

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 217
EMPC 408/2024**

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 FERETI FUIMAONO
 Plaintiff

AND RITCHIES MURPHY TRANSPORT
 SOLUTIONS LIMITED
 Defendant

Hearing: On the papers

Appearances: E Sooula, counsel for plaintiff
 P Swarbrick, counsel for defendant

Judgment: 7 October 2025

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

[1] This judgment resolves an application by Ritchies Murphy Transport Solutions Ltd (Ritchies) for an order that Mr Fuimaono pay security for costs.

[2] The substantive proceeding to which this application relates involves a challenge to a determination of the Employment Relations Authority (the Authority) in which the Authority dismissed Mr Fuimaono’s personal grievance for unjustified dismissal.¹

¹ *Fuimaono v Ritchies Murphy Transport Solutions Ltd* [2024] NZERA 563.

[3] Ritchies estimates that its scale costs in defending Mr Fuimaono's challenge would be approximately \$34,655. Ritchies seeks security for costs of \$10,000, which it says represents a significant, but not excessive, proportion of its estimated costs. Ritchies says that there is reason to believe that Mr Fuimaono will be unable to pay such an award of costs if his challenge is unsuccessful, that the merits of his challenge are dubious, and that it is just in all the circumstances to order the security sought.

[4] Mr Fuimaono says that the defendant has not provided credible evidence that he is unable to pay costs if his challenge is unsuccessful. He accepts that he has not paid the Authority's costs award but says that this award is subject to challenge and non-payment does not establish impecuniosity. He confirms that he is a New Zealand resident. He says that any order for security would delay or extinguish his ability to bring his challenge. He denies that his challenge is meritless. He maintains that his challenge raises arguable questions of fact and law, which are not frivolous or vexatious. Lastly, he says that it is not in the interests of justice for an order of security for costs to be made.

The law

[5] There are no particular provisions relating to security for costs in the Employment Court. Accordingly, pursuant to the Employment Court Regulations 2000 at reg 6(2)(a)(ii), the Court looks to the provisions of the High Court Rules 2016 when dealing with applications for security for costs.

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

[7] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.² An order may be made if it is just in all the circumstances.³ Where an order for substantial security may

² *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

³ High Court Rules 2016, r 5.45(2).

effectually prevent a plaintiff from pursuing their claim, security should only be ordered where the plaintiff's claim has little chance of success.⁴ If the defendant's actions, being the subject of the litigation, have caused the plaintiff's impecuniosity, that will count as a factor against security being granted.⁵

Analysis

Is there reason to believe Mr Fuimaono will be unable to pay costs if unsuccessful?

[8] There is no dispute that Mr Fuimaono is a New Zealand resident. The application for security for costs is brought on the basis that Ritchies believes that Mr Fuimaono will be unable to pay its costs if his challenge is unsuccessful.

[9] Mr Fuimaono's de novo challenge to the Authority's substantive and costs determinations was filed on 14 October 2024. However, a challenge does not operate as a stay of the Authority's determinations.⁶ The default position is that a successful party before the Authority is entitled to the use of the monies that the Authority has ordered the unsuccessful party to pay. If Mr Fuimaono sought to displace this default position, he was required to file an application for a stay of the Authority's proceedings.

[10] In an affidavit, Ms Scott, head of people, safety and culture of Ritchies, says she has serious concerns about Mr Fuimaono's ability to pay costs. Ms Scott's affidavit exhibits an Authority determination of 5 November 2024 in which Mr Fuimaono was ordered to pay Ritchies \$10,000 in costs.⁷ Mr Fuimaono has failed to pay the Authority's costs award and not sought a stay. On 29 April 2025 the Authority issued a compliance order requiring Mr Fuimaono to pay the costs awarded by the Authority within 28 days.⁸ Mr Fuimaono has failed to comply with the compliance order or respond to written requests from Ritchies' lawyer to Mr Fuimaono's lawyer for payment in line with the compliance order.

⁴ *McLachlan*, above n 2, at [15]–[16].

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

⁶ Employment Relations Act 2000, s 180.

⁷ *Fuimaono v Ritchies Murphy Transport Solutions Ltd* [2024] NZERA 656.

⁸ *Ritchies Murphy Transport Solutions Ltd v Fuimaono* [2025] NZERA 230.

[11] It was not until 19 September 2025, following a directions conference that discussed the issue of whether Mr Fuimaono was seeking a stay or not, that a joint memorandum of counsel was filed, which advised that the parties had conferred and now agreed that Ritchies would not take steps to enforce the Authority's costs determination pending the outcome of Mr Fuimaono's challenge.

[12] In an affidavit, Mr Fuimaono confirms that he does not have the ability to pay security for costs if an order was made and that such an order would force him to abandon his challenge. Mr Fuimaono sets out his belief that because he is challenging the Authority's determinations, his failure to comply with the costs awarded by the Authority should not be treated as evidence of his inability or unwillingness to pay costs. However, his affidavit provides a detailed breakdown of his weekly income and expenses. It is clear that his weekly expenses exceed his income and he does not have any assets or have savings to draw on to pay any costs order. Mr Fuimaono says that if the Court considers that some protection is required for Ritchies, that "No blanket stay of proceedings be ordered". Instead, he seeks that the amount of security be substantially reduced and paid in instalments over time.

[13] Mr Fuimaono's evidence of his weekly financial position combined with his failure to pay the costs awarded against him in the Authority and failure to comply with the Authority's related compliance order, provides the Court with a credible basis for finding that there is reason to believe that Mr Fuimaono will be unable to pay Ritchies' costs if his challenge to the Authority's determinations is unsuccessful.

Is an order for security for costs just in all the circumstances?

[14] Having accepted that the threshold test is satisfied, I now turn to consider whether an order for security for costs is just in all the circumstances. I now consider the key factors identified by the parties as relevant to the Court's consideration of whether an order for security is just in all the circumstances.

Balancing the interests and consideration of merits

[15] The balancing of the interests of the parties is an overriding consideration. This involves balancing Ritchies' interest to be protected from a barren costs order against Mr Fuimaono's right to access justice.

[16] Mr Fuimaono submits that a substantial order for security will prevent him from pursuing his challenge. The Courts recognise that an order having that effect should be made only after careful consideration and in a case where the claim has little chance of success.⁹ This requires the Court to consider the merits of the litigation and the prospect of Mr Fuimaono's success.

[17] Mr Fuimaono submits that the facts giving rise to his challenge are contested, including any interpretation of the CCTV footage, and that his challenge raises arguable questions of fact and law. He submits that it is inappropriate at an interlocutory stage to discuss the merits of his claim.

[18] Ritchies submits that the merits of the case overwhelmingly favour it. It says that Mr Fuimaono was dismissed from his employment as a bus driver following an incident during which a passenger on the bus he was driving was badly injured by other passengers and by being dragged by the bus. The incident was recorded by the onboard bus CCTV. It says Mr Fuimaono failed to stop and ascertain whether the injured passenger required assistance and did not call emergency services or alert the bus depot of the incident. This conduct was the basis for it alleging Mr Fuimaono's actions constituted serious misconduct. Ritchies completed an incident report form after it became aware of the incident. It conducted a disciplinary process in which Mr Fuimaono was given an opportunity to comment on the CCTV recording and provide an explanation for his alleged conduct. On 20 September 2022 Mr Fuimaono gave Ritchies a handwritten resignation letter. However, Ritchies chose to continue with its disciplinary process. On 29 September 2022 it advised Mr Fuimaono that it had reached a preliminary finding that his conduct amounted to serious misconduct and it proposed to terminate his employment. On 7 October 2022 Ritchies sent Mr Fuimaono a letter confirming its decision to terminate his employment.

⁹ *McLachlan*, above n 2, at [15].

[19] Ritchies has filed contemporaneous documents in support of its evidence of what it says occurs. This includes:

- (a) the CCTV recordings of the 17 September 2022 incident;
- (b) the incident report form completed the day of the incident;
- (c) the 20 September 2022 letter from Mr Fuimaono giving notice effective immediately of his resignation from his employment with Ritchies;
- (d) the 27 September 2022 letter from Ritchies to Mr Fuimaono inviting him to a disciplinary meeting to respond to allegations of serious misconduct, which if upheld could result in the termination of his employment;
- (e) the 29 September 2022 notes of the disciplinary meeting with Mr Fuimaono, which record (after hearing Mr Fuimaono's explanation) its preliminary view to terminate his employment on notice; and
- (f) the 7 October 2022 letter confirming Ritchies' decision to terminate Mr Fuimaono's employment on notice.

[20] Mr Fuimaono in his unsworn brief of evidence accepted that an incident occurred on 17 September 2022 when he had parked his vehicle at a bus stop in Manukau. He says a group of passengers got into an argument with another passenger. He asked them to get off the bus. The passengers fought outside of the bus. Some of the group of passengers who had been fighting returned to the bus. Mr Fuimaono turned the bus on and began driving away from the bus stop. A member of the public signalled for Mr Fuimaono to stop the bus. Mr Fuimaono said the injured passenger (the group had been fighting with) was outside the bus, holding on to the bus door trying to open it. Mr Fuimaono stopped the bus, opened the bus door, the injured person took his hand off the door and Mr Fuimaono drove off. He drove the bus to Papakura and was preparing to finish work when the Police approached him and he was taken to the Police station to give a statement.

[21] Mr Fuimaono denies that his conduct constituted serious misconduct. Mr Fuimaono claims that he was told by Ritchies to resign. Mr Fuimaono resigned. After receiving the letter inviting him to a disciplinary meeting, he claims he was told by Ritchies to rest and not work for the next two months. He believed he could return to work after the two months had passed when things had cooled down. Mr Fuimaono also claims that the CCTV footage had been incorrectly interpreted by Ritchies.

[22] While it is normally problematic to consider the merits of a proceeding before it has been heard and the evidence called, in this instance, where the contemporaneous documentary and CCTV evidence has been filed, which appear to support Ritchies' evidence, it is possible to say that, on the face of it, the merits of Mr Fuimaono's claims do not appear to be strong.

[23] Further, at the time of the incident, Mr Fuimaono's employment with Ritchies was subject to a final written warning. The lawfulness of that warning had not been challenged, which leads to the consideration that, even if the Court were to accept Mr Fuimaono's evidence of the incident, it is likely that his conduct in failing to call emergency services, or report the incident to the depot, could be capable of being regarded as misconduct. The termination of his employment could therefore have been justified as the next step in a progressive disciplinary process.

[24] Overall, Mr Fuimaono's challenge has difficulties. I accept the submissions from Ritchies that the merits of his claim based on the untested evidence before me, are not strong. This factor weighs in favour of granting the application for security for costs.

Causation of impecuniosity

[25] The parties in their submissions agree that Mr Fuimaono's financial hardship is not caused by the defendant's conduct. However, in spite of their agreement, I consider that Mr Fuimaono's evidence demonstrates that he has been unable to find work following his termination of employment. It is clear from his evidence that his impecuniosity has been caused, or significantly contributed to, by his dismissal from his employment with Ritchies. This factor weighs against the granting of the application for security for costs.

Other factors relevant to exercise of discretion

[26] I consider it is also relevant that Mr Fuimaono did not take any prompt action to respond to the Authority's costs order of \$10,000. Mr Fuimaono has been represented by Ms Sooula throughout the Authority and Court proceedings. On 14 October 2024 Ms Sooula filed a de novo challenge on Mr Fuimaono's behalf. She indicated as early as 7 February 2025 that Mr Fuimaono intended to file an application to stay the Authority's costs determination and agreed at a directions conference that a stay application "will be advanced in a timely manner" to enable it to be dealt with before the hearing. Despite this no stay application was made.

[27] Further, Mr Fuimaono and Ms Sooula failed to respond to Ritchies' lawyers' repeated requests for payment of the Authority's costs order. Ritchies sought in the Authority, and was granted, a compliance order that required Mr Fuimaono to pay Ritchies \$10,000 in costs by 27 May 2025. Mr Fuimaono has failed to comply with the Authority's compliance order.

[28] On 16 September 2025 the Court raised the issue of a stay during a directions conference. Shortly after, a joint memorandum was filed advising that Ritchies had sensibly agreed not to take steps to enforce the Authority's costs determination pending the outcome of the challenge "to avoid unnecessary timetabling and the need for a further hearing on any application for a stay."

[29] In the circumstances Mr Fuimaono has failed or refused to respond or engage with Ritchies in response to its legitimate attempts to seek payment of the Authority's costs order. Mr Fuimaono has made no effort to address the Authority's costs award against him, whether by offering a payment plan or promptly seeking the terms of an agreed stay. In these circumstances, Mr Fuimaono's failure to respond and engage with Ritchies on the issue of costs has unnecessarily protracted the proceedings in the Authority and unnecessarily increased Ritchies' legal costs. His conduct towards costs in the Authority does suggest that there is a high risk of Ritchies facing a barren costs order if it is successful.

[30] I consider this factor weighs in favour of granting the application for security for costs.

Balance of convenience

[31] I have already found that there is a real risk that if Mr Fuimaono is unsuccessful in his challenge, he will not be able to comply with any costs award issued against him.¹⁰ Further, the merits of his challenge at this stage do not appear to be strong. I have assessed, based on the evidence before me, that Mr Fuimaono's situation has been caused or significantly contributed to by his dismissal from employment.¹¹ I have also assessed that Mr Fuimaono's failure to engage in the issue of the Authority's costs, or make any effort to pay the costs order, supports an order for security being made.

[32] Having assessed these factors, I consider that it is in the interests of justice for security for costs to be ordered.

What security should be ordered?

[33] Ritchies seeks security for costs of \$10,000. This amount is the equivalent of the costs ordered in the Authority, and payment of which is subject to a compliance order. The security sought by Ritchies is significantly less than its estimated entitlement to scale costs it would be entitled to claim in defending Mr Fuimaono's challenge, which it says would be approximately \$34,655.

[34] Mr Fuimaono submits that \$10,000 is speculative, premature and inflated. He considers it would operate as a strike out and deny his ability to pursue his claim. However, he also suggested in his affidavit evidence that if the Court were to consider that an order for security for costs was required to protect Ritchies that the amount be substantially reduced and staged in payments. He objected to the proceedings being stayed while he paid the security.

[35] Overall, I consider that in the circumstances a sum of \$10,000 is appropriate. It reflects the amount of costs ordered by the Authority and is the subject of an Authority compliance order that remains unpaid. The sum also represents a

¹⁰ See above at [13].

¹¹ See above at [25].

significant, but not excessive, proportion of Ritchies' estimated costs. Overall, I consider that the sum of \$10,000 is sufficient in the circumstances of the case.

[36] I also observe that r 7.45 of the High Court Rules provides that the Court may make an interlocutory order subject to any just terms or conditions. In this case, any order for security for costs must rest on the foundation of the threshold issue of Mr Fuimaono's inability to pay. Mr Fuimaono has indicated that he is not in a position to pay any security if ordered immediately but has indicated that he would be open to staggered payments or payments over time. In the circumstances, the Court is prepared to grant Mr Fuimaono an indulgence of three months to make arrangements to pay the \$10,000 security for costs. In the circumstances where Mr Fuimaono has previously failed to comply with costs and compliance orders of the Authority, it is just in the circumstances that the substantive proceedings are stayed pending the payment of security for costs into the Court.

Orders

[37] The application for security for costs is granted:

- (a) Mr Fuimaono is to pay into the Employment Court registry on or before 7 January 2026, the amount of \$10,000 as security for costs (being three calendar months from the date of this judgment). Mr Fuimaono can arrange for payment by instalments in consultation with the Registrar of the Court. The sum is to be placed by the Registrar in an interest-bearing account until further order of the Court.
- (b) The substantive proceeding is stayed pending payment of security for costs. If payment of the security for costs is not received in full by 4 pm on 31 October 2025, the substantive hearing scheduled to commence on 10 November will be vacated.

[38] The costs on this application are reserved for consideration at the resolution of this proceeding.

M S King
Judge

Judgment signed at 4.45 pm on 7 October 2025