Employment Court of New Zealand

South Pacific Limited v Tian [2013] NZEmpC 214 (25 November 2013)

Last Updated: 8 December 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 214

ARC 76/12

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/stay of proceedings

BETWEEN SOUTH PACIFIC LIMITED Plaintiff

AND JINGXIN TIAN Defendant

Hearing: 25 November 2013 (Heard at Auckland)

Appearances: Paul Pa'u, advocate for plaintiff

May Moncur, advocate for defendant

Judgment: 25 November 2013

ORAL JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant seeks an order that the plaintiff give security for costs that may be awarded against it if it is unsuccessful in its challenge to an earlier determination of the Employment Relations Authority (the Authority). She seeks an additional order of a stay, pending payment of any security ordered against the plaintiff.

[2] The Authority found that the defendant had been unjustifiably dismissed and ordered the plaintiff (who had not participated in the Authority's investigative process) to repay a premium to the defendant of $33,510, a penalty of $10,000 ($5,000 of which was to be paid to the defendant), unpaid wages of $12,400, holiday pay of $1,455.20, distress compensation of $10,000 and costs. The Authority also found that the plaintiff had failed to act in good faith and imposed penalties of

$5,000, $3,000 of which was to be paid to the defendant.

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[3] There is no dispute that the plaintiff has failed to satisfy the awards made against it in the Authority, despite attempts by the defendant to secure payment. This has included seeking, and obtaining, a compliance order from the Authority on 10

June 2013. I pause to note that this failure to engage with the defendant arises against the backdrop of my interlocutory judgment of 22 March 2013. There I made the point that the plaintiff's challenge did not operate as a stay and reiterated that it remained liable to make payment to the defendant of the amounts awarded against it.1 Despite these observations the plaintiff has taken no steps to deal with its legal obligations to the defendant.

[4] 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 make such orders and to stay proceedings until security is given.2 Because no 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.3

[5] 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-cl (1) states that sub-cl (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.

[6] As Mr Pa'u, advocate for the plaintiff, points out there appears to have been a general reluctance in this Court to grant orders for security for costs and he referred me in his written submissions to *Gates v Air New Zealand Ltd* in this regard.4 While

that may be so, the Court's role is to exercise its discretion in accordance with the

1 *South Pacific Limited v Jingxin Tian* [2013] NZEmpC 44, at [18].

2 See for example *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139.

3 Regulation 6(2)(a)(ii).

4 EMC Auckland AC15/07, 27 March 2007.

overall interests of justice, having regard to the particular circumstances of the case before it. The interests of both parties must be weighed carefully.

[7] As the Court of Appeal observed in *A S McLachlan Ltd v MEL Network Ltd*:5

[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 affect 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 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.

[8] The merits of the plaintiff 's case are to be considered. Other matters which may be assessed in undertaking the balancing exercising include whether a plaintiff 's impecuniosity was caused by the defendant's actions and any delay in bringing the application.

[9] In essence the defendant submits that the plaintiff's failure to act in good faith before the Authority has put her to additional time and expense, that the plaintiff has failed to comply with the Authority's determination and awards made in her favour remain outstanding, the plaintiff's challenge lacks merit, the defendant does not have access to legal aid because of her immigration status and is dependent on the financial assistance of her parents, and that she ought to be given some guarantee of receiving the monies owed to her by the Authority in the event that the challenge fails.

[10] The plaintiff opposes the application on the grounds set out in the notice of opposition and on additional grounds traversed by Mr Pa'u at the hearing. It is submitted that the application is an abuse of process as it is essentially a duplication of the compliance application filed by the defendant in the Authority and that the appropriate way to deal with the defendant's concerns is to enforce the Authority's substantive determination. In addition, it is submitted that the financial position of

the company is precarious, that it would have difficulty meeting any award against it and the merits of the challenge lie in its favour.

[11] It is common ground that the plaintiff will face considerable financial difficulty in meeting any award of costs made against it in the Employment Court if it is unsuccessful on its challenge. It is not trading, and has not been for some time. Mr Pa'u accepts that it has no assets, and says that the litigation is being personally funded by Ms Kwok (previously a director of the company). It is said that her

interest in the proceeding is to clear her name,6 although it is notable that she did not

attend at the Authority's investigation. The current director and shareholder of the company appears to have little or no

interest in the challenge and resides overseas. The plaintiff company is, I am told, likely to be struck off the register.

[12] Based on the material before the Court I conclude that it can reasonably be inferred that the plaintiff will be unable to pay costs if they are ultimately awarded against it and that it will be difficult for the defendant to recover if the challenge does not succeed. These difficulties are likely to be exacerbated given the whereabouts of the company's sole director and shareholder. I do not consider that the application is an abuse of process on the basis contended for on behalf of the plaintiff. A compliance order was sought in the Authority, was granted and has not been complied with. It is difficult to see the basis on which it could be argued that the current application for security for costs constitutes an abuse of process. Nor do I consider there is any real merit in the plaintiff's submission that the appropriate way to deal with the defendant's concerns is to enforce the Authority's substantive determination. The defendant has taken the step of seeking and obtaining a compliance order from the Authority and that has failed to motivate the plaintiff into any action.

[13] A number of factors are relevant to the Court's discretion to order security for

costs in the circumstances of this case.

[14] The plaintiff failed to appear during the course of the Authority's

investigation. Its failure ultimately led to a good faith report being made against it,

with consequential orders limiting the scope of its involvement in the challenge.7 In another case referred to me by Mr Pa'u, *Harrisons Fine Art Ltd v Carrothers*,8 the Chief Judge noted the failure to engage in the Authority's investigation, and the

indifferent attitude this reflected, as a relevant factor in determining whether security ought to be ordered.

[15] The plaintiff 's likely attitude to payment of any costs award made against it is relevant to the discretionary exercise. In *Milne v Air New Zealand Ltd*9 it was observed that:

While the Court does not act as a debt collector in relation to costs ordered by the Authority, the fact of non-payment ... suggests that the respondent may fail to meet any order made against her following hearing if she does not accept that it has been properly made.

[16] The plaintiff company has not paid the awards made against it in the Authority. Nor has it complied with a compliance order made by the Authority in relation to the awards. These circumstances weigh in favour of the defendant's application, reflecting scant regard for orders made against it and may be taken to reinforce the concerns highlighted by the defendant as to likely difficulties with recovering if the challenge does not succeed.

[17] One of the points advanced on behalf of the defendant is that she is carrying the risk, and is ill-placed to do so. In this regard it is noted that she is owed a substantial amount of money following the Authority's determination, is struggling financially, is having to meet the legal costs associated with the challenge and that there is a singular lack of surety that she will be able to recoup her losses if the challenge fails. This, it is submitted, is an inequitable position for the defendant to be placed in. I agree that the defendant has been placed in an invidious position, with the plaintiff effectively sitting on its hands and requiring the defendant to take steps to secure the fruits of her success.

[18] It is difficult to assess where the merits of the challenge lie at this early stage and in the context of a de novo hearing. Much will centre on contested issues of fact

7 [2013] NZEmpC 44.

8 [2013] NZEmpC 195 at [18].

9 [2012] NZEmpC 25 at [23].

which are likely to be central to the determination of the challenge. While these were resolved in the defendant's favour before the Authority, that was in light of an investigation that did not involve the plaintiff's participation and there is affidavit evidence before the Court which may support the plaintiff 's case. However, as Ms Moncur observes, this material will be contested at the substantive hearing and the defendant maintains her position that the merits of the case weigh heavily in her favour.

[19] The plaintiff submits that it will have difficulty pursuing its challenge if security for costs is ordered against it. I accept, based on the material before the Court, that if an order for security for costs is made it will present some difficulties for the plaintiff. Access to the courts is not to be lightly denied. However, the plaintiff 's interest in pursuing its challenge must be balanced against other factors, including the defendant's interest in not being drawn into litigation with no

reasonable expectation of being able to recover the costs associated with it.10 And

while the plaintiff's financial position is difficult, it has failed to put anything before the Court that might address the

concerns raised on behalf of the defendant. Ultimately, a balancing exercise is required. There is no burden one way or the other.11 The interests of both parties are to be considered.

[20] On balance, I consider that an order for security would be just in all the circumstances. Counsel for the plaintiff submitted that if security was granted then it ought to be set at $3,500 having regard to the amount of security ordered in the *Harrisons* case. Ms Moncur considered that the hearing of the challenge in this case may well take two or more days, including having regard to the need for a translator and the number of witnesses she is proposing to call, together with the significant matters at issue from the defendant's perspective.

[21] Standing back, and having regard to all relevant matters before me, including the plaintiff 's position, the likely costs of proceeding to a hearing and the likely quantum of any costs award against the plaintiff if it fails to succeed, I consider that

security in the sum of $12,000 is appropriate.

10 *Air New Zealand v Milne*, above n 8, at [24].

11 *Bell-Booth Group Ltd v Attorney-General & BCNZ* [1986] NZHC 570; (1986) 1 PRNZ 457 (HC) at 460-461.

[22] The plaintiff's challenge is stayed unless, within 20 working days of today's date, it provides to the satisfaction of the Registrar of the Employment Court at Auckland security for costs in the sum of, or otherwise to the value of, $12,000.

[23] I make a further order that if payment of security has not been made within

20 working days, then the defendant may apply to the Court for an order striking out the challenge.

[24] The defendant is entitled to costs on this application, which I fix at $750. That amount is to be paid within a period of 14 days of today's date, as agreed by Mr Pa'u on behalf of the plaintiff.

Christina Inglis
Judge

Judgment delivered orally at 11.44 am on Monday 25 November 2013

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