Employment Court of New Zealand

Noble v Ballooning Canterbury.com Limited [2018] NZEmpC 97 (16 August 2018)

Last Updated: 25 August 2018

IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 97
EMPC 85/2018

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	ROBERT NOBLE Plaintiff
AND	BALLOONING CANTERBURY.COM LIMITED Defendant

Hearing:	(on the papers dated 4, 13, 20 and 27 July 2018)
Appearances:	J Goldstein, counsel for plaintiff A Toohey, counsel for defendant
Judgment:	16 August 2018

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL: SECURITY FOR COSTS

Introduction

[1] Ballooning Canterbury.com Ltd (BCL) seeks security for costs against Mr Robert Noble, on the grounds that he resides in the United States and that the Court should exercise its discretion to grant such security.

[2] Although the fact of Mr Noble's overseas residency is not in dispute, there are issues as to whether the Court should exercise its discretion to order security in the circumstances of this particular proceeding; if the Court is minded to make such an order, there is a further issue as to the extent of security by Mr Noble.

ROBERT NOBLE v BALLOONING CANTERBURY.COM LIMITED NZEmpC CHRISTCHURCH [2018]

NZEmpC 97 [16 August 2018]

Background facts

[3] BCL operates a small commercial hot air ballooning business. Mr Noble is a hot air balloon pilot. He accepted a short-term role of 11 weeks' work with BCL to cover a period when one of the directors of that company, Mr Oakley, who normally pilots BCL balloons, would be in Australia. Their arrangements were largely oral.

[4] After travelling to New Zealand from the United States, Mr Noble was trained as a pilot on BCL balloons whilst medical clearance was obtained. During this time, each party developed concerns as to the other's attention to health and safety issues. Two days after Mr Oakley departed for overseas, there was an incident when Mr Noble flew a balloon low over a pig

farm, causing panic amongst those animals which led to the death of one. This led to a dispute as to whether Mr Noble had been notified that the pig farm was in a prohibited zone for flight. The incident resulted in compensation having to be paid by BCL to the owner of the pigs.

[5] A few days later, Mr Noble stated that he needed some time off; soon after he was suspended from flying by BCL.

[6] A short time later, Mr Oakley returned from Australia. He convened a meeting with Mr Noble. The company's lawyer was also present. A number of issues were aired at the meeting. Then Mr Noble was sent a letter from BCL ending his relationship with the company. As a result, he raised a dismissal grievance which ultimately came before the Employment Relations Authority (the Authority).

[7] After an investigation meeting, the Authority stated in its determination that a preliminary jurisdictional issue had to be resolved.1 The Member said she had hoped that after considering some but not all of the evidence, a determination could be issued on the jurisdictional issue. However, given the short duration of the employment relationship and the number of disputed facts, it did not prove possible to proceed in this way and all evidence relevant to both parties' claims was heard.2 The result was

1 *Noble v Ballooning Canterbury.com Ltd* [2018] NZERA Christchurch 25.

2 At [21].

that the investigation spanned three full days and three part-days; this was followed by the subsequent provision of written submissions.

[8] After setting out the above chronology, the Authority discussed the question of whether Mr Noble was an employee. It determined that very little had been mutually agreed between the parties as to the applicable terms and conditions. There was no written agreement. There were multiple disputes, including as to the basis of payment.3 The Authority found that there was also no discussion between the parties as to the kind of contract which would apply.4

[9] The control test was considered, but found to be of limited help. Mr Noble as a pilot had a duty to comply with all relevant Civil Aviation Authority Regulations, and regulatory documents. These aspects of control would have applied whatever Mr Noble's formal relationship with BCL. The company did have some input regarding particular flights, such as whether there were enough passengers to justify any of them being undertaken, but factors such as this were seen as neutral. However, the Authority considered that the fact Mr Noble could choose to take on extra flights, and was able to decide unilaterally to have a break, tended to favour a conclusion that he was not under BCL's control or direction.5

[10] The integration tests were of little assistance, as was the evidence as to industry practice.6

[11] Turning to the fundamental test, the Authority analysed a range of factors, including the relevance of the retainer of $1,000 per week. This, it found, did not tend to prove employee status. It also commented that although there was an expectation that Mr Noble could fly for other operators and conduct private flights, that did not happen; this was because, for the short time Mr Noble was intending to be in New Zealand, there was an expectation of availability for BCL flights for at least six days out of seven.

3 At [99].

4 At [100].

5 At [109-[110].

6 At [111]-[115].

[12] In its discussion of the tax position, the Authority reviewed an email Mr Noble had written finding which indicated he thought of himself as a contract pilot, and that he had been insistent BCL should pay him on that basis.7 This was in spite of a late decision on Mr Noble's part to have BCL deduct PAYE from payments to be made to him. The Authority found that this only demonstrated that he was eager to be paid.

[13] In conclusion, the Authority commented that neither party had felt the need to reduce their arrangement to writing or to define it one way or the other. This made the matter more complex. Standing back and assessing the true nature of the relationship, however, the Authority found Mr Noble was not an employee.8

[14] The Authority reserved costs. BCL sought costs on an indemnity basis, stating that this was justified because of Mr Noble's conduct "in refusing to deal with the jurisdictional issue as a preliminary matter". In response, Mr Noble rejected that argument, blaming the level of costs on the way that the Authority had conducted its investigation.

[15] A different Authority Member considered the costs memoranda. He concluded that the Authority itself had a conflict of interest given the issue which had to be resolved; it could not in good conscience determine how costs should be borne by

the parties. It therefore directed removal of the costs issue to the Court as an independent forum.9

Procedural steps in this Court

[16] Mr Noble's challenge asserts that, in effect, he had been an employee at all relevant times.

[17] By way of response, BCL pleads that Mr Noble was an independent contractor. It says that if the Court were to find Mr Noble was an employee, it would dispute his claims and argue he is not entitled to any of the remedies which he seeks.

7 At [130].

8 At [137].

9 *Noble v Ballooning Canterbury.com Ltd* [2018] NZERA Christchurch 49.

[18] The parties are agreed that the question of status should be resolved by the Court as a preliminary jurisdictional issue.

[19] Potentially BCL wishes to bring a challenge to the Authority's determination for which leave would now be required. This step would be taken so as to advance its counter-claim. But it would do so only if the Court finds Mr Noble is an employee. The leave application will accordingly fall for determination after the preliminary issue has been resolved by the Court.

The parties' positions as to security for costs

[20] For BCL, Ms Toohey submitted in summary:

a. Mr Noble is domiciled in the United States;
b. he owns no property in New Zealand which might be available for enforcement purposes;
c. the United States does not have reciprocal arrangements for the enforcement of judgments with other countries;
d. in the event the company is successful in resisting the challenge, it would have no ability to enforce any costs judgment against Mr Noble;
e. the merits as to the preliminary issue as to jurisdiction are strongly in the company's favour;
f. any order for security should proceed on the basis that the company is entitled to costs with regard to the Authority's investigation; and
g. the Court should fix security having regard not only to the likely costs BCL will incur with regard to the hearing of the preliminary issue, but in dealing with all the issues of the de novo challenge which could potentially arise.

[21] For Mr Noble, Mr Goldstein submitted in summary:

a. Mr Noble does not reside in New Zealand which it is acknowledged triggers the relevant threshold for security. The Court is nonetheless required to exercise a discretion as to whether security should be awarded.
b. Both parties' claims were rejected by the Authority, and both have instituted challenges to its determination. In these circumstances, a security order would be inappropriate.
c. Mr Noble's challenge has merit.
d. The position as to costs in the Authority should be put to one side, since no costs determination was issued and the extent of any costs order that might be made arising from the investigation is therefore unknown.
e. If security is to be considered, it should only be in relation to the preliminary hearing, estimated at one and a half days.
f. Mr Noble's primary position is that there should be no order as to security. In his affidavit he stated, however, that were the Court to consider the making of such an order he would be willing to pay NZ$10,000, or any other sum which may be ordered by the Court, on the basis that it be held on an interest-bearing deposit account until further order. He says he has access to considerable assets and income, but is not, for reasons related to his wife's employment, able to disclose any information with regard to those matters. He did not disclose his residential address.

Relevant principles

[22] The principles which apply in respect of a security for costs application in this jurisdiction are uncontroversial. There is no express procedure for ordering security in either the Employment Relations Act 2000 or in the Employment Court Regulations

2000. Accordingly, such an application is routinely dealt with according to the procedure provided for in the High Court Rules, which under r 5.45 relevantly states:10

5.45 Order for security of costs

(1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—

(a) that a plaintiff—
(i) is resident out of New Zealand; or
(ii) is a corporation incorporated outside New Zealand; or
(iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
(b) that 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.

(2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
(3) An order under subclause (2)—

(a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
(i) by paying that sum into court; or
(ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and
(b) may stay the proceeding until the sum is paid or the security given.

...

[23] As already mentioned, the applicable qualifying ground relied on by BCL is that which is described in r 5.45(1)(a)(i) which relates to overseas residency; and as already stated there is no controversy about this.

[24] In this case, the real issue is whether, and if so how, the Court might exercise its discretion. This requires an assessment of the respective interests of both parties, which must be balanced as summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd* in this well known dicta: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

10 For example, *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139.

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

the plaintiff from pursuing the claim. An order having that effect should only 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 likely 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.

[25] Cases where security for costs is awarded against an overseas party are more common, and reflect the difficulties associated with enforcement outside of New Zealand.12

Discussion

Should an order be made?

[26] As summarised earlier, it is argued for Mr Noble that since the claims of both parties were rejected by the Authority, and now both parties wish to challenge that result, no order for security should be made.

[27] Essentially, it is submitted that each party is in an identical position. The reality is rather more nuanced.

[28] The Authority considered that it needed to resolve a jurisdictional issue. For the purposes of that issue, Mr Noble argued that he was an employee, and BCL argued that he was a contractor. The Authority rejected Mr Noble's contention, and accepted that of the company.

[29] It had to follow, at that point, that Mr Noble's claims would be struck out, along with the company's counter-claim. But BCL achieved the outcome it was seeking.

[30] For the purposes of the proceedings in this Court, the same preliminary issue must be determined. Mr Noble brings the challenge, and carries the onus of establishing that there is jurisdiction. BCL proposes again to contest the proposition that he was an employee. It is only if the Court allows the challenge on the preliminary issue, that the company's challenge would fall for consideration.

12 For example, *Neely v Attorney-General* [1984] 2 NZLR 636 (CA).

[31] It is reasonable to conclude that if Mr Noble had not brought his challenge, the company would not have commenced one either, since it essentially agrees with the Authority's conclusion as to jurisdiction.

[32] In short, in this Court Mr Noble is the primary proponent of the assertion that jurisdiction exists, as he was in the Authority.

[33] I proceed, therefore, on the basis that Mr Noble is the primary challenger, and the application for security must be resolved on that basis.

Position of each party

[34] Mr Noble has told the Court he has considerable assets and income, and indeed confirms he would make a payment into Court if ordered. This is not a case where the making of an order will impinge on his ability to bring his claim.

[35] Turning to the position of the company, it is submitted that significant legal costs have already been incurred for the purposes of the investigation, and yet further significant costs are likely to arise when dealing with Mr Noble's challenge, even on the preliminary point.

[36] The evidence before the Court is that BCL is a small family-owned and operated business, which constitutes the shareholders' main income. The legal costs incurred to this point have significantly affected the business of the company over the past two years.

[37] A further factor which is raised is that no information has been provided by Mr Noble as to the whereabouts of his residence; BCL submits that there are potentially significant problems of enforcement of any costs order which may be made by the Court. That point is not refuted; I accept the submission.

[38] For these reasons, I am satisfied that the company's position is considerably more vulnerable than that of Mr Noble.

The merits

[39] The Court's evaluation of the merits must proceed on the basis of the facts recorded in the determination; no additional evidence has been filed. Accordingly, my consideration of this issue is necessarily limited, and inevitably provisional.

[40] Mr Goldstein argues that Mr Noble's challenge has merit, relying particularly on:

a. First, a submission that the email referred to earlier, containing statements that Mr Noble wished to be treated as a contractor, had to be understood in context. He wanted to have time off because he was stressed by the company's actions and inactions; the email should not be understood as indicating a reliable or preferred view that he was a contractor, as the Authority found; and
b. Second, a submission which emphasised that Mr Noble had supplied his IRD number and tax code. It was argued that this supports a finding of employee status, contrary to the Authority's conclusion that this happened because Mr Noble considered it would facilitate a prompt payment of money that he sought.

[41] Neither of these points are dispositive. They have to be balanced against a range of other factors of some complexity, which will require careful evaluation in due course.

[42] As already noted, the onus to persuade the Court that it has jurisdiction will fall on Mr Noble. Given the absence of any written agreement between the parties, and the necessity to assess a broad range of facts a number of which are disputed, I consider that his claim is unlikely to be straightforward.

[43] On the material before the Court at present, I consider that Mr Noble's position is arguable, but not strongly arguable.

Should an order be made?

[44] The factors I have considered to this point strongly suggest that the interests of justice require the making of an order for security. Mr Noble's claim will be challenging, and in balancing the interests of the parties, it must be acknowledged that BCL is in a considerably more vulnerable position as to costs than is Mr Noble.

Extent of security

[45] A strong submission has been advanced for BCL to the effect that if the Authority had dealt with the issue of costs, Mr Noble would have had to apply for a stay of execution to prevent those costs being payable immediately, despite his de novo challenge.

[46] However, the Court must proceed on the basis of what has actually happened, not on the basis of what might have happened. The costs issue has been removed to the Court, which cannot be dealt with until the substantive issues have been resolved. Until that occurs, there is uncertainty as to what the position relating to costs in the Authority will be. Accordingly, it is not appropriate in fixing the quantum of security for costs to take account of a hypothetical liability which Mr Noble may have concerning costs in the Authority.

[47] It was also argued for BCL that security should be fixed with regard to the hearing of the entire challenge, and not just the preliminary issue. This, it was argued, would avoid the unnecessary cost of a subsequent application for security if jurisdiction is indeed established.

[48] I do not accept this submission. As far as proceedings are concerned in this Court, all that is known at this stage is that there will be a hearing relating to the preliminary issue. Whether the case will go further is unknown. In these circumstances, it is not appropriate to order security for any hearing other than that relating to the preliminary issue.

[49] If jurisdiction were to be established, and if it was then necessary to consider a further application for security for costs, the Court would have a greater range of evidence against which to consider security issues. Further, such an application would

have to be considered on the basis that the company had not succeeded in its contention that Mr Noble is not an employee with, perhaps, a potential liability for costs in respect of that preliminary issue.

[50] Accordingly, I consider that the focus must be on the attendances relating to the hearing of the preliminary issue.

[51] Mr Goldstein submitted that a hearing on the preliminary issue would take

1.5 days. No submission was made on this point by Ms Toohey; the time estimate she gave related to the full challenge which she said would occupy five days of hearing time.

[52] In my assessment, the hearing of the preliminary issue could take at least two days; for present purposes, I proceed on the basis of that estimate.

[53] Ms Toohey helpfully placed an assessment of scale costs which,13 adjusted for the hearing time just estimated, and corrected in respect of the preparation of the bundle, results in a total of $18,509.14

[54] Ms Toohey submitted that actual costs which the company would incur in this Court would be approximately $58,000, but that appears to be for a hearing of the full challenge. No estimate was given for actual legal costs for the hearing of the preliminary issue.

[55] In these circumstances, the only fair way of resolving this issue is to rely on the assessment obtained under the Court's scale.

Disposition

[56] I order Mr Noble to pay the sum of $18,509 as security for costs to the Registrar of the Employment Court within 14 days. If that sum is not paid within that timeframe,

13 On a Category 2, Band B basis, under the Courts Guideline Scale as to Costs.

14. Items 2, 11, 14, 15, 31, 38, 31 corrected to 0.6; and 40 adjusted to two days; the applicable daily rate is $2,230.

the challenge will be stayed. That sum is to be placed in an interest-bearing account, until further order of the Court.

[57] BCL seeks costs on this application. It is appropriate that those be fixed now. Costs should follow the event. My provisional view is that the appropriate classification is Category 2, Band B, the classifications used for security purposes.

[58] However, if agreement cannot be reached within 21 days, BCL may apply for costs to be fixed, with Mr Noble to respond 21 days, thereafter.

B A Corkill Judge

Judgment signed at 11.45 am on 16 August 2018