IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 25
ARC 17/11

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 IN THE MATTER OF	an application for stay of proceedings
BETWEEN	AIR NEW ZEALAND LIMITED Applicant
AND	KATHLEEN MILNE Respondent

Judgment: 20 February 2012

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The respondent was dismissed from her employment as an in-flight service director in 2004 following a long period of sick leave. She claimed that she had been unjustifiably dismissed. That claim was dismissed by the Employment Relations Authority.[1] The Authority awarded the applicant $8,000 costs.[2] The costs award has not been paid.

[2] The respondent has filed a *de novo* challenge in this Court. The applicant has responded with an application for security for costs (in the sum of $20,000) and/or a stay. The respondent requests a stay until the security for costs is paid and/or the Authority costs award is paid into Court. The application is opposed.

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[1] [2011] NZERA Auckland 45.
[2] [2011] NZERA Auckland 134.

[3] The parties agreed to the application being determined on the papers.

Grounds for application

[4] The application is advanced on a number of grounds. First, the respondent is residing out of New Zealand. Second, the applicant has reason to believe that the respondent will be unable to meet any award of costs if she is unsuccessful in her challenge. Reference is made to her financial situation and her failure to meet the costs award in the Authority, despite requests that she do so. Third, it is said that the respondent's claims lack merit and that responding to them will be costly.

[5] An affidavit has been filed in support of the application. Mr Gaskin points out that the Authority's investigation meeting took place on 1 and 2 September 2010, with further information being filed with the Authority. He traverses the considerable delays experienced in the Authority in progressing the claim to an investigation meeting, highlights repeated failures by Ms Milne to meet timetable directions, and the fact that multiple conferences were convened with the Authority to identify difficulties with Ms Milne's claims, resulting in the filing of an amended statement of problem. These difficulties are set out in minutes from the Authority member, dated 27 October 2009 and 25 February 2010.

[6] The applicant wrote to Ms Milne on 29 April 2011 requesting payment of the $8,000 awarded against her in the Authority on 6 April 2011, and requesting her agreement to pay security for costs in the Employment Court proceedings. She declined both requests, by way of letter dated 10 May 2011.

[7] The applicant submits that security is appropriate given the respondent's apparent financial position, the likely (significant) costs of the Employment Court proceedings, and the respondent's refusal to meet the costs award in the Authority.

Grounds of opposition

[8] The respondent has filed a notice of opposition to the application, two affidavits (one of which was filed out of time) and submissions. The respondent's

submissions in opposition to the application are principally focused on the merits of the Authority's determination, and the way in which aspects of her claim were dealt with. She says that the Authority and the applicant "removed" an unjustifiable disadvantage grievance in relation to alleged bullying from her claim before the Authority and goes on to say that she should not have to contest her dismissal at her own cost, given the circumstances which she says underlay it.

[9] Ms Milne's affidavit of 13 September 2011 refers to concerns she has about the Authority's costs determination. She also refers to evidence given at the Authority that she had suffered financially, and has been unable to claim ACC weekly compensation and has been unemployed from 2004.

[10] Ms Milne filed an additional affidavit, dated 15 November 2011. That affidavit was filed outside the timetabling orders earlier made by Judge Travis. Counsel for the applicant took issue with the late filing, including on the grounds that it contained material that was irrelevant to the matters at issue on the application currently before the Court. I accept that that is so.

[11] Much of Ms Milne's most recent affidavit filed in support of her opposition deals with issues that are not directly relevant to the application for security for costs and stay. That is because they relate to alleged inadequacies in the way in which the claim was dealt with in the Authority, including the removal of a claim of unjustified disadvantage (bullying) and a misunderstanding about the way in which costs would be dealt with. Ms Milne identifies concerns about document disclosure and obligations she says the applicant has to meet relating to the cost of medical and counsellor consultations, travel and specialist reports. She further contends that the applicant is raising ill-founded concerns about estimated hearing time.

[12] There is nothing in Ms Milne's 15 November 2011 affidavit that relates to her financial position. The only material that has been provided, in addition to that which is contained in the earlier affidavit, is an annexed memorandum of counsel dated some 21 months earlier (25 February 2010) which asserts that Ms Milne is "not in employment, her income is modest, and is derived from interest from

invested money/savings. She is not impecunious and there is no basis for requiring security for costs or imposing a penalty of costs."

Approach

[13] The Employment Court has the power to order security for costs and to stay proceedings until such security is given.[3] Because no procedure for ordering security is provided for in the Employment Relations Act 2000 or Employment Court Regulations 2000, the application is to be dealt with in accordance with the procedure provided for in the High Court Rules.[4]

[14] Rule 5.45 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".[5] Relevantly for the purposes of this application, subclause (1) states that subclause (2) applies if a Judge is satisfied, on application, that a respondent is resident out of New Zealand or that there is reason to believe that a respondent will be unable to pay the applicant's costs if the respondent's proceedings do not succeed.

Residence

[15] Ms Milne lives in Australia, and has done so since 2006. There is no dispute that she is not resident in New Zealand.

[16] The Court's willingness to order security for costs against an overseas party reflects the difficulties associated with overseas enforcement.[6] While the grounds specified in r 5.45(1)(a) (including residence outside New Zealand) are expressed to be disjunctive of the grounds in r 5.45(1)(b) (ability to pay), the Court is required, before making any order for security, to consider whether such an order would be just in all the circumstances. Determining that issue requires consideration of a range of factors.

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[3] Regulation 6, Employment Court Regulations 2000 and r 5.45(1)(a)(i) of the High Court Rules. See (for example) *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139.
[4] Regulation 6.
[5] HCR 5.45(2).
[6] See, for example, *Neely v Attorney-General* [1984] 2 NZLR 636.

[17] In the present case I consider that the issues which ordinarily attach to a non-New Zealand resident, are compounded by likely difficulties associated with the respondent's financial situation and attitude, which I refer to below.

Inability to pay?

[18] 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.[7]

[19] There is no clear evidence that the respondent is impecunious and would be unable to pay a costs award against her. However, it is clear (based on the material that she has placed before the Court) that she is currently unemployed and has been for some years, and has limited finances available to her. No assets are identified. While there is an oblique reference in an outdated memorandum of counsel filed in earlier proceedings to interest bearing accounts, there is no detail as to the extent of her financial reserves and whether or not they might be sufficient to meet the current, or any future, costs award against her.

[20] The investigation meeting in the Authority took over a day. Given the intended scope of the respondent's challenge, and the matters she is evidently wishing to canvas, a four day estimate of hearing time in this Court would appear to be conservative. I have no doubt that if the challenge progresses to a hearing in the Employment Court it will involve substantial costs. In light of the history of the proceedings in the Authority it is highly likely that there will be a number of interlocutory matters requiring determination and that significant case management will be involved. This will increase the costs that might otherwise be incurred.

[21] I am satisfied from the material before the Court that it can reasonably be inferred that Ms Milne will be unable to pay costs if awarded against her. The evidence relating to her financial position is scant, although what is plain is that she is unemployed, and has been for some time. There is nothing to suggest that her

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[7] *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].

position may improve. Nor has Ms Milne indicated that she would be in a position to pay costs.

Other factors

[22] At this early stage, it is difficult to assess where the merits lie. What can be said is that the Authority's determination is both reasoned and cogent. The respondent was dismissed following a significant period off work, and after having been assessed as medically unfit for work. While it may be that she is able to establish that her dismissal was unjustified at hearing, there is no obvious error on the face of the Authority's determination.

[23] The respondent's position is that she will not comply with the Authority's costs order because she does not agree with it. No challenge, or application for stay, appears to have been filed in relation to the costs determination. While the Court does not act as a debt collector in relation to costs ordered by the Authority, the fact of non-payment is in my view relevant to a determination of the applications currently before the Court. It suggests that the respondent may fail to meet any order made against her following hearing if she does not accept that it has been properly made.

[24] Access to the Courts is not to be denied lightly. However, there is nothing in the material filed by the respondent to suggest that if an order for security for costs is made she will be unable to proceed with her claim. Her interest in pursuing her claim must also be balanced against the applicant's interest in not being drawn into unnecessarily complicated, or protracted litigation, with no reasonable expectation of being able to recover costs.[8]

[25] Based on the material before the Court, if the applicant succeeds in defending the respondent's challenge, the prospect of it recovering costs are remote. This assessment is informed by the respondent's residence, her apparently constrained financial position, and her attitude to costs to date.[9]

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[8] *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]-[16].
[9] *Oldco PTI Ltd v Houston* AC 26/08, 25 August 2008 at [18].

Result

[26] I consider that it is just in the circumstances to make an order for security for costs. The amount of security is a matter of discretion. It is not necessarily linked to a likely award of costs. Rather it is the sum that the Court considers appropriate in all of the circumstances.[10]

[27] If the challenge proceeds it will be costly. At this early stage it is likely to take at least four days of hearing time and it is almost inevitable, given the nature of the claims that Ms Milne is wishing to pursue, that interlocutory applications will need to be determined. Costs awards range widely, depending on the circumstances of each case but it is not unusual for a successful party in the Employment Court to be awarded a sum in the range of $30,000 to $45,000 for a four day hearing.

[28] Having regard to all the circumstances, I require Ms Milne to give security for costs to the satisfaction of the Registrar in the sum of $10,000. Her challenge is stayed until such security is given.

[29] The applicant also sought orders staying the respondent's challenge pending payment of the costs award against her in the Authority, referring to a number of cases[11] in support of this aspect of the application. A note of caution was recently sounded by the Chief Judge in *Young v Bay of Plenty District Health Board*[12] noting that the enforcement of costs in the Authority should be for the party awarded costs to pursue in one of the usual ways, including proceedings in other jurisdictions.[13] In *Young*, an important factor weighing with the Court was that the defendant had placed costs recovery in the hands of a debt collection agency. That is not the situation here. As the Chief Judge observed in *Young*, litigants should not be permitted to rack up the costs of another party in defending ongoing or repetitious litigation were there is little and sometimes no consideration as to how and when

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[10] *McLachlan* at [27].
[11] *Buchan v Sheffield Ltd* AC 31/05, 24 June 2005*; Hamon v Coromandel Independent Living Trust* [2010] NZEmpC 20 *and Gates v Air New Zealand Ltd AC 15/07, 27 March 2007.*
[12] [2011] NZEmpC 89.
[13] At [11]. See too *Kaipara v Carter Holt Harvey Ltd* [2011] NZEmpC 132.

those costs will be met.[14] Further, a disappointed litigant is entitled to apply for a stay of a costs order made against them in the Authority pending a challenge to this Court.

[30] However, having regard to the matters before me and the order I have made in relation to security for costs, I do not propose to make any additional order for stay pending payment into Court of the costs awarded in the Authority.

[31] The applicant is entitled to costs on its application. If these cannot be agreed they are to be the subject of memoranda, the first of which is to be filed and served by the applicant within 30 days of the date of this interlocutory judgment, with any memorandum from the respondent to be filed and served within 21 days following.

Christina Inglis
Judge

Judgment signed at 10.30am on 20 February 2012

[14] At [8].