**IN THE EMPLOYMENT COURT OF NEW ZEALAND**
**CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA**
**ŌTAUTAHI**

**[2022] NZEmpC 122**
**EMPC 468/2021**

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| 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 | REUNITED EMPLOYEES ASSOCIATION INCORPORATED<br>Plaintiff |
| AND | NELMAC LIMITED<br>Defendant |

Hearing: On the papers

Appearances: J Drummond, agent for plaintiff
N Mason and S Thompson, counsel for defendant

Judgment: 8 July 2022

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**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH**
**(Application for security for costs)**

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[1] On 26 November 2021, the Employment Relations Authority decided that grounds existed to justify fixing the terms of a collective agreement between Reunited Employees Assoc Inc (REA) and Nelmac Ltd.[1]

[2] The Authority was satisfied s 50J(3) of the Employment Relations Act 2000 (the Act) applied because REA breached the duty of good faith in s 4 of the Act.[2]

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1 *Reunited Employees Assoc Inc v Nelmac Ltd* [2021] NZERA 530 (Member van Keulen).
2 At [112].

[3] The Authority decided the union had breached the duty by:[3]

(a) refusing to acknowledge the agreement reached in facilitation and putting an amended collective agreement to its members for ratification that did not reflect what was agreed;

(b) approaching collective bargaining unnecessarily aggressively, including refusing to acknowledge Nelmac's representative during the post-facilitation process for producing a collective agreement for ratification; and

(c) threatening and raising claims in the Authority without any substance.

[4] REA's claim that Nelmac breached the duty of good faith was rejected.[4]

[5] The Authority described in extensive detail the events that led to its conclusion that a breach had occurred and why it decided to fix the collective agreement. The following brief description comes from the determination.

[6] Bargaining began with discussions in June and July 2020.[5] Agreement was not reached and about a year later the parties attended facilitation.[6] Before a matter may be referred for facilitation the Authority must be satisfied that at least one of the grounds provided in s 50C of the Act applied. In this case the ground was a breach of good faith that was serious and sustained and undermined the bargaining.[7]

[7] During facilitation an agreement was reached on the outstanding bargaining claims. That agreement was contained in an Authority minute and was about wages, allowances, annual leave, obnoxious work outside of normal duties, tools, protective clothing and training.[8] A table of a new printed rates schedule was included in the minute.

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3 At [73].
4 At [72].
5 At [19].
6 At [47]; see Employment Relations Act 2000, s 50B.
7 Sections 50C(1)(a).
8 Dated 23 June 2021.

[8] According to the determination, REA subsequently refused to acknowledge the facilitated agreement in two ways:[9]

(a) by continuing to seek a 75 cent wage increase despite agreeing to a 50 cent wage increase in facilitation;[10] and

(b) asserting that the printed rates for allowances were to be the rates between Nelmac and the Amalgamated Workers Union NZ (AWUNZ).

[9] The Authority rejected the union's contentions that Nelmac had agreed to parity in this way with the collective agreement between Nelmac and AWUNZ concluding:[11]

> …The simple point is the agreement reached in facilitation was not based on parity with the AWUNZ collective agreement and did not include these two terms as expressed by REA.

[10] The Authority was satisfied that the agreement was as described in the minute.[12]

[11] A combination of circumstances led the Authority to conclude that REA breached the duty of good faith in its post-facilitation conduct. They were the union:[13]

(a) rejecting a draft collective agreement provided to it by Nelmac that was consistent with the agreement reached in facilitation;

(b) refusing to meet with a company representative after facilitation to prepare the agreement;

(c) making unsubstantiated allegations about that representative;

(d) wrongly asserting the facilitated agreement had been revoked; and

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9 *Reunited Employees Assoc Inc*, above n 1, at [74].
10 The reference is probably to pay per hour.
11 At [75].
12 At [79].
13 At [89].

(e) without Nelmac's consent, presenting a draft agreement to its membership for ratification that was different from what had been agreed in facilitation.

[12] That combination of circumstances meant REA had done more than just adopt a robust approach to bargaining. A finding was made that the union did not enable a relationship that was responsive and communicative, and that it frustrated the bargaining process.[14]

[13] The Authority decided that REA's position, about what was agreed in facilitation, was not arguable.[15]

[14] The Authority criticised REA's behaviour as sometimes taking the form of distortion, blatantly denying things had occurred when they had or asserting that things had occurred when the evidence showed they had not. It made trenchant comments about occasions when the union's impugned behaviour took the form of "misremembering" or "misreporting" what was discussed. Attempts to reopen bargaining on matters that were settled were also criticised.[16] REA's behaviour was held to be misleading and deceptive.[17]

[15] Having reached the conclusion that REA's post-facilitation conduct breached the duty of good faith the Authority considered what step it should take.[18] The possibility of imposing a penalty was rejected in favour of fixing the terms of a new collective agreement which was seen as a more effective and complete remedy.[19]

[16] The evidence before the Authority was such that it was only left with a choice between fixing the collective agreement proposed by Nelmac or the one proposed by REA. As Nelmac's proposal accorded with the minuted agreement and REA's version

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14 At [89].
15 At [90].
16 At [91].
17 At [90].
18 At [92].
19 At [97].

did not, the Authority used the company's version and fixed the collective agreement accordingly.[20]

## The challenge

[17] REA challenged the whole of the determination. It disputes the conclusions that it breached the duty of good faith and Nelmac did not. For the purposes of this decision it is not necessary to review the pleadings in any detail, except to note REA's claims that the Authority made material errors about what had happened and why.

[18] The relief claimed is:

> a) A declaration that REA did not breach its obligations of good faith in collective bargaining; and
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> b) A declaration that Nelmac breached its obligations of good faith in collective bargaining with REA; and
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> c) A declaration that Nelmac breached its contractual obligations to address progression rates under the 2019 [collective agreement]; and
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> d) The [collective agreement] is fixed in accordance with what was agreed between the parties, and to show the $0.75 wage increase; and
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> e) Penalties against Nelmac for breach of the [collective agreement], and for breaches of good faith under the Code of Good Faith agreements;
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> f) Any other relief the Court deems fit to grant.
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> g) Costs.

[19] Nelmac has defended the proceeding.

## Application for security for costs

[20] Against that background Nelmac has applied for security for costs. It seeks an order for security of $20,000 or any other sum the Court considers appropriate.

[21] The application contains one ground: there is reason to believe that REA will be unable to pay Nelmac's costs if it is unsuccessful.

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[20] At [109]–[111].

[22] The application was supported by an affidavit from a Personal Assistant employment by Nelmac's lawyers. The evidence was confined to producing REA's financial statement for the year ending 31 March 2021, information from its 2020 Annual Report, and copies of the law firm's invoices and memoranda submitted to the Authority relating to costs.[21]

[23] REA is opposed to security for costs being ordered. The union's grounds of opposition assert that the application lacks merit, the challenge is meritorious and is being pursued in good faith, and the overall interests of justice favour declining it. An affidavit by John Drummond, a union official, supported its position. A significant part of Mr Drummond's evidence discussed the history of the relationship between the parties and its recent difficulties as well as what he perceived to be the imbalance of bargaining power.

[24] Mr Drummond touched on REA's financial position and he acknowledged that the March 2021statement shows a modest deficit. He expressed confidence that the 2022 financial statement will show a small surplus, without indicating how much that is anticipated to be, and described the situation as a "double edge sword". Behaviour he attributed to Nelmac was said to have reduced union membership and, therefore, membership fees which are its main source of income. With that reservation Mr Drummond stated that the union can still pay its bills and described it as:

> … a lean operation reflective of our members who are low wage earners.

[25] Mr Drummond's affidavit contained a statement which is really a submission but captures REA's position. It was that if the Court ordered security that would prevent the union having access to justice.

## Test to apply

[26] There is nothing in the Act or the Employment Court Regulations 2000 dealing with security for costs. Nevertheless, the Court has jurisdiction to make an order in

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[21] The Authority has dealt with costs and declined to make an award; *Reunited Employees Assoc Inc v Nelmac Ltd* [2022] NZERA 119 (Member van Keulen).

an appropriate case, and to stay proceedings until security is paid or provided, by applying the relevant High Court Rules 2016.[22]

[27] Before making an order the Court must be satisfied that there is reason to believe a plaintiff will be unable to pay the defendant's costs if the claim does not succeed.[23]

[28] The discretion is a broad one. Regard must be had to the overall justice of the case, and the respective interests of both parties must be carefully weighed up. That balancing exercise was summarised by the Court of Appeal in *McLachlan v MEL Network Ltd* in the following way:[24]

> [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 lightly to be denied.
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> [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.

[29] While Nelmac's application relied entirely on REA's financial position Mr Mason's submissions dealt with issues raised by the union touching on the merits of the challenge and the overall interests of justice.

[30] Nelmac relied on establishing REA's inability to pay future costs by reference to the union's financial statements. It is apparent that it has no assets other than a modest bank balance and historically has incurred an annual deficit with only a small surplus now anticipated.

[31] Mr Mason prepared a table of indicative costs that might be awarded, necessarily making assumptions about the future of the litigation. By applying Category 2B to the steps likely to be needed, he submitted that if Nelmac succeeds a

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22 High Court Rules 2016, r 5.45(1)(b); applied by Employment Court Regulations 2000, reg 6.
23 High Court Rules 2016, r 5.45(3)(b).
24 *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

future costs claim would be in the region of $30,000. Measured against that sum the amount sought as security was considered reasonable.

[32] Mr Mason's point was that REA is not in a financial position to meet a future costs order of that magnitude, justifying the application for security.

[33] Addressing REA's position about the merits of its claim Mr Mason made two submissions. The first one drew attention to the robustness of the Authority's findings accepting Nelmac's evidence and rejecting REA's. The second point was the existence of a jurisdictional problem that may have implications for the relief claimed.

[34] As to the jurisdictional problem, the reference was to s 179A of the Act limiting the right to challenge a determination made under s 50J. A challenge is not available where the determination was made under that section, unless the matter is confined to whether one or more of the grounds in s 50C(1) or s 50J(3) exists.

[35] Section 50C(1) allows the Authority to accept a reference for facilitation but does so in a restrictive way; it must not accept a reference unless it is satisfied that one of the stipulated grounds for facilitation exists. So far as the duty of good faith is concerned, the Authority must be satisfied that in the course of bargaining a party's failure to comply was serious and sustained and undermined the bargaining.[25]

[36] Section 50J(3) specifies the remedy for a serious and sustained breach of the duty of good faith in relation to collective bargaining. Under that section the grounds on which the Authority may consider fixing a collective agreement are where a breach was sufficiently serious and sustained as to significantly undermine the bargaining.[26]

[37] While not expressed in these terms by Mr Mason, s 179A(2) may mean that the only challenge available is to Authority determinations that facilitation and/or fixing were available and not to anything more. If correct that would mean the Court

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25 Section 50C(1)(a).

26 Section 50J(3)(a). All other reasonable alternatives have to be exhausted and fixing the collective agreement must be the only effective remedy for the party or parties affected by the breach of the duty of good faith, see ss 50J(3)(b)–(c).

cannot entertain a challenge which invites it to fix a different collective agreement from the one determined by the Authority.[27]

[38] REA was not deterred by Nelmac's submissions. Mr Drummond accepted the union's financial position is "tight" but submitted that was understandable given the workers it represents are at the "lower end of the pay scale". He noted that the Authority declined to award costs against the union so that Nelmac's previous expense is not relevant to this application.

[39] Turning to s 179A, Mr Drummond accepted it places limits on challenges but noted that it was not a complete prohibition. REA intends to argue that grounds exist for the Court to decide that it did not breach the duty of good faith but Nelmac did, and that the Authority made an error about pay parity (meaning as between REA and AWUNZ as earlier described). In other words, there is a live issue about the breach which allowed the Authority to reach conclusions that, if revisited, might eventually lead to a different outcome.

*Should an order be made?*

[40] Nelmac's submission about the merits of the case cannot be resolved at this interlocutory stage given the nature of the disagreements between the parties over what happened. While the Authority robustly rejected REA's evidence, it would be wrong to hold on that basis alone that its case is weak. It is at least arguable that, when the evidence is considered again, a different result is possible.

[41] There is force in Mr Mason's argument that there are important jurisdictional hurdles that will have to be overcome if the union is to succeed. Section 179A(2) may present a barrier to parts of REA's claim. At this stage, however, it would not be appropriate to give that possibility too much weight because the subject has not been tested. Section 179A(2) may be able to be sidestepped if the union establishes it did not breach the duty of good faith.

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[27] There has been no decision of the Court on the relationship between ss 179A, 50C and 50J and, following a directions conference, the parties were invited to make submissions about that at the substantive hearing.

[42] Likewise, there is force in Mr Mason's submission about REA's finances. There was no real debate about them. Mr Drummond did not place a dollar value on the extent of the anticipated surplus but the "lean" operation he described indicates it is very unlikely to be enough to meet Nelmac's costs expectations. I bear in mind Mr Mason's concern that, if REA faces a significant costs order that cannot be met, it might fold leaving Nelmac out of pocket.

[43] Weighing up those matters, Nelmac has established that it is unlikely REA will be able to satisfy a future costs order if its challenge is unsuccessful.

[44] There is a broader consideration, however, about whether it would be in the interests of justice to order security for costs.[28] An order is usually accompanied by a stay until security is paid or otherwise provided. Given REA's limited resources the reality is that an order is unlikely to be complied with and the resulting stay will effectively end this litigation.

[45] An order having the effect of stopping the litigation in its tracks has obvious consequences for the union and is likely to have knock-on effects for its members. The union's argument that it did not breach the duty of good faith would remain unresolved. So far as its members are concerned, lingering uncertainty over what was agreed in facilitation could flow into concerns about what should or should not be in the collective agreement. Declining the application means the union's challenge will be heard. That may bring finality to those issues which, in turn, could assist in satisfying the object of the Act in s 3 to build productive employment relationships.[29]

[46] This decision is finely balanced, because Mr Mason put forward compelling arguments that would ordinarily go some distance towards an order being granted. What has tipped the balance against granting the application is my concern over the situation being faced by REA's members who are employed by Nelmac.

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[28] See for example *Koia v Attorney-General in respect of the Chief Executive of the Ministry of Justice* [2004] 1 ERNZ 116.

[29] Section [3](a)(iii).

## Conclusion

[47] I have reached the conclusion that it would not be in the interests of justice to order security for costs and the application is dismissed.

[48] Costs are reserved. They will be dealt with as an aspect of costs of the hearing.

K G Smith
Judge

Judgment signed at 3.30 pm on 8 July 2022