

**ORDER PROHIBITING PUBLICATION OF NAMES AND IDENTIFYING
PARTICULARS OF THE PARTIES OR OTHER INFORMATION**

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

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

**[2025] NZEmpC 20
EMPC 428/2023**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER OF | an application for substituted service |
| BETWEEN | VKU Plaintiff |
| AND | PHZ Defendant |

Hearing: On the papers

Appearances: Plaintiff in person
No appearance for defendant

Judgment: 19 February 2025

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application for substituted service)**

[1] The plaintiff has challenged a determination of the Employment Relations Authority.¹ However, the defendant has died since the challenge was initiated. As a result, the plaintiff has faced difficulties in serving documents for these proceedings and has applied for substituted service or, in the alternative, an order that service be dispensed with.

¹ *VKU v PHZ* [2023] NZERA 625.

[2] The plaintiff was partially successful in the Authority. He was awarded the following: \$12,000 in compensation, \$5,000 gross in lost wages, and \$8,000 gross in holiday pay.² In his statement of claim, the plaintiff is claiming that the Authority miscalculated remedies and that it wrongly rejected his claim for unjustified action and associated remedies.

[3] The plaintiff's challenge was filed on 21 November 2023. As the defendant did not file a statement of defence, the plaintiff was advised by the registry of the Court to file an affidavit of service. The plaintiff failed to do so, despite repeated reminders. The Court subsequently directed the plaintiff to file an affidavit of service by 21 October 2024. However, there were further delays and the Court allowed the plaintiff one further opportunity to file an affidavit by 21 November 2024. The plaintiff was warned that if the document was not filed, his challenge would be struck out for lack of prosecution.

[4] The plaintiff finally filed an affidavit of service on 21 November 2024, indicating that the defendant had died but that the documents had been served on his adult son about a month after the defendant's death. As the defendant had died, the plaintiff's affidavit of service was not sufficient. Further directions were made to have the personal representative of the defendant joined to the proceedings and served pursuant to r 4.50 of the High Court Rules 2016.

[5] On 21 November 2024, the plaintiff advised that he was unable to identify the personal representative of the defendant and sought directions from the Court as to how to proceed with service. On 19 December 2024, the Court directed the plaintiff to file an application for substituted service if he wished to continue the proceedings.

The application for substituted service

[6] On 10 January 2025, the plaintiff filed an application for substituted service or, in the alternative, for an order that service be dispensed with. He advised that he had made attempts to achieve service but that he was unable to identify the defendant's personal representative. In particular, he stated that the defendant's previous lawyers

² At [130].

had not responded to him, that the High Court has no record of a personal representative for the estate of the defendant, and that he was not in contact with the defendant's family. Finally, he suggested that service should be dispensed with because the defendant clearly indicated before he died that he did not wish to participate in legal proceedings regarding the dispute.

[7] The Court sought further information from the plaintiff about whether he had contact details of any family members of the defendant referred to in his affidavit. The Court also directed the plaintiff to address whether serving one or more of those family members or another person, such as the defendant's former representatives, would be sufficient to bring the proceedings to the attention of the defendant's personal representative. The plaintiff subsequently advised that he did not have the current contact details of those people. He also suggested that the defendant likely did not have a personal representative so that any substituted service would not bring the proceedings to their attention.

Analysis

[8] Rule 6.8 of the High Court Rules applies to applications for substituted service, allowing the Court to make directions where reasonable efforts have been made to serve a document by a permitted method and where the document has either come to the person's attention or cannot be served promptly. The Court is able to direct a party to take specific steps that are likely to bring documents to the notice of the person to be served and to treat those steps as service. It may also accept prior steps that have been taken which are likely to have that affect. Finally, the Court may, subject to any conditions it thinks just, dispense with service.

[9] In the present case, the Court has directed the plaintiff to serve the personal representative of the defendant, being the executor or administrator of his estate. The plaintiff has not been able to achieve that service. He suggests that the defendant does not have a personal representative. In the circumstances of the case, I do not consider that it is appropriate to order substituted service for a number of reasons.

[10] First, although I accept the plaintiff's evidence that an administrator has not been appointed over the defendant's estate, it seems inherently unlikely that a lawyer, who knew that he was dying, would die without a will and an associated executor of that will. Therefore, I find, on the balance of probabilities, that the defendant likely has a personal representative.

[11] Second, the plaintiff acknowledges that the sums ordered by the Authority, which amount to over \$25,000, remain unpaid. If the plaintiff was successful in his challenge, that sum would be increased. It is not clear how the plaintiff would enforce either award. To do so, he would almost certainly need to identify who to enforce the awards against. At some point, the plaintiff will have to face that issue. If the Court were to issue directions for substituted service now, the problem of identification faced by the plaintiff would be pushed into the future.

[12] The plaintiff may respond that his claim lies against the estate and that he may be able to enforce the awards against the defendant's successors. However, if that is the case, he should apply for them to be joined in substitution to the defendant's personal representative. As no such suggestion is before the Court, I cannot place any weight on it in the context of the present application.

[13] Third, even if the defendant did not wish to be involved in these proceedings, his successors to an interest in these proceedings may wish to be involved. The fact that the proceedings were served on the defendant's son is not sufficient to show that the defendant's successors do not wish to be involved because there is no reason to believe that the defendant's son or other successors was or is aware that they may have legal liabilities under these proceedings.

[14] Fourth, I note that the plaintiff holds a practicing certificate as a lawyer and is therefore an officer of the Court. At least some of the difficulties arising in this case are due to his failures to comply with the directions of the Court. If he had promptly served the documents on the defendant when he originally filed the challenge and when the defendant was still alive, he would likely now be in a much stronger position. In light of those failures, it would not be fair to dispense with service.

[15] Fifth, although the plaintiff seeks for directions as to substituted service, he has not identified steps that would be likely to bring the documents to the notice of the person to be served.

[16] Given the circumstances of this case, I do not consider that the plaintiff has made reasonable efforts to achieve service. Further, I do not consider that it would be appropriate for service to be dispensed with, given the plaintiff's conduct of these proceedings, and substituted service also cannot be granted, given that no steps have been identified that would be likely to bring the proceedings to the attention of the defendant's personal representative.

Outcome

[17] The application for substituted service is unsuccessful.

[18] If no further steps are made within one month of the date of this judgment, the proceedings will be struck out for lack of prosecution. I consider that order to be appropriate given that the plaintiff has been repeatedly warned that the proceedings will be struck out if service is not carried out.

[19] There is no issue as to costs.

Non-publication

[20] The Authority ordered permanent non-publication over the parties' names.³ To prevent it from being undermined, that order also applies to these proceedings.

M S King
Judge

Judgment signed at 9.15 am on 19 February 2025

³ At [16].