

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

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

**[2023] NZEmpC 123
EMPC 97/2023**

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

AND IN THE MATTER OF an application for security for costs

BETWEEN PHILLIP BOULTON
Plaintiff

AND FOOD THINGY LIMITED T/A BIRD THE
WORD
Defendant

Hearing: On the papers

Appearances: L Anderson, advocate for plaintiff
R Drake, advocate for defendant

Judgment: 11 August 2023

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for security for costs)**

[1] This judgment resolves an application by the defendant, Food Thingy Ltd (Food Thingy), for security for costs.

[2] Mr Boulton was almost entirely unsuccessful in his claims before the Employment Relations Authority. He did, however, succeed in respect of a failure by Food Thingy to allow him a rest break, for which it was ordered to pay Mr Boulton compensation of \$500.¹

¹ *Boulton v Food Thingy Ltd t/a Bird the Word* [2023] NZERA 106 (Member Dumbleton).

[3] In a subsequent determination, Mr Boulton was ordered to pay Food Thingy \$3,000 towards its costs in the Authority.²

[4] Mr Boulton has challenged the Authority's determinations on a de novo basis. He has not yet paid the \$3,000 costs award and has not applied for a stay of the Authority's costs determination.

[5] Food Thingy has now applied for security for costs in respect of Mr Boulton's challenge. It seeks an order that Mr Boulton pay security for costs of \$3,000 or such other amount as the Court may, in its discretion, order. Food Thingy also seeks an order requiring Mr Boulton to make an undertaking to the Court that he will be able to financially cover any costs award issued against him by the Court. Finally, Food Thingy applies for the proceedings to be stayed until security has been paid and the undertaking given.

[6] Food Thingy says it believes that Mr Boulton's challenge is frivolous and an attempt to avoid paying the costs order. It says it also believes the plaintiff may not be financially able to pay its costs if it successfully defends the challenge.

[7] Mr Bishop, a director of Food Thingy, has filed an affidavit in support of the application, in which he confirms the company's belief that the claim is frivolous and there is no chance of success. He also deposes to his belief that Mr Boulton does not have the financial ability to pay the costs determination, and that Food Thingy would have no hope of recovering costs from him should the challenge be unsuccessful.

The Court may order security for costs

[8] By virtue of reg 6(2)(a)(ii) of the Employment Court Regulations 2000, and r 5.45 of the High Court Rules 2016, the Employment Court has a discretion to order the giving of security for costs. One of the bases of such an order is that there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its proceeding.

² *Boulton v Food Thingy Ltd t/a Bird the Word* [2023] NZERA 178 (Member Dumbleton).

[9] When the Court exercises its discretion on such an application, it must consider all the circumstances and balance the interests of both the plaintiff and the defendant.³ An order may be made if it is just in all the circumstances.⁴

There is no basis for an order

[10] There has been no evidence filed by Food Thingy that establishes the foundation for its belief that Mr Boulton will be unable to pay costs in the Court.

[11] Although the onus is on Food Thingy to establish that an order ought to be made, Mr Boulton elected to file an affidavit. That affidavit confirms that he is in full-time employment, including working overtime. He disputes that he would be unable to pay costs should he be unsuccessful in his challenge. He also notes that he has not received the \$500 Food Thingy was ordered to pay to him.

[12] In summary, Food Thingy falls well short of establishing a basis for the Court to order Mr Boulton to pay security for costs.

[13] There also is no basis for the Court to order that Mr Boulton provide an undertaking.

[14] The application for security for costs and for an undertaking is accordingly declined. This means there is no basis for the proceedings brought by Mr Boulton to be stayed.

Mr Boulton is entitled to costs

[15] Mr Boulton is entitled to costs on this application. If these cannot be agreed between the parties, he may apply for costs by brief memorandum filed and served within 21 days of the date of this judgment. Food Thingy is then to file and serve its

³ *McLachlan v MEL Network Ltd* (2002) 16 PRN 747 (CA) at [15]–[16].

⁴ High Court Rules 2016, r 5.45(2).

memorandum in response within 14 days thereafter, with any reply from Mr Boulton filed and served within a further 7 days. Costs then will be determined on the papers.

J C Holden
Judge

Judgment signed at 10.30 am on 11 August 2023