



Employment Court of New Zealand

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Tones v 3D1 Limited AC 44/07 [2007] NZEmpC 87 (12 July 2007)

Last Updated: 6 August 2007

IN THE EMPLOYMENT COURT

AUCKLANDAC 44/07ARC 89/06

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 MATTHEW LANCE TONES

Plaintiff

AND 3D1 LIMITED

Defendant

Hearing: 12 July 2007

(Heard at Auckland)

Appearances: Matt Young, Advocate for the Plaintiff

Ian Matheson, Counsel for the Defendant

Judgment: 12 July 2007

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Because this challenge is set down for hearing only three weeks hence on 2 August 2007, I must now decide urgently whether the plaintiff should be required to provide security for the defendant's costs on the challenge and, if so, both the amount and the manner in which it will be secured.

[2] Because of the proximity to the hearing of the challenge, I took the precaution of having the Registrar inquire of Mr Tones's advocate whether, in the event that the Court might order security for costs, there would be sufficient time for these to be paid and the hearing of the challenge proceed as scheduled. That inquiry was expressed to be one made to cover practical contingencies and without any indication of what might be the outcome of this application for security. Mr Young's response to the Registrar was that he was confident that if security had to be paid, it could be and that the challenge could continue to be heard on 2 August 2007.

[3] Neither the [Employment Relations Act 2000](#) nor the [Employment Court Regulations 2000](#) provides an express power to order security for costs on a challenge from a determination of the Employment Relations Authority to this Court. Regulation 6, however, provides in such circumstances that the practice of the High Court under the High Court Rules 1985 should be adopted by the Court and that is the way in which such applications have been

treated by this Court and its predecessors. The jurisprudence can be summed up as saying that although the power exists in appropriate cases to make such orders, they have been made only rarely and in extraordinary circumstances, usually where an appellant is not domiciled in New Zealand so that execution of any costs award may prove difficult, if not impossible.

[4] The relevant background to 3D1 Limited's application is as follows. In a determination issued on 23 November 2006 the Employment Relations Authority found that Mr Tones was not an employee of 3D1 and that his dispute was therefore beyond its jurisdiction. The Authority reserved costs and gave a timetable if they were sought. The Authority subsequently determined costs on 7 February 2007, awarding 3D1 \$2,000 and disbursements of \$544.40. Those costs and disbursements have not been paid by Mr Tones.

[5] Mr Tones elected to challenge those determinations and did so by filing proceedings in this Court on 21 December 2006. He has elected a full hearing of the entire matter, a hearing de novo under [s179](#) of the [Employment Relations Act 2000](#).

[6] The defendant's case for security relies upon the assertions that:

- the plaintiff is an Australian citizen;
 - he resides in Australia;
 - he has no known assets in New Zealand;
 - it would be difficult and uneconomic to enforce a costs award; and
 - his challenge is unlikely to succeed.

[7] In support of those assertions, 3D1's director, Chris Adams, deposes to his belief that Mr Tones lived at the Auckland address given in the statement of claim only between June and September 2006 and that he thereafter returned to Australia, only coming back to New Zealand once for the Employment Relations Authority's investigation meeting. That address is also the registered office of the advocacy firm that represents the plaintiff, Shore Associates Limited.

[8] Mr Adams says that in his dealings with Mr Tones about their commercial relationship (to use a neutral term), the plaintiff told Mr Adams that he was in difficult financial circumstances, short of money, and unable to provide a vehicle for work purposes. The defendant company is based in New Plymouth and Mr Adams is concerned that the cost of return travel to Auckland for the hearing of the challenge will alone amount to about \$1,000.

[9] In opposition to the application for security, Mr Tones says that his challenge has merit, that he is not impecunious, that he maintains a residence in New Zealand despite working on a short-term contract in Australia, and that he is a New Zealand resident for tax purposes. Mr Tones says that a significant proportion of his personal belongings is still located at his Auckland residential address and he intends to make New Zealand his permanent home. He says that although short of money from time to time, he is not impecunious and is currently employed gainfully, albeit on a short-term basis. Mr Tones says he does not have any hire purchase commitments, had not borrowed money from a bank, and does not have any credit card debt.

[10] Mr Tones deposes to having assets of almost \$50,000 although this includes the money to pay the costs award in the Authority, and clothing and personal effects, so that what might be described as ready money is likely to be more limited. The plaintiff says he is working in Australia "*short term*", his services being the subject of a contract between his New Zealand registered company, Chartered Business Solutions Limited, the registered office of which is at the same Auckland address as he has given in these proceedings. He deposes to his company having customers in both Australia and New Zealand with the prospect of further work. He says his company's average billings are about \$7,000 per month. Mr Tones is an Australian citizen and Australian passport holder which entitles him to reside and work in New Zealand as of right. He says he anticipates returning to New Zealand before the end of August 2007.

[11] Other relevant factors include that the plaintiff has not yet paid to the defendant the costs and disbursements ordered by the Employment Relations Authority. A challenge does not operate as a stay of the Authority's orders and even if Mr Tones is confident of success on the challenge and of a reversal of the results in the Authority, he is still obliged to pay the costs that have been ordered unless there is a stay of execution of them. It counts against him that he has not done so.

[12] Despite requests for payment of the costs and disbursements ordered by the Authority, Mr Tones has not complied with its direction and, Mr Matheson for the defendant advises me, there are now judgment enforcement proceedings in the District Court at North Shore in which bailiffs are authorised to execute a distress warrant. That is the almost inevitable consequence of a litigant's refusal or failure to pay costs and disbursements directed by the Employment Relations Authority.

[13] This is not an application for security that relies on the plaintiff's impecuniosity. Even if it had been, that would not have persuaded me to make an order.

[14] It is, however, an appropriate case in which to require the plaintiff to give security as a condition of prosecuting his challenge. I accept that it will be very difficult for the defendant to recover costs that may be awarded to it on the challenge because of what is very arguably Mr Tones's overseas domicile. The defendant's difficulties in recovering the Authority's costs and disbursements from Mr Tones illustrates graphically this

problem. Mr Tones appears to have the resources to both meet the Authority's costs and disbursements and to provide reasonable security although this will be less than the sum of \$6,500 suggested by the defendant.

[15] Although it is difficult to assess the prospects of the plaintiff's case on the challenge, I think it is fair to say from the Authority's determination that Mr Tones faces an uphill battle to persuade the Court that the trading arrangements that he entered into with 3D1 through his company do not, in law, make their relationship one of commercial contract between 3D1 and Mr Tones's company but, rather, an employment relationship of personal service by Mr Tones. I note that Mr Tones is continuing to undertake contract work in Australia using the same service company that the Authority found dealt with 3D1 in New Zealand.

[16] As I indicated to the parties earlier today at the hearing, the plaintiff must give security for costs on the challenge by paying to the Registrar of the Employment Court at Auckland the sum of \$4,544, to be held on interest bearing deposit, and for disbursement on the directions of a Judge. This includes the costs and disbursements payable in the Authority. That payment must be made by 26 July 2007 at the latest. If it is not made, the plaintiff's challenge will then automatically be stayed.

[17] The defendant is not relieved of any of its obligations under the timetable set by Judge Perkins to file and serve the briefs of evidence of its witnesses.

[18] I now stay temporarily execution of the Employment Relations Authority's determination on costs and disbursements including by the distress warrant proceedings that the defendant has issued in the District Court at North Shore. To effect this temporary order for stay, the Registrar is to ascertain from Mr Matheson the North Shore District Court file number and is then to convey the stay decision to the Registrar of the District Court at North Shore as soon as possible. That order staying execution of the Employment Relations Authority's award of costs and disbursements is to apply until 26 July 2007. If, by that date, Mr Tones pays that money to the Registrar of the Employment Court at Auckland, the Authority's costs and disbursements order will be sufficiently secured. If that money is not paid to the Registrar of the Employment Court at Auckland by that date, the proceedings in the North Shore District Court may continue, including execution of the distress warrant by a bailiff.

[19] There are several other interlocutory directions that I make.

[20] First, Mr Matheson has indicated that he intends to call short evidence from one witness who is resident in Australia. Mr Matheson wishes to have the opportunity to take this witness's evidence by video conference call because it is disputed and will not be admitted by the consent of Mr Tones. I have indicated that Mr Matheson will have to make appropriate arrangements in conjunction with the Registrar for a video conference link during the scheduled hearing of this case on 2 or 3 August and the defendant will have to meet the costs of the video link.

[21] Judge Perkins made no direction as to which party was to prepare the agreed bundle of documents for the trial. That is to be done by the plaintiff.

[22] Having become aware of the judgment of the full Court in *Abernethy v Dynea New Zealand Limited* unreported, 10 July 2007, CC37/07 (issued only two days ago), Mr Young now seeks leave to amend the statement of claim. Until now, the challenge has been only to the Authority's determination about Mr Tones's employment status and has sought a direction that the case be remitted to the Authority for another Member to determine its substance.

Following the judgment in *Abernethy*, the plaintiff now wishes the Court to deal with the substantive aspects of his unjustified dismissal claim. Leave is granted to the plaintiff to so amend his statement of claim. Mr Young accepts that the hearing on 2 and 3 August next should deal only with the status question as a preliminary point. So it is only if the plaintiff is successful that the Court will go on and determine the merits of his grievance. The defendant is not required to plead to the new aspects of the claim to be included in the amended statement of claim until after the Court decides the employment status issue.

[23] I reserve costs on the defendant's application for security for costs.

GL Colgan

Chief Judge

Judgment signed at 3 pm on Thursday 12 July 2007