



Employment Court of New Zealand

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Ngawaka v Global Security Solutions Limited [2021] NZEmpC 133 (17 August 2021)

Last Updated: 20 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 133](#)

EMPC 343/2020

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 RIO NGAWAKA
 Plaintiff
AND GLOBAL SECURITY SOLUTIONS
 LIMITED
 Defendant

Hearing: On the papers

Appearances: R Ngawaka, plaintiff in person
 R Johnson, agent for
 defendant

Judgment: 17 August 2021

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application for security for costs)

[1] Rio Ngawaka was employed as a security guard by Global Security Solutions Ltd for just over six months before he resigned. Subsequently he lodged a claim in the Employment Relations Authority against Global Security alleging that he was constructively dismissed, subjected to an unjustifiable suspension, and that he had a personal grievance based on alleged discrimination. His claims were dismissed.¹

¹ *Ngawaka v Global Security Solutions Ltd* [\[2020\] NZERA 413](#) (Member Craig).

RIO NGAWAKA v GLOBAL SECURITY SOLUTIONS LIMITED [\[2021\] NZEmpC 133](#) [17 August 2021]

[2] Mr Ngawaka challenged the Authority's determination. He is seeking a full rehearing of the matter that was before the Authority but only as it relates to the conclusion that he was not suspended or constructively dismissed. This proceeding is set down to be heard on 7 and 8 September 2021.

[3] Global Security has applied for security for costs. Before considering the application a brief summary of what happened is necessary to provide context. The following summary comes from the Authority's determination.² Mr Ngawaka was employed on a night shift on 19 September 2018. The Authority found that during the shift he lost the keys to the building for which security services were being provided. The keys were found and handed in by a third party.

[4] According to the Authority, on 20 September 2018 Global Security began an investigation into what had happened. The loss of the keys was characterised as an allegation of unsatisfactory performance and serious misconduct. There was also an allegation that Mr Ngawaka was asleep on the job.

[5] Mr Ngawaka was invited to attend a meeting to respond to these allegations and to have a support person or representative present with him. A meeting was organised for 5 October 2018. Before the meeting could take place, Mr Ngawaka faced complaints alleging that the day before the lost key incident he had arrived at work dressed in “civilian attire,” not in uniform ready to perform his duties, that he had not turned up for a shift, or reporting his absence, and lateness.

[6] On 2 November 2018, Mr Ngawaka attended Global Security’s office and wrote out his resignation.³ The Authority held that his note did not contain any indication of dissatisfaction with Global Security or claim that the company had prompted this decision to resign.

[7] The grounds of Global Security’s application for security for costs are that Mr Ngawaka:

2 At [12]–[32].

3 At [54]–[56].

(a) has not paid \$2,700 that the Authority ordered him to pay as a contribution to the company’s costs of the investigation;⁴

(b) has not applied for a stay of the Authority’s order that he pay those costs;

(c) has made claims that are “unmeritorious”, having been fully canvassed by the Authority;

(d) was given advanced notice that Global Security would be applying for security for costs;

(e) has filed pleadings making it difficult to ascertain, with “any real clarity”, how he considers the Authority erred in fact or in law; and

(f) that its legal bills to date have amounted to just over \$9,900 and its forecast expenses for the anticipated hearing are \$30,000 plus GST.⁵

[8] Global Security’s application claims that fairness, equity and “reasonableness” justify the making of the orders sought. It sought security for costs of the \$2,700 awarded by the Authority and a further amount of \$15,000. The application did not explain how the amount of \$15,000 was calculated, but it is just under 50 per cent of the company’s stated anticipated costs if counsel is appointed to act for it at the hearing.

[9] Mr Ngawaka opposed the application. Belatedly he made brief submissions the essence of which was to repeat the basis of his challenge; that the Authority’s determination was flawed. As to Global Security’s present application, his response was that there was no reason to order security for costs.

4 *Ngawaka v Global Security Solutions Ltd* [2020] NZERA 482.

5. In submissions the company revised this expense incurred to being in excess of \$14,000 but made no change to the estimated future expenses.

Analysis

[10] The [Employment Relations Act 2000](#) does not contain any provision dealing with security for costs and nor do the [Employment Court Regulations 2000](#). Instead, the Court has jurisdiction to make an order by applying the relevant High Court Rules.⁶

[11] Under those rules a Judge may make an order that is considered to be just in the circumstances when satisfied that there is reason to believe a plaintiff would be unable to pay the defendant’s costs if the plaintiff’s claim fails.⁷ The power is discretionary and broad. In exercising the discretion regard must be had to the overall justice of the case, and the interests of both parties need to be carefully weighed up. The required balancing exercise was summarised by the Court of Appeal at *AS McLachlan Ltd v MEL Network Ltd* as follows:⁸

[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 weighted. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[12] What is taken into account varies depending on the circumstances. In this case the application is about the merits of Mr

Ngawaka's case and his ability to pay.

Merits of the case

[13] It is convenient to look first at Global Security's argument about the merits of Mr Ngawaka's case before considering the claim that he will be unable to pay an adverse costs award if his claim fails.

6. [High Court Rules 2016](#), r 5.45(1)(b) applied by virtue of [Employment Court Regulations 2000](#), reg 6(2)(a)(ii).

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

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

[14] As has been said many times before, care is required in attempting to evaluate the merits of cases in an interlocutory application where the anticipated evidence is not able to be tested.⁹ In such a situation it may only be possible to gain a general impression and an entirely different picture may emerge during the hearing.

[15] Global Security's application claims that its case is strong and Mr Ngawaka's is correspondingly weak and therefore of little or no merit. It relied on an affidavit by its director, Ross Johnson, which concentrated on the financial aspects of the application. Mr Johnson did not traverse the circumstances relied on by the company to invite the Court to conclude that Mr Ngawaka's claim has little merit. Instead, the company relied exclusively on the Authority's conclusions on the basis that they were the result of a detailed and exhaustive investigation. Presumably an inference is expected that the same outcome will be reached in this challenge.

[16] It is true that the Authority rejected Mr Ngawaka's arguments. However, he has sought to call into question the conclusions reached. He is entitled to do that and to have the Court reach its own conclusions on the matters in issue.¹⁰ While some weight can be given to the Authority's conclusions they are not determinative of the challenge.

Ability to pay

[17] In its submissions Global Security stated that Mr Ngawaka has a minimum wage job, lives in a "budget level dormitory" and claimed he has no apparent savings. Those claims, and the basis for them, were not addressed in Mr Johnson's affidavit. Mr Ngawaka did not address them in his submissions.

[18] There is no evidence one way or the other about Mr Ngawaka's ability to pay if there is an adverse costs order. However, an inference might be drawn from Global Security's submissions that he is working and has the ability to pay if required. There appears to be no dispute that he has not paid the costs awarded by the Authority but,

⁹ See for example *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 42 at [10].

¹⁰ [Employment Relations Act 2000](#), s 183.

by itself, that does not mean he will be unable to pay future costs if his claim is unsuccessful.

[19] What was put forward by Global Security is insufficient to establish the basis for an order for security for costs. There is, however, a more fundamental issue that would preclude an order being made in any event. Implicit in applying r 5.45 is that the defendant will incur costs of the hearing that may, if the defendant succeeds, be reflected in an order for costs.

[20] Parties who represent themselves are not usually entitled to an award of costs, although they may succeed in recouping out-of-pocket expenses.¹¹ In this case Mr Ngawaka and Global Security each represent themselves. It follows that there is no basis for security for costs to be ordered.

[21] The parties were made aware of that difficulty in a minute to them before submissions were exchanged. Addressing this issue, Global Security's submissions stated an intention to engage counsel for the hearing, but that step has not been taken as yet. Global Security's future intention to engage counsel is not a sufficient basis to justify making an order now. Until and unless counsel is appointed there is no more than a possibility that the company may incur that expense. That is too remote to support an order being made.

Conclusion

[22] I am not satisfied that an order is appropriate in these circumstances.

[23] The application is dismissed.

Judgment signed at 10.35 am on 17 August 2021

K G Smith Judge

11 See *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

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