

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

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

**[2023] NZEmpC 153  
EMPC 43/2023**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER OF an application by the plaintiff for stay of  
proceedings

AND IN THE MATTER OF an application by the defendant for a partial  
strike out of proceedings

AND IN THE MATTER OF a challenge by the defendant to an objection  
to disclosure

BETWEEN CODY JOYCE  
Plaintiff

AND ULTIMATE SITEWORKS LIMITED  
Defendant

Hearing: On the papers

Appearances: L Anderson, advocate for plaintiff  
D Fleming and K Singleton, counsel for defendant

Judgment: 15 September 2023

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**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN  
(An application by the plaintiff for stay of proceedings; an application by the  
defendant for partial strike out and a challenge by the defendant to an objection  
to disclosure.)**

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[1] This interlocutory judgment deals with three matters:

- (a) an application by Mr Joyce for a stay of the Employment Relations Authority's (the Authority's) costs determination;

- (b) an application by Ultimate Siteworks Limited (Ultimate Siteworks) for a partial strike out of Mr Joyce’s claim; and
- (c) a challenge from Ultimate Siteworks to Mr Joyce’s objection to disclosure.

[2] The Court suggested to the parties that they endeavour to reach agreement on one or more of these matters, but, unfortunately, they have been unable to do so.

### **Mr Joyce challenges the Authority’s determinations**

[3] The Authority found that Mr Joyce was not dismissed by Ultimate Siteworks and that, accordingly, he did not have a valid unjustifiable dismissal grievance or any other type of grievance.<sup>1</sup>

[4] The Authority subsequently ordered Mr Joyce to pay \$5,750 as a contribution towards Ultimate Siteworks’ representation costs.<sup>2</sup>

[5] Mr Joyce has challenged both determinations on a de novo basis.

[6] Mr Joyce seeks a finding that he has a personal grievance for unjustifiable dismissal (actual or constructive) in terms of s 103(1)(a) of the Employment Relations Act 2000 (the Act) or, in the alternative, unjustifiable disadvantage in terms of s 103(1)(b) “with respect to the Court’s consideration that a personal grievance can be found to be of a different type from that alleged in s 122 of the Act”.

[7] Mr Joyce claims lost wages and holiday pay and compensation for KiwiSaver on those amounts, interest, and compensation for hurt, humiliation, loss of dignity and injury to his feelings. He also seeks an order that the costs determination be set aside.

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<sup>1</sup> *Joyce v Ultimate Siteworks Ltd* [2023] NZERA 62 (Member Dumbleton).

<sup>2</sup> *Joyce v Ultimate Siteworks Ltd* [2023] NZERA 120.

## **Mr Joyce applies to stay the Authority's costs orders**

[8] Mr Joyce applies for an order staying the Authority's costs award. His primary position is that a stay should be granted without the requirement for him to make any payment into Court.

[9] In the alternative, he says that, while it would be very inconvenient for him to sell one of his vehicles to put up the full amount of the costs award immediately, he would be able to pay the amount into Court if the Court determined that, to strike a balance between the parties' interests, he must do so.

[10] United Siteworks opposes the granting of an unconditional stay but does not oppose the granting of a stay subject to the condition that the monies owed are paid into Court within a specified time.

[11] A challenge does not operate as a stay of execution.<sup>3</sup> However, the Court has the power to order a stay of proceedings where it considers that to be justified.<sup>4</sup> Both parties refer to the principles that apply where the Court is considering an application for a stay. The overarching consideration is whether granting a stay will be in the interests of justice, taking into account various factors, including:<sup>5</sup>

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

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<sup>3</sup> Employment Relations Act 2000, s 180.

<sup>4</sup> Employment Court Regulations 2000, reg 64.

<sup>5</sup> *Assured Financial Peace Ltd v Pais* [2010] NZEmpc 50 at [5]; *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA).

(f) the public interest in the proceeding; and

(g) the overall balance of convenience.

[12] There is no wider interest in the proceedings and no novel or important questions involved.

[13] Mr Joyce points to previous evidence that suggested Ultimate Siteworks was in dire financial circumstances. He is concerned that any money paid to Ultimate Siteworks would be unrecoverable if he succeeds in his challenge, rendering it ineffectual.

[14] This concern would be obviated if Mr Joyce pays the money into Court, a course Ultimate Siteworks is contented with, although it does note that having the use of the funds would enable it to reduce the amount of interest it has to pay on its debts. Ultimate Siteworks also notes that the directors of Ultimate Siteworks have given personal guarantees for debts of the company and therefore they would be affected personally should Ultimate Siteworks have to increase its borrowings.

[15] For the purposes of this application, I accept Mr Joyce is genuine in his grounds for a challenge. There is nothing that points to a lack of good faith in the way he is pursuing it.

[16] The central issue is, therefore, where the balance of convenience lies.

[17] Mr Joyce says he will be inconvenienced if he has to sell one of his vehicles to pay the monies into Court. He gives evidence, however, that he has had to spend the money he had saved repairing one of his cars to obtain a warrant of fitness. He also says that he has already listed one of his cars for sale and received an offer of \$8,000 for it. He says he has had other offers for trade-ins for other cars, plus cash. That suggests that the prospect of selling one of his cars is already within his contemplation.

[18] On balance, I consider that the interests of justice are best met by a stay on the condition that the monies currently due are paid into Court.

[19] Accordingly, a stay of the Authority's costs determination is granted for an initial period of 28 days from the date of this judgment. That stay will continue if, within that time, Mr Joyce pays the sum of \$5,750 into Court. That sum will be placed on interest-bearing deposit by the Registrar of the Court as soon as practicable following receipt.

[20] If the sum of \$5,750 is not paid within the 28-day timeframe, the stay will cease, and Ultimate Siteworks would be entitled to pursue the debt due to it.

### **Application to strike out**

[21] Ultimate Siteworks applies for an order that Mr Joyce's claims for a constructive dismissal grievance and for an unjustifiable disadvantage grievance be struck out, and that the issues be confined to a rehearing of the unjustifiable dismissal claim that was before the Authority.

[22] Ultimate Siteworks refers to the relief sought in the second amended statement of claim and, in particular, to the order sought in paragraph 21 that reads, in full:

21. That the plaintiff has a personal grievance for unjustifiable dismissal (actual or constructive) in terms of s 103(1)(a) or, in the alternative, unjustifiable disadvantage in terms of s 103(1)(b) with respect to the Court's consideration that a personal grievance can be found to be of a different type from that alleged in terms of s 122 of the Act.

[23] Ultimate Siteworks says that Mr Joyce does not have a reasonably arguable cause of action for constructive dismissal or unjustifiable disadvantage and these claims are frivolous or vexatious.

[24] It also says that Mr Joyce did not raise personal grievances for constructive dismissal or unjustifiable disadvantage at any time prior to the filing of a statement of claim in the Court. Ultimate Siteworks has not consented to the raising of these grievances out of time and Mr Joyce has not sought leave to raise them out of time. Ultimate Siteworks says that neither grievance was argued before the Authority and that it would be prejudiced if it had to call evidence to address them.

[25] In opposition, Mr Joyce argues that a claim for unjustifiable dismissal covers both actual and constructive dismissal. In the alternative, Mr Joyce argues that s 122 of the Act allows the Court to find that a personal grievance is of a type other than that alleged. He says that the facts and complaints of Mr Joyce were before the Authority, and the Court is considering the same facts and the same sequence of events.

[26] There is only one narrative of facts pleaded in the second amended statement of claim. The primary position for Mr Joyce is that he was unjustifiably dismissed and that this was an actual dismissal. Beyond that, my reading of the relief pleaded in the second amended statement of claim is simply that Mr Joyce, perhaps unnecessarily, points to the power that the Court has under s 122 of the Act to find that a personal grievance is of a type different from that alleged. That would be the position even if the relief was amended to remove reference to constructive dismissal and to unjustifiable disadvantage. That being the case, there is no need to strike out the words complained of in paragraph 21 of the second amended statement of claim.

[27] The application for a partial strike out fails.

### **Ultimate Siteworks seeks disclosure of certain documents**

[28] Ultimate Siteworks served Mr Joyce with a notice requiring disclosure. That notice requested copies of documents including bank statements, correspondence between Mr Joyce and various prospective employers, mobile phone records between Mr Joyce and prospective employers, records relating to Mr Joyce's earnings during the period 12 January 2022 and 20 April 2022, social media comments regarding Ultimate Siteworks and prospective employers and any other documents Mr Joyce has that would demonstrate what periods he was in employment and what earnings he received during the period 1 January 2022 to 30 April 2022. Mr Joyce objected to providing any of those documents. He says the majority of them do not exist, that other documents would be too onerous to obtain, and that disclosure would be unnecessarily intrusive into his privacy and his affairs. He also says the documents are not relevant.

[29] He says that he will be able to satisfy the Court of his loss of wages based on IRD records.

[30] In short, Ultimate Siteworks challenges the objection to disclosure on the basis that the information sought is relevant to proving or disproving Mr Joyce's claims that:

- (a) he had not secured alternative employment before the ending of his employment with Ultimate Siteworks; and
- (b) he lost \$17,220 in earnings (plus holiday pay and employer KiwiSaver contributions) as a result of his loss of his employment.

[31] Ultimate Siteworks also says that Mr Joyce is not being asked to produce documents that do not exist; he is being asked to produce such documents as do exist, within the categories listed. It says that it will not be unduly onerous to obtain the information requested, including call histories, text messages or messages or comments exchanged on messaging apps. Ultimate Siteworks says that Mr Joyce's privacy would not be unduly intruded upon, and that the information disclosed by him would be kept confidential and only used for the purposes of the litigation.<sup>6</sup>

### **Relevant documents generally must be disclosed**

[32] The starting point is that a party may require an opposing party to disclose documents in their possession, custody or control that are relevant to any disputed matter in the proceedings.<sup>7</sup>

[33] A relevant document is one that directly or indirectly:<sup>8</sup>

- (a) supports, or may support, the case of the party who possesses it; or
- (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
- (c) may prove or disprove any disputed fact in the proceedings; or
- (d) is referred to in any other relevant document and is itself relevant.

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<sup>6</sup> Employment Court Regulations 2000, reg 51.

<sup>7</sup> Regulation 40.

<sup>8</sup> Regulation 38(1).

[34] The pleadings define the ambit of the proceedings and therefore identify the issues towards which questions of relevance must be related. Within that, relevance should not be looked at narrowly.<sup>9</sup>

[35] Notwithstanding that overarching principle, the Court retains a discretion to refuse unnecessary or undesirable disclosure. In exercising that discretion, relevant circumstances may include:<sup>10</sup>

- (a) the nature and complexity of the proceeding; and
- (b) the number of documents involved; and
- (c) the ease and cost of retrieving a document; and
- (d) the significance of any document likely to be found; and
- (e) the need for discovery to be proportionate to the subject matter of the proceeding.

[36] Mr Joyce claims that he has lost earnings of \$17,220 plus holiday pay and KiwiSaver contributions. It is therefore relevant when he started new employment and what he earned from that new employment. In its statement of defence, Ultimate Siteworks says that Mr Joyce appeared to obtain new employment only days after the events in question, if not actually prior to those events happening. It further says that, even if Mr Joyce was entitled to lost wages, the amount claimed is well in excess of his actual loss.

[37] Documents that may prove or disprove whether Mr Joyce lost the amount currently being sought are, therefore, relevant to the proceedings.

[38] It is unclear whether there were discussions between the representatives about an agreed set of documents, which would have been sensible. It may be that there are no documents that relate to some of the entities that are referred to in the notice requiring disclosure. That could have been clarified by Mr Joyce and his representative. However, in any event, Mr Joyce is not required to disclose documents that do not exist.

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<sup>9</sup> *Airways Corporation of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA) at [5].

<sup>10</sup> *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [42]; High Court Rules 2016, r 8.14.



[39] To the extent they exist, the documents sought in paragraphs [2] to [9] of the notice must be disclosed.

[40] I acknowledge that not all the information contained in the bank statements will be relevant, and that there may be privacy issues involved, given that bank statements tend to indicate to whom payments have been made. However, Mr Joyce must disclose the parts of the bank statements covering the period 1 January 2022 to 30 April 2022 that reference any of the entities listed in paragraph [7] of the notice requiring disclosure (with that paragraph appearing to pick up all the entities in issue).

[41] Mr Joyce's affidavit listing the documents ordered to be disclosed is to be provided to Ultimate Siteworks within 14 days of the date of this interlocutory judgment, with disclosure of documents to be attended to by providing copies contemporaneously, or at the latest within seven days of that list being provided.

[42] Costs on all three interlocutory matters are reserved to be dealt with at the conclusion of the substantive matter.

J C Holden  
Judge

Judgment signed at 12.45 pm on 15 September 2023