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Khurana v Singh [2016] NZEmpC 91 (20 July 2016)

Last Updated: 21 July 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 91](#)

EMPC 59/2016

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 DEEPAK KHURANA Plaintiff

AND SURENDER SINGH Defendant

EMPC 61/2016

AND 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

AND BETWEEN JAG RAWAT Plaintiff

AND SURENDER SINGH Defendant

Hearing: On the papers filed on 6, 7 and 26 April; 3 and 16 June
 2016

Appearances: P Swarbrick, counsel for Deepak Khurana
 A Gallie, counsel for Jag Rawat
 S Laurent, counsel for defendant

Judgment: 20 July 2016

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

DEEPAK KHURANA v SURENDER SINGH NZEmpC AUCKLAND [\[2016\] NZEmpC 91](#) [20 July 2016]

Introduction

[1] These proceedings involve challenges by the two plaintiffs, Deepak Khurana and Jag Rawat, against a determination of the Employment Relations Authority (the Authority) dated 10 February 2016.¹ From the defendant, Surender Singh's point of view, these proceedings have gone seriously awry.

[2] The present applications dealt with in this judgment are applications by Mr Singh for security for costs against Mr Khurana and Mr Rawat respectively. However, in order to deal with the applications, some retracing of the history of the proceedings is necessary. Some additional comment on the company liquidation of Mr Singh's former employer is also necessary. Presently, the Authority's

investigation into Mr Singh's employment relationship problems is held up pending the outcome of the present challenges by Mr Khurana and Mr Rawat.

History of the proceedings

[3] In a determination of a preliminary issue by the Authority dated 27 May

2015, the Authority held that the underlying and true nature of the relationship between Mr Singh and Corporate Energy Ltd t/a Caltex Glenbrook (Corporate Energy) was that of employment.² Mr Singh had his employment with Corporate Energy terminated on 29 November 2012. The Authority held that it had jurisdiction to investigate Mr Singh's employment-related claims against Corporate Energy and it was clearly intending to commence an investigation into Mr Singh's claims. There was no suggestion that any person or entity other than Corporate Energy was Mr Singh's employer.

[4] The Authority's investigation went into abeyance when Corporate Energy filed a challenge to the determination by filing a statement of claim with the Employment Court on 24 June 2015. Mr Singh filed a defence to the challenge and following directions conferences the challenge was set down for hearing. That

hearing was due to commence on 7 December 2015. Corporate Energy did not

1 *Singh v Corporate Energy Ltd (In Liquidation) formerly known as Corporate Energy Ltd t/a Caltex*

Glenbrook [2016] NZERA Auckland 38.

2 *Singh v Corporate Energy Ltd t/a Caltex Glenbrook* [2015] NZERA Auckland 152.

comply with the timetabling requirements for that hearing and Mr Singh, through his legal counsel, filed an interlocutory application on notice to strike out or dismiss the proceedings. The outcome of the hearing on 7 December 2015 is recorded in an oral judgment of the Court on that date.³ That judgment records some actions taken by or on behalf of a director of Corporate Energy other than the present plaintiffs to delay the hearing. Prior to the hearing, Corporate Energy went into liquidation and the

liquidator filed a notice of discontinuance of the challenge which brought it to an end. Accordingly, there was no need to deal with the application to strike out the proceedings. In addition to the proceedings being discontinued, the Court made an order for costs against Corporate Energy in favour of Mr Singh and the matter was referred back to the Authority to enable steps which were necessary to then be taken if Mr Singh wished to continue with the matter.

[5] As Corporate Energy was in liquidation, for Mr Singh to continue with his claim in the Authority it would have been necessary to obtain the consent of the liquidator.⁴ Alternatively, if the liquidator refused to give such permission, as he did, then an application would need to be made to the High Court for an order authorising Mr Singh to continue with the proceedings before the Authority. Another alternative would have been to simply persuade the liquidator to admit Mr Singh's claims. This would then have enabled him to participate in the liquidation with other creditors. The liquidator's first report shows that Mr Singh's claims are listed as a

contingent liability. Part of his claim, if admitted or proved, may have priority over other creditors as it relates to wages and holiday pay.

[6] In my oral judgment dated 7 December 2015, I indicated that if the time came to enforce any monetary award, Mr Singh may investigate pursuing the directors and shareholders of Corporate Energy. That indication was made on the basis that there appeared to be some inference from the actions of Corporate Energy, in delaying the Authority's investigation by challenging its determination, that the assets of Corporate Energy may have been dealt with in a way that would defeat the creditors.

Any such action against directors or shareholders would need to be made in the

3 *Corporate Energy Ltd (In Liquidation) (formerly known as Corporate Energy Ltd t/a Caltex*

Glenbrook) v Singh [2015] NZEmpC 218.

4 [Companies Act 1993, s 248\(1\)\(c\)\(i\)](#).

High Court exercising its powers of supervision under the [Companies Act 1993](#). Primarily the liquidator would be responsible for pursuing such an action. In default, Mr Singh could raise these issues at the same time as he sought an order authorising him to continue with his proceedings against Corporate Energy. However, Mr Singh would need to give careful consideration to costs incurred in pursuing any such claim against the directors in this way. Even if successful, any recovery procured from the directors might simply have the effect of providing funds for distribution to all of the creditors and not just Mr Singh.

[7] Instead of obtaining permission to continue his claims against the company in liquidation, Mr Singh, through his legal counsel, then made an application to the Authority that the two plaintiffs in the present proceedings be substituted for Corporate Energy and Corporate Energy be removed as a party to the Authority proceedings. In a determination of the Authority dated 10 February 2016, Corporate Energy (then in liquidation) was struck out as a respondent to the proceedings in the

Authority.⁵ Mr Khurana and Mr Rawat, as former directors of Corporate Energy,

were joined as respondents. There was a direction that the Authority would then continue its investigation against the joint respondents, Mr Khurana and Mr Rawat. The basis upon which the continuation of the investigation was to be made and the remedies to be considered are not known. From the determination it appears a belated consideration may have been contemplated as to the true

employer of Mr Singh, although the Authority had already determined that Corporate Energy was the true employer of Mr Singh. These are matters which will need to be considered when the plaintiffs' substantive challenges are heard.

[8] As indicated, Mr Khurana and Mr Rawat have now filed challenges to the determination. It is alleged that they had ceased to be directors and shareholders of Corporate Energy well before the Authority determinations initially found Corporate Energy as the true employer and subsequently joined them as parties. Mr Khurana had ceased to be a shareholder approximately five months before and a director approximately four months before. Mr Rawat had ceased to be a shareholder and director over two years before. Both were directors and shareholders when Mr

Singh was first employed by Corporate Energy. Mr Rawat had ceased to be a

5 *Singh*, above n 1.

director and shareholder before Mr Singh had his employment terminated. They also allege that they were joined as parties in the Authority's proceedings without any cause of action being disclosed against them.

[9] The plaintiff's challenges will soon need to be set down for hearing. However, as indicated, in the meantime Mr Singh has filed the applications that each of the plaintiffs lodge security for costs.

The application for security for costs

[10] A separate application for security for costs is made against each of the plaintiffs in the present proceedings but the grounds in each case are the same. These grounds are that:

(a) There is a concern that the plaintiffs may not diligently pursue their cases to hearing.

(b) The plaintiffs may be using the present proceedings as a delaying tactic, thus stalling the investigation of the personal grievance claim.

(c) The award of costs by this Court on 7 December 2015 against Corporate Energy, in which the plaintiffs were former directors and shareholders, has not been paid.

(d) A former advocate of Corporate Energy, who represented that party in its challenge, withdrew from acting for the company shortly before the hearing and that this may have been because of non-payment of fees or inability to pay for the three-day hearing.

(e) The plaintiffs have each applied for a stay on the Authority's determination of an award of costs against them and the suggestion is that the determination is being resisted because of an inability to pay.

[11] The applications for security for costs are in each case supported by an affidavit by Samantha Lea Minny, affirmed on 4 April 2016. She states in her

affidavit that she is a law office assistant but does not specify which law office that is. The affidavits annex documentation establishing matters which are in any event not disputed by the plaintiffs.

[12] Mr Laurent, counsel for Mr Singh, submits in support of the application that the plaintiffs remained in effective control of Corporate Energy and that there is reason to believe that the plaintiffs will be unable to pay the costs of the defendant if the plaintiffs fail in the substantive proceedings. He also submits that it is just to direct the plaintiffs to pay security for costs.

[13] Each of the plaintiffs has filed a notice of opposition to the defendant's application for security for costs. In each case they allege that their challenges against the determination joining them to the proceedings have merit and that in the event that they are successful, then it is Mr Singh who will have to pay costs to them. In each case they allege in any event that they have sufficient means to pay any award of costs against them if such an award is made. Both of them are residents of New Zealand.

[14] Ms Swarbrick and Mr Gallie, counsel for Mr Khurana and Mr Rawat respectively, in their submissions reiterate the grounds for the opposition to the applications for security for costs contained in the notices of opposition. They refer to the fact that the plaintiffs have provided sufficient evidence in their affidavits to establish not only that they are residents of New Zealand but that they are people of means and have the financial ability to pay any award of costs which may be made. The submissions of each go into the respective merits and likely outcome of the challenges. In particular, it is submitted that the Authority lacked jurisdiction on any pleaded basis to join them as parties to the proceedings in the Authority in substitution for Corporate Energy which had already been held by the Authority to be the true employer.

Principles applying

[15] As stated in *S v I Ltd (formerly L Ltd)*:6

The Court is empowered to make such orders by applying r 5.45(2) of the High Court Rules via reg 6 of the [Employment Court Regulations 2000](#). As illustrated, for example, by cases such as *Liu v South Pacific Timber (1990) Ltd*, such orders are both rarely made in this jurisdiction and require persuasive grounds for doing so.

[16] The Employment Court also stated in *ALLWAZE Designs Ltd v Cawthorne*:7

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.

[17] The Court of Appeal in *McLachlan Ltd v MEL Network Ltd* when dealing with r 5.4 of the High Court Rules stated:⁸

[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 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.

[18] Mr Laurent in his submissions has referred to relevant authority from the High Court dealing with the principles upon which an order for security for costs would be made in that Court. Neither Ms Swarbrick nor Mr Gallie, on behalf of the plaintiffs, dispute the principles referred to.

[19] In this particular case, there is no suggestion that an order for costs against the plaintiffs would result in them abandoning viable litigation as was discussed in

⁶ *S v I Ltd (formerly L Ltd) (No 3)* [2016] NZEmpC 70.

⁷ *ALLWAZE Designs Ltd v Cawthorne* [2015] NZEmpC 17 at [6].

⁸ *McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215, (2002) 16 PRNZ 747 (CA); See also *Reekie v Attorney-General* [2014] NZSC 63, (2014) PRNZ 776.

S v I Ltd and *McLachlan Ltd v MEL Network Ltd*. Nor is there any suggestion of any imbalance of power between Mr Singh and the plaintiffs.

Conclusions

[20] The primary consideration in this case must be whether orders for security for costs are appropriate, and whether the plaintiffs are sufficiently financially able to meet any order for costs in the event that such an order is made against them if Mr Singh is successful in defending the challenges. Also material is an assessment of the likely outcome of the challenges in any event.

[21] I am satisfied, from the evidence which has been presented by both Mr Khurana and Mr Rawat, that they are people of sufficient means to be able to make any order of costs against them. Mr Laurent relies upon historical matters relating to the performance and eventual liquidation of Corporate Energy to submit that there is an inference that the plaintiffs may be impecunious. However, I am not prepared in the circumstances to draw such an inference in this case. The matters upon which Mr Laurent relies for the drawing of such an inference do not directly relate to the plaintiffs and are speculative.

[22] Having regard to the reasoning in the Authority's determination and the circumstances under which both the plaintiffs were joined in the Authority's proceedings, a preliminary assessment can be made that there is a reasonable prospect of the plaintiffs succeeding in their challenges, although they have yet to be heard and argued. The attempt to eliminate the company in liquidation, which was the true employer of Mr Singh, and replace it with the plaintiffs will need careful consideration as it may have the effect of Mr Singh obtaining priority over other creditors in the liquidation of Corporate Energy.

[23] With this background I am not persuaded that there are sufficient grounds for, or that overall justice supports, orders for security for costs against the plaintiffs, which in this Court are rarely made.

Disposition

[24] For the reasons discussed, Mr Singh's applications for an order for security for costs against each of the plaintiffs are dismissed. Costs will be reserved and considered once the outcome of the challenges is decided.

[25] A directions conference should now be convened so that timetabling can be set to enable the challenges to be heard. There was a suggestion in counsel submissions that the facts and matters giving rise to the challenges were not substantially in dispute and may be capable of being covered by an agreed statement of facts with the challenges simply proceeding on the basis of submissions. Counsel should discuss that urgently so that appropriate directions can be made at the directions conference to enable this matter to be heard as promptly as possible.

M E Perkins

Judge

Judgment signed at 12 noon on 20 July 2016