

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2025] NZEmpC 25
EMPC 295/2024**

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 CUSHLA HURRELL
 Plaintiff

AND MENOPAWS LIMITED T/A NUMBER
 8 CAFÉ
 Defendant

Hearing: On the papers

Appearances: E Brankin, advocate for plaintiff
 Y Hope, counsel for defendant

Judgment: 21 February 2025

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for security for costs)**

[1] On 10 July 2024, the Employment Relations Authority dismissed claims by Cushla Hurrell that she was unjustifiably disadvantaged and unjustifiably dismissed by her former employer, Menopaws Ltd which trades as Number 8 Café.¹

[2] The plaintiff challenged that determination. In addition to seeking to reverse the Authority's conclusions about the circumstances in which her employment ended,

¹ *Hurrell v Menopaws Ltd t/a Number 8 Café* [2024] NZERA 411 (Member Doyle).

she sought compensation for the alleged grievances. Not surprisingly, the defendant does not accept that the Authority's decision is wrong.

[3] The defendant has applied for an order requiring the plaintiff to pay or provide security for costs of \$13,563.25. Implicit in the application was that a further order would be made for the proceeding to be stayed until the amount is paid or adequate security is provided. The amount is half what the defendant calculated would be awarded to it under the Court's Guideline Scale, if the defence succeeds.²

[4] The application has four grounds. The first of them is that the Authority made a decision in its favour. The second ground is that there is an unsatisfied costs award in the Authority of \$3,375.³ The third ground is that the plaintiff has retained a representative who works on a "no win no fee" basis. The defendant extrapolated from that alleged arrangement that it does not appear the plaintiff has sufficient funds to pursue the litigation. The last ground is a general statement that, if the plaintiff is unsuccessful, she is unlikely to be able to pay costs associated with the proceeding.

[5] The application was not supported by an affidavit describing any of the circumstances that might justify an order. That position was maintained even though, during a directions conference on 4 December 2024, an opportunity was provided to both parties to reflect on the application, and the response to it, to consider whether they needed to be amended in some way.

[6] The application is opposed. The plaintiff stated that she is employed, denied engaging Ms Brankin on a "no win no fee" basis, and stated that the amount sought by the defendant would interfere with her ability to pay for representation and therefore frustrate the litigation.

[7] The plaintiff filed a brief affidavit. She deposed to being in permanent employment from October 2022. She stopped short of saying what her job is and did not provide any other information about her income, assets or liabilities. She said her representative is engaged on an hourly rate basis. She expressed concern that she

² By applying Category 1, Band B of Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

³ *Hurrell v Menopaws Ltd t/a Number 8 Café* [2024] NZERA 532 (Member Doyle).

would be prevented from pursuing the challenge if an order for the amount now sought is made.

Legal principles

[8] The Employment Relations Act 2000, and the Employment Court Regulations 2000, do not provide the Court with power to order security for costs. Instead, the Court applies r 5.45 of the High Court Rules 2016.⁴ The relevant part of that rule is that it empowers the Court to make an order 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.⁵

[9] If that threshold is met the Court must consider whether it is just in all the circumstances to make an order.⁶ 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.⁷ 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.⁸

[10] What needs to be borne in mind is that 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.⁹

Defendant's submissions

[11] Ms Hope's submissions relied on the following:

- (a) The costs awarded by the Authority have not been paid.

⁴ High Court Rules 2016, applied by Employment Court Regulations 2000, reg 6; the rule also covers the circumstances of a plaintiff outside New Zealand.

⁵ Rule 5.45(1)(b).

⁶ Rule 5.45(2).

⁷ *A S McLachlan Ltd v MEL Network Ltd* [2002] 16 PRNZ 747 (CA) at [13] and [14].

⁸ At [13].

⁹ At [15].

- (b) Filing a challenge does not operate as a stay of proceedings.¹⁰
- (c) There was no application by the plaintiff for a stay of the Authority's costs decision.¹¹
- (d) The plaintiff engages a "no win no fee" representative.
- (e) If the plaintiff is unable to pay that is not a result of any action by the defendant.
- (f) The plaintiff has not stated that she could meet a future costs award inviting an inference in favour of granting the application.

[12] These submissions referred to an attempt to reach a pragmatic compromise, although there was no evidence about it. Apparently, the defendant proposed to the plaintiff that both parties pay a stipulated sum of money into a trust account to meet any future adverse costs award, but the proposal was not responded to by the time the submissions were filed.

[13] The submissions concluded with a statement that the chances of the plaintiff succeeding are very low and it is just, in all the circumstances, to order security.

Plaintiff's submissions

[14] Ms Brankin's submissions can be summarised as:

- (a) The plaintiff considers the Authority made a mistake.
- (b) The proceeding challenging the determination is brought in good faith.
- (c) Security should only be ordered where the plaintiff's claim has little chance of success which is not the case here.¹²

¹⁰ Employment Relations Act 2000, s 180.

¹¹ *Maheta v Skybus NZ Ltd* [2022] NZCA 516, (2022) 19 NZELR 343.

¹² *A S McLachlan Ltd*, above n 7.

- (d) Declining the application would have no effect on the defendant's ability to defend the claim.
- (e) The plaintiff is relying on the effect of the judgment in *Maheta v Skybus NZ Ltd*, meaning that if the challenge succeeds the Authority's costs determination will fall away.¹³
- (f) No demand for payment has been made.
- (g) The defendant has avenues open to seek payment from the plaintiff.
- (h) The plaintiff has not stated an inability to pay in the event that the claim fails.

Analysis

[15] The difficulty confronting the defendant's application is the absence of evidence to justify granting it. It is only an acknowledgement by the plaintiff that the Authority's costs award is unpaid that opens the door to any consideration of the application.

[16] Aside from the plaintiff not paying those costs there was no evidence that she may be unable to satisfy any future costs award. All that can be said reliably is that those costs are unpaid and the plaintiff considers that, if her challenge succeeds, they will never have to be paid. That is a refusal to pay not proof of an inability to pay and falls short of establishing the ground required by High Court Rule 5.45.

[17] The plaintiff deposed to being in employment. While the information about that work is disappointingly brief, it is at least an indication of a means to fund future obligations. The fact that the plaintiff presently prefers to spend money on representation does not shift this assessment in the defendant's favour. The defendant's submissions, about how the plaintiff pays or will pay her representative, are not material.

¹³ *Maheta*, above n 11.

Outcome

[18] The application is unsuccessful and it is dismissed.

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

K G Smith
Judge

Judgment signed at 10 am on 21 February 2025