IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 189
EMPC 8/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of execution
AND IN THE MATTER OF	an application for security for costs and stay of proceedings
BETWEEN	MARIKA PRETORIUS Plaintiff
AND	BOARD OF TRUSTEES OF TAUPO INTERMEDIATE SCHOOL Defendant

Hearing: On the papers

Appearances: K Glass and L Lambert, advocates for plaintiff
K Harkess, counsel for defendant

Judgment: 3 November 2023

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application for stay of execution)
(Application for security for costs and stay of proceedings)

Background

[1] By a determination dated 15 December 2022, the Employment Relations Authority found that email and verbal communications Marika Pretorius had with the Board of Trustees of Taupo Intermediate School (the School) were insufficient to have raised an unjustified dismissal or any other personal grievance claim and that, even if they had been sufficient (and the Authority did not accept they were), such claims

would have been anticipatory because the action or dismissal had not at that point occurred.[1]

[2] The Authority found that the first communication raising a personal grievance was the service copy of Ms Pretorius's statement of problem, which was provided to the School on 27 May 2022. Because Ms Pretorius's employment had ended on 31 January 2021, the raising of her grievance was outside the 90-day time limit. It therefore found that she did not raise her personal grievance in the 90-day time period required by s 114 of the Employment Relations Act 2000 (the Act).[2] It also found that she had not sought leave to raise a personal grievance out of time. Accordingly, the Authority found that the matter was then at an end.[3]

[3] It then found that the School, as the successful party, was entitled to a contribution to its legal costs. Accordingly, it ordered that Ms Pretorius pay it $2,250 within 28 days of the determination.[4]

[4] Ms Pretorius challenges that determination on a de novo basis. This judgment resolves two interlocutory applications made by the parties.

[5] The School has applied for orders that the plaintiff pay security for costs in the sum of $10,000, and that the Court stay these proceedings until security has been paid. Ms Pretorius has made an application to stay execution of the Authority's costs order.

[6] I consider each application in turn.

Application for security for costs

[7] As noted above, the defendant has applied for security for costs of $10,000 in relation to the plaintiff's challenge. It considers the sum sought to be reasonable, given

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1 *Pretorius v Board of Trustees of Taupo Intermediate School* [2022] NZERA 664 (Member Larmer) at [55]–[56].
2 At [65]–[67].
3 At [75].
4 At [79].

that a likely costs award, based on the Court's guideline scale, is in the region of $27,000.[5]

[8] The application is made on the basis that the plaintiff admits that she resides outside of New Zealand, is unable to pay the existing costs order against her in the Authority ($2,250), is impecunious, and will not be able to pay costs if ordered by this Court.

[9] The defendant submits that it should not be put to the cost of defending what it considers to be an unmeritorious challenge when there is no prospect of recovering costs against the plaintiff. It also asks that this proceeding be stayed until security is provided.

[10] On the other hand, the plaintiff submits that she has a high probability of success and that to make an order for security for costs would effectively prevent her from seeking justice because she is not in a position to pay anything. She says this would be inequitable because the reason she is impecunious is due to the actions of the defendant (in terminating her employment).

Legal principles in relation to security for costs

[11] There are no particular provisions relating to security for costs in the Employment Court. Accordingly, pursuant to reg 6(2)(a)(ii) of the Employment Court Regulations 2000 (the Regulations), the Court looks to the provisions of the High Court Rules 2016 (the Rules) when dealing with applications for security for costs.

[12] Under r 5.45(1)(a)(i) and (b) of the Rules, the Court has a discretion to order the giving of security for costs if a plaintiff is resident outside New Zealand or there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in their proceeding.

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5 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[13] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.[6] An order may be made if it is just in all the circumstances.[7] Where an order for substantial security may effectually prevent a plaintiff from pursuing their claim, security should only be ordered where the plaintiff's claim has little chance of success.[8]

Analysis

[14] Based on the affidavit provided in support of the defendant's application, I accept that there is good reason to believe that the plaintiff will not be able to pay an adverse award of costs if she is unsuccessful on her challenge. This is accepted by the plaintiff. Further, she is resident in South Africa. Therefore, the statutory threshold having been met, I am now required to balance the interests of both the plaintiff and the defendant in considering whether to order security.

Merits

[15] The defendant submits that, in circumstances where the plaintiff admits that she is unable to meet a current or future costs award, the whole of the financial burden of bringing the claim falls on the defendant, a school board. It argues that the Court should therefore carefully consider whether the plaintiff's right of access to justice should prevail. It says the balance falls more strongly in favour of the defendant's interests where the plaintiff's claim lacks merit.

[16] Both parties strongly assert the merits of the case as being in their favour.

[17] This proceeding arises in the context of the COVID-19 Public Health Response (Vaccinations) Order 2021 that came into effect at 11.59 pm on 25 October 2021 (the Order). The Order provided for mandatory vaccinations for education providers. As a science teacher at the School, Ms Pretorius was an "affected person" under the terms of the Order, so the vaccination mandate applied to her.

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6 *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].
7 High Court Rules 2016, r 5.45(2).
8 *McLachlan v MEL Network Ltd,* above n 6, at [15].

[18] The central issue for the challenge is whether Ms Pretorius raised a grievance within 90 days. She relies on correspondence, which is before the Court, and conversations with the principal of the school, which are a matter of contested evidence. She argues that it is the collective effect of this correspondence, written and oral, that amounts to raising her grievance for unjustified disadvantage,[9] and it should be considered as a whole.

[19] Both counsel for the defendant and the representative for the plaintiff took me to aspects of the written correspondence.[10]

[20] It is correct that Ms Pretorius did not refer to a grievance per se; however, that is not essential.[11]

[21] The defendant says that the letters do not include any information from which it could conclude that the plaintiff alleged she had been disadvantaged by its actions or that it had breached any health and safety obligations owed to her. It further says that even if it did, any such communication would be anticipatory[12] because the school did not take any steps in relation to her employment until 30 November 2021, when it invited her to a meeting and set out the employment process it proposed to follow if she did not meet the requirements of the Order.

[22] Further, the defendant says the plaintiff's complaint was with the lawfulness of the Order which is outside the jurisdiction of the Authority and/or the Court.

[23] The plaintiff submits that the correspondence raised various possible breaches. It recorded that there was no requirement to be vaccinated in her employment agreement and that attempts to unilaterally change a contract are likely to be a breach of that contract. It asked for the information contained in it to be taken into account and noted the mutual obligations of good faith under the Act in relation to being active and constructive in establishing and maintaining a productive employment

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9 Her statement of claim does not pursue a claim for unjustified dismissal.
10 Three letters dated 27 October 2021 and one dated 6 November 2021.
11 *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 at [37].
12 The defendant relies on *Creedy v Commissioner of Police* [2006] ERNZ 517 at [28]–[30]; a grievance cannot be raised in anticipation of an event.

relationship in which the parties are communicative and responsive. It asserted that the School had a responsibility to assess the risks and engage with her in a health and safety risk audit, and stated that she looked forward to conducting and completing it with the School (noting that such an audit was key to the maintenance of the employment relationship). The plaintiff says the correspondence was not anticipatory. It was responding to steps taken by the School in preparation for the incoming mandate and which the plaintiff said were causing her psychological harm. The plaintiff argues that she was clearly seeking some sort of response as she had written four times and met with Mr Clark, but no reply was forthcoming.

[24] It is correct that the majority of the plaintiff's correspondence dealt with concerns about the Order and its implications for her. However, it also raised issues about how the School was dealing with her and the actions it was taking, or not taking, and so was not anticipatory. Further, Ms Pretorius also relies on the contents of her conversations with Mr Clark, which are in dispute.

[25] The defendant submits that the Court is able to properly determine the merits on the information currently before it and that those merits lie with it. I do not agree. The plaintiff is pursuing a de novo challenge to the Authority's determination. Her claim cannot be said to lack merit at this stage. The evidence will be heard afresh and in person – it was on the papers in the Authority.[13] Therefore, it is not possible to predict with any certainty what the outcome will be.[14]

[26] This is a neutral factor in the balancing exercise.

Other factors

[27] The plaintiff submits that the proceedings relate to developing areas of law. However, I do not consider that it engages novel or important questions. The plaintiff is referring to her case if she succeeds in having her grievance heard. That is premature but in any case, there is nothing to indicate that those substantive issues will be significant or novel on any level.

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13 *Pretorius v Board of Trustees of Taupo Intermediate School*, above n 1, at [28].
14 See also *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39](c).

[28] The issues arising when determining whether a grievance was raised within 90 days are well known. This case is unlikely to give rise to issues of public interest. This factor counts in favour of security being granted.

[29] The plaintiff attributes her impecuniosity to the actions of the defendant. She says she was forced to return home to South Africa due to the terms of her work visa. Again, it is not possible to determine such matters at this stage. However, I note that Ms Pretorius's grievance is for unjustified disadvantage, not for unjustified dismissal, and it was clear that the Order was being revoked after she booked tickets but before she left New Zealand. It is apparent that her personal circumstances are difficult, but it is not clear that the actions of the defendant are the cause. This is not a factor that counts against security being granted.

[30] The defendant seeks only a portion of the likely scale costs entitlement,[15] properly recognising that it is just that it bears some of the costs risk. However, it submits that it is not just for it to take all of the risk, in particular where, if it was successful, it would have to enforce outside of the jurisdiction. I agree that this is a proceeding where, in the circumstances, some risk should be shared. This factor counts in favour of security being awarded.

[31] Overall, having balanced the factors above, I consider that it is in the interests of justice for a modest amount of security for costs to be awarded. However, in light of the risk of the order preventing the challenge from being heard, I consider the sum of $5,000 is reasonable as an order of $10,000 would be prohibitive.

Conclusion

[32] Accordingly, I order that the sum of $5,000 be paid into Court as security for costs within 28 days of the date of this judgment. As soon as practicable following receipt, the Registrar of the Employment Court is to place the sum on interest bearing deposit until further order of the Court. The plaintiff's challenge is stayed until the payment is made or there is a further order of the Court.

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15 $10,000 of a possible $27,000

Application for stay of execution

[33] Ms Pretorius seeks a stay of execution of the costs order made by the Authority pending the resolution of her challenge.

[34] The defendant has proposed that the matter be resolved by way of a payment into Court of the sum at issue ($2,250). However, the plaintiff advises that she is unable to make such a payment and does not consider she should be required to do so.

[35] She submits she has good cause to believe that she will be successful in her challenge, that therefore costs will no longer be payable, and that to pay such an award to the defendant would mean that it will have profited from its wrongdoing.

[36] In the submissions in support of her application, the plaintiff further argues that her case has raised matters of public interest in relation to the implementation of the Order. Additionally, she says that, because she is unable to pay the costs award, to be required to do so would constitute considerable hardship, whereas the School, as a publicly funded institution, will not suffer hardship or detriment in the event a stay is granted.

[37] The defendant submits that the plaintiff has not made out the grounds for a stay of execution of the Authority's determination. It says it is not profiting from carrying out the order, is not seeking damages or any additional benefit, but is merely seeking to enforce an existing costs order in its favour.

[38] It says the plaintiff's challenge is not novel or important. It argues that the factual context of the Order, and the plaintiff's choice not to receive the vaccine (and her reasons), do not elevate her claim or the 90-day issue into a matter of public importance or a novel or developing area of law. It says this case requires a simple analysis whether the communications relied on met the requirements for raising a grievance under s 114 of the Act.

[39] The defendant further argues that the absence of a stay will not render the plaintiff's challenge nugatory. Even if the Court declines the plaintiff's application, she will still be able to pursue her substantive challenge, subject to the consequences

of any enforcement steps that the defendant may decide to take. Additionally, it submits that the plaintiff is not pursuing her challenge with the necessary bona fides, there having been unnecessary and unreasonable delay on her part.

Legal principles relating to a stay of execution

[40] As s 180 of the Act makes clear, a challenge does not operate as a stay of proceedings on a determination of the Authority. That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success. Regulation 64 of the Regulations provides that the Court may order a stay of proceedings where a challenge against a determination of the Authority is pursued. A stay may relate to the whole or part of a determination or to a particular form of execution and may be subject to conditions (including as to the giving of security) as the Court thinks fit. The Court's discretion is wide but must be exercised judicially and according to principle.

[41] The range of factors generally considered relevant in this jurisdiction are well established. They are borrowed from the approach adopted in the High Court and the Court of Appeal under the relevant rules of both Courts.[16]

[42] The starting point is that the successful party is entitled to the benefit of the judgment they have obtained at first instance. As the Court of Appeal has confirmed, orders for stay should be approached with restraint, being the least necessary to preserve the losing party's position against the prospect of the appeal succeeding. The interests of the successful party are to be balanced against the interest the challenging party has in preserving its position in case its challenge succeeds. The challenging party needs to establish the basis for a stay and can be expected, where a money judgment is involved, to make some concession, such as an offer to make a payment into Court pending the outcome of the appellate process.[17]

[43] There are additional factors which may be relevant to the assessment process, including the likely merits, impact on non-parties, the importance of the matters at

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[16] See *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733; applying *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11]; and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

[17] *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19].

issue, and whether the challenge is brought in good faith. Depending on the particular circumstances, some factors may carry less or more weight; there may be other factors which ought to be taken into account – it is not a tick-box exercise. In some cases, for example, it will not be possible to make an informed assessment of the merits; in others, no question of public interest, novelty or importance will be engaged.

[44] In weighing the competing factors, regard will be had to the balance of convenience. Overarching consideration will then be given to the overall interests of justice.

Analysis

Merits

[45] As already noted above, despite both parties urging that the merits lie with their cases, it is not possible to assess the merits at this stage. Ms Pretorius is pursuing a de novo challenge to the Authority's determination. The evidence will be heard afresh and while the written correspondence which is relied on as raising the grievance is before the Court, she also relies on conversations with the principal which took place around about the same time, and so it is difficult to predict with any certainty how the evidence will unfold or what the outcome will be.

Challenge rendered ineffectual if no stay granted?

[46] Notwithstanding my findings in relation to the merits, there is always a possibility that a challenge will succeed. However, that does not of itself warrant a stay.[18] Ms Pretorius has not explained how her challenge would be rendered nugatory if she was required to pay the amount outstanding.

[47] Further, there is no suggestion that if monies were paid to the defendant, they would not be able to be repaid in the event that the plaintiff was successful in her challenge and the costs finding reversed.

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[18] See *SP Blinds Ltd v Hogan* [2022] NZEmpC 104, [2022] ERNZ 416 at [11].

[48] The defendant has made the point that not granting a stay would not prevent the plaintiff pursuing her challenge subject to any consequences of any enforcement steps. It is not clear what these enforcement steps would be or indeed whether they would be pursued, but the amount involved is relatively modest. There is no evidence that it is likely that enforcement of this order could bring an end to these proceedings.

Is the challenge brought in good faith?

[49] The defendant has suggested that the challenge is not brought in good faith and points to delay and unnecessary and unreasonable costs arising from the way in which the plaintiff has pursued the proceedings to date. It notes with concern the plaintiff's statement, through her representatives, that she was in no hurry to have the proceedings determined:

> The Union is in no hurry and if we decide to raise the matter as a common law action under s 142 of the Employment Relations Act 2000 we have nearly 5 years to do so.

[50] The defendant notes that, consistent with that statement, the plaintiff has sought and obtained numerous extensions of time and has indicated an intention to amend the amended statement of claim but has not done so. It is critical of the nature of her submissions, pleadings and evidence, and the positions that have been taken in relation to both applications.

[51] It is fair to say that the plaintiff's submissions and the documentation filed in relation to these applications include significant material that is irrelevant to the matters at issue at this point. I do not consider that this is an issue of good faith. Rather, I consider that this issue arises as a result of the inexperience of those representing her and their misplaced desire to prematurely argue the merits of the broader factual context within which the employment relationship problem between the parties arose – vaccine mandates. However, when directed by the Court to amend the statement of claim, having regard to the Regulations, it was done promptly and properly. Further, during this hearing, when prompted by the Court to focus on the issues at hand, for the most part the plaintiff's representatives made efforts to redirect their submissions accordingly.

[52] I do not consider that there is any issue of good faith in bringing the challenge.

Importance of matters of issue

[53] As already noted above, while the challenge is important to the parties, it does not raise any novel or important points of law. Nor are there any public interest considerations in either this application or the challenge.

Impact on third parties?

[54] There is no evidence of any third parties being impacted by this decision.

Balance of convenience/interests of justice

[55] I am satisfied, having regard to the material before the Court, that the balance of convenience weighs against the grant of a stay. The plaintiff has not made out an adequate basis for the exercise of the Court's discretion in her favour. The defendant is entitled to the award, which is not otherwise adequately secured. It is already at risk of funding the defence of a challenge in circumstances where recovery of costs, if successful, is difficult. It is not in the overall interests of justice to make the order sought.

Conclusion

[56] The application for a stay of execution is declined.

Costs

[57] The defendant is entitled to costs. If they cannot be agreed, I will receive memoranda.

Kathryn Beck
Judge

Judgment signed at 3 pm on 3 November 2023