Employment Court of New Zealand

Allwaze Designs Limited v Cawthorne [2015] NZEmpC 17 (18 February 2015)

Last Updated: 23 February 2015

IN THE EMPLOYMENT COURT WELLINGTON

[2015] NZEmpC 17

WRC 13/14

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	ALLWAZE DESIGNS LIMITED Plaintiff
AND	ALICE CAWTHORNE Defendant

Hearing: (on the papers by memoranda filed 6 and 19 November 2014)

Representation: F Wong, representative for the plaintiff
S Govender, counsel for the defendant

Judgment: 18 February 2015

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The application

[1] I issued an earlier interlocutory judgment in this proceeding on

22 September 2014.1 That judgment dealt with an application by the defendant for leave to file her statement of defence out of time. I granted that application. In the course of a telephone directions conference held on 22 October 2014, counsel for the defendant gave notice that he was proposing to make application for a security for costs order against the plaintiff. I made a timetabling order in relation to that application and it was agreed that the matter could be dealt with on the papers. The security for costs application is the subject matter of this interlocutory judgment. The application was accompanied with a request for a stay of proceedings until

security is provided.

1 *ALLWAZE Designs Ltd v Cawthorne* [2014] NZEmpC 176.

Background

[2] The substantive proceeding before the Court is the plaintiff's de novo challenge to a determination of the Employment Relations Authority (the Authority) dated 16 April 2014.2 The Authority had upheld a claim by the defendant that she had a personal grievance against her employer, the plaintiff, for unjustified dismissal and an unjustified warning. After making a deduction of 25 per cent from the remedies on account of her own contribution, the Authority awarded the defendant

$1,260 for lost wages; $1,500 compensation for hurt feelings and $168 for two extra days' pay which should have been paid as sick leave.

[3] Although much of the factual background is not in dispute, some of the more critical factual issues canvassed by the Authority in its determination are contentious and are unable to be resolved on the papers. In October 2010, the defendant, Ms Alice Cawthorne, was employed by the plaintiff, Allwaze, as a salesperson. She reported to Ms Diana Mill who was the owner of the business. The precise nature of the business is not explained in the pleadings. The Authority's determination records that issues emerged between Ms Cawthorne and Ms Mill about Ms Cawthorne's use of sick leave on two days; her alleged abusive behaviour and the use of profanities in the workplace directed at Ms Mill. The Authority refers to the employment relationship problem as being about the clash of personalities between the two women and the process followed by the company leading to warnings and Ms Cawthorne's eventual dismissal on 11 August 2011. As noted, the Authority found in Ms Cawthorne's favour subject to a 25 per cent reduction in remedies resulting from her own contribution.

The law

[4] The principal ground the defendant relies upon in its application for security for costs is the plaintiff's impecuniosity. It is alleged that the plaintiff's financial situation is such that it would be unable to pay an award of costs if it was

unsuccessful in its challenge.

2 *Cawthorne v ALLWAZE Designs Ltd* [2014] NZERA Wellington 36.

[5] The principles applicable to applications for security for costs in this Court are well established. They have been applied in a number of recent cases.3 While there are no express provisions in the Employment Relations Act 2000 (the Act) or the Employment Court Regulations 2000 providing for such orders, the Court has consistently applied the security for costs provisions in the High Court Rules.

[6] Rule 5.45 of the High Court Rules provides, relevantly, that if a Judge is satisfied, on the application of the defendant, that a plaintiff is resident out of New Zealand or that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceedings, then the Judge may, if he or she thinks it just in all the circumstances, order the giving of security for costs.

[7] In past cases this Court has indicated a reluctance to order security for costs when the only ground for the application is the plaintiff's impecuniosity. That approach appears to have been based on the notion that such an order could prevent a plaintiff from pursuing a statutory remedy under s 179 of the Act, namely a

challenge to a determination of the Authority.4

[8] In more recent cases the trend has been to apply the same principles in relation to security for costs applications in this jurisdiction as those applicable to any civil case. Thus, in *Booth*, after noting counsel's submission that there are "numerous cases which suggest that orders for security for costs will be rare and only ordered in exceptional circumstances in this jurisdiction", Judge Inglis stated:5

... I prefer to approach the application having regard to whether either threshold test (overseas residence/inability to pay) is met and, if so, whether an order ought to be made having regard to the circumstances of the case ... the Court must assess both threshold tests and go on, in the exercise of its broad discretion, to have regard to any other relevant factors. ...

[9] Judge Inglis went on to cite from the Court of Appeal's judgment in

*McLachlan Ltd v MEL Network Ltd:*6

3 *Booth v Big Kahuna Holdings Ltd (No 2)* [2014] NZEmpC 43; *Robinson v Pacific Seals New*

Zealand Ltd [2014] NZEmpC 210, *Yan v Commissioner of Inland* Revenue [2014] NZEmpC

102; and *Kilpatrick v Air New Zealand Ltd* [2014] NZEmpC 48.

4 *Kereopa v Go Bus Transport Ltd* [2009] NZEmpC 51 at [6]; and *Argue v Premier Horse*

Transport (2007) Ltd [2009] NZEmpC 108 at [7].

5 At [10].

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

[15] The rule [for security for costs] 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 the 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.

[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.

[10] Reflecting similar sentiments, the Court of Appeal in *Snowdon v Radio New*

Zealand stated:7

... orders for security for costs are commonplace in civil proceedings where the plaintiff, if unsuccessful, may not be able to pay costs.

They always involve the Court balancing the plaintiff's right to have [her/his] claim heard against the need to give the defendant some protection for its costs in the event the claim fails.

[11] In an overview of the security for costs regime, the Supreme Court in *Reekie v Attorney-General* stated:8

[2] Security for costs can be required in the High Court and District Court when it appears that an order for costs against the plaintiff might not be able to be enforced (either because of the plaintiff's foreign residence or impecuniosity). The jurisdiction to require security poses something of a conundrum for the Courts. The poorer the plaintiff, the more exposed the defendant is as to costs and the greater the apparent justification for security. But, as well, the poorer the plaintiff, the less likely it is that security will be able to be provided and thus the greater the risk of a worthy claim being stifled.

[3] Applications for security for first instance proceedings call for careful consideration and judges are slow to make an order for security which will stifle a claim. A somewhat different approach has, however, been taken in respect of appeals.

[12] The dichotomy the Supreme Court was referring to in *Reekie* was also considered in *Pearson v Naydler* where the court was concerned with an application for security for costs against an impecunious plaintiff company.9 In England the impecuniousness of a natural person is not a ground for seeking security for costs but

under the relevant section in the (UK) Companies Act a judge may require a plaintiff

7 *Snowdon v Radio New Zealand* [2013] NZCA 108 at [10].

8 *Reekie v Attorney-General* [2014] NZSC 63; (2014) PRNZ 776.

9 *Pearson v Naydler* [1977] 1 WLR 889; [1977] 3 All ER 531.

company to give security if there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence. The provision can be compared with r 5.45 of the High Court Rules.

[13] In considering the relevant factors, Megarry V C stated:10

It is inherent in the whole concept of the section that the court is to have power to do what the company is likely to find difficulty in doing, namely, to order the company to provide security for costs which ex hypothesi it is likely to be unable to pay. At the same time, the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a larger company ... As against that, the court must not show such a reluctance to order security for costs that this becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. Litigation in which the defendant will be seriously out-of-pocket even if the action fails is not to be encouraged. While I fully accept that there is no burden of proof one way or the other, I think that the court ought not to be unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the section.

Submissions

[14] The defendant in the present case has sound reason for being concerned about the ability of the plaintiff to meet an adverse award of costs. In an affidavit in support of her application for security, Ms Cawthorne refers to an email Ms Mills sent to Ms Cawthorne's then solicitor (not Mr Govender) following the Authority's determination making an urgent plea that costs be allowed to lie where they fall. Ms Mills wrote:

Allwaze is a very small business operated essentially by me alone. I am the sole Shareholder of the company and the business make[s] no profit, nor does it have any assets beyond a tiny stock in hand. The business has considerable debts, including $25,000 in credit card loans. I am happy to share that evidence, and any other evidence about the business' lack of viability, with you. Frankly, the business risks bankruptcy as I have no personal assets, currently live in a caravan, and have considerable personal debts. The determination penalty alone ($2,928) is an extremely heavy burden for Allwaze to attempt to meet in the circumstances. Realistically a payment plan is needed to be agreed. Please advise urgently if you will be making an application for costs to the ERA which would likely add to the tremendous burdens the company, and I, suffer. This process has been severely stressing for me.

10 At 906, 537.

[15] The plaintiff has not paid the compensation and costs awards ordered by the Authority. Ms Cawthorne stated in her affidavit that she had made a recent visit to the plaintiff's premises where she had worked as an employee and she discovered "that there was no activity at the premises, it appeared to me that the respondent was no longer operating at that premises."

[16] The plaintiff does not deny the allegation that it is in serious financial difficulty. In an affidavit in support of the plaintiff's notice of opposition, Ms Mill deposed that, "Allwaze is now financially ruined and has ceased trading". The thrust, however, of Ms Wong's rather impressive submissions filed on behalf of the plaintiff and of Ms Mill's supporting affidavit is that the plaintiff's serious financial situation is the direct result of the actions of Ms Cawthorne. The submissions state:

12. Allwaze is a micro company. Its sole owner/operator (Ms Mill) suffered severe emotional stress and a resulting breakdown because of the defendant's abuse and harassment. Ms Mill was unable to continue operating the business in light of those actions and such evidence is submitted by Ms Mill. That is supported by correspondence from Dr Paul Brillhart, G.P. of Hastings, that Ms Mill's ... " [severe] depression has resulted from the issues and problems related to a single employee in her business".

13. It would be manifestly unfair for Allwaze to be required to make security (that it cannot afford) as a result of the defendant's

actions in bringing about the emotional breakdown of the sole operator resulting in the company's financial ruin. Allwaze asks the Court to consider the causation of its financial ruin in exercising its discretion to make any order for security.

[17] Turning to the merits, Ms Wong submitted that Allwaze "is a genuine plaintiff with good grounds for success in the Court." Ms Wong said that the plaintiff disputed the Authority's finding that the defendant's behaviour, which she described as "abusive", did "not fit in the range of considerations for serious misconduct involving instant dismissal".

[18] In another section of her submissions under the heading "Unequal resourcing", Ms Wong noted that Ms Cawthorne was on legal aid but Allwaze was not eligible for legal aid and "did not benefit from any expert legal or professional support either prior to, or in, the Authority investigation." The determination records that the plaintiff was represented at the Authority investigation by a "support person" (not Ms Wong). In all events, Ms Wong submitted:

29. The reality is that both parties are impecunious, but legal aid is only available to the defendant. This means that this impecunious employee has had access to expert help with the Authority and the Court, but this impecunious employer has had no similar access to legal or other expert representation and risks, were an order for security to be made, being denied access to the Court as well.

30. The provision of legal aid has resulted in an imbalance in resourcing and a manifestly unjust outcome. The injustice of that outcome would be concretised by preventing Allwaze from accessing this Court by making an order for security. Accordingly, the Court should place no emphasis on the role of legal aid in this case, and facilitate Allwaze's access to justice by declining to make any order for security.

Discussion

[19] The plaintiff alleges that its financial ruin was brought about solely by the actions of Ms Cawthorne. The authorities indicate that evidence that the defendant's actions caused the plaintiff's impecuniosity is a matter that can properly be taken into account in the balancing exercise; but in this jurisdiction the principle most commonly arises in the context of an employee plaintiff claiming that his/her impecuniosity was brought about by his/her dismissal.

[20] In the present case, the issue of whether the plaintiff's financial ruin was brought about by the actions of Ms Cawthorne, as alleged, is not a matter that was relevant to, or considered in, the Authority's determination, nor will it be a relevant issue in the challenge before this Court. The issue in this de novo challenge will be whether the plaintiff can succeed in satisfying the Court that the dismissal and other actions complained about by the defendant and upheld by the Authority were justified in terms of the test of justification in s 103A of the Act.

[21] In its statement of claim the plaintiff pleads:

13 ALLWAZE has suffered financial loss as a result of Ms Cawthorne's

actions and ALLWAZE seeks compensation of $15,000.

[22] It is unclear what the basis for that claim is. For the purposes of the present exercise relating to the security for costs application, however, I put the allegation to one side.

[23] In terms of the merits, it appears from the Authority's determination that in early August 2011 a serious disagreement arose between Ms Cawthorne and Ms Mill

over an aspect of Ms Cawthorne's sick leave entitlement. Ms Cawthorne had taken two days sick leave on account of stress. Ms Mill contended (wrongly, the Authority concluded) based on her understanding of advice she had allegedly received from the Ministry of Business, Innovation, and Employment (formerly the Department of Labour), that stress had to be work-related for it to be paid as sick leave. There may have been other issues, but the argument over sick leave appeared to be the dominant reason for the major fallout between the two women. Two written warnings were issued to Ms Cawthorne and on 11 August 2011 there was a serious altercation, resulting in Ms Cawthorne losing her temper and directing a tirade of offensive language at Ms Mill. The Authority carefully considered all of that evidence and concluded that Ms Cawthorne's behaviour did not constitute serious misconduct.

[24] As I understand Ms Wong's submissions, it will be contended by the plaintiff that, whatever the background, Ms Cawthorne's "abusive and harassing" behaviour towards Ms Mill on or around 11 August 2011 amounted to serious misconduct justifying instant dismissal. This Court cannot take the matter any further at this stage but obviously much will depend upon the evidence presented at the de novo hearing. Issues of credibility are likely to be involved.

[25] While it cannot be said that the claim is without merit, it is apparent from the determination that the conduct in question was carefully canvassed and considered by the highly experienced Authority Member who upheld Ms Cawthorne's grievance, subject to the 25 per cent deduction for contributory conduct.

[26] I place no weight on the plaintiff's submission appearing to allege that because the defendant is on legal aid there will be an "inevitable manifestly unjust outcome if security for costs is ordered". Whether or not Ms Cawthorne is on legal aid will have no effect on the plaintiff's "access to legal or other expert representation". Security for costs should not be seen as a vehicle for off-setting any perceived injustice in the legal aid system.

[27] Taking into account all the matters raised in submissions and touched upon in this judgment I consider that the defendant is entitled to have some protection for its costs in the event that the plaintiff's claim fails.

[28] The amount to be fixed for security is left in the unfettered discretion of the Court but security should be such as the Court thinks

just in all the circumstances of the case.

[29] Although the plaintiff's financial position in the present case appears to be parlous, it may still be able to borrow funds from some other source to provide security. It is often not until a litigant is facing a deadline fixed by the Court that the prospect of such an option is able to be reliably explored.

[30] In *Keary Developments Limited v Tarmac Construction Limited*, the English Court of Appeal was concerned with an application for security for costs against a plaintiff company which was unlikely to be able to pay the defendant's costs if the defendant was successful in its defence. The Court stated:11

However, the Court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation ...

[31] The Court of Appeal in *Keary* also endorsed Lord Diplock's approval in *M V Yorke Motors (a firm) v Edwards*, of the following remarks of Brandon L J in the Court of Appeal:12

The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.

[32] In *M V Yorke Motors* the House of Lords accepted that it would be a wrongful exercise of discretion to order security in an amount which a litigant would never be able to pay, "because it would be tantamount to giving judgment for the [other party] notwithstanding the court's opinion that there was an issue or question in dispute

which ought to be tried". The following submission was accepted:13

11 *Keary Developments Limited v Tarmac Construction Limited* [1995] 3 All ER 534 (CA Civ) at

540.

12 *M V Yorke Motors (a firm) v Edwards* 1 WLR 444 at 449; [1982] All ER 1024 [HL] at 1028.

13 At 1027.

A [litigant] cannot complain because a financial condition is difficult for him to fulfil. He can complain only when a financial condition is imposed which it is impossible for him to fulfil and the impossibility was known or should have been known to the court by reason of the evidence placed before it.

[33] Similar observations were made by the Supreme Court in *Reekie* in relation to security for costs on appeal involving impecunious individual litigants:14

43. An appellant without liquid assets may be required to borrow money to provide security. It might be appropriate to investigate whether it is reasonable for another party (such as a related family trust or close relative) to provide funding ... proof that security cannot be provided may require full disclosure of financial circumstances and the sources of funding relied on by the appellant to support his or her general lifestyle.

[34] Ms Mill has not deposed, nor has it been established on the evidence before me, that it would not be possible for the plaintiff company to raise modest security from some other source.

Conclusion

[35] In all the circumstances and taking into account the likely amount of any costs award against the plaintiff if it is unsuccessful, I consider that an appropriate amount to fix for security in this case is $2,000.

[36] The plaintiff's challenge is stayed unless the amount of $2,000 is lodged with the Registrar of the Employment Court at Wellington on or before 31 March 2015.

[37] If paid, the said amount is to be held in an interest-bearing account until further order of the Court.

[38] Costs have not been sought on the application and, accordingly, they are reserved.

A D Ford

Judge

Judgment signed at 2.30 pm on 18 February 2015

14 *Reekie v Attorney-General*, above n 8.