

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 247
5431908**

BETWEEN KEERITHI MERENNAGE
 Applicant

AND RITCHIES TRANSPORT
 HOLDINGS LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Helen White, Counsel for Applicant
 Kerry Amodeo, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 9 June 2014 from Applicant and from Respondent

Determination: 18 June 2014

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Respondent, Ritchies Transport Holdings Ltd (Ritchies), seeks an order that the Applicant, Mr Keerithi Merennage, pay a contribution of \$10,500.00 to be secured in his solicitor's trust account and held and disbursed in accordance with the ultimate direction of the Authority.

[2] The grounds for seeking such an order are that Mr Merennage is an undischarged bankrupt and is now resident in Australia, thus that it would prove extremely difficult and costly for Ritchies to locate Mr Merennage overseas and enforce against him any ultimate award for costs.

[3] Ms White, on behalf of Mr Merennage, submits that the Authority does not have jurisdiction to make an order for security of costs.

[4] Ms White further submits that, should the Authority decide that it does have jurisdiction to issue an order for security of costs, security of costs would be inappropriate in

this case as in cases of known impecuniosity, the Employment has repeatedly made the point that it will be reluctant to grant a right to claim given the special nature of the Court.

Issues

[5] The issues for determination are whether:

- The Authority has the jurisdiction to order security for costs.
- Security for costs should be ordered in the circumstances of this case.

Determination

Does the Authority has the jurisdiction to order security for costs?

[6] The Authority is established in accordance with the Employment Relations Act 2000 (the Act)¹ and its powers are set out by the Act. In particular the Authority is charged to: “... *deliver speedy, informal and practical justice to the parties*”(regulation 4 to the Act), and in so doing to: “*act as it thinks fit in equity and good conscience*” (s 156 (3) of the Act).

[7] In the case of *Reid v NZ Fire Service Commission (Reid)*² the Employment Court held:³

The Tribunal can only exercise its equity and good conscience jurisdiction within the bounds of the jurisdiction conferred by the Act.

[8] It was further held in that case:⁴

... in support of a proposition, which we accept, that a power to order security of costs is not only unnecessary but contrary to the core function of the Tribunal to provide speedy, fair and just resolution of differences.

[9] Whilst I accept that in *Reid* the Employment Court was referring to the powers and role of the Tribunal in the context of the Employment Contracts Act 1991, I note that in that case the Employment Court considered ordering security of costs to be contrary to the role of

¹ S 156 Employment Relations Act 2000

² [1996] 1 ERNZ 228

³ Ibid at p 244

⁴ Ibid at p 246

the Authority in delivering speedy and informal justice to the parties. I consider this to be still a relevant consideration given that this role of the Authority remains unchanged under the Act.

[10] Further whilst the role of the Authority in respect of the provision of speedy and informal justice is set out in regulation 4 of the Act, I note that there is no express provision in the Act for the Authority to order security of costs.

[11] In subsequent cases, it has been held that although the Employment Court has the power to award security of costs, there is no express provision in the Act for the Authority to order security of costs. In *Milne v Air New Zealand*⁵ and subsequently in *South Pacific Limited v Tian*⁶ Judge Inglis held⁷

[4] There is no express provision in the Employment Relations Act 2000 (the Act) to order security of costs. However, it has been accepted in numerous cases that the Employment Court has the power to make such an order and to stay any proceedings until security is given.

[12] Both the Authority and the Employment Court have the power to award costs pursuant to cl 15 of Schedule (2) of the Act and cl 19 Schedule 3 of the Act. The Respondent submits that clause 15(2) of Schedule 2 of the Act which states:

The Authority may apportion any such costs and expenses between the parties as any of them thinks fit, and it may at any time vary or alter any such order in such manner as it thinks reasonable.

allows the Authority to make such an order in advance of the matter being determined.

[13] I do not accept that in the absence of an express provision in the Act for the Authority to order costs, s 15(2) can be read in this way on the basis that I find that there is a distinction between ordering a party to pay costs following a determination in the matter before the Authority, and ordering a party to pay security of costs in advance of the matter being heard and determined by the Authority.

[14] I determine that in the absence of an express provision in the Act to do so, the Authority has no jurisdiction to order security of costs.

⁵ [2013] NZEmpC108

⁶ [2013] NZEmpC 214

⁷ Ibid at [4]

Should security for costs be ordered in the circumstances of this case?

[15] I have found that the Authority has no jurisdiction to order security of costs, but even had I found there to be jurisdiction, I would not have ordered that security of costs be ordered in the present matter for the reasons set out below.

[16] The Employment Court when considering making an order for security of costs has applied certain threshold tests, primarily those of residency and inability to pay.

Residency

[17] In the circumstances of this case, Mr Merennage is currently resident in Australia and the Respondent claims that it has no knowledge of the identity and place of his alleged employment.

[18] I note that Mr Merennage moved at Australia because he states he was able to secure work there which he was not able to do whilst resident in New Zealand, despite extensive efforts to find work

[19] Mr Merennage was under a duty to mitigate his loss following the termination of his employment with the Respondent, and he has done so by obtaining alternative employment in Australia. As a result Mr Merennage has decreased his claim before the Authority in respect of lost wages.

[20] Mr Merennage is resident in Australia and I find it a relevant consideration that there is reciprocity between New Zealand and Australia.

[21] Mr Merennage has also supplied his residential address, and further is in contact with the Official Assignee.

[22] On this basis I do not find that Mr Merennage being currently resident in Australia justifies an application for security of costs.

Impecuniosity

[23] The Respondent submits that Mr Merennage is an undischarged bankrupt and, despite now having obtained employment in Australia, may be still technically impecunious.

[24] Mr Merennage claims that his impecuniosity was caused by the act which is subject to legal action, specifically his claims for unjustifiable dismissal and unjustifiable disadvantage which are before the Authority. It is a well-established principle that in this situation, impecuniosity should not prevent the claim.

[25] Additionally Mr Merennage has supplied to the Authority the Official Assignee's view set out in a letter dated 28 February 2014 that: "*...the applicant is entitled to proceed with the proposed claim despite his bankruptcy adjudication*".

[26] In all the circumstances of this case, even if I had found, which I have not, that the Authority had the jurisdiction to order security of costs, I would not have done so.

[27] The application for security of costs is dismissed and the Authority will contact the parties shortly to progress the matter.

Costs

[28] Costs are reserved pending the final resolution of the matter.

Eleanor Robinson
Member of the Employment Relations Authority