IN THE EMPLOYMENT COURT
AUCKLAND

AC 42/09
ARC 26/09

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
BETWEEN	COREY ARGUE Plaintiff
AND	PREMIER HORSE TRANSPORT (2007) LIMITED Defendant

Hearing: 2 September 2009 (in Chambers)
By submissions filed on 15 September and 16 October 2009

Judgment: 20 November 2009

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The defendant has applied for an order requiring the plaintiff to provide security for costs in his challenge. As an alternative, the defendant seeks an order that the plaintiff pay into Court $3,000, being the costs awarded against him by the Employment Relations Authority and that his challenge be stayed in the meantime until that amount is paid. The defendant's application is opposed by the plaintiff.

[2] At the chambers hearing on 2 September 2009 there was an exchange of submissions and a timetable agreed for the filing and service of further affidavits in support and opposition. The parties agreed that the Court could then determine the matter on the papers without the need for a further hearing.

[3] The affidavit filed by the plaintiff in opposition, after addressing his dismissal from the defendant, deals with subsequent events. He was injured in an accidental fall from a horse on 22 December 2008 which left him paralysed from the waist down. He was not cleared from this injury until 5 August 2009 after which he was able to return to work. He has been receiving ACC payments. Apart from some horse riding equipment, which he states he needs in order to be able to work, he deposes that he has no further assets other than a motor vehicle valued at $2,500.

[4] As against this he deposes that he has outstanding debts in excess of $15,000. On the basis of his affidavit his income does not adequately meet his outgoings or provide a means for servicing those debts. From his affidavit evidence I am satisfied that the plaintiff is unable either to provide security for costs at this stage or to pay into Court the amount of the costs award in the Authority.

[5] The defendant's situation is disclosed in an affidavit sworn by Mr Lilburne, a director and the sole shareholder of the defendant company. He deposes that the defendant is a small company and at the time the plaintiff was employed. He was only one of two employees of the defendant. He claims that the plaintiff's proceedings have placed financial pressure on Mr Lilburne as the sole shareholder of the defendant. The assets of the defendant were sold to another company in which Mr Lilburne says he has no interest. The defendant is still registered with the Company's Office but Mr Lilburne does not state whether it is still trading in view of the sale of its assets. If the defendant has no assets and is not trading then, even if the plaintiff is successful in his challenge, the defendant will be unlikely to satisfy any orders that may be made in the plaintiff's favour. This is a most unfortunate situation for both the plaintiff and the defendant. It raises the very real question of whether the parities should be discussing the practical implications of the challenge proceeding.

[6] As to the application for security for costs, Ms Briggs, counsel for the defendant, has filed helpful submissions. These invoke Rule 60(1)(b) of the High Court Rules, now 5.45, to the effect that when the Court is satisfied, on the application of the defendant, that there is reason to believe the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the

proceedings, the Court, if it sees fit in all the circumstances, may order the giving of security for costs.

[7] There is no doubt the Court has the jurisdiction to make the orders the defendant seeks. However, as Ms Briggs has pointed out, the Employment Court has been reluctant to order security for costs when the only ground for the application is the plaintiff's impecuniosity. In such a situation to order security effectively bars the plaintiff from pursuing a statutory remedy under the Employment Relations Act 2000. The Court has previously been of the view that to order security for costs is therefore not a direction that is necessary or expedient in the circumstances in order to more effectively dispose of the challenge according to the substantial merits and equity of the case, as required by s221(d) of the Act. I accept Ms Briggs's submission that an application for security for costs should not be allowed to be used oppressively to shut out a genuine claim and, that, on the other hand, an impecunious party must not be allowed to use its inability to pay costs as a means of putting unfair pressure on the defendant.

[8] The Court will take into account the merits and bona fides of the challenge and whether there is a reasonable probability that the impecunosity of the plaintiff was caused by the very acts of the defendant on which the action has been brought. Ms Briggs submitted that the plaintiff's case lacks merit and relies on the Authority's determination. However, the plaintiff seeks a rehearing of the entire matter and has deposed that there are factual matters which he wishes to put before the Court and which he contends may produce a different result to that reached by the Authority. It is, therefore, not possible at this stage to say that the plaintiff's claim is without merit.

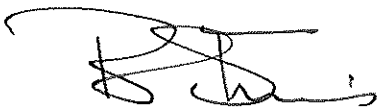
[9] It may also be arguable that the actions of the defendant, which it will no doubt wish to justify, may have contributed to the current impecuniosity of the plaintiff.

[10] In all these circumstances I consider it would not be an appropriate exercise of the Court's discretion to order security for costs or to direct that the plaintiff's challenge be stayed until he pays the amount of the Authority's award into Court.

The defendant is, of course, free to pursue recovery of the Authority's award of costs, but on the basis of the evidence provided by the plaintiff, such an exercise is unlikely to be fruitful.

[11] The challenge may now proceed although I invite the parties to consider the matters I have canvassed in this judgment. They should also consider whether a judicial settlement conference may be an appropriate way of advancing matters without the need to incur further substantial costs.

[12] Costs in relation to the defendant's unsuccessful application are reserved.



B S Travis
Judge

Interlocutory Judgment signed at 2.30pm on 20 November 2009