

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

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

**[2025] NZEmpC 61  
EMPC 289/2024**

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                      JOHN FAITALA  
                                         First Plaintiff

AND                              VAHANOA VEA  
                                         Second Plaintiff

AND                              THE PACIFIC ISLAND BUSINESS  
                                         DEVELOPMENT TRUST  
                                         Defendant

Hearing:                      On the papers

Appearances:                P Pa'u, advocate for plaintiffs  
                                         J Williams and C Sargison, counsel for defendant

Judgment:                    1 April 2025

---

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

---

[1]     On 5 July 2024, the Employment Relations Authority (the Authority) issued a determination where it found that Vahanoa Vea and her colleague, John Faitala, were unjustifiably dismissed by their employer, The Pacific Island Business Development Trust (the Trust).<sup>1</sup> The Authority awarded Mrs Vea two months lost wages, \$1,000 as

---

<sup>1</sup> *Faitala v The Pacific Island Business Development Trust* [2024] NZERA 403 (Member Blick).

compensation for loss of benefits and \$25,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).<sup>2</sup>

[2] Mrs Vea and Mr Faitala have filed a non-de novo challenge to the Authority's determination in relation to the quantum of remedies they were awarded for their unjustified dismissals and the dismissal of their unjustified disadvantage claims. The Trust does not accept that the Authority's decision is wrong.

[3] The Trust has applied for orders requiring Mrs Vea to pay or provide security for costs of \$10,000 and that her challenge be stayed until the amount is paid or adequate security is provided. The security sought is less than half of what the Trust calculated would be awarded to it under category 2 band B of the Court's Guideline Scale if its defence succeeds.<sup>3</sup> The Trust has not applied for any security for costs from Mr Faitala.

[4] The Trust's application is made on the two grounds. The first is that it has reason to believe that Mrs Vea is unlikely to be able to pay costs associated with the proceeding if her claim is not successful. The second is that Mrs Vea's challenge lacks merit. It submits that the remedies Mrs Vea received in the Authority were in excess of what was reasonable in the circumstances.

[5] The application was supported by an affidavit from Mary Los'e, chief executive officer of the Trust, in which she describes the circumstances that might justify the order. She deposes that the Trust paid Mrs Vea \$36,769.25 (less tax) pursuant to the Authority's 5 July 2024 determination. Ms Los'e deposes that Mrs Vea has four dependants and has been in receipt of a benefit from the Ministry of Social Development for a sustained period. Mrs Vea has disclosed a debt she owes to the Ministry of \$1,900 which is being repaid at \$5 per week. These circumstances give rise to the Trust's reason to believe that Mrs Vea is impecunious.

[6] Mrs Vea opposes the Trust's application on the grounds that the merits of her claims are strong. She says her current financial position was a direct result of the

---

<sup>2</sup> At [68].

<sup>3</sup> Employment Court of New Zealand Practice Directions <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 18.

Trust's actions that are being challenged in her proceedings and says that an order for security would cause her financial hardship and prevent her from pursuing her claims. Further, she says the application is misconceived because Mr Faitala's claims against the Trust arise from the same restructuring process and Authority determination. In addition, the Trust would expend the same resources and hearing time defending Mr Faitala's claims as it would defending Mrs Vea's and Mr Faitala's claims together at the same hearing.

## **Legal Principles**

[7] There is no express provision in the Employment Relations Act 2000 or the Employment Court Regulations 2000 providing the Court with power to order security for costs. Instead, the Court applies r 5.45 of the High Court Rules 2016.<sup>4</sup> That rule empowers the Court to make an order of security for costs if there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's claim.<sup>5</sup>

[8] If that threshold is met, the Court must consider whether it is just in all the circumstances to make an order.<sup>6</sup> The factors to take into account vary depending on each case. In exercising the discretion, the merits or nature of the case may be considered along with the interests of both parties.<sup>7</sup> Importantly, the Court has a discretion about the amount to order, and that sum does not need to be what could be awarded under the Guideline Scale.<sup>8</sup>

[9] Where an order is made to pay or provide a substantial amount for security which may effectively prevent a claim from being pursued, it should only be made following careful consideration and where the claim has little chance of success. Access to the Court for a genuine plaintiff should not lightly be denied.<sup>9</sup>

---

<sup>4</sup> The High Court Rules 2016 are applied via reg 6 of the Employment Court Regulations 2000.

<sup>5</sup> High Court Rules, r 5.45(1)(b).

<sup>6</sup> Rule 5.45(2).

<sup>7</sup> *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13]–[16].

<sup>8</sup> At [13].

<sup>9</sup> At [15].

## **Submissions were received**

[10] The Trust's submissions in support of its application can be summarised as:

- (a) Mrs Vea will be unable to pay an award of costs if her challenge was unsuccessful. Mrs Vea has given evidence to this effect.
- (b) An order is just in the circumstances as the merits of Mrs Vea's claim are weak and unlikely to succeed.
- (c) The Trust denies that it is responsible for Mrs Vea's current financial position. It points to Mrs Vea's failure to take reasonable steps to mitigate her losses as the basis for her current financial position.
- (d) Despite Mrs Vea and Mr Faitala advancing their challenges together, this does not mean that the Court would necessarily award costs for any unsuccessful challenge on a joint and several basis. This leaves a risk that the Trust may be left with a costs award against Mrs Vea which it cannot recover.
- (e) An award of \$10,000 security for costs is just in all the circumstances having regard to the likely scale costs of \$26,051.

[11] Mrs Vea's submissions in opposition can be summarised as:

- (a) The costs of defending Mrs Vea's and Mr Faitala's claims together would not be significantly greater than the costs of defending Mr Faitala's sole challenge.
- (b) Mrs Vea relies on a number of the Authority's findings which were critical of the Trust's restructuring process and the way it treated Mrs Vea and Mr Faitala. However, she submits that the Authority did not explain in its determination how it concluded that the plaintiffs' unjustified disadvantage grievances were more accurately

characterised as unjustified dismissals. It is submitted that the Authority made a mistake when making this finding.

- (c) The Authority failed to grant penalties even though there were serious, deliberate and sustained breaches of good faith and clearly made out breaches of the parties' employment agreement.
- (d) The Authority received significant evidence in regard to the harm and loss suffered by the plaintiffs, which Mrs Vea submits supported a greater level of remedies being awarded. It is submitted that the Authority made a mistake when awarding remedies.
- (e) Mrs Vea's impecuniosity was caused by the Trust's actions.
- (f) Ordering security for costs would prevent Mrs Vea from pursuing her challenge in the Court. She has a genuine challenge with strong merits, and her interest in being able to access justice outweighs the Trust's concerns about not being able to recover its costs.
- (g) Declining the application for security would have no effect on the Trust's ability to defend her claim.

## **Analysis**

[12] The evidence concerning Mrs Vea's financial position indicates that there is a real risk that she will be unable to pay any costs awarded to the Trust if she fails on her challenge. The threshold test for an order for security for costs has been met.

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

## *Merits*

[14] Both parties strongly assert the merits of the case as being in their favour. It is difficult to assess the merits of Mrs Vea's challenge at this early stage. The Authority

determination does not provide a detailed analysis of the evidence it relied on when dismissing Mrs Vea's unjustified disadvantage claim or when calculating remedies. The Court is yet to have an opportunity to consider the evidence for the challenge. Therefore, it is not possible to predict with any certainty at this early stage what the outcome will be.<sup>10</sup> I consider this factor to be neutral.

*Financial circumstances caused by the Trust*

[15] Mrs Vea deposes that her financial position was caused by her dismissal by the Trust and it failing to provide her with a reference to assist her in finding new employment. The Court recognises that where it is reasonably probable that it is the defendant's actions, being the subject of the litigation, that have caused a plaintiff's impecuniosity, ordering security for costs may be unjust.<sup>11</sup> Standing back, the evidence does appear to support the submission that the Trust's conduct in dismissing Mrs Vea, at least in part, contributed to her financial situation. This factor points away from security being granted.

*Impact on ability to bring her challenge*

[16] The evidence before the Court supports Mrs Vea's submission that if security for costs is ordered, Mrs Vea will be prevented from being able to proceed with her challenge. The Court of Appeal in *McLachlan v MEL Network Ltd* 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."<sup>12</sup> For the sake of completeness, I confirm that there are no allegations of the challenge being brought in bad faith. This factor points away from security being granted.

---

<sup>10</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39](c).

<sup>11</sup> *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC) at 461; and *Kaipara v Carter Holt Harvey Ltd* [2011] NZEmpC 132 at [15] and [20].

<sup>12</sup> *McLachlan*, above n 7, at [15].

*Other factors*

[17] Another feature of this case is that because Mrs Vea's challenge is being brought jointly with Mr Faitala's challenge, the Trust will incur legal costs, regardless of whether Mrs Vea's challenge proceeds or not. While it is accepted that there will be further evidence required in respect of Mrs Vea's challenge, there will necessarily be an overlap of facts and witnesses across the claims brought by the plaintiffs.

[18] Mr Faitala and Mrs Vea have overlapping, but separate causes of action, which makes separate costs awards possible. However, given Mr Faitala's support of Mrs Vea in this application, there is also the real possibility of costs being ordered on a joint and several basis. Further there is no evidence that declining the application for security would affect the ability of the Trust to defend the challenge. These factors weigh against security being ordered.

*Balance of convenience*

[19] It is too early to assess the merits of Mrs Vea's challenge, and the balance of most of the remaining factors fall in her favour. In the circumstances, the interests of justice favour the position of Mrs Vea. No order for security is made.

**Outcome**

[20] The application is unsuccessful, and it is dismissed.

[21] Costs are reserved. If agreement about them cannot be reached, memoranda may be filed.

M S King  
Judge

Judgment signed at 11.50 am on 1 April 2025