

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2018] NZEmpC 12
EMPC 139/2017**

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 MARIE MCNABB
Plaintiff

AND SILVER FERN FARMS BEEF LIMITED
Defendant

Hearing: On the papers filed on 8 December 2017; 19 and 25 January; 21
and 23 February 2018

Appearances: S Mitchell, counsel for plaintiff
T Cleary, counsel for defendant

Judgment: 5 March 2018

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
APPLICATION FOR SECURITY FOR COSTS**

Introduction and outcome

[1] Ms McNabb, the plaintiff, claims that she was unjustifiably dismissed by the defendant, Silver Fern Farms Beef Limited (Silver Fern). Her claim was unsuccessful in the Employment Relations Authority (the Authority).¹ Ms McNabb has filed a challenge to that determination.

[2] In a subsequent determination Ms McNabb was ordered to pay costs of \$4,500.² Those costs were paid, not by Ms McNabb, but by the New Zealand Meat Workers and Related Trades Union Incorporated (MWU).

¹ *McNabb v Silver Fern Farms Beef Ltd* [2017] NZERA Auckland 159 (substantive).

² *McNabb v Silver Fern Farms Beef Ltd* [2017] NZERA Auckland 203 (costs).

[3] Now Silver Fern applies for security for costs in the Employment Court in the amount of \$8,000.

[4] For the reasons set out in this judgment, Ms McNabb is ordered to pay security for costs of \$4,500 into Court by 3 April 2018 and these proceedings are stayed until the payment is made or there is a further order of the Court.

Silver Fern's application for security for costs

[5] The grounds upon which Silver Fern applies for security for costs can be summarised:

- (a) Ms McNabb's claim lacks merit;
- (b) she did not personally pay the costs of the Authority as they were paid by a third party;
- (c) she appears to be unable to pay costs, should her challenge be unsuccessful;
- (d) Ms McNabb has been indecisive about her legal representation and currently only has representation for this application;
- (e) she is engaged in other litigation and has not responded to a request for evidence of security; and
- (f) scale costs for a three-day hearing are approximately \$23,000.

[6] The Senior Advisor – Employment Relations and Resourcing for the Silver Fern Farms group of companies filed an affidavit in support of the application. He pointed to other proceedings in the Family Court involving Ms McNabb, which Silver Fern says are relevant because Ms McNabb's resources will be further stretched until that litigation is resolved and because they demonstrate Ms McNabb's attitude towards litigation risk generally.

[7] The Senior Advisor also noted that Silver Fern had asked Ms McNabb for evidence of security, which had not been provided.

[8] In opposition to the application in summary Ms McNabb says:

- (a) Ms McNabb has suffered significant financial disadvantage from her dismissal;
- (b) she seeks to challenge the determination, as is her legislative right;
- (c) she has an arguable case;³
- (d) she cannot provide evidence of funds to meet a costs award;
- (e) the level of security sought would result in her being unable to continue with the matter;
- (f) the requirement to pay security for costs will prevent access to justice and create unreasonable burdens in the legal system.

[9] She filed no evidence in opposition to the application.

[10] Mr Mitchell, who is acting for Ms McNabb, but, at this point, only in relation to this application, acknowledged that the MWU paid the costs awarded by the Authority and that Ms McNabb would not be able to provide evidence that she could meet a costs award.

[11] Mr Mitchell also advises that Ms McNabb does not have a grant of legal aid.

[12] He says that the decisions of the Family Court do not provide a proper basis for a submission that Ms McNabb is an unreasonable litigant; they are from some years ago, involving family matters.⁴

³ In her notice of opposition, Ms McNabb said her case was “strongly arguable” but in submissions Mr Mitchell said she has a “good case to proceed” and “an arguable case”.

⁴ While some matters are dated, there is evidence of recent involvement of the Family Court.

[13] Mr Mitchell's strongest arguments are in relation to access to justice issues. He says that even the sum of \$8,000 would be sufficient to prevent Ms McNabb from proceeding with the claim. He then contrasts that to employers who are likely to have significantly greater resources to pursue legal proceedings.

Principles that apply to applications for security for costs

[14] The principles that apply to an application for security for costs have been considered by the Employment Court several times previously. I recently summarised them in *TKR Properties Ltd t/a Top Pub & Route 26 Bar and Grill v MacDonald*.⁵ The Court has jurisdiction to order a party to pay security for costs and to stay the proceedings until payment has been made or security, in the quantum ordered by the Court, has been given.⁶ As no procedure for ordering security is provided for in the Employment Relations Act 2000 or in the Employment Court Regulations 2000, the application is to be dealt with in accordance with the procedures provided for in the High Court Rules 2016.⁷

[15] The starting point is that an order may be made if there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceedings.⁸ If the threshold is met, the Court may order the giving of security for costs if it considers that such an order is just in all the circumstances.⁹

[16] Overall, the Court needs to balance the interests of the plaintiff and the defendant in the exercise. As the Court of Appeal observed in *McLachlan v MEL Network Ltd*:¹⁰

[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 effect should be made only after careful consideration and in a case in which the

⁵ *TKR Properties Ltd t/a Top Pub & Route 26 Bar and Grill v MacDonald* [2018] NZEmpC 10 at [19]-[21].

⁶ At [19].

⁷ Employment Court Regulations 2000, reg 6; High Court Rules 2016, r 5.45.

⁸ HCR, r 5.45(1)(b).

⁹ Rule 5.45(2).

¹⁰ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.

[16] Of course, the interests of defendants also must be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

Balancing the considerations here

[17] It is accepted by Ms McNabb that she cannot provide evidence of funds to meet a costs award. Clearly the threshold is met.

[18] While the reasoning of the Authority in the determination appears sound, the outcome of this case will depend on the evidence. As acknowledged by Silver Fern, it is arguable.

[19] I do not put any significant weight on the other proceedings Ms McNabb has been involved with. Those are in a different context altogether.

[20] The MWU has assisted Ms McNabb to date, both with representation in the Authority and by paying the costs awarded by the Authority on her behalf.

[21] It seems that if Silver Fern successfully defends the challenge in the Employment Court, its best chance for receiving any payment in respect of a costs award would be if the MWU agreed also to pay the Employment Court costs. However, the MWU has given no indication that it will do so. The case is not entirely on all fours with *Oldco PTI Ltd v Houston*,¹¹ on which Silver Fern relies, where the plaintiff's representation was paid for by a third party. However, it remains the case that, as things stand, if Ms McNabb succeeds in her challenge, she will be paid any costs awarded to her, but if Silver Fern successfully defends her challenge there is no guarantee at all that any costs award will be paid.

[22] I am, of course, conscious of the access to justice issues that Mr Mitchell has raised, and the need to be fair to both parties. In all the circumstances, I consider that Silver Fern is entitled to obtain an order for security for costs, but that this should be at the level of \$4,500. In reaching that view I reviewed the issues

¹¹ *Oldco PTI Ltd v Houston* AC26/08, 25 August 2008 (EmpC).

involved in the case and they seem reasonably confined so that the case should not take the four days currently estimated. I also consider that the sum of \$4,500 gives Silver Fern some protection but is not so high that it is unreasonable to expect Ms McNabb to raise it. Ms McNabb needs to be aware that should she proceed with her challenge and be unsuccessful, then any award for costs could substantially exceed this amount.

[23] Accordingly, Ms McNabb is ordered to pay into Court the sum of \$4,500 as security for costs. That sum is to be paid into Court by 3 April 2018 and will be held by the Registrar of the Employment Court on interest-bearing deposit until further order of the Court. Ms McNabb's challenge is stayed until the payment is made or there is a further order of the Court.

[24] In any event, the Court Registry is to convene a directions conference at a convenient date after 16 April 2018 by which time I hope that Ms McNabb has arranged ongoing representation. If security has been paid, the directions conference will look to timetable the challenge to completion. If security is not paid within the time specified, consideration will need to be given at the directions conference to whether Ms McNabb's challenge should be dismissed.

[25] Costs are reserved.

J C Holden
Judge

Judgment signed at 2.30 pm on 5 March 2018