IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 178
EMPC 55/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for an order for security for costs
AND IN THE MATTER	of a stay of execution of the determination of the Employment Relations Authority
BETWEEN	BARBARA TWENTYMAN Plaintiff
AND	THE WAREHOUSE LIMITED Defendant

Hearing:	1 October 2015 (Heard at Manukau and by video conference from Rotorua)
Appearances:	Plaintiff in person P Swarbrick & M McGoldrick, counsel for defendant
Judgment:	8 October 2015

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This interlocutory judgment decides two preliminary applications.

[2] The first filed in time is the defendant's application for an order for security for costs against the plaintiff. The defendant seeks an order that the plaintiff be required to pay to the Registrar security in the sum of $30,000 no later than 14 days after this judgment; that such security be held pending resolution of the plaintiff's challenge; staying the plaintiff's claim pending the payment of this security; and directing the plaintiff to pay the defendant's costs on this application.

[3] The second application filed in time is Ms Twentyman's application for an order staying execution of the Employment Relations Authority's award of costs and penalties against her.[1]

[4] The defendant's general grounds in support of its application for an order for security for costs are that it has reason to believe that the plaintiff will be unable to pay the defendant's costs if her challenge is unsuccessful; that the plaintiff has failed to pay the penalty directed by the Authority to the defendant and to pay its costs; that the plaintiff's challenge lacks merit; that the likely duration of the challenge will exceed five days; and that expensive document preparation will be required.

[5] The defendant also says that the plaintiff's conduct of the case in the Authority put it to unnecessary expense; that it is likely that this will be repeated in court and will lengthen unnecessarily the hearing time required; that the defendant will be subjected to unmeritorious litigation and significant costs; and that it is just in all the circumstances for the Court to order security to a value of $30,000.

[6] In this regard the defendant relies upon r 5.45(2) of the High Court Rules (via reg 6(2)(a)(ii) of the Employment Court Regulations 2000 (the Regulations)) and on the judgments of the Court in *Booth v Big Kahuna Holdings Ltd*[2] and *Liu v South Pacific Timber (1990) Ltd.*[3]

[7] It is appropriate to start with the Authority's substantive determination issued on 9 February 2015 after an investigation meeting over two and a half days in November 2014 and following the receipt of written submissions in early December 2014.

[8] Ms Twentyman's grievances and common law claims for breach of contract were universally unsuccessful in the Authority. It held that The Warehouse Limited (TWL) had not breached the express or implied health and safety terms of Ms Twentyman's employment agreement with it; that she did not raise her personal

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[1] *Twentyman v The Warehouse Ltd* [2015] NZERA Auckland 112 (costs); *Twentyman v The Warehouse Ltd* [2015] NZERA Auckland 39 (substantive).
[2] *Booth v Big Kahuna Holdings Ltd (No 2)* [2014] NZEmpC 43.
[3] *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129.

grievance or grievances within the statutory period of 90 days; and that she herself breached express or implied terms of her employment agreement. The Authority ordered Ms Twentyman to pay a penalty of $1,500 to TWL for those breaches. The Authority subsequently awarded costs in favour of the company in the sum of $8,750 together with disbursements of $1,106.43. The penalty awarded against Ms Twentyman was directed to be paid to TWL rather than to the Crown.

[9] TWL's concerns are that, although it is not aware of whether Ms Twentyman worked or otherwise received money after leaving its employment by dismissal (but the justification for which is not challenged in this case), accident compensation payments, to which she may have been entitled, may have been or may be discontinued. This is said to be a possible result of the Authority's finding that she gave misleading evidence to it about her physical capacity. Ms Swarbrick for TWL notes that in addition to there being no reiteration by Ms Twentyman of her breach of contract claims, her later dismissal by the company is not challenged, at least in this proceeding.

[10] In its costs determination the Authority found that "… the management of Ms Twentyman's claims was not ideal", including that she "failed to provide transcripts of recorded discussions [and that she] put into evidence [and] … a significant number of documents that were not ordered, numbered or referred to in her evidence."[4]

[11] The Authority concluded at [10] of that determination:

> Even though the way the matter was managed by Ms Twentyman led to extra hearing time that extra time is recognised by the fact that the tariff approach includes all hearing time. If the matter had been better managed, the hearing may only have taken two days. The fact that it took two and a half days becomes a penalty to Ms Twentyman by virtue of the fact that she will be faced with contributing costs for the additional hearing time.

[12] Proceedings in the Authority are, however, controlled by that body. They are not adversarial litigation and if the plaintiff was responsible, as the defendant alleges, for significant waste of time and effort in that forum, that was both a matter for control by the Authority of its own process and able to be reflected in an award of

[4] *Twentyman*, above n 1 at [9].

costs if the Authority thought that was warranted. The Court's concern now is for the conduct of this proceeding although the case's track record is one element in the decisions on these applications now before the Court.

[13] Next, the defendant asserts that Ms Twentyman's challenge is without merit. Its National Health and Safety Manager, Kirsty Wooding, deposes to having found Ms Twentyman to misconstrue and misrepresent events in the many dealings she has had with the plaintiff. Ms Wooding points out, also, that the Authority reached similar views in making adverse credibility findings against the plaintiff. Counsel is concerned that, as in the Authority, the defendant will need to adduce extensive and detailed evidence to rebut Ms Twentyman's claims including the possible elaboration of these which Ms Wooding considers are likely to arise during Ms Twentyman's evidence. Ms Wooding says that TWL "can see no merit in Ms Twentyman's claims against it". That is unsurprising given that Ms Wooding is the principal representative of TWL, but such assessments are better made independently by the Court. Of greater concern, however, is the prospect, signalled by Ms Swarbrick, of TWL's Ms Wooding giving lengthy evidence from notes taken at the time of things the plaintiff said at the Authority's investigation meeting.

[14] In these circumstances, TWL considers that it is unlikely to be able to recover costs that may be awarded in its favour if the challenge is unsuccessful.

[15] I agree that Ms Twentyman has taken no steps to either pay or otherwise deal with the Authority's costs orders against her totalling $9,856.43 or in relation to the penalty she has been required to pay of $1,500. Surprisingly, her inaction is said to have been after taking legal advice, which the plaintiff is continuing to receive as and when she believes she needs it. Ms Swarbrick is correct that Ms Twentyman is wrong to believe that the filing of a challenge stays automatically the execution of the Authority's orders.[5]

[16] Ms Twentyman's opposition to the application for security for costs is contained principally in the form of a memorandum to the Court rather than the expected notice of opposition and affidavit in support. Ms Twentyman's (therefore

[5] See Employment Relations Act 2000, s 180.

unsworn) grounds for opposition include that she is currently not working; is receiving weekly compensation payments of $440; and has outgoings of about $300 per week. She says that she will not be able to return to full-time employment until surgery (for which she has provided some medical evidence) is performed and she has healed.

Ms Twentyman says that if the Court were to order security for costs, this would "increase the risk of a worthy challenge being stifled …" and so bring about an unjust outcome. As in the case of her application for an order staying execution of the Authority's determination, Ms Twentyman says that she should not be required to pay the sums ordered by the Authority against her unless and until she is unsuccessful on her challenges. Given the absence of a challenge to the Authority's rejection of her common law claims of breach of contract, however, the plaintiff should have to face up to payment of at least some of these costs.

[17] To require the plaintiff to furnish security for the defendant's costs in the sum of $30,000 before Ms Twentyman's claim can proceed further would result, in effect, in precluding that challenge from ever proceeding further. Ms Twentyman's financial circumstances (as I am prepared to accept them from the bar pursuant to s 189 of the Employment Relations Act 2000 (the Act)) are such that she would be unable to offer security in that amount or indeed in any realistic lesser amount.

[18] The plaintiff has a statutory right to challenge the Authority's determination or parts of it as she does. Although the Court is empowered to order security for costs in appropriate circumstances, the case law establishes that such orders are rarely made and, for the most part where they are made, in circumstances such as where a party is resident out of the jurisdiction.[6]

[19] Although it is understandable that TWL may wish to seek to secure an award of costs to which it is confident it will be entitled subsequently, to accede to that request would amount effectively to giving judgment by default in favour of the defendant because it would give Ms Twentyman no real choice other than to abandon

[6] High Court Rules, r 5.45(1)(a)(i); see also, for example, *Fraser v Otago District Health Board* CC19/03, 17 July 2003 (EmpC) at [27].

her proceeding. Her challenge is not so obviously hopeless that the Court would be warranted in taking such a step. In these circumstances, the defendant's application for security for costs in the sum of $30,000 is dismissed.

[20] It is understandable that the defendant opposes Ms Twentyman's application that she not be required, pending the hearing and determination of her challenge, to pay the costs and penalties ordered by the Authority. The costs and disbursements which the Authority ordered Ms Twentyman to pay TWL amount to $9,856.43. This is made up of $8,750 as a contribution towards TWL's costs, and disbursements of $1,106.43. The penalty awarded by the Authority against Ms Twentyman in respect of her "conduct in providing misleading information and being [deliberately] obstructive" and which was "serious and sustained over a long period of time",[7] amounted to $1,500 which it directed be paid to TWL within 28 days of the date of the Authority's determination.

[21] Her Honour Judge Inglis has dealt with a similarly difficult question of security for costs being given by indigent unrepresented plaintiffs and a stay application (as in this case) in a very recent judgment, *Lawson v New Zealand Transport Agency*.[8] I respectfully endorse the Judge's summary of the law, and of the difficulties faced by parties and the Court in these circumstances which I perceive are now becoming more common. I propose to add only a few additional remarks to those made by her Honour.

[22] Historically, this Court and its predecessor have been loath to make orders for security for costs in cases such as this, and have made them only very rarely. Without referring specifically to the gate-keeping tests in the High Court Rules, such cases in which orders for security have been made have included ones where a party is resident out of the jurisdiction and has no assets in New Zealand from which costs could be recovered. Even in such cases, however, the Court needs to take account of the particular facts of the absence from the jurisdiction. For example, where a party is resident (and with assets) in another jurisdiction such as Australia, and attempts at recovery may be assisted by mutually operative statutory provisions, an order for

[7] *Twentyman* (substantive), above n 1 at [41].
[8] *Lawson v New Zealand Transport Agency* [2015] NZEmpC 168.

security will not necessarily be made simply because the party is not resident in New Zealand. Orders for security are still made rarely and in the particular circumstances of unusual cases. The tests are not the same as those in the High Court, in view of the different natures of the cases and the unique 'de novo hearing' challenge process under s 179 of the act.

[23] The other feature that distinguishes cases in this jurisdiction from litigation in other courts is that a party's impecuniosity is often the consequence of the dismissal from employment or other personal grievance which is the subject of the litigation.

[24] Ms Swarbrick, in submissions, sought to distinguish this case from the more common ones in which a litigant in Ms Twentyman's position asserts that her impecuniosity is a consequence of her unjustified dismissal from employment, the justification for which she is challenging. However, I would conclude that there is not a substantial or in-principle difference in consequence. Here, Ms Twentyman alleges that she was disadvantaged unjustifiably by her employer's actions contributing to, and following, a workplace accident and subsequent hazardous exposure to concrete dust which caused her to be on long-term leave for these injuries and paid accident compensation payments.

[25] TWL is apparently an employer exempt from the (usually applicable) accident compensation scheme. That is in the sense that, although subject to the oversight of parts of the Accident Compensation Act 2001 by the Accident Compensation Corporation, it meets many of the Corporation's (as well as its own as employer) obligations under the legislation and is, I imagine, therefore exempt from the payment of levies. Ms Swarbrick confirmed that the defendant is not privately insured for its accident compensation obligations, at least in respect of workplace accidents.

[26] Ms Twentyman says that she has been paid, and continues to be paid, an earnings-related weekly sum equivalent to 80 per cent of her former earnings. Ms Swarbrick did not have instructions as to whether her client's payments to Ms Twentyman are at that rate or a higher rate. In these circumstances I accept, as would seem to be logical, that Ms Twentyman has suffered, and continues to suffer, a

loss equivalent to 20 per cent of her previous earnings and maybe more if those wage rates would have risen in the period between her injury and now.

[27] Ms Swarbrick submitted that the fact that Ms Twentyman has been able to file her challenge to the Authority's determination, which she has a statutory right to do, means that she cannot be said to be prevented from bringing a bona fide challenge to the Court. In a narrow and literal sense, that may be true but the focus of the test or guideline is not simply the filing but the prosecution and ability to obtain a result that is looked at. Indeed it would be ironic if the law were to be, as Ms Swarbrick submitted, that having paid a filing fee, Ms Twentyman cannot be said to have been deprived of her statutory entitlement to have her case heard and determined on its merits. That was not a submission which assisted the defendant's case.

[28] Although, therefore, Ms Twentyman may not be in precisely the same position as an employee who alleges that he or she has been dismissed unjustifiably, which has caused the losses for which compensation is claimed, that is in principle and in essence the situation here. Ms Twentyman receives accident compensation payments of about $440 per week. She says, and I accept as inherently probable, that she is unable to save money or otherwise accumulate in cash, the sum of $30,000 sought by TWL as security.

[29] Ms Twentyman says that she has an impending review of the payments made to her by TWL on the basis that she says she was underpaid for some period, the amount in issue being about $14,000. That review is due to take place within the next couple of months, although it is not known when there will be an outcome to that.

[30] Ms Twentyman also tells the Court that she has a 50 per cent equitable interest in two motor vehicles owned and operated by her and her (domestic) partner which she estimates would have a combined retail value of between $40,000 and $50,000 and which are unencumbered. Taking the more conservative view of this valuation, it follows that Ms Twentyman's own equivalent interest in these assets may be $20,000. That opens up two possibilities: first, that these interests could

provide security for a loan to pay security for costs; or, second, that an instrument by way of security could be entered into and registered in favour of the defendant on appropriate conditions as to repayment.

[31] The defendant is concerned, justifiably, about the prospective costs to it of defending this proceeding which Ms Swarbrick estimates will, on past performances, occupy more than five hearing days. I accept that there may have been a number of uneconomic, even wasteful, elements to the Authority's investigation of the case which may be attributable to Ms Twentyman's conduct in that forum as a litigant in person. Those matters should, however, be able to be dealt with or at least ameliorated by close and tight hearing management of the case in this Court. The procedure under regs 55 and following of the Regulations will enable a Judge to manage the matter henceforth, including especially the issues for determination, numbers of witnesses, relevance of documents, isolation of disputed facts, and questions of law.

[32] It must be said that whilst not dictating, and certainly not being critical of, the defendant's choice of counsel, the matter does not appear to warrant necessarily the involvement of senior and experienced counsel, let alone two lawyers, as it was at this hearing. As has been said in other cases, a party is free to choose its representative(s) but cannot necessarily expect that an award of costs will reflect that choice if the Court assesses that the case is capable of being handled by a junior or intermediate representative as I consider this one may be.

[33] I am satisfied that if money is paid to the defendant but is ultimately repayable to the plaintiff, the defendant is in a position to disgorge that payment and will do so.

[34] In the foregoing circumstances I do not consider that it would be in the interests of justice to require the plaintiff to pay security for costs in the sum of $30,000; and to stay the proceedings and, potentially, to dismiss them, other than on their merits, in the absence of payment of this sum. Rather, I think the situation can be dealt with most justly by requiring the plaintiff to give security for the costs and disbursements ordered by the Authority and in respect of which the plaintiff has

taken no step to meet her responsibilities, but as a condition of granting a stay of execution of the remedies by TWL. I exclude from that sum the penalty ordered by the Authority to be paid to the defendant. Penalties are in a different category to costs and, although in some circumstances might be payable to a party, are payable primarily to the Crown. It is not entirely clear why the Authority in this case directed payment of the penalty of $1,500 to the defendant in lieu of the Crown.

[35] I will stay execution of the Authority's remedies but on condition that these are secured by the plaintiff, what might be described as requiring security for past costs. In these circumstances, I do not order security for future costs.

[36] The plaintiff has an election. She may provide security in the sum of $9,856.43 (being the costs and disbursements awarded in the Authority) for costs in favour of TWL by way of an instrument of security over her interest or interests in a motor vehicle or motor vehicles. Alternatively, the plaintiff may pay that sum of $9,856.43 to the Registrar of the Employment Court at Auckland, to be held on interest-bearing deposit pending the agreement of the parties or an order of the Court for payment out of this capital sum plus interest.

[37] Until whichever of these alternatives the plaintiff elects to follow is completed, the proceeding before this Court is to be stayed with the exception that the defendant may now file and serve an amended statement of defence as it has intimated it will do, to deal with its absence of pleading to the claim for compensation for wage loss which the defendant says is barred by the accident compensation legislation.

[38] Anticipating that these matters of security will be able to be attended to, if not completed, within two months, the Registrar is to arrange a further directions conference with a Judge about 10 weeks hence to progress the matter and, in particular, to institute a hearing management regime under the Regulations.

[39] This compromise, as in the recent case of *Lawson*,[9] represents an attempt to achieve and maintain the delicate and difficult balance, on the one hand, between

[9] *Lawson*, above n 7.

compensating the defendant for its costs incurred and as are likely to be incurred and, on the other, the importance to the plaintiff of access to justice in the form of a first hearing by a court in adversarial litigation.

[40] Leave is reserved for either party to apply for any further orders or directions.

[41] The defendant has sought costs on these applications. It has enjoyed partial success but so, too, has Ms Twentyman in resisting the defendant's application for security for costs in the sum of $30,000. In these circumstances, I consider that the most just course is to let the costs of this exercise lie where they fall and there will be no order.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on Thursday 8 October 2015