

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 85  
EMPC 43/2023**

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                      CODY JOYCE  
   Plaintiff

AND                                ULTIMATE SITEWORKS LIMITED  
   Defendant

Hearing:                      On the papers

Appearances:                L Anderson, advocate for plaintiff  
   D Gelb, advocate for defendant

Judgment:                    9 June 2023

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**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN  
(An application for security for costs)**

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[1] Mr Joyce has challenged a determination of the Employment Relations Authority (the Authority) in which the Authority did not accept that Mr Joyce had been dismissed and accordingly found he did not have an unjustifiable dismissal grievance or any other type of grievance.<sup>1</sup>

[2] The defendant, Ultimate Siteworks Ltd (USL) applies for orders that Mr Joyce pay into Court security for costs of \$10,000 or such other amount as the Court may in

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<sup>1</sup> *Joyce v Ultimate Siteworks Ltd* [2023] NZERA 62 (Member Dumbleton).

its discretion order; and that the proceedings brought by Mr Joyce be stayed until that security has been paid.

[3] The main grounds on which USL applies for security for costs include:

- (a) Mr Joyce has not paid the costs award from the Authority of \$5,750.<sup>2</sup>
- (b) Mr Joyce's claim lacks merit.
- (c) Mr Joyce's previous conduct suggests that the way in which he pursues his challenge will unnecessarily increase USL's costs.
- (d) Mr Joyce may be unable to pay an award of costs to the level that likely would be awarded should he be unsuccessful. The amount USL has calculated in terms of the scale costs is approximately \$20,000, with an additional approximately \$4,500 for costs on this application.
- (e) USL will be significantly affected financially if it succeeds in its defence of the challenge and is unable to recover costs.
- (f) It is in the interests of justice that that security for costs be awarded.

[4] Mr Joyce opposes the application. He says he is not impecunious and does not have financial hardship to the extent asserted by USL. He says that the information provided by USL is based on information provided before the Authority to demonstrate a brief period of financial difficulties resulting from being dismissed from his employment.

[5] Mr Joyce says he now works full-time as a contractor at a rate of \$65 an hour, that he has \$12,400 in KiwiSaver and owns two motor vehicles, including one of significant value, and a dinghy. He acknowledges some debt but the assets he sets out exceed the debt that he owes. He says that he is saving in order to pay security for costs if ordered, and/or costs if necessary.

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<sup>2</sup> *Joyce v Ultimate Siteworks Ltd* [2023] NZERA 120 (Member Dumbleton).

[6] He disputes that his claim lacks merit and sets out the reasons for that assertion.

### **The Court may order security for costs**

[7] Although there is no express provision in the Employment Relations Act 2000 (the Act) or the Employment Court Regulations 2000 (the Regulations) providing for a security for costs to be ordered, pursuant to reg 6(2)(a)(ii) of the Regulations, the Court can look to the provisions of the High Court Rules 2016 when dealing with such applications.

[8] Under r 5.45(1)(b) of the High Court Rules, the Court has discretion to order the giving of security for costs if there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its claim.

[9] If such reason exists, the overarching issue is then whether such an order is just in all the circumstances.<sup>3</sup>

[10] In considering whether to exercise its discretion, the Court will consider the respective interests of both parties to strike a fair balance.<sup>4</sup> The rule itself contemplates that an order for security for costs may, in effect, prevent a plaintiff from pursuing their claim. Nevertheless, access to the courts for a genuine plaintiff is not lightly to be denied. Therefore, such an order should only be made after careful consideration. However, a defendant is entitled to be protected against being drawn into unjustified litigation brought by an impecunious plaintiff, particularly where it is overcomplicated and unnecessarily protracted.<sup>5</sup>

[11] I accept that Mr Joyce has previously had financial difficulties. The evidence that USL points to, however, dates back to early 2022. Mr Joyce is now in full-time employment at a good hourly rate of pay. Importantly also, Mr Joyce has assets that would appear to be sufficient to satisfy a costs award at the level that may be obtained in the Court. In particular, I note the ownership of a valuable car as well as a second car and a dinghy, any of which could be sold by Mr Joyce or recovered by a court

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<sup>3</sup> High Court Rules 2016, r 5.45(2).

<sup>4</sup> *Edwards v Recreational Services Ltd* [2021] NZEmpC 13 at [12].

<sup>5</sup> *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

bailiff under a warrant to seize property, to obtain payment of a cost award in favour of USL.<sup>6</sup>

[12] In short, I am not satisfied that Mr Joyce would be unable to pay a costs award in favour of USL should he be unsuccessful in his challenge. In those circumstances, USL does not satisfy r 5.45(1)(b) and there is no basis for an order for security for costs. USL's application for security for costs is unsuccessful. As a result, there is no need to determine the associated application for a stay of proceedings.

[13] For completeness I note there is no stay in place in respect of the costs order of the Authority and so USL is able to pursue payment. I also note that any conduct of either party, that tended to increase costs in the Court, may be considered by the Court when it comes to exercising its discretion to make an order as to costs on these proceedings.<sup>7</sup>

[14] Costs in respect of this application are reserved.

J C Holden  
Judge

Judgment signed at 12.30 pm on 9 June 2023

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<sup>6</sup> District Court Act 2016, s 167-169.

<sup>7</sup> Employment Court Regulations 2000, reg 68.