



Employment Court of New Zealand

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Kilpatrick v Air New Zealand [2014] NZEmpC 48 (27 March 2014)

Last Updated: 4 April 2014

IN THE EMPLOYMENT COURT AUCKLAND REGISTRY

[\[2014\] NZEmpC 48](#)

ARC 46/13

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 a stay of proceedings

BETWEEN JENNIFER KILPATRICK Plaintiff

AND AIR NEW ZEALAND LIMITED Defendant

Hearing: 21 March 2014 (Heard at Auckland)

Appearances: Plaintiff, in person

D France, counsel for defendant

Judgment: 27 March 2014

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

[1] The plaintiff, Ms Jennifer Kilpatrick, was dismissed by the defendant, Air New Zealand Ltd (Air NZ) on 25 July 2012. The ground for dismissal was serious misconduct. She brought proceedings in the Employment Relations Authority (the Authority). There were a series of claims. In a determination dated 31 May 2013, her claims were dismissed.¹

[2] Ms Kilpatrick brought separate proceedings against Air NZ in the Authority relating to different facts from those involved in the present proceedings. Her four

alleged personal grievances in the separate proceedings were dismissed as being

¹ [2013] NZERA Auckland 221.

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raised outside the 90 day limitation period prescribed under s 114 of the Employment

Relations Act 2000 (the Act).²

[3] In a later determination in respect of the dismissal on 25 July 2012,³ the Authority ordered Ms Kilpatrick to pay a contribution towards Air NZ's costs amounting to \$8,750. In respect of the separate proceedings, in a further determination of the Authority,⁴ she was ordered to contribute to costs the sum of

\$1,750. The total sum of \$10,500 has, to date, not been paid by Ms Kilpatrick.

[4] Ms Kilpatrick has filed a de novo challenge to the determination of the Authority dated 31 May 2013. Air NZ has filed an application for an order that Ms Kilpatrick give security for costs in respect of the challenge. It seeks that the sum of

\$20,000 be paid into Court pending the hearing of the challenge. It also seeks a stay of the challenge until such security is given, either in payment or other satisfactory form. It also asks the Court to set a time limit for such security to be given.

[5] Ms Kilpatrick has filed a notice of opposition to the applications. Whilst she has not paid the awards of costs made by the Authority, Air NZ has not yet taken proceedings to enforce those awards. Ms Kilpatrick has not sought any stay of enforcement of the awards. She has not filed any challenge to the costs determinations, would appear to have no grounds for doing so and in any event is out of time for doing so. She stated during the hearing of the present application that she has reached an arrangement with the Authority registry to pay the awards by instalments. That appears to have been without any discussion or agreement with Air NZ.

[6] Affidavits have been filed both in support of the application and the notice of opposition. Ms Kilpatrick has not provided the Court with any details of her present financial position except to state that she would be unable to afford payment of security. Her present financial position is also her reason for not paying the

Authority's awards of costs in a lump sum.

² [2013] NZERA Auckland 150.

³ [2013] NZERA Auckland 280.

⁴ [2013] NZERA Auckland 279.

[7] Ms Kilpatrick presently resides in Australia. Air NZ, in its application, states that there is reason to believe that she will be unable to pay costs if she is unsuccessful in her challenge. Air NZ states that if the matter proceeds to a defended hearing, its costs will be substantial. In her notice of opposition, affidavit in support and indeed her submissions presented at the hearing of the application, Ms Kilpatrick has concentrated on the issue of the merits of her case. There is little, if any, information covering the financial issues which the Court needs to consider. However, Ms Kilpatrick has made it plain that she is not financially in a position to meet any order for security for costs if one is made. She did indicate in presenting her oral submissions that she is presently endeavouring to sell a property she owns in Wellington. She further indicated that she has friends who are willing to support her financially in the proceedings. This information was not included in her affidavit.

[8] I perceived that Ms Kilpatrick's main submission was that she would effectively be deprived of her entitlement to continue with her proceedings if an order for security for costs was made against her. She considers she has good grounds to proceed with her challenge. She submitted that an issue of justice is at stake. This in turn, she submitted, was not only of importance to her personally, but to her union, the public interest and even the defendant, her former employer.

[9] In her submissions, Ms Kilpatrick set out a substantial amount of information, giving her summary of the facts as she perceived them to be and dealing with each of the causes contained in her statement of claim. I have read her submissions and considered her oral submissions in support of her opposition. It is clear, simply from the pleadings, that one, and possibly more of the causes she has pleaded, are outside the jurisdiction of this Court or unlikely to succeed. Despite that, on an inferential basis it cannot be said that her challenge in its entirety is so without merit that it is unlikely to succeed. It would seem certain though that if this matter does proceed further, the defendant will take further interlocutory steps to have the pleadings amended and limited.

[10] Mr France, in his submissions on behalf of Air NZ, fairly conceded that it was not possible at this stage to come to definitive conclusions as to the merits of the plaintiff's case. Nevertheless, as he submitted, an experienced Authority Member has held against her in a considered determination. He conceded that the Court, in considering its discretion, would take into account the issue of whether the exercise of that discretion would deprive the plaintiff of her ability to continue with the challenge. He submitted that without evidence of her financial position, apart from her assertions of an inability to pay, there is no real evidence that an order for security for costs will have that effect. His ultimate submission, with which I agree, is that it is for the Court to carry out a balancing exercise.

[11] Similar considerations to those applying in this case were before the Court in *Booth v Big Kahuna Holdings Ltd*.⁵ As stated in that case, there is no express provision in the Act covering an application such as this. Rather, pursuant to reg 6(2)(a) (ii) of the [Employment Court Regulations 2000](#), the Court accepts jurisdiction to make such orders and deals with them "as nearly as may be practicable" in accordance with the High Court Rules. As was stated by Judge Inglis in *Booth*:⁶

... 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. If the cases referred to in support of an exceptionality principle are to be taken as suggesting that the inquiry starts and stops with an assessment of overseas residence then I respectfully disagree with that approach. Rather, 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, including (but not limited to) the respective interests of both parties and the merits of the case.

[12] Mr France kindly referred me to other authorities where similar principles have been enunciated.

[13] I accept that Ms Kilpatrick is aggrieved by the circumstances surrounding her dismissal. She will have the opportunity to have all of that canvassed by the Court at the hearing of her challenge. However, the position disclosed to the Court at this point, insofar as the present application is concerned is as follows:

a) Ms Kilpatrick is resident out of New Zealand.

⁵ [\[2014\] NZEmpC 43.](#)

6 At [10].

b) There is reason to believe she will be unable to pay the defendant's costs

if the proceedings do not succeed. Indeed she has conceded that.

c) There is insufficient evidence provided by her that if the order for security for costs is made she will be unable to continue with the challenge. She has given some information to the Court that she retains assets and can procure other financial assistance. She appears willing to represent herself and has shown some acumen in that respect to date in the documents she has filed and her conduct of the opposition to the present application.

d) While there are causes pleaded in her statement of claim, which on an inferential basis appear to have some substance, the overall assessment of the merits of the case at this stage is difficult to assess. There is clearly one cause of action, which on the face of the pleadings, is outside the jurisdiction of this Court to consider.

e) If the challenge proceeds to a hearing, the costs incurred by Air NZ in defending it will be considerable. Substantial time will be expended by officers of the company in preparation and attendance at Court.

[14] Having regard to such factors, I consider this is an appropriate case for an order for security for costs to be made against Ms Kilpatrick. It is also appropriate that there be an order for stay of her challenge until the security is given. That should not be left open ended. While I have no sworn evidence as to the ownership or value of the property Ms Kilpatrick stated to the Court that she is in the course of selling, I will allow some time for her to attend to the payment of the security ordered.

[15] The following orders are made:

a) Ms Kilpatrick is to pay security for costs on her challenge in the sum of

\$20,000;

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

c) Such sum is to be lodged on or before Friday 27 June 2014;

d) The challenge is stayed until the lodgement of the security for costs is paid to the Registrar;

e) If the security is not paid to the Registrar by the date specified the proceedings will be dismissed for want of prosecution;

f) Ms Kilpatrick is to file with the Court an affidavit disclosing the address of the property she claims to own in Wellington and annexing an up to date copy of the certificate of title to that property. Such affidavit is to be filed on or before Wednesday 16 April 2014. A copy of that affidavit is to be served on the solicitors for the defendant;

g) Leave is granted to the defendant to seek a review of these orders in the event of failure to file such an affidavit within the time provided;

h) Costs on this application are reserved.

M E Perkins

Judge

Judgment signed at 12.30 pm on 27 March 2014