Employment Court of New Zealand

Alkazaz v Enterprise IT Limited [2020] NZEmpC 42 (14 April 2020)

Last Updated: 17 April 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2020] NZEmpC 42
EMPC 397/2019

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	AHMED ALKAZAZ Plaintiff
AND	ENTERPRISE IT LIMITED Defendant

Hearing:	On the papers
Appearances:	Plaintiff in person R Bryant, counsel for defendant
Judgment:	14 April 2020

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application for security for costs)

Background

[1] The defendant company has applied for an order for security for costs against the plaintiff. The application arises against the following backdrop.

[2] Mr Alkazaz was employed by Enterprise IT Limited for a period of just less than three months (12 September 2016 to 9 December 2016). He was dismissed and pursued a claim against the company. The Employment Relations Authority upheld Mr Alkazaz's claim, found that he had been unjustifiably dismissed and awarded him

lost wages and compensation.1 The Authority also penalised the company for failing to pay Mr Alkazaz in lieu of notice on termination of his employment. Although Mr Alkazaz had been successful in the Authority he was unhappy with the determination. He says that he held off on filing a challenge because he believed that the company would be filing a challenge itself. That does not explain why, if he took issue with the determination, he did not file his own challenge. Rather he filed an application to re- open the determination. That application was filed some eight months after the Authority's substantive determination had been issued.

[3] The Authority declined the re-opening application, for reasons fully set out in a determination dated 30 September 2019.2 In summary, the Authority found that Mr Alkazaz was seeking to bring fresh personal grievance claims (which he needed to pursue by way of statement of problem in the usual way, rather than re-opening the original investigation); that

much of the evidence that he wished to bring before the Authority was not "fresh" or "new"; none of the evidence which Mr Alkazaz wished to rely on would have made a material difference to the outcome; and there was an insufficient basis for concluding that a miscarriage of justice had occurred.

[4] Mr Alkazaz has filed a challenge to the Authority's determination declining to re-open its original investigation. The company has filed a statement of defence to the challenge and has coupled that with an application for security for costs. The grounds for the application for security for costs can be summarised as follows. Mr Alkazaz is resident overseas; there is reason to believe that he will be unable to pay the company's costs if his challenge fails; the challenge lacks merit (including because it includes matters which are outside the Court's jurisdiction); and it is likely that the way in which Mr Alkazaz will pursue his challenge will unnecessarily increase the company's costs.

[5] Mr Alkazaz opposes the company's application. While he accepts that he is currently residing overseas, he says that he has more than sufficient assets to meet a costs order in these proceedings. He also disputes the company's assessment of the

1 *Alkazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig).

2 *Alkazaz v Enterprise IT Ltd* [2019] NZERA 560 (Member Craig) (the reopening determination).

merits of his challenge and its characterisation of his conduct as likely to unnecessarily increase costs.

The approach to applications for security for costs

[6] The Court has jurisdiction to order a party to pay security for costs and to stay proceedings until that is attended to.3 Rule 5.45 of the High Court Rules sets out the basis on which an order for security for costs may be made. Relevantly for present purposes, a Judge may, if they think it is just in all of the circumstances, grant security for costs where a plaintiff is resident outside of New Zealand or where there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in their proceeding.

Threshold met?

[7] Security for costs can be ordered against a permanent resident if the Court considers that person does not reside in New Zealand.4 Mr Alkazaz is not currently living in New Zealand. Rather, he is living and working in Dubai. I am satisfied that Mr Alkazaz's usual or ordinary place of residence is, for present purposes, Dubai.5 That means that the threshold under r 5.45(1)(a)(i) for making an order for security for costs has been met.

Should an order for security for costs be made?

[8] The next question is whether an order for security for costs should be made. That involves an exercise of the Court's discretion, balancing the defendant's interest in being protected against a barren costs award and the plaintiff's right of access to the courts. In exercising its discretion the Court will have regard to a range of factors. While the factors will vary depending on the circumstances of each case, the overriding consideration remains the same – namely whether it is in the overall interests of justice to make an order for security for costs.

3 Employment Court Regulations 2000, reg 6(2)(a)(ii); High Court Rules 2016, r 5.45.

4. See *Verschuur v Minister of Immigration* [2018] NZHC 160; and generally *Bolton v New Zealand Insurance Company Ltd [1993] NZHC 1145; (1993)* 7 PRNZ 71 (HC).

5 *Bolton*, above n 4, at 72.

[9] In this case there are three factors which I consider particularly relevant: the merits; the plaintiff's conduct; and likely difficulties with cost recovery in the event that the plaintiff's challenge fails. I deal with each in turn.

Merits of challenge

[10] While there are limits to the extent to which the Court can assess the merits of a claim at an early stage, it is appropriate to do so even where nothing more than an impression of the strengths and weaknesses of a plaintiff's position can be arrived at. My assessment is that the challenge is of doubtful merit. The grounds on which an investigation may be reopened are limited.6 Reopening is designed to prevent an actual or potential miscarriage of justice. It is not designed as an alternative route to challenging a determination a party does not agree with, either as to the law or the facts or both.

Nor is it an opportunity to present a better case, bolstered by evidence which was available at the time or which could have been available if reasonable inquiries had been made.

[11] It is apparent that Mr Alkazaz wishes to re-open the Authority's investigation for the primary purpose of presenting material that could or should have been available at the time the original investigation meeting took place. Mr Alkazaz had an opportunity to file a de novo challenge to the Authority's substantive determination but chose not to do so. He says that this was because he understood that the company was intent on challenging the determination, and so he believed that it would come before the Court via that means. That does not explain why, when a challenge from the company was not forthcoming, he did not seek to file his own. As I have said, an application to re-open an investigation is not an alternative to a challenge.

[12] Further, Mr Alkazaz appears to be suggesting that the Authority's determination was obtained through perjury of the company's witnesses. While that might give rise to re-opening in an appropriate case, the basis for the allegations which Mr Alkazaz wishes to advance appears (at least at this stage) weak.

6 See *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [13]–[18].

Mr Alkazaz's conduct

[13] Past conduct is often the best predictor of future conduct. The statement of claim in these proceedings is lengthy and contains a number of very serious allegations which lack particulars; it is apparent from the face of the Authority's most recent determination that the application for re-opening was difficult to decipher, prolix and supported by a very large number of documents.7

[14] The defendant points to other proceedings which Mr Alkazaz is currently pursuing and an order for security for costs that has been made against him. The point of referring to these matters is, the defendant says, that it demonstrates a dogged determination to pursue claims, including claims which are not adequately supported, in a way which unnecessarily increases costs, and it is just for the defendant to have some protection from that. The nature of some of the assertions which Mr Alkazaz seeks to advance against various individuals (including of perjury) is said to bolster the company's concerns.

[15] There is ample basis for the defendant's concerns that the plaintiff's conduct will likely unnecessarily increase the costs it will face in responding to his application. In reaching this conclusion I do not overlook the fact that Mr Alkazaz is representing himself and some latitude is required. That does not, however, provide a free rein. As the Supreme Court pointed out in *Reekie v Attorney-General*:8

> [40] A litigant in person does not incur the expense of legal representation and, if impecunious, will obtain a fee waiver and will not be in a position to pay costs if unsuccessful. All costs associated with litigation so prosecuted fall on other parties. This means that litigants in person may be more prepared to engage in litigation which, when viewed in light of the costs that others must incur, is disproportionate to the occasion and which therefore would not be prosecuted by a solvent litigant. In such circumstances, the Registrar or reviewing judge may conclude that it is unjust to require the respondent to defend the judgment without the protection of security.
> [41] As we have made clear, cost and benefit are not to be assessed in purely financial terms. An appeal may raise issues of public interest which are not measurable in economic terms. As well, considerations which are personal to an appellant (for instance, considerations affecting reputation) may

7 Reopening determination, above n 2.

8. *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [2]. The Court was concerned with the approach to security for costs on appeals, including the circumstances in which security might be waived.

legitimately fall to be considered as part of the cost/benefit assessment. Proceedings relating to the vindication of rights under the New Zealand Bill of Rights Act 1990 may have both personal and public non-financial benefits. In the end, what is called for is an exercise of judgment.

Difficulties with cost recovery

[16] Mr Alkazaz lives overseas, although there is a possibility he might return to New Zealand next year. He has annexed a screen shot of a Kiwibank account to his affidavit, which shows a balance of $35,000. The screen shot is undated and lacks sufficient detail to conclude that Mr Alkazaz actually does currently hold this amount in savings in New Zealand. And, as counsel for the defendant points out, there would be little difficulty in transferring whatever money he does hold in this jurisdiction out of this jurisdiction. Mr Alkazaz does not appear to have any other assets in New Zealand.

[17] There is no inflexible principle that an overseas plaintiff with little or no assets in New Zealand should be ordered to

pay security for costs. However, the Court will have regard to the ease, convenience and cost of enforcing a costs judgment in a plaintiff's country of residence, in this case Dubai. Although Mr Alkazaz says that he has an annual income which equates to around $213,480 (NZD), the bank account details exhibited to his affidavit are incomplete and insufficient to give any confidence as to his ability to meet a costs award against him.

[18] In any event, I have little confidence, based on the material currently before the Court, that recovery action would be a straightforward process for the defendant.

[19] Standing back, and weighing the interests of both parties, I am satisfied that it is just to order security for costs against the plaintiff.

What amount by way of security should be ordered?

[20] How much should be ordered against the plaintiff by way of security? This step of the process is not a mathematical exercise; rather it will reflect what the Court

thinks fit in all of the circumstances.9

[21] Proceedings of this sort would generally be dealt with on the basis of affidavit evidence, either on the papers or at a submissions-only hearing. In my view there is a real prospect that the plaintiff's conduct of the case will inflate the costs that the defendant might otherwise expect to incur. Costs calculated according to scale would amount to around $24,000 in respect of the plaintiff's proceedings. This is the amount the defendant seeks (rounded down) by way of security. I accept the defendant's submission that its costs are likely to be significantly more.

[22] I consider that an order for security in the sum of $24,000 is appropriate.

Summary

[23] The following orders are accordingly made:

(a) The plaintiff is to pay security for costs of $24,000 into Court within 21 days of the date of this judgment.
(b) Such amount is to be held by the Registrar on interest-bearing deposit, pending further order of a Judge.
(c) The challenge is stayed until security for costs is paid.

[24] A further telephone conference for the substantive challenge will be convened once security for costs is paid in accordance with the orders I have made.

9. *A S McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; (2002) 16 PRNZ 747 (CA) at [27]; see also High Court Rules, r 5.45(2).

[25] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 3 pm on 14 April 2020