IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 101
ARC 17/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out proceedings
AND IN THE MATTER	of an application for variation of orders for security for costs
BETWEEN	KATHLEEN ANN BEATTIE MILNE Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

ARC 51/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out proceedings
AND IN THE MATTER	of an application for variation of orders for security for costs
BETWEEN	KATHLEEN ANN BEATTIE MILNE Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing:	Following a hearing by telephone conference call at 11am on 9 May 2014 and written submissions filed by the parties on 17 April 2014
Appearances:	K Milne, in person D France, counsel for defendant
Judgment:	9 July 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The defendant (Air New Zealand Limited) has applied for orders striking out Ms Milne's proceedings for failure to comply with the Employment Court's orders to give security for costs. In the alternative, the applications for strike out are advanced on the basis of want of prosecution and, in relation to ARC 51/12, for disclosing no reasonably arguable cause of action.

[2] There is an additional interlocutory application before the Court, namely Ms Milne's application to vary the Court's earlier orders for security for costs.

[3] The parties filed written submissions and supporting material in relation to each of these applications in advance of a telephone hearing that was conducted on 9 May 2014.

[4] Ms Milne opposes Air New Zealand's applications for strike out and Air New Zealand opposes Ms Milne's applications for variation.

[5] In order to deal with the parties' respective applications it is necessary to understand the background to them.

Background

[6] Ms Milne was employed by Air New Zealand as a flight attendant in 1972. The employment relationship came to an end in November 2004, when she was dismissed for medical incapacity. Ms Milne subsequently pursued a personal grievance in relation to the circumstances surrounding her dismissal, although the investigation meeting did not occur until September 2010.

[7] The Employment Relations Authority dismissed Ms Milne's grievance and awarded $8,000 in costs against her.[1] Ms Milne then filed a challenge to the

[1] *Milne v Air New Zealand Ltd* [2011] NZERA Auckland 45; *Milne v Air New Zealand Ltd* [2011] NZERA Auckland 134.

Authority's substantive determination (ARC 17/11).

[8] Air New Zealand applied for an order for security for costs in ARC 17/11 and the application was granted.[2] Ms Milne was ordered to give security for costs in the sum of $10,000 and there was an associated order that ARC 17/11 be stayed until such security was paid or given to the satisfaction of the Registrar.[3] Costs of $1,250 were ordered on the defendant's successful application.[4]

[9] Ms Milne subsequently filed a statement of problem in the Authority on 16 May 2012 alleging various additional breaches on the part of Air New Zealand. These related to the period before her employment commenced and during the course of it. The Authority determined that she could not pursue her claim because it was filed more than six years after her cause of action arose and accordingly was outside the six year time limit provided for in s 142 of the Employment Relations Act 2000 (the Act).[5] In addition, the Authority determined that when Ms Milne was employed in 1972, an entirely different statutory and contractual regime was in force and that the statutory or contractual rights contended for were not in existence at the time she was recruited.[6] Ms Milne's grievance was dismissed and that determination was also the subject of challenge to this Court (ARC 51/12).

[10] The defendant applied for a further order of security for costs in relation to the second challenge, in ARC 51/12, which was filed after the Court's judgment (dated 20 February 2012) ordering security for costs in ARC 17/11. The Court ordered that the plaintiff was to give security for costs in the sum of $1,500 and that ARC 51/12 was to be stayed until such security was paid or given to the satisfaction of the Registrar.[7] Costs of $500 were awarded on the defendant's successful application.[8]

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[2] *Air New Zealand Ltd v Milne* [2012] NZEmpC 25.
[3] At [28].
[4] *Milne v Air New Zealand Ltd (No 2)* [2012] NZEmpC 69 at [9].
[5] *Milne v Air New Zealand Ltd* [2012] NZERA Auckland 236 at [13].
[6] At [10].
[7] *Milne v Air New Zealand Ltd* [2013] NZEmpC 108 at [27].
[8] At [33].

[11] It is common ground that the following orders of the Authority and the Court remain unpaid:

a) $10,000 security for costs on ARC 17/11;

b) $1,250 costs on ARC 17/11;

c) $1,500 security for costs on ARC 51/12;

d) $500 costs on ARC 51/12;

e) $8,000 costs in the Authority.

[12] Against this background, I turn to consider Ms Milne's application for variation of the orders for security for costs made against her.

Applications to vary

[13] Ms Milne has applied to vary the terms of the orders for security for costs made against her in ARC 17/11 and ARC 51/12 from $10,000 and $1,500, respectively, to $1 in each.

[14] Ms Milne submits that she is on the unemployment benefit and that she has outstanding legal costs (of around $7,000) to meet. She submitted that the responsibility for the situation she finds herself in lies with the Flight Attendants and Related Services Association (FARSA), which is not a party to these proceedings, and Air New Zealand. She firmly believes that she has evidence that she was treated poorly by the defendant from the time of her appointment and that she was victimised, harassed and subjected to unequal treatment by it. She points, in this regard, to being appointed to a position in New Zealand although her family remained in Australia and that she was not given the same treatment, including in terms of being able to telephone home without incurring costs and to enjoy visits from her family that other staff enjoyed.

[15] While I accept that Ms Milne has strong views about the basis for the orders against her and a strong desire to pursue her claims against Air New Zealand through to a hearing in this Court, there is no additional material that has been put before the Court that would otherwise warrant a variation to the orders for security for costs

that have been made. In particular, it is common ground that Ms Milne remains resident in Australia (which gives rise to the potential difficulties for enforcement identified in my earlier judgments), and it appears her financial situation remains unchanged. Nor is there anything to suggest that her situation, considered in the context of the earlier applications for security for costs, has materially altered.

[16] I am not satisfied that the earlier orders for security for costs ought to be varied. A reduction would undermine the purpose for which security is given. This applies with particular force in the context of the present applications, where Ms Milne seeks a reduction to $1 on each proceeding. In the circumstances, and after having considered all matters raised by Ms Milne in the material before the Court, I decline her applications for variation.

Applications to strike out

[17] The defendant has applied to strike out both sets of proceedings on largely (although not exclusively) overlapping grounds.

Approach

[18] The Court of Appeal has confirmed in *New Zealand Fire Service Commission v New Zealand Professional Fire Fighters' Union Inc,* that there is no reason for the Employment Court to approach strike out applications on any other basis than that applying in the High Court.[9]

[19] Rule 5.45(2) of the High Court Rules provides that a Judge may, if she/he "thinks it is just in all the circumstances, order the giving of security for costs". It has long been accepted that there is an associated discretion to strike out a proceeding for failure to comply with an order for security for costs.[10] This is confirmed by r 7.48 which provides that if the party fails to comply with an interlocutory order, the Court may make any order it considers just including striking out pleadings.

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[9] *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].
[10] *Jagwar Holdings Ltd v Fullers Corp* (1991) 4 PRNZ 577 (HC) at 579.

[20] The applicable principles are conveniently summarised in *Prager-Macholl v Stuhlmann.*[11] There it was said that:[12]

> (a) The plaintiff is entitled to a reasonable opportunity to comply; generally the Court fixes the time;
>
> (b) If the plaintiff fails to provide security within the time allowed, or within a reasonable time, the Court may strike out the proceeding, and an unless order may be made… even within the limitation period;
>
> (c) If the defendant cannot establish the more general ground of failure to prosecute under r 15.2, a proceeding should only be dismissed if the non-compliance is "intentional and contumelious"; and
>
> (d) Generally, the proceeding will only be dismissed if its continuation would involve substantial prejudice to the defendant.

[21] The Court went on to hold that an application for strike out for failure to pay security for costs involves answering the following questions.[13]

> (a) Has the plaintiff had a reasonable opportunity to comply?
>
> (b) Can the defendant rely on the general ground of failure to prosecute under r 15.2?
>
> (c) If not, is the plaintiff's non-compliance intentional and contumelious?
>
> (d) Will the continuation of the proceeding involve substantial prejudice to the defendant?

[22] I accept the submission advanced on behalf of the defendant that Ms Milne has had ample opportunity to comply with the orders for security for costs. In this regard it is notable that the orders for security were made in relation to ARC 17/11 more than two years ago and in relation to ARC 51/12 over a year ago.

[23] Ms Milne has taken no steps towards satisfying either order. While neither judgment provided a specific timeframe for her to comply with the order, in a minute dated 10 December 2013, a timeline for the proposed strike out applications was provided for and Ms Milne was given a further two months from the date of the minute to satisfy the Court's orders for security for costs. She failed to take any steps to do so. It is notable that, by way of email dated 10 February 2014, Ms Milne

[11] *Prager-Macholl v Stuhlmann* (2011) 20 PRNZ 364 (HC).
[12] At [17].
[13] At [18].

advised that she would not be satisfying the orders for security for costs in either proceeding.

[24] I accept that Ms Milne is facing some financial difficulties. However it is also clear that she does not consider that she ought to be required to pay security for costs. This stems from her strong belief that it is the defendant and a non-party (FARSA) who are responsible for the predicament she now finds herself in.

[25] I conclude that Ms Milne has had a reasonable opportunity to comply with the orders for security in both proceedings, but has failed to do so.

[26] Ms Milne has also failed to take any steps to meet her costs' obligations in both the Court and the Authority. I agree with Mr France's summation that Ms Milne's conduct reflects a contumelious disregard for orders made against her. Her position, as previously recorded, is that she would not comply with the Authority's costs order because she did not agree with it.[14]

[27] In *Fava v Official Assignee*, Associate Judge Bell noted that a failure to meet existing costs orders represented vexatious and contumelious conduct:[15]

> It is important to note Mr Fava's approach to the security for costs orders, and to consider it against the background of his past conduct. The relevant past conduct is that a number of costs orders had been made against him right throughout the litigation leading up to the decision of Hugh Williams J. Those costs orders had not been honoured. He has not paid anything under the costs order of Hugh Williams J. He has not paid any of the costs orders made against him since his bankruptcy. There is a general course of conduct of Mr Fava taking proceedings, not being deterred by the prospect of orders for costs going against him, and ignoring orders for costs. That is conduct that can be characterised as vexatious and contumelious.

[28] There is nothing before the Court in the context of the current applications that suggests that the plaintiff's attitude has softened, or that she is willing to satisfy the orders made against her. Quite the reverse. As I have said, she has made it clear that she considers that others ought to be liable for the costs she faces. I do not

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[14] See *Milne*, above n 2, at [23] where the Court noted that Ms Milne's "position is that she will not comply with the Authority's costs order because she does not agree with it"; and *Milne*, above n 7, at [19] where the Court stated that it was "reasonable to conclude that if the plaintiff has a further costs order made against her, she will similarly refuse to meet that obligation."

[15] *Fava v Official Assignee* [2013] NZHC 564 at [24].

consider that Ms Milne's belated application to vary the amount of security for costs down to $1 on each proceeding reflects a genuine willingness to meet her obligations. The following observation in *Fava* is apposite:[16]

> As to his conduct in relation to the orders I made in November 2012, he has treated the court to arguments as to why the original orders were wrong but has not addressed the need to comply with the orders themselves. He has maintained a consistent approach of not taking to heart requirements to provide security for costs or to meet orders for costs. It is conduct like that, that led me to require security in the first place. In effect, when he invites the court to rescind its order, he is saying that he is not intending to comply with the order, regardless of its merits.
>
> I regard that kind of attitude to the order I made for security for costs as being intentional and in contumelious disregard of the orders of the court.

[29] Previous conduct is often the best predictor of future behaviour. It is reasonable to conclude that Ms Milne will not be taking steps to satisfy the orders for security made against her, even if she was given a further opportunity to do so.

[30] Air New Zealand mounted three arguments in support of its contention that it faces ongoing prejudice arising from Ms Milne's failure to satisfy the security for costs orders. First, it is said that the continuation of both proceedings has caused it to accrue significant legal costs, which cannot be recovered because Ms Milne is resident in Australia and has refused or is likely to refuse to pay any costs orders against her in the future. It is said that Air New Zealand has been significantly prejudiced by her conduct and the continuation of the proceedings will cause even further prejudice in relation to legal fees without the prospect of recovery. I accept that Air New Zealand has incurred significant legal costs to date and that its ability to recover them is uncertain. It is unlikely that the defendant will incur any significant legal costs going forward if the proceedings are stayed, rather than struck out, although I accept that there is a prejudice in having a contingent liability on the defendant's books that must be accounted for.

[31] Second, it is submitted that there has been a significant passage of time in relation to both proceedings (nine years since the plaintiff was dismissed, in relation to ARC 17/11 and over 40 years in relation to ARC 51/12). I accept that the

[16] At [25]-[26].

memories of witnesses will likely have dimmed over time and that it may be difficult for the defendant to locate witnesses who have since left employment with the defendant. Given the passage of time there is also a risk that some of the intended witnesses will otherwise be unavailable.

[32] Finally it is submitted that in the unlikely event that the security for costs orders were satisfied, it is reasonable to assume, given the past history of delays in progressing the proceedings, including before the Authority, that there would be ongoing prejudice to the defendant because of delays in the conduct of the proceedings.

[33] I consider it relevant, having regard to the overall interests of justice, that Ms Milne's claims have been heard and determined already by the Authority. She has a strong view that the claims have merit and that they ought to be heard but this is not a case where the plaintiff's claims have yet to be decided by an independent body. It is apparent, from a perusal of the Authority's two determinations, that Ms Milne's complaints have been fully considered and rejected. I accept Mr France's submission that this is not a case involving an attempt to have the plaintiff's claims dismissed in the absence of any hearing whatsoever.

[34] Standing back and considering the overall interests of justice, I am satisfied that both proceedings ought to be struck out. It is time for these proceedings to be brought to an end. I accept that the defendant will face significant prejudice if the proceedings are allowed to dawdle on. Because of the conclusion I have reached on the defendant's primary grounds for strike out, I do not need to consider the alternative (and forcefully articulated) arguments advanced on its behalf in support of its applications.

[35] Accordingly, the proceedings in ARC 17/11 and ARC 51/12 are struck out.

[36] Air New Zealand seeks costs in relation to its applications to strike out and in relation to Ms Milne's (unsuccessful) applications to vary. While costs ordinarily follow the event, in the particular circumstances of this case and having regard to the

matters I have identified, I do not propose to order costs and decline to do so. Costs will lie where they fall.

Christina Inglis
Judge

Judgment signed at 3pm on 9 July 2014