

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 129
ARC 65/11**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for security for costs and stay of proceedings
BETWEEN	NANZHENG LIU Plaintiff
AND	SOUTH PACIFIC TIMBER (1990) LIMITED Defendant

Hearing: 17 July 2012
(Heard at Auckland)

Counsel: Rodney J Hooker, counsel for plaintiff
Craig Andrews, counsel for defendant

Judgment: 2 August 2012

**INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS
ON APPLICATION FOR SECURITY FOR COSTS AND STAY**

[1] Mr Nanzheng Liu filed a statement of problem with the Employment Relations Authority (the Authority) contending that he had been forced to resign from his position with the defendant company because it had failed to pay his wages and commission. The defendant responded to the grievance by disputing that Mr Liu had been an employee. Accordingly, it was argued that the Authority had no jurisdiction to consider the matters that Mr Liu had raised.

[2] The Authority resolved the jurisdictional issue by way of preliminary determination. It found that Mr Liu was not an employee of the defendant company

and dismissed his grievance.¹ The Authority awarded the defendant costs in the sum of \$3,500.00.²

[3] The plaintiff has filed a de novo challenge in this Court. The challenge is against the Authority's preliminary determination. No challenge has been pursued in respect of the costs award and nor has any application for stay been filed. Despite this, the plaintiff has taken no steps to meet his costs obligations.

[4] The defendant applies for security for costs (in the sum of \$10,000), and for an order staying the plaintiff's challenge until security has been paid. The defendant originally sought an order that the plaintiff's challenge be dismissed in the event that any security ordered was not given within 28 days. At hearing, counsel modified the nature of what was being sought to specification of a timeframe after which an application for dismissal of the plaintiff's claim might be pursued.

[5] The application for security for costs is advanced on the grounds that the plaintiff is resident in China and that it is unlikely that he will have an ability to pay in the event that his challenge fails and costs are awarded against him. The plaintiff opposes the application for security for costs.

Legal framework

[6] Mr Hooker's starting point was that security for costs should only be ordered by the Employment Court in rare, exceptional, or extraordinary cases. He drew attention to the fact that security for costs cannot be awarded in the Authority, and submitted that it is anomalous that security for costs can be awarded in this Court on a de novo challenge. Mr Hooker submitted that a restricted approach to security for costs in this Court was required having regard to the special nature of the employment jurisdiction and the need to ensure access to justice. Counsel did not go so far as to suggest that this Court lacked jurisdiction to consider an application for security for costs, while expressing a temptation to do so.

¹ AA 392/10, 30 August 2010.

² [2011] NZERA Auckland 199.

[7] Mr Hooker referred to observations by the Chief Judge in *Young v Bay of Plenty District Health Board*,³ where it was said that:⁴

[Orders for security for costs] 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.

[8] There is no express provision in the Employment Relations Act 2000 (the Act) to order security for costs.⁵ However, it has been accepted in numerous cases that the Employment Court has the power to order security for costs and to stay proceedings until such security is given.⁶ Because no procedure for ordering security is provided for in the Act or the Employment Court Regulations 2000, the application is to be dealt with “as nearly as may be practicable” in accordance with the procedure provided for in the High Court Rules.⁷ In *New Zealand Fire Service Commission v New Zealand Professional Firefighters’ Union Inc*⁸ the Court of Appeal held that the Employment Court was required to approach strike out applications (which similarly have no express statutory basis in the Act) on the same basis as the High Court does.⁹

[9] Rule 5.45(2) of the High Court Rules provides that a Judge may, if he/she “thinks it is just in all the circumstances, order the giving of security for costs.” Relevantly subclause (1) states that subclause (2) applies if a Judge is satisfied, on application by a defendant, that a plaintiff is resident out of New Zealand or that there is reason to believe that a plaintiff will be unable to pay the defendant’s costs if the plaintiff’s proceedings do not succeed. Accordingly, the Court must consider whether the threshold test in r 5.45(1) has been met and, if so, how the Court’s discretion should be exercised under r 5.45(2).

³ [2011] NZEmpC 89.

⁴ At [13].

⁵ Reg 69 applies rule 11 of the Court of Appeal (Civil) Rules 1997 relating to security for costs on an appeal.

⁶ Reg 6, Employment Court Regulations 2000 and r 5.45 of the High Court Rules. See (for example) *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139.

⁷ Reg 6(2)(a)(ii).

⁸ [2005] ERNZ 1053.

⁹ At [13].

[10] In exercising its broad discretion the Court must have regard to the overall justice of the case, and the respective interests of both parties are to be carefully weighed. The balancing exercise was summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd*¹⁰ as follows:

The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.

Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[11] The merits of the plaintiff's case are to be considered in the context of an application for security for costs. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions, any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.

[12] Concerns relating to access to justice apply across all courts. As the Chief Judge observed in *Mackenzie v Bayleys Real Estate Ltd*:¹¹ "ultimately, the particular decision must be on its own merits and the justice of the case."

Threshold test: Residency

[13] It is not in dispute that the plaintiff is currently living in China, and has been for some time (he has been in China since at least the beginning of 2012).

[14] The Court's willingness to order security for costs against an overseas party reflects the difficulties associated with overseas enforcement.¹² For the purposes of r 5.45, "resident" refers to a person's usual or ordinary place of abode. It is a question

¹⁰ (2002) 16 PRNZ 747 at [15]-[16].

¹¹ AC 18/04, 22 March 2004 at [11].

¹² See, for example, *Neely v Attorney-General* [1984] 2 NZLR 636.

of fact and degree, depending on the way the person's life is ordered.¹³ In *Bolton v New Zealand Insurance Co Ltd*¹⁴ Henry J observed that a temporary or occasional absence from a permanent address would not suffice, and cited Lord Scarman's speech in *R v Barnet London Borough Council ex parte Shah*¹⁵ as follows:

Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinary resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.

[15] In *Bolton* the plaintiff had been out of New Zealand for approximately one year, was working overseas, had family and property in New Zealand, and had deposed that he would return to New Zealand "when feasible". Henry J held that although the plaintiff had a family to which he intended to return at some unidentified time in the future he was nevertheless resident, for the time being, outside New Zealand. As he observed, the plaintiff had chosen to make his present residence elsewhere.¹⁶

[16] It is evident that Mr Liu has close links to New Zealand. He is a New Zealand citizen. He has a wife and two daughters living in New Zealand, who are studying at school and university. He also has some unspecified property here. He appears to have returned from time to time in the past over the course of the last 12 months, having sworn some of his affidavits filed in these proceedings in New Zealand. However, it is clear that Mr Liu is living, and working, in China and has been doing so for at least six months. While he deposes that he intends to return to New Zealand at some stage, he gives no indication of when this might be.

[17] In *Kapadia v PRP Auckland Ltd*¹⁷ the Court granted an application for security for costs in circumstances where a New Zealand citizen resident in India

¹³ *Bolton v New Zealand Insurance Co Ltd* (1993) 7 PRNZ 71 (HC); *Levene v Inland Revenue Commissioners* [1928] AC 217 (HL); *Lysaght v Inland Revenue Commissioners* [1928] AC 234 (HL). See too *Rankin v Secretary of War Pensions* HC Wellington CIV-2008-485-382, 30 July 2008 at [23], in considering whether the plaintiff was resident in New Zealand for the purposes of the Social Security Act 1964, citing *Fowler v Minister of Social Welfare* (1984) 4 NZAR 347.

¹⁴ At 72.

¹⁵ [1983] 2 AC 309 at 343.

¹⁶ At 73.

¹⁷ AC 60/06, 1 November 2006.

claimed to have an intention to return to New Zealand. The Court had regard to the fact that there was no indication as to the timeframe within which the plaintiff might return. In *Tones v 3D1 Ltd*¹⁸ security for costs was awarded against a party with an overseas domicile, and in *Burns v Media Design School Ltd*¹⁹ an order for security was made in circumstances where the plaintiff was an overseas citizen, resident in the Republic of Ireland and subject to work visa restrictions.

[18] Mr Hooker submitted that as a New Zealand citizen Mr Liu would not be able to work indefinitely in China, although no evidence to that effect was before the Court. In any event, I do not consider that Mr Liu's absence overseas can be properly be described as temporary. He is living in China and has been for some months, carrying out work as part of the regular order of his life.

[19] The purpose behind the availability of an order for security for costs is to provide a defendant with a means of recovering, so far as is reasonable, payment of costs if the plaintiff is ultimately unsuccessful. A plaintiff who is resident outside New Zealand is likely to present enforcement difficulties for a successful defendant.

[20] On balance, and having regard to the particular circumstances relating to Mr Liu's living arrangements as they appear on the evidence, I consider that he is resident in China in the sense that that is currently his usual or ordinary place of abode. The threshold test in r 5.45(1)(a)(i) is accordingly met.

Threshold test: Inability to pay

[21] Mr Andrews submitted that it was unlikely that the plaintiff would be able to pay costs in the event that his challenge failed. Reference was made to affidavit evidence relating to the plaintiff's financial position. Mr Vincent, a director of the defendant, deposed that his researches had failed to uncover any property held in Mr Liu's name of any value. He says that Mr Liu appears to have no real property in New Zealand, and that any shareholdings that he may hold in New Zealand companies appear to be in entities that are defunct and of no remaining value being

¹⁸ AC 44/07, 12 July 2007.

¹⁹ [2010] NZEmpC 147.

in liquidation, struck-off, or about to be. Mr Vincent appends a search of the New Zealand Companies Office Register, which reflects the position. The plaintiff's failure to meet his costs obligations in the Authority is also referred to as reflecting a likely inability to meet any costs that might be awarded against him in the Employment Court.

[22] Mr Andrews submitted that costs in the region of \$30,000 might reasonably be incurred if the matter proceeds to a three day hearing in this Court. I did not understand Mr Hooker to be taking issue with this estimate.

[23] What is required is credible evidence from which it can be inferred that a party will be unable to pay costs. It is not necessary to prove that this is so in the normal civil sense.²⁰

[24] Mr Liu deposes that he has property in New Zealand. However there is no detail of what property he might own, or the value of it, or the extent to which it might be subject to encumbrances. A failure by a plaintiff to disclose his/her financial circumstances may give rise to an inference as to their ability to meet costs.²¹ However, what is clear from the evidence is that Mr Liu is currently employed.

[25] On balance, and having regard to Mr Liu's employment status, I am not satisfied on the material before the Court that it can reasonably be inferred that the plaintiff will be unable to pay costs if they are ultimately awarded against him.

Exercise of discretion

[26] I turn to consider whether an order for security for costs would be just in all the circumstances.

[27] At this early stage, it is difficult to assess with any degree of certainty where the merits lie. Mr Andrews rightly conceded that the challenge is not untenable. The

²⁰ *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516 at 519; *Totara Investments Ltd v Abooth Ltd* HC Auckland CIV-2007-404-990, 4 March 2009 at [28].

²¹ *Arklow Investments Ltd v MacLean* (1994) 8 PRNZ 188 (HC) at 191.

issue for the Court on the challenge will be whether Mr Liu was in an employment relationship with the defendant. The Authority concluded that he was not, referring to the indicia that were consistent with a contract for services.

[28] However, as the Chief Judge observed in his interlocutory judgment granting leave to pursue the challenge out of time,²² there appear to be a number of factors that are indicative of a contract of service between the parties, including the exclusive nature of the work that Mr Liu undertook for the defendant during the relevant period; the defendant's wish to provide a restraint of trade on Mr Liu; Mr Liu's description of himself as a manager of the company, with the defendant's apparent tolerance of that self-description; the reference to Mr Liu's remuneration as being "salary"; the provision of a lap-top, computer, and company email address to Mr Liu; and the expectation that Mr Liu would comply with the company's policies (including in relation to expenditure and reimbursement of money). As against this, there are a number of strong factors suggesting that an independent contractor arrangement existed, as identified by the Authority.

[29] The substantive challenge will be intensely factual, and require assessment of which side of the line the relationship falls. While I accept that the plaintiff's challenge appears to have some merit, it is far from certain whether it will succeed.

[30] The plaintiff has not met the costs order against him in the Authority, or taken steps such as applying for a stay pending determination of his challenge. Mr Hooker submitted that the defendant had taken no steps to enforce the order, or seek payment of it, and the implicit reason for this was that any such steps would be met with an application for stay. The costs order made in the Authority remains payable, absent a stay. I do not consider that it assists the plaintiff to rely on the failure of the defendant to take steps to enforce, or recover, costs. While the Court does not act as a debt collector, the non-payment of costs ordered against the plaintiff is, in my view, a relevant factor in considering the application currently before the Court. It suggests that the plaintiff may fail to meet any order made against him following hearing.

²² [2011] NZEmpC 100 at [16].

[31] Mr Hooker submitted that an order for security for costs would likely pose difficulties for the plaintiff in pursuing his challenge, although he did not detail why this was so. I am not satisfied, on the basis of the material before the Court, that an order of security for costs would effectively prevent Mr Liu from pursuing his challenge, including having regard to the fact that he is currently working.

[32] Mr Hooker also advanced a submission that Mr Liu was entitled, under the New Zealand Bill of Rights Act 1990, to access to justice. Section 27 is entitled “Right to Justice”. Section 27(3) does not apply in the circumstances of the present case, given that the litigation is between an individual and a private company and does not involve the Crown. Section 27(2) relates to judicial review and is, accordingly, also not applicable. Section 27(1) confers a right to the observance of natural justice. I do not consider that the right recognised in this provision advances the analysis in the present case.

[33] As Mr Andrews pointed out, the proceedings have been characterised by some unfortunate delays, including the late deferment of a scheduled judicial settlement conference, somewhat ironically on the basis of the plaintiff’s unavailability overseas. Further, the plaintiff was obliged to seek an order from the Court extending the timeframe for filing a challenge (which was opposed, though ultimately granted).

[34] Mr Hooker submitted that it was relevant that the defendant had delayed in bringing an application for security for costs. I do not consider that the defendant can be criticised for the timing of the application. It was brought after it became evident that the plaintiff was living in China, and had sought deferment of the settlement conference because he was overseas.

[35] Ultimately a balancing exercise is required. There is no burden one way or the other.²³ The interests of both parties are to be considered. Mr Liu is currently resident overseas. I consider that this is likely to present enforcement difficulties for the defendant if his challenge fails, and costs are awarded against him. Mr Liu does not appear to have assets of any real value in New Zealand. His challenge appears,

²³ *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC) at 460-461.

at this early stage, to have some merit although I do not consider that it can be stated any more strongly than that. There have been a number of delays so far in progressing the proceedings, which have largely been occasioned by the plaintiff, and (in relation to the scheduled judicial settlement conference) because he was overseas.

[36] On balance, I consider that an order for security would be just in all of the circumstances.

[37] I turn to consider the issue of the quantum of security to be ordered. The defendant seeks security in the sum of \$10,000. Mr Hooker submitted that if security was to be ordered, a figure comparable to the outstanding costs award in the Authority would be appropriate (namely \$3,500).

[38] The Court is required to make an assessment of what is just in the circumstances of the particular case.²⁴ I accept that if the challenge proceeds to hearing it is likely to occupy around three days. I also accept that costs in the region of \$30,000 could readily be incurred in relation to defending the challenge. Applying the usual approach to costs in this Court, if successful, the defendant could reasonably expect a contribution of 66% (absent any inflating or discounting factors).²⁵

[39] There is no evidence to suggest that Mr Liu is in a straightened financial situation, although he does not appear to have any assets of value in New Zealand. Mr Hooker submitted that an order of security would present difficulties for Mr Liu, but, as I have noted, did not detail why that was so by way of reference to the evidence.

[40] Standing back, and having regard to all of the circumstances of the case, I consider that an order for security for costs in the sum of \$6,000 is appropriate.

[41] I do not propose to make the additional order sought by the defendant, namely that a timeframe be placed on payment, after which the defendant could

²⁴ *A S McLachlan Ltd* at [27].

²⁵ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

advance an application for dismissal of the proceeding. The defendant remains entitled to pursue such an application, if and when it considers it appropriate to do so, and any such application will need to be considered on its merits at that time.

Result

[42] The defendant's application for security for costs and a stay is granted. The plaintiff is required to give security for costs to the satisfaction of the Registrar in the sum of \$6,000. His challenge is stayed until such security is given.

[43] The defendant's application for additional orders relating to a timeframe for pursuing an application to dismiss the proceedings in the event that security is not paid within a specified timeframe is declined.

[44] The defendant sought costs on this application. Counsel are encouraged to seek to agree costs between themselves. If costs cannot be agreed, they can be the subject of an exchange of memoranda, with the defendant filing within 30 days of the date of this judgment and the plaintiff filing within a further 30 days.

Christina Inglis
Judge

Judgment signed at 9.30am on 2 August 2012