IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 201
ARC 56/13

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	SHIRLEY ANNE MACDONALD Plaintiff
AND	WHALE PUMPS LIMITED T/A DENBY CATERERS Defendant

Hearing:	By affidavits and memoranda of submissions filed on 25 September, 8 and 14 October, and 4 and 8 November 2013
Representatives:	Cor Eckard, counsel for plaintiff Christine Rowe, advocate for defendant
Judgment:	12 November 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] The defendant seeks an order that the plaintiff's challenge by hearing de novo to the determination of the Employment Relations Authority dismissing her personal grievance, be stayed until she gives security for costs. That application is opposed.

[2] Shirley MacDonald contended before the Authority that she had been dismissed unjustifiably and that she was owed arrears of wages. The defendant denied the latter claim and said that she had not been dismissed but, rather, that Ms MacDonald was a casual employee who had not been engaged for any further casual assignments, each of which was a separate contract of employment which concluded

at the end of each agreed period. In any event, it said that the initiative for the parties' failure to engage further had come from the plaintiff.

[3] The Authority investigated Ms MacDonald's claims at a meeting in Whangarei on 16 April 2013 and, on 14 June 2013, issued its determination dismissing her claims except to the extent that it allowed her a modest amount for short-paid holidays.[1] The Authority concluded that the parties' employment relationship was ended at the initiative of Ms MacDonald who, through her representative, advised her employer that she did not wish to continue working for it.

[4] In a subsequent determination issued on 28 August 2013,[2] the Authority awarded Denby Caterers $2,000 towards its costs, directing also that "Ms MacDonald is to have time to pay that sum" to take account of her financial circumstances.

[5] Ms MacDonald was granted legal aid in respect of her challenge to the Authority's determination on 10 October 2013.

[6] Ms Rowe has advanced every conceivable argument that can be made in the circumstances for an order requiring Ms MacDonald to give security for costs and staying her challenge unless and until she does so.

[7] First, Ms Rowe advises the Court that the defendant has challenged the plaintiff's grant of legal aid by asking formally that the Legal Aid Services Commissioner withdraw Ms MacDonald's grant under s 30(2) of the Legal Services Act 2011. That provides materially that the Commissioner may withdraw a grant of legal aid if:

> (d) the Commissioner considers that the aided person no longer has reasonable grounds for taking, defending, or being a party to the proceedings, or that it is unreasonable or undesirable in the particular circumstances for the person to continue to receive legal aid:
> (e) the Commissioner is satisfied that the aided person has, in relation to any application by that person relating to legal aid,—
> (i) intentionally or negligently made an untrue statement about that person's resources, or has failed to disclose any material

[1] [2013] NZERA Auckland 252.
[2] [2013] NZERA Auckland 387.

fact concerning them, whether the statement was made or the failure occurred before or after the aid was granted; or

(ii) intentionally contravened or failed to comply in any respect with this Act or regulations.

[8] The defendant's contention is that Ms MacDonald has filed false affidavit evidence in this proceeding and adduced misleading evidence in the Authority's investigation. On this basis the defendant contends that "it is possible that she has also provided false information" to the legal aid authorities.

[9] Although it is not for this Court to determine whether the grant of legal aid should be withdrawn, it will be for the Court to determine whether false evidence has been given to it. That is, of course, a very serious allegation amounting, in effect, to perjury. The allegations of false evidence are contained in the second affidavit of Alwyn Carrell, the director and operator of the defendant company which trades in Northland as Denby Caterers. He responds to Ms MacDonald's affidavit opposing the defendant's application. Many of Mr Carrell's allegations go to the merits of the plaintiff's case and Mr Carrell's affidavit interweaves submissions with factual allegations. A challenge by hearing de novo will not, however, revisit who said what before the Authority. In any event, it is simply premature to determine these conflicts which the defendant has identified and only some of which will be relevant in determining the challenge.

[10] Without seeing and hearing the witnesses, it is simply not possible to make any conclusion about the probabilities of the evidence, let alone to determine whether any witness has committed perjury as the defendant now effectively alleges.

[11] Next, Ms Rowe draws the Court's attention to s 45(2) of the Legal Services Act 2011 which precludes the making of an order for costs against a legally aided person in a civil proceeding unless the Court is satisfied that there are "exceptional circumstances". It provides:

> **45 Liability of aided person for costs**
>
> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the

circumstances, including the means of all the parties and their conduct in connection with the dispute.

(2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

(3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

- (a) any conduct that causes the other party to incur unnecessary cost:
- (b) any failure to comply with the procedural rules and orders of the court:
- (c) any misleading or deceitful conduct:
- (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
- (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
- (f) any other conduct that abuses the processes of the court.

(4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.

(5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

(6) If an order for costs is made against a next friend or guardian ad litem of an aided person who is a minor or is mentally disordered, then—

- (a) that next friend or guardian ad litem has the benefit of this section; and
- (b) the means of the next friend or guardian ad litem are taken as being the means of the aided person.

Subsection (3) sets out some of the considerations applicable to determining whether there are exceptional circumstances under subs (2). Ms Rowe concedes that the defendant's application for security for costs is unlikely to succeed unless the defendant can establish the existence of "exceptional circumstances" although these are said to exist in this case, even before the hearing has taken place.

[12] Those exceptional circumstances are said by the defendant to include, first, that the plaintiff's conduct has caused the defendant to incur unnecessary cost. The "conduct" alleged is the exercise by the plaintiff of her statutory right to challenge the Authority's determination under s 179(1) of the Employment Relations Act 2000. There can be little doubt that this "conduct" has caused, and will cause, the defendant to incur cost but whether that additional cost can be said to be "unnecessary" is a moot point. The defendant says, however, that the Authority

concluded that Ms MacDonald's evidence was "unreliable" and that its determination was not finely balanced on any issue. It follows, therefore, in the defendant's submission, that there is no merit whatsoever in the plaintiff's challenge, so that its additional cost will be "unnecessary".

[13] Having read the Authority's determination of 14 June 2013, I cannot discern in that document an assessment, let alone a clear assessment, that Ms MacDonald's evidence was "unreliable". That the Authority may have preferred the defendant's evidence on a number of points does not mean necessarily that Ms MacDonald's evidence was unreliable. Preferring one account of an event to another is an everyday occurrence in courts and tribunals but does not necessarily indicate the unreliability of the witness whose evidence is not accepted. It is correct, nevertheless, that the Authority described Ms MacDonald's claim for arrears of wages as "frankly specious". On the other hand, it is difficult to understand, on their face, the concluding words of the Authority that it was not persuaded "as a matter [of] legal principle [that] it is available to an employee in a casual employment to raise a claim for unpaid wages some many months after the employment had ceased." If that was the Authority's reason for expressing the "frankly specious" assessment, then it is arguable that it may have misdirected itself in law.

[14] Additionally, in its costs' determination issued on 28 August 2013 the Authority was not persuaded to depart from its usual "daily tariff" approach to costs or, in particular, to augment this to reflect the misconduct in the litigation that the defendant now contends for.

[15] There are some further relevant aspects of the legal aid legislation affecting applications for security to which the Court's attention was not drawn by the parties, but which research conducted for me reveals are pertinent.

[16] Although neither the Legal Services Act 2011 nor any of its predecessors makes express reference to security for costs in affected proceedings, the current s 116(b) (and equivalent earlier provisions) provide that the rights and liabilities of a legally aided person under the legislation do not affect "the principles on which the discretion of any court or tribunal is normally exercised". This addresses the

position of the High Court to make an order for security for costs under r 5.45(2) of the High Court Rules and, therefore, via reg 6(2)(a)(ii) of the Employment Court Regulations 2000, in this Court.

[17] Section 45(2) of the Legal Services Act 2011 restricts the power of courts to make costs orders generally and, in my assessment, those restrictions affect necessarily the Court's approach to an application for security for costs where there has been a grant of legal aid. The legislative approach to costs in legally aided cases has changed materially between the former 1991 Act and the current 2011 Legal Services Act.

[18] As to the effect of the new s 45 of the 2011 Act, the requirement for exceptional circumstances to exist under s 45(2), and the non-exhaustive list of exceptional circumstances under s 45(3), the High Court in *Barron v Hutton*[3] said:

> [13] In my opinion, an appropriate summary of the principles relating to applications for security for costs against a legally aided plaintiff is as follows:
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> (a) There is no statutory bar to ordering a legally aided plaintiff to give security for costs: Legal Services Act 2011, s 116.
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> (b) However, the Court's general discretion as to the amount of any security for costs pursuant to r 5.45(3) must take account of s 45 of the Act.
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> (c) Unless an applicant for security can establish exceptional circumstances under s 45 of the Act it is unlikely that an order for security for costs could be justified.
>
> (d) If an applicant establishes exceptional circumstances, s 45(1) of the Act should be taken into account in determining the amount of the security.

[19] The difficulty in attempting to apply the s 45(3) criteria to an application for security for costs is that the criteria are, for the most part, only ascertainable after the hearing has been concluded and judgment given. That is understandable because the criteria relate to orders for costs against a party which really can only be considered at that point in the litigation. An application for security must necessarily, in these respects at least, attempt to look forward to what might be the outcome and whether

[3] [2013] NZHC 2281.

such criteria may apply in the conduct of the prospective litigation. That is notoriously difficult to gauge at the necessarily early stage when a party applies for an order for security for costs.

[20] I will illustrate the difficulty of attempting to ascertain whether the Court is likely to award costs against the legally aided plaintiff based on those examples of exceptional circumstances in this case. Under s 45(3)(a) the only conduct to date in relation to the litigation for which Ms MacDonald may be criticised is the late service of the statement of claim upon the defendant. This, however, has probably not caused the defendant to "incur unnecessary cost". Additional costs arising out of the present interlocutory skirmishing are attributable, arguably, to the defendant itself which has applied for security.

[21] Under subs (3)(b) there is an arguable minor failure to comply with the procedural rules requiring service of the statement of claim upon the defendant more promptly than 18 days after its filing. There is, however, no explanation for that minor procedural infelicity and it would be unsafe for the Court to hold this against Ms MacDonald if, for example, there may have been difficulties in serving the defendant or any one of a number of other unexceptional circumstances causing such a short delay.

[22] Under subs (3)(c) it is simply not possible to decide the defendant's allegations of "misleading or deceitful" conduct by Ms MacDonald in her affidavit evidence opposing the application for security.

[23] Subsection (3)(d) is not able to be applied at this stage. The Court cannot assess whether the plaintiff may pursue unreasonably one or more issues on which she may fail.

[24] Under subs (3)(e) my impression is that there is a mutual refusal to attempt to negotiate a settlement or to participate in alternative dispute resolution. The case has already been the subject of mediation before going to the Employment Relations Authority and it is simply not possible for the Court to assess at this stage whether this exceptional circumstance exists.

[25] Finally, under subs (3)(f) it is again too early to determine whether there is, on the plaintiff's part, "any other conduct that abuses the processes of the court". Although the defendant objects to Ms MacDonald challenging the Authority's determination, this is the exercise of a statutory right and not an abuse of process. It is notable, also, that the reference in subs (3)(f) is abuse of the process "of the Court" so that the emphasis would need to be on the challenge for which the plaintiff is legally aided in any event. For reasons already set out, it cannot be said at this stage that the plaintiff's conduct of her proceeding is an abuse of court process.

[26] Next, the defendant emphasises that Ms MacDonald has not paid any, let alone all, of the costs of $2,000 awarded against her in the Authority. As against that, however, the Authority concluded its costs determination by saying: "Ms MacDonald is to have time to pay that sum." Ms Rowe has indicated to the Court that the defendant intends to seek a compliance order which it is, of course, entitled to do and that matter is for the Authority to determine.

[27] Ms Rowe seeks to draw an analogy between the position in this case and the situation of third party funded litigations dealt with by this Court in *Oldco PTI Ltd v Houston*.[4] I do not agree, however, that the cases are analogous. Here, the plaintiff is assisted or "funded" by a tightly controlled statutory scheme in which there is independent oversight of the litigation. That contrasts significantly with the position in *Oldco*. There, Oldco was being funded by a bank which had its own separate proceedings against Mr Houston in the High Court for recovery of substantial sums under personal guarantees of loans. The funder of that litigation had, thereby, a very clear incentive to have Oldco pursue Mr Houston. The civil legal aid regime is not so motivated.

[28] I accept that a party's attitude towards the payment of costs ordered by the Authority may be a material factor in determining whether security is ordered. As already noted, however, in this case the Authority has allowed the plaintiff an unspecified latitude within which to meet its order for costs so that it cannot be said that the plaintiff is in breach of that order.

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[4] [2010] NZEmpC 161.

[29] Finally, dealing with the defendant's submissions, I decline to await the decision of the legal aid authorities whether to withdraw Ms MacDonald's grant as the defendant seeks. Not only is that wrong in principle in my view, but no cogent evidence has been put forward by the defendant in support of its contention that Ms MacDonald has, in relation to her application for legal aid, intentionally or negligently made any untrue statement about her resources, or has failed to disclose any material fact about them, or has otherwise intentionally contravened or failed to comply in any respect with the Legal Services Act or Regulations made under it.

[30] If Ms MacDonald's current legal aid status changes, it is open to the defendant to apply again to the Court although that is not to be taken as encouragement to do so.

[31] There is an additional dimension to the case affecting the defendant. Its owner has, and continues to have, long-term health problems and the stress associated with these proceedings is not helping that position. It is, therefore, desirable that the litigation be concluded as soon as possible. But whether that is achieved by Ms MacDonald being unable to prosecute her challenge because she is unable to give security, or on the merits of the case, is the real question now.

[32] The defendant says that if it is again successful, as it was in the Authority, Ms MacDonald is very unlikely to be able to meet any order for costs that may be made against her. That is probably true so as far as it goes. She has not been able to secure other work since finishing up with Denby Caterers and attributes her financial predicament to the loss of her employment. She says that she worked for Denby Caterers for more than six years and was reliant upon the continuity of ongoing work and income from it. Ms McDonald's only income is an unemployment benefit of a little over $200 per week. She lives in a bedsitter accommodation in a rural area of Northland and although she says she is trying to do so, she finds it very difficult to find potential work, let alone to obtain it.

[33] Mr Carrell emphasises the difficulties incurred by the business in defending Ms MacDonald's proceedings. He says that it has had to take out a bank loan of $10,000 (to date) to contribute to its costs of defending proceedings in the Authority,

and points also to indirect losses of time and business occasioned by the proceedings. Mr Carrell says that the business continues to have five (casual) employees whose livelihoods will be affected if it becomes insolvent as a result of expending its resources on this litigation and being unable to recover any of its costs from Ms MacDonald.

[34] Mr Carrell believes that if Ms MacDonald's challenge is unsuccessful but she does not contribute to the company's costs, the business may be so affected that it will be insolvent and will need to close. Mr Carrell fears that, in turn, he will lose his personal assets and residence which secure loans to the company.

[35] Both parties appear to consider that it will be crucial to the determination of the challenge whether Ms MacDonald was a casual employee or what she describes as a "permanent part time" employee. It seems to me, however, from reading the Authority's determination, that at least as, if not more, important than this distinction will be whether Ms MacDonald was dismissed by the company, that is whether the initiative for the termination of her employment (however it may be categorised) came from the employer. There is no absolute rule of law that casual employees cannot be dismissed because of that status. Whilst their status may be relevant in determining issues such as whether there was a dismissal and at whose initiative, simply because one is categorised as a casual employee does not necessarily mean that an unjustified dismissal personal grievance must fail thereby. In any event, as I read the Authority's determination, its conclusion was that Ms MacDonald resigned from, or abandoned, her employment and so it could not have been said that she was dismissed, let alone unjustifiably.

[36] Absent the legal aid considerations, this would be a difficult borderline case for a number of reasons. If Ms MacDonald is required to give security for costs, the reality is that she will be unable to do so and her litigation will go no further. She has a statutory right to a challenge by hearing de novo and the deliberate scheme of the Employment Relations Act is that a party dissatisfied with the Authority's informal, low level and investigative outcome can start again in the Employment Court with conventional adversarial litigation. The Court must be very sure that it is

in the interests of justice to extinguish a party's right to take that course for economic reasons.

[37] On the other hand, the defendant has a determination in its favour and has, for an enterprise of its size, expended a not insignificant sum in costs of representation which it is concerned justifiably it may not be able to recover. The consequences to the business of ongoing litigation will be very significant as they will be to its owner personally.

[38] The plaintiff's grant of legal aid counts significantly against the defendant's application for the reasons set out earlier in this judgment.

[39] Although allowing or refusing the application will prejudice to an extent one or other of the parties, I consider that the interests of justice are best served by declining the application for stay and for the payment of security for costs, but giving the parties an early opportunity for the challenge to be heard and, thereby, some finality.

[40] The defendant's application is refused but I will let costs on it lie where they fall in light of the circumstances of the parties I have set out.

[41] Unfortunately, although the Court could have accommodated the hearing in Whangarei on 9 December 2013, the parties' implacable positions on stay and security for costs, and the necessity to allow them time to make submissions to the Court on these questions, mean that there will be insufficient time after decision of this interlocutory issue to prepare for the hearing if it is to proceed then.

[42] I should record, also, that the parties' intractability is reflected in their unpreparedness to attempt to settle this proceeding, either by further mediation or at a judicial settlement conference. I do, nevertheless, urge them to reconsider their positions on alternative dispute resolution. It would be remiss of the Court not to express its concern at the cost and delay that these interlocutory skirmishes are incurring and particularly relative to the desirability for both sides of moving on

from what was clearly a broken employment relationship, in Ms MacDonald's case with new employment, and in the defendant's, with its catering business.

[43] In these circumstances, another date in early 2014 will have to be allocated and, as the Court has directed, the Registrar will now arrange a further telephone directions conference with the parties' representatives to that end.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Tuesday 12 November 2013