



Employment Court of New Zealand

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Reimann v Hodgson [2020] NZEmpC 134 (26 August 2020)

Last Updated: 31 August 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 134](#)

EMPC 96/2020

IN THE MATTER OF a challenge to determination of
the Employment Relations
Authority

AND IN THE MATTER OF an application for security for
costs

BETWEEN TONY REIMANN
Plaintiff

AND JACOB HODGSON
Defendant

EMPC 182/2020

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 WARREN JOHN HURST
Plaintiff

AND JACOB HODGSON
Defendant

Hearing: On the papers

Appearances: P Skelton QC and T L McKenzie, counsel for Mr
Reimann C W Stewart and L Knight, counsel for Mr
Hurst
F Joychild QC, counsel for Mr Hodgson

Judgment: 26 August 2020

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Application for security for costs)

TONY REIMANN v JACOB HODGSON [\[2020\] NZEmpC 134](#) [26 August 2020]

[1] Mr Hodgson applies for an order that Mr Reimann and Mr Hurst pay security for costs in the order of \$26,000 into Court prior to their being able to proceed with their challenges. Counsel for Mr Hodgson also submits that, regardless of his application for security for costs, the de novo hearing of the challenges should not be permitted to proceed until the costs awarded by the Employment Relations Authority (the Authority) from the last hearing have been paid to Mr Hodgson by Mr Reimann and Mr Hurst.¹

[2] For the reasons set out in this judgment, Mr Hodgson's application fails.

Mr Hodgson succeeded against the employing company

[3] In the substantive Authority determination, Mr Hodgson succeeded against Greenfields Internet Ltd for wage arrears, KiwiSaver, holiday pay, compensation for humiliation, loss of dignity and injury to feelings, reimbursement of expenses and reimbursement of wages lost as a result of his personal grievance. He says that in all, Greenfields Internet Ltd owes him \$135,342.80, plus interest from 2 March 2020.²

[4] The Authority also found that Mr Reimann, as a director of Greenfields Internet Ltd, and Mr Hurst, as a person exercising significant influence over the management of Greenfields Internet Ltd, were each “a person involved in the breach” as defined in [s 142W](#) of the [Employment Relations Act 2000](#) (the Act). The Authority said, if Greenfields Internet Ltd was unable to pay the arrears in wages and other monies ordered, Mr Hodgson would have the option of seeking leave to pursue the remedy available against Mr Hurst and Mr Reimann under [s 142Y](#) of the Act.³

[5] In April 2020, Mr Hodgson filed an application in the Authority for leave to recover the monies due to him against Mr Reimann and Mr Hurst.

[6] Both Mr Reimann and Mr Hurst have filed de novo challenges to the Authority’s substantive determination. It is with respect to those challenges that Mr Hodgson seeks security for costs.

1 *Hodgson v Rural Networks Ltd* [\[2020\] NZERA 310 \(Member Arthur\)](#).

2 *Hodgson v Rural Networks Ltd* [\[2020\] NZERA 80 \(Member Arthur\)](#).

3 At [104].

The Employment Court may order security for costs

[7] Where, as here, there are no relevant procedures provided for by the Act, the [Employment Court Regulations 2000](#) (the Regulations) or applicable rules, the Court looks to the [High Court Rules 2016](#).⁴ All parties refer to r 5.45 of the [High Court Rules](#), which gives a Judge the discretion to order security for costs 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 proceeding. If this is established, through credible evidence of surrounding circumstances from which it can be reasonably inferred that the plaintiff will be unable to pay the costs of the defendant, the Court then considers whether it would be just, in all the circumstances, to order the giving of security for costs.⁵ In exercising its discretion, the Court is conscious that the effect of the order likely would be to prevent the plaintiff from pursuing the claim. The Court therefore should only make such an order after careful consideration, balancing the right for a genuine plaintiff to have access to the Courts against the interests of a defendant.⁶

Evidence does not establish that the plaintiffs will be unable to pay costs

[8] The evidence first needs to establish that it can be reasonably inferred that there is reason to believe that Mr Reimann and/or Mr Hurst will be unable to pay Mr Hodgson’s costs should Mr Reimann and/or Mr Hurst fail in their respective challenges.

[9] Mr Hodgson has filed an affidavit setting out the background to this matter and the basis for his belief that Mr Reimann and Mr Hurst will be unable to pay his costs. Mr Reimann has not filed any evidence; Mr Hurst has filed an affidavit in response.

[10] Mr Hodgson submits that an inference can be drawn from the past behaviour of Greenfields Internet Ltd, as found by the Authority, the failure of Mr Reimann to make any payment in relation to the found breaches of Mr Hodgson’s employment agreement, and the absence of affidavit evidence from Mr Reimann that he does not

4 [Employment Court Regulations 2000](#), reg 6(2)(a)(ii).

5 *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* (No 2) [\[1977\] 1 NZLR 516 \(SC\)](#) at 519.

6 *A S McLachlan v MEL Network Ltd* [\[2002\] NZCA 215](#); [\(2002\) 16 PRNZ 747 \(CA\)](#) at [14]- [16].

have the means to pay an award of costs. Mr Hodgson also points to reference in the Authority’s determination that Mr Reimann gave evidence that he lost his house “after Orcon” and had to move to Tauranga and live in his mother’s house.⁷ The determination records that Mr Reimann was Chief Operating Officer at Orcon, a telecommunications company and internet service provider, in 2013 and 2014.

[11] I do not accept such an inference can be drawn. The basis for the challenge by Mr Reimann is that he was not a person involved in the breach by Greenfields Internet Ltd. It would be inconsistent with his claim for him to assume the debts of that company. He has no obligation to file an affidavit in opposition to the application. If Mr Hodgson had established a foundation for his claim that Mr Reimann would be unable to pay a costs award, an inference might be

drawn from a failure to give rebuttal evidence, but Mr Hodgson's affidavit does not lay that foundation. The reference in the Authority's determination to the previous position, "after Orcon" dates back six years. On its own, it is not enough to establish that Mr Reimann would be unable to pay costs should his present challenge fail.

[12] The situation regarding Mr Hurst is a little stronger but also does not meet the threshold test. He acknowledges that he might have difficulty paying a costs award against him if he were unsuccessful but says that "does not necessarily mean that I would be unable to pay". He admits he has previously been bankrupt and that he has few assets. He also says he could not make a lump sum payment for security for costs, whether that is \$26,000 or \$13,000. He is funding the costs of the litigation on a drip-feed basis. Mr Hurst, however, is working in several businesses where he is a director and shareholder. Although he acknowledges that clients of his businesses have been slow to pay, particularly with the current COVID-19 situation, he is earning an income and says that he has few liabilities. The information he has provided includes his values for his shareholdings, and he identifies a motor vehicle worth

\$7,500, a little over \$1,800 in a bank account and \$5,000 of personal effects.

[13] Accordingly, while I acknowledge the concerns Mr Hodgson may have regarding Mr Hurst's willingness and ability to pay costs, and Mr Hodgson may need

7 Hodgson v Rural Networks Ltd, above n 2, at [89].

to take steps to enforce any award in his favour, the evidence does not reach a threshold of establishing there is reason to believe Mr Hurst would be unable to pay costs.

Discretion would not have been exercised in favour of an order in any event

[14] The case is one that is obviously important to all three parties. For Mr Hodgson it likely will determine whether he receives any payment for his time with Greenfields Internet Ltd. On the other hand, if Mr Reimann and/or Mr Hurst fail in their challenges, they face a significant personal liability. The conundrum of an application for security for costs is that a finding that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if they are not successful very likely will mean that the plaintiff is unable to meet the order for security for costs and therefore loses his or her ability to pursue the challenge.

[15] The issues surrounding s 142W have recently been considered by the Employment Court in decisions issued after the Authority's determination.⁸ I accept that there is a serious argument that the actions of Mr Reimann and/or Mr Hurst do not meet the threshold in s 142W.

[16] While one may feel sympathy for the position that Mr Hodgson finds himself in, Mr Reimann and Mr Hurst ought not be prevented from pursuing their challenges. This means that, even if Mr Hodgson had met the threshold of establishing there is reason to believe Mr Reimann and/or Mr Hurst would be unable to pay Mr Hodgson's costs, security for costs would not have been ordered.

No order with respect to costs awarded by the Authority

[17] There is some support for the Court being able to order payment of a costs award into Court as a precondition to a challenge being able to proceed, coupling that with an order staying execution of the costs determination.⁹ However, that is not the usual practice of the Court and, while both plaintiffs have indicated an intention to

⁸ *Southern Taxis Ltd v A Labour Inspector* [2020] NZEmpC 63; *Tolson v Potter* [2020] NZEmpC 98.

⁹ *Gates v Air New Zealand Ltd* EmpC Auckland ARC 40/04, 27 March 2007; *Mackenzie v Bayleys Real Estate Ltd* EmpC Auckland ARC 92/03, 25 March 2004.

seek to have the costs determination of the Authority revisited by the Court, neither plaintiff has amended their statement of claim or applied for a stay. In any event, the same considerations would apply to this issue as apply to the application for security for costs. There is no order with respect to the costs awarded by the Authority.

[18] Costs on this application are reserved.

J C Holden Judge

Judgment signed at 4.30 pm on 26 August 2020

