

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

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

**[2025] NZEmpC 231
EMPC 382/2025**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for a stay of proceedings
AND IN THE MATTER OF	an application for security for costs
BETWEEN	DSJ JOINERY LIMITED Plaintiff
AND	DEIVID MARIOTTI DA SILVA Defendant

Hearing: On the papers

Appearances: M Leaf, counsel for plaintiff
A Kersjes, advocate for defendant

Judgment: 29 October 2025

**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for stay of proceedings)
(Application for security for costs)**

Introduction

[1] There are two interlocutory applications currently before the Court. The first is the plaintiff's application for a stay of execution of orders made against it in the Employment Relations Authority;¹ the second is the defendant's application for security for costs. I directed that both applications be dealt with together. This judgment resolves both applications.

¹ *Da Silva v DSJ Joinery Ltd* [2025] NZERA 444.

[2] I deal with the applications in turn.

Stay of proceedings

[3] In its determination dated 23 July 2025, the Authority ordered the plaintiff to pay the defendant the amounts of:²

- (a) \$13,500 (\$15,000 minus 10 percent contribution) compensation for humiliation, loss of dignity and injury to feelings;
- (b) \$760.32 (gross) (\$822.80 minus 10 percent contribution) reimbursement of lost wages; and
- (c) a penalty of \$500.

[4] The plaintiff seeks an order staying execution of the orders against it pending the outcome of the challenge process.

[5] The approach is well established, and can be summarised as follows. 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. 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.⁴ The challenging party must satisfy the Court that adequate grounds have been made out. 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.⁵

[6] In determining whether a stay ought to be granted, the Court must balance the interests of the parties and generally has regard to the following non-exhaustive list of

² Above, n 1, at [83].

³ Employment Relations Act 2000, s 180.

⁴ Employment Court Regulations 2000, reg 64.

⁵ *Bathhurst Resources Ltd v L& M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

factors: whether the challenge will be rendered ineffectual if a stay is not ordered; whether the challenge is brought for good reasons and being pursued in good faith; whether the successful party at first instance will be injuriously affected by a stay; the extent to which a stay will impact on third parties; the novelty and/or importance of the questions involved; the public interest in the proceeding; and the overall balance of convenience. Other factors, including the likely merits, can also be relevant. Ultimately, the overarching consideration is the interests of justice.⁶

[7] The plaintiff's primary point relates to the first of the above factors. In this regard it is said that the company will suffer a degree of financial hardship if a stay is not granted and it ultimately succeeds on its challenge. That is because the company will be placed under pressure associated with making payment of the Authority's orders and funding its challenge. It is accepted that refusing a stay would not render the plaintiff's challenge rights nugatory – rather that it will need to find short term funding (either by way of overdraft or by lending) to pursue the challenge absent a stay. It is not suggested that it would have difficulty securing such funding.

[8] While I accept that the plaintiff will likely be stretched if no stay is granted, there is nothing to suggest that if a stay is not granted the company will be unable to proceed with its challenge or that its challenge rights would be rendered ineffectual. This factor is neutral.

[9] I accept, for present purposes, that the challenge is brought in good faith.

[10] The plaintiff submits that there is no basis for contending that the defendant would be injuriously impacted by a stay. That submission overlooks the point that if a stay is granted it will deny him access to the sums ordered in his favour.

[11] The plaintiff further submits that if the defendant is paid out the money the Authority ordered against it, and if it succeeds, the defendant would have to repay it, and it would have been disbursed to his advocate for legal fees. It is unclear what the submission is based on, but, even accepting it, there is nothing before the Court to

⁶ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7].

support an inference that the defendant would be unable to repay any money in the event that the company's challenge was wholly successful and the Authority's determination was set aside.

[12] There is no suggestion that a stay would impact any third party; nor is there anything to suggest that declining to stay on enforcement would impact on any third party (a factor I also consider relevant to the assessment exercise).

[13] There are no novel or important issues raised by these proceedings. They centre on the correct interpretation of a clause in an individual employment agreement relating to hours of work. No issues of broader public interest arise.

[14] Counsel for the plaintiff says that credibility will be an issue on the challenge and appends a letter to submissions in which serious allegations are made against the defendant in respect of evidence said to have been given in the Authority's investigation. Credibility may well be an issue on the challenge, but I am not in a position to conclude whether it impacts the likely merits.

[15] The balance of convenience weighs against a stay, as do the overall interests of justice.

Security for costs

[16] The defendant seeks an order of security for costs against the plaintiff company.

What is the scope of the Court's power to order security for costs?

[17] While not raised in argument, an initial question arises as to the basis on which the Court may order security for costs.

[18] The Court is a creature of statute; it does not have inherent jurisdiction and must act within the four corners of the legislation it operates under.

[19] There are two express provisions relating to security for costs and the circumstances in which they can be ordered, namely where a party seeks to appeal to the Court of Appeal against a judgment of this Court;⁷ or where the Court has ordered a stay of proceedings. In the latter regard reg 64 of the Employment Court Regulations 2000 provides that the Court and the Authority may order a stay of proceedings and may order that a stay be “subject to such conditions, including conditions as to the giving of security, as the Authority or the court think fit to impose.”

[20] The circumstances of this case do not fall within the scope of reg 64 because I have declined to order a stay and so there is no order to which security for costs can attach by way of condition. Does that mean that there is no power to order security for costs in this case?

[21] There are numerous instances in which the Court has accepted jurisdiction to order security for costs absent an order for a stay.⁸ A review of the cases suggests a combination of the Regulations (particularly regs 6 and 64) and the Court’s equity and good conscience jurisdiction has been seen as creating a power to order security for costs.⁹

[22] In my view it is arguable that, given the express provisions relating to when such an order may be made (namely under regs 64(3)(b) and 69), no broader power exists. The regulation making power conferred by the Act may be said to reinforce the point. In this regard s 237(1)(c) provides that regulations may be made for the purposes of: “prescribing any act or thing necessary to supplement or render more effectual the provisions of this Act as to the conduct of proceedings before the Authority or the court.” No regulation has been made prescribing stand-alone security for costs on a challenge to a determination of the Authority.

[23] I consider it arguable that reg 6, (“Procedure”) does not apply to create a bridge through to the High Court Rules 2016, and its provisions relating to security for costs. Rather, reg 6 assists the Court with determining *how* to apply the procedural

⁷ Regulation 69, Employment Court Regulations 2000 (“Security for costs”).

⁸ See for example *Watkins v Highmark Homes Ltd* [2024] NZEmpC 105; *Burgess v Tutton Sienko and Hill Partnership* [2025] NZEmpC 133.

⁹ *Koia v Attorney-General* [2004] 1 ERNZ 116 (EmpC); *Watson v Fell* [2002] 2 ERNZ 1 (EmpC).

powers conferred on it; it does not give the Court all of the powers of the High Court found in the High Court Rules 2016.

[24] Further, the wording of s 189 suggests that the Court's equity and good conscience jurisdiction is directed at the *way* in which matters (properly) before the Court are to be determined, rather than conferring jurisdiction in and of itself.

[25] Finally, it is arguable that ordinary principles of statutory interpretation tell against "reading in" a power to order security in light of the objectives of the legislation, and its focus on accessibility to the dispute resolution processes provided under the Act. Free wheeling orders of security for costs do not sit comfortably with this right; the same concern does not arise in respect of security in circumstances where the Court or Authority has concluded that a stay on condition is appropriate.

[26] As I have said, the point about the Court's power to make a stand-alone order for security was not argued and does not need to be decided because of the view I have reached on the application, which I turn to next.

Application of the conventional approach

[27] A threshold test applies under r 5.45 of the High Court Rules. In this case I must be satisfied that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its challenge; if so, the question becomes whether I consider it just in all of the circumstances to order the giving of security for costs.

[28] As Judge Shaw observed in *Watson v Fell*, difficulty paying is not synonymous with inability to pay; a plaintiff does not need to have sufficient cash always to pay costs as soon as they are awarded.¹⁰ Impecuniosity, she said, means virtually a total inability to pay, including over time. The Court must also be mindful in "all" cases to exercise its discretion in a way that does not prevent people from making claims in

¹⁰ *Watson v Fell*, above n 9, at [10].

this Court, finding that the aim of the Court is to ensure that, wherever possible, access to justice is not denied.”¹¹

[29] A similar point was made a few years later in *Barry v Anoop Investments Ltd*, emphasising the special nature of the jurisdiction and the wariness of the Court to order security for costs in the same way that might find favour with the ordinary Courts:¹²

[4] The principles on which the Employment Court considers applications for security for costs are well established. *Because of the special nature of the employment jurisdiction and, in particular, the unique nature of an election under s 179 of the Employment Relations Act 2000, the Court will be less inclined to order security for costs than other courts might be. Potential inability to pay an award of costs which might be made will usually not, on its own, justify an order.* In every case, the grounds relied on must be properly made out on the evidence.

[30] I respectfully agree with the above observations. The chilling effect of orders of security for costs is particularly acute in this jurisdiction and should in my view lead to such orders being exceptional, not routine.

[31] In this case I am not satisfied the plaintiff will be unable to pay in the event the challenge fails. The test is not immediate capacity to pay, as Judge Shaw confirmed. Nor is it difficulty paying. It is impecuniosity. The plaintiff, at least on the material before the Court, is not in that category.

[32] It follows that the threshold has not been met and the application for security for costs is declined.

Conclusion

[33] The plaintiff’s application for a stay of execution is declined; the defendant’s application for security for costs is declined.

¹¹ At [12].

¹² *Barry v Anoop Investments Ltd* EmpC Auckland AC19B/08, 19 December 2008 (emphasis added).

[34] In the circumstances I consider it appropriate to order that costs are to lie where they fall.

Christina Inglis
Chief Judge

Judgment signed at 11.00 am on 29 October 2025