Employment Court of New Zealand

Sfizio Limited v Mawhinney [2019] NZEmpC 140 (9 October 2019)

Last Updated: 14 October 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2019] NZEmpC 140
EMPC 28/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for strike out of proceedings
AND IN THE MATTER	of an application for stay of proceedings
AND IN THE MATTER	of an application for security for costs
BETWEEN	SFIZIO LIMITED Plaintiff
AND	HELEN MAWHINNEY Defendant

Hearing:	On the papers
Appearances:	C Gregorash, agent for plaintiff A Kersjes, advocate for defendant
Judgment:	9 October 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for strike out of proceedings; application for stay of proceedings; and an application for security of costs)

Background

[1] Ms Helen Mawhinney succeeded in establishing that she was an employee of Sfizio Limited (SL) for a short period of time, and that she was constructively

dismissed. SL was ordered by the Employment Relations Authority (the Authority) to pay Ms Mawhinney a total of $9,009.07.1

[2] SL then brought a de novo challenge to the Authority's determination; the company asserted that Ms Mawhinney had agreed to undertake a "voluntary unpaid competency assessment" and so was never an employee; consequently, it is pleaded, the determination should be set aside.

[3] Ms Mawhinney seeks an order that SL provide security for costs, that the proceedings be stayed until such time as any security so ordered be paid, and if not paid, that the proceedings then be dismissed.

[4] In her supporting affidavit, Ms Mawhinney stated she believes SL has brought the challenge purely to create delay and avoid paying her the sums awarded for payment by the Authority. At the time she gave that evidence, the remedies awarded by the Authority had not been paid.

[5] SL filed a notice of opposition, essentially asserting that the application was an intimidation tactic, and there was no basis for making any order.

[6] Then submissions were filed. Mr Kersjes, advocate for Ms Mawhinney, said that as a result of the execution of a distress warrant, the sums awarded to Ms Mawhinney for payment by SL had been the subject of distraint by a bailiff, nearly five months after the date of the determination.

[7] Reference was also made to an email exchange, apparently with regard to costs in the Authority, in early February 2019, when Mr Gregorash, a director of SL, said:

... we have lots of bills, lots of debt, and if you push for more we will bankrupt and you will get nothing. In addition, everything we pay you will need to be paid back once the employment court rules in our favour.

1 *Mawhinney v Sfizio Ltd* [2019] NZERA 49.

[8] Mr Kersjes also submitted there were poor prospects of success, and that defending the challenge would incur unnecessary costs; any order for costs then made would, in light of the history, prove difficult to recover.

[9] Mr Gregorash, in his submissions, disputed these statements. First, he said SL was not impecunious. It operated two businesses on leased premises, which were profitable. There was a small bank debt. He said SL has in excess of $150,000 of equipment; no security is held over these assets. Reference was made to regular trade suppliers, it being suggested that there were no outstanding debts in that regard. References could be provided, he said, from those suppliers, and from the landlords as well as three currently paid staff.

[10] Mr Gregorash went on to state that the email he sent was because Ms Mawhinney's advocate was seeking an unreasonable amount for costs in the Authority, which he regarded as being an "extreme position", there being a difference of opinion over the appropriate hourly rate. It was in the context of attempting to negotiate the issue of costs that he sent the email, which he said was "simply posturing". He confirmed that SL had paid the amount awarded by the Authority, in full.

[11] He went on to submit that it was believed the Authority had reached an incorrect conclusion as to Ms Mawhinney's status. He argued that the issue raised by the challenge related to a narrow issue as to whether Ms Mawhinney had become an employee.

Principles

[12] The applicable principles relating to applications for security for costs and stay of proceedings were conveniently summarised by Judge Inglis, as she then was, in *Liu v South Pacific Timber (1990) Ltd*, as follows:2

> [8] 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 Employment Court has the power to order security for costs and to stay proceedings until such security is given. Because no

2 *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129 (footnotes omitted).

procedure for ordering security is provided for in the Act or the Employment Court Regulations 2000, the application is to be dealt with "as nearly as may be practicable" in accordance with the procedure provided for in the High Court Rules. In *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* the Court of Appeal held that the Employment Court was required to approach strike out applications (which similarly have no express statutory basis in the Act) on the same basis as the High Court does.

[9] 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 subclause (1) states that subclause (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 and, if so, how the Court's discretion should be exercised under r 5.45(2).

[10] In exercising its broad discretion the Court must have regard to the overall justice of the case, and the respective interests of both parties are to be carefully weighed. The balancing exercise was summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd* as follows:

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.

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.

[11] The merits of the plaintiff's case are to be considered in the context of an application for security for costs. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions, any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.

[12] Concerns relating to access to justice apply across all courts. As the Chief Judge observed in *Mackenzie v Bayleys Real Estate Ltd*: "ultimately, the particular decision must be on its own merits and the justice of the case".

Analysis

[13] It is perhaps unsurprising that this application has been brought, having regard to the time it took for the Authority's order to be complied with, and having regard to the statements made by Mr Gregorash in his email to Mr Kersjes. These factors fuelled

a belief that SL would be unable to pay costs; the applications for security and related orders inevitably followed.

[14] However, I find, based on the material before the Court, that those matters do not necessarily lead to a conclusion that there is an inability on the part of SL to pay; rather, these events arose from the fact that Mr Gregorash did not, and does not, agree with the Authority's determination.

[15] SL of course had the right to bring the challenge it has brought, but such a step does not mean that any award of remedies is automatically stayed. No application for stay of execution was brought.

[16] On the face of the information before the Court, it cannot be concluded that SL is impecunious at the present time. But it delayed payment of a judgment debt, and the employment relationship problem arose over a dispute concerning a small sum; these factors, together with the concerning email, suggest there could be difficulties in obtaining payment of an order for costs in the Court, if one were to be made following an unsuccessful challenge; but not that SL would be unable to pay.

[17] In assessing overall justice, I consider next the merits. The Authority's determination must inform the basis of the Court's assessment, since no other evidence has been placed before the Court by the parties. The determination reflects a careful examination of the evidence provided to the Authority by the parties at the investigation meeting. Essentially the evidence given by Mr Gregorash, and another Director, Ms Parfitt, was about whether Ms Mawhinney would undertake an unpaid trial, was considered equivocal. Other aspects of the parties' discussion on this subject were regarded as not being credible.

[18] Ultimately, the Authority determined that the line between having Ms Mawhinney participate in a competency assessment, and having her engage in work, was crossed. The Authority said that objectively assessed, there was no doubt that the activities that were undertaken by Ms Mawhinney were better characterised as work.

[19] After concluding that Ms Mawhinney was constructively dismissed because of SL's "resolute refusal" to pay Ms Mawhinney wages for the work she performed, and that such non-payment was a breach of the fundamental term of any employment relationship, the Authority said it was foreseeable that Ms Mawhinney would conclude SL had repudiated her employment. Modest lost wages and arrears of wages were awarded. The Authority also concluded that Ms Mawhinney was clearly distressed when she realised that she would not be paid for the work she had done. She had remained emotional about the event when giving evidence before the Authority. It was concluded that $7,000 compensation should be paid.

[20] It is evident from this material that in determining the challenge, the Court will need to carefully consider oral evidence from the parties, as well as some subsequent emails. Credibility will be important.

[21] On the information before the Court at the present time, there may well be difficulties in SL establishing its challenge.

[22] That said, I am not persuaded that the interests of justice require the making of an order for security. I note that in the event of SL failing to establish its challenge, any order for costs in the Court could be enforced, either by a distress warrant as has already occurred, by liquidation proceedings, or by any other enforcement option which may be available.

[23] Accordingly, I dismiss the application for security, as well as the related applications. In the circumstances, there will be no order as to costs.

B A Corkill Judge

Judgment signed at 3.05 pm on 9 October 2019