Employment Court of New Zealand

Robinson v Pacific Seals New Zealand Ltd [2014] NZEmpC 210 (14 November 2014)

Last Updated: 24 November 2014

IN THE EMPLOYMENT COURT WELLINGTON

[2014] NZEmpC 210

WRC 26/14

IN THE MATTER OF	an application for rehearing
AND IN THE MATTER	of an application for security for costs/stay
BETWEEN	ALAN ROBINSON Plaintiff
AND	PACIFIC SEALS NEW ZEALAND LTD Defendant

Hearing:	13 November 2014
Appearances:	T Kennedy, counsel for plaintiff J Tannahill, counsel for defendant
Judgment:	14 November 2014

ORAL JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The defendant seeks an order that the plaintiff give security for costs that may be awarded against him if he is unsuccessful in his application for rehearing. That application follows the Court's substantive judgment1 dismissing his challenge to an earlier determination of the Employment Relations Authority.2 The defendant seeks an additional order of a stay pending payment of any security ordered against the

plaintiff. The sum sought by way of security is $5,000.

1 *Robinson v Pacific Seals (NZ) Ltd* [2014] NZEmpC 99.

2 *Robinson v Pacific Seals (NZ) Ltd* [2013] NZERA Wellington 101.

Security for costs

[2] There is no express provision in the Employment Relations Act 2000 (the Act), to order security for costs. However, it has been accepted in numerous cases that the Court has the power to make such orders and to stay proceedings until security is given.3 Because no procedure for ordering security is provided for in the Act or in the Employment Court Regulations 2000, such applications are to be dealt with "as nearly as may be practicable" in accordance with the procedures provided for in the High Court Rules.4

[3] Rule 5.45(2) of the High Court Rules provides that a Judge may, if he/she "thinks it is just in all the circumstances order the giving of security for costs". Relevantly sub-clause (1) states that sub-clause (2) applies if a Judge is satisfied, on application by a defendant, that a plaintiff is resident out of New Zealand or that there is reason to believe that a plaintiff will be unable to pay the defendant's costs, if the plaintiff's proceedings do not succeed. Accordingly, the Court must consider whether the threshold test in r 5.45(1) has been met (either through residency or inability to pay) and, if so, how the Court's discretion should be exercised.

[4] Mr Robinson is resident in New Zealand. It is the second threshold, inability to pay, which the defendant relies on. An affidavit has been filed in support of the application. Mr Wilton, the Managing Director of the defendant company, deposes that Mr Robinson will have incurred substantial legal costs in the proceeding and surmises that he will be unable to meet any costs order in respect of the application for rehearing in the event that such application fails.

[5] Mr Tannahill, counsel for the defendant, submits that $5,000 should be provided by way of security. He rejects any suggestion that the application is being pursued to deter the plaintiff from proceeding with his application for rehearing. He also rejects the suggestion that there have been delays in pursuing the application for

security for costs. He notes that costs in the Authority and the Court remain at large.

3 For example, *Oldco PTI Ltd v Houston* [2010] NZEmpC 161 at [9].

4 Employment Court Regulations 2000, reg 6(2)(a)(ii).

Ultimately he says that Mr Robinson is not in a "great financial position", and

appears to have assets which could be used to meet an order for security.

[6] Mrs Kennedy, counsel for the plaintiff, submits that the application for security has been brought on at a late stage, having regard to the history of the proceedings. This, it is said, underlies a concern the plaintiff has that the defendant wishes to delay the proceeding. Mrs Kennedy submits that there may be a number of factors, not yet before the Court, that will be relevant to any outstanding costs issues.

[7] The application for security was focussed on the plaintiff's ability to meet the costs associated with the application for rehearing. Mr Robinson has sworn an affidavit setting out his financial position, including the net payments he receives a week and the assets that he owns. He is currently unemployed but is actively seeking work. He says that he has incurred legal costs in these proceedings to date, and confirms that he has made arrangements in relation to those expenses.

[8] The application for rehearing is confined to relatively narrow grounds. Costs of around $5,000 could, in my view, reasonably be expected in relation to the application. I am not satisfied, based on the material before the Court, that the plaintiff will be unable to meet an award of costs if one is made against him in respect of his application for rehearing. That is clear from his evidence relating to income and assets. As Mrs Kennedy points out, by way of reference to *Booth v Big*

Kahuna Holdings Ltd,5 difficulty in paying is not the same as an inability to pay.

[9] The threshold in r 5.45(1) has not been met. In these circumstances I do not need to proceed to consider the discretionary factors that might otherwise apply. I record, however, for the sake of completeness that I would not have been minded to exercise my discretion in the defendant's favour having regard to the broader circumstances of the case. While at this early stage (and in the absence of detailed submissions on the likely merits of the application) I do not regard the prospects of success as high, there are important issues of access to justice that need to be weighed.

Costs

[11] I turn to deal with the issue of costs. The Court's usual approach to costs is well known and does not need to be repeated. Essentially a starting point of two thirds of actual and reasonable costs is generally applied, with an adjustment as appropriate.6

[12] Mrs Kennedy submits that costs of $4,000 should be awarded, applying the approach under the High Court Rules. She says that actual costs have not yet been fully calculated, but costs of around $5,000-$6,000 would likely have been incurred in defending this application.

[13] Mr Tannahill submits that costs on the application for security should be reserved and determined following the application for rehearing. I prefer to deal with costs today, as I earlier indicated I would. This was a discrete application and in my view it is appropriate that costs be awarded on it at this stage. Mr Tannahill says that if costs are to be ordered today, a contribution of no more than $1,000 would be appropriate. He submits that costs in the region of those said to have been incurred on behalf of the plaintiff are grossly excessive.

[14] I accept that the plaintiff has incurred costs of up to $6,000. I do not accept that such costs are reasonable having regard to the steps necessary to respond to the defendant's application, which was narrowly focussed. I do however accept that the defendant requested an oral hearing on the application and that this would have put the plaintiff to some additional expense. Standing back and considering the steps required to respond to the defendant's application, I am of the view that costs of no more than $3,000 would be reasonable. There are no factors that warrant an increase or decrease to that starting point. Accordingly the defendant is ordered to pay the plaintiff a contribution to his legal costs on this application of $2,000.

[15] The defendant's application for security for costs and a stay is dismissed.

[16] The defendant is ordered to pay the plaintiff a contribution to his legal costs of $2,000.

Christina Inglis

Judge

Oral Judgment delivered at 11.05 am on 13 November 2014