IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 82
ARC 90/13

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	AUCKLAND UNIVERSITY STUDENTS' ASSOCIATION (AUSA) Applicant
AND	TOM O'CONNOR Respondent

Hearing: (on the papers - documents received on 7 April, 22 April and 13 May 2014)

Appearances: B Scotland, counsel for the applicant
G Pollak, counsel for the respondent

Judgment: 22 May 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment decides an interlocutory application for security for costs.

[2] The application has been made on the course of a challenge brought by the respondent to a determination of the Employment Relations Authority (the Authority) of 21 October 2013.[1] The respondent claims he was unjustifiably dismissed. He wishes to establish that he has a personal grievance which would entitle him to reimbursement of lost remuneration; compensation for stress and humiliation; compensation, reimbursement, or such other remedies which the Court considers to be fair and just; and an order as to costs.

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[1] *O'Connor v Auckland University Students Assoc Inc* [2013] NZERA Auckland 484. [Authority determination]

[3] The applicant defends the challenge on the basis that the respondent's dismissal was justifiable because he was involved in serious misconduct to a degree that led to a substantial loss of trust and confidence in the respondent's ability to carry out his role as General Manager.

[4] On 7 April 2014, the applicant filed its application for security for costs for the sum of $20,000 or such other sum as the Court sees fit to order; and an order permanently staying the respondent's proceedings in respect of ARC90/13 unless the respondent provides security within one calendar month of the Court's order that it do so.

[5] The grounds of the application are:

- The respondent is a resident outside of New Zealand and has no assets in the jurisdiction.
- There is reason to believe the respondent would be unable to pay the costs of the applicant if the respondent is unsuccessful in his challenge as he has failed to pay costs ordered by the Authority despite a request to do so.
- The matter has been set down for a four-day hearing in June 2014. Applying a standard formula for costs in the Court, if the applicant were successful then it is likely to be entitled to more than $20,000 as a contribution towards its legal costs.
- The respondent's challenge is unlikely to succeed given the weight of evidence referred to by the Authority.
- The applicant relies on reg 6(2) of the Employment Court Regulations 2000 (the Regulations); r 5.45(1)(a)(i) and 5.45(1)(b) of the High Court Rules; the judgment of the Employment Court in *Tones v 3d1 Ltd*;[2] and evidence in the affidavit of Ms C D H K Bell.

[6] The evidence of Ms Bell, currently President of the applicant, is in summary:

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[2] *Tones v 3d1 Ltd* EMC Auckland AC44/07, 12 July 2007.

- She gave evidence for the applicant in the Authority and was present during the respondent's evidence.

- The respondent's evidence on oath was that he was impecunious, and that he had attempted unsuccessfully to obtain employment in both New Zealand and in Australia. He stated that he and his wife had moved to Australia in May 2013 to reside in his daughter's Melbourne residence. He had sold his house in New Zealand. None of his children or their families resided in New Zealand.

- She understands that the respondent is now residing in Australia. She is unaware of his employment circumstances or whether he intends to return to New Zealand to live.

- She confirms that the Authority awarded the applicant costs of $10,000, that demand for payment had been made and that no response had been received and no payment made.

- Accordingly she holds concerns regarding the respondent's ability to meet the legal costs that had been awarded to the applicant by the Authority. She also held significant and real concerns regarding his ability to meet any costs award made by the Court in the event that the applicant was successful in justifying the decision to dismiss.

- She considers that the applicant would struggle to recover any costs awarded.

- The costs of defending the challenge in the Court would be likely to exceed the costs incurred in the Authority which were more than $20,000, particularly given that the Authority hearing lasted one and a half days and the Court hearing has been set down for four days.

[7] The respondent filed a notice of opposition on 22 April 2014 which stated:

- The respondent is generally agreeable to provide security for costs and had previously proposed this to the applicant.

- He proposes a payment of $10,000 to be paid to the Court pending the outcome of the challenge.

- He is resident outside of New Zealand and has had to seek employment in Melbourne due to an inability to find employment in New Zealand.

- He asserts that this is as a direct consequence of the applicant's action in dismissing the respondent.

- There are no grounds to substantiate the assertion that he would be unable to pay costs if ultimately unsuccessful.

- He has made a number of proposals to pay security for costs, but these had been rejected.

- The parties have different views about the likelihood of the success of the challenge.

- There is no dispute as to the jurisdiction of the Court to order security for costs.

- The sum of $10,000 security for costs was reasonable whereas the sum of $20,000 was not.

- The assertion by the applicant that the respondent did not have any apparent ties to New Zealand was conjecture.

- Consequently the respondent agrees that security of costs should be fixed in the sum of $10,000 and requested the Court to stay the costs determination of the Authority upon deposit of such sum as the Court may direct.

[8] The respondent filed an affidavit in which he confirmed:

- He was surprised that the applicant was seeking $20,000 as security for costs, because it had previously sought $15,000 as security.

- He was agreeable to a deposit of $10,000, this being the limit of available funds.

- He had only recently found employment in Australia, following a period of 14 months unemployment.

- He had sold the family home and he and his wife had shifted to Melbourne to reside in a house owned by his daughter.

- He asserted that as a result of the unjustifiable dismissal he had lost at least $120,000, with personal costs being greater.

- He was unable to pay security of more than $10,000.

- He wishes to return to New Zealand as soon as he can.

Issue

[9] There is no dispute that security for costs should be paid; the issue is quantum.

[10] Although para [8] of the notice of opposition appears to suggest that the respondent should provide security for costs of $10,000, and that the costs determination of the Authority be stayed "upon the deposit of such a sum as the Court directs," having regard to the respondent's evidence that he could only pay $10,000, I conclude that the notice of opposition should not be construed as the respondent accepting that he pay $10,000 security for costs in the Court, and an additional amount in respect of the Authority's costs – although I note that the Court does have jurisdiction to do so.[3]

General principles

[11] The general principles applicable to applications for security for costs were conveniently summarised by Judge Inglis in *Liu v South Pacific Timber (1990) Ltd*:[4]

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[3] *Tones*, above n 2, at [16].
[4] *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129 (footnotes omitted).

[10] In exercising its broad discretion the Court must have regard to the overall justice of the case, and the respective interests of both parties are to be carefully weighed. The balancing exercise was summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd* as follows:

> 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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> 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.

[11] The merits of the plaintiff's case are to be considered in the context of an application for security for costs. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions, any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.

[12] Concerns relating to access to justice apply across all courts. As the Chief Judge observed in *Mackenzie v Bayleys Real Estate Ltd*: "ultimately, the particular decision must be on its own merits and the justice of the case."

Discussion

[12] Given that the respondent is currently residing in Australia where he has obtained employment, that he has sold his previous family home and that there is no evidence of him retaining assets in New Zealand, it is properly conceded that there should be an order for security for costs since otherwise the applicant would have difficulty enforcing any award of costs obtained in this Court.

[13] As already noted, the contest between the parties relates to the appropriate quantum. On the one hand, the applicant should be protected against unjustified litigation particularly if it becomes over-complicated and unnecessarily protracted; on the other hand, security should not be such an amount as to preclude the respondent from pursuing the challenge, this being an important issue of access to justice.

[14] In exercising the discretion, regard should be given to the merits, although it is necessary to acknowledge the early stage of this proceeding. The only information which the Court has in that regard is the substantive determination of the Authority

and the pleadings filed by the parties which were considered in a formal disciplinary process which was undertaken by the applicant.

[15] The Authority's determination outlines what appears to have been a careful disciplinary process relating to seven allegations. Three of these related to whether the applicant's financial affairs had been competently managed over a period of time. Those concerns were not matters of mere opinion held by the relevant decision-maker within the applicant. The issues were raised in a comprehensive letter from the Office of the Vice Chancellor highlighting a number of concerns that had arisen for the University in recent years pertaining to the ability of the applicant to manage its financial affairs.[5] In addition an independent review was conducted by Grant Thornton, Chartered Accountants, wherein a number of significant concerns as to financial management were also made.[6]

[16] The respondent asserted that he adequately addressed the issues which were being raised with him in the course of the disciplinary process and that most of the financial issues were beyond his control or areas of responsibility as General Manager. As well he said he had significant concerns as to predetermination by the applicant.

[17] The Authority considered that the concerns raised as to financial management did justify a conclusion that there were serious breaches of duties.[7] However this related to only four of the seven allegations.[8] The Authority held that in regard to the issues of predetermination there may have been certain comments made about the general concerns of the applicant pertaining to the respondent's performance, but that did not go as far as establishing actual predetermination.[9]

[18] There appears to be little doubt that there is reliable evidence that financial mismanagement occurred, but the central issue will likely relate to the question of who carries responsibility for this and whether the financial management issues were such as to reach a conclusion that there had been serious misconduct; also, evidence

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[5] Authority determination, above n 1, at [24]-[27].
[6] At [34]-[40].
[7] At [76]-[90].
[8] At [88] and [91].
[9] At [92].

will need to be heard before a view could be expressed as to the merits of the predetermination issue.

[19] My preliminary assessment on the basis of the limited material placed before the Court at this stage is that the respondent's challenge is arguable. On the material before me I cannot conclude it is strongly arguable.

[20] I am mindful of the fact that if the personal grievance is established it appears that the respondent's current impecuniosity has been catalysed by the dismissal.

[21] I turn to the information provided relating to the anticipated costs which will be incurred by the applicant in defending the challenge. It is asserted that if the applicant succeeds in defending the current proceeding the likely costs award will exceed the amount awarded by the Authority - $10,000 – particularly given that the Authority hearing lasted a day and a half and the Court hearing has been set down for four days.

[22] The applicant submits that an order of $20,000 would be likely applying "the standard formula for costs in the Court".

[23] In this Court a successful party can expect a contribution of 66 per cent of its reasonable costs (absent any inflating or discounting factors).[10] But no details have been provided by the applicant as to the makeup of its anticipated reasonable costs. Extrapolating the figure which has been referred to suggests that these might be in excess of $30,000.

[24] By way of comparison, applying the relevant provisions of sch 3 of the High Court Rules, a successful party could expect an order for costs under category 2B for a four-day case to be approximately $22,000.[11] Since that sum would be regarded as a contribution only to costs, I regard the figure of $30,000 as a reasonable starting point in respect of the applicant's costs for a four-day case.

[25] I take account of the previous indication given for the applicant that it would accept security in the sum of $15,000.

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[10] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[11] Having regard to items 2, 10, 11, 12, 31, 33 and 34 of sch 3.

[26] Standing back and having regard to all circumstances, particularly the factors which must be balanced as indicated at [13] above, I consider $15,000 to be appropriate. The respondent is required to pay security for costs to the Registrar in that sum.

[27] A stay is sought until such security is given. Any such order will have to take into account the current timetable for the filing of briefs of evidence. This was set out in the minute of the Chief Judge dated 17 February 2014 (the respondent is to file and serve his briefs of intended evidence-in-chief no later than four weeks prior to the start of the hearing, with the applicant to do likewise no later than two weeks before the start of the hearing).

[28] Accordingly, if security for costs has not been provided by 10 June 2014, the proceeding will be stayed. This will ensure that the parties' briefs have been filed and served before any stay will take effect; it is hoped that the security will be paid before then so that other preparation for the hearing can proceed and that the fixture can go ahead on 23 June 2014. If the security for costs are not paid and the stay operates, the fixture will be vacated so that valuable Court time can be utilised for other purposes.

[29] The result is that there is an order for security for costs in the sum of $15,000, to be paid to the Registrar on or before 10 June 2014. If such sum is not paid to the Registrar before then plaintiff's challenge is stayed. Once that sum is paid, there will be an order staying the enforcement of the order for costs made by the Authority: this order shall continue until further order of the Court.

[30] Costs in respect of this application are reserved.

B A Corkill
Judge

Judgment signed at 4.15 pm on 22 May 2014