



Employment Court of New Zealand

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Sky Stone Consulting Limited v Xu [2022] NZEmpC 179 (27 September 2022)

Last Updated: 30 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 179](#) EMPC 240/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for security for costs
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	SKY STONE CONSULTING LIMITED Plaintiff
AND	LI XU Defendant

Hearing: On the papers
Appearances: No appearance for plaintiff
S Langton and R L White, counsel for
defendant
Judgment: 27 September 2022

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application for security for costs) (Application for stay of proceedings)

[1] Mr Xu succeeded in a claim against his previous employer, Sky Stone Consulting Limited.¹ The Authority made orders in his favour said to amount to

\$70,824.70. The company has filed a de novo challenge to the Authority's determination. Mr Xu has sought an order for security for costs and an associated order for a stay of the challenge pending payment of security into Court.

¹ *Xu v Sky Stone Consulting Ltd* [\[2022\] NZERA 288](#) (Member Urlich).

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[2] The applications were served on the company. A timetable for filing any notice of opposition to the applications was set by the Court. It was made clear that if no steps were taken, the applications would proceed to be dealt with on an unopposed basis. Counsel for the plaintiff did not receive instructions, and no steps have accordingly been taken. Counsel filed a memorandum advising of the position and acknowledged that the applications would need to be dealt with on an unopposed basis. While the applications are not opposed, the Court still needs to be satisfied that the orders sought are appropriate.

[3] The Court has jurisdiction to order security for costs and to order that proceedings be stayed pending payment. The procedure set out within r 5.45 of the [High Court Rules 2016](#) is applied.² In a case such as the present the Court must be satisfied that the company will be unable to pay the costs awarded to Mr Xu if it fails on its challenge.³ If so, the Court must consider whether it would be just in all the circumstances to make the order sought.⁴ In carrying out this exercise, the Court will generally consider factors such as the interests of the parties, the merits of the case, whether any impecuniosity results from the defendant's actions, and any delay.⁵

[4] Mr Xu has affirmed a detailed affidavit which includes his understanding of the company's financial position. That understanding is supported by various documents exhibited to the affidavit. I am satisfied that the threshold for making an order has been met – the company's financial position, as disclosed by the material currently before the Court, indicates that the company will be unable to pay the costs awarded to Mr Xu if it fails on its challenge.

[5] Mr Xu has also set out details as to the financial position he and his family are currently in and the costs he has incurred in pursuing his claim in the Authority and in responding to the company's challenge. I accept that he is in constrained financial circumstances; that taking steps to enforce the Authority's orders will cost him more

2. Rule 5.45 of the [High Court Rules 2016](#) is applied via reg 6(2)(a)(ii) of the [Employment Court Regulations 2000](#): see *Quality Consumables Ltd v Hannah (No 2)* [2017] NZEmpC 155 at [11].

3 [High Court Rules 2016](#), r 5.45(1)(b).

4 [High Court Rules 2016](#), r 5.45(2).

5. Andrew Beck and others *McGechan on Procedure* (online ed. Thomson Reuters) at [HR5.45.03]; but see *Koia v Attorney-General* [2004] NZEmpC 13; [2004] 1 ERNZ 116 (EmpC) at [32].

money and place a significant burden on him; and that his interests weigh in favour of the orders sought.

[6] It is difficult to assess, at this early stage, the merits of the company's challenge. What can be said is that the company has not pointed to any matters that might be said to weigh in its favour on this consideration, and nor are any immediately apparent from the Authority's determination. I have been unable to identify any other factors that might be relevant in this case. The interests of justice weigh in favour of security being ordered.

[7] The Court has a broad discretion in terms of quantum. The sum sought by Mr Xu is \$18,500. This is said to be appropriate having regard to the likely costs of defending the challenge through to a hearing.⁶ While I have not overlooked the possible impact on the company in terms of its ability to pursue its challenge if the orders sought are made, I am satisfied that the quantum is reasonable in the circumstances and is necessary in order to protect Mr Xu's position.

[8] Accordingly, the company is ordered to give security for costs for \$18,500 by paying that sum into Court. That is to be done within 21 days of the date of this judgment. The Registrar is to place the sum paid on interest-bearing deposit as soon as practical thereafter where it will remain pending further order of the Court.

[9] It is appropriate that the company's challenge be stayed until payment of the security for costs is made.

Christina Inglis Chief Judge

Judgment signed at 4.45 pm on 27 September 2022

6 Assessed as being around half of potential 2B scale costs.