

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 220
EMPC 72/2024**

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	VERY NICE PRODUCTIONS LIMITED Plaintiff
AND	GEORGIE ORMOND Defendant

Hearing: On the papers

Appearances: M Thomas, representative for plaintiff
A Mapu, advocate for defendant

Judgment: 19 November 2024

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application for security for costs)**

[1] This judgment resolves an application by the defendant, Ms Georgie Ormond, a former employee of the plaintiff company, Very Nice Productions Limited (the Company), for an order that the Company pay security for costs and that the Company's challenge be stayed until the security is paid.

[2] The substantive proceedings to which this application relates involves a non-de novo challenge to a determination of the Employment Relations Authority (the Authority).¹

¹ *Ormond v Very Nice Productions Limited* [2024] NZERA 53 (Member Loftus).

[3] The Authority found that Ms Ormond was originally a contractor of the Company but that this changed on 13 September 2021 when the parties entered into an employment agreement. Accordingly, any grievance relating to the period prior to 13 September 2021 was not able to be considered by the Authority.²

[4] The Authority determined that Ms Ormond was unjustifiably disadvantaged by the warnings issued during the employment relationship, on the basis that they were unfair and that the Company had failed to follow a fair process when issuing them.³ The Authority determined that Ms Ormond had been constructively dismissed in light of the way she had been treated by the Company.⁴

[5] Ms Ormond was awarded \$10,077.69 (gross) in lost wages and \$18,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Costs were reserved.⁵

[6] The Company has elected to only challenge the Authority's findings that Ms Ormond was unjustifiably disadvantaged and constructively dismissed and the remedies awarded as a result of those findings.

[7] Ms Ormond has applied for security for costs of between \$22,896 and \$34,416. She stated both figures are estimated using the Employment Court's Costs Guideline Scale based on a one-and-a-half-day hearing.⁶ The lower figure is her estimated costs calculated on a category 1, band B basis. The higher figure is her estimated costs calculated on a category 2, band B basis.

[8] Ms Ormond seeks security for costs on the basis that if the Company's challenge is unsuccessful, it will likely be ordered to pay costs. She says that there is reason to believe that the Company will be unable to pay an award of costs if it is unsuccessful, that the merits of the Company's challenge are dubious, and that it is just in all the circumstances to order security.

² At [41].

³ At [42]–[46].

⁴ At [48]–[57].

⁵ At [64]–[66].

⁶ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[9] The Company has accepted that it is impecunious and that if an order for security for costs is granted, it will not be able to pay. It says that even a small amount of less than \$5,000 is beyond its resources. The Company submits that despite its impecuniosity, it is not just for the Court to decide to make an order for security for costs. It submits that its challenge has merit and that the Authority investigation was deeply flawed. It says that Ms Ormond has acted in bad faith during her employment, in the Authority and in these proceedings before the Court. It submits that Ms Ormond's conduct may have contributed to it being impecunious. Lastly, it submits that any order for security for costs will bring an end to its challenge in the Employment Court and that this is unjust in all the circumstances.

The Employment Court may order security for costs

[10] As there are no particular provisions relating to security for costs in the Act or the Employment Court Regulations 2000, the Court looks to the provisions of the High Court Rules 2016 when dealing with such applications.⁷

[11] Under r 5.45(1) of the High Court Rules, the Court has discretion to order the giving of security for costs if a plaintiff is resident outside New Zealand or if there is a reason to believe that the plaintiff would be unable to pay the costs of the defendant if they are unsuccessful in their proceeding.

[12] If either of those thresholds is met, the Court under r 5.45(2) must consider what is just in all the circumstances when deciding whether to make an order for security for costs.⁸ In exercising that discretion, the Court may consider the merits and nature of the proceedings as well as the interests of both parties, but the factors falling for consideration will vary depending on the circumstances of each case. The Court also has discretion as to the quantum of any security it orders.⁹ Where an order for substantial security may effectively prevent a plaintiff from pursuing their claim, security should only be ordered where the plaintiff's claim has little chance of success.¹⁰

⁷ Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁸ High Court Rules 2016, r 5.45(2).

⁹ Rule 5.45(3).

¹⁰ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

Analysis

[13] The Company's financial position, as disclosed in the material currently before the Court, indicates that there is a real risk that it will be unable to pay the costs awarded to Ms Ormond if it fails on its challenge. The threshold test for an order for security for costs has been met.

[14] I am now required to balance the interests of both parties in considering whether to order security.

Merits

[15] Both parties strongly assert the merits of the case as being in their favour. The plaintiff says that the Authority's investigation was deeply flawed and that it made a number of errors in its determination, including the following:

- (a) The Company argues that the Authority failed to give appropriate weight to ss 103A(2) and (3)(a) of the Act when considering whether the warnings issued by the Company were lawful. The Company says that the Authority only focused on ss 103A(3)(b), (c) and (d) of the Act.¹¹
- (b) The Company disputes the Authority's finding that the warnings issued by the Company were not preceded by a clear raising of the Company's concerns, with advice that disadvantageous consequences might follow, that Ms Ormond was not given a chance to respond in the knowledge of a disciplinary context, and that her response was not listened to with an open mind.¹² The Company refers to a Bullying Investigation Report and evidence from its director, Myles Thomas, about the performance improvement process, which it effectively says refutes the Authority's findings in this regard.

¹¹ *Ormond*, above n 1, at [44].

¹² At [45].

- (c) The Company disputes the Authority's finding that Ms Ormond was no longer in the workplace when the 29 March 2022 warnings were issued.¹³ As a basis for refuting the Authority's finding that Ms Ormond was no longer in the workplace, the Company submits that Ms Ormond worked from home and had emailed the Company earlier that day.
- (d) The Company further disputes the Authority's findings about Ms Ormond being constructively dismissed, saying that the Authority wrongly applied the law for constructive dismissal and that it based its decision on an incorrect understanding of the evidence. It says that there was no causal connection between the Company's actions and Ms Ormond's resignation, that the Company had not given Ms Ormond a choice between resigning and being dismissed, and that her resignation was not foreseeable.

[16] Ms Ormond submits that the Authority rightly found that she was unjustifiably disadvantaged and constructively dismissed. She submits that the evidence supports the Authority's finding that the Company did not comply with the requirements of s 103A when issuing warnings. She submits the Authority was also right to find that she was not in the workplace when she received the 29 March 2022 warnings as she was at home, had advised the Company on 25 March 2022 that she was on stress leave, and had provided a medical certificate to support her being on leave. She also submits that the Company's unjustified actions foreseeably caused her resignation so that she was constructively dismissed. Ms Ormond submits that the plaintiff's challenge has little chance of success and was brought in bad faith.

[17] It is difficult to assess the merits of the Company's challenge at this early stage. It was apparent from the determination that the Authority member who upheld Ms Ormond's grievance carefully canvassed and considered the evidence and issues before him, and while the Company's case does not look strong at this preliminary stage, it could not be said that the Company's claim is entirely without merit. The Company is challenging the Authority's findings, and the Court is yet to have an

¹³ At [46].

opportunity to consider the evidence for the challenge. Therefore, it is not possible to predict with any certainty what the outcome will be.¹⁴

Were the Company's financial circumstances caused by Ms Ormond?

[18] The Company submits that security for costs should not be ordered against it because Ms Ormond contributed to its inability to pay. The Company says that Ms Ormond's poor performance affected its ability to fulfil its contracts and adversely impacted on its application for future funding contracts. The Company accepts that the link between Ms Ormond's performance and its failure to secure future funding contracts is "not confirmed" and "unknown" but submits that "it seems likely" that her actions contributed to the Company's financial situation.

[19] Ms Ormond's representative, Mr Mapu, points out that the Company accepts that Ms Ormond's contribution to the Company's impecuniosity is unknown. Mr Mapu submits that the Authority has determined that the Company disadvantaged and constructively dismissed Ms Ormond and that any responsibility for the financial demise of the Company lies with it rather than Ms Ormond.

[20] The evidence before the Court does not support a submission that Ms Ormond through her conduct caused the Company's financial situation.

Impact of order on plaintiff's ability to bring its challenge?

[21] The Company has submitted that if security for costs is ordered, it may prevent it from being able to proceed with its challenge. The Court of Appeal has noted that where an order will have that effect, it "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".¹⁵

[22] The fact that there is reason to believe that the Company will be unable to pay an adverse costs award does not necessarily mean that it is unable to obtain funds to

¹⁴ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39](c).

¹⁵ *McLachlan*, above n 10, at [15]–[16].

pay security. While there is a risk that the Company's right to bring a challenge may be limited, the Company has simply provided assertions from it and its director that it is impecunious. The Company has not provided any detailed evidence of its financial position to support such a claim. Nor has it provided evidence that it would not be possible for it to raise modest security from some other source.

[23] This Court has previously observed, "It is often not until a litigant is facing a deadline fixed by the Court that the prospect of an option is able to be reliably explored".¹⁶ Therefore, I consider that this factor does not stand in the way of granting security.

Allegations of bad faith

[24] The Company says that Ms Ormond demonstrated bad faith throughout her employment and says that bad faith has continued through to the present proceedings before the Court.

[25] The Court does not consider that the evidence before it supports such an assertion of bad faith. Ms Ormond was entitled to raise a personal grievance and bring proceedings in the Authority to resolve that grievance. While not all of Ms Ormond's claims were upheld in the Authority, she was nevertheless successful in bringing a disadvantage and constructive dismissal claim, and remedies were awarded in her favour. Ms Ormond is the defendant in the current proceedings, and in circumstances where the Company has admitted that it is impecunious, she has a legitimate interest in seeking security for costs in the face of a challenge which is likely to cause her further costs.

[26] Ms Ormond says similarly that the Company's challenge has not been brought in good faith because it has little chance for success. For the reasons given above, I do not consider that the challenge is without merit, and I do not accept that there is any evidence before the Court to support the assertion that the challenge is being brought in bad faith.

¹⁶ *ALLWAZE Designs Ltd v Cawthorne* [2015] NZEmpC 17, [2015] ERNZ 1 at [29].

Other factors

[27] Ms Ormond's evidence is that the Company has failed or refused to pay the remedies of \$28,077.69 awarded in the Authority. A challenge does not operate as a stay of an Authority determination.¹⁷ The Company has not applied for a stay of execution of the Authority's determination. Mr Mapu has sought payment of the Authority's awards from the Company. However, no payment has been received. In these circumstances Ms Ormond is entitled to seek to enforce the Authority's determination.¹⁸ While it would not be appropriate to order payment of the Authority's award as part of an application for security for costs, the fact that the amount remains outstanding is relevant to the Court's assessment of the impecuniosity of the Company and the Court's discretion in deciding whether to award security for costs and the quantum of such an award.

Balance of convenience

[28] The Company accepts that there is a real risk that if it is unsuccessful in its challenge, it may not be able to comply with any costs award issued against it. Further, the merits of its challenge at this early stage do not appear particularly strong. There is no evidence to support the suggestion that Ms Ormond is responsible for the financial circumstances facing the Company. While the Company has submitted that any order for security for costs may prevent its challenge from being heard, it has failed to provide evidence of its financial position to support its claim.

[29] Overall, having balanced the factors above, I consider that it is in the interests of justice for security for costs to be awarded.

¹⁷ Employment Relations Act 2000, s 180.

¹⁸ Including, among other options, by filing a statutory demand under s 289 of the Companies Act 1993.

What security should be ordered

[30] I now consider the amount of security to be fixed by the Court. The Court may order whatever security is just in the circumstances.¹⁹ Those circumstances will generally include:²⁰

- (a) the amount or nature of the relief claimed;
- (b) the nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of any interlocutory applications;
- (c) the estimated duration of the hearing; and
- (d) the probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant's estimated actual costs.

[31] The Court has reviewed the costs figures provided by Ms Ormond and considers that the estimated costs outlined are likely too high. For example, there are discrepancies between the time allocations claimed in her estimate and the allocations set out in the Court's Costs Guideline Scale. The estimate refers to costs for a stay application, but no stay application has been filed, and there is no indication that such an application is likely, so inclusion of steps for that is speculative. It also refers to obtaining judgment without appearance. However, the Court's Costs Guideline Scale does not provide for recovery of such costs. Once those are removed, I consider that the appropriate likely costs to be claimed by the defendant, including for this security for costs application, would be \$19,239 for costs pleaded on a category 1, band B basis and \$28,919 for costs pleaded on a category 2, band B basis.

[32] Considering the above factors, the proceeding at this stage appears relatively straightforward; the defendant's estimated duration of the hearing of one-and-a-half-days is not unreasonable; and the probable costs payable if the Company is unsuccessful is aligned with the amount and nature of relief being claimed by the

¹⁹ High Court Rules, r 5.45(2).

²⁰ *McNaughton v Miller* [2022] NZCA 273 at [17].

defendant. In the circumstances, I consider the amount of security claimed by Ms Ormond under category 1, band B of \$19,239 is fair and reasonable.

[33] However, in light of the risk of an order for security preventing the challenge from being heard, I consider that it would not be in the interests of justice for the full sum of likely costs claimed by Ms Ormond to be ordered. It is likely that an order of that magnitude would bring these proceedings to an end.

[34] Considering the amount of relief claimed, I determine that a sum of \$10,000 is fair and reasonable in all the circumstances.

[35] Accordingly, I order that the sum of \$10,000 be paid into Court as security for costs within 21 days of the date of this judgment. As soon as practicable following receipt, the Registrar of the Employment Court is to place that sum on interest-bearing deposit until further order of the Court. The Company's challenge is stayed until the payment is made or there is a further order of the Court.

[36] Costs are reserved.

M S King
Judge

Judgment signed at 10.45 am on 19 November 2024