

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2025] NZEmpC 281
EMPC 347/2023**

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 A LABOUR INSPECTOR OF MINISTRY
OF BUSINESS, INNOVATION AND
EMPLOYMENT
Plaintiff

AND ELEMENTS THERAPEUTIC MASSAGE
LIMITED
First Defendant

AND XUAN ZHANG
Second Defendant

AND PING DU
Third Defendant

Hearing: On the papers

Appearances: G La Hood and P Siania, counsel for plaintiff
No appearances for the first or second defendant
A Douglass, counsel for the third defendant

Judgment: 22 December 2025

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M S KING
(Application for stay of proceedings (costs))**

[1] This judgment resolves an application by the Labour Inspector for a stay of proceedings regarding the Court's judgment, pending resolution of an appeal.

The Labour Inspector is seeking a stay of proceedings

[2] On 15 May 2025 the Court issued a judgment granting the Labour Inspector's application to extend time to file a challenge to a determination of the Employment Relations Authority (the Authority).¹ The judgment indicated that while the Labour Inspector was successfully granted leave, this was an indulgence. The Court ordered that the Labour Inspector pay scale costs to Mr Du, in light of his financial circumstances and given the result of the case largely rests on the interests of third parties and the public interest. It provided that if the issue of costs was unable to be agreed, memoranda may be filed.²

[3] Mr Du has filed an application to seek leave to appeal the judgment to the Court of Appeal. While the parties agree that the substantive proceedings should be stayed, the parties do not agree that the issue of costs should be stayed. The Court of Appeal directed the parties to file submissions in respect of the application for leave by 5 and 26 September 2025.

[4] On 17 July 2025 the Labour Inspector filed an application for stay of proceedings of the Court's costs judgment, on the grounds that: the question of costs is not straightforward, the position of costs could change pending the outcome of the appeal, the parties are unable to agree on the issues of costs, and that costs in the Authority remain unresolved. The Labour Inspector submits that all issues between the parties can be dealt with conveniently at a later date. It notes that Mr Du is legally aided so is not prejudiced by a stay on the issue of costs. In the circumstances it is in the interests of justice and efficiency that proceedings of costs should be determined after the appeal process.

[5] Mr Du opposes any stay being granted on the grounds that:

- (a) Mr Du's representatives have consulted with the Labour Inspector extensively on costs and the parties were unable to reach agreement. Mr Du has now filed a memorandum on costs with the Court and

¹ *A Labour Inspector of the Ministry of Business, Innovation and Employment v Elements Therapeutic Massage Ltd* [2025] NZEmpC 94.

² *Elements Therapeutic Massage Ltd*, above n 1, at [39].

considers the issues of costs are capable of being resolved on the papers.

- (b) A stay of a determination on costs will prejudice Mr Du, who has already incurred costs of filing a memorandum on costs and defending the application for a stay.
- (c) Regardless of the outcome of the appeal, Mr Du is entitled to costs for the reasons given in the Court's judgment.³
- (d) It is in the interest of justice for costs to be determined at this stage, so that the parties have clarity regarding their respective liability for costs in the Court ahead of any determination of the appeal.

[6] Both parties have filed submissions and agreed that the stay application would be heard on the papers.

Legal framework

[7] The standard principles governing stay applications are well established and may be summarised briefly.

[8] Section 214(6) of the Employment Relations Act 2000 (the Act) provides that neither an application for leave to appeal, nor an appeal, operates as a stay of proceedings on the decision to which the application or appeal relates unless the Court or the Court of Appeal so orders.

[9] In determining whether to grant a stay, the Court must weigh the factors “in the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position in case the appeal is successful”.⁴ The factors from

³ See *Elements Therapeutic Massage Ltd*, above n 1, at [38]–[39].

⁴ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87; and *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11].

Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd are well known.⁵

Relevant factors here are:

- (a) whether the appeal is bone fide and has been prosecuted thus far with diligence;
- (b) any public interest in the proceedings;
- (c) the novelty and importance of the questions in the appeal;
- (d) whether the applicant's right of appeal will be rendered nugatory if no stay is granted;
- (e) whether the successful party will be injured or prejudiced by a stay; and
- (f) ultimately the overall balance of convenience.

[10] Generally, it will be appropriate for costs to be determined despite an appeal being brought because the successful party is entitled to the fruits of any costs award.⁶ However, it is not unusual for the Court to grant a stay in such circumstances.⁷ It has to do with a highly fact-specific assessment of the particular circumstances of each case. In *Ioan v Scott Technology NZ Ltd t/a Rocklabs*, Judge Holden exercised her discretion to fix costs, on the basis that both parties were entitled to know the amount of costs awarded and fixing those costs would not have been an overly complex exercise.⁸ In *White v Reserve Bank of New Zealand*, Judge Ford declined to determine costs pending an appeal to the Court of Appeal. He considered that course to be preferable to putting the parties to the expense of arguing a matter that might never need to be determined or might be determined differently depending on the outcome of the appellate process.⁹ Similarly, in *Gate Gourmet NZ Ltd v Sandhu*, Chief Judge Inglis held:¹⁰

⁵ *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9]; and *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7].

⁶ See for example Court of Appeal (Civil) Rules 2005, r 12; *Bracewell v Richmond Services Ltd* [2014] NZEmpC 171 at [4]; and *Ioan v Scott Technology NZ Ltd t/a Rocklabs* [2018] NZEmpC 58.

⁷ See for example *White v Reserve Bank of New Zealand* [2012] NZEmpC 125; and *Gate Gourmet New Zealand Ltd v Sandhu* [2021] NZEmpC 20 at [6].

⁸ *Ioan v Scott Technology NZ Ltd t/a Rocklabs*, above n 6, at [9].

⁹ *White v Reserve Bank of New Zealand*, above n 7, at [8].

¹⁰ *Gate Gourmet*, above n 7, at [6].

I do not consider it desirable to layer additional costs (potentially unnecessary) on the defendants at this stage, when resolving costs would involve a degree of *complexity*; when matters can conveniently be dealt with at a later date; and where there is nothing to suggest that the plaintiffs will be materially prejudiced by a stay in the interim. (emphasis added)

Analysis

[11] I accept that Mr Du's application for leave to appeal is being pursued in good faith. If leave is declined, the matter can come back before the Court and the issue of costs can be promptly dealt with alongside the substantive matters. If leave is granted and the appeal proceeds, the ultimate outcome may impact on the issues of costs, including in both the Court and Authority.

[12] I also accept that the judgment under appeal raises issues of public interest, and novel and important issues in relation to costs. In particular, whether the Court can order the Labour Inspector to pay Mr Du's legal costs on the grounds that the case rested on the interests of third parties and the public.¹¹

[13] I can see no evidence to suggest that Mr Du's right of appeal will be rendered nugatory if a stay is granted. Further, the issue of costs is not straightforward, due to Mr Du's financial circumstances, his grant of legal aid and the interests of third parties as well as the public and their relevance to the assessment of costs. This may create a degree of complexity, which weighs in favour of a stay on the issues of costs.

[14] While I accept that Mr Du has an interest in being paid the costs awarded to him by the Court, it is necessary to consider matters more broadly in the exercise of the Court's discretion. This includes that the parties have agreed to stay the substantive proceedings before this Court, pending the outcome of Mr Du's appeal. I consider it is undesirable to stay the substantive proceedings and treat the costs arising from that proceeding differently to the substantive proceedings. This adds an additional layer (potentially unnecessarily) on the proceedings at this stage, when resolving costs would involve a degree of complexity; when matters can conveniently be dealt with at a later date; and where there is nothing to suggest that Mr Du will be materially prejudiced by a stay in the interim.

¹¹ *Elements Therapeutic Massage Limited*, above n 1, at [39].

[15] It is in the interests of justice and efficiency that proceedings of costs should be determined after the appeal process. Overall, the balance of convenience favours the granting of the stay.

[16] For the above reasons, I grant a stay of the determination of costs. The determination of costs in the Employment Court is accordingly stayed pending the outcome of the appeal process to the Court of Appeal or until further order of this Court.

[17] Costs on the application are reserved.

M S King
Judge

Judgment signed at 9 am on 22 December 2025