Employment Court of New Zealand

Zhou v Lin [2012] NZEmpC 108 (11 July 2012)

Last Updated: 15 July 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 108

ARC 18/12

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 or a stay of proceedings

BETWEEN SANDY ZHOU Plaintiff

AND NEW TIMES PRESS LIMITED Second Plaintiff

AND LING LIN Defendant

Hearing: 18 June 2012

(Heard at Auckland)

Counsel: Tonderai Mukusha, counsel for defendant

May Moncur, advocate for defendant

Judgment: 11 July 2012

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS ON APPLICATION FOR SECURITY FOR COSTS OR STAY OF PROCEEDINGS

[1] Ms Ling Lin worked for New Times Press Limited for a period of time. The arrangement did not end happily. She subsequently pursued a grievance in the Employment Relations Authority claiming that she had been constructively dismissed. She also claimed that she had been unjustifiably disadvantaged in her employment. These grievances were dismissed by the Employment Relations

Authority, for reasons set out in a determination dated 31 January 2012.[1]

[2] However, the Authority found that the plaintiffs had breached s 12A(1) of the

Wages Protection Act 1983. The second plaintiff was ordered to repay the defendant

$6,000 (pursuant to s 12(2) of the Wages Protection Act) and a penalty of $15,000 (pursuant to s 13(b) of that Act and s 135 of the Employment Relations Act 2000). The Authority ordered that the amount of $10,000 be paid to the Authority for subsequent payment into the Crown Bank Account and the remaining $5,000 was to be paid by the company to the defendant. The first plaintiff was ordered to repay the defendant the sum of $5,000 (pursuant to s 12(2) of the Wages Protection Act) and

$7,000 (pursuant to s 13(b) of the Wages Protection Act and s 135 of the Employment Relations Act), $3,000 of which was to be paid to the defendant with the remainder being paid to the Authority. The Authority ordered that these payments be made no

later than 28 days after the date of the determination.

[3] It is common ground that the plaintiffs have failed to make the payments ordered by the Authority.

[4] The plaintiffs have filed a non *de novo* challenge in this Court. The defendant has responded with an application for security for costs (in the sum of

$32,000) and, in the alternative, an application for a stay. Both applications are opposed by the plaintiffs.

[5] The application for security for costs is advanced on a number of grounds. First, it is said that the plaintiffs' challenge lacks merit and that it has been brought for ancillary purposes (namely to take advantage of the defendant's employment status, and her inability to work given the terms of her visa). It is submitted that prolonging the process will severely disadvantage the defendant, as she is not financially independent and is unable to work in New Zealand. Secondly, the defendant submits that the plaintiffs have taken no steps to pay any of the amounts ordered in the defendant's favour and the penalties imposed. Thirdly, the defendant is concerned about the plaintiffs' ability to pay. It is submitted that costs in relation to the Authority's investigation remain pending and that the defendant's costs in responding to the plaintiffs' challenge are likely to be significant.

[6] The defendant's evidence is that neither plaintiff has taken any steps to make payment to her of the amounts awarded in her favour by the Authority, and that she had been obliged to commence enforcement action in the District Court. She said that this had imposed a considerable burden on her, as she had had to pay a filing fee of $150.00. Her evidence, which I accept, is that she has limited financial means and is reliant on her family (resident in China) for support. Correspondence dated 5 June

2012 from the District Court Collections Unit confirms that attempts to locate the plaintiffs to execute a distress warrant have proved fruitless. The defendant's evidence is that she is not entitled to legal aid because of her immigration status, and that she is in a precarious financial position.

[7] The plaintiffs oppose the applications advanced on behalf of the defendant. It is submitted that the challenge has merit; that the second plaintiff is still registered with the Companies Office; and that the plaintiffs do not have the money to meet either the orders in favour of the defendant in the Authority or an order of $32,000 by way of security for costs, as sought by the defendant.

[8] The first plaintiff gave evidence in support of the plaintiffs' opposition to the applications before the Court. She is one of the directors of the second plaintiff company. She confirmed that the company has not complied with the Authority's orders to pay the defendant. She also confirmed that the company was not making any money at present and has very limited assets (other than miscellaneous office furniture). She said that she has very limited finances, and no assets. She said that the company may have some money at some future date to meet its financial obligations but was uncertain as to where any such money might come from. Her evidence was that she has tried to make contact with the District Court in relation to the recovery action being taken, by way of telephone call and text message.

[9] The Employment Court has the power to order security for costs and to stay proceedings until such security is given.[2] Because no procedure for ordering

security is provided for in the Employment Relations Act 2000 or Employment

Court Regulations 2000, the application is to be dealt with in accordance with the procedure provided for in the High Court Rules.

[10] Rule 5.45 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".[3]

Relevantly for the purposes of this application, subclause (1) states that subclause (2) applies if a Judge is satisfied, on application, that there is reason to believe that a respondent will be unable to pay the applicant's costs if the respondent's proceedings do not succeed.

[11] The Court is required, before making any order for security, to consider whether such an order would be just in all the circumstances. Determining that issue requires consideration of a range of factors.

[12] What is required is credible evidence from which it can be inferred that a party will be unable to pay costs. It is not necessary to prove that this is so in the normal civil sense.[4]

[13] While the first plaintiff gave evidence that she is attempting to enter into an arrangement in relation to the penalties imposed, the details of any such arrangement or proposals relating to it were not before the Court. What is however clear is that both the company and the first plaintiff have very limited financial resources. The first plaintiff confirmed that neither she nor the company have any assets of worth, and that she does not have the ability to meet an order of security for costs.

[14] Counsel for the defendant submitted that costs in the region of $12,000 might reasonably be incurred if the matter proceeds to a two day hearing in this Court. I consider that to be a conservative estimate (as to both cost and hearing time) given that the investigation in the Authority took place over the course of three days. Generally, hearings in this Court occupy up to twice the time an investigation takes. I have no doubt that if the challenge progresses to a hearing in the Employment

Court it will involve substantial costs.

[15] I am satisfied from the material before the Court that it can reasonably be inferred that the plaintiffs will be unable to pay costs if awarded against them.

[16] At this early stage, it is difficult to assess where the merits lie. Counsel for the plaintiffs submitted that issues of credibility will arise which will significantly affect the ultimate outcome. Ms Moncur agreed.

[17] The plaintiffs have not met the orders against them in the Authority, or taken steps such as applying for a stay pending determination of their challenge. While the Court does not act as a debt collector in relation to orders of the Authority, the fact of non-payment is a relevant factor in considering the application currently before the Court. It suggests that the plaintiffs may fail to meet any order made against them following hearing.

[18] The first plaintiff gave evidence that the defendant has been late in filing an amended statement of claim and counter claim and that this demonstrates a lack of serious commitment by the defendant to Court directions, which should weigh against the orders sought being granted. I do not accept that these matters materially assist in determining the applications being advanced by the defendant in the circumstances.

[19] The defendant contends that the plaintiffs' challenge is being pursued for ulterior purposes, namely to draw out proceedings knowing that this is causing her hardship, because they are aware that she is unable to work in New Zealand in light of the restrictive conditions on her visa. There is insufficient support for this contention in the material before the Court, and I put the allegations as to motive to one side. I accept the defendant's evidence that she is in a difficult position, reliant on support from her family in China, and that her family itself is struggling financially. However, the plaintiffs are entitled to pursue a challenge to the

Authority's determination unless good reason exists preventing them from doing so.[5]

[20] Access to the Courts is not to be denied lightly. An order for security for costs may, in the circumstances of the present case, pose difficulties for the plaintiffs in pursuing their challenge. The plaintiffs' interest in pursuing their challenge must, however, be balanced against the defendant's interest in not being drawn into unnecessarily complicated, or protracted litigation, with no reasonable expectation of

being able to recover costs.[6] Ultimately a balancing exercise is required.

[21] I am satisfied that if the defendant succeeds in defending the plaintiffs' challenge, her prospect of recovering costs is remote. The plaintiffs' financial situation is significantly constrained, and it does not appear that any steps have been taken by the plaintiffs to meet their financial obligations to the defendant consequent on the Authority's substantive determination. [7]

[22] I consider that it is just, having regard to the particular circumstances, to make an order for security for costs. The amount of security is a matter of discretion. It is not necessarily linked to a likely award of costs. Rather it is the sum that the Court considers appropriate in all of the circumstances.[8]

[23] If the challenge proceeds it will be costly. I consider that it is likely to consume at least six days of hearing, possibly more given the indication as to the number of intended witnesses and the fact that the assistance of an interpreter will be required.

[24] Finally, I am satisfied that the two plaintiffs are challenging in the same interest, are represented by the same counsel and neither party would, on the evidence, be able to satisfy a costs award.[9] An order for security for costs against both plaintiffs is therefore appropriate.

[25] I require the plaintiffs to give security for costs to the satisfaction of the

Registrar in the total sum of $15,000. The plaintiffs' challenge is stayed until such

security is given.

[26] The defendant is entitled to costs and disbursements on its application. The defendant is to file and serve any submissions and supporting material in relation to any application for costs within 20 days of the date of this judgment, with the plaintiffs to file and serve within a further 20 days.

Christina Inglis

Judge

[1] [2012] NZERA Auckland 43.

[2] Regulation 6, Employment Court Regulations 2000 and r 5.45 of the High Court Rules. See (for example) *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139.

[3] Rule 5.45(2).

[4] *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516 at 519; *Totara*

Investments Ltd v Abooth Ltd HC Auckland CIV-2007-404-990, 4 March 2009 at [28].

[5] Such as, for example, where it was established that the challenge was vexatious or an abuse of process, cl 15, Schedule 3 of the Act; *Young v Bay of Plenty District Health Board* [2011] NZEmpC

89 at [8].

[6] *A S McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; (2002) 16 PRNZ 747 (CA) at [15]- [16].

[7] *Oldco PTI Ltd v Houston* AC 26/08, 25 August 2008 at [18].

[8] *McLachlan* at [27].

[9] *Ariadne Australia Ltd v Grayburn* [1990] NZCA 359; [1991] 1 NZLR 329 (CA) at 333; *Smith v Covington Spencer Ltd*

[2007] NZCA 224, [2008] 1 NZLR 75 at [24].