

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA27/2021  
[2022] NZCA 516**

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| <b>BETWEEN</b> | <b>DHARMENDRA MAHETA</b><br>Appellant                                       |
| <b>AND</b>     | <b>SKYBUS NZ LIMITED</b><br>(FORMERLY AIRBUS EXPRESS LIMITED)<br>Respondent |

Hearing: 30 August 2022

Court: Cooper P, Miller and Gilbert JJ

Counsel: L M Hansen for Appellant  
A H Waalkens KC and S M Lapthorne for Respondent

Judgment: 2 November 2022 at 2 pm

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B We answer the questions of law as follows:**

**(a) Did the Employment Court err in holding it had no jurisdiction to order a stay of the Employment Relations Authority's costs determination, as Mr Maheta had applied for?**

**Yes, the Employment Court had jurisdiction to order a stay.**

**(b) Did the Employment Court err in awarding security for costs to the respondent on the basis that Mr Maheta was not in receipt of legal aid?**

**Yes, as Mr Maheta was in receipt of legal aid.**

**C The respondent must pay costs to Mr Maheta for a standard appeal on a band A basis and usual disbursements.**

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## **REASONS OF THE COURT**

(Given by Gilbert J)

[1] Mr Maheta was employed as a bus driver by Skybus NZ Ltd from December 2017 until 6 September 2018 when he was summarily dismissed following a number of driving incidents.

[2] On 6 December 2019, the Employment Relations Authority dismissed Mr Maheta's claim that he had been unjustifiably dismissed.<sup>1</sup> The Authority also dismissed his claims that he had been unjustifiably disadvantaged in his employment by being issued with a written warning,<sup>2</sup> being demoted,<sup>3</sup> and placed on unpaid suspension.<sup>4</sup> Costs were reserved.<sup>5</sup>

[3] On 18 December 2019, Mr Maheta filed a statement of claim in the Employment Court electing, pursuant to s 179 of the Employment Relations Act 2000 (the Act), to have the matter heard de novo by the Court. Mr Maheta, who was then unrepresented, filed an affidavit on 30 January 2020 seeking an order staying any orders the Authority "may subsequently make, and in particular in relation to costs". He stated that the Authority had reserved costs and Skybus had then applied for an order exceeding \$30,000. He said that he was opposing the application for costs and was not aware of when the Authority would determine it. He concluded his affidavit by stating:

If, eventually, I am required to pay costs to [Skybus], then I acknowledge my liability in law to do so and will try to make arrangements to this end. Until my proceedings are finalised, however, I would be put in a very harsh

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<sup>1</sup> *Maheta v Airbus Express Ltd* [2019] NZERA 698 at [118].

<sup>2</sup> At [69].

<sup>3</sup> At [80].

<sup>4</sup> At [92].

<sup>5</sup> At [119].

position financially if I had to pay [Skybus's] costs in the Authority, especially if these were to be for anything like the very substantial sum exceeding \$30,000 asked for by the company.

[4] On 5 February 2020, the Authority issued its costs determination and ordered Mr Maheta to pay costs of \$10,000 to Skybus.<sup>6</sup>

[5] On 18 December 2020, the Employment Court determined Mr Maheta's application for a stay (filed almost one year earlier) and Skybus's cross-application for security for costs, which it filed on 3 September 2020.<sup>7</sup> The Court found that it had no jurisdiction to entertain Mr Maheta's stay application because he had not challenged the Authority's costs determination.<sup>8</sup> Alternatively, if Mr Maheta was seeking an order preventing the Authority from taking any steps to determine costs pending his challenge to the substantive determination, this was not permissible because the Court could not "direct the Authority about its procedures".<sup>9</sup> The Court granted Skybus's application for security for costs and ordered Mr Maheta to pay security for costs in the sum of \$10,000.<sup>10</sup> In making this order, the Court understood that Mr Maheta was not then in receipt of legal aid.<sup>11</sup>

[6] This Court granted Mr Maheta leave to appeal against the Employment Court judgment on two questions of law:<sup>12</sup>

- (a) Did the Employment Court err in holding it had no jurisdiction to order a stay of the Authority's costs determination, as Mr Maheta had applied for?
- (b) Did the Employment Court err in awarding security for costs to the respondent on the basis that Mr Maheta was not in receipt of legal aid?

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<sup>6</sup> *Maheta v Airbus Express Ltd* [2020] NZERA 52.

<sup>7</sup> *Maheta v Skybus NZ Ltd* [2020] NZEmpC 236 [Employment Court judgment].

<sup>8</sup> At [30].

<sup>9</sup> At [31]–[33].

<sup>10</sup> At [62].

<sup>11</sup> At [58].

<sup>12</sup> *Maheta v Skybus NZ Ltd* [2021] NZCA 493.

## Did the Employment Court have jurisdiction to order a stay?

[7] Section 179 of the Act enables a party who is dissatisfied with a determination of the Authority to elect to have the matter heard by the Employment Court. The dissatisfied party may elect to have a full hearing of the “entire matter” *de novo*:<sup>13</sup>

### 179 Challenges to determinations of Authority

- (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
- (2) An election under subsection (1) must be made in the prescribed manner and within 28 days after the date of the determination.
- (3) The election must—
  - (a) specify the determination, or the part of the determination, to which the election relates; and
  - (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as the **hearing de novo**).
- (4) If the party making the election is not seeking a hearing *de novo*, the election must specify, in addition to the matters specified in subsection (3),—
  - (a) any error of law or fact alleged by that party; and
  - (b) any question of law or fact to be resolved; and
  - (c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and
  - (d) the relief sought.
- (5) Subsection (1) does not apply—
  - (aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 174(a) or (b); and
  - (a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

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<sup>13</sup> Employment Relations Act 2000 (emphasis in original).

- (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[8] The making of an election under s 179 does not operate as a stay of proceedings on the determination of the Authority unless the Court or the Authority so orders.<sup>14</sup> If an election is made under s 179, the Court is required to make its own decision “on that matter and any relevant issues”.<sup>15</sup> Once the Court has made a decision, the determination of the Authority is set aside and the decision of the Court stands in its place.<sup>16</sup> The Court has a broad discretion to make such costs orders as it thinks reasonable.<sup>17</sup> Clause 19 of sch 3 of the Act provides:

**19 Power to award costs**

- (1) The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.
- (2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[9] The power to grant a stay of proceedings is set out in reg 64 of the Employment Court Regulations 2000:

**64 Power to order stay of proceedings**

- (1) If an election is made under section 179 of the Act, the Authority and the court each have power to order a stay of proceedings under the determination to which the election relates.
- (2) If an application for a rehearing is made under clause 5 of Schedule 3 of the Act, the court has power to order a stay of proceedings under the decision or order to which the application relates.
- (3) An order under subclause (1) or subclause (2)—
  - (a) may relate to the whole or part of a determination or decision or order, or to a particular form of execution; and
  - (b) may be made subject to such conditions, including conditions as to the giving of security, as the Authority or the court thinks fit to impose.

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<sup>14</sup> Section 180.

<sup>15</sup> Section 183(1).

<sup>16</sup> Section 183(2).

<sup>17</sup> Section 191; and sch 3, cl 19.

[10] The Employment Court reasoned that because Mr Maheta did not make a separate election under s 179 of the Act in respect of the costs determination, the Court had no jurisdiction to grant a stay of that order.<sup>18</sup> We respectfully disagree with this conclusion for the reasons set out below.

[11] Mr Maheta elected to have the entire matter heard by the Employment Court de novo. The remedies he sought included orders for reinstatement, payment of lost remuneration, compensation, and costs. The Court “must make its own decision on that matter and any relevant issues”.<sup>19</sup> Once the Court has made its determination, the Authority’s determination will be set aside and the Court’s determination will stand in its place. There can be no doubt that the Court has jurisdiction to determine the issue of costs. If the Court were to uphold Mr Maheta’s claims, he would normally be entitled to an award of costs.

[12] If the Authority’s substantive determination of his claims is reversed, its costs decision could not stand. Costs awards are generally parasitic on the substantive determination to which they relate in the sense that they are assessed on the basis the substantive determination is correct. Mr Maheta did not dispute before the Authority that costs should follow the event in the usual way; he only contested the quantum of costs claimed by Skybus. If Mr Maheta succeeds in the Employment Court, the whole basis for the costs awarded by the Authority to Skybus will fall away and the question of costs will have to be revisited.<sup>20</sup>

[13] While costs had not been fixed by the Authority at the time Mr Maheta filed his proceeding in the Employment Court, his challenge was to the entire matter and he elected a full de novo hearing. In these circumstances, and by specifically seeking an award of costs from the Court, it was plain that he was challenging all aspects of the Authority’s determination, which provided the foundation for the inevitable associated costs award the Authority was yet to make. It is also clear from Mr Maheta’s affidavit that he was challenging the expected costs award. Indeed, that

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<sup>18</sup> Employment Court judgment, above n 7, at [30].

<sup>19</sup> Employment Relations Act, s 183(1).

<sup>20</sup> *PBO Ltd v Da Cruz* (2005) 3 NZELR 1 (EmpC) at [13].

was the sole basis for his application for a stay; there was no other order capable of being stayed.

[14] As with an appeal, a party challenging a substantive determination need not separately challenge an associated costs judgment if the only basis for the challenge is that the substantive determination which underpins it is incorrect.<sup>21</sup> The outcome on costs will follow the event on the challenge to the substantive determination. The position is different if a party wishes to challenge the costs judgment on the basis it is incorrect irrespective of the correctness of the underlying substantive determination.

[15] In summary, we do not consider it was necessary for Mr Maheta to have made a separate election under s 179 in respect of the costs determination after costs were fixed by the Authority. While, technically, there was no order for costs at the time Mr Maheta made his stay application, there was no dispute that costs should follow the event and that Skybus should therefore receive costs. In short, a costs award was inevitable. Further, the costs award was made long before the stay application was determined. It would have been pointless to require a fresh application to be made.

[16] In conclusion, we consider the Employment Court erred in holding it had no jurisdiction to grant Mr Maheta's application for a stay of the Authority's costs award.

### **Did the Employment Court err in ordering security for costs?**

[17] No order for costs can be made against an aided person in civil proceedings unless the court is satisfied there are exceptional circumstances.<sup>22</sup> The Employment Court recognised this.<sup>23</sup> However, it did not consider that Mr Maheta continued to qualify as an aided person:

[58] As a result of subsequent inquiries made of Mr Maheta, at the Court's direction, it transpires that he has withdrawn instructions from the barrister to whom the Legal Services Commissioner's letter was written. A replacement grant has not yet been made and, as a result, he is currently not a person in

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<sup>21</sup> *Parsot v Greig Developments Ltd* [2009] NZCA 241, (2009) 10 NZCPR 308 at [33]; and *Reid v New Zealand Fire Service Commission* [2010] NZCA 133, (2010) 19 PRNZ 923 at [26].

<sup>22</sup> Legal Services Act 2011, s 45(2).

<sup>23</sup> Employment Court judgment, above n 7, at [57].

receipt of legal aid. That means the Legal Services Act does not need to be considered any further.

[18] We agree with Ms Hansen, for Mr Maheta, that this was an error.

[19] Mr Maheta received a grant of legal aid on an interim basis on 13 November 2020. This grant, made under s 16(1)(b) of the Legal Services Act 2011, continued until the Legal Services Commissioner determined Mr Maheta’s application for legal aid for the whole of the proceedings or considered it appropriate that payments should cease.<sup>24</sup>

[20] Mr Maheta advised the Court on 17 December 2020 that Legal Services had advised him that the grant could be reassigned to a new legal aid provider. He said that he had found a new legal aid provider and had advised Legal Services of this. However, he said that “until such time the grant [had] been reassigned by Legal Services to the new legal aid provider [he was] unable to confirm [he had] a new legal provider”. Mr Maheta said he would ensure the Court was advised as soon as this occurred. We note that Legal Services subsequently approved the change of lawyer. That was done on 6 January 2021, after the Employment Court judgment was delivered.

[21] The Court considered that because instructions had been withdrawn from the barrister originally instructed to act, Mr Maheta was no longer in receipt of legal aid and that a replacement grant would be required. This is not correct. An “aided person” under the Legal Services Act is a person who is granted legal aid under the Act.<sup>25</sup> This includes a person who is granted legal aid on an interim basis.<sup>26</sup> Mr Maheta was therefore an aided person against whom no costs order could be made in the absence of exceptional circumstances. That Mr Maheta was in the process of engaging a replacement lawyer does not alter the fact that he was in receipt of a grant of legal aid.

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<sup>24</sup> Legal Services Act, s 16(3).

<sup>25</sup> Section 4(1) definition of “aided person”, para (a).

<sup>26</sup> Section 4(1) definition of “aided person”, para (b)(i).



## **Result**

[22] The appeal is allowed.

[23] We answer the questions of law as follows:

- (a) Did the Employment Court err in holding it had no jurisdiction to order a stay of the Employment Relations Authority's costs determination, as Mr Maheta had applied for?

Yes, the Employment Court had jurisdiction to order a stay.

- (b) Did the Employment Court err in awarding security for costs to the respondent on the basis that Mr Maheta was not in receipt of legal aid?

Yes, as Mr Maheta was in receipt of legal aid.

[24] The respondent must pay costs to Mr Maheta for a standard appeal on a band A basis and usual disbursements.

Solicitors:

Kiely Thompson Caisley, Auckland for Respondent