



Employment Court of New Zealand

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Ashby v Niwa Vessel Management Limited [2020] NZEmpC 228 (15 December 2020)

Last Updated: 21 December 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[\[2020\] NZEmpC 228](#)

EMPC 220/2020

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
AND IN THE MATTER	of an application for stay of proceedings
BETWEEN	KIM ASHBY Plaintiff
AND	NIWA VESSEL MANAGEMENT LIMITED Defendant

Hearing: On the papers

Appearances: A Halse, advocate for the plaintiff
P Shaw, counsel for the defendant

Judgment: 15 December 2020

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Application for security for costs and application for stay of proceedings)

[1] Although Ms Ashby was successful in the Employment Relations Authority and awarded lost wages and compensation, she has filed a non-de novo challenge seeking to increase the remedies awarded.¹

[2] NIWA Vessel Management Limited (NIWA) now applies for security for costs and for a stay of proceedings until security for costs are paid. NIWA contends that there is reason to believe Ms Ashby will not be able to pay any costs ordered by the

¹ *Ashby v NIWA Vessel Management Ltd* [\[2019\] NZERA 571](#) (Member Campbell).

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Court if her challenge was unsuccessful and that an order is just in all the circumstances, including because Ms Ashby's challenge has no merit and NIWA will be injuriously affected if security for costs is not ordered.

[3] Ms Ashby opposes the applications on the grounds that NIWA has no evidence that she could not pay costs if she was unsuccessful; her challenge has merit and no evidence has been supplied that NIWA would be injuriously affected if security for costs is not ordered.

[4] Ms Ashby has provided an affidavit which largely covers substantive matters rather than her ability to pay. However, she notes she has a very supportive family and group of friends that help her during difficult times. She acknowledges that

she was bankrupted after her employment ended but says that bankruptcy was as a result of the unjustifiable actions of NIWA. Ms Ashby has recently been discharged from bankruptcy.

[5] Although there are no specific provisions regarding security for costs in the Employment Court, pursuant to reg 6(2)(a)(ii) of the [Employment Court Regulations 2000](#), the Court can look to the provisions of the [High Court Rules 2016](#) when dealing with such applications.

[6] Under r 5.45(1)(b) of the Rules, the Court has discretion to order the giving 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 its proceeding.

[7] An order may be made if it is just in all the circumstances.²

[8] The Court must in exercising its discretion, consider all the circumstances, and balance the interests of both the plaintiff and the defendant.

[9] In the present case, it is clear that Ms Ashby has limited finances and has been in financial difficulty in the past. However, she has been discharged from bankruptcy,

² [High Court Rules 2016](#), r 5.45(2).

has support and there is no definitive evidence that would point to her not being able to pay costs should they be awarded.

[10] At this stage, it is difficult to assess the merits of Ms Ashby's claim, although as previously noted, the amount she seeks means that she may have unrealistic expectations as to what she may achieve in the Court.³

[11] Although NIWA has claimed that it would be injuriously affected if security for costs is not ordered, and it might have difficulty in recovering any costs to which it may be due, no evidence was given as to any particular injurious effect NIWA might suffer if there is no order for security for costs.

[12] On balance, I am not satisfied that this is a case in which the interests of justice require security for costs to be paid and no order is made.

[13] Costs are reserved.

J C Holden Judge

Judgment signed at 2 pm on 15 December 2020

³ *Ashby v NIWA Vessel Management Ltd* [2020] NZEmpC 103 at [16].