

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

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

**[2025] NZEmpC 29
EMPC 322/2023**

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

AND IN THE MATTER OF an application to strike out proceedings for
 want of prosecution

BETWEEN CARRINGTON RESORT JADE LP
 Plaintiff

AND GRAHAM MAHENO
 Defendant

Hearing: On the papers

Appearances: No appearance for plaintiff
 A Kersjes, advocate for defendant

Judgment: 26 February 2025

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M S KING
(Application to strike out proceedings for want of prosecution)**

Background

[1] The plaintiff in these proceedings, Carrington Resort Jade LP (Carrington), has challenged a determination of the Employment Relations Authority (the Authority). The defendant, Graham Maheno, has applied to strike out that challenge on the basis that Carrington has not pursued its challenge.

[2] In its determination, the Authority awarded Mr Maheno approximately \$10,345.41 in compensation, wage arrears, and penalties, along with \$3,821.56 in costs.¹ Carrington filed its challenge on 12 September 2023.

[3] At the same time as filing its challenge, Carrington applied for a stay of proceedings. However, before that application could be heard, Mr Maheno had the Authority's determination enforced. Ultimately, the stay application was unsuccessful.²

[4] In response to the challenge, Mr Maheno filed an application for security for costs. That application was successful as there was unrebutted evidence before the Court that Carrington was at risk of liquidation.³ Carrington was ordered to pay \$15,000 as security for costs within 20 working days of the date of the judgment, which was delivered on 13 June 2024.⁴ No payment has been received and Carrington's challenge is presently stayed.

[5] The Court also obtained a good faith report from the Authority pursuant to s 181 of the Employment Relations Act 2000 (the Act).⁵ That report indicated that Carrington and Mr Tan, who is the chief executive officer and general manager of Carrington and who represented it in the Authority proceedings, had failed to fully facilitate the Authority's investigation. Carrington had also failed, without excuse, to attend mediation when directed. Further, Carrington had failed to comply with some of the Authority's directions, which led the Authority to impose a penalty of \$1,500 on Carrington for obstructing or delaying the Authority's investigation. These findings caused the Court to limit the scope of Carrington's challenge pursuant to s 182 of the Act.⁶

[6] Finally, the Court awarded Mr Maheno an additional \$8,126 in costs as a result of the various interlocutory applications.⁷

¹ *Maheno v Carrington Resort Jade LP* [2023] NZERA 445 (Member Dumbleton).

² *Carrington Resort Jade LP v Maheno* [2024] NZEmpC 103 at [2]–[16].

³ At [17]–[31].

⁴ At [50].

⁵ At [35].

⁶ At [32]–[48].

⁷ *Carrington Resort Jade LP v Maheno* [2024] NZEmpC 184.

The strike-out application

[7] Mr Kersjes, the representative for Mr Maheno, observed that the sum of security for costs ordered by the Court has not been paid by Carrington and that Carrington has not taken any steps in these proceedings since the Court's interlocutory decision dated 13 June 2024. He highlights the conduct of Carrington in the Authority, which led to the Authority issuing a penalty and the Court finding that Carrington did not participate in the Authority's investigation in a manner that was designed to resolve the issues.

[8] Mr Kersjes submitted that the prolonged delays caused by Carrington are unreasonable and clearly exceed any acceptable timeframe for progression. He also submitted that Carrington has not provided any reasonable explanation for its delays. Further, he submitted that Carrington's delay has caused unnecessary stress and disruption to Mr Maheno, along with significant additional costs.

[9] Mr Kersjes submits that in these circumstances Carrington's challenge should be struck out. In the application to dismiss for want of prosecution, it is proposed that Carrington's challenge should be struck out if the ordered security for costs were not paid within 14 days of the date of the application.

[10] Although Mr Maheno filed and served the strike-out application on Carrington and has subsequently filed an affidavit of service with the Court, Carrington has not filed a notice of opposition and has not engaged with the Court in any way on this application. The matter was set down to be heard on the papers, which was notified to the parties by minute dated 11 December 2024.

Legal principles

[11] Rule 15.2 of the High Court Rules 2016 provides:

15.2 Dismissal for want of prosecution

Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if—

- (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment; or
- (b) the defendant fails to prosecute all or part of the defendant's counterclaim to trial and judgment.

[12] An applicant seeking the strike-out of a claim or counterclaim for want of prosecution, as provided in r 15.2 of the High Court Rules, must show that there has been inordinate delay, the delay is inexcusable, and the delay has caused prejudice to the other party. However, the decision to strike out is discretionary, and those considerations are not necessarily exclusive. The overriding consideration is whether justice can be done, despite the delay.⁸

Analysis

[13] I accept that there has been inordinate and inexcusable delay in Carrington pursuing its challenge. Security for costs orders were made in June 2024, and it is now February 2025. Carrington has made no attempt to explain its conduct and has not communicated with the Court in any way. This is compounded by previous delays caused by Carrington in these proceedings and in the Authority. The delay strongly indicates that Carrington is no longer engaged in these proceedings and does not intend to pursue them further.

[14] I also accept that Carrington's delay in pursuing its challenge has caused prejudice to Mr Maheno. The proceedings have caused considerable stress to Mr Maheno and have disrupted his life. They continue to hang over his head with escalating costs. These proceedings have already given rise to substantial costs. The costs award issued by the Court in respect of its interlocutory judgment came to \$8,126. This can be compared with the award made to Mr Maheno in the Authority, which was approximately \$10,345.41. If these proceedings are permitted to continue, there is a real risk that Mr Maheno's success in the Authority may be rendered nugatory by his legal costs. Such an outcome would prevent justice from being done.

[15] Of course, if Mr Maheno was successful, he could seek indemnity costs and, given the delays caused by Carrington, might well be successful. However, the Court

⁸ *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58 (CA) at 61.

ordered Carrington to pay security for costs as there was evidence that it might not be in a position to pay costs as a result of the potential risk that it could be placed into liquidation, so there is no guarantee that any costs award could in fact be recovered from Carrington.

[16] Alternatively, if Carrington were successful, Mr Maheno would likely need to bear his own costs, which would likely exceed the sums at issue in these proceedings.

[17] Therefore, I consider that the unexplained delay in the circumstances is sufficiently serious and has caused sufficient prejudice to Mr Maheno as to warrant Carrington's challenge being struck out.

[18] On the other hand, I consider that Carrington should be given one further opportunity to pay the ordered security for costs into Court. If that opportunity is not taken up by Carrington, the proceedings will be struck out. If Carrington does make payment, it will be required to comply with all directions of the Court, which may be enforced under r 7.48 of the High Court Rules.

Orders

[19] I order that Carrington is to pay a sum of \$15,000 to the Employment Court Registry within 14 days of the date of this judgment.

[20] If security is paid by the time specified, that sum is to be placed by the Registrar of the Employment Court on an interest-bearing account until further order of the Court.

[21] If security is not paid by the time specified, this proceeding will be struck out pursuant to r 15.2 of the High Court Rules, without Mr Maheno needing to make any further application.

Costs

[22] Costs are reserved. Mr Maheno is entitled to costs on this application. If the award of security for costs is not paid within 14 days of the date of this judgment, he will also be entitled to costs incurred in defending the substantive challenge.

[23] If the parties are unable to agree on the issue, Mr Maheno will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with Carrington 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 1.30 pm on 26 February 2025