to timetabling directions are insufficient to justify dismissing the proceedings. Section 179 of the Act confers an absolute right to challenge determinations of the Authority, although Mr Caswell will

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<sup>23</sup> At [33] (footnotes omitted).

inevitably face some hardship if the challenge is permitted without any security for costs.<sup>24</sup> The terms of the orders below will go towards ameliorating any hardship or prejudice in the delay of his awards in the Authority, and the potential for Kamo's assets to be depleted or disposed of between now and a substantive hearing.

[51] The application for dismissal is declined.

### **Outcome**

[52] The plaintiff's application for a stay is granted in relation to the following orders, on the condition that such sums are paid into the Court's trust account, to be held on interest-bearing deposit, until further order of the Court:

- (a) \$2,250 towards Mr Caswell's costs and \$250.70 for disbursements;
- (b) \$26,000 distress compensation, being \$22,000 for the unjustified dismissal and \$4,000 for the unjustified disadvantage;
- (c) \$2,134 two weeks' unpaid notice;
- (d) \$27,742 six months' lost remuneration under s 128(3) of the Act; and
- (e) \$4,000 penalty for breaches for failing to keep and produce proper documentation;

[53] The plaintiff's application for a stay is declined in relation to the order to pay \$31,963.97 in wage arrears, as well as interest on those arrears. Mr Caswell is entitled to take steps to enforce that debt.

[54] The application for security for costs is successful in part. The challenge is stayed until the amount in [53] has been paid to Mr Caswell and the amounts in [52] have been paid into Court.

[55] The application to dismiss the proceedings is declined.

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<sup>24</sup> Employment Relations Act 2000, s 179.

[56] Both parties have had some measure of success in relation to these applications. Costs will lie where they fall.

Kathryn Beck  
Judge

Judgment signed at 3.30 pm on 18 September 2025