IN THE EMPLOYMENT COURT
AUCKLAND

AC 15/07
ARC 40/04

IN THE MATTER OF	de novo challenge to determination
AND IN THE MATTER OF	application for security for costs and/or a stay of proceedings
BETWEEN	LINDA GATES Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: 27 March 2007
(Heard at Auckland)

Appearances: Linda Gates, plaintiff
Kevin Thompson, counsel for defendant

Judgment: 27 March 2007

ORAL INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

---

[1] The defendant has applied for orders requiring the plaintiff to give security for costs and staying her challenge until the sum is paid or security for the sum is given. Alternatively the defendant seeks that the proceedings be stayed until such time as the order for costs, earlier made by the Employment Relations Authority in a determination dated 8 March 2005, has been complied with by the plaintiff. As a further alternative the defendant requests a stay on condition that the plaintiff pay the amount of the costs order into Court.

[2] The grounds for the application are that there is reason to believe that the plaintiff will be unable to meet the costs of the defendant if the plaintiff is unsuccessful in her proceedings.

[3] The proceedings are by way of a de novo challenge to a determination of the Authority in which the plaintiff has sought to considerably expand the areas in contention and also to recant on admissions or acknowledgements that may have been made or given at the investigation meeting conducted by the Authority. The defendant contends that the claims now to be advanced by the plaintiff will significantly increase the hearing time required to deal with the plaintiff's challenge.

[4] These matters were dealt with by a judgment issued by Chief Judge Colgan on 13 July 2005 (unreported as AC39/05). The Court applied *Sibly v Christchurch City Council* [2002] 1 ERNZ 476 and found that the law there stated was fatal to the defendant's application to restrict the scope of the plaintiff's claims on a de novo challenge. These matters cannot now be re-litigated and it is difficult to see how they necessarily support the defendant's application for security.

[5] The defendant's application for security, supported by an affidavit from one of its managers, Mr Walker, claims that there have been significant delays in the proceedings due to the plaintiff's conduct. It is also asserted that the challenge is unmeritorious. There have indeed been considerable delays, largely occasioned by the issue of whether the plaintiff was going to pursue her application for legal aid. It was not until January this year that the plaintiff advised that she was not going to proceed with her application for legal aid so that this application for security could then be set down for hearing.

[6] The reasons for the adjournment of the earlier trial date in July 2005 are set out in the Chief Judge's decision and arose because of the defendant's need for time to address the new matters raised by the plaintiff, the need for an amended statement of claim to be filed by the plaintiff, the underestimate of the length of the fixture and the plaintiff's pursuance of her legal aid application. There may also have been some outstanding issues of disclosure.

[7] Again whilst it may be possible to ascribe to the plaintiff the responsibility for the delays although she in turn complains about aspects of non-disclosure of documents, it is difficult to see how this material could be called upon to support the application for security. It is also extremely difficult at this stage to make any clear assessment of the merits of the case but I am satisfied on the usual assumption at this

interlocutory stage that the allegations contained in the amended statement of claim can be proved, an application to strike out would not be successful.

[8] There was no issue as to the Court's jurisdiction to order security in an appropriate case. Rule 60 of the High Court Rules and Regulation 6(2) of the Employment Court Regulations 2000 provide the basis for the jurisdiction. Where there is no formal procedure in the Regulations or any Rules made under s212(1) of the Employment Relations Act, the Court must dispose of the case as nearly as may be practicable in accordance with the Regulations or provisions of the Act, or the provisions of the High Court Rules affecting a similar case: see *Koia v Attorney-General in respect of the Chief Executive of the Ministry of Justice* [2004] 1 ERNZ 116 and *MacKenzie v Bayleys Real Estate Ltd*, unreported, Colgan J, 25 March 2004, AC 18/04.

[9] The test for determining whether the plaintiff should provide security for costs in a case based on an allegation of impecuniosity is, first, to establish an inability of the plaintiff to pay the defendant's costs if unsuccessful and, second, having established a prospective inability to pay, the Court has a residual discretion to determine whether, in the circumstances, it should order security and if so what amount and by what means. The Court of Appeal, in the case referred to by Mr Thompson, *A S McLauchlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747, stated that the discretion is not to be fettered by constructing "*principles*" from previously decide cases. The Court must carefully assess the circumstances of a particular case, noting that where a plaintiff is unable to meet an adverse order for substantial security this may in effect prevent the plaintiff from pursuing the claim. The Court of Appeal stated:

> *[15] …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.*
>
> *[16] 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.* (p752)

[10] Where a claim for security is brought before the Employment Court the cases show that the statutory framework in which personal grievances are to be dealt with,

may give rise to additional considerations. Judge Colgan stated in *MacKenzie* at paragraph [10]:

> *[10] Although reg 6(2) Employment Court Regulations 2000 now means that the provisions of the High Court Rules 1985 incorporate a jurisdiction to make orders for security for costs, the principles applicable are not exclusively those of the High Court in civil litigation. The statutory objectives contained in the Employment Relations Act 2000 and applicable to this Court's conduct of litigation are paramount. These include:*
>
> - *s101(a) — a relevant objective of the legislation being that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures;*
> - *s143(d) — one of the objects of the Act being recognition that the procedures for problem-solving need to be flexible;*
> - *s189(1) — requiring this Court to determine these proceedings in such manner and to make such decisions or orders, not inconsistent with this or any other Act, as in equity and good conscience it thinks fit;*
> - *s221(d) — empowering the Court to give such directions as are necessary or expedient in the circumstances to enable it to more effectually dispose of the matter before it according to the substantial merits and equities of the case; and*
> - *reg 4 — requiring that the Court's procedural regulations be construed in the manner that best secures the speedy, fair and just determination of proceedings.*

[11] I am unaware of any case in which this Court or its predecessors has ordered security for costs to be provided by an appellate grievant on grounds only of impecuniosity. There are several examples of security for costs being ordered in situations where the appellant was overseas, and for such cases involve different considerations. A Court's final orders should not be made nugatory by a party remaining outside or leaving the jurisdiction in which those orders can be readily enforced: see *Maybry v Shuker t/a Tamatea Meats* unreported, Goddard CJ, 16 May 1996, WEC 27/96 at p7. The former Chief Judge noted that those considerations perhaps do not extend to impecunious litigants, being of the school of thought that holds that poverty is no sin.

[12] The Court should not fetter its discretion by any statements of principle that orders will not be made against impecunious plaintiffs. However it is likely to be very rare that such orders will be made, especially where it is arguable, as it is in the present case, that the impecuniosity has arisen as a result of the actions of the former employer in dismissing the employee. That is one exception which also weighs

heavily in the civil courts. The statutory rights of grievants, who are often impecunious, to pursue their challenges are not to be lightly put aside.

[13] Although in the present case there is strong evidence that the plaintiff will be unable to pay the defendant's costs if her challenge fails, I cannot at this stage conclude that her case is without merit.

[14] There is an arguable case that the actions of the defendant, which it will no doubt seek to justify, have had an effect on the plaintiff's current financial situation. I am advised by Mrs Gates that she is in receipt of an invalids benefit and has not worked since March 2002. I have also taken into account Mrs Gates' indication that she is prepared to pay into Court the amount of the order made against her in the Employment Relations Authority. Further Mrs Gates has indicated that she has been successful in litigation against the ASB and Sovereign and, if and when that litigation is completed, she may be in a position to offer security for costs in the sum of $5,000, an amount which Mr Thompson indicated that the defendant would be prepared to accept. I therefore direct the plaintiff when or if those matters are resolved in her favour to make contact with Mr Thompson to make such arrangements. For all of these reasons I consider that the discretion must be exercised against the defendant and therefore make no order for security and the application is, at present, dismissed.

[15] As to the alternative orders sought requiring the plaintiff to pay or give security for the costs ordered against her by the Authority, Mr Thompson has referred me to authorities in which the Court has ordered that the amount determined by the Authority as the appropriate order for costs, be paid into Court. This occurred in both the *MacKenzie* case and in the case *Buchan v Sheffield Ltd* unreported, Travis J, 24 June 2005, AC 31/05.

[16] Mrs Gates has very fairly and properly agreed to pay the amount of costs outstanding into Court, which I see now from a Certificate of Judgment annexed to Mr Walker's affidavit, totals $4,030, and has undertaken to endeavour to do so by Monday, 2 April 2007. There will be an order staying the proceedings until that amount has been paid into Court.

[17] So the alternative orders sought by the defendant requiring the plaintiff to pay or give security for the costs awarded against her by the Authority is granted and the monies I direct are to be held in an interest bearing account pending further orders of the Court.

[18] I understand from the parties that there are still outstanding matters relating to the disclosure of documents, which will need to be dealt with either informally between the parties or, if they are unable to agree, by way of formal applications to the Court. Mr Thompson has indicated that the defendant may have a difficulty with being out of time in respect of one aspect of the disclosure procedure, but I have indicated to the parties that on the basis of the material he was able to advise me about, it is unlikely that that delay will cause any difficulties in the Court being able to deal with the matter on its merits.

[19] Once the issue of disclosure has been disposed of, then the matter, I understand, will be ready in all respects to be set down. I have advised the parties that the minute that disclosure is completed they are to contact the Registrar and seek a fixture. It appears that the fixture will be at least 5 days in length, with perhaps another 2 days to be kept as an overflow if necessary. Because of the length of the hearing, the matter will be subject to the hearing management procedure contained in the Regulations and it will be necessary for the plaintiff to file and serve a memorandum in the form required by the Regulations together with statements, if possible, from the witnesses she intends to call. The defendant will of course respond in kind and the matter will then go to a hearing management meeting, with a view to try to assist the parties to reduce the amount of time required for the matter to be heard.

[20] In the circumstances I consider that costs should be reserved from today's application.

B S Travis
Judge

Oral Interlocutory Judgment delivered at 3.10pm on Tuesday, 27 March 2007