



Employment Court of New Zealand

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UBP Limited v Rangitaawa-Kauī [2022] NZEmpC 25 (16 February 2022)

Last Updated: 23 February 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 25](#)

EMPC 448/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for a stay of execution of a determination of the Employment Relations Authority
BETWEEN	UBP LIMITED Plaintiff
AND	HARLEY RANGITAAWA-KAUI Defendant

Hearing: On the papers

Appearances: J Douglas, counsel for plaintiff
A Kersjes, advocate for
defendant

Judgment: 16 February 2022

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK

(Application for stay of execution)

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority which held that the defendant was unjustifiably disadvantaged and unjustifiably dismissed from his employment at UBP Ltd (UBP).¹ The Authority awarded remedies of \$38,437.38 gross in lost wages and \$20,000 in compensation.²

[2] UBP now applies for a stay of execution of the Authority's determination subject to the following conditions:

¹ *Rangitaawa-Kauī v UBP Ltd* [\[2021\] NZERA 527](#) (Member Craig).

² At [96].

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(a) Within 14 days, UBP will pay the total amount awarded in the Authority, being \$58,437.38, into Court.

(b) The amount paid will be held in an interest-bearing account until distributed pursuant to a further order or by agreement of the parties in writing.

[3] The initial application, filed before Ms Douglas was retained as counsel for UBP, was framed as an application for a stay of proceedings and made a number of comments about the Authority's investigation. It was accompanied by an affidavit from Ms Morgan, a Human Resources Manager for UBP, which largely addressed the perceived merits of the Authority's findings and processes.

[4] Ms Douglas has now filed helpful submissions clarifying UBP's position and confirming the application is for a stay of execution. The primary ground relied on is an assertion that Mr Rangitaawa-Kauai is impecunious and that the challenge, which is being pursued in good faith, may be rendered ineffectual. The proposed conditions are said to protect both UBP and Mr Rangitaawa-Kauai's positions pending the outcome of the challenge.

[5] The application is opposed by Mr Rangitaawa-Kauai who says that as the successful party in the Authority, he is entitled to the fruits of his success. The stay application is characterised by Mr Kersjes, advocate for Mr Rangitaawa-Kauai, as being unreasonable and based on outdated information on the defendant's financial circumstances. The challenge itself is said to be lacking in good faith.

Principles applying

[6] A challenge to the determination of the Authority does not function as a stay of execution of the determination.³ The Court has the power to order a stay but must first be satisfied that to do so would be in line with the overarching consideration of the interests of justice.⁴

³ [Employment Relations Act 2000, s 180.](#)

⁴ [Employment Court Regulations 2000](#), reg 64.

[7] A number of well-established factors are to be considered such as:⁵

(a) whether the challenge will be rendered ineffectual if the stay is not granted;

(b) whether the challenge is brought and 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 would impact on third parties;

(e) the novelty and/or importance of the question involved;

(f) the public interest in the proceeding; and

(g) the overall balance of convenience.

[8] In this case, the parties for the most part focused on grounds (a) and (b).

Would the challenge be rendered ineffectual?

[9] As noted, the primary ground for UBP's application is the alleged impecuniosity of Mr Rangitaawa-Kauai.

[10] It relies primarily on comments made in the Authority, and referred to in the determination, in which Mr Rangitaawa-Kauai described living off his savings for a number of months and being forced to draw on his KiwiSaver fund on financial hardship grounds. Once he had drained his savings, he went on the unemployment benefit. At the time of the determination, he described himself as "still being in a deep hole financially."⁶

5. See for example *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [\[1999\] NZHC 1324](#); [\(1999\) 13 PRNZ 48 \(CA\)](#); and *Assured Financial Peace Ltd v Pais* [\[2010\] NZEmpC 50](#).

⁶ *Rangitaawa-Kauai*, above n 1, at [91].

[11] UBP says this provides sufficient cause for concern as to the likelihood of it being able to recover those remedies in the event its challenge is successful.

[12] Mr Kersjes has submitted that the information relied on in respect of impecuniosity is out of date and that the inferences made are insulting to Mr Rangitaawa-Kauai. It is said that it would be unfair for him to be deprived of the money now due to him when any financial hardship was caused by UBP's actions.

[13] There has been no evidence provided in support of the claim that Mr Rangitaawa-Kauai is in an improved financial position. It does not appear that he was found new employment,⁷ and approximately six months has now passed since the Authority's investigation meeting. The only indicators of an improved financial position are the fact that his son is now in good health and his partner has found employment.

[14] Absent any evidence to the contrary, I am not willing to accept Mr Kersjes' submission that the application is "gross presumption" based on a vague concern. The concern is based on Mr Rangitaawa-Kauai's own evidence as to his circumstances which was accepted by the Authority.

[15] I accept that there is a risk the challenge may be rendered ineffectual if the stay is not granted.

Is the challenge being pursued in good faith?

[16] Mr Kersjes submits that the challenge has not been filed in good faith. In support of this claim, an affidavit was provided by Mr Cain, Mr Rangitaawa-Kauai's advocate in the Authority. It alleged that following the Authority's determination, Mr Cain was contacted by Mr Stewart, the Managing Director of UBP. Mr Stewart is said to have attempted to engage in informal settlement negotiations; there is nothing, in and of itself, that is wrong with that.

7 He is said to be soon to return to the workforce.

[17] In the course of the discussion, Mr Stewart is said to have made comments to the effect that, given its financial resources, UBP could drag the Court proceedings out for 18 months to two years. That allegation was strongly denied by UBP and Mr Stewart. An offer was made to provide an affidavit to that effect if necessary.

[18] I do not consider I need to reach any conclusion as to what was or was not said. At the point Mr Stewart is said to have made that call, the challenge had already been filed. I am satisfied with the bona fides of the challenge which clearly arise out dissatisfaction with the Authority's determination and a desire by UBP to exercise its statutory right to challenge it.

[19] It is possible that any comments about costs or time delays made by Mr Stewart have been misinterpreted as threats. It is not necessarily objectionable to bring such factors to the attention of the other party in settlement discussions. At the time, UBP had not engaged a representative and Ms Morgan was acting as its agent. The initial filings were characterised by assertions about the objectivity and fairness of the Authority and may have arisen out of a lack of understanding of the Authority's inquisitorial approach.

[20] In any case, UBP has now engaged counsel who holds an overriding duty to the Court and an obligation to protect the Court's processes. I am satisfied the challenge is and will be pursued in good faith.

Other factors

[21] The Authority's award was said to be a welcome relief to Mr Rangitaawa-Kauai's family given the effects of the dismissal. I accept that there will be some inconvenience to both him and his family should a stay be granted. However, I do note his own assertions that his family's situation has improved considerably since the Authority meeting.

[22] I did not understand there to be any suggestion that there was any novelty or importance to the questions involved; nor is there any real public interest in these proceedings.

[23] UBP has proposed paying the monies awarded by the Authority into Court. Where a monetary award has been made, the balance between those two competing considerations is often struck by granting a stay but making it subject to a condition that the money is paid either to a stakeholder or to the Registrar of this Court.⁸

[24] I have accepted that there is a risk of the challenge being rendered ineffectual and that there are no significant countervailing factors. To the extent any prejudice exists to Mr Rangitaawa-Kauai and his family, I am satisfied that it is limited by UBP's proposal to make payment into Court. Concerns held by Mr Rangitaawa-Kauai about how UBP intends to conduct its challenge can be addressed by the usual direction that the challenge is to be diligently pursued.

[25] I am satisfied that the overall balance of convenience lies with UBP.

Conclusion

[26] There is an order staying execution of the Authority's determination dated 25 November 2021 on the following conditions:

- (a) The amount of \$58,437.38 is to be paid to the Registrar of this Court no later than 5 pm on 28 February 2022.
- (b) The money referred to at [26](a) is to be held by the Registrar in an interest-bearing account and is not to be disbursed except by order of the Court or agreement of the parties in writing.
- (c) UBP is to pursue its challenge diligently.
- (d) Leave is reserved to either party to apply to amend or vary this order.

⁸ *QDA v EQD* [2021] NZEmpC 1 at [13].

[27] Costs are reserved.

Kathryn Beck Judge

Judgment signed at 3.30 pm on 16 February 2022

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