Employment Court of New Zealand

Rachelle v Air New Zealand Limited [2018] NZEmpC 41 (4 May 2018)

Last Updated: 10 May 2018

IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 41
EMPC 250/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of interlocutory applications for urgency, non-publication, security for costs and to strike out
BETWEEN	GEORGINA RACHELLE Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing:	On the papers, 6 April, 16 April and 23 April 2018
Appearances:	Plaintiff, in person P A Caisley, counsel for the defendant
Judgment:	4 May 2018

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH URGENCY, NON-PUBLICATION, STRIKE-OUT AND SECURITY FOR COSTS

[1] There are four interlocutory applications which need to be dealt with. Two were applied for by Ms Rachelle who sought an urgent hearing and a non-publication order. Air New Zealand Ltd applied to strike out paragraphs in Ms Rachelle's amended statement of claim and sought security for costs with an associated stay of proceedings.

GEORGINA RACHELLE v AIR NEW ZEALAND LIMITED NZEmpC CHRISTCHURCH [2018] NZEmpC 41 [4 May 2018]

[2] Ms Rachelle has challenged the whole of the Employment Relations Authority determination in which she was unsuccessful in personal grievance proceedings against Air NZ.1

[3] To place these applications into context it is necessary to briefly describe the Authority's conclusions and the pleadings in this proceeding. The Authority found that Ms Rachelle was employed by Mt Cook Airline Ltd under a fixed term agreement from 19 May 2014 to 25 September 2014 as a temporary, part-time customer services agent to cover peak seasonal work.2 It held that on 18 September 2015 Mt Cook offered her further casual employment on an "as and when required" basis with each engagement being a separate employment agreement.3 She was engaged under that arrangement by Mt Cook between 28 September 2015 and 10 April 2016.

[4] The Authority found that Air NZ proposed changes to the way it operated regional airports by taking direct responsibility for ground services. The effective date for this reorganisation was 4 April 2016. In response, Mt Cook advised Ms Rachelle, and its other employees, of the proposed changes at Queenstown airport. Permanent Mt Cook employees were advised their employment would end on 3 April 2016 and they were employed by Air NZ from 4 April 2016.4

[5] A recruitment process followed because Air NZ decided it would employ more customer service agents.5 Ms Rachelle applied unsuccessfully for a position with Air NZ as a customer service agent.6 According to the Authority determination she was advised about this result on two occasions in December 2015.

[6] The Authority's determination records that Ms Rachelle continued to be engaged by Mt Cook until 20 February 2016 but made herself unavailable from that time until 11 April 2016.7 Subsequently, Air NZ contacted her to ask if she would be prepared to accept employment as a casual employee. On 31 March 2016 she was

1 *Rachelle v Air New Zealand Ltd* [2017] NZERA Christchurch 140.

2 At [11].

3 At [16].

4 At [20].

5 At [21].

6 At [22].

7 At [25].

provided with a letter containing the proposed casual employment agreement which she accepted.8

[7] The Authority found that the casual employment agreement contained an express statement that Air NZ did not guarantee any future offer of work, or an expectation of regular or continued employment. The Authority concluded that Air NZ did not actually engage her to undertake any activities.9

[8] The Authority concluded that Ms Rachelle did not have any personal grievances against Air NZ. For completeness it also concluded she did not have any personal grievances against Mt Cook. She was ordered to pay costs of $4,500 to Air NZ.

[9] In an amended statement of claim in this proceeding Ms Rachelle has pleaded several causes of action against Air NZ but has done so in a way which does not adequately, or succinctly, describe the nature and extent of the claims which that company is to answer. In a truncated format she has pleaded that she has been subjected to workplace discrimination, harassment and bullying, that Air NZ has breached 12 workplace "codes and conducts", has breached her privacy, engaged in unlawful discrimination, breached policies and procedures within the work force, has defamed her and that she has been subjected to sexual harassment. These pleadings are, essentially, listed without satisfactory elaboration. The connection between these pleadings and her employment on a casual basis has not been stated.

[10] Some, but not all, of these pleadings are supported by references to appendices attached to the statement of claim, without identifying how they support each pleading or cause of action. Some of the pleadings invite cross-referencing to appendices which, at face value, seem to have little or no bearing on the allegations made to support the claim that Ms Rachelle was unjustifiably disadvantaged or unjustifiably dismissed. There is no pleading, for example, explaining why it is said that Air NZ breached policies and procedures in some way pertinent to those claims.

8 At [27].

9 At [31].

[11] As to the claim for defamation, putting aside the jurisdictional issue about the Court's ability to consider it, all that is pleaded is that Ms Rachelle has been unable to seek employment for the last three years because of "...repercussions of Air NZ...and the management's influence on its employees".

[12] The very serious pleading of sexual harassment is not supported by any particulars identifying behaviour alleged to give rise to the claim or to state what is said to have occurred and when. It is a blunt assertion devoid of anything more.

[13] Deficiencies in the pleadings were identified to Ms Rachelle and, on 21 March 2018, an attempt was made to provide further and better particulars by memorandum. She listed each of the eight claims in the amended statement of claim and attached 11 separate documents to her memorandum, some of which are screenshots, and others are either emails or memoranda written to Air NZ. The documents were described in the memorandum as being "...in no particular order".

[14] The current state of the pleadings is unsatisfactory. The amended statement of claim, even making some allowances for what has been supplemented by the memorandum, does not comply with regulation 11 of the Employment Court Regulations 2000.

[15] Against that background the parties filed interlocutory applications.

Urgency

[16] Ms Rachelle applied for urgency relying on three general grounds. Summarised they were the amount of time that had

elapsed since the events she complained about and the resulting financial pressure she had been caused. Her application expressed a concern about publicity, without explaining what was meant by that. The remaining ground was a statement that she had accepted a teaching position in Thailand and was to take up work on 30 April 2018.

[17] Air NZ opposed this application because, it said, the pleadings were not in a sufficient state to enable the case to be set down for hearing and that there were

unresolved interlocutory applications. Primarily, its complaint was that it could not identify the issues in the pleadings it was required to respond to.

[18] Ms Rachelle declined to make submissions in support of her application relying instead on her stated grounds as being sufficient. She did not support this application with any evidence.

[19] The circumstances Ms Rachelle finds herself in are no different from any other person who brings an action alleging unjustified dismissal, or disadvantage. The time since the events said to give rise to her alleged grievances is not relevant. No evidence was provided about publicity to be able to gauge Ms Rachelle's concern, but even if this case has attracted public attention that is an aspect of open justice. It is not a ground for granting urgency.

[20] Ms Rachelle's statement about her impending departure from New Zealand, for work, is also insufficient. Furthermore, it is inconsistent with a later statement that she is remaining in New Zealand. Beyond the statement that she is leaving for work, other information, such as the anticipated duration of her employment, or any planned return to New Zealand, was not provided. However, there is no reason in principle why a trial cannot be accommodated during any return to New Zealand or, alternatively, for arrangements to be made for evidence to be provided remotely.

[21] If Ms Rachelle's decision to travel overseas for work had been sufficient for urgency to be considered the present unsatisfactory state of the pleadings would preclude an order being made.

[22] The application for urgency is dismissed.

Non-publication

[23] This application is addressed for completeness only. During a directions conference, on 19 March 2018, Ms Rachelle advised the Court that she withdrew it.

Security for costs

[24] While Air NZ has made two applications its primary objective is to obtain security for costs and a stay of proceedings until it is provided. Air NZ sought an order that Ms Rachelle provide security of $20,000 either by paying that sum to the Registrar of the Court or providing security for that amount to the Registrar's satisfaction. As an alternative it sought security to be fixed in any amount the Court considers appropriate.

[25] The ground relied on for this application is that Ms Rachelle will be unable to pay costs if her claim is unsuccessful and an order for them is made. In a supporting affidavit Air NZ said that she was ordered by the Authority to pay costs to it of $4,500 which she has not done despite a formal demand for payment being made. Other supporting submissions were about the state of the pleadings, that her claim is unmeritorious, and she plans to leave New Zealand to take up a job overseas.

[26] Ms Rachelle opposed this application, describing it as ludicrous, not feasible and corporate bullying. In her submissions she relied on a statement that she should not need to provide security and had already paid to the Registrar of the Court a sum for a hearing. She acknowledged not paying the costs ordered by the Authority, but said she was merely demonstrating the case is still alive. She stated her belief that all financial matters would be resolved after a trial.

[27] Ms Rachelle's submissions contradicted a statement made in her application for urgency, about working overseas, saying she would not be leaving New Zealand until the hearing of this proceeding is concluded. In the same submissions, she acknowledged being unemployed due to what she described as internet postings and to be in receipt of a benefit. Beyond those statements she did not provide any evidence, or information, about her financial position or ability to pay costs if ordered to do that.

[28] She did submit that being ordered to pay security of costs of $20,000 would be an injustice. That is because, she considered, she had paid emotionally and financially

for the amount of time that had elapsed since the events giving rise to her causes of action against Air NZ.

[29] The Court has jurisdiction to order security for costs, and to stay the proceeding until it is provided. Regulation 6 of the Employment Court Regulations 2000 provides the High Court Rules 2016 may apply where a matter is not addressed by the regulations.10 The regulations do not deal with security for costs, but High Court rule 5.45(1) does. Rule 5.45(1)(b) applies where there is reason to believe a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding. Whether or not security of costs is ordered is a matter of discretion.11

[30] This Court's judgment in *Quality Consumables Ltd v Hannah* is an example of the application of the High Court rule. In that case, the Court summarised the jurisdiction to order a party to pay costs and to stay proceedings until payment, or security, is provided.12 The Court noted that in exercising the discretion to grant the application it is appropriate to take into account the merits of the challenge.

[31] Balancing the interests of the plaintiff and defendant is the overriding consideration.13 In *McLachlan v MEL Network Ltd* the Court of Appeal said in reference to rule 5.45:14

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.

Of course, the interest 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.

10. And see: *Oldco PTI Ltd v Houston* [2010] NZEmpC 161; and *Quality Consumables Ltd v Hannah. (No 2)* [2017] NZEmpC 155.

11 Rule 5.45(2).

12 *Quality Consumables Ltd v Hannah (No 2)*, above n 10, at [11].

13 See also *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017.

14 *McLachlan v MEL Network Ltd* [2002] NZCA 215; (2002) 16 PRNZ 747 (CA) at [15] – [16].

[32] In this case there is no reason to think that the first limb of rule 5.45 (where the plaintiff is resident out of New Zealand), will apply despite what Ms Rachelle said in her application for urgency about a plan to move overseas to work. However, the contradiction between the statement in her application, and in her submissions in response to this application, remains unexplained.

[33] Air NZ has met the threshold required by rule 5.45(1)(b) and it is appropriate to grant an order for security for costs. Ms Rachelle has not paid the amount she was ordered to pay by the Authority and her explanation for not doing so is unconvincing. Air NZ demanded payment of that amount but its correspondence went unanswered until Ms Rachelle filed her submissions. It must have been apparent to her that Air NZ did not consider it should wait until the outcome of this proceeding before seeking to recover costs awarded by the Authority.

[34] Air NZ also produced correspondence between Ms Rachelle and the Authority, in which she referred to her continuing unemployment which she attributed, at least partly, to adverse publicity arising from the Authority's determinations being published on its website making them accessible to her potential employers. As well as acknowledging her unemployment, something which was also referred to throughout this proceeding, she informed the Authority that she was in financially straightened circumstances.

[35] Despite being on notice that Air NZ intended to rely on this information to support its application, Ms Rachelle's notice of opposition, and her submissions, did not include any statement of her financial means or ability to pay. In those circumstances a reasonable conclusion is that in all likelihood she will be unable to pay any further order of costs against her if one is made.

[36] Bearing in mind the balancing exercise in *McLachlan*, it is possible that mere impecuniosity is not sufficient to result in an order. There may be cases, for example, where it would be unjust to make an order such as where the plaintiff's impecuniosity is the direct and immediate result of actions by the defendant. The current state of pleadings in this case would not support such a submission.

[37] There is a limit as to how much of an inquiry can and should be made into the merits of the case at this early stage of the proceeding.15 In a complex case assessments are no more than an impression and cannot be a definite indicator of the ultimate outcome at trial.16 Obviously a claim which is wholly without merit may face an application seeking to strike it out. At this stage, given the state of the pleadings, the most that might be said about the merits is that Ms Rachelle faces an uphill battle to succeed.

[38] That leaves for consideration the amount to order. Air NZ sought $20,000 on its assessment of a four-day case calculated using Category 2, Band B, of the guideline scale. Ms Rachelle did not make submissions in reply but objected to $20,000 as

being excessive.

[39] At best Air NZ's estimate is a guess that four days of hearing time will be needed. Two days seems more realistic based on an imprecision of what may actually be placed in issue once the pleadings comply with reg 11. I consider $10,000 is an appropriate amount to order.

Disposition

[40] Ms Rachelle is ordered to pay security of costs of $10,000 to the Registrar of this Court to be held on interest-bearing deposit until further order of the Court or, alternatively, she can provide security to the satisfaction of the Registrar for the same amount.

[41] The proceeding is stayed until such time as the security is paid or provided or, alternatively, there is a further order of the Court.

[42] No useful purpose would be served in analysing Air NZ's application to strike- out. That application is adjourned.

15 *Meates v Taylor* [1991] NZCA 288; (1992) 5 PRNZ 524 (CA).

16 See *McLachlan v MEL Network*, above n 14, at [21].

[43] Costs are reserved.

K G Smith Judge

This judgement is signed at 4:40 pm on 4 May 2018.
