



## Legal framework

[3] A challenge does not operate as a stay of proceedings on a determination of the Authority.<sup>3</sup> That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success.<sup>4</sup> 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.<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>

[4] 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 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;
- (e) the novelty and/or importance of the questions involved;

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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).

(f) the public interest in the proceeding; and

(g) the overall balance of convenience.

[5] 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.

### **Documents have been filed**

[6] The plaintiff submitted that a stay should be awarded as he cannot afford to pay the Authority's costs award. He has provided evidence of his financial position in affidavits. He also submitted that he expects to be successful in his case so that the Authority's award is likely to be reversed. Further, he submitted that the case gives rise to public interest issues and that therefore costs should lie where they fall until the matter is determined by the higher courts.

[7] In response, the defendant submitted that a successful litigant is entitled to the fruits of their success at first instance even where an appeal has been filed. It was submitted that the responsibility to pay costs will not have any impact on the plaintiff's ability to pursue his challenge and that he should not be shielded from the consequences of pursuing unsuccessful litigation. The defendant also submitted that the challenge does not give rise to any novel or important issues or issues which are in the public interest. On the other hand, the defendant proposed that the money be paid into Court.

### **Analysis**

[8] This matter is finely balanced.

[9] I accept that the plaintiff is genuine in seeking to appeal the Authority's determination and that his finances are strained. If he is required to pay the Authority's award, that will have an impact on both him and his family.

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

[10] However, he was unsuccessful in the Authority, and as set out above, the defendant is entitled to the fruits of its success in the Authority. Further, the plaintiff's challenge will not necessarily be rendered ineffectual if a stay is not granted.

[11] While I accept the defendant's submission that if the plaintiff is successful, he would have no difficulty obtaining the sums awarded from it, as a public sector organisation, likewise there is no evidence that it will be injuriously affected by a stay.

[12] Although the merits of a challenge can be relevant to the issue of whether a stay should be ordered, it is generally difficult to make any assessment at an interlocutory stage.<sup>10</sup> I acknowledge that the plaintiff considers himself to have a strong case; however, I do not accept that the merits are relevant for the purposes of this application.

[13] The plaintiff was unsuccessful in the Authority on the basis that he did not raise his personal grievances within 90 days. In light of that, I do not accept that the case as it stands before the Court presently gives rise to any novel or important questions of law. The 90-day issue also does not give rise to any public interest issues. It is possible that the underlying claim could give rise to important issues which may be of public interest, but those claims are not presently before the Court, and the costs award that is the subject of this stay application relates solely to the 90-day issue. Therefore, I do not place any weight on this point either.

[14] In weighing the overall balance of convenience, I consider that the sum in question should be stayed. Ultimately, I accept that the plaintiff is impecunious. While, in principle, the defendant is entitled to the fruits of its success, it will not be injuriously affected by a stay, whereas the opposite is true of Mr Thebe.

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<sup>10</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].

## **Conclusion**

[15] The plaintiff has been granted an indulgence. I am of the view that costs should lie where they fall on this matter. If either party seeks costs, memoranda may be filed.

Kathryn Beck  
Judge

Judgment signed at 3.45 pm on 8 April 2025