

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 80
ARC 99/13**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application by the defendant for security for costs and stay of proceedings
BETWEEN	MAPU TOMO Plaintiff
AND	CHECKMATE PRECISION CUTTING TOOLS LIMITED Defendant

Hearing:	On the papers filed on 31 January, 20 February, 14 April 2014, and memorandum for plaintiff filed 9 May 2014
Appearances:	Mr Austin, advocate and Ms Insley, counsel for plaintiff Mr Beech, counsel for defendant
Judgment:	21 May 2014

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant has applied for security for costs and a stay of proceedings. The plaintiff had indicated that a cross-application would be advanced, seeking a stay of the costs determination of the Employment Relations Authority (the Authority). An extension of time was granted for such an application to be filed but that timeframe has now elapsed and no application has been made. It can accordingly be put to one side.

[2] The defendant's application for security for costs is opposed.

[3] The plaintiff worked for the defendant company for a number of years prior to his dismissal following a restructuring. The plaintiff pursued a grievance

contending that his dismissal was unjustified, including on the basis that it was procedurally flawed. The Authority investigated the plaintiff's claim and it was dismissed.

[4] The plaintiff challenged the whole of the determination and sought a hearing de novo. It appears that substantially the same allegations have been advanced in the context of the challenge as were pursued in the Authority.

[5] The Authority issued a costs determination on 3 April 2014 in which it effectively ordered a contribution of \$2,000 costs in the defendant's favour.¹ The Authority indicated that if the defendant took steps to obtain a compliance order from it in relation to its costs award it would likely seek further information as to the plaintiff's financial position. The sum ordered in the defendant's favour has not yet been paid. No application for a stay has been made on the plaintiff's behalf. Nor does it appear that the defendant has taken steps to seek a compliance order from the Authority, or otherwise taken enforcement action in respect of the unpaid sums awarded in its favour.

[6] The application for security for costs is primarily advanced on the basis of concerns about the plaintiff's financial position. It is also said that the challenge is weak. An affidavit has been filed in support of the application, referring to evidence that Mr Tomo is said to have given in the Authority, confirming that while he had found some work since his dismissal he was currently unemployed. Mr Austin, advocate for the plaintiff, takes issue with the affidavit on the basis that the deponent was not present at the Authority meeting and accordingly is not in a position to say what evidence Mr Tomo gave in that forum. Plainly a deponent can only make statements about matters within their personal knowledge. However, the matters are otherwise addressed by Mr Tomo himself in his affidavit. He confirms that he is not currently working and is on the unemployment benefit. He says that he has no personal assets other than clothing and the like and that he no longer owns his own car.

¹ *Tomo v Checkmate Precision Cutting Tools Ltd* [2014] NZERA Auckland 122.

[7] Mr Tomo was in receipt of legal aid in respect of his (successful) challenge to a preliminary determination of the Authority.² He is not currently legally aided but says that he has taken further steps to obtain legal aid in relation to the substantive challenge and that if that does not prove possible the Community Law Service will be approached. I pause to note that this is what appears to have occurred, with Ms Insley from the Community Law Centre taking a role in relation to the stay application, which has not been pursued.

[8] The plaintiff makes the point that prior to his dismissal from the defendant company his financial position was secure but that dramatically changed once he was dismissed. He has since been unable to find permanent work, although he has been able to find work sporadically in the intervening period. Mr Tomo strongly considers that his dismissal was unjustified and that the Authority overlooked, or did not adequately address, a number of factual matters. He accepts that if he does not succeed and an award of costs is made against him he will bear responsibility for that award. He does not say how he would meet that responsibility. It is, however, submitted on Mr Tomo's behalf that it is improbable that an award of costs would be made against him if his challenge fails, although the basis for this submission is not made clear.

[9] There is no express provision in the Employment Relations Act 2000 (the Act) to order security for costs. However, it has been accepted in numerous cases that the Employment Court has the power to make such orders and to stay proceedings until security is given. Because no procedure for ordering security is provided for in the Act or the Employment Court Regulations 2000, the application is to be dealt with "as nearly as may be practicable" in accordance with the procedure provided for in the High Court Rules.³

[10] Rule 5.45(2) of the High Court Rules provides that a Judge may, if he/she "thinks it is just in all the circumstances, order the giving of security for costs." Relevantly sub-cl (1) states that sub-cl (2) applies if a Judge is satisfied, on application by a defendant, that a plaintiff is resident out of New Zealand or that

² *Tomo v Checkmate Precision Cutting Tools Ltd* [2013] NZEmpC 54.

³ Employment Court Regulations 2000, reg 6.

there is reason to believe that a plaintiff will be unable to pay the defendant's costs if the plaintiff's proceedings do not succeed. Accordingly, the Court must consider whether the threshold test in r 5.45(1) has been met and, if so, how the Court's discretion should be exercised under r 5.45(2).

[11] In exercising its broad discretion the Court must have regard to the overall justice of the case. As the Court of Appeal observed in *McLachlan Ltd v MEL Network Ltd*:⁴

[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.

[12] The defendant submits that it is unlikely that the plaintiff would be able to pay costs in the event that his challenge fails. It is clear, from Mr Tomo's affidavit, that he has no personal assets other than personal effects, that he is currently unemployed and in receipt of a benefit, and that he has only been able to find intermittent work since leaving the defendant company.

[13] I am satisfied on the material before the Court that it can reasonably be inferred that the plaintiff will be unable to pay costs if they are ultimately awarded against him. I do not share the optimism expressed on the plaintiff's behalf that it is improbable that an award of costs would be made in the event that his challenge fails.

[14] I turn to consider whether an order for security for costs would be just in all the circumstances.

[15] There are obvious difficulties associated with assessing the merits of a challenge at this early stage, particularly where the challenge is being pursued on a de novo basis. That is because much will depend on the way in which the evidence comes out at the hearing. The primary focus of the challenge will be on the process

⁴ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

that was followed prior to the decision to dismiss, including in relation to the extent to which the defendant engaged with the plaintiff, the sufficiency of the information that was provided to him and what occurred after his departure. While, at this early stage, I do not consider that the plaintiff's challenge can be characterised as strong, there is scope for argument as to the extent of the defendant's obligations in the particular circumstances and whether its obligations were met (as reflected in the Authority's determination).

[16] I accept that there are likely to be enforcement difficulties for the defendant if the plaintiff's challenge fails. There is already a substantive and a costs determination in the defendant's favour in the Authority. The plaintiff has no assets of any real value. An order for security for costs will likely pose significant difficulties for the plaintiff in pursuing his challenge. Prior to his dismissal he was in full time employment to which he has not been able to return.

[17] Ultimately a balancing exercise is required. There is no burden one way or the other.⁵ The interests of both parties are to be considered. Having considered the matters identified on each party's behalf, I do not consider that it is in the overall interests of justice to make an order for security and I decline to do so. Accordingly the defendant's application is declined.

[18] Costs are reserved.

Christina Inglis
Judge

Judgment signed at 2pm on 21 May 2014

⁵ *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC) at 460-461.