IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 102
ARC 11/14

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of security for costs and stay of proceedings
BETWEEN	MICHAEL KINLIM YAN Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing:	On the papers filed on 24 April, 8 May, 26 May and 3 June 2014 and hearing by telephone conference held on 18 June 2014
Appearances:	M Scott, counsel for plaintiff S Hornsby-Geluk, counsel for defendant
Judgment:	19 June 2014

REASONS FOR INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff has challenged a determination of the Employment Relations Authority (the Authority) finding that his dismissal was justified.[1] The defendant subsequently filed an application for security for costs (in the sum of $25,000) and a stay. The application was opposed. Both parties filed extensive submissions and affidavits in support of their respective positions. The parties wished to be heard orally on the application and a hearing by telephone was convened for this purpose.

[1] *Yan v Commissioner of Inland Revenue* [2014] NZERA Auckland 6.

[2] After hearing from counsel I declined the application, on the basis that the grounds for making the orders sought had not been made out. These are my reasons for doing so.

[3] Ms Hornsby-Geluk, counsel for the Commissioner of Inland Revenue, submitted that it can reasonably be inferred that the plaintiff will be unable, or unwilling, to meet any costs obligations if his challenge fails. Reference was made to an alleged failure to satisfy an agreement as to costs following the Authority's substantive determination. It was further submitted that the plaintiff's challenge lacks merit and that it is likely that the hearing will be unnecessarily protracted and complicated by the plaintiff's approach to the litigation. This, it was said, will impose an additional costs burden on the defendant.

[4] Mr Scott, counsel for the plaintiff, took issue with the points advanced on the defendant's behalf. He said that the plaintiff is in a position to meet any order for costs made against him. While it was accepted that costs in the Authority remain outstanding, it was submitted that it is consistent with usual practice for such orders to be 'parked' pending the outcome of any challenge to the Court. I pause to note that the Authority issued a determination in relation to costs just prior to the hearing of the defendant's application, ordering the plaintiff to pay the defendant the sum of $20,000 within a period of 14 days and ordering the defendant to pay the plaintiff the sum of $1,750 within the same period. The 14 day period for complying with the Authority's orders has not yet expired.

[5] Mr Scott submitted that orders for security for costs in this Court ought to be rarely granted and would not be appropriate in the present case. It was further said that the plaintiff's claim is strong and that the Authority overlooked a number of important aspects of his grievance, or failed to deal with them in an appropriate manner, in the course of reaching its substantive determination.

[6] The parties were in agreement as to the approach to security for costs. While there is no express provision in the Employment Relations Act 2000 (the Act) to

make such orders,[2] it has been accepted in numerous cases that the Employment Court has the power to order security and to stay proceedings until such security is given.[3] It was common ground that the applicable principles are set out in the High Court Rules and the jurisprudence developed around them.

[7] Rule 5.45(2) of the 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-r (1) states that sub-r (2) applies if a Judge is satisfied, on 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.

[8] 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). 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.[4] It is at this phase of the inquiry that the merits of a plaintiff's case are considered, together with other matters relevant to the balancing exercise, including whether a plaintiff's impecuniosity was caused by the defendant's actions and any delay in bringing the application.

[9] The defendant's application founders on the second threshold requirement referred to above. That is because there is clear evidence before the Court that the plaintiff, while presently unemployed, owns his own home (which is mortgage free) and its value substantially exceeds the costs that he might otherwise be required to pay if his challenge fails. He has no debts and some savings, and enjoys the support of his wife who is in full time employment.

[10] Ms Hornsby-Geluk submitted that, despite the uncontroverted evidence as to the plaintiff's financial position, he had no 'present ability' to pay and that this amounted to an inability to pay for the purposes of r 5.45(1)(b). She was unable to

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[2] Although reg 69 of the Employment Court Regulations 2000 relates to security for costs on an appeal to the Court of Appeal.
[3] See *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139 at [6].
[4] As summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]-[16].

point to any authority in support of this proposition. It cannot be correct that a respondent to an application for security for costs must establish that they have sufficient cash assets to immediately meet a costs order. While not referred to me by counsel, in *Keeys v Peterson* the plaintiff, while cash-poor, was asset rich or potentially asset rich, and security was declined on this basis.[5] And in *Watson v Fell* Judge Shaw observed that:[6]

> Another factor which is well-established is that difficulty in paying is not synonymous with inability to pay. *McGechan on Procedure* … says a plaintiff does not need to have sufficient cash always available to pay costs immediately [if] they are awarded.
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> It is against those principles that I now make my decision. I do not accept that the defendant has established that the plaintiff is impecunious in the sense that is required for the Court to make an order for security for costs. Impecuniosity means virtually a total inability to pay. I am satisfied from Mr Watson's evidence that he does have an ability to pay, maybe not immediately, but certainly over time. …

[11] It was further submitted that the plaintiff's attitude to the payment of costs in the Authority supported an inference of inability to pay. I do not accept this. It is apparent that an agreement was entered into following the Authority's substantive determination that the plaintiff would pay the defendant $20,000 by way of contribution to its costs, and that no timeframe for payment was negotiated by the parties as part of the agreement. The plaintiff did not make payment of the amount, the correspondence disclosing that he considered that payment ought to be deferred pending resolution of the challenge. In the event, the defendant pursued an application in the Authority, the outcome of which is referred to above.

[12] I do not consider that the plaintiff's position on the issue of costs in the Authority, in so far as I am able to discern it based on the material before the Court, supports the defendant's application. Even if it did that would not have advanced matters in the way contended for on behalf of the defendant. That is because while perceived reluctance to pay may be relevant to the second stage of the inquiry (exercise of discretion), it is not relevant to an assessment of the threshold issue –

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[5] *Keeys v Peterson* HC Whangarei CIV-2003-488-145, 20 April 2004 at [13].
[6] *Watson v Fell* [2002] 2 ERNZ 1 (EmpC) at [10]-[11].

that being, inability to pay. This point was made by Kós J in *Highgate on Broadway Ltd v Devine*.[7] There it was stated that:[8]

> The words "will be unable [to pay costs]" in rule 5.45(1)(b) are concerned with *ability* to pay. Not with financially capable, but constitutionally unwilling, persons – where a stone must be squeezed hard to produce blood. The "will be unable" formula in the rule is drawn directly from the former United Kingdom Rules of the Supreme Court, 0.23, r. 1(1)(b). They seem first to have been introduced in the 1965 version of the United Kingdom Rules and followed in the New Zealand High Court Rules in 1986. Prior to that impecuniosity was addressed as a matter of inherent jurisdiction. Expansion of the threshold (which may be worth considering, given that it is just that – a threshold – with an "unfettered discretion" at the next stage) is a matter the Rules Committee may wish to grapple with. A case to expand the threshold from the unable to the unwilling can certainly be made.

[13] It is clear, based on the evidence before the Court, that the plaintiff will be able to pay costs (including substantial costs) if required to do so. I do not accept the submission that an immediate ability to pay is to be read into the threshold requirement of r 5.45(1)(b). There is accordingly no need to proceed to consider whether, if the threshold requirement had been met, the discretion to order security in the particular circumstances should be exercised.

[14] I accordingly dismissed the defendant's application. The plaintiff is entitled to costs. Mr Scott was not in a position to address me on the issue at the conclusion of the hearing. He is to do so by 4 pm 20 June 2014. The defendant will have until 4 pm 25 June 2014 to file a response.

Christina Inglis
Judge

Judgment signed at 10 am on 19 June 2014

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[7] *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288.
[8] At [8].