

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

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

**[2024] NZEmpC 115
EMPC 379/2023**

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 VGM
 Plaintiff

AND JXC
 Defendant

Hearing: On the papers

Appearances: S Mitchell KC, counsel for plaintiff
 M Dew KC and D Josephs, counsel for defendant

Judgment: 1 July 2024

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application for security for costs)**

[1] This judgment resolves an application by the defendant, a former employee of the plaintiff for an order that the plaintiff pay them security for costs and that the plaintiff's challenge be stayed until the security is paid.

[2] The substantive proceedings to which this application relates involve a de novo challenge to a determination of the Employment Relations Authority (the Authority),¹ which found that the plaintiff's conduct towards the defendant constituted sexual harassment and that the dismissal of the defendant was unjustified. The defendant was

¹ *JXC v VGM* [2023] NZERA 554 (Member Doyle).

awarded \$8,505 in lost wages, \$15,000 in compensation for unjustified dismissal, and \$25,000 in compensation for sexual harassment.

[3] In a subsequent costs determination, the Authority also awarded the defendant \$10,938.28 together with disbursements in the sum of \$500.² The plaintiff has not amended their statement of claim to include the costs determination in their challenge.

[4] The defendant has applied for security for costs of \$59,943.28 being the total awarded by the Authority in both its substantive and costs determinations. The defendant seeks a further sum of \$23,726.50 (\$21,626.50 being the amount of costs excluding disbursements; and \$2,100 disbursements) which is based on a four-day Employment Court hearing pleaded on a category 2, band B basis using the Costs Guideline Scale at the rates payable by legal aid.³

[5] The grounds upon which the defendant seeks the order for security for costs are:

- (a) the plaintiff has not applied to stay the Authority's determinations;
- (b) there is reason to believe the plaintiff will be unable to pay the amounts awarded by the Authority, if the plaintiff is unsuccessful in this proceeding; and
- (c) it is just in all the circumstances to order security for the defendant's costs in defending this proceeding.

The Employment Court may order security for costs

[6] As there are no particular provisions relating to security for costs in the Employment Relations Act 2000 or the Employment Court Regulations 2000, the Court looks to the provisions of the High Court Rules 2016 when dealing with such applications.⁴

² *JXC v VGM* [2023] NZERA 636 (Member Doyle).

³ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

⁴ Employment Court Regulations 2000, reg 6(2)(a)(ii).

[7] For present purposes, under r 5.45(1)(a)(ii) and (b) of the High Court Rules, the Court first must be satisfied that the plaintiff is either:

- (a) a corporation incorporated outside of New Zealand, or is a subsidiary of a corporation incorporated outside of New Zealand; or
- (b) there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in their proceeding.

[8] If either of those thresholds is met, the Court under r 5.45(2) must consider what is just in all the circumstances when deciding whether to make an order for security for costs.⁵ In exercising that discretion, the Court may consider the merits or nature of the proceedings and the interests of both parties, but the factors falling for consideration will vary depending on the circumstances of each case. The Court also has discretion as to the quantum of any security it orders.⁶ Where an order for substantial security may effectually prevent a plaintiff from pursuing their claim, security should only be ordered where the plaintiff's claim has little chance of success.⁷

Analysis

The defendant points to the plaintiff's directors and shareholders residing overseas

[9] The plaintiff is a company incorporated in New Zealand that runs a restaurant business. Its directors are a husband and wife. The directors are also shareholders of the plaintiff. They each hold 50 per cent of the shareholding. The directors have moved with their family to live in Australia. Despite the directors residing in Australia, the plaintiff company continues to operate in New Zealand.

[10] The defendant relies on the fact that the directors and shareholders of the plaintiff company reside in Australia, in making the submission that the plaintiff company and its directors are overseas parties, akin to residents out of New Zealand

⁵ High Court Rules 2016, r 5.45(2).

⁶ Rule 5.45(3).

⁷ *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

or overseas corporations recognised in rule 5.45(1)(a) of the High Court Rules 2016. It submits that the plaintiff company has not disclosed any assets held in New Zealand or provided financial statements and that a reasonable inference for the Court to take is that the plaintiff holds no assets in New Zealand.

[11] It is submitted that in these circumstances the defendant faces the same risks and difficulties associated with overseas enforcement as a plaintiff that is resident outside of New Zealand as identified in r 5.45(1)(a). On that basis the defendant submits that the first threshold test is met. The plaintiff is an overseas party that falls within the intended coverage of r 5.45(1)(a).

[12] I can see the rationale behind the defendant's submissions, but the wording of r 5.45(1)(a) is clear and binding. The plaintiff in the present case is a company. As such, it does not meaningfully have a residence; it merely has a location of registration or incorporation, and r 5.45(1)(a)(i) does not apply to it. Rather, r 5.45(1)(a)(ii) applies, which focusses on the plaintiff's place of incorporation, which is New Zealand. The alternative is the exception in r 5.45(1)(a)(iii), which applies to subsidiaries trading in New Zealand, but this is not applicable in the current case as the shareholders are the directors of the plaintiff, rather than a corporation.

[13] As the plaintiff is incorporated in New Zealand, the threshold in r 5.45(1)(a) is not met.

Defendant points to evidence of impecuniosity

[14] In an affidavit provided by a director of the plaintiff, it says that while the business operated by the plaintiff continues to trade, it is not profitable. The plaintiff's two directors and shareholders have exhausted their savings and do not have assets which could be financed to assist the plaintiff to pay the sum awarded by the Authority, or to pay the defendant's costs in defending the plaintiff's challenge. One director initially struggled to find employment but is now working as a chef. The other director is employed as an assistant manager in an Australian restaurant. The director who is working as an assistant manager is undertaking medical tests; depending upon the outcome of the testing they may be unable to work for a significant period of time.

[15] The plaintiff has not paid the sum awarded by the Authority. Its director has confirmed that neither the plaintiff nor its directors are in the position to pay the sum awarded by the Authority at the present time.

[16] The plaintiff has put forward an open offer to pay the defendant \$10,000 as security for costs into Court immediately, with additional monthly payments of \$2,500 until the commencement of the hearing. The funds proposed to be paid by the plaintiff into Court will be sourced from the shareholders.

[17] The defendant submits that the plaintiff's offer to pay an initial lump sum of \$10,000 as security and then \$2,500 per month over time is an offer to pay costs over time, which does not amount to security. It submits that the only material offer of security is the \$10,000 initial payment, and that this is insufficient and wholly inadequate to meet the costs incurred by the defendant in the current proceedings. It is also submitted that the offer to pay security for costs is reliant on the shareholders' willingness to pay monies on behalf of the plaintiff, which may be withdrawn at any time.

[18] The plaintiff submits that it has provided an open offer to pay a substantial sum of security into Court that is reasonable and sufficient to meet an award of costs for the proceedings in this Court if the plaintiff was unsuccessful. The plaintiff submits that the open offer is proof that the plaintiff can afford to pay the defendant's costs if it is unsuccessful in this proceeding.

[19] The plaintiff submits that the proposal creates an appropriate balance reflecting the costs for the defendant in this application being filed, while perceiving the plaintiff's access to justice. It submits that, in those circumstances, the proposal is fair and in accordance with justice.

[20] The evidence before the Court is that the plaintiff faces other substantial liabilities. Specifically, the Authority has ordered the plaintiff to pay the defendant \$59,943.28 which the plaintiff has not paid and has not applied to stay the execution of the Authority's orders. The Authority's orders remain payable and are a substantial liability and accruing interest.

[21] The plaintiff's ability to pay costs is reliant on two key factors, being:

- (a) the defendant not enforcing the Authority's orders; and
- (b) the plaintiff's directors and its shareholders funding the security for cost offer the plaintiff has put forward and their willingness to pay which may be withdrawn at any time.

[22] The plaintiff's offer to pay costs is entirely contingent on the defendant not enforcing the Authority's orders and its shareholders' willingness to pay any costs awarded in the event the plaintiff's challenge fails.

[23] Given the above, I am satisfied that the threshold for making an order has been met, the plaintiff's financial position, as disclosed by the material currently before the Court, indicates that there is a real risk that, if the plaintiff was pursued for the payment of the Authority's orders, it would be insolvent and will be unable to pay the costs awarded to the defendant if it fails on its challenge.

Is an order for security for costs just in all the circumstances?

[24] Having been satisfied that the threshold test is satisfied, I now turn to consider the other factors stated by the parties, which concern the following issues:

- (a) What are the merits of the plaintiff's challenge?
- (b) Additional considerations.

What are the merits of the challenge?

[25] It is difficult to assess, at this early stage, the merits of the plaintiff's challenge. What can be said is that the plaintiff in its evidence accepts that it dismissed the defendant without proper process, but it denies the allegations of sexual harassment. However, the plaintiff has filed a challenge de novo and claims that the defendant's dismissal was justified, the Authority's findings that the dismissal was unjustified are wrong in fact and law, and if there was an unjustified dismissal the defendant

contributed to the circumstances giving rise to the dismissal. The plaintiff's challenge means the Court is required to hear the whole matter again and reach its own conclusions.

[26] The defendant has submitted that, given the admission made by the plaintiff in its evidence that the defendant was dismissed without a proper process, it submits that the plaintiff has not acted in good faith by challenging the finding of unjustified dismissal and full-scale costs should be awarded in the circumstances where the plaintiff is impecunious.

[27] While the plaintiff is entitled to pursue its claims in the Court, the manner in which it is seeking to pursue those claims appears to raise real difficulties. I consider this factor weighs in favour of the granting of an application for security for costs.

Additional factors

[28] The defendant has raised additional considerations that they submit supports their application for security for costs, including:

- (a) The defendant has provided evidence that they would find it distressing and a hardship to give evidence for a third time⁸, due to the nature of their evidence involving allegations of sexual harassment and sexual assault. The plaintiff submits that the requirement to give evidence more than once was most unfortunate and equally affected both the plaintiff and the defendant.
- (b) The plaintiff's conduct in failing to pay the Authority's orders, or in the alternative seek a stay of execution. The plaintiff submits that its challenge has been bought in good faith. The defendant submits that the non-payment displays an unjustified avoidance of these payments. The defendant submits that the plaintiff's conduct speaks to the lack of merit in its opposition to the application for security for costs.

⁸ The defendant was required to give evidence on two earlier occasions due to the original Authority Member not issuing a decision, resulting in a second investigation meeting.

[29] Having assessed these factors, I consider that they weigh in favour of the granting of an application for security for costs.

Balance of convenience

[30] I have already found that there is a real risk that, if the plaintiff is unsuccessful in its challenge, it may not be able to comply with any costs awards issued against it. Further, the merits of its challenge at this stage appear to have difficulties and the additional factors raised in support of the application by the defendant weigh in favour of the granting of the application. I consider there is no evidence to indicate that the application for security has been brought with improper motives.

[31] Having assessed these factors, I consider that it is in the interests of justice for security for costs to be ordered. The application for security for costs is successful.

What security should be ordered?

[32] The defendant seeks orders for security and stay as follows:

- (a) \$35,164.78 being that security for costs be paid in full, within 14 days of the date of this order, for the actual and expected legal aid costs incurred in defending the plaintiff's challenge in this Court and the defendant's actual legal aid costs awarded by the Authority; and
- (b) \$48,505 being that this proceeding is stayed within 14 days of the date of this order, unless the sum of \$48,505 is paid by the plaintiff into Court, to protect the remainder of the award made in the defendant employee's favour in the Authority.

[33] The defendant accepts that the security for costs application cannot achieve an order for payment of the Authority award in full. It applies to stay proceedings until payment of both the security for costs and the full amount of the Authority award are paid into the Court.

[34] The plaintiff submits that the defendant is conflating an application for stay that could be sought by the plaintiff, with an application for security for costs. A stay of proceedings cannot be used in conjunction with a security for costs application in this way.

[35] The plaintiff further submits that the Court does not have jurisdiction to make an order giving security for costs for sums awarded in the Authority to the defendant. It submits that security for costs has a forward focus, not a backward focus, and that an application is not to address the issues of payment of an Authority award but rather to protect the defendant against further costs.

Analysis

[36] Rule 5.45(2) clearly states:

A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

The rule does not permit the Court to order the giving of security for the sums potentially owing to the defendant; it only permits an order relating to the costs of the defendant in the current proceedings.

[37] The quantum of security is a matter of discretion and determined by what the Court thinks fit in all the circumstances.⁹ Those circumstances generally include the amount or nature of the relief claimed, the nature of the proceedings (including the likely extent of interlocutories), the estimated duration of the hearing, and probable costs if the plaintiff is unsuccessful.

[38] I therefore agree that an order to indemnify the defendant for potential costs is not justifiable in the circumstances.

[39] I find that it is not appropriate to order payment of the Authority's award as part of an application for security for costs. There are other mechanisms which are available to the defendant to enforce payment of any awards made in the Authority

⁹ *McNaughton v Miller* [2022] NZCA 273 at [17].

that do not require a strained interpretation of r 5.45(2). An order for security for costs must be limited to the costs expected to be incurred by the defendant in this proceeding.

[40] The defendant has estimated that it will incur \$21,626.50 in legal costs based on a four day Employment Court hearing, on a category 2, band B basis using the Costs Guideline Scale at the rates payable by legal aid and \$2,100 in disbursements.¹⁰ This includes \$5,511.00 being the costs incurred by the defendant in bringing its application for security for costs and a stay.

[41] The plaintiff submits that the costs of the security for costs and stay application should not be addressed until after the judgment is issued. The plaintiff also submits that its offer to pay \$10,000 immediately and \$2,500 per month is a reasonable offer and sufficient to meet the expected award of costs for the proceeding in this Court.

[42] I find that it is appropriate that costs on other applications before the Court not be included in any security for costs application. This reduces the amount claimed by the defendant to \$18,215.50. The plaintiff's offer effectively was a payment of \$10,000 immediately and \$2,500 per month, which if this was calculated from when the offer was made in March 2024 would equate to approximately \$22,500 by August 2024 when the substantive hearing is scheduled.

[43] Overall, I consider a sum of \$18,000 is sufficient security in the circumstances of this case.¹¹ The sum will provide sufficient security to the defendant to cover their expected legal costs in the current proceedings. It is less than the amount of security offered by the plaintiff in March 2024. In the circumstances the sum is reasonable and will not prevent the plaintiff from pursuing its claim in the Court.

[44] Consistent with the Court's approach in *Watkins v Highmark Homes Ltd*,¹² I observe r 7.45 which provides that the Court may make an interlocutory order subject to any just terms or conditions. In this case, any order for security for costs must rest

¹⁰ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

¹¹ Compare *Wishart v Smallbone* [2020] NZCA 434.

¹² *Watkins v Highmark Homes Limited* [2024] NZEmpC105

on the foundation of the threshold issue of the plaintiff's inability to pay. There is reason to believe that the plaintiff is impecunious because of the substantial awards made in the Authority remaining unpaid. If, however, those awards were to be paid, the basis for the defendant's application would be weakened. Therefore, I consider that this order ought to be made subject to a condition that, if the plaintiff pays the outstanding Authority awards, the order will lapse.

Outcome

[45] Accordingly, I make the following orders:

- (a) The plaintiff is to pay the amount of \$18,000 to the Employment Court registry, as security for costs, within 14 days of the date of this judgment. That sum is to be placed by the Registrar of the Court in an interest bearing account until further order of the Court.
- (b) If the payment is not made within 14 days, these proceedings are stayed.

[46] However, the orders at [45] above will lapse if the plaintiff pays in full the sums awarded to the defendant by the Authority. Counsel for the defendant is to advise the registry if this occurs.

[47] If the plaintiff complies with its other obligations after 14 days has elapsed. I reserve leave for it to apply on notice for the orders at [45] to be discharged.

[48] In the circumstances, costs on this application are reserved for consideration at the resolution of this proceeding.

M S King
Judge

Judgment signed at 2.45 pm on 1 July 2024