

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2015] NZEmpC 61
EMPC 30/2015**

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 ASHISH MAHARAJ
 Respondent/Plaintiff

AND RECON PROFESSIONAL SERVICES
 LIMITED
 Applicant/Defendant

Hearing: (on the papers by application made 20 March 2015 and
 submissions filed 12 April 2015)

Counsel: J D Evans, counsel for the applicant/defendant
 G D Bennett, advocate for the respondent/plaintiff

Judgment: 13 May 2015

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

Introduction

[1] The applicant/defendant (Recon) seeks an order for security for costs in the sum of \$10,000. Mr Bennett, on behalf of the respondent/plaintiff Mr Maharaj, strenuously opposes the application. It was agreed that the matter could be dealt with on the papers without the need for a formal hearing.

[2] The substantive matter before the Court is a non de novo challenge by Mr Maharaj to a determination of the Employment Relations Authority (the Authority) dated 8 January 2015.¹ In that determination, the Authority concluded that Mr Maharaj had been unjustifiably dismissed from his employment as a Mobile

¹ *Maharaj v Recon Professional Services Ltd* [2015] NZERA Wellington 1.

Security Officer with Recon. After allowing for a contribution of 50 per cent, the Authority awarded Mr Maharaj the sum of \$2,500 in compensation and \$3,770 gross in lost remuneration. Costs were reserved.

[3] In his non de novo challenge, Mr Maharaj alleges that the awards for compensation and lost remuneration should have been considerably higher and he disputes the 50 per cent reduction in the remedies on account of his contributing behaviour.

[4] The matter has previously been before this Court. Initially, Mr Maharaj failed in his claim before the Authority on the grounds that he had not raised his personal grievance with Recon within the 90-day limitation period prescribed in s 114(1) of the Employment Relations Act 2000 (the Act). Mr Maharaj was successful in his challenge to that determination, however, and in a judgment dated 3 July 2014 the Court concluded that his challenge had, in fact, been raised within the 90-day period.²

The application

[5] The grounds advanced by Mr Evans, counsel for Recon, in support of the application for security for costs are expressed in these terms:

- 1 The Plaintiff is currently unemployed.
- 2 The Defendant understands the Plaintiff's only source of income is the unemployment benefit.
- 3 The Defendant understands the Plaintiff has arranged his representation on a contingency fee basis.
- 4 The Defendant believes that if the Plaintiff is unsuccessful in his rehearing the Defendant will be unable to recover any costs awarded against the Plaintiff.

[6] In response, Mr Bennett accepts that the plaintiff is presently unemployed and is in receipt of the unemployment benefit but he denies that the plaintiff is being represented on a contingency basis. Mr Bennett submitted that the application for security for costs had been made at "the eleventh hour" and the defendant had failed

² *Maharaj v Recon Professional Services Ltd* [2014] NZEmpC 114.

to put forward any grounds reflecting on the plaintiff's prospects of success in its challenge on quantum.

Legal principles

[7] While there are no express provisions in the Employment Relations Act (the Act) or the Employment Court Regulations 2000 providing for security for costs, this Court has consistently applied the security for costs provisions in the High Court Rules. The relevant principles are now well established and have been applied in a number of recent cases.³

[8] Rule 5.45 of the High Court Rules provides that if a Judge is satisfied, on the application of the defendant, that a plaintiff is resident out of New Zealand or that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceedings, then the Judge may, if he or she thinks it just in all the circumstances, order the giving of security for costs.

[9] In *ALLWAZE Designs Ltd v Cawthorne*,⁴ this Court reviewed the authorities and noted that the relevant principles had recently been considered by the Supreme Court in *Reekie v Attorney-General*. In an overview of the security for costs regime, William Young J, delivering the reasons of the Court, stated:⁵

[2] Security for costs can be required in the High Court and District Court when it appears that an order for costs against the plaintiff might not be able to be enforced (either because of the plaintiff's foreign residence or impecuniosity). The jurisdiction to require security poses something of a conundrum for the courts. The poorer the plaintiff, the more exposed the defendant is as to costs and the greater the apparent justification for security. But, as well, the poorer the plaintiff, the less likely it is that security will be able to be provided and thus the greater the risk of a worthy claim being stifled.

[3] Applications for security for first instance proceedings call for careful consideration and judges are slow to make an order for security which will stifle a claim. A somewhat different approach has, however, been taken in respect of appeals.

³ *Booth v Big Kahuna Holdings Ltd (No 2)* [2014] NZEmpC 43; *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 210; *Yan v Commissioner of Inland Revenue* [2014] NZEmpC 102; *Kilpatrick v Air New Zealand Ltd* [2014] NZEmpC 48, and *ALLWAZE Designs Ltd v Cawthorne* [2015] NZEmpC 17.

⁴ *ALLWAZE Designs Ltd v Cawthorne* above n 3.

⁵ *Reekie v Attorney-General* [2014] NZSC 63; (2014) PRNZ 776 at [2]-[3], cited in *ALLWAZE Designs Ltd v Cawthorne*, above n 3, at [11].

Discussion

[10] There had been no application for security for costs when this matter was last before the Court. On that occasion, following a three-day hard fought challenge, the plaintiff was successful. The plaintiff has subsequently also been successful in his substantive personal grievance claim in the Authority. Costs are yet to be determined in both matters but it is likely that the plaintiff, as the successful party, will be awarded costs.

[11] In fixing the award of compensation for hurt and humiliation, the Authority was influenced by the fact that Mr Maharaj's evidence about how the dismissal had impacted on his life "was not corroborated in any way". However, this is not a criminal case and Mr Maharaj's evidence on hurt and humiliation could still be accepted *in toto* without corroborating evidence.

[12] In confining the award for lost remuneration to three months' loss, the Authority was influenced by the fact that Mr Maharaj "was unable to provide sufficient material to show that he had mitigated his employment loss". Again, that is a matter upon which the Court could end up taking a different view.

[13] In fixing the reduction for contribution at 50 per cent, the Authority was strongly influenced by Mr Maharaj's unacceptable behaviour in abusing and swearing at his senior managers in the course of the disciplinary meeting. The evidence relied upon in fixing the contribution will require careful analysis.

[14] When the challenge is heard, all of these matters will be at issue again and the Court may or may not uphold the Authority's findings. At this stage, however, it cannot be said that the challenge is lacking in merit and, of course, there is no challenge to the Authority's key finding that Mr Maharaj's dismissal was unjustified.

[15] In the balancing exercise, I consider that Mr Maharaj is entitled to pursue his statutory right of challenge and have these matters properly tested before the Court without having to further compromise his obviously parlous financial circumstances by providing security for costs.

[16] I consider that if the Court were to order security it would simply increase the risk of a worthy challenge being stifled and, in my view that would not be a just outcome.

[17] For these reasons, the application for security for costs is dismissed.

[18] Costs on the application are reserved.

A D Ford
Judge

Judgment signed at 3.30 pm on 13 May 2015