

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

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

**[2023] NZEmpC 82
EMPC 394/2022**

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	MATTHEW LAI Plaintiff
AND	DAVID GRAY Defendant

Hearing: On the papers

Appearances: A O'Connor, counsel for plaintiff
P Mathews, advocate for defendant

Judgment: 6 June 2023

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

[1] On 13 October 2022, the Employment Relations Authority determined that David Gray was employed by Matthew Lai and had been unjustifiably dismissed.¹ Mr Lai was ordered to pay as compensation \$7,500 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a further amount of \$2,280 pursuant to ss 123(1)(b) and 128 of the Act. Costs of the investigation were reserved.

¹ *Gray v Lai* [2022] NZERA 528 (Member Cheyne).

[2] On 31 October 2022, the Authority issued a further determination dealing with costs.² Mr Lai was ordered to pay Mr Gray costs of \$2,321.56, which included reimbursing his lodgement fee.³

[3] Mr Lai challenged both determinations.

Application for security for costs

[4] Mr Gray has applied for security for costs and a stay of this proceeding until such time as security is paid or provided. The grounds of the application are confined to Mr Lai's financial position and a concern that he will not be able to pay a future costs award arising from this proceeding if the challenges fail.

[5] Mr Gray's application was not opposed by Mr Lai who elected to not take any steps in response.

[6] The Act, and the Employment Court Regulations 2000, do not deal with the Court's ability to order security for costs. However, the Court has jurisdiction to make an order in an appropriate case by applying the High Court Rules 2016.⁴

[7] The power to order security for costs is discretionary. In exercising that power regard must be had to the overall justice of the case and the respective interest of both parties must be carefully weighed up.⁵

[8] Mr Gray's evidence was that he has not been paid any of the sums of money the Authority ordered Mr Lai to pay him. Aside from the Authority's orders being unsatisfied, Mr Gray relied on correspondence written on Mr Lai's behalf by his counsel, Mr O'Connor. In April this year Mr O'Connor wrote an email to Mr Mathews and in it made a statement that Mr Lai is not in a position to pay in full. Instead, in response to a demand for payment, the email contained a proposal to pay the amount ordered by the Authority by a very modest payment of \$10 per week. The same email

² *Gray v Lai* [2022] NZERA 560 (Member Cheyne).

³ At [9].

⁴ High Court Rules 2016, r 5.45(1)(b); Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁵ *McLachlan v MEL Network Ltd* [2002] 16 PRNZ 747 (CA).

contained a statement that Mr Lai was unsuccessful in seeking a loan to enable him to pay the amount awarded. No other financial information was supplied by Mr Gray.

[9] The application sought as security an amount of \$3,900. It was calculated as approximately half the costs that could be ordered by the Court under the Guideline Scale of Category 1, Band A.⁶

Discussion

[10] The first issue is whether an order should be made. I am satisfied it is appropriate to make an order. The Authority ordered Mr Lai to pay reasonably modest sums to Mr Gray. He has taken no steps to do that and, in the face of the application for security for costs, has not provided an assurance that funds are available or will become available to pay to Mr Gray if the challenge fails. Compounding that situation is the concession about Mr Lai's finances in Mr O'Connor's email.

[11] Mr Lai's straitened financial circumstances justifies security being ordered. The next issue is how much to order as security. The amount of an order is discretionary. My view is that a sum of \$3,500 is appropriate.

Conclusion

[12] Mr Gray's application for security for costs is granted. Mr Lai is ordered to provide security for costs in this proceeding in the amount of \$3,500 subject to the following conditions:

- (a) If security is provided by payment the amount is to be held by the Registrar in an interest-bearing account pending further order of the Court.
- (b) Security provided by any other means must be to the satisfaction of the Registrar.

⁶ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

- (c) Security is to be paid or provided no later than **4 pm on Wednesday 5 July 2023**.
- (d) If security is not paid or provided by the time specified in [12](c) this proceeding will be stayed until it is paid or provided without Mr Gray having to make any further application.

[13] Costs are reserved.

K G Smith
Judge

Judgment signed at 12 pm on 6 June 2023