

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 132
ARC 45/11**

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

AND IN THE MATTER OF application for security for costs

AND IN THE MATTER OF an application to strike out (in part) an
affidavit in support

BETWEEN ARTHUR KAIPARA (HATA)
Plaintiff

AND CARTER HOLT HARVEY LIMITED
Defendant

Hearing: By telephone at 10am on 3 October and 10 am on 6 October 2011
(Heard at Auckland)

Counsel: Stan Austin, advocate for plaintiff
Daniel Erickson, counsel for defendant

Judgment: 18 October 2011

REASONS FOR INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] On 6 October 2011 I dismissed the defendant's application for security for costs and the plaintiff's application to strike out large parts of the affidavit filed in support of the defendant's application. These are my reasons for so doing.

[2] The defendant sought an order that the plaintiff's claims be stayed pending the plaintiff's payment into Court of \$6,083.80, being the amount that the plaintiff was ordered to pay as a contribution towards the defendant's costs and disbursements by a determination of the Employment Relations Authority.¹ The

¹ [2011] NZERA Auckland 338.

plaintiff opposed the application and applied to strike out the evidence contained in the affidavit of Collette Firth, the human resource operations manager for the defendant's wood products division, filed in support of the defendant's application.

[3] It is convenient to deal with the plaintiff's strike out application first. The plaintiff submits that in her affidavit Ms Firth has adopted the persona of an "expert witness" but has stated no qualifications for that status. Certain paragraphs of the affidavit were sought to be struck out on that basis. These included: a statement that she has personal knowledge of the facts and was duly authorised by the defendant to provide evidence on its behalf; statements that the plaintiff does not have a strong prima facie case and that his prospects of success are low; that the defendant considers that the plaintiff was given ample opportunity to explain his version of events and that he made telling admissions.

[4] I heard the submissions for and against the strike out of those paragraphs. I have concluded that at no point was Ms Firth holding herself out as an expert other than referring to her employment as human resource operations manager. The matters to which she deposed set out the defendant's view of those matters. There was no suggestion that her evidence had been given on the basis of expert testimony. I was therefore satisfied that the plaintiff had not provided grounds for the striking out of those paragraphs.

[5] The plaintiff also objected to paragraphs in which Ms Firth attested to the oral evidence given at the Authority's investigation meeting because, allegedly on her own admission, the plaintiff claims she was a spectator without standing at that meeting. Ms Firth deposes that she was involved in the defendant's preparation for the Authority's investigation meeting, which she attended and at which she heard the oral evidence of all the witnesses including the plaintiff. She referred to the plaintiff's evidence to the Authority that he had been unable to find employment since he was dismissed on 29 January 2010, that this has put his family under huge financial pressure and it was necessary for him to access his superannuation funds. This was supported by a copy of the plaintiff's witness statement as filed with the Authority, which is annexed to Ms Firth's affidavit. She also referred to evidence before the Authority in which the plaintiff admitted to failing to follow the

defendant's procedures for the electrical isolation of machines under repair and claimed that he had repeated this on more than one occasion during his oral evidence. She also referred to paragraphs in the Authority's determination which indicates that it accepted the defendant's evidence, which allegedly was not disputed, that the plaintiff had been fully trained in relation to electrical isolation procedures.

[6] I can see no basis in law for those passages in Ms Firth's evidence to be struck out. She was allegedly an eye-witness to the disciplinary enquiry at the Authority, and is able to give evidence of what she claims she heard the plaintiff say. This is especially so as part of that evidence is of admissions allegedly made by the plaintiff which may turn out to be highly relevant to the outcome of the challenge. Such evidence of admissions has always been accepted by the Courts.

[7] The plaintiff then complained that Ms Firth made statements as to the findings of the Authority that are contradicted by the Authority in its determinations. These are as to whether certain meetings were disciplinary meetings or health and safety meetings. If Ms Firth turns out to be wrong in that evidence, which I do not find to be particularly relevant to the application for security for costs, this is a matter that may be remedied at trial and was not a basis for it to be struck out from her affidavit in support of an interlocutory application.

[8] The plaintiff then objected to what was stated by Ms Firth to be the basis for the dismissal on the grounds of serious misconduct, namely the plaintiff's own admission that he had breached the relevant isolation procedures and had failed to ensure other employers on his shift had followed the proper procedures prior to entering a dangerous area. The plaintiff contests this evidence and Mr Austin submitted that it is contradicted by the plaintiff's unchallenged evidence in his written statement and the evidence provided by Paul Trow, one of the defendant's managers. This may well be an issue for trial but I find that Ms Firth is entitled to express what she says was the defendant's view of the circumstances that led to the dismissal. Such evidence is clearly admissible for present interlocutory purposes.

[9] The plaintiff next objected to a paragraph in Ms Firth's affidavit where she states the defendant has reason to believe that the plaintiff will be unable to pay, not

only the current Authority's costs award, but also any cost awards made by the Employment Court if he is unsuccessful in his challenge. The plaintiff objected to that paragraph on the basis that there is no evidence of any enquiry by the defendant into this question, nor the provision of reasons why the defendant so believes. However, the next paragraph in the affidavit, which I have mentioned above, refers to the plaintiff's inability to obtain other employment and his evidence of the financial pressure under which he has been placed. This provided the basis for Ms Firth's evidence of the defendant's views as to the plaintiff's ability to pay the Authority's costs award and costs in the Court. That of course, does not determine the issue for the purposes of the defendant's application but Ms Firth's evidence is admissible in support.

[10] Finally the plaintiff attacked Ms Firth's statement that she found nothing in the plaintiff's statement of claim as now filed which challenged or contradicted the Authority's evidential findings. Mr Austin observed that this is a de novo challenge and that the plaintiff is attempting to overturn the Authority's determination by placing all the facts and applicable law before the Court and Ms Firth's assertion is irrelevant. He therefore asks for it to be struck out. I have some sympathy for that submission because the way that statement is framed in her affidavit is more in the nature of a legal submission on the defendant's behalf than direct evidence. However, because the submissions of both parties dealt extensively with the merits of the challenge I place little or no weight on Ms Firth's view of this matter but I do not see it is necessary to strike it out.

Application for security

[11] I now turn to the defendant's application for security for costs.

[12] The first ground advanced by the defendant in support of its application is that the Authority's costs order has not been paid, either because the plaintiff is unwilling or unable to make such a payment.

[13] Mr Erickson, counsel for the defendant, submitted that the Court's jurisdiction to order security for costs derives from regulation 6(2) of the

Employment Court Regulations 2000 which provides a link to the High Court Rules affecting any similar case. The relevant High Court Rules are Rule 5.45 which provided insofar as they are relevant to the present application that an order for security for costs can be made:

... if a Judge is satisfied, on the application of a defendant

- (a) ...
- (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

[14] Mr Erickson referred to early decisions of the Court where it has upheld the jurisdiction to make an order for security, citing *Watson v Fell*² and *Koia v Attorney-General in respect of the Chief Executive of the Ministry of Justice*.³ He also cited *A S McLachlan Ltd v MEL Network Ltd*,⁴ where the Court of Appeal stated that the exercise of the discretion whether to order security should not be fettered by applying any principles but instead the Court must assess the circumstances of the particular case on the basis that access to the Courts for genuine plaintiffs is not likely to be denied. He also cited *MacKenzie v Bayleys Real Estate Ltd*⁵ in which this Court noted that access to justice for individual litigants whose impecuniosity may have either been caused or aggravated by their dismissals would not be lightly deprived of their right to challenge.

[15] That is consistent with the High Court's approach to cases where it is alleged that the defendant's actions, being the subject of the litigation, have caused the plaintiff's impecuniosity and it would be unjust for the defendant to receive security for costs.⁶

[16] As to the plaintiff's ability to pay, Mr Erickson relied on the evidence given by the plaintiff in the Authority, the non-payment of the costs award and plaintiff's own affidavit in opposition which, he submitted, failed to address the plaintiff's ability to pay. In that affidavit the plaintiff claims he has not refused to pay the costs

² [2002] 2 ERNZ 1.

³ [2004] 1 ERNZ 116.

⁴ (2002) PRNZ 747.

⁵ AC 18/04, 25 March 2004.

⁶ See McGechan on Procedure, HR 5.45.03 and the cases there cited.

award but believes that if his challenge to the Authority's main determination should succeed the costs award will be set aside. The plaintiff also complains that no enquiry has been made by the defendant as to his willingness or ability to pay the award. The rest of his affidavit addresses the merits of the case.

[17] The parties have placed much emphasis on the merits of the case but I do not consider that this is a central issue in determining whether, on proof of impecuniosity, security for costs ought to be granted. It may be relevant to the justice of the case and, as will be shown, may provide exceptional circumstances for the grant of security. Further, the threshold in challenges relating to personal grievances by an unsuccessful grievant must, of necessity, be at a low level, as all that is required at this stage is proof of a dismissal, which is not an issue in this case, a sense of grievance and the onus is then on the employer to justify the dismissal in terms of s 103A of the Employment Relations Act 2000.

[18] Mr Erickson had endeavoured to argue that the plaintiff did not have a strong prime facie case and his chances of success were low. I do not think it appropriate to canvass in any detail the matters I addressed with the parties as to the merits of the claim as these will have to be dealt with by the Court in due course. I did, however, note that this was a de novo hearing, that there were issues as to procedural deficiencies in the disciplinary investigation carried out by the defendant against the background of a simultaneous health and safety enquiry. The plaintiff had been suspended and been required to attend a meeting to discuss the incident for which he had been suspended. The plaintiff is challenging the Authority's conclusion that that meeting could not have been disciplinary in nature. There are also allegations that the defendant failed to provide to the plaintiff the reports upon which it was relying for the decision to dismiss. It is also contended that the plaintiff was not given the opportunity to raise any matters in mitigation in the context of 20 years of service at the mill. Further there is also an allegation that the plaintiff raises as to the disparity of his treatment in comparison with another supervisor. These are all matters which will be disposed of at a de novo hearing.

[19] The defendant's first difficulty however, is that I have no clear evidence as to the plaintiff's impecuniosity. The only material upon which the defendant relies is, I

find, insufficient reason to believe the plaintiff will be unable to pay the costs of the defendant if his challenge fails. In his affidavit the plaintiff acknowledges his responsibility for the defendant's costs in such circumstances but never states he would be unable to pay them.

[20] Even if the material in the brief of evidence before the Authority was taken to be sufficient, it clearly links the impecuniosity to the dismissal which has cost the plaintiff his job. For the reasons I have noted above, this Court has shown a marked reluctance to make orders for security for costs against grievants whose financial circumstances may have been caused or contributed to significantly by their dismissal.

[21] The Court has awarded security for costs on challenges in such circumstances in two recent cases where it has been held that there have been exceptional circumstances. In *Young v Bay of Plenty District Health Board*,⁷ it was held that the plaintiff was attempting to relitigate a case that he had already lost on its merits and which he had also failed to appeal within time. These were held to be exceptional circumstances to make an order for security for costs in a realistic amount.

[22] The Chief Judge in that case noted that the enforcement of the Authority's costs should be for a defendant to pursue in one of the usual ways, including proceedings in other jurisdictions and not by an application for security for costs on a challenge. In that case the defendant had placed the matter in the hands of a debt collection agency which had entered into an arrangement for the payment of the debt by the plaintiff. In these circumstances the Court concluded that it was especially inappropriate for the Court to undertake enforcement on behalf of the defendant where this might prevent or make it more difficult for the plaintiff to pursue a challenge he was entitled to take.

[23] In the second case, *Brake v Grace Team Accounting Ltd*⁸ there was clear evidence of impecuniosity. The grievant had made no effort to address the relatively modest costs awarded by the Authority against her and there had been substantial

⁷ [2011] NZEmpC 89.

⁸ [2011] NZEmpC 64.

interlocutory skirmishing between the parties, particularly in relation to document disclosure. The claim involved the consideration of substantial quantities of the defendant's financial and managerial information and expert evidence. In those circumstances the Court was satisfied that the defendant would be put to more than the usual costs of a defendant employer on such a challenge and that without an order for security for at least some of its costs the defendant was unlikely to be able to recover any of them if it was successful, as it had been to date. Because the Court was reluctant to make an order for security for costs, which could have the effect of disabling the plaintiff from pursuing her challenge, a modest order was made with the Court observing that it was not necessary for the plaintiff to have to lodge a cash bond to provide security because there were a variety of legal means of satisfactorily securing assets. The sum of \$6,000 was awarded as security for costs.

[24] I saw no such exceptional circumstances in the present case and therefore declined the defendant's application for the reasons I have given.

[25] I considered, as an alternative, as a result of Mr Erickson's reference to cases such as *MacKenzie v Bayleys Real Estate Ltd*,⁹ *Buchan v Sheffield Ltd*,¹⁰ *Gates v Air New Zealand Ltd*,¹¹ to stay enforcement of the Authority's costs awards on condition that the amount of the costs award was paid into Court. Such a course was adopted in those three cases. However, in light of the Chief Judge's comments about the enforcement of such awards in the Court in the *Young* case, this may not be considered appropriate in the future.

[26] Mr Erickson made it clear that the defendant would be taking steps to pursue the costs award if the defendant's application for security failed. In these circumstances I invited Mr Austin to take instructions as to whether the plaintiff would be prepared to agree to providing the security for the amount of the costs award as a condition of an informal oral application for a stay of such enforcement. The hearing was adjourned to enable Mr Austin to take instructions. Before the matter reconvened on 6 October, Mr Austin advised the Court that, although the parties had corresponded on the issue, his client had respectfully declined to accept

⁹ AC 18/04, 25 March 2004.

¹⁰ AC 31/05, 24 June 2005.

¹¹ AC 15/07, 27 March 2007.

the Court's suggestion and invited it to determine the defendant's application for security for costs. For the reasons I gave, I declined that application and reserved costs.

[27] With the consent of the parties I then dealt with directions timetabling the matter to a hearing. This has been the subject of a minute that has now been issued to the parties.

B S Travis
Judge

Judgment signed at 11.15am on 18 October 2011