

**ORDER PROHIBITING PUBLICATION OF THE 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 129
EMPC 428/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VKU Plaintiff
AND	PHZ Defendant

Hearing: On the papers

Appearances: Plaintiff in person
No appearance for defendant

Judgment: 27 June 2025

**JUDGMENT OF JUDGE M S KING
(Dismissal for want of prosecution)**

[1] On 21 November 2023 the plaintiff filed a non-de novo challenge to a substantive determination of the Employment Relations Authority.¹

[2] The plaintiff advised the Court's registry that he had served the proceedings on the defendant on 16 February 2024. The registry advised the plaintiff on multiple occasions that he was required to file an affidavit of service. The plaintiff failed to file an affidavit of service.

¹ *VKU v PHZ* [2023] NZERA 625.

[3] On 4 October 2024 the Court issued a direction recording the importance of the plaintiff prosecuting his claim in a timely manner. It explicitly warned him that any failure to do so could result in his claim being dismissed for want of prosecution. The plaintiff was directed to file an affidavit of service by 4 pm on Monday 21 October 2021.

[4] On 24 October 2024 the plaintiff sought a short extension of time to file his affidavit of service. An extension was granted allowing the plaintiff time to file the affidavit in the last week of October 2024. The plaintiff failed to file the affidavit of service in time.

[5] On 6 November 2024 the Court issued a minute where it made an “unless” order. It directed the plaintiff to file an affidavit of service confirming service of the proceedings on the defendant by 21 November 2024. It further directed that, unless the plaintiff files the affidavit of service by 5 pm on that date, the document would not be accepted by the Court. Service would not be deemed to be effected and the proceeding would be dismissed for want of prosecution.

[6] On 21 November 2024 the plaintiff filed an affidavit of service, but it was deficient.

[7] In a minute dated 26 November 2024 the Court issued a minute setting out the basis for why it was not satisfied that service had been effected on the defendant. Specifically, the plaintiff’s affidavit of service claimed that the defendant had died in January 2024, prior to proceedings purporting to be served on him. The affidavit recorded that on 17 February 2024 the proceeding documents were delivered to an address by a courier and the adult child of the first defendant signed and acknowledged receipt of the documents.

[8] In a minute dated 26 November 2024 the plaintiff was informed that due to the death of the first defendant, his personal representative must be joined as a party to the proceedings in accordance with r 4.50 of the High Court Rules 2016.² Consequently, the amended proceedings must be served on them. The minute directed that:

² High Court Rules 2016, r 4.50.

- (a) The personal representative (executor or administrator of estate) of the defendant be joined as a party to the proceedings.
- (b) The proceedings be served on the personal representative of the defendant, being the executor or administrator of their estate.
- (c) The plaintiff was to file an affidavit of service by 17 December 2024 confirming the identity of the personal representative of the defendant and providing sufficient details to satisfy the Court that personal service of the proceedings had been effected on them. If the plaintiff failed to file a satisfactory affidavit of service by this date, the document would not be accepted by the Court, service would not be deemed to be effected, and the proceeding would be dismissed for want of prosecution.

[9] On 17 December 2024 the plaintiff filed a memorandum advising that he had failed to identify the personal representative of the defendant and therefore was unable to serve the proceedings as directed. The plaintiff sought directions from the Court as to service on the defendant.

[10] In a minute dated 19 December 2024 the Court advised that if reasonable efforts to identify the personal representative of the defendant were unsuccessful, the plaintiff may apply for substituted service. However, the application and supporting affidavit must identify the reasonable efforts that had been taken to identify the personal representative and explain why service could not be effected in the ordinary manner. Further, the plaintiff was required to set out the proposed steps to be taken to serve proceedings in a manner likely to bring the documents to the notice of the defendant's personal representative. The Court observed that it was granting the plaintiff one further indulgence and directed him to apply for substituted service by 10 January 2025. Again, the plaintiff was warned that any failure to comply with the Court's directions could result in the plaintiff's claim being dismissed for want of prosecution.

[11] On 10 January 2025 the plaintiff applied for substituted service on the defendant, or in the alternative, an order that service be dispensed with. The plaintiff advised that he had made attempts to achieve service but that he was unable to identify the defendant's personal representative. In particular, the defendant's previous lawyers had not responded to him, the High Court had no record of a personal representative for the estate of the defendant, and he was not in contact with the defendant's family.

[12] The plaintiff suggested that service should be dispensed with because the defendant had clearly indicated before he died that he did not wish to participate in legal proceedings regarding the dispute.

[13] The Court sought further information from the plaintiff about whether he had contact details of the defendant's family members 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 legal representatives, would be sufficient to bring the proceedings to the attention of the defendant's personal representative. The plaintiff advised that he did not have any current contact details of those people. He also suggested that the defendant did not have a personal representative so any substituted service would not bring the proceedings to their attention.

[14] On 19 February 2025 the Court issued a judgment dismissing the plaintiff's application for substituted service.³ A summary of its reasons for doing so included:

- (a) On the balance of probabilities the Court found it was likely that the defendant had a personal representative.⁴
- (b) The issue of identification and effecting service on the defendant is an issue that would not go away. The plaintiff would need to resolve that issue if he were successful in these proceedings and sought enforcement.

³ *VKU v PHZ* [2025] NZEmpC 20.

⁴ *VKU*, above n 3, at [10]. The Court observed that the defendant was a lawyer who knew he was dying, making it inherently unlikely he would die without a will and an associated executor.

- (c) While the plaintiff may seek to pursue his claim against the estate of the defendant, the plaintiff has not applied to join the estate of the defendant in substitution to the defendant's personal representative.
- (d) Even if the defendant did not wish to be involved in the proceedings, his successors may take an interest in this proceeding and may wish to be involved. The Court has no reason to believe that the defendant's successors are aware that they may have legal liabilities under this proceeding.
- (e) The plaintiff is a lawyer and officer of the Court, holding a practicing certificate. The failures to effect service promptly on the defendant likely occurred while the defendant was alive. In addition, the plaintiff's repeated failure to comply with Court directions have likely contributed to the difficulties he is now facing with service.

[15] The Court determined that the plaintiff had not made reasonable efforts to achieve service. It was not appropriate to dispense with service given the plaintiff's conduct in the proceedings. It also found that while the plaintiff sought directions as to substituted service, he had not identified the steps which would likely bring the documents to the notice of the person to be served. On that basis, the application for substituted service could not be granted. The Court finally directed:⁵

[18] If no further steps are made within a 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.

[16] The plaintiff filed a memorandum on 19 March 2025 reiterating that he did not know who the person to be served was, and seeking directions from the Court on what needs to be done in the circumstances.

[17] While the Court may provide some guidance for achieving service, and it has done so in the present case through directions and minutes, the responsibility to effect

⁵ *VKU*, above n 3, at [18].

service ultimately lies with the plaintiff. This responsibility includes identifying reasonable efforts and proposed steps to be taken and explaining why service cannot be effected in the ordinary manner.

Legal Principles

[18] Regulation 6(2)(a)(ii) of the Employment Court Regulations 2000 incorporates the High Court Rules 2016 insofar as they relate to dismissing or staying a proceeding without a trial.⁶ Rule 15.2 provides for the dismissal of a proceeding for want of prosecution as follows:⁷

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

[19] Although the provision does not explicitly permit the Court to strike out proceedings for delay on its own initiative, power to do so arises under the Court's inherent powers.⁸

[20] In *Lovie v Medical Assurance Society New Zealand Ltd*, Eichelbaum J, in dealing with the application of the rule, stated:⁹

... the applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.

⁶ Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁷ High Court Rules 2016, r 15.2.

⁸ *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 10; and Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 902, n 604.

⁹ *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.

[21] In *Commerce Commission v Giltrap City Ltd*, the Court of Appeal also addressed the need to stand back by considering whether the overall interests of justice would allow the case to proceed.¹⁰

[22] The issues of whether there is inordinate delay and whether that delay is inexcusable, depend upon the circumstances of a particular case.¹¹ As to whether there is serious prejudice, the most important factor is whether justice can still be done between the parties if the proceeding goes to trial.¹²

[23] In *A Ifraz Investments Ltd v Jamal*,¹³ this Court relied on the above principles to strike out the plaintiff company's proceedings for want of prosecution. In that case more than a year had passed since the statement of claim had been accepted for filing and the plaintiff had failed to effect service on the defendant to the Court's satisfaction. The plaintiff was given numerous opportunities and clear directions from the Court on the importance of prosecuting its claim in a timely manner and the potential consequences should it fail. Despite this, the plaintiff failed to comply with the Court's directions. The Court found that the inaction of the plaintiff seriously prejudiced the defendant, and it was in the interests of justice for it to order the proceedings to be struck out.

It is in the interests of justice to strike out

[24] The passage of time since the plaintiff filed his challenge to the Authority's determination is significant. It has been more than 18 months. This, combined with the plaintiff's failure to serve the documents on the defendant to the satisfaction of the Court, raises serious concerns about the ability of the Court to fairly deal with the plaintiff's challenge. Further, the plaintiff's own delays in failing to effect service and follow the Court's directions, despite being warned that this could result in his claim being dismissed, undermines the Court's processes. It is contrary to the public interest in having an effective and efficient justice system.

¹⁰ *Commerce Commission v Giltrap City Ltd* (1997) 11 PRNZ 573 (CA) at 577.

¹¹ Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.2.02] and [15.2.03].

¹² At [15.2.04].

¹³ *A Ifraz Investments Ltd v Jamal* [2024] NZEmpC 174.

[25] Collectively, these factors lead me to find that the action, or inaction, of the plaintiff seriously prejudices the defendant.

[26] Standing back and having regard to the interests of justice in the circumstances, it is appropriate to strike out the proceedings for want of prosecution and I order accordingly.

[27] As the defendant has taken no steps in this proceeding, there is no issue as to costs.

M S King
Judge

Judgment signed at 2.45 pm on 27 June 2025