Employment Court of New Zealand

Polzleitner v WWW Media Limited [2011] NZEmpC 139 (26 October 2011)

Last Updated: 4 November 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 139

ARC 56/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF applications for security for costs and stay of proceedings

BETWEEN MARTIN POLZLEITNER Plaintiff

AND WWW MEDIA LIMITED Defendant

ARC 62/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF applications for security for costs and say of proceedings

BETWEEN MELANIE ZINK Plaintiff

AND WWW MEDIA LIMITED Defendant

Hearing: 26 October 2011 (Heard at Hamilton)

Appearances: David Hayes, counsel for plaintiffs

Vicki Campbell, counsel for defendant

Judgment: 26 October 2011

MARTIN POLZLEITNER V WWW MEDIA LIMITED NZEmpC AK [2011] NZEmpC 139 [26 October 2011]

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] Should the challenges of Martin Polzleitner and Melanie Zink against the determinations[1] of the Employment Relations Authority, dismissing their claims, be stayed until the plaintiffs have given security for costs in this Court?

[2] WWW Media Limited (WWWML) says that a combination of their domicile in the republic of Germany (or at least Ms Zink's) and the inherent improbability of successful challenges means that they should be required to give security. Mr Polzleitner and Ms Zink (who were, and I assume still are fiancés, and whose cases have been heard together in this interlocutory proceeding) have not instructed counsel Mr Hayes in respect of these applications. As a matter of professional courtesy, which the Court appreciates, he has appeared this morning for the plaintiffs. Mr Hayes tells me that he understands that Ms Zink may have returned to Germany and although this may not be the case with Mr Polzleitner, there is some suggestion that Mr Polzleitner may now been receiving treatment for a psychiatric indisposition. Apart from that advice, Mr Hayes has no instructions either about the application for security for costs or in relation to the plaintiffs' challenges. In those

circumstances, I think it is fair to determine the defendant's application today.

[3] Martin Polzleitner is a 20 per cent shareholder in WWWML. The other shareholders are his brother Matthias Polzleitner, Matthias Polzleitner's fiancée Natalie Ellis, Ms Ellis's mother Shiree Ellis, and Ms Ellis's father Chris Ellis.

[4] Both Martin Polzleitner and Ms Zink travelled from Germany to New Zealand for the purpose of working with WWWML (to put it neutrally) and were accommodated rent free by Matthias Polzleitner and Natalie Ellis. After a period Martin Polzleitner and Ms Zink left these arrangements, claiming that the company had breached its agreements with them that they would each be employed and would be paid for work done. The company denied the existence of employment

agreements between the parties and, therefore, that it owed them any money. The

Employment Relations Authority, in separate similar determinations, upheld the

company's contention in each case.

[5] Martin Polzleitner and Ms Zink have both filed challenges by hearing de novo to the Authority's determinations but it appears that Ms Zink at least has returned to Germany and is living there. It is possible that Martin Polzleitner may have done likewise or may still be in New Zealand. The only other relevant fact is that the Employment Relations Authority has subsequently directed Martin Polzleitner to contribute $1,800 to WWML's legal costs and Ms Zink to contribute

$1,200 towards these. Neither sum has been paid, nor any arrangement for its payment made.

[6] The Employment Court is empowered to order security for costs and to stay proceedings until such security is given.[2] Although such orders are made rarely, it is a feature of a number of cases in which this has been done that the plaintiff is domiciled out of the jurisdiction which would make recovery of any order for costs more difficult for a successful defendant.

[7] Although past cases set out a number of considerations, the ultimate test to determine whether security for costs should be provided is the justice of the particular case. The Court's discretion will take into account a number of relevant factors including the apparent strength of the parties' cases.

[8] The Authority's determinations are reasoned and cogent although that is not to say that the plaintiffs (or either of them) may not be able to establish, by evidence and submissions, that the Authority was mistaken in its conclusions. WWWML did employ staff on written individual employment agreements. Martin Polzleitner, as a member of the family that owns the company, was given a not insignificant shareholding in it. Those other extended family members in a similar position were not paid but, rather, contributed what is known as sweat equity which, it is hoped, will be reflected in the value of their shareholding in due course. In the case of Ms

Zink, who was not given shares, the Authority found that she both had an insufficient

command of the English language to act as a company receptionist, which she claimed she was, and that she in fact performed no work of the type that would normally be expected of a paid employee of a company of this sort. Although not so expressed by the Authority, it found essentially that the plaintiffs were volunteers as that term is set out in s 6 of the Employment Relations Act 2000 (the Act) and therefore not employees.

[9] Although infrequently, the Authority and the Court do sometimes conclude that family members did not intend to establish employment relationships between themselves when working in a family business. One relatively long established example of that is *MacGillivray v Jones (t/a* Tahuna *Camp Store)*.[3]

[10] At this stage it cannot be said that there is an obvious error on the face of the

Authority's determinations.

[11] As has been said before, it is not this Court's function to act as a debt recovery agency for the defendant in respect of costs ordered by the Employment Relations Authority; it has its remedies in that regard. But the fact of their non- payment and the absence of any other response by the plaintiffs to those orders is relevant in determining whether there should be security.

[12] The particular and unusual circumstances of this case, and Ms Zink's domicile in particular, have persuaded me that it is an appropriate case in which to make an order for security for costs. It is likely that if both challenges are heard, they will be able to be together, providing a saving in time and costs to the parties.

[13] In these circumstances, although not as the defendant invites me to, reflecting precisely the amounts ordered by the Authority, I will require each of Martin Polzleitner and Melanie Zink to give security for costs to the satisfaction of the Registrar in the sum of $3,000 and their challenges are stayed until those securities

are given.

[14] In view of Mr Hayes's advice about the possible current health situation of Martin Polzleitner, I reserve leave to Mr Polzleitner to apply on reasonable notice to the defendant to modify or set aside the orders for security and staying the proceedings as they relate to him if his circumstances warrant such an application.

GL Colgan

Chief Judge

Judgment delivered orally at 10.24 am on Wednesday 26 October 2011

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[1] [2011] NZERA Auckland 310; [2011] NZERA Auckland 311.

[2] Reg 6 Employment Court Regulations 2000 and r 5.45(1)(a)(i) of the High Court Rules: see, for example, *Young v Bay of Plenty District Health Board* [2011] NZEmpC 89.

[3] [1992] 2 ERNZ 382.
