IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 231
EMPC 273/2024
EMPC 278/2024

IN THE MATTER OF	challenges to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for security for costs
BETWEEN	SHALINEE DOWLUT Plaintiff
AND	AURECON NEW ZEALAND LIMITED Defendant

Hearing: On the papers

Appearances: Plaintiff in person
M Lawlor and J Gray-Smith, counsel for defendant

Judgment: 27 November 2024

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application for security for costs)

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[1] This judgment resolves an application for security for costs regarding two proceedings brought by a former employee, Shalinee Dowlut, against her former employer, Aurecon New Zealand Ltd (Aurecon).

[2] In essence, Aurecon submits that the two challenges brought by Ms Dowlut have very limited prospects of success, and that she has on several occasions stated that she is suffering from financial pressure so that she would have difficulty meeting any order for costs made against her were her challenges to be unsuccessful. Security for costs in the sum of $10,000 is accordingly sought.

[3] For her part, Ms Dowlut submits that her challenges have strong prospects of success and that the assertions made by Aurecon as to her financial circumstances are ill-founded and do not lead to a conclusion that an order for security for costs should be made.

[4] Ms Dowlut's claims revolve around performance issues that were under consideration in 2023. She was a level 5 project management consultant for Aurecon, which is an engineering firm. In that year, Aurecon assessed her performance as "needs improvement", which was the lowest of its performance ratings. It identified two main aspects for improvement, being communication and taking accountability.

[5] Ms Dowlut did not accept the feedback or the rating. She raised allegations about the managers giving the feedback and those undertaking the review process. She did not engage in the process for improvement which Aurecon tried to implement, or in the disciplinary process which ultimately led to her dismissal for serious misconduct.

The challenges

[6] On 23 July 2024, Ms Dowlut brought a challenge against a determination of the Authority dated 1 July 2024.[1]

[7] The challenge was brought on a de novo basis. This means the Court is now required to reconsider Ms Dowlut's claims afresh. The statement of claim refers in part to the chronology set out in the Authority's determination but adds assertions as to how the investigation meeting was conducted and determined. It states that the remedies sought include reinstatement or redeployment and also compensation.

[8] A second challenge was brought on 25 July 2024. It initially cited the Authority Member as the defendant, but it was subsequently amended to refer to Aurecon as the defendant. It was described as being a challenge "in respect of dismissal of frivolous or vexatious proceedings" and was brought under s 178A of the

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1 *Dowlut v Aurecon New Zealand Ltd* [2024] NZERA 385 (Member Szeto).

Employment Relations Act 2000 (the Act). It criticised various aspects of the Authority's process and alleged that steps were taken which were not in accordance with good faith.

[9] The second challenge filed by Ms Dowlut was discussed at an initial telephone directions conference held on 19 September 2024. As I indicated in my subsequent minute, Ms Dowlut was advised that the Court could not consider the issues referred to in that proceeding for two reasons. First, no determination was issued by the Authority dismissing her proceeding on the grounds it was frivolous and vexatious. There is no evidence that any such application was considered by the Authority. Consequently, the Court has no jurisdiction to consider this challenge. Second, even if such an application had been before the Authority, because the challenge has been brought on a de novo basis, the Court would simply rehear that application. The Court would not necessarily, under such a challenge, review how the Authority had dealt with a purported application to strike out.

[10] I invited Ms Dowlut to confirm that this particular challenge would be discontinued. To date, this step has not been taken.

[11] In the same directions conference, I raised with Ms Dowlut whether she was proposing to advance each and every one of the multiple issues which had been considered by the Authority. She said she would consider this and file a statement of issues. It does not appear that she understood what was intended because the statement of issues she then filed was intended to enlarge on her reasons for wishing to bring a challenge under s 178A of the Act. The problems to which I have already alluded remain. The Court simply has no jurisdiction to deal with that matter.

The Authority's determination

[12] The determination provides a summary of key events and the legal issues. I summarise the conclusions referred to. I make it clear that in referring to this summary, I am in no way endorsing the conclusions reached by the Authority. The summary simply provides a framework for considering the issues I must consider at this preliminary stage.

[13] The Authority noted that Ms Dowlut had raised multiple personal grievances which gave rise to the following issues:[2]

> (a) Whether Ms Dowlut was unjustifiably disadvantaged by Aurecon raising performance concerns with her.
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> (b) Whether Ms Dowlut has been discriminated against by Aurecon.
>
> (c) Whether Ms Dowlut has been subjected to racial harassment by Aurecon.
>
> (d) Whether Aurecon has engaged in adverse conduct for a prohibited health and safety reason.
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> (e) Whether Ms Dowlut has a claim under the Equal Pay Act 1972, in particular on the basis that she has been unlawfully discriminated against (s161(1)(qd) of the Act).
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> (f) Whether Aurecon retaliated or threatened to retaliate against Ms Dowlut in breach of s 21 of the Protected Disclosures (Protection of Whistleblowers) Act 2022 because Ms Dowlut made or intended to make a protected disclosure.
>
> (g) Whether Ms Dowlut was unjustifiably dismissed from her employment with Aurecon.
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> …

[14] The Authority then went on to describe the remedies and outcomes which would be considered if any of the above causes of action were successful. One of these was a claim for reinstatement.

[15] After setting out the chronology in some detail, the Authority investigated the assertion of unjustified disadvantage. First, it explored the performance review process which was undertaken in May 2023. Ms Dowlut claimed that she had been unfairly assessed so that there was no change to her level of employment and no pay rise or bonus. The Authority found that Ms Dowlut was disadvantaged by being given a performance review rating of "needs improvement" but went on to say that Aurecon's actions were justified and were those of a fair and reasonable employer in all the circumstances.[3]

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2 At [7].
3 At [51]–[61].

[16] The Authority then investigated the steps taken to implement a performance improvement plan (PIP) later that year. After summarising the details, it concluded that Ms Dowlut was disadvantaged by the actions Aurecon took with regard to a PIP, including by an instruction not to send certain documents to a client on a major project directly and, when that instruction was not complied with, removing her from working on that project.[4] The Authority concluded that the steps taken were those of a fair and reasonable employer and that they were justified.[5]

[17] Turning to the unjustified dismissal claim, the Authority noted that Ms Dowlut was invited to participate in a disciplinary meeting to discuss the following assertions of serious misconduct:[6]

(a) Continued unsatisfactory performance.

(b) Unwillingness to accept performance feedback.

(c) Impact of performance and conduct on other managers.

(d) Failure to follow reasonable instructions.

[18] The Authority described medical issues which arose during the process, summarising medical opinions presented to Aurecon during the process, as well as evidence given by a general practitioner at the investigation meeting.[7] It concluded that it had been open to Aurecon as a fair and reasonable employer to decide, on the basis of the information it had, that the disciplinary process could proceed with appropriate mitigation steps in place.[8]

[19] The Authority then found that Ms Dowlut had not engaged directly with Aurecon about the serious misconduct concerns, recording her claim that Mediation Services or the Authority would be the appropriate arbiter of the facts.[9]

[20] The Authority concluded that Aurecon had sufficiently investigated the allegations; it had raised its concerns with Ms Dowlut on a number of occasions,

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4 At [65]–[66].
5 At [67]–[70].
6 At [81].
7 At [83]–[101].
8 At [102]–[105].
9 At [106].

giving her opportunities to respond; and it had genuinely considered such feedback as she in fact gave. It had scheduled five disciplinary meetings to obtain her views, which the Authority said demonstrated openness to hearing her feedback. It had also participated in several mediations, which the Authority found illustrated that the decision to dismiss Ms Dowlut was made after considering reasonable alternatives.[10]

[21] The Authority said Ms Dowlut's conduct throughout the performance review, performance improvement and then disciplinary processes reinforced the concerns the company reasonably held and contributed to its loss of trust and confidence in her.[11]

[22] Accordingly, the claim that Ms Dowlut had been unjustifiably dismissed did not succeed.[12]

[23] The Authority went on to consider the other personal grievance claims – firstly relating to discrimination and racial harassment. Ms Dowlut pursued a claim of discrimination on the basis that her employment commenced on a lower wage than that of other employees and that she was not advanced through the different levels of consultant, but the Authority concluded that the claim was not supported by evidence and was out of time.[13] It found there was also insufficient evidence to establish the assertion that negative feedback given about her was due to racial harassment or discrimination.[14] It also held that a fair and reasonable process had been conducted when responding to Ms Dowlut's allegations of racism and bullying.[15]

[24] Nor was the Authority satisfied that the company had been motivated by a desire to cause physical harm to her health, safety and wellbeing. There was no evidence that Aurecon had acted against her for a prohibited health and safety reason under s 103(1)(j)(i) of the Act. Nor had it contravened s 92 of the Health and Safety at Work Act 2015 (the HSW Act), thus giving rise to a claim under

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10 At [110]–[111].
11 At [111].
12 At [113].
13 At [118].
14 At [116], [119], and [121].
15 At [120].

s 103(1)(j)(ii), by continuing with the disciplinary process. This claim was described as misconceived in law and unsupported on the evidence.[16]

[25] The claim of discrimination under the Equal Pay Act 1972 was also dismissed. The Authority stated that there was no credible evidential basis for it. It found it was misconceived in law and unsupported by the evidence.[17]

[26] With regard to the final claim of retaliation in relation to a protected disclosure, the Authority found that allegations made about bullying and harassment had been responded to appropriately and that there was no evidence of retaliation in any of the company's actions that followed the making of the alleged disclosure.[18]

[27] Ms Dowlut had also asserted that Aurecon retaliated against her for engaging with the Authority process. The Authority said it was not an "appropriate authority" to whom a protected disclosure could be made. As there was no protected disclosure, Aurecon could not logically have taken any retaliatory action in respect of it.[19] This claim was considered to be misconceived in law and unsupported by the evidence.[20]

[28] It is against that background that I must consider the application for security for costs now made by Aurecon, as well as Ms Dowlut's response to it.

Relevant principles

[29] There is no express provision in the Act to make an order for security for costs, but it has been accepted in numerous cases that the Court has power to order security for costs and to stay proceedings until such time as security is given in light of the provisions of the High Court Rules 2016 which govern applications for security for costs.[21]

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16 At [125]–[127].
17 At [131].
18 At [135].
19 At [136].
20 At [137].
21 *Watson v Fell* [2002] 2 ERNZ 1 (EmpC) at [8]–[9].

[30] Under r 5.45 of the High Court Rules, a judge may, if they think it is just in all the circumstances, order security for costs if it is satisfied 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.

[31] Then, the Court must have regard to the overall justice of the case and the respective interests of both parties. The balancing exercise was summarised by the Court of Appeal in *McLachlan v MEL Network Ltd* as follows:[22]

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

[32] In short, it is well established that the merits of the plaintiff's case are to be considered in the context of an application for security for costs. Other matters that may fall for consideration in the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions, whether there was any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.[23]

[33] At the end of the day, and as Chief Judge Colgan observed in *Mackenzie v Bayleys Real Estate Ltd*: "… ultimately, the particular decision must be on its own merits and the justice of the case: …".[24]

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

23 Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR5.45.03].

24 *Mackenzie v Bayleys Real Estate Ltd* EmpC Auckland AC18/04, 25 March 2004 at [11].

Analysis

Financial issues

[34] I begin by considering the threshold test as just discussed. Is there reason to believe that Ms Dowlut would be unable to pay the costs of Aurecon if she were to be unsuccessful in her proceedings?

[35] In Ms Dowlut's statement of claim dated 23 July 2024, she states that one of the remedies she is seeking is compensation:

> … for [lost] wages over 9 months which caused me serious financial hardship. Under these extreme circumstances, I relied on my retirement investment plan to fulfil my financial obligations to not be indebted so far. This situation will lead to bankruptcy if not rectified …

[36] In her second statement of claim dated 25 July 2024, she refers to the same topic, stating that the Authority investigations:

> … spanned over 11 months with loss of employment forcing me into significant financial hardship with a need to rely on work and income benefits. I continued medical treatment at my own costs …

[37] David Hughes, a transport leader of Aurecon who filed an affidavit in support of the company's application, said that at the time of the investigation meeting in February 2024, Ms Dowlut advised the Authority Member that she was not working and that because of this, she was under significant financial pressure, including as to the payment of her mortgage. He also said Ms Dowlut had told the Authority in her written closing submissions that the company had not acted in good faith to rectify her allegations and that it had continued to aggravate her financial situation and push her into financial hardship and dependency.

[38] In her submission, Ms Dowlut appears to suggest that the statements placed before the Court by Mr Hughes are not proved satisfactorily. She relies on s 10 of the Defamation Act 1992; that provision makes it clear that it applies only to a proceeding for defamation, which is not the case here.

[39] The first two statements to which I have referred are Ms Dowlut's own statements as contained in the statements of claim filed in this Court. The Court is

entitled to rely on statements made by Ms Dowlut herself in court documents. The Court is told that the third statement was given orally to the Authority, and the fourth statement was contained in written submissions filed by Ms Dowlut in the Authority. I have no reason to doubt the veracity of Mr Hughes's evidence concerning these statements since they are consistent with the statements made to this Court.

[40] In her notice of opposition to the application for security, Ms Dowlut went on to refer to cost issues in the Authority. For two reasons I place those considerations to one side. First, the Authority has yet to determine the issue of costs before it; those issues are not, therefore, before the Court. More importantly, I am required to consider whether Ms Dowlut would be able to pay any costs order the Court might make in the future in favour of Aurecon if her challenges are unsuccessful. The Court's analysis has a prospective focus, not a retrospective one.

[41] An indicative costs analysis prepared by Mr Lawlor, counsel for Aurecon, under category 2, band B of the Court's guideline scale as to costs totals $26,051.[25] The analysis proceeds on the basis of a three-day hearing; I assume that would be for both challenges if they are heard together. I have no reason to doubt the accuracy of that indication or the accuracy of the other entries that have been derived from the guideline scale.

[42] Standing back, I am satisfied that there is credible evidence that Ms Dowlut would be unable to pay costs of this amount were she to be unsuccessful.

[43] I acknowledge that she appears to be suggesting that the financial pressure she faces has arisen from the fact of her dismissal. That is a consideration to which I will return shortly.

Is it just in all the circumstances to order security?

[44] I turn now to the balancing exercise. As noted, this requires consideration of a range of factors which are case-specific.

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

[45] The Court can only make a preliminary assessment of the factual issues because the circumstances have not yet been tested at a hearing. That is inevitably the case when considering applications for security for costs. I have focused on the information contained in the statements of claim, the statement of defence, the amended statement of problem, the statement in reply and other documents placed before me by Ms Dowlut.

[46] I begin with the issues raised that have the least prospect of success. I have already noted that there is no jurisdiction to consider Ms Dowlut's second challenge, as brought under s 178A of the Act. I can see no basis for that challenge being successful.

[47] I also consider that there is no plausible basis for the claim brought in respect of adverse conduct for a prohibited health and safety reason. On the materials I have reviewed, there is no credible evidence to suggest that adverse actions were taken against Ms Dowlut for a prohibited health and safety reason as defined in s 89 of the HSW Act. Nor could s 92 of the HSW Act apply; it relates primarily to the exercise of roles and powers under the HSW Act including those of a health and safety representative. Ms Dowlut was not such a representative. This claim is also misconceived.

[48] Similarly, the claim of discrimination under the Equal Pay Act could not, on the material placed before me, succeed since no evidence of pay earned by males engaged in comparable positions has been placed before the Court to suggest that there was unlawful discrimination of the kind referred to in s 2A of that Act.

[49] Next, I turn to the personal grievances for unjustified action and unjustified dismissal. I have carefully reviewed the documents referred to above. It is apparent that a fundamental deficiency with Ms Dowlut's claims is that she either engaged with her employer at relevant times on a very limited basis, or not at all, both when performance issues were raised and in the disciplinary process.

[50] A second problem of some significance is that Ms Dowlut did not and does not accept that there were communication and performance issues in respect of which she

needed to engage in good faith with her employer when concerns were raised. The materials suggest that her immediate response, when invited to respond to these issues, was a defensive one. She considered her managers were acting in bad faith when raising issues, that their actions were due to her ethnicity, and that she was being bullied. The correspondence which Ms Dowlut has placed before the Court does not support these assertions.

[51] She also asserts that those managers to whom she reported did not, in effect, have the necessary skills, experience and authority. Her assertion seems to be that she did not therefore need to engage with them or comply with their performance directions. This appears to be an inherently unlikely proposition.

[52] I recognise that medical issues arose at the time the disciplinary process commenced. Ms Dowlut was admitted to hospital on the day she had been invited to attend a disciplinary meeting. The employer accepted that she had suffered a medical event on that day and paused the proposed meeting for four days whilst further inquiries were made about her health.

[53] Then Ms Dowlut resumed work, with the employer being satisfied that she could work and undertake disciplinary processes with appropriate support. At the same time, however, Aurecon requested any information Ms Dowlut wanted considered as part of the disciplinary process. Three weeks later, it attempted to restart the disciplinary process by inviting Ms Dowlut to a meeting. She declined to be involved thereafter, but did supply information from her general practitioner about what had happened at the outset of the disciplinary process.

[54] That information confirmed that on the day she was invited to attend the disciplinary meeting, she had been admitted to hospital with chest pain and palpitations, and that evidence of heart muscle strain had been found by way of a tachycardia-induced troponin rise. The hospital notes recorded Ms Dowlut's description of workplace events as having contributed to the identified symptoms.

[55] Following a request from Aurecon for clarification, a second report was sent a few days later. The general practitioner said there had been an extreme stress response,

and that further stress or workplace interactions should be minimised as much as possible.

[56] It is evident, for the purposes of his initial report, that the general practitioner had attended Ms Dowlut for 15 minutes only, and that there had been no time to provide a detailed assessment of her work capabilities. He said it had been reasonable for Ms Dowlut to assume that workplace meetings could lead to ongoing heart muscle issues. He had relied on self-reported symptoms, as well as the clinical record of the hospital admission.

[57] Ms Dowlut did not participate in the disciplinary process thereafter. The question is whether the steps which Aurecon persevered with were steps which a fair and reasonable employer could have taken in these circumstances.

[58] This aspect of Ms Dowlut's case, which relates to the procedural fairness of the dismissal, is not as weak as other aspects of her case. I am left, however, with concerns as to whether the medical circumstances were such as to justify outright non-participation in the disciplinary process for its duration.

[59] I conclude that the prospects of success with regard to the disadvantage grievance are weak, and with regard to the dismissal personal grievance are modest.

[60] For completeness, the assertions as to racial harassment and discrimination on the part of her managers are also weak.

[61] Finally, I note that the claim for reinstatement, even if a grievance could be established, has poor prospects of success.

[62] Next, I consider the access to justice issue, namely whether the financial circumstances alluded to earlier were caused by the dismissal, and whether this should be taken into account for the purposes of this application.

[63] The limited information the Court has as to Ms Dowlut's financial circumstances, as alluded to by her in her statements of claim, suggests that a contributory factor to her financial pressure is the fact that she was not in receipt of

wages over some nine months after her dismissal. She says that reliance on her retirement plan has been necessary "to fulfil [her] financial obligations to not be indebted so far". She goes on to say that the situation could lead to bankruptcy.

[64] The Court has practically no information as to Ms Dowlut's financial position on an ongoing basis, including what steps she may have taken to mitigate any lost wages over the nine-month period she referred to, or since then. At best, the Court can only infer that there is a degree of financial pressure which has been caused by her loss of employment with Aurecon, but the precise nature of that is unknown.

[65] These considerations lead to the question of whether her challenges are sufficiently strong that the interests of justice would not be met if there was an undue focus on Ms Dowlut's apparent financial pressures.

[66] I have found that Ms Dowlut's prospects of success on her challenges are, in one respect, moderate only, and in others respects, poor. Thus, there is accordingly only a modest access to justice issue.

[67] I recognise that Ms Dowlut does not have a legal background, and this is a factor I must recognise. But I must balance that factor, and the other considerations to which I have referred, against Aurecon's concerns as to the financial loss it would likely suffer if and to the extent the challenges may be unsuccessful. The Court is required to evaluate the circumstances of both parties.

[68] Taking into account the access to justice issue I have discussed, I have concluded that it is appropriate to assess the security for costs issue primarily on the basis of the causes of action which are untenable.[26]

[69] In my view, an amount equal to 20 per cent of the scale figure of $26,051 claimed by Aurecon under category 2, band B is appropriate as security.

[70] Balancing all factors, I have decided that a fair outcome is that Ms Dowlut be ordered to pay the sum of $5,200 as security for costs.

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[26] As described above at [46]–[48].

[71] That sum is to be paid by Ms Dowlut into Court within 28 days of the date of this judgment.

[72] If security for costs is paid, it is to be placed by the Registrar in a suitable interest-bearing account once payment has been made, until further order of the Court. If paid, a directions conference will then be convened to progress the matter towards a hearing.

[73] If the challenges fail, and if Aurecon subsequently succeeds in obtaining a costs order, the trial judge may decide that it should at that stage be paid to the company.

[74] If Ms Dowlut's 23 July 2024 challenge were to succeed, in whole or in part, then the trial judge may consider other alternatives, including repayment of some or all of the sum to Ms Dowlut.

[75] Until such time as the payment is made into Court, both proceedings are stayed.

[76] Costs are reserved.

B A Corkill
Judge

Judgment signed at 3.10 pm on 27 November 2024