



Employment Court of New Zealand

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Edwards v Recreational Services Limited [2021] NZEmpC 13 (16 February 2021)

Last Updated: 20 February 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 13](#)

EMPC 262/2020

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
BETWEEN THOMAS EDWARDS
 Plaintiff
AND RECREATIONAL SERVICES LIMITED
 Defendant

Hearing: On the papers

Appearances: P Moore, advocate for plaintiff
 G Pollak, counsel for defendant

Judgment: 16 February 2021

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application for security for costs)

[1] In the Employment Relations Authority Thomas Edwards unsuccessfully claimed that he had been unjustifiably dismissed, and underpaid, by his former employer Recreational Services Ltd.¹ Mr Edwards' claims extended to pursuing Recreational Services for allegedly failing to provide him with personal protection equipment for the work he undertook and to reimburse him for expenses he had incurred in acquiring some.²

¹ *Edwards v Recreational Services Ltd* [\[2020\] NZERA 301 \(Member Loftus\)](#).

² At [1].

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[2] Mr Edwards' claims necessarily involved the Authority determining the nature of his employment. He claimed to have been permanently employed; Recreational Services argued that he was only ever a casual employee. A decision about the nature of his employment was determinative of most of his claims.³

[3] According to the Authority's determination, Mr Edwards applied for a job with Recreational Services as a lawn mower operator, in a position of fixed duration.⁴ Having applied for that job, he was offered another job weed spraying. Work began on 26 September 2016 and his employment ended on 7 December 2016 following a meeting with the company's operations manager.⁵

[4] The Authority concluded that the preponderance of evidence pointed towards casual employment. In addition to preferring the evidence by Recreational Services' operations manager, the Authority relied on corroboration it found in the job advertisement placed by Recreational Services seeking to employ staff on a casual basis, the application completed by Mr Edwards which referred to a casual position and the terms and conditions of the employment agreement he signed.⁶ The Authority concluded that Mr Edwards was employed as a casual employee and his employment status did not change throughout his time with Recreational Services.⁷

[5] The conclusion that Mr Edwards' employment was casual led to the Authority dismissing all of his personal grievance claims. The claim for reimbursement of the cost of personal protection equipment was dismissed, because the Authority held that the invoice produced to support the claim was dated long after the employment ended.

The Authority was not satisfied that the purchase related to the employment.⁸

[6] Mr Edwards challenged the whole determination and is seeking a hearing of the entire matter. Extensive remedies are sought including a finding that he was permanently employed and unjustifiably dismissed, an order for payment of lost remuneration and KiwiSaver contributions, and two separate amounts for compensation under [s 123\(1\)\(c\)\(i\) of the Employment Relations Act 2000](#) (the Act) arising from the personal grievances he raised.

3 At [18].

4 At [5].

5 At [6] and [14].

6 At [20]–[22].

7 At [33]

8 At [38].

[7] Recreational Services has applied for an order for security for costs and a stay of the proceeding if that security is not paid or provided. Its application sought an order for security of \$3,500, or any other sum the Court considered to be appropriate.

[8] The main ground of the application was a concern about Mr Edwards' ability to satisfy any future order of costs if he is unsuccessful. This ground is based on Mr Edwards not paying Recreational Services the costs of \$3,500 he was ordered to pay by the Authority or to make any arrangements to pay them. Recreational Services' position is that Mr Edwards has chosen to ignore that determination.

[9] The other ground relied on by Recreational Services was about the merits of the claims, characterising Mr Edwards' case as "not strong". The ground was that, while he maintained that he was a permanent employee, that was despite having applied for, and agreed to, being a casual employee on seasonal work of short duration.

[10] Mr Edwards opposed the application. In his notice of opposition, he stated a willingness to pay any award of costs made against him. In his brief affidavit, Mr Edwards deposed to being unable to pay the amount sought in the application because he did not have that kind of money. He is in receipt of an unemployment benefit and could make weekly payments to satisfy an adverse future costs order, but not a lump sum. He also observed that Recreational Services is a large and well-resourced company with branches throughout New Zealand. He maintained that his claim is meritorious, and that any order for security for costs would become an impediment to him accessing justice because of his present financial position.

Analysis

[11] There is no express provision in the Act, or the [Employment Court Regulations 2000](#), enabling security for costs to be ordered. However, the Court has jurisdiction to make an order and to stay proceedings until security is provided.⁹

[12] A Judge may make an order that he or she thinks is just in all the circumstances where satisfied that there is reason to believe a plaintiff will be unable to pay the defendant's costs if the plaintiff's claim does not succeed.¹⁰ The Court has a broad discretion to consider whether security for costs should be ordered. In exercising that

⁹ [High Court Rules 2016](#), r 5.45(1)(b) applied by [Employment Court Regulations 2000](#), reg 6.

¹⁰ [High Court Rules 2016](#), r 5.45(3)(b).

discretion regard must be had to the overall justice of the case and the respective interests of both parties need to be carefully weighed up. That balancing exercise was summarised by the Court of Appeal in *AS McLachlan Ltd v MEL Network Ltd* as follows:¹¹

[15] The rule 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.

[13] What will be taken into account in exercising the discretion varies depending on the circumstances. In this case the relevant matters are confined to the comparative strength of each party's case and Mr Edwards' ability to pay.

Strength of the case

[14] It is convenient to look at the argument concerning the strength of Mr Edwards' case first before turning to his ability to pay. Care is required in this exercise because at such an early stage of the proceeding only a general impression can be gained and a different picture may emerge during a hearing.

[15] While both parties filed affidavits, what was said in them concentrated on Mr Edwards' ability to pay. They did not traverse in any way what was said to have happened when Mr Edwards was employed and throughout his employment. The Authority's conclusions were based on material available to it that has not been provided to the Court. In the absence of further evidence or comment from the parties,

I am left with placing some weight on the Authority's findings.¹²

[16] The Authority preferred the evidence of witnesses for Recreational Services and found corroboration for what they said in contemporaneous documents. Mr Edwards has called into question all of the Authority's conclusions in his challenge. In doing so he is entitled to have the Court reach its own conclusions on the matters

11 *AS McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; (2002) 16 PRNZ 747 (CA).

12 See paragraph [4] above.

in issue. That said, it is difficult to put aside the comprehensive findings by the Authority about his employment status.

[17] The Authority's conclusions give some support to making an order, but only weakly.

Ability to pay

[18] There is no dispute that Mr Edwards has limited financial means, has not paid the Authority costs order, and has no present ability to pay a future adverse costs order in a lump sum. He characterised the matter as an issue about access to justice: an assertion by him that he has a good case but, as a person of limited means, if the application is granted he will be blocked from being able to have the chance to present that case against a well-resourced defendant.

[19] The submission would have been more compelling if Mr Edwards had provided some evidence about the strength of his case and answered one of Recreational Services' criticisms of him; that he has withheld his address from them so that it cannot locate him. Recreational Services takes the view, it seems, that he has sheltered behind Mr Moore, his advocate, by only providing a business address as an address for service.

[20] There is one area where Mr Pollack and Mr Moore agree. That is, they accept that Mr Edwards' circumstances are such that he is probably eligible for legal aid. He has not applied for legal aid and there was no explanation for that step not being taken beyond a general comment by Mr Moore doubting that it is regularly sought in Christchurch. The absence of an application for legal aid is concerning given the provisions of s 45 of the [Legal Services Act 2011](#), which would all but preclude a successful application for security for costs against an aided person.

Conclusion

[21] This application is finely balanced. Mr Edwards' concern about access to justice is compelling, but so is Recreational Services concern about being involved in litigation that may be expensive with little real prospect of costs recovery if it successfully defends the challenge. By a slim margin I have decided an order is appropriate, but the one that will be made provides an opportunity for it to be reviewed and revoked if Mr Edwards successfully applies for legal aid.

[22] The application by Recreational Services for an order for security for costs is granted. Mr Edwards is ordered to pay or provide security for costs in the sum of

\$3,500 subject to the following conditions:

(a) The amount is to be paid into Court and held by the Registrar in an interest-bearing account pending further order of the Court.

- (b) If security is provided by any other means, it must be to the satisfaction of the Registrar.
- (c) Security is to be paid or provided no later than **4 pm on 9 April 2021**.
- (d) If security is not paid or provided by the time in [22](c) this proceeding will be stayed until it is paid or provided.
- (e) The stay referred to in [22](d) will be effective without Recreational Services making any further application.
- (f) The order made may be reviewed and revoked if Mr Edwards successfully applies for legal aid.

Judgment signed at 2.30 pm on 16 February 2021

K G Smith Judge

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