Employment Court of New Zealand

Lawson v New Zealand Transport Agency [2015] NZEmpC 168 (29 September 2015)

Last Updated: 2 October 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 168

EMPC 127/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for stay of execution by the plaintiff
AND IN THE MATTER	of an application for an order for security for costs and a stay by the defendant
BETWEEN	TERE LAWSON Plaintiff
AND	NEW ZEALAND TRANSPORT AGENCY Defendant

Hearing:	On the papers filed on 15, 21 and 25 September 2015
Appearances:	T Lawson, plaintiff in person R Burt and R Butler, counsel for defendant
Judgment:	29 September 2015

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The parties have each advanced an interlocutory application. Mr Lawson has applied for an order staying execution of the determination of the Employment Relations Authority (the Authority) dated 19 June 2015 ordering him to pay costs of

$33,000 to the defendant following his unsuccessful personal grievance in that forum.1 The defendant seeks an order of security for costs and an associated order for a stay until security has been given in respect of Mr Lawson's challenge.2 Both

applications are opposed.

1 *Lawson v New Zealand Transport Agency* [2015] NZERA Auckland 173 (costs).

2 *Lawson v New Zealand Transport Agency* [2015] NZERA Auckland 116 (substantive).

TERE LAWSON v NEW ZEALAND TRANSPORT AGENCY NZEmpC AUCKLAND [2015] NZEmpC 168 [29 September 2015]

[2] The parties agreed to the applications being dealt with on the papers. Affidavits and submissions have been filed, which I have considered.

[3] It is convenient to deal with each application in turn. I begin with the defendant's application for security for costs and stay.

[4] It is well accepted that this Court has jurisdiction to order a party to pay security for costs and to stay proceedings until security, in the quantum ordered by the Court, has been given.3 A threshold test applies, namely where either the plaintiff is resident out of New Zealand or there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceeding.4 Once either threshold is met, the Court may order the giving of security for costs if the Judge considers such an order to be just in all of the circumstances.

[5] The defendant's application is advanced on the basis that Mr Lawson will be unable to pay its costs if his challenge fails. It is said that the Court ought to exercise its discretion in favour of ordering security for costs having regard to the merits of the challenge (which it considers to be lacking) and other factors which I will come to.

[6] Mr Lawson forthrightly claims that he will be unable to pay costs if they are ultimately awarded against him. Indeed this is his explanation for not satisfying the costs award made against him in the Authority.

[7] There is a need to balance the interests of the plaintiff and the defendant. As the Court of Appeal observed in *A S McLachlan Ltd v MEL Network Ltd*:5

[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.

3 *Oldco PTI Ltd v Houston* [2010] NZEmpC 161 at [9].

4 High Court Rules, r 5.45.

5 *A S McLachlan Ltd v MEL Network Ltd* 2012] NZHC 2288.

[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.

[8] There are three factors of particular relevance to the discretionary exercise in this case. They are the merits of Mr Lawson's challenge, insofar as they can be assessed at this early stage, the extent to which Mr Lawson's financial position may be said to have resulted from the defendant's actions and the delay in bringing the application.

[9] Mr Lawson was dismissed for alleged serious misconduct. The conduct giving rise to his dismissal related to evidence that he gave at a hearing, and communications he had with his employer in relation to the basis on which such evidence had been given. The facts were fully traversed in the Authority, with the Authority Member concluding that he had been justifiably dismissed. Mr Lawson challenges that determination on a de novo basis. That means that the evidence will be heard afresh in the Court. Because the resolution of the challenge is likely to revolve predominantly around determinations of fact, rather than an application of law, it is difficult to predict where the merits may lie. Suffice to say at this point that the experienced Authority Member heard the evidence of witnesses for both parties over a five-day period, took time to deliver a reserved determination, reached clear conclusions as to the facts, supplemented by contemporaneous documentation, and applied well established principles of law to the facts as she found them to be.

[10] The Authority is designed to be a cost effective forum for litigants. I pause to note that the defendant apparently expended a sum in excess of $100,000 in legal costs in the Authority. The Authority ordered a significant quantum of costs against Mr Lawson ($33,000). The Authority had regard to a Calderbank offer made in advance of the investigation meeting. The defendant says that Mr Lawson's challenge to the Authority's costs determination is unlikely to succeed in light of the refusal of the offer to settle and his conduct of the litigation. I do not consider that the outcome is so readily predicted. The Calderbank offer remained open for acceptance for one day. It is arguable that this was not a sufficient time for consideration in the circumstances. It was submitted in the Authority that Mr Lawson's then lawyer had failed to pass on the Calderbank offer, and so Mr Lawson

was unaware of its existence. The Authority Member concluded that this factor was immaterial, on the basis of agency principles, but that too is arguable.6 Further, the Authority declined to have regard to Mr Lawson's claimed financial circumstances, referring to the lack of supporting material and noting that such circumstances may be relevant at the compliance stage.7 The position, in relation to lack of evidence, is likely to shift on a de novo challenge.

[11] While Calderbank offers will be relevant to an assessment of costs in the Authority, costs in that forum are to be modest.8 A full Court has recently considered the impact of Calderbank offers in the Authority and has made some observations that the Authority is to adopt a "steely" approach.9 However, it is notable that in that case the ultimate uplift allowed was approximately $1,000 on top of the generally applied daily rate of $3,500.

[12] It seems to me that there may be some merit in Mr Lawson's costs challenge.

The substantive challenge cannot be characterised as devoid of merit.

[13] Counsel for the defendant take issue with the suggestion that Mr Lawson's claimed financial position is directly attributable to his dismissal (justified or otherwise). They submit that while he lost his job he may have been able to find another one, and has put insufficient material before the Court to support a conclusion that he has taken adequate steps to do so. In *Du Claire v Palmer*, MacKenzie J held that the "possibility of a connection between the plaintiff's impecuniosity and the subject matter of the proceedings" was sufficiently strong to

weigh against an order for security.10 In the present case I consider that a sufficient

connection can be drawn, having regard to Mr Lawson's age and personal

circumstances.

[14] The application for security comes at a relatively late stage. This is relevant

to a consideration of whether the application ought to be granted in the Court's

6 *Lawson* (costs), above n 1 at [78].

7 At [92].

8. See *PBO (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC) at [4], [45]; *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [92]- [95].

9 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [109].

10 *Du Claire v Palmer* HC Wellington CIV-2009-485-2638, 29 October 2010 at [23].

discretion.11 The plaintiff's statement of claim was filed on 18 May 2015. The defendant filed a statement of defence on 23 June 2015. The application for security for costs was filed on 8 September 2015. The defendant submits that Mr Lawson's financial position did not become fully illuminated until the amended statement of claim and the application for stay was filed (on 10 August 2015). However, the defendant would have been sufficiently aware of the plaintiff 's likely inability to meet costs well before this stage. I say that because it is evident from the Authority's costs determination that the plaintiff was unemployed and in very difficult financial circumstances.12 He had also made it clear, as recorded in the Authority's determination, that he was willing to provide details of his financial position. Even accepting the defendant's argument, there was a delay of just over a month in pursuing the application.

[15] The delay in pursuing the application for security has, in my view, not been adequately explained and weighs heavily against the making of the orders sought by the defendant.

[16] Mr Lawson's primary submission is focussed on access to justice issues. While not cited by either party, I note that in *Highgate on Broadway Ltd v Devine* Kós J observed that:13

... Access to justice is an essential human right. The cost of exercising that right is the payment of costs in the event of failure. The right of a successful defendant to costs in that event is arguably subordinate to the plaintiff's right to be heard. Strong social policy considerations favour the use of Courts as an accessible forum for the resolution of disputes and grievances of almost all kinds. ...

[17] While I agree that access to the Courts is not to be lightly denied, the situation must be viewed in context. Mr Lawson has exercised his right to access the grievance procedures of the Authority and has had his claim heard in that forum.

There is a need, as the Court of Appeal emphasised in *A S McLauchlan Ltd*, to

11 *Oceania Furniture Ltd v Debonaire Products Ltd* HC Wellington CIV-2008-485-1701, 24 April

2009.

12 *Lawson*, above n 1 at [91].

13. *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288 at para [23](b). See also *Westpac NZ Ltd v Adams* [2013] NZHC 3112 at [67].

balance the interests of both parties, including the interests of the defendant.14 The defendant here is facing the looming prospect of expensive and extensive litigation (up to 10 days of hearing time), against the backdrop of significant legal costs already incurred. The reality is that it currently has no protection against ballooning costs which it has limited (if any) prospects of recouping.

[18] Having weighed the competing considerations I am not persuaded that it is appropriate to exercise my discretion to make an order for security for costs, and I decline to do so. I am, however, mindful of the invidious position that the defendant finds itself in. I have concluded that an order for a stay of the Authority's costs determination, on conditions, best balances the competing interests of the parties. My reasons follow.

[19] The starting point is that a challenge does not operate as a stay unless the Court so orders.15 As Judge Couch observed in *North Dunedin Holdings Ltd v Harris*:16

[7] The discretion conferred by s 180 is not qualified by the statute but must be exercised judicially and according to principle. I note two key principles. There must be evidence before the Court justifying the exercise of the discretion. The overriding consideration in the exercise of the discretion must be the interests of justice.

[20] A range of factors will be relevant to the exercise of the Court's discretion to grant a stay.17 There are four factors which are of particular relevance in the present case. They relate to whether the plaintiff's right of challenge will be ineffectual if no stay is granted, whether the challenge is being brought and prosecuted for good reasons and in good faith, whether the defendant will be injuriously affected by a stay and the overall balance of convenience.

[21] Mr Lawson submits that he will not be able to proceed with his challenge if no stay is granted. It is unclear why that would be so.

Mr Lawson is representing himself and accordingly is not incurring any legal costs in the pursuit of his

proceedings. While he may be obliged to respond to enforcement action by the

14 *A S McLauchlan*, above n 5 at [16].

15 Employment Relations Act 2000, s 180.

16 *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118 at [7].

17 See, for example, *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].

defendant if no stay is granted, I do not see how this would have the broader effect he contends for. Accordingly I do not accept that Mr Lawson's right of challenge would be rendered ineffectual if no stay was granted.

[22] While the defendant has raised concerns about whether Mr Lawson has brought his challenge for good reason and in good faith I am unable to find any real support for these assertions. Mr Lawson is plainly aggrieved at the Authority's finding that he committed serious misconduct as a senior manager and that his dismissal was justified. He wishes to challenge those findings on a de novo basis, as he is entitled to do. He also seeks to challenge the Authority's costs determination. As I have said, this aspect of his challenge appears to have some merit.

[23] It is true, as counsel for the defendant points out, that Mr Lawson has expressed some strong views about his previous employer and those involved in his dismissal, and has failed to abide by well established rules (which have been drawn to his attention) relating to 'without prejudice' communications. However, these matters do not of themselves reflect that the challenge is being pursued for an ulterior purpose, or for no good reason.

[24] The defendant submits that if a stay is granted it will be injuriously affected. I accept that there is considerable substance to the defendant's concern in this regard. If a stay is granted it will incur further costs in defending the plaintiff's challenge, but in circumstances where there is considerable uncertainty that the plaintiff will be able to pay those additional costs, let alone the costs he is already liable to. The defendant has offered a compromise solution, namely that a stay be ordered on agreed conditions, with Mr Lawson making a payment into Court. That proposal was not met with enthusiasm by Mr Lawson, on the basis that he did not have the funds to make the payment sought by the defendant. As counsel for the defendant point out, there appears to be an incomplete picture of Mr Lawson's financial position before the Court, despite the fact that the need for full information was drawn to his attention.

[25] For completeness, I note that there do not appear to be any novel or important issues in the case. The defendant submits that it is relevant that it is a publicly

funded organisation but I do not consider that this fact gives rise to any broader public interest in the proceedings, such as may be relevant to determining an application for stay.

[26] I am not unsympathetic to either party's position. Ultimately I must be guided by the overall interests of justice. I consider that the appropriate course in the particular circumstances of this case, and after weighing the competing interests, is to order a stay on conditions. This will give some measure of protection to the defendant while also going some way to addressing the concerns raised by the plaintiff.

[27] The financial orders made by the Authority are to be stayed following payment of a sum equivalent to the usual daily rate in the Authority (of $3,500) for a five day investigation meeting, namely $17,500, to the Registrar of the Court. That sum is to be paid within a period of 135 days from the date of this judgment. If the sum is paid within a period of seven days from the date of this judgment, the tentative hearing dates are to be confirmed. If not, the tentative hearing dates are to be vacated. If the condition that the sum be paid to the Registrar is not met within the 135-day timeframe specified for payment, the plaintiff's challenge will be dismissed.

Christina Inglis

Judge

Judgment signed at 3.30 pm on 29 September 2015