

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 53
EMPC 343/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	ALLSTAR ROOFING LIMITED Plaintiff
AND	BAOYOU LIU Defendant

Hearing:	On the papers
Appearances:	S Ravindra, counsel for plaintiff D Kim, advocate for defendant
Judgment:	25 March 2024

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application for stay of proceedings)**

[1] Mr Liu was found by the Employment Relations Authority (the Authority) to have been unjustifiably disadvantaged by the actions of Allstar Roofing Ltd (ARL).¹

[2] ARL was ordered to pay Mr Liu:²

- (a) \$10,000 compensation for humiliation, loss of dignity and injury to his feelings;

¹ *Liu v Allstar Roofing Ltd* [2023] NZERA 484 (Member Gane).

² At [46]; see *Liu v Allstar Roofing Ltd* [2023] NZERA 732 (Member Gane) at [9].

- (b) \$1,647.25 in unpaid public holiday pay;
- (c) Arrears of wages and holiday pay to be quantified; and
- (d) Interest on the amounts in paragraphs [2](b) and (c) above.

[3] ARL was also ordered to pay a penalty of \$3,000 to the Authority for transfer to a Crown Bank Account.

[4] While the Authority determined that ARL had not paid Mr Liu the correct contractual rate for his employment and he was entitled to arrears of wages and holiday pay for the period 12 November 2019 to 14 January 2021, it did not calculate the quantum of the wages and holiday pay arrears owing in its determination.³ The quantum was left for the parties to reach agreement on and, failing that, the parties had leave to return to the Authority to determine the quantum of arrears.

[5] ARL filed a de novo challenge to the Authority's substantive determination, which is set down to be heard by this Court on 15 and 16 May 2024. ARL is seeking to set aside the Authority's determination. It has also applied for a stay of proceedings of the Authority's orders against it. Mr Liu is opposed to the application. Timetabling orders were made for the exchange of evidence and submissions, which has been completed. The application proceeded on the papers.

[6] Following the exchange of evidence and submissions on the application for the stay, the Authority issued a second determination on 7 December 2023, where it determined the quantum of arrears and interest payable to Mr Liu under the first determination. It also determined costs. The Authority ordered ARL to pay Mr Liu:⁴

- (a) \$7,706.80 in wages arrears;
- (b) \$616.54 in holiday pay;

³ *Liu v Allstar Roofing Ltd*, above n 1, at [35] and [36].

⁴ *Liu v Allstar Roofing Ltd*, above n 2, at [9].

(c) \$761.27 in interest; and

(d) \$4,500 in costs and a \$71.55 lodging fee.

[7] On 5 March 2024, the application for stay was amended to include the Authority's 7 December 2023 determination. The parties filed supplementary submissions, and the amended stay application was then set down to be determined on the papers.⁵

Legal Framework

[8] The starting point is that a challenge does not operate as a stay of proceedings on a determination of the Authority.⁶ That reflects the principle that a successful litigant is ordinarily entitled to the fruits of their success. There are, however, circumstances in which a stay is appropriate, and the Court may order a stay of proceedings where a challenge against a determination of the Authority is pursued.⁷ 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.⁸

[9] The Court's discretion is wide but must be exercised judicially and according to principle. In considering whether to order a stay, the overarching consideration is whether that would be in the interests of justice, taking into account various factors, including:⁹

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

⁵ Although no challenge has been filed to the second determination of the Authority, the Court has jurisdiction to issue a stay in relation to that determination due to its derivative nature, see *Maheta v Skybus NZ Ltd* [2022] NZCA 516, [2022] ERNZ 1005.

⁶ Employment Relations Act 2000, s 180.

⁷ Employment Court Regulations 2000, reg 64.

⁸ See *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [19]. While this judgment was unrelated to stay applications in this Court, it has been cited with approval in a number of Employment Court judgments, see *Jeon v Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 114 at [6]; *Pretorius v Board of Trustees of Taupo Intermediate School* [2023] NZEmpC 189 at [42]; and *Spring 2017 Ltd v Taifau* [2024] NZEmpC 33 at [4].

⁹ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5]; and *Dymocks Franchise Systems (NSW) PTY Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

- (b) whether the challenge is brought for good reasons and being pursued in good faith;
- (c) whether the successful party at first instance would be injuriously affected by a stay;
- (d) the extent to which a stay will impact on third parties;
- (e) the novelty and/or importance of the questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

Affidavits and submissions have been filed

[10] Mengyao Yu, director and shareholder of ARL, has filed an affidavit on behalf of ARL. In essence, ARL's position is that a stay is necessary to protect its challenge rights. The affidavit claims that if a stay is not granted, ARL's challenge rights will be rendered ineffectual because Mr Liu would not be able to repay the money paid by ARL.

[11] Mr Liu has filed an affidavit. His evidence is that he is currently employed, and he confirms that he is in a "critical financial situation" with very little money left to pay for other matters after the cost of living. Bank statements have been provided to support his evidence. However, the bank statements show that Mr Liu is managing to live within his means. He is not in debt, and it appears that he is managing to save a modest amount each month. Mr Liu's evidence is that nevertheless he has had difficulty paying for the fees and costs associated with defending ARL's challenge. His evidence is that he understands that if ARL is successful in its challenge, he may need to repay the awards made by the Authority. He promises to return any money to ARL if he is found liable to do so.

[12] Mr Kim, advocate for Mr Liu, submits his client should be entitled to the fruits of his success. He also submits that Mr Liu understands the liability he will have if the stay is not granted and that he will repay the money by all means including with his assets in China if his defence is unsuccessful. Mr Kim's submissions also raise the

concern that if ARL's challenge is not successful, it will liquidate its company to escape any liabilities. However, no evidence is provided in support of this submission.

[13] ARL's submissions focus on the merits of its challenge and the risk that its challenge would be being rendered ineffectual due to Mr Liu's critical financial situation. ARL submits that Mr Liu does not have any means to repay the money awarded by the Authority should its challenge succeed, due to his lack of assets and savings in New Zealand. ARL's submissions note the lack of evidence provided to support the submission that Mr Liu has assets in China that could be relied upon to repay any amounts ordered.

[14] ARL submits that if a stay is not granted, there is a real risk of it not being able to pursue its challenge. It seeks to rely on the High Court judgment of *Cullen Group Ltd v Commissioner of Inland Revenue* to support its submission that a factor weighing most heavily in favour of a stay is if the appeal of the substantive judgment may be rendered nugatory if a stay is not granted, because liquidation will inevitably follow, preventing the appeal.¹⁰ However, *Cullen* does not support ARL's submissions; rather, the High Court makes findings to the contrary that:¹¹

... a party owing costs under a judgment cannot force a stay of the judgment by effectively threatening its own liquidation. Rather, that appears to be a reason in favour of liquidation, and against a stay, to enable enforcement of the judgment. That is particularly so given the parties agree the case law holds that a money judgment, particularly a costs judgment, should be paid and a stay not granted unless security is provided.

[15] Similarly, this Court has recently observed in *Spring 2017 Ltd v Taifau* that if an applicant company is in a perilous financial state, a stay may well serve to increase the prejudice faced by the respondent.¹² There is no evidence before the Court to support any concerns ARL has raised in its submissions about its financial position and the impact on it if a stay is not granted.

¹⁰ *Cullen Group Ltd v Commissioner of Inland Revenue* [2019] NZHC 3110, (2019) 24 PRNZ 703 at [17].

¹¹ At [19].

¹² *Spring 2017 Ltd v Taifau*, above n 8, at [8].

Analysis

[16] As noted, the default position is that Mr Liu, as the successful party before the Authority, is entitled to receive the sum that ARL was ordered to pay him. The question is whether ARL has established that the default position should be displaced.

[17] Despite both parties urging that the merits lie with their cases, it is not possible to assess the merits at this stage. ARL is pursuing a *de novo* challenge to the Authority's determination. The evidence and documentation being relied upon by each party is yet to be considered by the Court, so it is difficult to predict with any certainty how the evidence will unfold or what the outcome will be.¹³ Notwithstanding my findings in relation to the merits, there is always a possibility that the challenge will succeed. However, that does not of itself warrant a stay.

[18] ARL has not established that Mr Liu would be unable to repay any monies if its challenge is successful. The evidence before the Court is that Mr Liu is in current employment and is living within his means. He has given evidence that he is aware that ARL is challenging the Authority's determination and that if it were to be successful, he would repay the money. In the meantime, Mr Liu is out of pocket in respect of the amounts ordered by the Authority, which impacts him. However, I consider some weight must be given to Mr Liu's own evidence about his financial situation, which confirms to a certain extent the assertions of ARL that his financial position would impact on his ability to repay the Authority's awards in the event that ARL's challenge is successful. I consider it is a finely balanced decision on whether ARL's challenge will be rendered ineffectual if the stay is not granted. I find that this factor weakly supports the granting of the stay.

[19] For the purposes of this application, I accept that ARL's challenge is brought in good faith and for good reasons. No issues were raised by the parties in respect of the impact of third-party interests, nor was it suggested that the challenge would raise any novel or important issues or any issues of public interest.

¹³ Although dealing with an application to bring an appeal out of time, the Supreme Court made helpful observations about the necessarily superficial nature of any consideration of the merits of cases at an interlocutory stage in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39].

Decision

[20] In carrying out the balancing exercise and having regard to the overall interests of justice, I am of the view that ARL's application for a stay of proceedings of the determination should be granted in part. However, because Mr Liu will be deprived of his entitlement to enforce the determination by the stay, the following conditions apply:

- (a) On or before 4 pm on 8 April 2024, ARL is to pay Mr Liu half of the total sums awarded by the Authority (excluding the penalty of \$3,000 payable to the Authority), being the sum of \$12,651.71.¹⁴
- (b) On or before 4 pm on 8 April 2024, ARL is to pay to the Registry of the Employment Court the balance of the awards (including the penalty of \$3,000 payable to the Authority), amounting to \$15,651.70. This sum is to be held by the Registrar in an interest-bearing account pending further order of the Court.
- (c) The plaintiff is required to prosecute its challenge in a timely fashion, and this will be reviewed periodically by the Court.
- (d) If the sums directed above are not paid to Mr Liu and the Registrar within the time specified, then the order for stay will lapse, and Mr Liu will be free to take such enforcement action as he chooses.

[21] As the plaintiff has been granted an indulgence by the Court, which has precluded Mr Liu from obtaining a substantial proportion of the awards made by the Authority, it is appropriate that the plaintiff should pay Mr Liu's costs in any event on its application for stay. Such costs are to be calculated in accordance with the Court's

¹⁴ This includes half of all the compensation ordered, the interest ordered on that compensation, and costs. No distinction is made between whether sums were ordered on a net or gross basis. As interest was ordered up until the date of payment, any additional sum of interest owing will need to be calculated separately from the amount set out above, see *Liu v Allstar Roofing Ltd*, above n 1, at [40].

Guideline Scale on a category 2B basis.¹⁵ Any dispute as to the calculation of such costs, or failure by the plaintiff to pay such costs within a reasonable time, may be referred to the Court by appropriate memoranda for resolution and, if necessary, further orders.

M S King
Judge

Judgment signed at 11.15 am on 25 March 2024

¹⁵ “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 18.