

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 126
EMPC 379/2021**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF applications for security for costs

BETWEEN HENDERSON TRAVELS LIMITED
 Plaintiff

AND RAJWINDER KAUR
 Defendant

Hearing: On the papers

Appearances: A Singh, counsel for plaintiff
 J M Douglas, counsel for defendant

Judgment: 15 July 2022

**INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH
(Applications for security for costs)**

[1] In the Employment Relations Authority Rajwinder Kaur succeeded in establishing that she was unjustifiably dismissed by her former employer Henderson Travels Ltd.¹

[2] Henderson Travels was ordered to pay Ms Kaur:

- (a) \$21,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

¹ *Kaur v Henderson Travels Ltd* [2021] NZERA 418 (Member van Keulen).

(b) \$25,480 for reimbursement pursuant to ss 123(1)(b) and 128 of the Act.²

[3] Henderson Travels was also ordered to reimburse Ms Kaur \$7,268.10 for underpaid wages and \$267.75 for working on a public holiday. Holiday pay at eight per cent was added.

[4] The Authority found that the Wages Protection Act 1983 was breached by Henderson Travels because it obtained a premium from Ms Kaur of \$860. The company was ordered to repay her.

[5] In addition to those sums a penalty of \$12,000 was imposed on Henderson Travels of which \$9,000 was payable to Ms Kaur. The balance was to be remitted to the Crown.

[6] Henderson Travels challenged the determination and sought a full rehearing of the whole matter. An application for a stay of execution of the Authority's determination has already been dealt with, and Henderson Travels has paid to the Registrar of this Court the sum of \$64,478.72.³

[7] Ms Kaur and Henderson Travels applied for security for costs. Both applications are opposed.

Ms Kaur's application

[8] Ms Kaur is seeking security for costs from Henderson Travels of \$10,000, or such other amount as the Court considers appropriate, and that the proceeding be stayed until it is paid or provided. She is seeking to reserve the ability to apply for an increase in any security that is ordered if the proceeding changes character or there is a material change in circumstances.

[9] Essential to the grounds of Ms Kaur's application is a concern about Henderson Travels' financial situation. Supplementing that ground are concerns that the

² The compensatory payments under ss 123(1)(b) and 128 were gross sums.

³ *Henderson Travels Ltd v Kaur* [2022] NZEmpC 34.

company's only director lives in Australia and that its claim lacks merit. Presumably the director's domicile is intended to indicate the company has only a limited connection to New Zealand.

[10] Ms Kaur provided an affidavit supporting her application and responding to the one made by Henderson Travels.

Henderson Travels' application

[11] Henderson Travels' application mirrored Ms Kaur's application. It also seeks security of \$10,000, or any other amount the Court considers appropriate. Curiously, the application sought a stay until any security is paid or provided.

[12] Essential to Henderson Travels' application are concerns about Ms Kaur's financial resources and immigration status.

[13] Vyom Sikri, a former director of Henderson Travels, provided affidavits in support of the company's application and in opposition to Ms Kaur's application.

[14] As well as indicating that Henderson Travels is financially viable, Mr Sikri relied on the amount deposited with the Registrar of this Court to satisfy the application for a stay as proof of the company's solvency. He said there are sufficient funds available to pay future costs if Henderson Travels is ordered to do so.

[15] Mr Sikri deposed to Henderson Travels continuing to have a business presence in New Zealand, referring to an office in Hamilton and another to be opened soon in Manukau.

[16] In expressing confidence about Henderson Travels' finances Mr Sikri repeated evidence he gave about Flight Experts NZ Ltd when the application for a stay was considered. He described that company as a "sister concern of Henderson Travels" but did not explain what that business relationship means. I infer it indicates they have connected business and financial interests such that Henderson Travels can rely on Flight Experts for funding when required.

Analysis

[17] The Act and the Employment Court Regulations 2000 do not deal with security for costs. However, the Court has jurisdiction to make an order by applying the relevant High Court Rules.⁴

[18] Under r 5.45 a Judge may make an order if satisfied that there is a reason to believe a plaintiff will be unable to pay the defendant's costs if the plaintiff's claim fails.⁵

[19] The discretion is broad but must be exercised in the interests of justice. The interests of both parties need to be carefully weighed up. The required balancing exercise in weighing up those interests was summarised by the Court of Appeal in *McLachlan v MEL Network Ltd*.⁶

[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.

[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.

[20] The Court must be satisfied that there is a reason to believe that the party against whom an order is sought will be unable to pay a future costs award. If that threshold is reached, consideration turns to whether it will be just to make an order. Factors commonly considered include the interests of the parties, the merits of the case, and whether any impecuniosity resulted from the other party's actions. The Court will consider access to justice issues in exercising the discretion.⁷

⁴ Applied by Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁵ High Court Rules 2016, r 5.45(2).

⁶ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

⁷ See *Koia v Attorney General in respect of the Chief Executive of the Ministry of Justice* [2004] 1 ERNZ 116 (EC) at [23].

Should Henderson Travels' application succeed?

[21] I will deal with Henderson Travels' application first. Its counsel, Mr Singh, acknowledged the application is unusual but submitted that the ambit of r 5.45 is sufficiently broad to allow an order to be made against a defendant and in favour of a plaintiff.

[22] Mr Singh reached that position by drawing on the statement in r 5.45(6) that references to the words "plaintiff" and "defendant" are to persons, however described in the Court record, who are in the position of plaintiff or defendant. He argued, by extrapolation, that the purpose of the rule was to protect any party to the litigation if circumstances warranted such an outcome. He did not submit, however, that Ms Kaur is in the position of plaintiff.

[23] I do not accept Mr Singh's submission. Rule 5.45 is clear and unequivocal: its goal is to assist a defendant by enabling an application for security for future costs; it is not intended to assist a plaintiff. Ms Kaur is not a plaintiff or in the position of a plaintiff because she did not challenge the determination or file a counterclaim. She did, however, raise positive defences and seeks an uplift in the remedies awarded to her by the Authority in two respects. One of them is a request to increase the compensation awarded to her under s 123(1)(c)(i) and the other is for enhanced penalties.

[24] The company's challenge means the Court is required to hear the whole matter again and to reach its own conclusions.⁸ Ms Kaur's pleading responded to Henderson Travels placing in issue the whole of the Authority determination. The fact that she has invited reconsideration of remedies in the context of responding to the company's challenge does not transform her defence into a counterclaim or make her a counterclaim plaintiff. She has only responded to Henderson Travels' claim and advanced her position in relation to remedies.

[25] On the basis that Ms Kaur is a defendant, Henderson Travels' application cannot succeed.

⁸ Commonly called a de novo challenge; Employment Relations Act 2000, s 183.

[26] Even if that assessment is wrong, I would not make an order against Ms Kaur. Her limited ability to satisfy a future costs award is likely to stem from her employment being ended by Henderson Travels, the lawfulness of which is at the heart of the proceeding. It would not be just to make an order in that situation.

[27] Henderson Travels' application is dismissed.

Should Ms Kaur's application succeed?

[28] Ms Douglas, counsel for Ms Kaur, argued that an order should be made because:

- (a) The only director/shareholder of Henderson Travels is overseas.
- (b) Mr Sikri is no longer a director of the company but appears to be funding the business.
- (c) There is nothing to indicate the basis on which Mr Sikri is able to describe Henderson Travels and Flight Experts as "sister" concerns.
- (d) No information was provided about the financial viability of Henderson Travels.
- (e) What is known of the company's finances is that it is not able to pay its debts because it is being supported by either Mr Sikri or Flight Experts.

[29] The central issue is whether Ms Kaur has established that Henderson Travels may not be able to satisfy a future costs award. Two factors point in that direction. The company has not provided any evidence of its current financial position, and Mr Sikri's evidence indicates it needs funds from elsewhere.

[30] Mr Sikri's evidence may have been intended to describe the company's ongoing business and show that it is able to pay a costs award. If that was its purpose, the information supplied was unclear. He described an office in Hamilton and another shortly to open in Manukau. Nothing more was said about the Hamilton office, and

he was vague in describing the new Manukau one. The lease of the Manukau premise he produced to support his evidence named Flight Experts as the tenant.

[31] Measured against that, though, is the substantial payment made to comply with a condition of the stay. The source of those funds was not disclosed in this application. Mr Sikri's evidence was written in such a way that it strongly indicated the money came from Flight Experts, which is consistent with the companies treating themselves as siblings.

[32] On the basis that Henderson Travels has financial support from Flight Experts, it cannot now be confidently said that it will be unable to pay a future costs order.

[33] I bear in mind there is a possibility that this support could be withdrawn if Henderson Travels' challenge fails. In such a situation the exposure Ms Kaur has to any unpaid costs could be dealt with by joining Flight Experts to the proceeding as a defendant for the purposes of costs.

Outcome

[34] Both applications are dismissed.

[35] There will be no order for costs.

K G Smith
Judge

Judgment signed at 4.50 pm on 15 July 2022