# Employment Court of New Zealand



## Kapadia v PRP Auckland Ltd AC 60/06 [2006] NZEmpC 107 (1 November 2006)

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Last Updated: 4 June 2011

**IN THE EMPLOYMENT COURT AUCKLAND**

**AC 60/06**

**ARC 76/05**

IN THE MATTER OF of a non de novo challenge to a determination of the Authority

AND IN THE MATTER OF an application by the defendant for an order requiring the plaintiff to provide security for costs

BETWEEN RAHUL RAMESH KAPADIA Plaintiff

AND PRP AUCKLAND LIMITED (FORMERLY AXIOM ROLLE PRP VALUATION SERVICES LTD) Defendant

Hearing: 27 October 2006 (Heard at Auckland)

Appearances: Rahul Ramesh Kapadia, in person

Chris Patterson, counsel for defendant

Judgment: 1 November 2006

**INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS**

[1] The defendant has applied for an order requiring the plaintiff to provide security for the defendant's costs in this

challenge brought by the plaintiff against a determination of the Authority which found that he was an employee of the defendant.

[2] The plaintiff is no longer represented by solicitors and has advised the Court this is because of his difficult financial situation. The plaintiff has sold his home and his car and has moved to India with his wife and two children and says that he is now destitute and living at his brother's house.

[3] The plaintiff is a New Zealand citizen and although presently resident in India, he says that he wishes to return but does not know when he will be in a financial position to do so. The plaintiff has said that because he is not resident in



New Zealand he is no longer eligible for legal aid to enable him to pursue his challenge.

[4] Mr Patterson summarised his written submissions with reference to a number of the leading cases and made the following points.

[5] He invoked the Court's express power to make orders for security under regulation 64(3)(b) of the Employment Court Regulations 2000 if there has been a stay or an application for rehearing. It is a discretionary matter. Reference may also be made to regulation 6(2) and rule 60 of the High Court Rules.

[6] From the reported cases a number of principles emerge which should be regarded not as a check list but as an assistance to the Court in exercising its discretion: *A S McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; (2002) 16 PRNZ 747 (CA). The Employment Court exercises a specialist jurisdiction and consequently in determining whether to order security the objects of the Employment Relations Act

2000 must be taken into account: *MacKenzie v Bayleys Real Estate Ltd*

unreported, Colgan J, 25 March 2004, AC 18/04 at para [10].

[7] The *MacKenzie* case also indicates that the grounds of impecuniosity either alone or in the absence of another significant consideration such as the foreign domicile of the plaintiff have not been regarded by the Employment Court under the current or previous legislative regimes as being sufficient to require the provision of security. The Court stated:

*Access to justice considerations, especially for individual litigants whose impecuniosity may have been either caused or at least aggravated by their dismissals that are the subject of the challenge, almost invariably mean that the Court will not require security to be provided although, ultimately, the particular decision must be on its own merits and the justice of the case...* (para [11]).

[8] The plaintiff has no assets in New Zealand, unlike the situation in *Fraser v Otago District Health Board* unreported, Goddard CJ, 17 July 2003, CC 19/03. Although there are enforcement of judgment arrangements between New Zealand and India, Mr Patterson submitted that this is a case where the plaintiff does not have a permanent address in India and the enforcement of any costs judgment would be difficult and expensive for the defendant. He referred to *Aquaculture Corporation v McFarlane Laboratories (1984) Ltd* (1987) 1 PRNZ 467. There it was said where there were no assets from New Zealand the ease and convenience and cost of procedures in the plaintiff's country of residence was a primary consideration. The Court's discretion was to be exercised by taking into account all

of the circumstances of the case and arriving at a conclusion which would do justice between the parties.

[9] Mr Patterson sought costs on the making of this application as he submitted the plaintiff had declined the opportunity of having it determined on the papers or by consent. He submitted the defendant's costs exceeded $3,000 plus GST and, applying the High Court scale of costs, this would produce an award of some

$2,900.

[10] Mr Kapadia addressed at some lengths the merits of his case and criticised the actions of the defendant and its counsel. These are matters which have yet to be tested before the Court. At present there is a determination of the Authority which on its face contains a fully reasoned conclusion that the plaintiff was an employee of the defendant for a short but crucial time, during which the plaintiff breached his obligations of fidelity. The Court does not have the benefit of the documentation or of the evidence which the plaintiff says will support his contention that the determination should be set aside. Mr Kapadia also outlined his own financial circumstances and claimed an inability to make any contribution towards the defendant's costs at this stage. He still expressed an anxiousness to have his challenge dealt with but would be unable to say when he would be able to pursue it in New Zealand.

[11] Mr Patterson submitted that the evidence of Mr Kapadia's financial situation had not been presented on oath but he accepted the plaintiff's oral submissions and declined Mr Kapadia's offer to provide an affidavit supporting his lack of assets and income.

[12] There is material which does support the plaintiff's contention that his parlous financial situation was caused by the actions that had been taken against him by the defendant. In this regard the plaintiff observes that the defendant had sought a Mareva injunction, but had abandoned it at the last moment. He also contended that the delays in seeking security for costs should also be fatal to the application.

[13] Delay can be a relevant factor in the exercise of the discretion especially if it has caused prejudice. There are however no express time constraints on a defendant seeking security for costs and often it will be the case that the evidence which supports the application may be late in coming to hand. Further security may not be sought until it appears that the plaintiff is intending to pursue the claim before the Court. The delays in bringing the application in the present case appear to be

answered by the late discovery by the defendant of the plaintiff's disposition of his assets in New Zealand and his travel to India. Therefore this is not a factor which I take into account in the exercise of my discretion in the particular circumstances.

[14] If the application had been based purely on the plaintiff's impecuniosity for the reasons given by Judge Colgan in *MacKenzie* I would have declined it. The defendant's residence in India and the uncertainty as to when, if ever, he will return to New Zealand is however a factor which in my view, strongly influences the justice of the case and leads me to conclude that an order for security is appropriate.

[15] I have assessed the quantum of the security on the basis that the plaintiff, if unsuccessful in his challenge, will be able to reduce the amount of the costs that would otherwise have been awarded against him in favour of the defendant because of his impecuniosity. It is highly unlikely that an award for costs in such circumstances would exceed the sum of $1,500 for what the parties estimate would be a two date hearing. Taking into account the plaintiff's financial circumstances I consider that an order for security at this stage in the proceedings in the sum of

$750 would be appropriate and order that the proceedings be stayed until that sum is paid into Court. Once paid into Court it will be held in an interest bearing account until further order of the Court.

[16] I also direct that if the plaintiff returns to New Zealand and successfully obtains legal aid, the security I have ordered may be reviewed. There is a real possibility that the order will be discharged if the plaintiff is legally aided.

[17] The defendant is also entitled to a contribution to its costs on its successful application. Taking into account the plaintiff's situation, I award only a modest contribution of $200.

B S Travis

Judge

Interlocutory judgment signed at 2.45pm on Wednesday, 1 November 2006

Representatives: Rahul Ramesh Kapadia

Lovegroves, Lawyers, P O Box 2886, Auckland

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