



# Employment Court of New Zealand

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## Quality Consumables Limited v Hannah [2017] NZEmpC 155 (7 December 2017)

Last Updated: 11 December 2017

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2017\] NZEmpC 155](#)

EMPC 120/2017

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                QUALITY CONSUMABLES LIMITED  
                                 Plaintiff

AND                      NICOLE HANNAH Defendant

Hearing:                On the papers filed on 31 October and 24 November  
                                 2017

Appearances:        M Ryan, counsel for plaintiff  
                                 G Pollak and J Lynch, counsel for defendant

Judgment:             7 December 2017

### INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M E PERKINS APPLICATION FOR SECURITY FOR COSTS

#### Introduction

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority) dated 8 May 2017.<sup>1</sup> The subsequent determination on costs dated 8 June 2017 has not been challenged.

[2] There have been previous interlocutory judgments issued in this matter.<sup>2</sup>

These set out in full the details of the monetary awards contained in the

1 *Hannah v Quality Consumables Ltd v McCormick* [2017] NZERA Auckland 138 (substantive);

*Hannah v Quality Consumables Ltd v McCormick* [2017] NZERA Auckland 166 (costs).

2 *Quality Consumables Ltd v Hannah* [\[2017\] NZEmpC 114](#) (stay of proceedings); *Quality*

*Consumables Ltd v Hannah* [\[2017\] NZEmpC 123](#) (costs).

QUALITY CONSUMABLES LIMITED v NICOLE HANNAH NZEmpC AUCKLAND [\[2017\] NZEmpC 155](#) [7 December 2017]

determination of the Authority, which was in favour of Nicole Maree Hannah, the defendant, and the extent of the costs awarded by the Authority.

[3] In a judgment dated 26 September 2017, the plaintiff, Quality Consumables Ltd, was granted a stay of enforcement of the monetary awards in Ms Hannah's favour but subject to payment into Court of the majority of the awards and payment of a further portion of the awards to Ms Hannah personally.<sup>3</sup> The judgment directed that failure to pay the sums so ordered would result in the stay order lapsing

and leaving Ms Hannah free to enforce the determinations.

[4] Quality Consumables Ltd failed to pay the amounts as directed and the order for stay has now lapsed. Ms Hannah has renewed enforcement proceedings by issuing a statutory demand against Quality Consumables Ltd. Quality Consumables Ltd has applied to the High Court for an order setting aside the statutory demand and this is now pending for hearing.

[5] Ms Hannah has now applied for an order for security of costs in respect of the proceedings before this Court.

### **Application for security for costs**

[6] The application for security for costs which is now made is based on the stated financial position of the plaintiff and that in the event that the plaintiff was unsuccessful in its challenge, the defendant would be unable to recover reimbursement of her costs.

[7] The application, when dealing with the history of this matter, mentions the previously granted stay of enforcement. As discussed, this lapsed as a result of the plaintiff's unwillingness to make the payments ordered to be paid to the Registrar of the Court and the defendant. The present application in the High Court made by the plaintiff to set aside the statutory demand is part of the continuing process being followed by the defendant in endeavouring to enforce the awards made in her favour

in the Authority's determination.

3 *Quality Consumables Ltd v Hannah* [2017] NZEmpC 114, above n 2, at [26].

[8] The plaintiff has filed a notice of opposition to the application for security for costs. The parties were given the opportunity to make submissions on the defendant's application. Mr Lynch, counsel for Ms Hannah, has filed submissions in support of the application. Those submissions are also accompanied by a copy of an affidavit filed by the director of the plaintiff company, Mr Alan McCormick, in the High Court proceedings. Mr Ryan, counsel for the plaintiff, has indicated to the Court that he is not instructed to file any submissions in opposition to the application for security for costs.

[9] The notice of opposition sets out the following grounds for opposing the defendant's application for security for costs:

3. The plaintiff has read the grounds set out in the application and provides the following response:

(a) In relation to the assertion at paragraph 6 the plaintiff's position is that the plaintiff company made it quite clear that it does not have the ability to drain \$54,428.33 from its daily cash flow as this is required to meet the day to day expenses of running the business including paying creditors. The concern around cash flow should be viewed differently as to an issue with the liquidity of the company.

(b) The assertion made by the respondent at paragraph 8 is not only misleading it is incorrect. No liquidation proceedings have been commenced. The respondent has issued no proceedings in the High Court all that has been done is a statutory demand has been issued and the plaintiff company has made an application to set this aside. As at the date of filing this Notice of Opposition no steps have been taken by the respondent to oppose the application.

(c) In relation to paragraph 10 of the application the plaintiff company observes that the respondent has refused to pay costs in the amount of \$6,092 awarded against her by the High Court. Ms Hannah issued a statutory demand and put the plaintiff company to the time and expense of applying to set it aside. The respondent took no steps to oppose the application and the plaintiff company instructs that the respondent cannot complain about the plaintiff's inability to pay money into Court when she is a contributing factor to legal expenses being incurred by the plaintiff company opposing her applications.

(d) The assertion made by the respondent at paragraph 12 is startling when the Authority Member himself made the observation that the Employment Relations Authority determination was based entirely on credibility issues.

(e) Furthermore, the plaintiff company note the comments about the respondent being unemployed and currently on a sickness benefit however she owes the plaintiff company \$6,092 in costs from the High Court. The Employment Court is a Court based on principles of equity and good conscience. It is inconsistent with those principles for the respondent, who owes money to the plaintiff company, to now try and fetter the plaintiff company's right to challenge a determination of the Authority by requesting costs in the amount \$20,293 to be ordered by way of security.

(f) In addition there is a well-known principle that applicants who seek orders from the Court should have clean hands. This is not the case as Ms Hannah has refused to pay costs ordered by the High Court and on her own statement is unlikely to be able to pay those costs.

[10] The notice of opposition, and the plaintiff's previous inability and refusal to meet the conditions upon which a stay of enforcement was granted, all go to confirm the defendant's assertion that, in the event that the plaintiff is unsuccessful with its challenge, the plaintiff would be unable and unwilling to meet any costs award in favour of the defendant. The plaintiff can hardly complain about Ms Hannah's attempts to enforce the monetary awards of the Authority when it failed to give effect to the conditions imposed in granting it a stay of enforcement. If the financial position of the plaintiff is as precarious as is asserted by its director Alan McCormick, then the likely outcome of the proceedings presently in the High Court may be predictable. Concern also needs to be expressed about the position of a director continuing to trade a company when it is clearly insolvent.<sup>4</sup> I note in that context that Mr McCormick carefully makes a distinction between cashflow and liquidity. Of course, the plaintiff has filed no evidence in opposition to the application for security for costs to verify the assertions made on its behalf. Also, very little, if any, evidence has been put forward which might support a proposition by the plaintiff that it has strong grounds for challenging the Authority's determination.

## Principles applying

[11] Applications such as the present have been considered in a number of previous decisions of this Court. The principles applying were recently summarised

4 [Companies Act 1993, ss 135-136](#).

in *Davidson v Great Barrier Airlines Ltd*.<sup>5</sup> The Court has jurisdiction to order a party to pay security for costs and stay the proceedings until payment has been made or security, in the quantum ordered by the Court, has been given.<sup>6</sup> As no procedure for ordering security is provided for in the [Employment Relations Act 2000](#) or the [Employment Court Regulations 2000](#) the application is to be dealt with in accordance with the procedures provided for in the [High Court Rules 2016](#).<sup>7</sup>

[12] A threshold test applies in exercising the discretion as to whether or not to grant the application. An order can be made if the plaintiff is resident out of New Zealand (not the case here), or there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceedings.<sup>8</sup> If the threshold in either respect is met, the Court may order the giving of security for costs if it considers that such an order is just in all the circumstances.<sup>9</sup> In the present case, the defendant's application is of course advanced on the basis that the plaintiff company will be unable to pay its costs if the challenge fails. All of the indications arising from the history of this matter to date, and the evidence now before the Court, would appear to indicate that is the position.

[13] In deciding whether it is just in all of the circumstances to make an order, the Court ought to include in the exercise of its discretion regard to the merits of the challenge.<sup>10</sup> Unfortunately, as already indicated, there is very little discussion on this particular point in those limited number of documents which the plaintiff has chosen to file in respect of this application. On a perusal of the statement of claim which has been filed in respect of the substantive challenge, it would appear, however, that the plaintiff, on an inferential basis, has set out arguable grounds for the challenge. On the other hand, the determination itself appears to be well reasoned in granting

Ms Hannah the remedies which she has been awarded.

5 *Davidson v Great Barrier Airlines Ltd* [2017] NZEmpC 46.

6. *Oldco PTI Ltd v Houston* [2010] NZEmpC 161 at [9]; *Polzeitner v WWW Media Ltd* [2011] NZEmpC 139 at [6]. See also *Air New Zealand Ltd v Milne* [2012] NZEmpC 25 at [13].

7 [Employment Court Regulations 2000](#), reg 6; High Court Rules 2006, r 5.45.

8 [High Court Rules 2016](#), reg 5.45(1).

9 reg 5.45(2).

10 *Davidson v Great Barrier Airlines Ltd*, above n 5, at [14].

[14] There is a need to balance the interests of the plaintiff and the defendant in the overall exercise. As the Court of Appeal observed in *A S McLachlan v Mel Network Ltd*:<sup>11</sup>

[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.

[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.

## Findings and disposition

[15] From the documents filed in this matter, including those which related to the earlier application for stay by the plaintiff, it is clear that Ms Hannah has established one of the threshold tests for ordering security for costs, namely the plaintiff's clear impecuniosity. Clearly, the plaintiff will have difficulty in meeting any costs award against it if it is unsuccessful in the challenge. The plaintiff, however, does not assert that it will be prevented from pursuing its claim if an order for security for costs is made. The notice of opposition simply refers to the defendant attempting to "fetter the plaintiff company's right to challenge...". In the notice of opposition, there is also a somewhat fatuous suggestion that Ms Hannah's actions are aggravating the impecuniosity of the plaintiff. In view of what has transpired in this matter, Ms Hannah's submission that the plaintiff is endeavouring simply to delay the effect of the Authority's determination would appear to have some justification.

[16] In view of the fact that the plaintiff has already been given the opportunity to enable a stay of enforcement of the proceedings pending the outcome of the challenge but has not taken up that opportunity, Ms Hannah has the clear entitlement to pursue the awards made by the Authority, as the challenge does not operate as a

stay.<sup>12</sup> The reference to costs owing by Ms Hannah in connection with the earlier

11 *A S McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; [2002] 16 PRNZ 747.

12 [Employment Relations Act 2000, s 180](#).

High Court proceedings relates to her failure to appear on an application to set aside an earlier statutory demand. This occurred through mistake on the part of her counsel, who failed to appear on that occasion, and he has indicated to this Court that he bears responsibility for meeting those costs.

[17] In all of the circumstances, the interests of justice prevail in favour of Ms Hannah in making an order for security for costs in this case. Ms Hannah is seeking an order in the vicinity of \$20,000. That request appears to be made on the basis of a calculation of total costs to date using classification 2B under the Court's Guideline Scale. While further substantial costs will be incurred if the challenge proceeds to a hearing, an order for security for costs would not usually be made on the basis of providing security for full costs, although the position can be reviewed from time to time.<sup>13</sup>

[18] I am of the view that the present position can be met by ordering the plaintiff to provide security for costs in the sum of \$15,000. This sum is to be paid into Court and to be held by the Registrar on interest-bearing deposit until further order of the Court. The sum is to be paid into Court within seven days from the date of this judgment. The proceedings are already set down for a fixture in the new year. If the security is not paid within the seven-day period ordered, then the matter will be reconsidered with a view to dismissing the challenge. While it is usual that proceedings simply be stayed pending payment of security, in this case the plaintiff's previous actions in refusing to meet the conditions for a stay would now warrant a dismissal rather than a stay. These orders of course do not affect Ms Hannah's ability in the meantime to continue with her enforcement proceedings.

[19] Costs on this application will be reserved.

M E Perkins

Judge

Judgment signed at 4.35 pm on 7 December 2017

13 A S *McLachlan Ltd v MEL Network Ltd*, above n 11, at [27].

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