



Employment Court of New Zealand

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Burns v Media Design School Limited [2010] NZEmpC 147 (2 November 2010)

Last Updated: 16 November 2010

IN THE EMPLOYMENT COURT AUCKLAND

[\[2010\] NZEMPC 147](#)

ARC 94/09

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 BRENDAN BURNS Plaintiff

AND MEDIA DESIGN SCHOOL LIMITED Defendant

Hearing: Submissions filed by the defendant on 13 July 2010, the plaintiff on

20 July 2010 and by the defendant in response on 27 July 2010

Judgment: 2 November 2010

JUDGMENT OF JUDGE B S TRAVIS

[1] The defendant company has applied for security for costs on the joint grounds that there is an outstanding costs order of \$1,000 in favour of the defendant and the plaintiff is now an overseas citizen and resident. The initial indications were that the plaintiff would be unlikely to oppose the application for security for costs provided that the payment in could be made on a periodic basis. The parties were directed to liaise with a view to reaching agreement on the sum to be paid into Court as security. Agreement could not be reached and the Court was invited to dispose of the matter on the basis of the submissions filed by the parties.

[2] The defendant company sought the sum of \$13,800 on the following basis:

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- a) The typical range of awards awarded by the Court of between \$3,800 to \$6,400 per hearing day, was used as the basis of calculating \$4,000 per day at the lower end of the range.
- b) What was said to be a conservative estimate of four days would be required for the fixture although it was more likely to run to five days. The calculation did not include any allowance for the costs of preparation.
- c) A discount of 20 percent, having regard to the High Court's approach of applying a discount to the likely costs award when assessing security for costs.
- d) The outstanding costs award of \$1,000 owed to the defendant by the plaintiff.

[3] The defendant also consented to an instalment arrangement on the basis that

\$9,000 would be paid in prior to the matter being set down and the full amount of

\$13,800 paid before the trial commenced.

[4] Mr Langton on behalf of the defendant submitted that the Court has the power to make an order for security pursuant to

reg 64(3)(b) of the [Employment Court Regulations 2000](#) and cited *Koia v Attorney-General*[1] in support. Counsel also relied on rule 5.45 of the High Court Rules which provides for the making of an order for security for costs where a plaintiff is resident outside of New Zealand and where the Judge thinks it is just to do so in all the circumstances. Counsel referred to two cases where the Court has ordered security where the plaintiff was overseas: *Tones v 3D 1 Ltd*[2] and *Kapadia v PRP Auckland Ltd*. [3] Counsel submitted that if a costs award was obtained against the plaintiff in these proceedings it would be difficult and expensive to recover the costs from the plaintiff because he does not have any property available in New Zealand: see *Neeley v Attorney-General*. [4]

Further the plaintiff resides in the Republic of Ireland which does not have a

reciprocal enforcement of judgments arrangement with New Zealand thereby necessitating the costs of issuing proceedings in Ireland: see *Jalfox Pty Ltd v Motel Association of New Zealand Inc*. [5]

[5] Mr Langton's submissions also addressed the plaintiff's conduct and what was said to have been an unreasonable refusal of an offer of settlement contained in a Calderbank letter and contended that his challenge is lacking in merit.

[6] Mr Nicolson, in response, accepted that the Court has the power to make an order for security for costs where a plaintiff resides out of New Zealand, did not oppose the application and agreed that an amount should be set aside but not at the level sought by the defendant. Mr Nicolson submitted that the plaintiff is both impecunious and was forced to leave New Zealand to work because of visa restrictions and therefore being an overseas resident is not a situation in which the plaintiff willingly put himself. He claimed that these circumstances are causally related to the unjustifiable actions of the defendant. Mr Nicolson denied that the plaintiff's case lacks merit.

[7] Mr Nicolson accepted that as the plaintiff is a citizen of Ireland there is no reciprocal arrangement for recovery of judgments. He accepted these are factors which would justify an order for security but invited the Court to take into account the plaintiff's current impecuniosity.

[8] As to the length of the hearing, Mr Nicolson expressed the view that four days was excessive and that three days would be sufficient as the plaintiff would only require four witnesses and did not expect that they would give evidence for any length of time. Mr Nicolson submitted that the defendant was also bringing its own proceedings and that the four days may be required because of the evidence the defendant intends to lead.

[9] Mr Nicolson accepted that the plaintiff owes \$1,000 pursuant to an award of

Judge Couch. He also consented to a stay of proceedings pending the payment by

the plaintiff of any amount ordered by the Court for security. He submitted that a sum closer to \$1,000 per day for three days would be sufficient.

[10] As to the suggestion that there should also be a costs order in relation to the application for security Mr Nicolson submitted that costs should lie where they fall as the parties have agreed to have the matter dealt with on the papers in a cooperative attempt to keep costs down.

[11] Mr Langton, in response, submitted that the plaintiff has not provided to the Court any reliable evidence to support his claim of impecuniosity. He noted that counsel for the plaintiff advised the Court during a callover on 22 April 2010 that the plaintiff has a house and a job in Ireland and, although he has debts, his situation is improving. Any issue of impecuniosity can be met, in Mr Langton's submission, by ordering the security to be paid by way of instalment.

[12] As to the length of hearing, Mr Langton observed that the plaintiff's claim took three days in the Employment Relations Authority, with closing submissions being provided in writing after the investigation meeting. He noted that the defendant intends to call at least eight witnesses and that four days is therefore a proper basis for assessing security. He observed that the defendant's cross-challenge is related to a point of law which will not require the Court to consider new evidential material and on which the submissions for both sides should take no longer than one hour. Mr Langton concluded by submitting that if the defendant was successful in obtaining an award of security for costs it should also be entitled to costs in respect of the application of \$1,000.

Discussion

[13] I agree with both counsel that this Court has jurisdiction to award security for costs and that this is expressly contained in the Regulations. The Court has also ordered security where a plaintiff was overseas.

[14] I accept Mr Langton's submission that there is no clear evidence of the plaintiff's impecuniosity and that the material provided to the Court by counsel at the

callover indicates that the plaintiff would be in a position to meet a reasonable order for security, by instalments.

[15] Having examined the material before the Court I also consider it is likely that the hearing will take four days, if not

longer. The amount of security sought by the defendant is not unreasonable taking into account the likely length of the hearing, the average awards by the Court, and the discount normally applied by the High Court when dealing with security for costs.

[16] However, because of the additional costs the plaintiff may have to occur in order to attend New Zealand to pursue his challenge, I am prepared to modify the amount of security sought by the defendant to the sum of \$10,000 plus an additional \$1,000 being the amount of the award of costs made by Judge Couch.

[17] In addition the defendant is entitled to the costs on this application for security which I set at \$500. That amount too, must be paid into Court before the case can be set down.

[18] As to the instalments, I direct that until the sum of \$10,000 is paid into Court, the proceedings are stayed and no fixture will be allocated. Once that sum is paid into Court the balance of \$1,500 is to be paid into Court before the fixture commences. The total required is \$11,500.

B S Travis

Judge

Judgment signed at 3.45pm on 2 November 2010

[1] [\[2004\] NZEmpC 13](#); [\[2004\] 1 ERNZ 116](#) at [17].

[2] AC 44/07, 12 July 2007.

[3] AC 60/06, 1 November 2006.

[4] [\[1984\] 2 NZLR 636](#) at 637 (CA).

[5] [\[1984\] 2 NZLR 647](#) at 649.
