IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 161
EMPC 49/2019

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	TE WHATU ORA – HEALTH NEW ZEALAND (in respect of the former Bay of Plenty District Health Board) Plaintiff
AND	CULTURESAFE NZ LIMITED (IN LIQUIDATION) First Defendant
AND	ALLAN GEOFFREY HALSE Second Defendant
AND	ANA SHAW Third Defendant

Hearing:	On the papers
Appearances:	M Beech, counsel for plaintiff No appearance for first defendant Second defendant in person No appearance for third defendant
Judgment:	26 September 2023

INTERLOCUTORY JUDGMENT (NO 7) OF JUDGE B A CORKILL
(Application for stay of proceedings)

Introduction

[1] Mr Halse has filed an application for stay of the balance of this proceeding, due "to a miscarriage of justice occurring should the proceedings continue prior to mistake in law issues being resolved in the Court of Appeal".

[2] This is a reference to judicial review proceedings filed by Mr Halse in the Court of Appeal on 15 May 2023.

[3] Te Whatu Ora Health New Zealand (Te Whatu Ora) opposes the application, asserting that it would suffer prejudice and be injuriously affected by the granting of the application; that it is in the interests of justice for the application for stay to be denied; and that this proceeding should be set down for hearing at the earliest possible date.

[4] I summarise the history of the proceeding, as to its substantive aspects, briefly. On 22 September 2020, I issued a judgment on a preliminary matter as to the scope of the jurisdiction of the Employment Relations Authority.[1] I concluded that the Authority had jurisdiction in respect of three of four directions it had issued, and that the Court therefore had jurisdiction to consider whether orders under s 134A and/or s 196 of the Employment Relations Act 2000 should be made.[2] Since then, those follow-on issues have not been resolved by the Court due to legal steps which have been taken in the meantime.

[5] A stay was granted whilst an earlier judicial review proceeding was brought by Mr Halse in the Court of Appeal.[3] The Court of Appeal ultimately struck out that judicial review application.[4] Subsequently, the Supreme Court dismissed an application for leave to appeal the judgment of the Court of Appeal.[5]

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1 *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2020] NZEmpC 149, [2020] ERNZ 367 *[The first judgment]*.
2 At [170]–[171].
3 *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2021] NZEmpC 131 at [13]–[22].
4 *H v Employment Relations Authority* [2021] NZCA 507, [2021] ERNZ 858.
5 *H v Employment Relations Authority* [2021] NZSC 188, [2021] ERNZ 1380.

[6] A second application for stay was granted in light of an application for leave brought by Mr Halse to appeal the first judgment out of time to the Court of Appeal.[6] However, the Court of Appeal declined the application for extension of time.[7]

[7] For the purposes of this particular application for stay, I set out the relevant principles. The Court is ultimately guided by the interests of justice. Where there are parallel proceedings involving witnesses, the Courts have developed useful factors for consideration such as which proceeding was commenced first; the potential effect each proceeding may have on the other; the public interest; duplication of witnesses and issues of wasted resources; the state of advancement of the subject proceeding; and whether there is any issue of a multiplicity of proceedings involving the same subject matter arising.[8]

[8] Only some of these considerations are relevant here since the proceeding in this Court is a witness action and the proceeding in the Court of Appeal is not; the proceeding in this Court involves different circumstances to those raised in the Court of Appeal; and the two sets of proceedings involve different parties.

[9] In my view, when considering the interests of justice in this case, the relevant factors relate to the prospects of success of the judicial review proceeding, the extent to which a successful outcome of the Court of Appeal proceeding could ultimately impact on the present proceeding, and finally, the state of advancement of the present proceeding.

The proposed Court of Appeal proceedings in more detail

[10] The judicial review proceeding which has been instituted in the Court of Appeal by Mr Halse is brought against the Court as first respondent, the Employment Relations Authority as second respondent, and the Rangiura Charitable Trust Board

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6 *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2022] NZEmpC 89 at [70]–[81].

7 *H v Bay of Plenty District Health Board* [2022] NZCA 260.

8 See *Transpacific All Brite Ltd v Sanko* [2012] NZEmpC 7 at [34]; and see also *Speed v Board of Trustees of Wellington Girls College* [2017] NZEmpC 74 at [29]–[30].

(the Trust) as third respondent. Apart from Mr Halse, none of those parties is cited in this proceeding.

[11] Two decisions in that set of litigation are pleaded as being reviewable. They concern a minute issued by the Court on 8 February 2022 and a decision striking out a proceeding issued on 13 September 2022.[9]

[12] The statement of claim, which raises Mr Halse's application for judicial review in the Court of Appeal, recites the background. It then refers to s 27 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) which, in summary, states that every person whose rights are affected by a determination of a tribunal or public authority has the right to apply, in accordance with law, for judicial review; this right includes the right to bring civil proceedings against the Crown in the same way as civil proceedings between individuals.

[13] The pleading goes on to refer to certain provisions of the Judicial Review Procedure Act 2016 (the JRP Act). Reference is made to s 10(1) of that Act which provides that a respondent to an application must file a statement of defence unless otherwise directed by a Judge under s 14. Section 14 includes, as one of the orders or directions which a Judge may make, a direction that the name of any party be struck out.

[14] It is alleged that in the particular proceeding, the Authority at no time filed a statement of defence in accordance with s 10(1); nor did it seek to be struck out as a party in accordance with s 14(2)(b)(ii) of the JRP Act; nor did the employing party, the Trust, apply to be struck out as a party.

[15] Subsequent steps in the proceeding are recited. It is asserted the Court exceeded its jurisdiction when issuing the minute referred to earlier by dispensing with various obligations which it says fell on the Court, the Authority, and the employer.

[16] Next, it is alleged the Court erred in striking out Mr Halse's judicial review application, thus violating Mr Halse's right to be heard under s 27(2) and (3) of the

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9 *Halse v Employment Relations Authority* [2022] NZEmpC 167, [2022] ERNZ 808.

Bill of Rights Act on all aspects of his judicial review claim. This cause of action is brought on several grounds, including that the Authority did not comply with its legal obligations to file a statement of defence or apply for leave to appear in the proceeding.

[17] Declarations are sought that the identified decisions of the Employment Court were unlawful on the grounds of illegality by reason of absence of jurisdiction, defeat of legitimate expectations, procedural impropriety, and the denial of Mr Halse's right to justice.

Overview of the parties' positions in the application for stay

[18] Mr Halse submitted that the proceedings brought in the Court of Appeal are "closely linked" to another set of judicial review proceedings determined in this Court concerning the Bay of Plenty District Health Board (whose rights were subsumed by Te Whatu Ora on 1 July 2022) as employer, and Ms Shaw as employee. I will refer to that proceeding as EMPC 381/2021.

[19] In that case, Judge Beck struck out Mr Halse's application for judicial review of certain directions issued by the Authority as well as its determination removing the matter to the Court.[10]

[20] Mr Halse said the problems which occurred in the proceeding which is the subject of the Court of Appeal judicial review proceeding, also occurred in EMPC 381/2021.

[21] Mr Halse said that this proceeding is closely linked to EMPC 381/2021, where the parties are the same; that were he to succeed in the Court of Appeal matter, he would seek a rehearing of EMPC 381/2021; and that these steps would in turn impact on this Court's first judgment.

[22] He went on to say there would be a miscarriage of justice if this proceeding was not stayed before a mistake in law was corrected. The purported mistake relates

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10 *Halse v Employment Relations Authority* [2022] NZEmpC 149, [2022] ERNZ 717.

to the practice of the Authority not taking an active part in judicial review proceedings, including in EMPC 381/2021.

[23] Mr Halse said that previously he did not have a clear understanding of the significance of the questions of law that the Court of Appeal was now being asked to consider.

[24] Mr Halse disputed that a stay of the present proceeding would prejudice Te Whatu Ora. He said that given the length of time that had transpired so far, a delay to address an important question of law and miscarriage of justice would outweigh short-term expediency.

[25] Referring to the overall interests of justice, he said it was preferable for a stay to be granted until such time as the proceedings in the Court of Appeal had been resolved and that a serious miscarriage of justice would occur if the Court did not "pause" these proceedings. He said the balance of relevant considerations were demonstrably in his favour.

[26] At the time of the filing of submissions by Mr Beech, counsel for Te Whatu Ora, the Court of Appeal proceedings had yet to be filed. After this step had occurred, I allowed supplementary submissions to be filed. In his supplementary submission, Mr Beech said that Te Whatu Ora was not a party to the judicial review proceedings in the Court of Appeal. He argued there was therefore no reason for the current proceedings to be stayed pending resolution of that matter. It also followed that the pleaded causes of action would not affect the current proceedings. Moreover, Mr Halse's right to bring the Court of Appeal proceedings would not be curtailed or rendered ineffectual if the Court were to decline to grant a stay.

[27] Mr Beech also referred to the fact that a stay had similarly been sought in EMPC 381/1021. The application for stay on the grounds of the then intended Court of Appeal action had been dismissed.[11] In the course of the Court's review of the history of that case, it had been noted that no application for leave to appeal the strikeout order had been made.

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[11] *Halse v Employment Relations Authority* [2023] NZEmpC 51.

[28] Turning to whether Te Whatu Ora would be injuriously affected by the grant of a stay, Mr Beech argued that the organisation would suffer prejudice resulting from its inability to prosecute its claim and to have this long running proceeding brought to an end. It was inconsistent with the principles of access to justice to continue to delay the determination of the proceeding.

[29] With regard to good faith issues, he said that the proceedings had been on foot for almost four years. Te Whatu Ora had been put to the cost of defending a myriad of interlocutory and other applications. He submitted that against a background of unsuccessful previous applications, any new process was not being pursued in good faith and was merely an attempt to re-litigate matters which had already been determined.

[30] On a balancing exercise, he submitted it should be determined that a stay was unnecessary in the circumstances and prejudicial to Te Whatu Ora's rights, including its right to have the current proceeding determined without delay. The application for stay should accordingly be declined.

Analysis

Potential impact of judicial review proceeding on this proceeding

[31] As was noted earlier, the Court of Appeal proceeding brought by Mr Halse is not one which relates to the parties in this proceeding.

[32] It follows that if the Court of Appeal proceeding were to succeed, it would not automatically impugn the first judgment in this proceeding, as Mr Halse appears to suggest.

[33] Numerous steps have been taken since September 2020. As noted, judicial review proceedings were issued in respect of this Court's first judgment, but the Court of Appeal dismissed that proceeding. The Supreme Court subsequently dismissed an application for leave to appeal the judgment of the Court of Appeal. Then Mr Halse

brought an application for leave to appeal the first judgment out of time, but the Court of Appeal dismissed that application.[12]

[34] At this stage, then, it is difficult to see how a yet further appellate step could be taken in respect of the first judgment.

[35] There is also the problem that this proceeding is not a judicial review proceeding to which the Authority is a respondent. Therefore, the issue which Mr Halse has placed before the Court of Appeal could have no direct impact on it.

[36] Mr Halse argues, instead, that EMPC 381/2021 could potentially be affected by the Court of Appeal judgment, and that he would, if appropriate, seek a rehearing of it. As I understand it, his submission is that were that application for rehearing to succeed, that could have implications for this Court's first judgment. However, it is far from clear how that would be the case in light of the procedural issues I have described.

Prospects of success

[37] The foregoing points rest on the assumption that the judicial review proceeding in the Court of Appeal will succeed. However, the realism of that possibility needs to be assessed. On a preliminary basis, is there a reasonable prospect of that proceeding being successful?

[38] The claim placed before the Court of Appeal materially relies on s 10(1) of the JRP Act, which provides that a statement of defence must be filed by a respondent.

[39] No reference, however, is made to s 10(2) of that Act. The language of that provision suggests the filing of a statement of defence by a decision maker – that is a court, tribunal or officer of a court or tribunal – is discretionary.[13] Such a party "may" file a statement of defence.

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12 See above at [5]–[6].

13 The Employment Relations Authority is a tribunal: *Claydon v Attorney-General* [2002] 1 ERNZ 281 at [112].

[40] The distinction between s 10(1) and s 10(2) is not surprising. The possibility of such a decision maker not taking an active stance is consistent with the principle that decision makers should not "enter the fray" by becoming active protagonists in appeals from their own decisions; this is a well established principle.[14] The proper course is to abide the decision of the appellate Court, letting the first instance decision speak for itself.

[41] A yet further difficulty relates to relief sought in the Court of Appeal. The statement of claim in those proceedings refers to declaratory relief. However, any such relief is discretionary.[15] Thus, even if a ground for review were to be established, it does not follow that the Court of Appeal would grant the relief sought.

[42] A variety of factors would fall for consideration in assessing the possibility that relief be granted, including whether there would be sufficient prejudice to justify granting relief.

[43] That issue will include a consideration as to whether there was in fact a miscarriage of justice in this Court due to the fact that the Authority did not file a statement of defence.

[44] In summary, there are a range of significant procedural challenges, all of which would have to be cleared before the previous finding of the Court in this proceeding could fall for review. In my assessment, the prospects of doing so are weak.

The state of advancement of the present proceeding

[45] Next, I must consider the practicalities of the present circumstances. There has been substantial delay in reaching the point of the Court being able to finalise the plaintiff's claims against the defendants. This delay has been caused by the plethora of procedural steps which have been undertaken.

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14 *NZ Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) at 284–285; *Shaw v Attorney-General (No 1)* [2002] NZAR 987 (HC) at [30]; *Fonterra Co-Operative Group Ltd v Grate Kiwi Cheese Co Ltd* (2009) 19 PRNZ 824 (HC) at [12]–[19]; and *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627, [2014] NZAR 177 at [25]–[27].

15 *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549 at [89]–[91].

[46] The plaintiff is entitled to have its case heard. However, in reality, this will not occur immediately. It will be some months before a substantive hearing can be heard because it will likely take place over several days.

[47] At this stage, it is appropriate to allow the present proceeding to be timetabled to a fixture.

Result

[48] I am not persuaded that the interests of justice require the granting of a yet further stay. The application is accordingly dismissed.

[49] The file is to be placed before another Judge for a consideration of timetabling directions.

[50] I reserve costs.

B A Corkill
Judge

Judgment signed at 2.30 pm on 26 September 2023