

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2012] NZEmpC 213
CRC 30/12**

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

AND IN THE MATTER OF interlocutory applications

BETWEEN LYNETTE TURNER
 Plaintiff

AND TALLEY'S GROUP LIMITED
 Defendant

Hearing: By memoranda filed on 3 and 10 December 2012

Appearances: Anjela Sharma, counsel for plaintiff
 Maree Kirk, counsel for defendant

Judgment: 13 December 2012

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] There are two preliminary interlocutory matters now for priority decision because this challenge to a determination¹ of the Employment Relations Authority is scheduled to be heard in early February 2013. Counsel have agreed in these circumstances to have the Court deal with these questions on the papers without a hearing. Witnesses were not called for cross-examination and counsel have made their submissions by memoranda.

[2] By a minute issued on 14 November 2012 I set a timetable for the filing of submissions on these two interlocutory matters which has been adhered to by counsel. I indicated that any telephone conference call hearing which either party might seek could be heard in the week commencing 10 December 2012 but neither

¹ [2012] NZERA Christchurch 162.

party has sought to take up that option. Accordingly, I have determined the applications on the papers which include affidavit evidence and written submissions.

[3] Although the two applications (one from each party) are connected, they must be decided separately. I address, first, the plaintiff's application for an order to stay execution of the Authority's costs award² in favour of the defendant.

Plaintiff's application for stay of Authority's costs order

[4] Lynette Turner was unsuccessful in the Authority. It subsequently made an order for costs in favour of Talley's Group Limited (Talley's) of \$1,750.

[5] There is some relevant evidence about the parties' circumstances that needs to be set out. The defendant is a substantial commercial organisation and a significant employer of labour in the Nelson region. There is no question of its ability to meet orders for costs that may be made against it.

[6] Mrs Turner had worked for Talley's for a number of years, earning about \$40,000 per year. Her employment ceased, at Talley's' instigation, in July 2011 and it took her about 16 months to secure full-time substitute employment, during which period she did not have a regular income. Despite difficult circumstances as a result of sustained and significant loss of income, Mrs Turner cannot be described as impecunious. She has a substantial interest in an Auckland property which is currently on the market for sale. She says, and I accept, that she is very unlikely to be able to borrow money, even against the security of the property, to pay court costs. So, in these circumstances and until the property is sold, Mrs Turner is thrown back on her income which is, at \$14 per hour, only just above the minimum wage as a laundry worker, which employment she has only obtained in recent months. Mrs Turner has acknowledged that she will have to meet her own legal costs in due course.

[7] Mrs Turner's grounds for an order staying the Authority's costs award are:

² [2012] NZERA Christchurch 226.

- that it would be more just if she not pay any costs to the defendant until her challenge in this Court is heard and decided in early 2013;
- that there will be little or no prejudicial effect of the award's non-payment on the defendant; and
- that she has very limited financial resources to both meet that award of costs and to prosecute her challenge which is to a preliminary jurisdictional point, albeit an important one.

[8] The Authority's award was a modest one although I acknowledge that this is to be assessed in light of a number of factors including Mrs Turner's ability to meet that award. For Mrs Turner in her financial circumstances after her employment ended, the amount of the Authority's award was significant.

[9] The most just way of addressing her application, bearing in mind Mrs Turner's limited financial ability, is to stay execution of the Authority's costs award on condition that she pays \$50 per month towards those costs, such payments to be made to her solicitor's trust account to be held undisbursed except by order of a Judge or by written agreement of the parties. The first payment by Mrs Turner should be made on 1 February 2013 with regular payments on the first calendar day of each month thereafter. I make this as an order of the Court.

[10] Although it might be suggested that such an arrangement should have been offered by Mrs Turner, it is equally true that it could have been proposed by Talley's as a sensible and reasonable alternative to a lump sum payment, especially after Mrs Turner's financial circumstances were disclosed.

[11] Costs on this application will, therefore, be met by the parties themselves.

Defendant's application for security for costs

[12] The second matter for decision is the defendant's application for an order for security for costs. It seeks an order that Mrs Turner give security for its costs in the

sum of \$10,000 in addition to the payment by the plaintiff of the Authority's award of costs. Talley's grounds for seeking security include:

- Mrs Turner's failure to date to pay the costs awarded by the Authority;
- her impecuniosity generally;
- that Talley's is being put to the additional and "unnecessary" expense of interlocutory matters such as document disclosure;
- criticism of Mrs Turner's professional fee arrangements with her solicitor;
- that Mrs Turner does not have a registered interest in the house that she occupies in Motueka; and
- the contended strength of the defendant's case.

[13] The defendant's claim that the plaintiff should provide security for its costs and that Mrs Turner's challenge should be stayed unless and until she does so, is without merit. The case law reflecting this Court's practice discloses that such applications are granted only rarely and in extraordinary circumstances, which do not exist in this case. It is difficult to accept that the defendant would not have been advised otherwise, which has no doubt caused Mrs Turner to fear that Talley's application for security is a strategy to persuade or compel her to abandon her case.

[14] The plaintiff is a widow who lost her longstanding employment with the defendant as a consequence of its decision that she should not be employed by it. The justification for that decision in law is the subject of the case. The scheme of the Employment Relations Act 2000 is that cases go first for investigation to the Employment Relations Authority which is not a court but, rather, investigates and resolves employment relationship problems. In this case Mrs Turner's case has been knocked out (on grounds of non-compliance with time limits) before there has been

any opportunity to examine it on its merits. To now seek to place a barrier in the way of Mrs Turner's challenge by requiring her to pay what, for her, will be an impossibly high sum as security for costs, will deprive her of access to justice.

[15] The defendant's grounds for an order for security are not at all strong. It says that she is impecunious so that if it is successful in this Court and Mrs Turner is ordered to pay costs, it is unlikely that it will be able to recover these from her. As I have already noted, however, Mrs Turner's income loss was attributable to the defendant's actions (whether these were justified or unjustified) so that it would be unjust to effectively prevent her from challenging the lawfulness of those because of the financial consequences of them. For reasons already set out, Mrs Turner is not impecunious so far as her ability to meet an award of costs goes in the long term.

[16] The defendant claims that it has a strong case but I conclude, without determining the issue, that this is not able to be established at this stage. It is notoriously difficult to assess in advance the prospects of success or failure of a challenge, especially where the plaintiff has elected to do so by hearing *de novo*. I do not propose to embark on such an exercise except to say that the case raises a number of legal issues which have already been identified to the parties but which the Authority did not address in its determination. Again without predicting even the probability of a result, it is simply not possible to say that the plaintiff has so little prospect of success that she should be required to pay security for costs at a level which will prevent her from pursuing her case where the decision appealed from does not address a number of obvious, relevant and important legal issues.

[17] The fact that the plaintiff's challenge will raise these issues for argument and decision counts against the defendant's assertion that the plaintiff has slim prospects of success and, therefore, against making an order for security that will have the practical consequence of preventing these issues from even being considered.

[18] The defendant appears to be critical of Mrs Turner by presenting unattributed hearsay evidence that she has been seen with her grandchildren in Motueka. Just what that establishes I am not sure but it does not amount to a ground for making an order that will effectively prevent her from even having her case heard on its merits.

[19] The weakness of the defendant's grounds for an order for security is illustrated by its attacks on what it can do no better than suspect are the financial arrangements between Mrs Turner and her solicitor who represents her in this proceeding. That is a matter between Mrs Turner and her lawyer and, frankly, none of Talley's' business. I simply note that there may be a variety of arrangements into which people enter with their lawyers about how they will be represented. These arrangements are subject to certain ethical rules but there is no evidence that these have been breached. If Mrs Turner's lawyer has agreed to await payment of her fee until after the case has concluded, then the lawyer is to be complimented and the client not criticised as Talley's does. What can only be the defendant's speculation about these arrangements, and its dissatisfaction that Mrs Turner is being represented, are not relevant elements in determining the application for security.

[20] Next, the defendant says that a property search reveals that the address at which Mrs Turner lives is owned by someone else. That is not surprising, not only because a substantial proportion of the workforce lives in rented accommodation, but so, too, does an even greater proportion of those in low wage jobs as Mrs Turner's. That is not a ground for requiring her to give substantial security for the defendant's costs in the proceeding. Not everyone, especially low paid employees, has equity in their homes that can be offered as collateral security.

[21] Evidence for the plaintiff discloses that, although renting her home in Motueka, Mrs Turner nevertheless has significant equity in a residential property elsewhere in New Zealand so that she could not be described as "impecunious" in a cost setting. This means that the defendant is not at risk of being unable to recover any costs award against her. In these circumstances, it is surprising that Talley's persisted in its application for security for costs after having become aware of the true facts.

[22] The defendant also complains about the inconvenience, and therefore the cost to it, of being required to make disclosure of its documents that are relevant to the case. That is, however, a fact of life in litigation and if, as it says, it has provided the plaintiff with all relevant documents in its power, possession or control, then confirming that formally ought not be an onerous or expensive exercise. If, on the

other hand, there are relevant documents that have not been disclosed and/or inspected, the plaintiff may be entitled to these. If the defendant resists, as it is entitled to, then there will necessarily be some expenditure of energy and money in resolving that disputed question.

[23] Mrs Turner is not domiciled outside the jurisdiction or in any of the other extraordinary circumstances in which the Court occasionally requires that security for costs be given. Security of \$10,000 would be an excessive amount in all the circumstances in any event.

[24] The defendant's application for security is dismissed.

[25] Mrs Turner is entitled to a contribution towards her costs of defending this unmeritorious application. Those are fixed in the sum of \$750 and are payable to Mrs Turner irrespective of the outcome of this litigation henceforth.

GL Colgan
Chief Judge

Judgment signed at 12 noon on Thursday 13 December 2012