

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 20
ARC 15/09**

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

AND IN THE MATTER OF applications for stay and security for
costs

BETWEEN LUCY HAMON
Plaintiff

AND COROMANDEL INDEPENDENT
LIVING TRUST
Defendant

Hearing: 5 March 2010 (by telephone conference call) and by memorandum
filed on 9 March 2010

Appearances: Plaintiff in Person
Robert Coltman, Counsel for Defendant

Judgment: 9 March 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

- A Execution of the Employment Relations Authority's costs determination is stayed on condition that, by 1 May 2010, the plaintiff pay the sum of \$10,000 to the Registrar of the Employment Court at Auckland to be held on interest bearing deposit and disbursed either by order of the Court or by written agreement of the parties.**
- B The plaintiff may take no further steps in the litigation unless and until that sum has been paid in.**
- C Costs are reserved on the plaintiff's application for stay of execution of the Authority's costs determination and on the defendant's application for security for costs.**

[1] There are two principal issues to be determined before the plaintiff's challenge by hearing de novo to the Employment Relations Authority's dismissal of her proceedings. There are also some other preliminary matters.

[2] Although usually required by statute, I will not direct mediation or further mediation in this matter for the following reason. Earlier mediation undertaken in an attempt to settle the case has simply generated a separate interlocutory argument whether what was discussed in the course of mediation should be able to be the subject of evidence. Ms Hamon says that she was blackmailed and that other oppressive conduct in mediation ought now to be considered by the Court and held against the defendant. Without determining in any way the veracity of this allegation, I foresee a likelihood of its repetition or expansion if further mediation or other confidential alternative dispute resolution mechanisms were to be employed. There is already foreshadowed a significant argument about whether s 148 of the Employment Relations Act 2000 ("the Act") may protect the confidentiality of discussions at mediation and I consider it would be counter-productive to attempt to engage in further mediation in these circumstances.

[3] The plaintiff seeks a stay of execution of the Authority's costs determination. The defendant opposes this course. The defendant seeks an order for security for its costs on the challenge. The plaintiff opposes this application. The plaintiff also seeks a number of other orders but these can either be heard more appropriately at a later point or disposed of now:

- that she have leave to adduce similar fact evidence;
- that she have leave to adduce evidence of the behaviour of the defendant's representatives at mediation which she alleges was in breach of good faith requirements;
- that she have leave to adduce evidence of the behaviour of the defendant's representatives after mediation and during the Authority's investigation which is said to be in breach of good faith requirements;

- that she have leave to adduce evidence including documents filed in the Authority;
- that she have leave to adduce evidence of alleged misrepresentations by the defendant inducing “a preliminary ‘partnership’ agreement which together with further representations induced the employment agreement”; and
- that the Authority’s order for costs against her be struck out.

Background

[4] It is necessary to set out some brief background to better understand these applications. Ms Hamon complained that she was dismissed constructively and unjustifiably by the Trust. She also asserted that she was induced to enter their employment relationship by the Trusts’s misleading and deceptive conduct. She claimed that these inducements and misrepresentation entitled her to elect to discontinue her employment in circumstances which amounted to a constructive dismissal of her. Ms Hamon made other allegations of breaches of their employment agreement by the Trust which justified her in abandoning her employment and which amounted to a constructive dismissal of her.

[5] The Authority, after an investigation meeting lasting three days and subsequently receiving written submissions, rejected comprehensively Ms Hamon’s claims in a lengthy determination issued on 10 March 2009 (AA 75/09). It subsequently awarded costs against Ms Hamon in a supplementary determination given on 4 August 2009 (AA 75A/09) allowing the defendant \$13,500 as a contribution to its costs and \$1,432.40 “less any GST” as disbursements and witnesses’ expenses.

[6] In her affidavit, filed both in support of her application for orders and in opposition to the application for security for costs, Ms Hamon addresses in detail what appear to be the merits of her claim and trenchant criticisms of the process of it to date. Those matters are not, however, the subject of this application. It is

regrettable Ms Hamon has not addressed directly the merits of either her application for stay or the defendant's grounds of its application for security. In these circumstances I can only assume and accept (with one notable exception) that Ms Hamon is unable to meet the order for costs made against her in the Authority as she herself asserted.

[7] The defendant is a charitable Trust whose object is to assist persons in need in the area in which it operates. It is funded principally, perhaps solely, by government and other grants for which it competes, and is understandably loathe to spend money on the legal costs of defending proceedings if that can be avoided. However, the plaintiff's claims have been substantial and have included very serious allegations against the Trust's representatives. In these circumstances I accept that it has really had no alternative but to obtain costly legal representation and that the significant award of costs made by the Employment Relations Authority is nevertheless only a contribution to costs actually incurred.

[8] Among the plethora of evidence and submissions advanced by the plaintiff is some, but not much or enough, evidence of her financial position. She says that in the last financial year she not only had no income but incurred substantial business or other trading losses. The plaintiff says that she does not have either income or assets to pay the Authority's costs determination which, if it is enforced, will result in her bankruptcy and consequent inability to pursue her claim. For similar reasons, the plaintiff says that she is not in any position to make a payment into court as security for the Authority's costs award or for any prospective award of costs in this Court.

[9] Ms Hamon also says that security should not be ordered because the defendant, by its representatives, has blackmailed her by threats made in mediation and during and following the Authority's investigation. It is, however, simply impossible to determine these allegations at this stage and in this forum.

Miscellaneous applications

[10] These are set out in paragraph [3] of this judgment and I deal with them as follows.

[11] The plaintiff does not require “to adduce similar fact evidence”. This is a civil proceeding and although Ms Hamon has not yet made clear the evidence which she considers may require leave, the primary test for admissibility in this Court is relevance. The better way to deal with this application is, after directions have been given for the advance exchange of evidence, to allow admissibility to be determined if it is challenged.

[12] Next, Ms Hamon seeks leave to adduce evidence of the conduct of the defendant’s representatives at mediation. This question is not only to be determined by reference to s 148 of the Act and the case law determining the parameters of privilege and confidentiality, but will depend also on the relevance of the intended evidence to Ms Hamon’s cause of action which is for unjustified constructive dismissal. It is unclear, at this stage at least, how the conduct of the defendant’s representatives at mediation may be relevant to whether Ms Hamon was dismissed, if so unjustifiably and, if so again, to the remedies which she seeks. Again, however, these matters are best tested before trial after Ms Hamon has outlined the general nature of the evidence intended to be called in this regard and has established its relevance, and that it falls outside the very tight constraints of s 148.

[13] The same process should apply to the next order Ms Hamon seeks, that is to have leave to call evidence about the behaviour of the defendant’s representatives after mediation and during the Authority’s investigation. Again, any such evidence will have to be relevant to the matters in issue although this may include the remedies for Ms Hamon if she is found to be unjustifiably dismissed. Because Ms Hamon has elected to challenge the Authority’s determination by hearing de novo and there are no separate causes of action or proceedings alleging breach of statutory good faith obligations, it may be difficult for her to establish relevance of those matters to her causes of action. In addition, the conduct of the parties and their

representatives before the Employment Relations Authority is principally a matter for the Authority itself. It can and does control its own processes and is equipped with an appropriate range of sanctions to do so. This is not an application for judicial review of the Authority.

[14] Next, Ms Hamon seeks leave to adduce evidence including documents filed in the Authority. Again, subject to relevance, if these documents relate to her proceedings for unjustified constructive dismissal, leave is not required for these to be produced to the Court on a challenge by hearing de novo.

[15] Penultimately, Ms Hamon seeks leave to adduce evidence of misrepresentations by the defendant which she says induced her to enter the employment relationship from which she says she was subsequently dismissed unjustifiably. It is unclear at this stage what cause of action may depend on an allegation that the plaintiff was induced to enter an employment agreement by misrepresentations. Although the plaintiff may so complain, whether this may constitute a justiciable cause of action for which remedies can be granted in this proceeding may be a matter of dispute. This, too, is a matter better dealt with before trial when the pleadings are settled.

[16] Finally, Ms Hamon asks that the Authority's costs order be struck out. It is premature to do so. That is one of the remedies which Ms Hamon seeks in her substantive proceeding. If she is successful in her challenge by hearing de novo, the Authority's determinations will, as a matter of law, be set aside and orders of this Court will substitute for them. Whether the Authority's costs determination remains in force will depend upon the outcome of the substantive challenge brought by Ms Hamon.

Decision of principal applications

[17] The two applications, although discrete, overlap to a significant degree in the sense that they deal with the payment by the plaintiff of costs, whether accrued or potential. The principal ground relied on by the defendant in seeking security for

costs on the challenge is Ms Hamon's refusal and failure to pay the defendant's costs ordered by the Employment Relations Authority.

[18] I deal first with the application for stay of execution of the Authority's costs award. On the one hand, I am loathe to deprive Ms Hamon of the opportunity to bring her challenge as would be the likely outcome of a refusal to stay a substantial order for costs and disbursements made by the Authority. Ms Hamon says that enforcement of this would simply take her into bankruptcy because she does not have the assets to meet that debt which I have little doubt the defendant would seek to enforce against her. On the other hand, the defendant is a charitable trust providing educational and other important social services for residents of the Coromandel area to assist them to live independently. It is dependent upon a number of sources of discretionary income including contestable public funding and depends on these periodic injections of income to perform its work. I think it is no exaggeration to say that the intensity, even the ferocity, of Ms Hamon's attacks on the Trust and the Trust's responses in kind against her have caused it to spend significant sums on legal representation already. Although Ms Hamon has criticised the Trust for engaging solicitors, saying that it could have been represented by a lay advocate or by its own personnel, I do not consider that it can be criticised for doing so.

[19] Although Ms Hamon says that she has neither income nor capital with which to pay or even secure the Trust's costs award, the evidence establishes that the plaintiff does have an asset, albeit one that is probably not realisable either immediately or in full. That is a debt due to her of \$85,000 which, in view of the absence of formal detail about its repayment, I infer is repayable on demand. Ms Hamon has provided very little information about this asset or indeed, as the defendant points out, about her financial circumstances as would be expected in answer to an application such as this.

[20] I consider that the most just course in all the circumstances is that Ms Hamon should be required to provide some security for the Trust's costs awarded by the Authority as a condition of staying execution of that order. I will not require that security to be given for the whole amount ordered by the Authority however. That is

because, although I am not deciding the point at this stage, there is an arguable case for Ms Hamon that the Authority adopted an erroneous method for calculating the defendant's costs. The Authority's costs' determination records that at least one *Calderbank* offer was made to Ms Hamon but declined by her and that her counter-offer of settlement was declined by the defendant. The Authority appears to have used Ms Hamon's refusal of the *Calderbank* offer of more than she ultimately recovered to increase, from a notional costs level of \$3,000 per day in the Authority, that daily rate to \$4,500. If that was so, the plaintiff has a tenable argument that this was a wrong application of the *Calderbank* offer in the sense that it appears to have increased significantly the amount of total costs of representation of the defendant. The significance of a *Calderbank* offer is that it affects the level of costs incurred by the offeror from the point of refusal of the offer.

[21] In these circumstances I stay execution of the Authority's costs determination on condition that Ms Hamon pay to the Registrar of the Employment Court at Auckland the sum of \$10,000 to be held on interest bearing deposit and disbursed either by order of the Court or by written agreement of the parties. Ms Hamon may have what I calculate should be a sufficient period to recover this sum so that, for the stay to remain effective, that payment in must be made by her no later than 1 May 2010.

[22] To clarify the effect of this order, the defendant may not enforce the Authority's costs determination until at least 1 May 2010. For stay of execution of the costs' determination to continue beyond that date, however, Ms Hamon will have had to have paid the sum of \$10,000 to the Registrar.

[23] I turn now to the associated question of security for costs on the challenge. Other than in cases other than where plaintiffs are resident overseas and enforcement of costs may be difficult or impossible, I am not aware of any case in which this Court has made an order for security. Impecuniosity alone has rarely if ever been grounds for security in this jurisdiction, especially where a dismissal may have brought that about. The circumstances of this case, however, come very close to providing grounds to require security for costs on the challenge. On her own clear admission, Ms Hamon asserts that she has no funds with which to provide security

and will not make a payment in any event. There is, in these circumstances, a very real risk that if the defendant is successful on Ms Hamon's challenge, it will both incur further significant legal costs in doing so and have little prospect of their payment unless some method can be made for securing at least a contribution to those costs.

[24] I propose, however, to deal with the application for security by adding a further condition to the order for stay of execution of the Authority's costs determination. It is that the plaintiff may take no further steps in the litigation unless and until she has paid in the \$10,000 referred to previously. This will ensure that the defendant does not incur further costs which may be wasted costs without a tangible sign of good faith on the plaintiff's part.

[25] A proper sense of proportionality must now apply to this case. Substantial resources have already been expended by the parties, by the mediation service, by the Employment Relations Authority and, even initially, by this Court in what can only be described as an apparent war between the parties in which the use of any weapons available seems fair game. In some senses, an employment dispute might be said to be the vehicle for a broader conflict. Ms Hamon is clearly very antagonistic towards the Trust, blaming it for a continuation of past misfortunes and the beginning of others.

[26] In its defence of these wide ranging and serious allegations against it, the Trust may have been drawn into a tit-for-tat strategy in which attack is seen as the best means of defence. Usually in such circumstances arising out of an employment relationship, the Court would direct the parties to mediation with a view to resolving those differences. As I have already noted, however, that exercise has simply generated further issues in the litigation about whether what passes there, that ought to be confidential, is further actionable and even criminal conduct.

[27] Ms Hamon is entitled to challenge the Employment Relations Authority's determinations and to have her justiciable employment issues determined independently. There must, however, be a realistic proportionality to the exercise of

that right and of the defendant's defence and I urge the parties to reflect upon that before taking their next steps in the litigation.

GL Colgan
Chief Judge

Judgment signed at 5.00 pm on Tuesday 9 March 2010