IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 195
ARC 27/13

IN THE MATTER OF	a challenge to a determinaton of the Employment Relations Authority
AND IN THE MATTER	of an application for security for costs
BETWEEN	HARRISONS FINE ART LIMITED Plaintiff
AND	GAYE CASSIE CARROTHERS Defendant

Hearing: By written submissions filed on 18 October 2013

Representatives: Alan Stuart, counsel for plaintiff
Mark Beech, counsel for defendant

Judgment: 21 October 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The defendant seeks an order that the plaintiff give security for costs that may be awarded against it if it is unsuccessful in its challenge to a determination of the Employment Relations Authority. The Authority found that Gaye Carrothers was dismissed unjustifiably by Harrisons Fine Art Limited (Harrisons), and awarded her compensation and costs totalling about $60,000.[1] The plaintiff (which was the respondent in the Authority) did not participate in its investigations of Ms Carrothers's personal grievance.

[2] There is no dispute between the parties that if the interests of justice so require, the Court can direct a party to proceedings to give security for costs

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[1] [2013] NZERA Auckland 121.

although security for costs orders are rarely made, especially in personal grievance proceedings such as these.

[3] The plaintiff's challenge is set down for hearing on 14 and 15 November 2013 in Tauranga, this fixture having been timetabled as long ago as 12 July 2013. The application for security for costs was not made until 19 September 2013 although, as the minute of Judge AA Couch dated 26 September 2013 notes, the grounds upon which the defendant's application is made have all been known to the plaintiff for many months.

[4] The amount for which security is sought by the defendant is $7,000 which, for a two day hearing, would not be an unreasonable amount for which an unsuccessful party might be required to contribute in costs. So the focus is on whether security should be given rather than on the amount of it if it is required.

[5] The defendant's grounds include that the company took minimal steps to defend Ms Carrothers's claims in the Employment Relations Authority and failed entirely to attend its investigation meeting. The defendant says that the company has refused or failed to satisfy the Authority's determination or to attempt to make any arrangements to do so. The defendant relies on the company's own statement of claim which says that it was insolvent at the time of Ms Carrothers's dismissal and had in fact ceased trading some time previously. Finally, the defendant is legally aided and is required to account to the Ministry of Justice for monies expended on her behalf.

[6] On 24 January 2013 the company's former solicitors wrote to the Employment Relations Authority stating:

> The Respondent [the company] is insolvent and has ceased trading. The respondent has closed the Gallery business and is in the process of winding up.
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> …
>
> The Respondent does not have funds to further employ a solicitor to defend the application.
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> …
>
> It is noted that it is unlikely that the Respondent will be in a position to satisfy any Award made in favour of Ms Carrothers.

[7] In its statement in reply filed in the Employment Relations Authority, the company said: "The business has now ceased trading and is technically insolvent."

[8] Harrisons opposes the application for security for costs. In doing so, it accepts, however, that it "may not have sufficient funds to meet any costs that are awarded against it" but, nevertheless, says that it should not have to be required to give security. The company has not filed any affidavit evidence in opposition to the application.

[9] In opposing an order for security, the defendant emphasises what it says is the "presumption" that orders for security for costs will not be made in this Court. It says that because the defendant is in receipt of legal aid, she will not be personally affected financially should her claim not be successful. Penultimately, Harrisons submits that impecuniosity on its own is not sufficient for the Court to award security. Finally, the plaintiff invokes delay as a discretionary factor against ordering security.

[10] Whilst it is correct that orders for security for costs are made only rarely, the merits of any particular case will be the determiner. In most cases where security has been refused, orders have been sought against individual former employees whose financial circumstances are at least arguably connected to dismissals or like occurrences attributable to their former employers who are seeking security for costs. That is not the position here and although a former employer company is not to be disqualified from applying for that reason alone, this is, nevertheless, an unusual and quite different case.

[11] I do not accept the plaintiff's submission that the defendant's grant of legal aid means that it should not be required to give security for costs. A litigant in receipt of a grant of legal aid is required to carefully manage the expenditure of the grant and no less so than he or she would that party's own funds. There are arguably additional responsibilities on the grantee who is not free, for example, to indulge in litigation on matters of principle or for other tangential motives as may self-funded litigants.

[12] Turning to impecuniosity, I agree that impecuniosity alone will very frequently not be sufficient to warrant an order for security. This is a case in which there is both a degree of uncertainty about the plaintiff's impecuniosity but in which, in any event, there are a number of other relevant factors in addition to it.

[13] Finally, on the discretionary matter of delay, I accept that the defendant's application has been made belatedly, but not so belatedly as to be fatal, and I am satisfied that any increased cost attributable to such delay can be compensated for ultimately in costs if necessary.

[14] I should mention, also, a final matter that emerged for the first time in the defendant's submissions filed on 18 October 2013. Ms Carrothers appears to suggest that the Court should make an order for security for costs not only against the plaintiff but also against its (unidentified) directors.

[15] No application to this effect was put before the Court. There is no evidence that the directors have been put on notice of an application against them personally. No persuasive grounds have been advanced as to why the directors should be required to give security as well as the company. Finally, the Court is not concerned with who actually provides security but with the fact that it is given in the name of the plaintiff.

[16] In these circumstances, I did not require the plaintiff to respond on the question of any personal liability of the directors to give security.

[17] A combination of unusual factors means that it is in the interests of justice that the plaintiff be required to give security for costs and, in default of doing so, that its challenge to the Authority's determination should be stayed.

[18] Those factors are as follows. First, the company has conceded frankly that it is insolvent and would be unable to meet even a modest and reasonable award of costs in the event that it was unsuccessful. The defendant is legally aided and the expenditure of Crown funds on what might otherwise be a fruitless exercise if costs were to be awarded against the plaintiff, is to be considered. The plaintiff chose not

to take part in the Employment Relations Authority's investigations of Ms Carrothers's grievance. It has indicated thereby at least an indifference to the proceedings and their consequences, although I acknowledge that it is now engaged with them by bringing its challenge with the assistance of counsel.

[19] In these circumstances, the plaintiff's challenge to the determination of the Employment Relations Authority is stayed unless, within 10 working days of the date of this judgment, it provides to the satisfaction of the Registrar of the Employment Court at Auckland security for costs in the sum, or otherwise to the value of, $7,000.

[20] The adequacy of the security is a matter for the Registrar to determine with leave to refer any question to a Judge. If security is in the form of a payment of the sum of $7,000, the Registrar is to place this sum on interest bearing deposit and it will be payable out either by direction of a Judge or with the written consent of counsel for both parties.

[21] If the plaintiff gives security for costs as directed, the fixture of its challenge will remain as scheduled. If the plaintiff fails to do so, the fixture will be vacated.

[22] Although the Court's order for stay will not dispose of the proceeding, the defendant is entitled to some finality and so, if security is not given, it will be open to the defendant to apply in due course for appropriate orders.

[23] The defendant is entitled to costs on this application for security for costs, which I fix in the sum of $750.

GL Colgan
Chief Judge

Judgment signed at 11 am on Monday 21 October 2013