



Employment Court of New Zealand

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Davidson v Great Barrier Airlines Limited [2017] NZEmpC 46 (5 May 2017)

Last Updated: 11 May 2017

IN THE EMPLOYMENT COURT AUCKLAND

[\[2017\] NZEmpC 46](#)

EMPC 316/2016

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER of an application for security for
costs

BETWEEN ANNA DAVIDSON Plaintiff

AND GREAT BARRIER AIRLINES LIMITED
Defendant

Hearing: On the papers filed on 27 March, 19, 20 and 28 April
2017

Appearances: G Bennett, advocate for plaintiff
M Robins, counsel for defendant

Judgment: 5 May 2017

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

Background

[1] These proceedings involve challenges to two determinations of the

Employment Relations Authority (the Authority). The first determination was dated

4 November 2016 in which the Authority decided that Ms Davidson was not constructively dismissed by the defendant, Great Barrier Airlines Ltd. Costs were reserved in that determination as was the issue of whether a penalty should be imposed.¹ The second determination is dated 9 December 2016. In that determination Ms Davidson was ordered to pay to the defendant a contribution towards its costs of \$7,000.² In addition, Mr Bennett, who was acting as advocate for Ms Davidson, was ordered to pay a penalty of \$4,000 for obstructing and

delaying the Authority in its investigation. Of this sum \$2,000 was to be paid to

¹ *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland 362.

² *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland 403.

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Great Barrier Airlines Ltd, and the balance of \$2,000 was to be paid to Ms Davidson,

Mr Bennett's own client.

[2] The challenge to both determinations has been made within time by Ms Davidson. However, Mr Bennett has not filed any challenge to that part of the second determination in which a penalty was imposed upon him. While the challenge by Ms Davidson in relation to

the second determination seeks a hearing de novo, none of the remedies sought by Ms Davidson in the challenge cover the penalties. It is clear that she has only challenged the determination as it negatively affects her.

[3] In addition to the substantive proceedings, Ms Davidson applied to the Court for an interlocutory order staying execution of the costs award against her. Following directions from the Court, Ms Davidson subsequently filed an affidavit in support of her application and at a directions conference on 7 March 2017, it was agreed that the application could be dealt with on the papers. The defendant, by that stage, had filed a notice of opposition to Ms Davidson's application for a stay of execution of the costs award. At the directions conference, in order that the Court could deal with the application on the papers, timetabling was also set for the filing of submissions by Mr Bennett in support of the application. Timetabling was also set to enable Ms Robins, counsel for the defendant, to file any submissions in answer. Mr Bennett failed to file submissions within the time set and despite prompting from the Court registry, did not file any submissions at all. In view of that default, the application for stay of execution was then treated as having lapsed.

[4] On 27 March 2017, the defendant filed an application for security for costs against Ms Davidson. The application is supported by an affidavit of Graham Reynolds, who is the managing director of the defendant, and is sworn and dated 24

March 2017. In addition, Ms Robins has filed a memorandum containing her submissions in support of the application.

[5] No notice of opposition to the application for security for costs has been filed by Ms Davidson. However, on 19 April 2017, an inadequately executed affidavit by her was filed. The affidavit had been sworn on 31 March 2017 before a Justice of

the Peace, but the Justice of the Peace and Ms Davidson had not signed or initialled each page of the affidavit as would normally be required.³ On 20 April 2017 Mr Bennett filed a memorandum opposing the application by the defendant for costs. This memorandum set out submissions relating to the application for security for costs. Both this memorandum and the affidavit of Ms Davidson had been filed well outside the time required to do so and there was no application for leave to file out of

time. Repeated requests by the Court registry of Mr Bennett to file a notice of opposition were not responded to by him.

[6] At the directions conference on 7 March 2017, in addition to timetabling being set for submissions to be filed in respect of the application for stay of execution, timetabling had also been set for the substantive hearing of this matter and a fixture was allocated for 10 and 11 May 2017. The timetabling directions required Ms Davidson to prepare and file a common bundle of documents six weeks prior to the hearing date allocated. In addition, briefs of evidence were to be prepared by Ms Davidson and filed and served also no later than six weeks prior to the hearing. The defendant was then to file its briefs of evidence no later than four weeks prior to the hearing. A bundle of documents was filed by Mr Bennett on 19

April 2017 in breach of the time limit set for doing so at the directions conference. No briefs of evidence from Ms Davidson have yet been filed. On 28 April 2017, Ms Robins filed a further memorandum seeking to have the application for security for costs dealt with by the Court on an unopposed basis in view of Ms Davidson's failure to respond adequately (through her advocate Mr Bennett), to file a notice of opposition. In addition, Ms Robins expressed concern at the failure of Mr Bennett, on behalf of Ms Davidson, to comply with the directions given in preparation for the substantive hearing; and sought to have the fixture vacated. While Mr Bennett has received a copy of Ms Robins's memorandum of 28 April 2017, no response has been received from him.

[7] Clearly the defendant is now seriously prejudiced in preparation for the hearing of the substantive proceedings and that fixture has been vacated. The

application for security for costs now needs to be considered.

3 [High Court Rules 2016](#), r 9.76(4).

Grounds for application

[8] The application for security for costs is based on a number of grounds. The primary allegation is that Ms Davidson is unable to pay any costs that might be awarded by the Court in the event that she is unsuccessful and that she has little prospect of success in her de novo challenges. Additional grounds are that Ms Davidson has not paid the costs awarded against her by the Authority despite her application for the stay of the costs award having lapsed. In the affidavit of Mr Reynolds, filed in support of the application, he refers to the frustrating and time-consuming nature of the proceedings to date and the expense which has been incurred by his company. He also points to the fact that Mr Bennett has not paid the penalty that he was ordered to pay.

[9] Insofar as the merits of the challenge are concerned, this is a case where Ms Davidson resigned her employment and subsequently claimed that she had been constructively dismissed. The Authority in its determination held that Ms Davidson had resigned prematurely in the face of appropriate attempts by the employer to restructure the administration functions of the company, and also held that Ms Davidson did not engage appropriately with the employer in respect of those efforts.

Grounds of opposition

[10] No notice of opposition to the application has been filed. Ms Davidson's affidavit filed on 19 April 2017 (even though not adequately executed) does not specifically answer the matters raised in the application for security for costs and embarks on an attempt to attack the credibility of Mr Reynolds not only as to the matter set out in his affidavit in support, but also the evidence which he gave before the Authority. Ms Davidson believes that no security for costs should be ordered in view of Mr Reynolds's lack of credibility. Insofar as the non-payment of the costs order in the Authority is concerned, Ms Davidson states that she has failed to pay these costs because she disagrees with the decision of the Authority. These are matters which will need to be raised and considered at the substantive hearing.

[11] In her earlier affidavit in support of the application for stay of execution filed on 22 February 2017, Ms Davidson had set out her financial circumstances, which confirmed that she was in difficulty financially. It is clear from that affidavit that she would be unable to pay any costs awarded against her in the event that she was unsuccessful in her challenge. This is partly confirmed by the fact that she has been unable to pay the costs award of the Authority, even though she has stated that she does not intend to pay it in view of her disagreement with the determination.

Principles applying

[12] This 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.⁴ As no procedure for ordering security is provided for in the [Employment Relations Act 2000](#) (the Act), or the [Employment Court Regulations 2000](#) (the Regulations), the application is to be dealt with in accordance with the procedure provided for in the [High Court Rules 2016](#).⁵

[13] A threshold test applies. An order can be made if the plaintiff is resident out of New Zealand or 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. If the threshold in either respect is met, the Court may order the giving of security for costs if it considers that such an order is just in all of the circumstances. In this case the defendant's application is advanced on the basis that Ms Davidson will be unable to pay its costs if the challenge fails.

[14] In deciding whether it is just in all of the circumstances to make an order, the

Court ought to include in the exercise of its discretion regard to the merits of the challenge.

4. *Oldco PTI Ltd v Houston* [2010] NZEmpC 161 at [9]; *Polzleitner v WWW Media Ltd* [2011] NZEmpC 139 at [6]. See also *Air New Zealand Ltd v Milne* [2012] NZEmpC 25 at [29];

5 [Employment Court Regulations 2000](#), reg 6 and [High Court Rules 2016](#), r 5.45(2).

[15] There is a need to balance the interests of the plaintiff and the defendant in the overall exercise. As the Court of Appeal observed in *A S McLachlan Ltd v Mel Network Ltd*:⁶

[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.

[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.

[16] Ms Robins and Mr Bennett have not departed from these principles in their submissions. Mr Bennett in his submissions did not specifically address Ms Davidson's precarious financial position. He concentrated on what he perceives to be the respective merits of the parties in the challenge. In particular he has referred to the way in which the Authority is alleged to have dealt with the matter and its exclusion of relevant evidence which Ms Davidson should have been permitted to have admitted. He also submitted that in pursuing an application for security for costs in this case, the defendant is trying to ensure that the plaintiff is not given the opportunity or will be unable to pursue her claim. He further submitted that the defendant's present financial position has been caused by the actions of the defendant.

[17] Ms Robins in her submissions pointed to the plaintiff's clear impecuniosity particularly in view of the fact that Ms Davidson in her earlier affidavit had stated that she would struggle to pay the costs ordered by the Authority into Court if ordered as a condition of the stay of execution if granted. Secondly, Ms Robins submitted that Ms Davidson's challenge has little prospect of success. She pointed in particular to the fact that the plaintiff refused to participate in a consultation process needed for a proposed restructuring of the defendant's business and that Ms Davidson resigned of her own volition during that consultation process. She also

submitted that while being impecunious, Ms Davidson has been able to mitigate her

6 *A S McLachlan v Mel Network Ltd* [2002] NZCA 215; [2002] 16 PRNZ 747.

alleged loss in any event by obtaining alternative employment. Ms Robins also

criticises Ms Davidson's attack on the credibility of Mr Reynolds.

Findings and disposition

[18] Having considered the documents which have been filed, inadequate as they are in respect of Ms Davidson as a result of Mr Bennett's deficiencies as her advocate, it is clear that one of the threshold tests for an order for security for costs, namely Ms Davidson's impecuniosity, has been established. Insofar as the merits of her challenge are concerned, it is difficult to make any final assessment in that regard. The matter has been the subject of a well reasoned determination of the Authority which has rejected Ms Davidson's claim that she was constructively dismissed. The determination refers to her deficiencies in the restructuring process which the defendant was entitled to undertake. Despite those matters now belatedly raised by Mr Bennett in his memorandum, which will need to be considered at the substantive hearing of this matter, I am of the view that on an inferential basis the merits of Ms Davidson's challenge are not strong.

[19] Clearly Ms Davidson will have difficulty in meeting any costs award against her if she is unsuccessful in her challenge. I am not prepared to accept Mr Bennett's submissions that her impecuniosity has been caused by the actions of the defendant. As Ms Robins has pointed out in her submissions, Ms Davidson has been able to obtain alternative employment on slightly better financial terms than existed while she was employed by the defendant.

[20] In deciding whether the interests of justice prevail in favour of making an order for security for costs, consideration needs to be given to the unsatisfactory nature in which Ms Davidson, through her advocate, has conducted the proceedings to date. This has led to her application for stay of execution having to be considered as lapsed after the defendant incurred costs in initially defending that application. Now there is the fact that the substantive fixture has had to be vacated because of failure to comply with timetabling directions. These actions have led to the defendant having to incur unnecessary extra costs. Insofar as Ms Davidson's failure to pay the costs awarded by the Authority is concerned, that can now be the subject

of enforcement proceedings by the defendant in view of the fact that Ms Davidson's application for stay of execution has lapsed. However, in view of the way the proceedings have progressed, it must be a real concern that if Ms Davidson is not successful in her challenge the defendant will have difficulty in enforcing any award of costs against her by this Court. It has already had to incur extra unnecessary costs which aggravate the position which will prevail if it is successful in defending the challenge.

[21] The Court is not unsympathetic to either party's position in this matter. However, the overall interests of justice must prevail in the exercise of the discretion. Ms Robins, recognising that in making such orders in the past the Courts have taken a moderate approach, seeks an order of \$15,400 as security for costs to cover the projected two-day hearing of the matter. The defendant also seeks an order for stay of the proceedings until such time as the awarded sum is paid or security for the sum is given, and payment of the costs award of the Authority is made. Alternatively, the defendant seeks that the stay continues until such time as the plaintiff pays the amount into Court. As already indicated, it is open to the defendant to take whatever enforcement steps it wishes in respect to the Authority's costs award. Insofar as the amount of security for costs in these proceedings is concerned, I consider that an appropriate sum to fix should be \$7,500. While Ms Davidson's impecuniosity founds the order for security for costs, she is now in employment and if intending to pursue her challenge she should be in a position to pay or secure an award to this extent.

[22] Accordingly, the plaintiff, Ms Davidson, is ordered to pay into Court the sum of \$7,500. This will be held by the Registrar of the Employment Court on interest-bearing deposit until further order of the Court. That sum is to be paid into Court within seven days from the date of this judgment. Ms Davidson's challenge is stayed until the payment is made or there is a further order of the Court. In any event, a directions conference is to be convened at the expiry of one month from the date of this judgment to monitor progress in the matter. If the security has been paid, then consideration will need to be given as to how to progress the challenge to completion. If security is not paid within the time specified, then consideration will

need to be given at that conference as to whether Ms Davidson's challenge should be dismissed.

[23] Costs are at this stage reserved.

M E Perkins

Judge

Judgment signed at 3 pm on 5 May 2017