

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 108
ARC 51/12**

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

AND IN THE MATTER an application for security for costs and/or
stay of proceedings

BETWEEN KATHLEEN ANN BEATTIE MILNE
Plaintiff

AND AIR NEW ZEALAND LIMITED
Defendant

Hearing: By submissions filed on 22 February, 18 March, 24 April and
20 May 2013

Appearances: Kathleen Ann Beattie Milne, plaintiff
David France, counsel for defendant

Judgment: 13 June 2013

INTERLOCUTORY JUDGMENT NO 1 OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff was employed with the defendant company as a flight attendant in 1972. Her employment ended in November 2004 and she subsequently pursued a claim for unjustified dismissal. The Employment Relations Authority concluded that her dismissal was justified.¹ She challenged that determination.² The plaintiff filed a further statement of problem in the Authority on 16 May 2012, alleging various breaches on the part of the defendant during her employment. The Authority concluded that these claims were time barred, and accordingly dismissed them.³

¹ *Milne v Air New Zealand Ltd* [2011] NZERA Auckland 45.

² ARC 17/11, *Milne v Air New Zealand Ltd*.

³ *Milne v Air New Zealand Ltd* [2012] NZERA Auckland 236.

That decision has also been challenged in this Court.⁴ Neither challenge has been substantively determined.

[2] The Employment Court has previously made an order that the plaintiff give security for costs in ARC17/11,⁵ and ordered that that proceeding be stayed until security is paid or given to the satisfaction of the Registrar. The Court also ordered the plaintiff to pay the defendant costs on the defendant's successful application for security for costs.⁶ Those costs have not been paid.

[3] The present application for security for costs relates to the challenge in ARC51/12. It is advanced on the grounds that the plaintiff is resident overseas and is unlikely to be able to pay costs in the event that her challenge fails and costs are awarded against her. The plaintiff opposes the application for security for costs and/or for stay.

[4] The parties agreed that the application could be dealt with on the papers.

Legal framework

[5] There is no express provision in the Employment Relations Act 2000 (the Act) to order security for costs.⁷ However, it has been accepted in numerous cases that the Employment Court has the power to make such orders and to stay proceedings until security is given.⁸ 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.⁹

[6] 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, sub-cl (1) states that sub-cl (2) applies if a Judge is satisfied, on

⁴ ARC 51/12.

⁵ *Air New Zealand Ltd v Milne* [2012] NZEmpC 25.

⁶ *Milne v Air New Zealand Ltd* (No 2) [2012] NZEmpC 69.

⁷ Although reg 69 of the Employment Court Regulations 2000 relates to security for costs on an appeal.

⁸ See, for example, *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139.

⁹ Regulation 6(2)(a)(ii).

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 (either through residency or inability to pay) and, if so, how the Court's discretion should be exercised under r 5.45(2).

[7] 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 is summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd*¹⁰ as follows:

[15] 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 likely to be denied.

[16] 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.

The merits of the plaintiff's case are to be considered. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions and any delay in bringing the application.

Threshold test: residency

[8] The purpose behind the availability of an order for security for costs is to provide a defendant with the means of recovering, so far as is reasonable, payment of costs if the plaintiff is ultimately unsuccessful. The Court's willingness to order security for costs against an overseas party reflects the difficulties associated with overseas enforcement.¹¹

¹⁰ (2002) 16 PRNZ 747 (CA).

¹¹ See, for example, *Neely v Attorney-General* [1984] 2 NZLR 636 (CA).

[9] It is not in dispute that the plaintiff is currently residing overseas in Australia, and has been for some time. The threshold test in r 5.45(1)(a)(i) is met.

Threshold test: inability to pay

[10] It is clear, based on the material before the Court, that the plaintiff will face considerable financial difficulty in meeting any award of costs made against her in the Employment Court if she is unsuccessful on her challenge. It appears that she is currently unemployed and has been for some time, although no information has been provided in relation to what (if any) assets she has, or the extent of any financial reserves she might have available to her to meet any future costs award.

[11] Counsel for the defendant estimates that the likely costs of proceeding to a hearing on the challenge will be around \$20,000. Ms Milne takes issue with this estimate, on the basis that the defendant company could make use of the in-house legal services it has at its disposal. While that may be so, the defendant is entitled to instruct external counsel to appear on its behalf in proceedings, as it has done.

[12] Estimating costs at an early stage of proceedings is an inexact task. However, I accept counsel's estimate of the costs likely to be incurred by it to the conclusion of a hearing.

[13] 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.¹² Based on the material before the Court I conclude that it can reasonably be inferred that the plaintiff will be unable to pay costs if they are ultimately awarded against her. Accordingly, the threshold test relating to inability to pay is met.

[14] While the threshold tests in sub-cl (1) are disjunctive, both are satisfied in this case.

¹² *Concord Enterprises Ltd v Anthony Motors Ltd (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].

Exercise of discretion

[15] Mr France, counsel for the defendant, submits that a number of factors are relevant to the Court's discretion to order security for costs in the circumstances of this case, including the plaintiff's prospects of success.

[16] The plaintiff was unsuccessful in the Authority, for reasons cogently expressed. I accept that while there are difficulties associated with assessing where the merits lie at the early stage of proceedings, in the present case the plaintiff is likely to face significant hurdles in establishing her claim, relating as it does to alleged obligations to advise her of her rights to an individual employment agreement, and under a different statutory regime, some 41 years ago.

[17] As Mr France submits, the plaintiff's likely attitude to payment of any costs award made against her is also relevant to the discretionary exercise. This was highlighted in the earlier interlocutory judgment of 20 February 2012 in ARC17/11, where I observed:¹³

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.

[18] The plaintiff frankly acknowledges that she has not paid the costs awarded against her on the defendant's successful application for security for costs and nor has she met the Authority's costs award (\$8,000), for reasons set out in her submissions.¹⁴ Essentially she says that the defendant has failed to satisfy her of the costs it has incurred, and which form the basis of the awards. That is not an excuse for non payment of a costs award made in the Authority or the Court.

[19] I consider that it is reasonable to conclude that if the plaintiff has a further costs order made against her, she will similarly refuse to meet that obligation. This is, in my view, a factor that weighs in favour of the defendant's application.

¹³ [2012] NZEmpC 25 at [23].

¹⁴ The plaintiff also refers to substantial outstanding legal bills, amounting to \$14,073.61.

[20] Mr France submits that the lack of realistic exposure that the plaintiff has, compared to the defendant's certain exposure, is supportive of the discretion being exercised in favour of the defendant and demonstrates a situation which is "entirely inequitable".¹⁵

[21] Ms Milne submits that there is an inequality of power, favouring the defendant, and that this ought to be taken into account in considering the current application. She also submits that if security is ordered against her she will be unable to proceed with her claim.

[22] Access to the courts is not to be denied lightly. I accept, based on the material filed by the plaintiff, that if an order for security for costs is made it will present additional difficulties for her in pursuing her claim against the defendant. I also accept that the defendant, with significant resources available to it, is in a position of some strength. However, the plaintiff's interest in pursuing her claim must be balanced against other factors, including the defendant's interest in not being drawn into unnecessarily complicated or protracted litigation, with no reasonable expectation of being able to recover the costs.¹⁶ And while the plaintiff's financial position is difficult, there is a dearth of evidence or information relating to what assets (if any) she holds and what financial reserves she might have.

[23] I take into account the broader circumstances, including the orders already made against the defendant.

[24] Ultimately, a balancing exercise is required. There is no burden one way or the other.¹⁷ The interests of both parties are to be considered.

[25] On balance, I consider that a modest order for security would be just in all the circumstances in relation to this proceeding. Standing back, and having regard to all relevant matters before me, including the plaintiff's position, the likely costs of proceeding to a hearing, the merits of the claim (insofar as they can be assessed at

¹⁵ Citing *Oldco PTI Ltd v Houston* [2010] NZEmpC 161 at [20] and *Oldco PTI Ltd v Houston* AC 26/08, 25 August 2008, as authority for this proposition.

¹⁶ *Air New Zealand v Milne* [2012] NZEmpC 25 at [24].

¹⁷ *Bell-Booth Group Ltd v Attorney-General & BCNZ* (1986) 1 PRNZ 457 (HC) at 460-461.

this stage), the orders made in the related proceeding, I consider that security in the sum of \$1,500 is reasonable.

[26] Rule 5.45(3)(b) of the High Court Rules provides that any order requiring the giving of security for costs may stay the proceeding until the sum is paid or security given. I consider it appropriate that such an order be made in the circumstances of this case.

[27] Accordingly, the plaintiff's challenge in ARC 51/12 is stayed until security for costs in the sum of \$1,500 has been paid or security given to the satisfaction of the Registrar.

Application for cross-stay orders pending payment of security for costs and costs in ARC 17/11

[28] The defendant applies for additional orders that the proceedings in ARC 51/12 be stayed until such time as the previous orders for security for costs and costs made by this Court in ARC 17/11 have been met. This appears to be a novel application in the sense that the stay is sought on the basis of satisfaction of orders in a separate proceeding which was itself subject to an order of stay until satisfied.

[29] While the two proceedings are separate they are, nevertheless, related. As both parties point out, the claims are based on the employment relationship that existed between them and which provides the basis for the plaintiff's claims against the defendant. I accept that there is an interest in the defendant not being unnecessarily vexed with proceedings, arising out of the same employment relationship, in circumstances where there is little prospect of costs recovery against the plaintiff in the event that her claims fail. I also accept that, given the plaintiff is resident overseas, there will be difficulties associated with enforcing the costs award made against her.

[30] However, at this stage the proceedings remain separate and no application has been advanced for consolidation. The effect of making the cross-stay orders sought by the defendant would be to restrict the plaintiff's ability to pursue a claim

even after satisfying an order for security for costs in relation to that proceeding, on the basis that she had not paid security or costs ordered in another proceeding. Such a consequence brings access to justice principles sharply into focus. Even assuming jurisdiction to make a cross-stay order, I would not have been inclined to do so having regard to the overall interests of justice in this case. The plaintiff ought not to be unnecessarily burdened, and I consider that the defendant's interests are sufficiently protected by the orders that have already been made.

Conclusion

[31] The plaintiff's challenge in ARC 51/12 is stayed until security for costs in the sum of \$1,500 has been paid to the Court to the satisfaction of the Registrar.

[32] The defendant's application for a stay of the plaintiff's challenge in ARC 51/12 until security for costs and costs in ARC 17/11 are paid is declined.

[33] The defendant is entitled to costs on this application which, having regard to all of the circumstances, I fix at \$500.

Christina Inglis
Judge

Judgment signed at 1.30 pm on 13 June 2013