Employment Court of New Zealand

Huang v Li [2014] NZEmpC 128 (14 July 2014)

Last Updated: 27 July 2014

IN THE EMPLOYMENT COURT WELLINGTON

[2014] NZEmpC 128

WRC 26/12

IN THE MATTER OF	an application for a rehearing
AND IN THE MATTER	of an application for stay of proceedings
AND IN THE MATTER	of an application for security for costs
BETWEEN	WANZHI HUANG Applicant
AND	FEI LI Respondent

Hearing:	(on the papers by documents dated 31 October 2012, 12 November 2012, 24 May 2014 and 31 May 2014)
Appearances:	Applicant in person G Ogilvie, advocate for the respondent
Judgment:	14 July 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment decides an interlocutory application for orders as to security

for costs and stay of the applicant's application for rehearing.

[2] The applicant originally pursued a claim against the respondent in the Employment Relations Authority (the Authority) for arrears of wages and for unjustifiable dismissal.1 The Authority sustained his claims and awarded him remedies totalling more than $25,000. The respondent challenged that determination

and the matter proceeded before Judge Ford as a hearing de novo. In his decision,

1 *Huang v Li t/a Eland Internet Café and Games* [2012] NZERA Wellington 35.

Judge Ford upheld the respondent's challenge and dismissed all of the applicant's

claims.2

[3] The applicant then initiated two further proceedings. The first was an application to the Court of Appeal for judicial review of Judge Ford's decision. That judicial review was advanced on eight grounds, including irrationality, failure to properly consider relevant

evidence, taking into account irrelevant matters, placing weight on unreliable evidence, breach of the Privacy Act 1993 and bias. The relief sought was that Judge Ford's decision be set aside. In its decision of 7 May 2013, the Court of Appeal dismissed Mr Huang's application for judicial review, and

ordered him to pay costs to Mr Li.3 It will be necessary to refer to aspects of the

Court of Appeal's decision more fully later in this judgment.

[4] The second proceeding initiated by the applicant was for a rehearing of the matter in this Court. This application is advanced on the grounds that fresh evidence is available and that Judge Ford made five findings of fact which were incorrect. The relief sought is that Judge Ford's decision be set aside and a rehearing held. The application is supported by an affidavit of 17 October 2012 wherein the proposed grounds for rehearing are described in detail. The respondent opposes the application for rehearing.

[5] This is the context in which the present applications must be considered.

The respondent's applications

[6] The respondent applies for:

a) An order for payment to the Court by the applicant of $10,000 as security for costs with regard to the applicant's application for rehearing.

b) A stay of the application for rehearing until the applicant has paid into the Court any amount ordered as security for costs for this matter,

2 *Li vHuang* [2012] NZEmpC 166 [Employment Court judgment].

3 *Huang v Li* [2013] NZCA 135, (2013) 10 NZELR 514 [Court of Appeal judgment].

together with any costs awarded by the Court in relation to the original hearing in the Court.

c) The respondent also seeks costs in respect of the present applications.

[7] The grounds relied on by the respondent are elaborated on in his submissions, which may be summarised as follows:

a) Reference is made to well-known decisions that outline principles which must be considered when an application for security for costs is made.

b) It is submitted that Mr Huang has been declined New Zealand residency, and is required to leave New Zealand for reasons directly related to the conclusions reached in the Employment Court, namely the forging of documents and for working in paid employment (unrelated to the parties in this case) without a Work Permit.

c) The applicant has already advised the Court that he is unable to pay the filing fee for his application for a rehearing, and has further advised the applicant on a number of occasions that he would not be paying any costs awarded against him.

d) The applicant has had costs of $2,438 awarded against him by the

Court of Appeal and has refused to pay them.

e) There is no prospect of the applicant paying any costs awarded by this

Court against him.

f) It is unjust for multiple orders for costs to be made in favour of Mr Li without Mr Huang paying them, and for Mr Huang to be continuing to be threatening to continue with litigation, if necessary, to the Supreme Court.

g) It is appropriate for orders for security for costs and stay to be made pending any further hearing, and to require costs already awarded to be paid into Court.

h) The applicant's financial circumstances are not as a result of the matters giving rise to his first personal grievance. Evidence submitted to the Employment Court was that the respondent had full-time paid employment throughout the period considered by the Court.

i) The merits of the application are balanced strongly in favour of the respondent, because:

- The new evidence now sought to be introduced by the applicant is not new evidence. Evidence of that kind was presented and considered by the Employment Court in its substantive decision.
- The applicant had every opportunity to produce such evidence from any additional witnesses at the initial Court hearing, and was clearly reminded of this by the presiding Judge.
- The initial judgment shows a lack of credibility and good faith on the part of the applicant.4
- The decision of the Court of Appeal also suggests that the application for rehearing has little merit.

The applicant's response

[8] In response, Mr Huang submits as follows:

a) The application for rehearing is bona fide and has high prospects of success.

b) An order for security for costs would prevent Mr Huang from pursuing his application.

c) Section 27 of the New Zealand Bill of Rights Act 1990 codifies a right to justice. An order for security of any amount would deny Mr Huang's

access to the Court.

4 Reference is made to paras [36]-[38], and [53] of the substantive Employment Court judgment.

d) Such decisions as *Liu v South Pacific Timber 1990 Limited* support Mr Huang's opposition to the present application, when it is stated that access to the Courts for a genuine plaintiff is not lightly to be denied.5

e) The substantive decision is under challenge and should not be relied on.

f) The Court should now determine the application for rehearing on the papers.

g) Reference was made to the detailed information contained in Mr Huang's affidavit as filed in support of his application for rehearing, dated 17 October 2012.

General principles

[9] Although there is no express provision in the Employment Relations Act

2000 (the Act) that provides for the making of orders as to security for costs, it has been regularly accepted in this Court that there is a power to make such orders and to stay proceedings until security is given. Such applications are dealt with "as nearly as may be practicable" in accordance with the relevant High Court Rules.6 Rule

5.45(2) of the High Court Rules provides that an order may be made if either a

plaintiff is resident out of New Zealand or that there is reason to believe a plaintiff will be unable to pay the defendant's costs if the plaintiff's proceedings do not succeed.

[10] The general principles applicable to applications for security for costs were conveniently summarised by Judge Inglis in *Liu v South Pacific Timber (1990) Ltd*:7

[10] In exercising its broad discretion the Court must have regard to the overall justice of the case, and the respective interests of both parties are to be carefully weighed. The balancing exercise was summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd* as follows:

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

5 *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129.

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

7 *South Pacific Timber (1990) Ltd*, above n 5 (footnotes omitted).

which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.

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.

[11] The merits of the plaintiff's case are to be considered in the context of an application for security for costs. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions, any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.

[12] Concerns relating to access to justice apply across all courts. As the Chief Judge observed in *Mackenzie v Bayleys Real Estate Ltd*: "ultimately, the particular decision must be on its own merits and the justice of the case."

[11] The Court has a broad discretion which it must exercise having regard to the respective interests of both parties to the case, and the merits of the case.

[12] It is also well established that the Court has a discretion to dismiss proceedings if a party fails to comply with an order to give security for costs.8

Furthermore, r 7.48 of the High Court Rules provides that where a party fails to comply with an interlocutory order, the Court may

make such order as it thinks just, including an order striking out the pleadings of a defaulting applicant or plaintiff.9

Discussion

[13] On the threshold question of whether there is reason to believe Mr Huang would be unable to pay Mr Li costs if the application for rehearing is not granted, the clear evidence is:

a) Mr Huang has stated that he is "bankrupt in reality".

b. He informed this Court that he was unable to pay the filing fee in respect of his application for a rehearing.

c. He has failed to pay the sum of $2,438 costs, as awarded against him by the Court of Appeal.

[14] I conclude from that evidence that Mr Huang would be unable to pay Mr Li's

costs if Mr Huang's application for rehearing does not succeed.

[15] It is next necessary to deal with the issue of the potential merits of Mr Huang's application for rehearing. The Court cannot determine that application at this stage, but it is appropriate to have regard to its prospects of success.

[16] In doing so I note that what any applicant for a rehearing must establish is not whether there is a "mere possibility" of a miscarriage of justice.10 The question is whether there has been a miscarriage of justice.11 Given other processes available to a party who is dissatisfied with a judgment, the power to order a rehearing is one which should not be taken lightly, because it potentially involves setting aside a judgment which would otherwise be final and binding.12

[17] A convenient starting point when assessing the merits of the rehearing application is the finding made by the Court of Appeal in connection with the application for judicial review. There, the Court stated:13

Quintessentially, this was a case which depended on the view taken by Judge Ford about the credibility of the parties. He decided this critical issue in favour of the evidence of Mr and Mrs Li. To the extent that there may have been conflicts with documentary evidence, the Judge accepted the explanations given by Mr and Mrs Li for such conflicts. We add there is no foundation for the allegations of bias, predetermination and irrationality. The decision of the Employment Court was an orthodox approach to conflicting oral and documentary evidence. All the immigration issues were properly taken into account in establishing the factual context and in assessing issues of credibility.

[18] The Court of Appeal reached its conclusions on the basis of the evidence which was before the Employment Court at the substantive hearing. But the Court of Appeal's finding is nonetheless significant for present purposes.

[19] Mr Huang alleges in his supporting affidavit that there is fresh evidence, and that more than 30 witnesses are likely to be summonsed for a rehearing. As to this it

is relevant to note:

10 *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] NZCA 390; [1995] 2 ERNZ 85 (CA) at 89.

11 *Cavalier Carpets NZ Ltd v NZ (Except Taranaki etc) Woollen Mills etc IUOW* [1989] 2 NZILR 378 (LC).

12 *Yong t/a Yong and Co Chartered Accountants v Chin* [2008] ERNZ 1 (EmpC) at [13]-[14].

13 Court of Appeal judgment, above n 3, at [23].

a) Judge Ford considered evidence of the kind alluded to by Mr Huang.

Simply calling yet more witnesses to say the same thing as witnesses who were called previously does not mean that a different conclusion is likely to be reached by the Court. A comparison of the evidence of intended witnesses (as set out in Mr Huang's affidavit) indicates that the proposed evidence is not materially different from that which was considered by Judge Ford.

b) In any event, it is well established that where it is alleged there is fresh evidence, an applicant for rehearing must establish that such evidence could not with reasonable diligence have been obtained at the trial.14

In this instance, the Court specifically raised with Mr Huang whether he proposed to call further evidence. He did not do so. One witness was reluctant to attend, but no witness summons was sought.

c) The prospect of Mr Huang persuading the Court that having regard to fresh evidence the Court should conclude there has been a miscarriage of justice is low.

[20] Mr Huang also alleges that there were incorrect findings as to fact, as described by him in his supporting affidavit.15 The Court has carefully considered the points made. What Mr Huang is asserting is that incorrect assessments were made of contested evidence. As the Court of Appeal has noted, these were credibility issues which were for the trial Judge to resolve, which he did. It is very unlikely that this factor will persuade the Court that there are circumstances

amounting to a miscarriage of justice.

[21] In summary, I consider that the grounds raised in Mr Huang's application for rehearing are weak.

[22] I accept the submission made by Mr Li's advocate that Mr Huang's financial

position is not caused by the matter which is the subject of the proceeding.

[23] Mr Huang raises an access to justice issue. This is always a very important factor when considering an application for security for costs. The case law is clear that any order for substantial security which has the effect of precluding a plaintiff from pursuing a claim should only be made after careful consideration and in a case where the claim has little chance of success.16 I have already found that the prospects of success in this instance are weak.

[24] The Court, when considering access to justice issues, must also consider the position of Mr Li. He has now incurred expense in defending proceedings in attending the investigation meeting in the Authority, and in defending proceedings in this Court and in the Court of Appeal.

[25] Standing back and undertaking the broad assessment which the Court is required to undertake, the balance is firmly in favour of Mr Li. It would be contrary to justice for Mr Huang to be permitted to proceed with his application for rehearing without providing appropriate security for costs against the possibility that his application will fail.

[26] The amount sought is $10,000; I consider this to be a reasonable sum for security, given an indication that Mr Huang proposes to call 30 witnesses.

[27] I turn to the issue of the application for stay of the application for rehearing. Two issues arise from Mr Li's application:

a) His first request is that the stay should continue until such time as the amount fixed as security for costs, $10,000, has been paid. That is an uncontroversial request where an order for security has been made, and it should be made in this instance. The factors I have already considered lead to the conclusion that the interests of justice require the application to be stayed until this amount is paid.

b) Secondly, a stay is sought until costs awarded by the Court in relation to the original hearing have been paid. The costs judgment in respect of the Employment Court hearing will be issued contemporaneously

with this judgment.17 The amount ordered to be paid by Mr Huang to Mr Li in respect of the Employment Court proceeding is $6,500 plus GST, and disbursements of $1707.15, a total of $9,182.15. I do not consider that it is in the interests of justice that an order for stay be contingent on this sum being paid. It should be capable of enforcement by reference to normal means of enforcement.

[28] I award $750 as a contribution to Mr Huang's costs in respect of the present

applications.

[29] In summary, the following orders are made:

a) Mr Huang is to pay security for costs in respect of his application for rehearing in the sum of $10,000.

b) Such sum is to be lodged with the Registrar of the Employment Court at Wellington, and held on an interest bearing account until further order of the Court.

c) Such sum is to be lodged on or before 8 August 2014.

d) The application for rehearing is stayed until the sum of $10,000 has been paid to the Registrar as above.

e) If the security is not paid to the Registrar by the date specified above the application for rehearing will be struck out.

f) Mr Huang is to pay Mr Li the sum of $750 in respect of the present applications.

B A Corkill

Judge

Judgment signed at 3.45 pm on 14 July 2014