IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 210
ARC 46/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	interlocutory applications
BETWEEN	CANDYLAND LIMITED Plaintiff
AND	JO-ANNE LYNDA JARVIS Defendant

Hearing: 7 December 2012
(Heard at Hamilton)

Appearances: Michele Coker, agent for plaintiff
Mark Nutsford, advocate for defendant

Judgment: 7 December 2012

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] There are two preliminary issues to be determined before the plaintiff's challenge to the determination[1] of the Employment Relations Authority (finding in Jo-Anne Jarvis's favour) can be heard.

[2] First, Candyland Limited applies for an order staying execution of the Authority's determination which awarded monetary remedies to Ms Jarvis of about $13,000.

[3] Second, the defendant has applied for an order that the plaintiff give security for her costs and, until then, staying the plaintiff's challenge.

[1] [2012] NZERA Auckland 218.

[4] The Employment Relations Authority investigated Ms Jarvis's claims in investigation meetings on 16 March and 26 April 2012. It delivered its determination on 27 June 2012 finding that Candyland dismissed Ms Jarvis unjustifiably. Candyland was directed:

- to reimburse Ms Jarvis for lost remuneration of $3,748.28;
- to pay Ms Jarvis under s 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $3,750;
- to reimburse Ms Jarvis's legal costs of $5,250; and
- to pay Ms Jarvis's Authority filing fee of $71.56.

[5] That determination has been challenged by Candyland. None of the sums due under the Authority's determination has yet been paid to Ms Jarvis. Candyland says it is unable to pay that debt and cannot do so, let alone put aside funds for its legal representation in the proceeding.

[6] Candyland operates a confectionary manufacturing and on-site sales business at Henry Road in Taupiri. It purchased this business in 2010 from Cokers Candy Limited. The agreement for sale and purchase of the lease of the business premises (which is in evidence) lists Michele Robyn Cocker as "guarantor". The vendors were, in effect, Michele Coker's parents who remain as landlords of the company premises. The sale was completed with 100 per cent vendor finance and the agreement for sale and purchase includes a provision that the vendor has priority over other creditors of Candyland Limited in the disposition of its assets. Whether that provides the vendor with an enforceable priority in law is perhaps another question but I do not need to decide that. The agreement for sale and purchase is collateral with a contract entered into at the same time between Cokers Candy Limited and Candyland Limited for the sale of the business known as "Candyland".

[7] By Ms Coker's account (which has not been challenged by cross-examination), things have not gone well financially in the business of recent times.

Its accountants are owed a substantial sum for their services. At times, Candyland has struggled to pay its creditors including employee wages. Sales have been slower and fewer over the last 12 months and, by Ms Coker's account, were affected significantly by the events of 24 July 2011 when there was apparently an exodus of staff. Ms Coker claims that outstanding creditors of $60,000 are in preferential ranking over Ms Jarvis's claims. She says she is the sole director, has no other income, and has judgments recorded against her for unpaid accounts over the last four years. Ms Coker says that she has been quoted a fee of $12,000 for representation on the challenge but if these funds are able to be raised but are committed to providing security for costs, the company will not have sufficient funds to enable it to be represented professionally.

[8] Candyland's case is not only that it cannot pay Ms Jarvis but that it will not do so. It is very clear, having heard from Ms Coker, that the plaintiff takes a stand on a matter of principle, says that its case was not fairly reflected in the Authority's determination and is unwilling to even consider payment of any part of the compensation ordered by the Authority.

[9] The Authority's determination is comprehensive and, apart from saying that it contains no reference to a number of elements of evidence about Ms Jarvis's alleged misconduct that Ms Coker says was put before the Authority, the plaintiff has not been able to point to any obvious error which would indicate that the determination will be reversed on the company's challenge. Having found that Ms Jarvis was unjustifiably dismissed, the Authority's awards for that do not appear to be so out of line that they would be liable to be reduced for that reason alone, although the contribution to costs seems higher than usual for such a case. That is not to say, of course, that the plaintiff may not succeed in its challenge. At this stage the strength of its case is, however a neutral factor.

[10] It is likely that the plaintiff's challenge will not be able to be heard until early March 2013 at the soonest so that, after time taken for a reserve judgment, the case is unlikely to be concluded in this Court until about early June 2013.

[11] Despite Ms Coker's adamant opposition to paying any of the awards ordered by the Authority, even on an interim basis to an independent stakeholder, and cognisant of the company's financial difficulties, I am going to make an order for stay of execution of the Authority's determination but on conditions.

[12] I direct that execution of the Authority's determination be stayed on condition that the plaintiff pays the sum of $2,000 per month to the Registrar of the Employment Court at Auckland to be held on interest bearing deposit and to be paid out only at the direction of a Judge or by written agreement of the parties. The first sum of $2,000 is payable on 1 January 2013. The plaintiff should make arrangements before 20 December 2012 with the Registrar for these payments to be made automatically between banks. If the plaintiff defaults on those payments, then there will be no stay of execution of the Authority's determination and Ms Jarvis will be free to pursue her remedies in the usual way. The Registrar will advise Mr Nutsford of any default in payments by the plaintiff.

[13] Turning to the application for security for costs, I do have some sympathy for Ms Jarvis's position in view of both the plaintiff's tenuous economic circumstances and because of its adamant refusal to acknowledge its liability under the Authority's determination. It is a longstanding principle of this Court's practice that security for costs will only be allowed only in unusual and compelling circumstances. These have included, in some cases, a party being domiciled outside the jurisdiction so that recovery of costs may be more difficult, if not impossible. Here, the plaintiff company is a locally based business and if Ms Jarvis is awarded costs that may be difficult to recover, Ms Coker may be joined as a party to proceedings for compliance to ensure that these costs are paid.

[14] There is, however, one extraordinary factor which has persuaded me to make an order for security, but again on conditions. What should be entituled the plaintiff's second amended statement of claim filed on 16 August 2012 includes substantial claims against Ms Jarvis but which are of dubious justiciability. The plaintiff claims damages in the sum of $50,000 for defamatory statements about the company and its director/manager, Ms Coker, and for breach of implied duty of trust, faith and confidence. Separately, the plaintiff also seeks what it describes as

reimbursement for lost earnings in the sum of $33,256. As I discussed with Ms Coker, these claims are problematic for the following reasons. First, this Court has no jurisdiction over claims in defamation. Such claims must be brought in other courts. Neither of the claims by the plaintiff against Ms Jarvis was before the Employment Relations Authority so that they seem to have been brought only on this challenge for the first time. Such claims cannot be lumped into a challenge dealing with other matters that were before the Authority: they must be commenced in the Authority in the first place if they are for damages for breach of an employment agreement.

[15] Without determining the matter, it seems very likely that the claims for more than $83,000 by Candyland against Ms Jarvis are not properly before the Court. Nevertheless, they probably appear intimidating to the defendant and if they are persisted in, the defendant will have to take steps to defend them and those will be at a cost.

[16] The plaintiff has embarked on a bold strategy, even without professional representation in the proceeding. There are no particulars in support of the claimed losses as would have to be provided even if these claims were properly before the Court.

[17] In these circumstances, I am prepared to make a conditional order for security for costs. The condition is that if it maintains these counterclaims in the proceeding after 1 February 2013, the plaintiff must provide security for costs to the satisfaction of the Registrar of the Employment Court in the sum of $10,000. The plaintiff may, of course, maintain those claims and will be able to do so by doing nothing after 1 February 2013. That is not to say, however, that if these causes of action are maintained, the plaintiff may not have to re-plead them properly and sufficiently. If the claims that I have referred to are to be abandoned (meaning that security will not have to be given) or modified, then this will have to be by a further amended statement of claim filed and served by that date, 1 February 2013.

[18] At the end of the hearing, I took the opportunity to discuss with the parties the necessary timetabling directions to a hearing of the plaintiff's challenge

[19] I now deal with directions to the hearing of the challenge which Ms Coker is adamant must be heard by the Court. The following are those directions:

1. The challenge is by hearing de novo. Because the plaintiff does not concede that it dismissed Ms Jarvis, she must present her case first including establishing that she was dismissed before the onus for justification for that dismissal moves to the defendant.

2. The plaintiff anticipates having between two and up to possibly five witnesses, one or two of whom may be difficult to locate and one of whom may be required to be summonsed if he or she is to appear.

3. The defendant likewise may have up to five witnesses although one of those may be one of the same witnesses as Mr Nutsford has indicated the plaintiff also intends to call.

4. Neither party has any further known interlocutory applications to deal with.

5. It does not appear that there are many relevant documents in the proceeding and Mr Nutsford has undertaken to compile and to file with the Court a bundle of common relevant documents no later than three days before the start of the hearing. Only documents to be referred to at the hearing are to be included in the bundle. There are to be no documents in the bundle on a 'just in case' basis. Equally, all documents to which witnesses will refer in their evidence-in-chief should be included in the bundle. All documents should be arranged in chronological order if possible and tabbed separately. All pages in the bundle should be numbered consecutively.

6. The defendant is to file and serve briefs of the intended evidence-in-chief of her witnesses no later than 21 days before the start of the hearing. The plaintiff is to do likewise in respect of its witnesses no later than seven days before the start of the hearing. If there is a witness or witnesses who is or are reluctant to give evidence and/or to prepare a brief, the party calling that witness must file and serve a 'will say' statement which will set out what the party anticipates will be the evidence-in-chief of that witness. All briefs of evidence should be filed in hard copy and electronic (MS Word) format. Any evidence in reply by the defendant's witnesses will be heard viva voce at the hearing.

7. The most convenient venue for the case is Hamilton and realistically three days should be set aside for that hearing.

[20] The Registrar will confer with Mr Nutsford and Ms Coker about the suitable dates for the hearing which, as I have already noted, is unlikely to be before March 2013 in any event.

[21] I reserve leave for either party to make any further interlocutory applications on reasonable notice and I reserve costs on the interlocutory applications heard today.

GL Colgan
Chief Judge

Judgment delivered orally at 10.35 am on Friday 7 December 2012