

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2011] NZEmpC 89  
ARC 34/11**

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 RODERICK JOHN YOUNG  
Plaintiff

AND BAY OF PLENTY DISTRICT  
HEALTH BOARD  
Defendant

Hearing: 20 July 2011  
(Heard at Auckland)

Counsel: Plaintiff in person  
Gail Bingham, counsel for defendant

Judgment: 20 July 2011

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**ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN**

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[1] The Board seeks an order that Mr Young's challenge to the Employment Relations Authority's determination<sup>1</sup> dismissing his claims be stayed until Mr Young pays costs awarded. Although in the latest Authority determination<sup>2</sup> (in which the Board was successful) no costs were sought against Mr Young, previous Authority costs in closely associated litigation have amounted to \$7,500. Also, in closely associated proceedings in this Court between the same parties on 27 October 2010,<sup>3</sup> an award of costs was made against Mr Young in favour of the Board of \$2,500. So there is amassed a total costs award of \$10,000.

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<sup>1</sup> [2011] NZERA Auckland 149.

<sup>2</sup> [2011] NZERA Auckland 165.

<sup>3</sup> *Young v Bay of Plenty District Health Board* [2010] NZEmpC 145.

[2] Mr Young has made only very modest attempts to pay or otherwise address those costs awards. The Board put them in the hands of a debt collection agency which has, apparently over a long period, negotiated with Mr Young an arrangement whereby he pays \$10 per week. \$140 has been paid so far towards the outstanding balance of \$10,000.

[3] In addition to claiming that Mr Young's current challenge should not proceed until he has paid off those costs already incurred, the defendant is also seeking an order for security for costs against Mr Young in the present challenge. The Court is empowered to make an order for security for costs. Although not expressly in the Employment Relations Act 2000 or the Employment Court Regulations 2000, reg 6 provides that in such cases the applicable provisions of the High Court Rules apply and those include the power to make orders for security for costs.

[4] Mr Young opposes both applications, saying that to grant them would:

... subvert natural justice (in that a corporate public body wishes to hide its indiscretions around a protective disclosure matter and attempts to [do] so by delay and financial intimidation against a private individual who challenges that body under the Protective Disclosure Act 2000.)

[5] Mr Young says this application is only the last in:

... a long line of legal twists the BOP DHB has employed to keep this matter from showing up certain members of the DHB who have acted unethically and who continue to corrupt the system that is in place to protect the public health and wellbeing.

[6] Mr Young says:

Fighting this process, coming up to three years of my time, has disrupted my employment history and depleted my savings and equity personally to the point that I teeter [on] bankruptcy with legal bills and loss of earnings. The DHB of BOP has positioned itself to inflict this outcome in its actions over three years to bury the Protective Disclosure matter so I oppose one last by the BOP DHB and ask the court to stay this order till after the case on grounds of Protective Disclosure is heard.

[7] The Authority determination now challenged by Mr Young was made on papers rather than after any investigation meeting and was delivered on 12 April 2011. Mr Young claimed that his complaints arising out of a disclosure that he had

made under the Protective Disclosure Act 2000 had not been resolved by the Board as his former employer. He said that because of this disclosure, the Board dismissed him constructively and unjustifiably. Mr Young sought reinstatement in employment with the Board before the Employment Relations Authority as he does on his challenge to this Court, together with compensation for lost income over the last three years. The Authority concluded that Mr Young's personal grievances arising out of his dismissal, and an allegedly unjustified suspension, had already been heard and determined by it in March 2010. Both suspension and dismissal were then found to have been justified. As the Authority recorded in its determination also, Mr Young was unsuccessful in an application for leave to this Court for leave to challenge out of time. That was the occasion on which costs of \$2,500 were awarded.

[8] The Court must be careful to protect the rights of a litigant (including an unsuccessful litigant) to be able to challenge adverse findings in litigation. Just as financial constraint should not be a reason to deny access to justice, so too should not a requirement to pay the other party's costs. On the other hand, litigants, especially litigants not bearing the cost of their own representation, should not be permitted to rack up the costs of another party in defending ongoing or repetitious litigation where there is little and sometimes no consideration as to how and when those costs will be met.

[9] Although, in the matter last before this Court in which I awarded costs against Mr Young, I made strong findings about his attitude to the proceedings at para 25 of that judgment, I acknowledge that the Board, having elected to place the debt in the hands of a debt collection agency, and Mr Young have entered into an agreement, albeit for a very elongated programme of payment.

[10] What I must be careful about also is that if Mr Young is successful in his challenge, he may well have an argument for the reversal of costs ordered in the Authority previously.

[11] I consider that the defendant's two claims today are in different categories. Enforcement of the costs awarded by the Authority and by this Court should be for the defendant to pursue in any one of the usual ways that it may, including in

proceedings in other jurisdictions. Indeed, as I have noted, the defendant has elected to place these matters in the hands of a debt collection agency and is bound by its agreement as to the method of payment by Mr Young. So it is especially appropriate that this Court should not undertake that enforcement on behalf of the defendant, especially where this may prevent or make more difficult for Mr Young, his pursuit of a challenge that he is entitled to take.

[12] So I decline to stay Mr Young's proceeding until he pays the costs incurred previously and which are enforceable by the Board as a debt. On the other hand, the defendant's claim for an order for security for costs on the challenge currently before the Court has merit and is a matter properly able to be dealt with by the Court.

[13] Such orders are made only rarely and in exceptional circumstances, usually where a litigant is beyond the jurisdiction and so enforcement of costs orders may be difficult or impossible. But that is not a closed category. I am satisfied that there are exceptional circumstances in this case.

[14] The Authority's determination, which is challenged, is effectively a decision that Mr Young's proceedings were an abuse of process in the sense that they were an attempt to re-litigate a case that Mr Young had already lost on its merits and which he also failed to appeal within time. Those exceptional circumstances make it just to make an order for security for costs but that must be for a realistic amount.

[15] Mr Young has estimated that the hearing of the challenge will take three days. In those circumstances, I make an order that Mr Young give security for costs to the satisfaction of the Registrar of the Employment Court in the sum of \$6,000 and that until such security is given, his challenge is stayed.

[16] The only other matter that I need to note at this point is that it is clear that Mr Young attributes to Ms Bingham significant wrongdoing in her role with the Board. I am, of course, not deciding the merits of that but it seems that if and when the challenge comes on for hearing, it is almost inevitable that Ms Bingham will need to be a significant witness for the Board and in those circumstances should not act as its representative as well as being a witness. Therefore consideration should be given,

when the security has been provided, to alternative representation for the Board in this challenge.

GL Colgan  
Chief Judge

Judgment delivered orally at 2.39 pm on Wednesday 20 July 2011