Employment Court of New Zealand

Booth v Big Kahuna Holdings Limited [2014] NZEmpC 43 (14 March 2014)

Last Updated: 21 March 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 43

ARC 1/14

IN THE MATTER OF challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for stay of execution

BETWEEN BRENDON RICHARD BOOTH Plaintiff

AND BIG KAHUNA HOLDINGS LIMITED Defendant

ARC 84/13

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 stay

BETWEEN BRENDON RICHARD BOOTH Plaintiff

AND BIG KAHUNA HOLDINGS LIMITED Defendant

Hearing: On the papers filed on 21 February, 3, 4, 6 and 10 March 2014

Appearances: T Oldfield, counsel for plaintiff

J Golightly, counsel for defendant

Judgment: 14 March 2014

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE CHRISTINA INGLIS

[1] The plaintiff pursued a personal grievance in the Employment Relations

Authority (the Authority) claiming that he had been unjustifiably disadvantaged and

dismissed by his employer. The Authority dismissed both claims.1 In its subsequent costs determination2 the Authority awarded the defendant company the sum of

$29,400 by way of contribution to its costs. Particular weight was placed on a Calderbank offer that the company had advanced prior to the Authority's investigation. In doing so the Authority observed that:3

It is the Authority's usual practice to deal with costs matters even where the substantive determination has gone on challenge, as in this case. No doubt the parties will use their good sense and not seek to enforce this order until the results of

the challenge, and any impact that has on costs in the Authority, is known.

[2] The plaintiff has challenged the Authority's substantive and costs

determination. The challenges are set down for hearing in the week commencing 12

May 2014.

[3] The defendant has filed an application for security for costs and a stay of proceedings pending payment into Court. The application relates to the plaintiff's substantive challenge only. The plaintiff has filed an application for stay of execution of the Authority's costs determination. I deal with each application in turn.

Application for security for costs/stay

[4] Ms Golightly, counsel for the defendant, submits that an order for security for costs in the sum of $15,000 would be appropriate in the circumstances of this case. This, she submits, would be at the lower end of the likely range of costs for a three day hearing in the Employment Court. It is further submitted that the plaintiff appears to be in a difficult financial position, that his challenges lack merit, the defendant is unduly exposed if no security is ordered, that the plaintiff 's current financial position cannot be laid at the defendant's door and that the overall interests of justice warrant the grant of the orders sought. It is said that any order for security

ought to be coupled with a stay, pending payment of the amount ordered into Court.

1 [2013] NZERA Auckland 430.

2 [2013] NZERA Auckland 566.

3 At [23].

[5] The plaintiff opposes the application. Mr Oldfield submits that it is not sufficiently established that the plaintiff would be unable to pay the defendant's costs if unsuccessful. He also submits that the merits lie in the plaintiff 's favour, that even if the defendant's actions did not cause any inability to pay they at least contributed to it and that an order for security of the magnitude sought by the defendant would significantly stretch his finances and his ability to fund his challenges and could prevent him from pursuing them. The plaintiff submits that if an order for security for costs is granted it will likely delay the hearing. Mr Oldfield also makes the point that the issue that appears to have sparked the defendant's application was the plaintiff's professed inability to make immediate payment of the Authority's costs order of $29,400. As he notes, $29,400 represents a hefty award of costs in the Authority, which generally attracts a daily rate of $3,500, and in circumstances where the investigation appears to have consumed one and a half days.

Approach

[6] There is no express provision in the Employment Relations Act 2000 (the Act) to order security for costs. However, it has been accepted in a number cases that this Court has the power to make such orders and to stay proceedings until such security is given. Because no procedure for ordering security is provided for in the Act or the Employment Court Regulations 2000, the application is to be dealt with "as nearly as may be practicable" in accordance with the procedure provided for in

the High Court Rules.4

[7] Rule 5.45(2) of the High Court Rules provides that a Judge may, if he/she "thinks it is just in all the circumstances, order the giving of security for costs." Relevantly sub-clause (1) states that sub-clause (2) applies if a Judge is satisfied, on application by a defendant, that a plaintiff is resident out of New Zealand or that there is reason to believe that a plaintiff will be unable to pay the defendant's costs if the plaintiff's proceedings do not succeed. Accordingly, the Court must consider whether the threshold test in r 5.45(1) has been met and, if so, how the Court's

discretion should be exercised under r 5.45(2).

4 Employment Court Regulations 2000, reg 6(2)(a)(ii).

Exceptionality threshold in this jurisdiction?

[8] Mr Oldfield's first point is that this Court will only order security for costs in exceptional circumstances, generally where the plaintiff resides overseas. He places particular reliance on the observations in *Young v Bay of Plenty District Health Board* that:5

[Orders for security for costs in the Employment Court] are made only rarely and in exceptional circumstances, usually where a litigant is beyond the jurisdiction and so enforcement of costs orders may be difficult or impossible.

[9] Ms Golightly does not accept that such an exceptionality threshold applies,

describing the position as “evolving”.

[10] While there are, as Mr Oldfield says, numerous cases which suggest that orders for security for costs will be rare and only ordered in exceptional circumstances in this jurisdiction,6 I prefer to approach the application having regard to whether either threshold test (overseas residence/inability to pay) is met and, if so, whether an order ought to be made having regard to the circumstances of the case. If the cases referred to in support of an exceptionality principle are to be taken as

suggesting that the inquiry starts and stops with an assessment of overseas residence then I respectfully disagree with that approach. Rather, the Court must assess both threshold tests and go on, in the exercise of its broad discretion, to have regard to any other relevant factors, including (but not limited to) the respective interests of both parties and the merits of the case.

[11] There are other potential difficulties with the approach advanced on the plaintiff’s behalf, having regard to the way in which the Court has historically taken inability to pay into account as a discounting factor in assessing costs’ contributions (sometimes to nil) at a post litigation phase. That may lead to an unintended double- pincer effect on defendants, reducing their ability to protect their costs exposure and

allowing litigants to proceed with claims with no ability to contribute to costs if their

5 [2011] NZEmpC 89 at [13].

6 See, for example, *Miller v Thompson (t/a Thompson Fishing)* [1997] NZEmpC 117; [1997] ERNZ 470 (EmpC) at 474; *MacKenzie v Bayleys Real Estate Ltd* EmpC Auckland ARC 92/03, 25 March 2004; *Koia v Attorney- General* [2004] NZEmpC 13; [2004] 1 ERNZ 116 (EmpC) at [32]; *Kaipara v Carter Holt Harvey Ltd* [2011] NZEmpC 132 at [24].

claim fails. The policy imperative identified in *Young* as supporting an order for security for costs in relation to overseas residence in this jurisdiction (namely difficulties with any subsequent enforcement of costs) applies with equal force where a litigant is impecunious, although resident in New Zealand. This reinforces the desirability of a broader approach, and consideration of a range of factors in the exercise of the Court’s discretion, and is consistent with the Court of Appeal’s observation in *McLachlan Ltd v MEL Network Ltd* that:7

[15] The rule [for security for costs] itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect 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.

[16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[12] The Court’s discretion is a wide one. It is not a matter of going through a check list of so-called principles. That would give rise to the risk that a factor would be given disproportionate weight in a particular case or treated as a requirement either for making or refusing of an order.8

[13] The merits of the plaintiff’s case are to be considered in the context of an application for security for costs. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff ’s impecuniosity was caused by or significantly aggravated by the defendant’s actions, any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim. Other factors may be relevant, depending on the circumstances of the case.

Analysis

[14] The plaintiff has filed an affidavit setting out details of his financial position. While he was without work for some time following his dismissal he has since

7 [2002] NZCA 215; (2002) 16 PRNZ 747 (CA).

8 At [13] - [14].

started a business and is the director and sole shareholder of a limited liability company, which employs seven staff (including the plaintiff). He draws a salary from the company of around $1,000 per week. He has limited savings and no significant personal assets. The majority of his left over salary, after meeting expenses, apparently goes towards paying the legal fees he is currently incurring. He has paid (substantial) fees to his previous solicitors for costs incurred in the Authority and has no outstanding obligations in that regard.

[15] Ms Golightly submits that it is unlikely that the plaintiff will be able to pay costs in the event that his substantive challenge fails. She says that this is reinforced by the plaintiff’s affidavit evidence, and submissions advanced on his behalf, that suggests that he is not in a position to make an immediate payment of the Authority’s costs award. As Mr Oldfield points

out, however, such a payment (particularly of the magnitude ordered by the Authority) might well present difficulties for many, especially litigants who have been dismissed from their employment and who have struggled to find alternative work.

[16] It is evident that the plaintiff is currently employed and has some financial capacity, given that he had offered to make instalment payments into Court in relation to the Authority's costs award, and despite having his own legal and other costs to bear in the meantime. It is true that the plaintiff has not yet paid the costs awarded against him in the Authority, but these are the subject of challenge and an associated application for a stay of execution. Nor is difficulty in paying the same as

an inability to pay.9

[17] What is required is credible evidence from which it can be inferred that a party will be unable to pay costs.10 On balance, and having particular regard to the plaintiff's employment status, I am not satisfied that it can reasonably be inferred that the plaintiff will be unable to pay costs if they are ultimately awarded against

him.

9 *Watson v Fell* [2002] NZEmpC 23; [2002] 2 ERNZ 1 (EmpC) at [10].

[18] For completeness, I turn to consider whether an order for security for costs would be just in all the circumstances.

[19] At this early stage, and as Ms Golightly accepts, it is difficult to assess with any degree of certainty where the merits of the substantive challenge lie. The challenge is being advanced on a de novo basis. While much will come down to contested issues of fact it is clear that other issues will arise, including the Authority's conclusion that the plaintiff's suspension without prior consultation did not give rise to an actionable disadvantage, the extent of the information provided to the plaintiff during the course of the process, the identity of the decision-maker and the way in which the disciplinary allegations were framed.

[20] Mr Oldfield submits that an order for security for costs would likely pose difficulties for the plaintiff in pursuing his challenge, although advancing the submission in somewhat equivocal terms. I accept that an order (particularly of the quantum sought by the defendant) would present difficulties for the plaintiff and would almost certainly jeopardise the forthcoming hearing dates and the timetabling orders that have been made.

[21] Ultimately a balancing exercise is required. There is no burden one way or the other.11 I am not satisfied, based on the material before the Court and after having carefully considered the submissions advanced by each party that it would not be just to order security for costs in the particular circumstances of this case. That being so the defendant's application is dismissed.

Plaintiff's application for stay of execution

[22] The plaintiff seeks an order staying execution of the Authority's costs determination pending the outcome of his challenge. That application is opposed by the defendant.

[23] While the Authority member expressed an expectation that the defendant would refrain from taking steps to enforce the costs judgment pending the plaintiff's

11 *Bell-Booth Group Ltd v Attorney-General* [1986] NZHC 570; (1986) 1 PRNZ 457 (HC) at 460-461.

challenge that has not proved to be the case. It appears that shortly after the costs determination was issued the defendant wrote to the plaintiff demanding full payment and threatened bankruptcy proceedings if that was not forthcoming. The plaintiff then extended an offer to make payments by instalment into Court but that does not appear to have found favour with the defendant and the plaintiff was invited to advance a stay application. The application for a stay of execution followed, combined with an application for urgency (which was granted in light of the indication by the defendant that it would pursue enforcement action). An interim order was made in order to preserve the plaintiff's position.

[24] The starting point is s 180 of the Act, which provides that a challenge does not operate as a stay. The discretion conferred by s 180 is not qualified by the statute but must be exercised judicially and according to principle. The overriding consideration in the exercise of the discretion must be the interests of justice.12

[25] The hearing is some eight weeks away. While the defendant would not be able to enjoy the fruits of its success in the Authority in the intervening period, the costs challenge will be heard and determined reasonably expeditiously. This dilutes the strength of any prejudice that might otherwise be suffered by the defendant.

[26] The defendant has raised concerns about the plaintiff's financial position and, in particular, whether it will be able to recover costs if his challenge does not succeed. I have already referred to these issues in the context of the application for security for costs. The plaintiff's financial position does raise some justifiable concerns in terms of potential prejudice. These issues must be weighed with other relevant factors in determining whether a stay ought to be ordered.

[27] The costs challenge raises issues relating to the approach adopted by the Authority in relation to Calderbank offers and the extent to which a "steely" approach is required. I expressed doubts about the applicability of such an approach

in relation to costs awards in the Authority in *Mattingly v Strata Title Management*

12 *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118 at [7].

Ltd,13 a judgment relied on by the plaintiff. The potential difficulties with adopting a steely approach have recently been reiterated by Judge Couch in *Harvey Norman Stores (NZ) Pty Ltd v Boult*.14 While, as Ms Golightly points out, the challenge will involve careful consideration of the full Court's judgment in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,15 the matters raised on the challenge appear to have some merit, are being pursued on a bona fide basis and are plainly important, not only to the parties but also more generally.

[28] Mr Oldfield submits that if the plaintiff is required to immediately meet the Authority's costs award it is most unlikely that he would be able to proceed with his challenge. I accept that this is so. Effectively the plaintiff's right of challenge would be significantly compromised, if not rendered nugatory.

[29] Having regard to the circumstances and the overall interests of justice I am satisfied that it is appropriate to make an order for stay. This will, however, be on condition that a sum equivalent to the Authority's usual daily rate for a one and a half day investigation, namely $5250, is paid by the plaintiff to the Registrar of the Employment Court at Auckland. This sum must be paid to the Registrar within a period of 32 days from today's date, and is to be held by the Registrar on interest bearing deposit. If the plaintiff fails to comply with the condition I have imposed the stay of execution will lapse.

[30] There is accordingly an order staying execution of the determination of the Employment Relations Authority in [2013] NZERA Auckland 566 on condition that the plaintiff pay the sum of $5250 to the Registrar of the Employment Court within a period of 32 days from today's date. If this condition is met, the order for stay will continue until final determination of the plaintiff's challenge to the Authority's

determination in [2013] NZERA Auckland 566 or until further order of the Court.

13 [2014] NZEmpC 15.

Result

[31] The defendant's application for an order for security for costs and a stay is dismissed. The plaintiff's application for a stay of execution of the Authority's costs determination is granted, on the conditions set out above.

Costs

[32] At the request of both parties, costs are reserved.

Christina Inglis

Judge

Judgment signed at 4.55 pm on 14 March 2014
