IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 194
EMPC 34/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a stay of execution
AND IN THE MATTER	of an application for security of costs
BETWEEN	VIANNEY TUALA Plaintiff
AND	LINFOX LOGISTICS (N.Z.) LIMITED Defendant

Hearing: (on the papers filed 15 and 29 April and submissions dated 2 and 10 July 2015)

Counsel: S Fonua, counsel for the plaintiff
M Wisker and L Adams, counsel for the defendant

Judgment: 4 November 2015

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

Introduction

[1] In this proceeding, the plaintiff, Mr Vianney Tuala, has challenged de novo two determinations of the Employment Relations Authority (the Authority).[1] In its first determination dated 13 January 2015, the Authority rejected a claim by Mr Tuala that he had been unjustifiably dismissed by his former employer, the defendant, Linfox Logistics (N.Z.) Limited (Linfox). In its second determination dated 27 February 2015, the Authority made a costs award against Mr Tuala in favour of Linfox in the sum of $11,250.

[1] *Tuala v Linfox Logistics (N.Z.) Ltd* [2015] NZERA Auckland 9; *Tuala v Linfox Logistics (N.Z.) Ltd* [2015] NZERA Auckland 62.

[2] There are now two interlocutory matters before the Court. First, an application by Mr Tuala for an order staying execution of the costs determination pending the outcome of his challenge and, secondly, an application by Linfox for an order requiring Mr Tuala to give security for costs within a specified time period, failing which the challenge is to be struck out. The respective applications are strongly opposed.

[3] It was agreed that the applications could be dealt with on the papers. Affidavits and supporting documentation, along with helpful submissions, have been produced by counsel. Judge Perkins, who has been handling the matter up to now, issued minutes to the parties dated 17 March 2015 and 18 June 2015 dealing with certain procedural issues and noted that the parties had indicated that it would be helpful if they could attend a Judicial Settlement Conference (JSC). Judge Perkins presided over a JSC on 13 August 2015. The matter did not settle and no further JSC is planned.

The background

[4] The following background summary is taken from the dismissal determination and other documentation before the Court.

[5] Linfox is Australia's largest privately owned logistics company. It operates throughout Australia, Asia and New Zealand. Linfox has approximately 900 employees in New Zealand with that number increasing over a Christmas period with the addition of approximately 200 temporary employees.

[6] Mr Tuala commenced employment with Linfox in November 1995 as a Class 5 Truck Driver. He was employed pursuant to a Collective Employment Agreement between Linfox and the National Distribution Union. Mr Tuala continued in his employment as a driver until he was dismissed on 20 August 2009. The reasons given for his dismissal were:

i. He had failed to comply with Linfox's health and safety policies; and

ii. He had falsified his logbooks and runsheets (timesheets).

[7] From the commencement of his employment Mr Tuala, who was based in Auckland, was employed by Linfox as a driver delivering goods to Progressive supermarkets but at the end of June or early July 2009, following a disciplinary matter, he was transferred to work from a South Auckland depot dealing with the Linfox Foodcap Contract. The new role involved Mr Tuala distributing fresh meat to Progressive supermarkets throughout the North Island.

[8] On 15 July 2009, Mr Tuala was making a delivery to Woolworths Bayfair in Tauranga. He alleges in his pleadings (but this is denied by Linfox) that the lifting equipment on his vehicle failed to operate and as he, with the assistance of one of the customer's employees, was engaged in manually unloaded bins of meat, he injured his back. Mr Tuala claims, but again this is denied by Linfox in its statement of defence, that he notified his supervisor of the accident at the time but when he arrived back in Auckland, he could not find the supervisor to complete an incident report form. Linfox does accept that approximately 90 minutes after he left the Foodcap site at the end of his shift that day, Mr Tuala notified his supervisor that he was off on ACC and would not be coming into work the following day.

[9] Subsequently, as part of an investigation into the incident involving Mr Tuala on 15 July 2009, Linfox's Transport Manager for the Foodcap contract, Ms Rene Reynolds, checked to see if Mr Tuala had noted the accident and his injury on his runsheet. She found nothing in his runsheet about the accident but while she was carrying out her check Ms Reynolds found two recent entries in Mr Tuala's runsheets and log book where he recorded that he had finished work 58 minutes and 40 minutes, respectively, after CCTV footage had shown him leaving the work depot. Those entries were for the 7-8 and 8-9 of July 2009. The entry for 15 July, the day of the Tauranga incident, also showed an irregularity. Mr Tuala had recorded in his logbook finishing work at midnight but the CCTV footage had shown him leaving the premises at 11.07 pm.

[10] Both of those matters, Mr Tuala's failure to record his accident and complete an incident report form along with the alleged falsification of his timesheets and logbook, were then formally investigated by Linfox. Meetings were held and following a final disciplinary meeting on 20 August 2009, Linfox concluded that the

allegations had been established. Mr Tuala was advised that his actions had amounted to serious misconduct and his employment was summarily terminated that same day.

[11] In its determination, the Authority made reference to the relevant contractual provisions and Linfox's policy documentation noting that, as a senior driver and union delegate, Mr Tuala understood health and safety was paramount in the workplace. It also found he was aware of Linfox's policies and procedures and other relevant rules and regulations. One of the provisions referred to in this regard was the rule set out in guidelines published by the NZTA (New Zealand Transport Agency) – The Work Time and Log Books Guide which provided (relevantly) that drivers must have at least a 30 minute break after 5.5 hours work time.

[12] The Authority recorded in its determination that at the first disciplinary meeting on 31 July 2009, Mr Tuala had explained that during the runs in question he did not have time to have lunch breaks or other breaks in order to maintain the schedule which he had been set. As a result, he had added one hour after his arrival time back at the depot to compensate him for not having had the breaks. He had further explained that he had been doing this for many years without Linfox making an issue of it and that it was common practice amongst all of the drivers.

The applications

[13] In an affidavit dated 1 April 2015, which accompanied his application for a stay of proceedings, Mr Tuala, who according to a medical certificate attached to another affidavit was 59 years of age at the time of his dismissal, deposes that he cannot afford to pay the costs ordered by the Authority pending the hearing of his challenge. He is registered with WINZ as unemployed; his only income (confirmed by a letter from WINZ) is a benefit of $292.06 per week and his weekly rent amounts to $170. Details of Mr Tuala's other weekly expenses have been disclosed. He states that he has no assets and the small savings he had accumulated has been spent on legal fees.

[14] Mr Tuala also deposed that he had applied for legal aid which was declined but he had requested reconsideration which was still pending.

[15] In its notice of opposition, dated 15 April 2015, opposing Mr Tuala's application for a stay, Linfox noted Mr Tuala had also raised an unjustified disadvantage grievance with the Authority over Linfox's decision to relocate his place of work from the Progressive contract site to the Foodcap contract site in South Auckland but that grievance had been dismissed by the Authority on the basis that it had not been raised within the 90-day statutory limitation period. Linfox submitted that Mr Tuala had not challenged that particular determination but Mr Fonua, counsel for Mr Tuala, claims in his Notice of Opposition dated 29 April 2015, that the disadvantage grievance is now being challenged. Although the issue is not relevant to the two applications before me, I note it as a procedural matter which will need to be clarified at a future directions conference.

[16] Linfox accepted that Mr Tuala is impecunious but it claimed that Linfox had not caused his impecuniousity. It also expressed concern about the delays and claimed that the way in which Mr Tuala had conducted his claim to date was unduly affecting Linfox, "both in terms of legal fees incurred and in management and other time spent."

[17] There is considerable overlap, which is almost inevitable, in the stated grounds and submissions advanced by the parties in respect of the two applications before the Court. The principal grounds advanced by Linfox in support of its application for security for costs were that its costs in the proceeding are likely to be significant; Mr Tuala had little prospect of success; Mr Tuala was not legally aided and, in the circumstances, it was just that an order for security for costs be given in favour of Linfox.

[18] In his Notice of Opposition, dated 29 April 2015, Mr Tuala confirmed that he has now been granted legal aid.

Legal principles

The stay application

[19] The starting point in any consideration of a stay application is s 180 of the Employment Relations Act 2000 (the Act) which provides that an election to challenge a determination of the Authority does not operate as a stay of proceedings unless the Court or Authority so orders. That discretionary power is reaffirmed in reg 64 of the Employment Court Regulations 2000 (the regulations) which provides that a stay order may relate to the whole or part of a determination and may be made subject to such conditions, including conditions as to the giving of security, as the Court thinks fit to impose.

[20] In *Duncan v Osborne Buildings Ltd*, the Court of Appeal stated in relation to an application for stay:[2]

> … [I]t is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful. Often it is possible to secure an intermediate position by conditions or undertakings and each case must be determined on its own circumstances.

[21] Those principles were reaffirmed in *Keung v GBR Investment Limited*, where the Court of Appeal listed a number of factors to be taken into account in the balancing exercise, including:[3]

(a) Whether the appeal may be rendered nugatory by the lack of a stay;

(b) The bona fides of the applicant as to the prosecution of the appeal;

(c) Whether the successful party will be injuriously affected by the stay;

(d) The effect on third parties;

(e) The novelty and importance of the questions involved;

(f) The public interest in the proceeding;

(g) The overall balance of convenience; and

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2 *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA), at 87.

3 *Keung v GBR Investment Ltd* [2010] NZCA 396, at [11] (footnotes omitted).

(h) The apparent strength of the appeal.

[22] The Court of Appeal in *Keung* stated that generally a stay would only be granted on provision of security and the issue in any given case is whether there is anything in terms of the factors outlined above to warrant a departure from that general rule.[4] It also indicated that there may be cases where the merits of an appeal may be "so obvious as to be a critical factor in favour of a stay".[5]

The security for costs application

[23] While there are no express provisions in the Act or regulations providing for security for costs orders, this Court has consistently applied the security for costs provisions in the High Court Rules. Rule 5.45 of the High Court Rules provides, relevantly, that if a Judge is satisfied, on the application of the defendant, that the plaintiff is resident out of New Zealand or that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceedings, then the Judge may, if he or she thinks it just in all the circumstances, order the giving of security for costs.

[24] In *Allwaze Designs Ltd v Cawthorne* the Court cited certain passages from some of the leading authorities on security for costs.[6] The following citations appear to have particular relevance to the facts of the present case:[7]

> [15] The rule [for security for costs] 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.
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> [16] Of course, the interests 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.

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4 *Keung v GBR Investments Ltd*, above n 3, at [12].
5 At [21].
6 *Allwaze Designs Ltd v Cawthorne* [2015] NZEmpC 17 (at [9] – [11]).
7 *McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215, (2002) 16 PRNZ 747 (CA) cited in *Allwaze Designs Ltd v Cawthorne*, above n 6 at [9].

[25] The second citation was from the recent judgment of the Supreme Court in *Reekie v Attorney General*:[8]

> [2] Security for costs can be required in the High Court and District Court when it appears that an order for costs against the plaintiff might not be able to be enforced (either because of the plaintiff's foreign residence or impecuniosity. The jurisdiction to require security poses something of a conundrum for the Courts. The poorer the plaintiff, the more exposed the defendant is as to costs and the greater the apparent justification for security. But, as well, the poorer the plaintiff, the less likely it is that security will be able to be provided and thus the greater the risk of a worthy claim being stifled.
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> [3] Applications for security for first instance proceedings call for careful consideration and judges are slow to make an order for security which will stifle a claim. A somewhat different approach has, however, been taken in respect of appeals.

Submissions

[26] Mr Fonua, counsel for Mr Tuala, submitted that Mr Tuala had a "strong arguable case" in respect of both the substantive dismissal challenge and the costs challenge. In respect of the dismissal challenge, Mr Fonua submitted that the Authority had failed to investigate the assertion by Mr Tuala that the practice of adding an hour to the runsheet to compensate for not taking a lunch break was common practice. Mr Fonua complained that at the Authority investigation, Mr Tuala had called three witnesses to testify to the fact that adding an hour to the runsheet had been common practice at Linfox for "many years" but the Authority did not refer to the evidence of these witnesses. Mr Fonua also claims that at the time of the Tauranga incident, Linfox was aware that Mr Fonua was undergoing chiropractic treatment but it still required him to carry out heavy duties in breach of its health and safety policy.

[27] Mr Fonua submitted that as Mr Tuala was now in receipt of legal aid, the Court had no jurisdiction to order security for costs. Mr Fonua's argument, in this regard, was that s 45(2) of the Legal Services Act 2011 prevents the making of costs orders in civil proceedings against an aided person unless there are exceptional circumstances and counsel submitted that this requirement presupposes that there is no room for an order for costs, such as an application for security, being "entertained

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[8] *Reekie v Attorney General* [2014] NZSC 63; (2014) PRNZ 776 cited in *Allwaze Designs Ltd v Cawthorne*, above n 6 at [11].

prior to the hearing". Mr Fonua also submitted that if security for costs were to be ordered then it would deny the plaintiff access to justice in the sense that his challenge to the Authority's determination would be rendered nugatory.

[28] In their extensive submissions on behalf of Linfox, counsel contended that, as Mr Tuala was not legally aided when the costs determination was made by the Authority, it would be unjust to order a stay of the Authority's cost determination pending the "re-hearing" of the claim "where there is no reason to believe that the result for Mr Tuala will be any different, but where Linfox will certainly suffer further loss."

[29] Counsel for Linfox made submissions in respect of the various factors noted by the Court of Appeal in *Keung*.[9] They submitted that the challenge would not be rendered nugatory by Mr Tuala's financial position if a stay was made because he is now legally aided and has the funding necessary to continue with the challenge. In other words, as counsel expressed it, the challenge would not in any way be affected by an order requiring Mr Tuala to pay the Authority's costs determination either in whole or in part. Counsel also attacked Mr Tuala's bona fides, given the delays in prosecuting his case to date and the lack of merit in his challenge. In response to the allegation that the Authority had ignored the evidence of Mr Tuala's three witnesses, counsel for Linfox submitted that there was no basis for drawing the inference or conclusion that the Authority had not considered the evidence of these witnesses simply because they were not named in the determination.

[30] In support of Linfox's application for security for costs, counsel noted that Linfox had incurred costs in excess of $72,000 in relation to the proceeding to date without any contribution from Mr Tuala and that it was likely to incur an additional $60,000 or more in connection with the challenge in this Court. Counsel submitted that this factor, plus the lack of merits and the delays in prosecuting the proceeding, amounted to "exceptional circumstances" which would enable the court to order security under s 45(2) of the Legal Services Act 2011.

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9 See [21] of this judgment.

Discussion

[31] As noted above, the Court of Appeal in *Keung* made it clear that the merits of an appeal is a proper matter, indeed sometimes a decisive factor, in determining whether it is appropriate to order a stay. In *Ambrose v Pickard* the Court of Appeal also made it clear that a proper assessment of the merits of the case is an essential consideration in considering an application for security for costs.[10]

[32] The thrust of Mr Tuala's challenge to the finding by the Authority that he had falsified his logbooks and runsheet was that all drivers employed by Linfox were adding time on to their logbooks and runsheets to compensate for not having lunch breaks while carrying out their delivery duties to Progressive supermarkets. In his affidavit of 29 April 2015, Mr Tuala deposed that the practice of adding time at the end of the run was "common practice and it was approved by the supervisors by signing them off." Mr Tuala attached as exhibits to his affidavit the briefs of evidence of the three witnesses he had called to give evidence at the Authority investigation. He claims that the Authority did not consider or make any ruling accepting or rejecting that evidence.

[33] As noted above, counsel for Linfox state that the Authority Member heard and questioned the witnesses and there is no basis for concluding that their evidence was not considered or addressed simply because they were not named or referred to in the determination.

[34] One of the witnesses in question was a truck driver who had worked for Linfox for more than 10 years. In one passage of his brief of evidence he stated:

> 8. It was IMPOSSIBLE to have a break during the day to get all our driving duties done. It was "very normal" and part of every "day-to-day work ethics" not to have any breaks. To compensate our loss for the two breaks we missed, we would always add an extra hour onto our run sheets.

[35] Another driver witness stated:

> 23. The reality of the matter is that all drivers are working under very highly stressful time constraint in order to satisfy their biggest

[10] *Ambrose v Pickard* [2009] NZCA 502, at [32].

customers who demand that the goods must be delivered on time. Drivers simply cannot take their break as stated in the memo.

24. As said above the drivers are encouraged and ordered to forego legally required breaks to meet Linfox contracted in-store time. This is the reality of the situation.

25. It is a common practice at Linfox that drivers who are not taking their breaks at the appropriate time will have to add the equivalent time on into their timesheets so that they would be paid for such time.

26. This kind of practice is well known to Linfox management and they allow it to happen in order to meet the contracted in-store time.

[36] Although the Authority noted in its determination that Mr Tuala had claimed during the Linfox disciplinary process that his actions had been common practice amongst the Linfox drivers, it made no reference to the evidence he had given at the Authority investigation on the subject or to the supporting evidence given by his three supporting witnesses.

[37] Section 174(a) of the Act, as it stood at the date of the determination in this case (prior to its amendment as from 6 March 2015), provided that a determination must state relevant findings of fact; state and explain findings on relevant issues of law; express the Authority's conclusions on matters or issues it considers require determination in order to dispose of the matter and specify what orders (if any) it makes. Section 174(b) then provided that the Authority need not record in its determination other matters such as the evidence heard or received; submissions made by the parties; the process followed in its investigation and its assessment of the credibility of any evidence or person.

[38] It is arguable that under the mandatory requirements of s 174(a) of the Act the Authority should have made findings or expressed its conclusions on what appears to have been the central plank of Mr Tuala's dismissal grievance. Clear findings on such pivotal issues play a critical role in maintaining public confidence in the Authority's investigative process.[11]

[39] However, I need not rule on that issue. Mr Tuala has pursued his statutory right under s179 of the Act to challenge the Authority's determination rejecting his

[11] See further observations on the mandatory statutory requirements (now s 174E of the Act) in *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192 at [28]-[34] per Judge Corkill.

dismissal grievance. For present purposes in relation to the stay and security for costs applications before the Court, it is sufficient for me to find (which I do) that it cannot be said that Mr Tuala's challenge lacks merit. On the contrary, I consider that the merits of this particular aspect of the challenge are sufficiently obvious as, in the words of the Court of Appeal in *Keung*, "to be a critical factor in favour of a stay."[12]

[40] The other aspect of the substantive challenge related to the finding by the Authority that Mr Tuala had failed to comply with Linfox's health and safety policies in that he did not report the Tauranga accident. As noted above, that aspect of the challenge is likely to depend upon the Court's assessment of the credibility of the key witnesses. For his part, Mr Tuala apparently contends that he did, in fact, notify his supervisor about the accident. In any event, there may also be an issue as to whether his failure to report the accident or injury could amount to serious misconduct.

[41] In the balancing exercise, I have taken into account the other factors mentioned in *Keung* but, in my view, none of them are as critical as the merits. Counsel for Linfox submitted that the absence of a stay would not render the challenge ineffectual now that Mr Tuala is legally aided and they submit that the costs awarded by the Authority should (in whole or in part) be paid into Court or some other form of security provided. They further submitted that there is no evidence before the Court that Mr Tuala is in any way precluded from obtaining financial assistance or security from some other source. If Linfox wished to explore that option further, however, then it should have sought leave to have Mr Tuala cross-examined on the topic but by agreeing that the applications could be dealt with on the papers, counsel has left the Court with no option but to accept the affidavit evidence before it. On the basis of that evidence, the Court has no difficulty in concluding that Mr Tuala is impecunious with no prospect of obtaining financial backing from any other source. To order Mr Tuala to pay funds into Court or provide security in some form or other would, on the basis of the evidence before the Court, be an exercise in futility.

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[12] *Keung v GBR Investment Ltd*, above n 3, at [21].

[42] Turning to Linfox's application for security for costs, I agree with counsel that the position is now covered by s 45 of the Legal Services Act 2011 which provides (relevantly):

> **45 Liability of aided person for costs**
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> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
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> (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
>
> (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
>
> (a) any conduct that causes the other party to incur unnecessary cost:
>
> (b) any failure to comply with the procedural rules and orders of the court:
>
> (c) any misleading or deceitful conduct:
>
> (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
>
> (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
>
> (f) any other conduct that abuses the processes of the court.
>
> (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
>
> (5) If, because of this section, no order for costs is made against the aided person, an order may be made specify what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.
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> …

[43] Counsel for Linfox accepted that Linfox had the onus of proving the existence of "exceptional circumstances".

[44] As noted above, Mr Fonua submitted that as Mr Tuala was now legally aided the Court had no jurisdiction to order security for costs. The argument developed by counsel was to the effect that the wording of s 45(2) of the Legal Services Act 2011 precluded the making of a costs order against an aided person in civil proceedings

until after the substantive hearing of the case, and then only in exceptional circumstances. No authorities were cited by Mr Fonua for that proposition and it was rejected by counsel for Linfox as being "incorrect".

[45] Although the definition of "civil proceedings" in the Legal Services Act 2011 does not specifically refer to proceedings under the Employment Relations legislation, the definition is not expressed to be inclusive and its scope is not an issue in this proceeding. There is no definition of the term "order for costs" but, in reference to that term in s 45(2) of the Legal Services Act 2011, counsel for Linfox submitted: "The High Court and Employment Court have not only shown willingness to award security for costs against a legally aided defendant, but have actually done so." The authorities counsel relied upon in this regard were *Apatu v Apatu*[13]and *MacDonald v Whale Pumps Limited t/a Denby Caterers.*[14]

[46] In *Apatu*, Associate Judge Gendall concluded that the legally aided plaintiff had "very low prospects of success".[15] His Honour considered that there were exceptional circumstances which warranted the making of an award of costs under s 45(2) of the Legal Services Act 2011 and on that basis he considered it was appropriate to make an award of security for costs which he proceeded to do.

[47] In *MacDonald v Whale Pumps Limited*, Chief Judge Colgan noted that the difficulty in attempting to apply the s 45(3) of the Legal Services Act 2011 criteria in establishing “exceptional circumstances” was that, for the most part, the statutory criteria was "only ascertainable after the hearing has been concluded and judgment given".[16] To that extent the judgment affords support for Mr Fonua's proposition that s 45(2) does not envisage the making of a costs order against a legally aided plaintiff prior to the substantive hearing.

[48] Later in his judgment, Chief Judge Colgan made some observations which have particular relevance to the facts of the present case:

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13 *Apatu v Apatu* HC Napier CIV-2010-441-195, 19 December 2011.
14 *MacDonald v Whale Pumps Ltd t/a Denby Caterers* [2013] NZEmpC 201.
15 *Apatu v Apatu* , above n 13, at [28].
16 *MacDonald v Whale Pumps Ltd t/a Denby Caterers*, above n 14, at [19].

> [36] … If Ms MacDonald is required to give security for costs, the reality is that she will be unable to do so and her litigation will go no further. She has a statutory right to challenge by hearing de novo and the deliberate scheme of the Employment Relations Act is that a party dissatisfied with the Authority's informal, low-level and investigative outcome can start again in the Employment Court with conventional adversarial litigation. The Court must be very sure that it is in the interests of justice to extinguish a party's right to take that course for economic reasons.
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> [37] On the other hand, the defendant has a determination in its favour and has, for an enterprise of that size, expended a not insignificant sum in costs of representation which it is concerned justifiably it may not be able to recover. The consequences to the business of ongoing litigation will be very significant as they will be to its owner personally.
>
> [38] The plaintiff's grant of legal aid counts significantly against the defendant's application for the reasons set out earlier in this judgment.
>
> [39] Although allowing or refusing the application will prejudice to an extent one or other of the parties, I consider that the interests of justice are best served by declining the application for stay and for the payment of security for costs, but giving the parties an early opportunity for the challenge to be heard and, thereby, some finality.

[49] With respect to counsel, I fail to see how the decision in *MacDonald* does provide support for Linfox's contention that s 45 of the Legal Services Act 2011 envisages the making of an order for security for costs against a legally aided litigant. After noting that s 45(2) allowed for the making of an order for costs against an aided person in "exceptional circumstances", Chief Judge Colgan considered in some detail each of the non-inclusive criteria listed in s 45(3) for determining whether there were exceptional circumstances in any given case. His Honour concluded that, in the main, the conduct referred to could only be properly considered at the conclusion of the substantive hearing and after delivery of judgment in the case.[17]

[50] I respectfully agree with those observations but, in any event, I have not been persuaded that there are exceptional circumstances in the present case, of the type listed in s 45(3), which would warrant the making of an order for security for costs at this point in time against Mr Tuala.

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[17] At [19].

[51] The particular factors listed in s 45(3) of the Legal Services Act 2011 which Linfox relies upon in support of its submission that "exceptional circumstances" exist in the present case are:

> 66.1 Any conduct that causes the other party to incur unnecessary cost; and
>
> 66.2 Any unreasonable pursuit of one or more issues on which the aided person fails.

[52] In reference to the statements by the Court of Appeal in *McLachlan*, counsel for Linfox in their submissions in reply summarised the factors amounting to "exceptional circumstances" in these terms:

> 26. This is an instance where Linfox should be entitled to the protection afforded by security for costs. As noted in Linfox's submissions, Mr Tuala has not raised any novel arguments that would alter his prospects of success. Furthermore, Mr Tuala has pursued his claim in an over-complicated and unnecessarily protracted manner. Linfox submits these proceedings are precisely the kind of situation [envisaged] by the Court of Appeal.

[53] The reality of the situation, however, as was the case with Ms MacDonald, is that if security for costs is ordered, Mr Tuala's challenge will go no further. Indeed, Linfox's application specifically requests the inclusion of a provision in any security for costs order striking out the proceeding if the security ordered is not given by a specified date. In *McLachlan* the Court of Appeal made it clear that an order having that effect should be made only where a claim has little chance of success.[18] For the reasons stated above, I do not consider that to be the situation in the present case. I am satisfied that Mr Tuala is a worthy plaintiff with a genuine claim which should be permitted to proceed to a hearing.

[54] The plaintiff's application for a stay of the Authority's costs determination pending the outcome of the substantive hearing is granted.[19] The defendant's application for a security for costs order is dismissed. Costs are reserved.

A D Ford

Judge

Judgment signed at 2.00 pm on 4 November 2015

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[18] *McLachlan Ltd v MEL Network Ltd*, above n 7, at [15].

[19] *Tuala v Linfox Logistics (NZ) Ltd* [2015] NZERA Auckland 62.