



Employment Court of New Zealand

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Kocaturk v Zara's Turkish Limited [2018] NZEmpC 130 (7 November 2018)

Last Updated: 12 November 2018

IN THE EMPLOYMENT COURT
CHRISTCHURCH

[\[2018\] NZEmpC 130](#)
EMPC 158/2018

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	IBRAHIM KOCATÜRK First Plaintiff
AND	GÜLER KOCATÜRK Second Plaintiff
AND	ZARA'S TURKISH LIMITED Defendant

Hearing: On the papers
Appearances: A Sharma, counsel for plaintiffs
B Buckett, counsel for defendant
Judgment: 7 November 2018

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Application for security for costs)

[1] Zara's Turkish Ltd (Zara's) applies for an order that the plaintiffs, Mr and Mrs Kocatürk, give security for Zara's costs in this proceeding. In its notice of application, Zara's seeks \$10,000 security for costs from Mrs Güler Kocatürk and approximately

\$27,000 from Mr Ibrahim Kocatürk, which includes approximately \$17,000, being the nett amount Zara's has paid Mr Kocatürk to satisfy the Employment Relations Authority's (the Authority) determination so far as it applies to him.¹

[2] Zara's also seeks costs in relation to this application.

¹ *Kocatürk v Zara's Turkish Ltd* [2017] NZERA Christchurch 145.

IBRAHIM KOCATÜRK v ZARA'S TURKISH LIMITED NZEmpC CHRISTCHURCH [\[2018\] NZEmpC 130](#)

[7 November 2018]

[3] The Authority found that Mr and Mrs Kocatürk are entitled to awards of unpaid wages, unpaid holiday pay and statutory holiday pay from Zara's. The determination also found that Mr Kocatürk was not unjustifiably dismissed by Zara's but that Mrs Kocatürk was and is entitled to lost wages and compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act).

[4] Zara's is challenging the Authority's determination insofar as it relates to Mrs Kocatürk. Mr and Mrs Kocatürk are also challenging the determination. Directions have been made so that the two Court proceedings would be heard together as de novo challenges to the determination.

[5] The main grounds upon which Zara's seeks the order for security for costs on Mr and Mrs Kocatürk's challenge are:

- (a) Mr and Mrs Kocatürk are residents outside of New Zealand;
- (b) Zara's has reason to believe Mr and Mrs Kocatürk will be unable to pay its costs, or will avoid paying costs, if unsuccessful in the substantive proceedings;
- (c) Mr and Mrs Kocatürk do not appear to be currently employed or hold property in New Zealand that would be available for costs in the event of a costs award ultimately being obtained by Zara's;
- (d) Mr and Mrs Kocatürk's claims are complex and lack merit;
- (e) that the granting of an order for security for costs is just in all the circumstances; and
- (f) the sums sought for security for costs are fair and balance the interests of the parties.

The parties gave evidence of the plaintiffs' circumstances

[6] Mrs Hanife Kokcu, who is a director and shareholder of Zara's, gave affidavit evidence in support of the application. She says that Mr and Mrs Kocatürk are Turkish passport holders whose family reside in Turkey. She says she understands that Mr and Mrs Kocatürk return to Turkey to visit family from time to time and is concerned that they could return to Turkey at any time, including because Mr Kocatürk is currently in breach of his immigration visa and might be apprehended and deported. She also alleges that Mr Kocatürk has a history of leaving a country to avoid responsibility. In support of that statement, Mrs Kokcu gives hearsay evidence based on a discussion she says she had with Mr Kocatürk's mother.

[7] Mrs Kokcu points to her understanding that Mr Kocatürk gambles regularly. She also says that she is unaware of Mr or Mrs Kocatürk having any employment or income or any assets of substantial value and that they have limited financial means, as evidenced by their not paying legal fees to their representative until the conclusion of the proceedings.

[8] Mr and Mrs Kocatürk responded to the application, saying that their challenge has substantive merit, is being prosecuted in good faith and that the overall justice of the matter favours them. Mr and Mrs Kocatürk filed a joint affidavit. In that affidavit, they point out that they had agreed to stay the payment of the award made to Mrs Kocatürk with the funds (totalling \$61,813.07 gross) to be held by the Registrar of the Court, which provides some measure of security for Zara's. On the other hand, they say they have concerns about Zara's ability to pay any awards the Court may make should they succeed in their claims. They say that the security for costs sought is financially unsustainable for them and that Zara's owes them money that they have not been paid. They also allege they were misled by Mrs Kokcu and her husband about immigration matters.

[9] In answer to the evidence Mrs Kokcu gave, they acknowledge they have Turkish passports, as, they say, does Mrs Kokcu. They say they have not visited Turkey since 2014 and they have no plans to return there. They deny the allegations of Mr Kocatürk avoiding his responsibilities.

[10] They admit that Mr Kocatürk had previously enjoyed poker machines (which they say Mrs Kokcu and her family introduced them to), but say that Mr Kocatürk now only uses poker machines on an occasional basis and that he does not have a gambling problem. They say that, although they do not have New Zealand residency, Mr Kocatürk has a work visa, valid until September 2020 and has full time employment.

[11] They accept that their solicitor is taking their case without pressing them for immediate payment of fees but consider that is a matter between them and their solicitor.

The Court has a discretion when dealing with applications for security for costs

[12] The Employment Court looks to the provisions of the [High Court Rules 2016](#) when dealing with applications for security for costs. It does so pursuant to reg 6(2)(a)(ii) of the [Employment Court Regulations 2000](#) (the Regulations), as there is no form of procedure provided by the Act, the Regulations or any rules of the Employment Court.

[13] Under r 5.45 of the [High Court Rules](#), the Court has discretion to order the giving of security for costs. One basis for ordering security is if a plaintiff is resident out of New Zealand. The discretion also may be exercised if there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding. Zara's relies on both those grounds here.

[14] In exercising its discretion, the Court must consider all the circumstances, including the nature of the proceedings and the interests of both parties. An order for security that has the effect of preventing a party from pursuing his or her claim

should only be made after careful consideration in a case in which the claim has little chance of success; access to the courts for a genuine plaintiff is not to be lightly denied. Against that, defendants are entitled to be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.²

2 *A S McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; (2002) 16 PRNZ 747 (CA) at [15]- [16].

The circumstances do not support an order

[15] Zara's does not explain the basis on which the Court might order Mr Kocatürk to pay the \$17,000 received from it into Court as part of security for costs. There was no application for a stay of execution of the Authority's determination insofar as it applied to Mr Kocatürk. The sum paid has no relation to costs and would not be included in any order. That leaves the application for security of \$10,000 for each of Mr and Mrs Kocatürk to be considered.

[16] The first basis relied on in Zara's application, that the plaintiffs are resident outside of New Zealand, can be quickly disposed of. Although they are Turkish, they are domiciled in New Zealand, where they live with their young family, and Mr Kocatürk has full-time employment. Whatever their immigration status, they are not presently resident outside of New Zealand.

[17] It is not disputed that Mr and Mrs Kocatürk are not well off. They have given evidence that providing \$20,000 security for costs is currently financially unsustainable. However, they say that is in part because of the actions of Zara's in not paying them correctly.

[18] Where it is reasonably probable that it is the defendant's actions, being the subject of the litigation, that have caused a plaintiff's impecuniosity, ordering security for costs may be unjust.³

[19] Mr and Mrs Kocatürk were successful in the Authority, which ordered that Zara's pay them, in total, over \$80,000 (gross). Therefore, based on the findings of the Authority, Mr and Mrs Kocatürk's financial position has been significantly impacted by Zara's alleged failings as their employer. While Mr Kocatürk has been paid the amount due to him, the larger amount due to Mrs Kocatürk has not been paid to her but was paid into Court by Zara's as part of an agreed resolution of Zara's application for a stay of the Authority's determination. An order for security for costs in these circumstances would seem unjust.

3. *Bell-Booth Group Ltd v Attorney-General* [1986] NZHC 570; (1986) 1 PRNZ 457 (HC) at 461; *Kaipara v Carter Holt Harvey Ltd* [2011] NZEmpC 132 at [15], [20].

[20] Another significant feature in this case is that, because of Zara's own challenge, it will be incurring legal costs, regardless of whether Mr and Mrs Kocatürk's challenge proceeds. While there will be further evidence required, particularly in respect of Mr Kocatürk's employment, Mr and Mrs Kocatürk's challenge will traverse a lot of the same facts as that of Zara's, with the same witnesses. This factor counts against security for costs being ordered.

[21] A further, related point is that, potentially, making the orders sought would place Mr and Mrs Kocatürk in a position where Mrs Kocatürk is required to defend Zara's challenge but she and Mr Kocatürk could not proceed with their own challenge. That would not be fair.

[22] In the circumstances, the interests of justice favour the position of Mr and Mrs Kocatürk. No order for security for costs is made.

[23] Because the basis upon which costs have been incurred by Mr and Mrs Kocatürk is unclear, costs are reserved pending the completion of the substantive cases.

J C Holden Judge

Judgment signed at 12.30 pm on 7 November 2018