IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2016] NZEmpC 169
EMPC 211/2016

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 of costs
AND IN THE MATTER	of an application for a stay of proceedings
BETWEEN	LISA ROBINSON Plaintiff
AND	GILLON & MAHER PLUMBING LIMITED Defendant

Hearing: (on the papers filed on 30 September, 19 October and 2 and 16 November 2016)

Appearances: R Thompson, advocate for the plaintiff
T Twomey, counsel for the defendant

Judgment: 16 December 2016

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Gillon & Maher Plumbing Limited (Gillon & Maher) has applied for an order for security for costs from Ms Lisa Robinson, as well as an order staying her challenge of a determination of the Employment Relations Authority (the Authority).[1]

[2] By way of background, the Authority dealt with several issues which followed Ms Robinson's resignation from her employment as a Services Manager in

[1] Robinson v Gillon & Maher Plumbing Ltd [2016] NZERA Christchurch 123.

Gillon & Maher's plumbing business. The first and most complex of these related to her assertion that she was entitled to a bonus. The Authority determined that there was an agreement between the parties that she would be eligible for a bonus, but the details as to how such a bonus would be calculated were never agreed upon by the parties, so the clause was unenforceable by reason of uncertainty.[2]

[3] The Authority also determined Ms Robinson had suffered an unjustifiable disadvantage in her employment. This arose because the employer had chosen to remain silent when there was a live disagreement as to Ms Robinson's entitlement to a bonus. The Authority determined that the sum of $5,000 should be paid to her as compensation for humiliation, loss of dignity and injury to feelings. The Authority was not satisfied that a penalty should be imposed on Gillon & Maher for its deliberate choice not to tell Ms Robinson of its concerns as to her bonus arrangement.[3]

[4] Finally the Authority considered whether Gillon & Maher could counterclaim $6,859.32 (GST inclusive), said to be a sum owed in respect of drainage works done to Ms Robinson's property. The Authority concluded it did not have jurisdiction to consider the counterclaim, since the invoice with regard to the sum involved was addressed to a company and not Ms Robinson; nor did the claim fall within the meaning of "employment relationship problem" as defined in s 5 of the Employment Relations Act 2000 (the Act).

[5] Ms Robinson has now brought a de novo challenge to the Authority's determination and Gillon & Maher has brought a non de novo challenge to the Authority's costs determination.

Gillon & Maher's application for security

[6] Gillon & Maher brings its current application on the basis that Ms Robinson resides out of New Zealand; does not have property in New Zealand which would be available for costs in the event of a costs award ultimately being obtained by Gillon & Maher; and that the grant of an order for security is just in all the circumstances.

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2 At [60].
3 At [70].

[7] A director of Gillon & Maher, Mr John Maher, has sworn a supporting affidavit. He stated that he believed Ms Robinson resides in Australia. He deposed that the respondent's company no longer owns a Christchurch property. Then he produced a copy of the invoice which had been raised for the drainage work addressed to that company, but also stated Ms Robinson had asserted that the sum involved should be deducted from her bonus entitlement. He said the debt remained unpaid.

[8] Next he referred to Gillon & Maher's challenge in respect of the Authority's costs determination.[4] Gillon & Maher asserts that the Authority had erred in its approach to a Calderbank offer made by Gillon & Maher; the offer was not regarded as valid. However, Ms Robinson was ordered to contribute to Gillon & Maher's legal costs in the sum of $3,500.

[9] Mr Maher said that if the company succeeds on the various issues in this Court, it would not be able to recover costs; additionally it would have been left out of pocket for the drainage costs.

[10] Ms Robinson's opposition to the application for security is advanced on the basis that she has permanent ties to New Zealand, is a New Zealand resident, and that the claim set out in her challenge has merit. It is also asserted in the notice of opposition that she has sufficient financial means to meet any award of costs.

[11] In her supporting affidavit, however, she states that she is currently living in Australia, although she still has financial interests in New Zealand. She confirmed that she had travelled to New Zealand twice for the purposes of the current proceedings. She also points out that she was awarded $5,000 compensation by the Authority; allowing for costs which she was to pay of $3,500, Gillon & Maher currently owe her $1,500. She says she would not recover this until the matters before the Court had been heard. She stated that she believed the debt due for drainage work is part of the bonus payment that is owed to her.

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4 *Robinson v Gillon & Maher Plumbing Ltd* [2016] NZERA Christchurch 146.

[12] She went on to state that if she was unsuccessful in her challenge, any debt payable by her could be enforced in Australia.

[13] Finally, she said that whilst she has assets, she would not have sufficient funds to meet any order of security for costs. She said that if she was required to make such a payment, she may have to forego the pursuit of her challenge.

[14] Each party filed detailed submissions in support of their respective positions. I will refer to these where appropriate when dealing with the relevant issues.

Legal principles

[15] The principles which apply in respect of a security for costs application in this jurisdiction are uncontroversial. There is no express procedure for ordering security in either the Act or in the Employment Court Regulations 2000 (the Regulations). Accordingly, such an application is routinely dealt with according to the procedure provided for in the High Court Rules, under r 5.45.

[16] This rule relevantly provides that a Judge may, if he or she thinks it is just in all the circumstances, order the giving of security for costs providing threshold requirements are made out. There are several of these, two of which are potentially relevant for current purposes. The first is that the plaintiff is resident out of New Zealand. The second is that there is reason to believe the plaintiff would be unable to pay the costs of the defendant if the plaintiff were to be unsuccessful in the plaintiff's proceeding.

[17] So, the correct approach is to determine whether either or both of the threshold requirements are met. Then the Court must consider whether it is just in all the circumstances to exercise its discretion. The following factors are normally considered, although these should not be elevated to principles which must be slavishly applied:

a) It may be unjust for a defendant to receive security for costs if it is the defendant's actions which have caused the plaintiff's impecuniosity.

b) Delay in applying for security for costs is a factor which may be brought into account.

c) The merits should be considered to the extent that it is reasonable to do so bearing in mind the proceeding is at an early stage.

d) There must be a balancing of the interests of the parties. This is often an overriding consideration; it was authoritatively summarised by the Court of Appeal in *AS McLachlan Ltd v MEL Network Ltd* as follows:[5]

> The rule 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 only be made after careful consideration and in a case in which the claim has little chance of success. Access to the court's for a genuine plaintiff is not likely to be denied.
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> Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is overcomplicated and unnecessarily protracted.

[18] If the Court exercises its discretion, the quantum of security will need to be fixed, along with the question as to whether a stay should be ordered.

[19] I proceed on the basis of the foregoing principles, having regard to the submissions made for the parties.

How much is sought?

[20] Mr Twomey submits that an appropriate amount for security is $15,000 – that is, half of the sum which counsel submits is reached by utilising the Guideline Scale found in the Court's Practice Direction.

[21] Mr Twomey's analysis of costs proceeds on a Category 2, Band B basis. However, he has included two allowances which I do not agree are relevant for present purposes. The first relates to the preparation of a challenge in respect of the

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5 *AS McLachlan Ltd v MEL Network Ltd* [2002] 16 PRNZ 747 at [15] – [16].

costs determination. Attendances with regard to Gillon & Maher's own challenge are, in effect, steps taken by a plaintiff and therefore do not fall within the confines of an analysis of security for costs. Secondly, several steps have been included with regard to the current application for security, which is a separate issue and not one which, in my view, should be part of the ultimate assessment of costs for security purposes.[6] I agree with the remaining steps on Mr Twomey's schedule, which produces a starting figure of $20,293.

Threshold test: residency

[22] There is a dispute as to whether Ms Robinson's circumstances are such that she could be described as a plaintiff who is resident out of New Zealand.

[23] On this topic I am assisted by the discussion of Judge Inglis in *Liu v South Pacific Timber (1990) Ltd*, where she said:[7]

> The Court's willingness to order security for costs against an overseas party reflects the difficulties associated with overseas enforcement. For the purposes of r 5.45, "resident" refers to a person's usual or ordinary place of abode. It is a question of fact and degree, depending on the way the person's life is ordered. In *Bolton v New Zealand Insurance Company Ltd* Henry J observed that a temporary or occasional absence from a permanent address would not suffice, and cited Lord Scarman's speech in *R v Barnet London Borough Council ex parte Shah* as follows:
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> > Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinary resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.
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> (footnotes omitted)

[24] Although, in her affidavit, Ms Robinson describes herself as being "of Christchurch" she also states that she is "currently living in Australia". That appears to have been the position from at least June 2015, the undisputed evidence being that Ms Robinson ended her employment with Gillon & Maher to return to Australia to live. She has returned to New Zealand twice in connection with events pertaining to this proceeding. Ms Robinson still has obvious connections with New Zealand, but I

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6 Items 16, 28, 30, 34 and 35.

7 *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129 at [14].

find for the purposes of this application that she is resident out of New Zealand. The threshold requirement for security for costs is accordingly made out.

Threshold issue: inability to pay

[25] The parties also made submissions on this issue. It is asserted for Ms Robinson that she is employed in Australia and has savings as well as other assets in that country; but that she also has a small business, some savings and an interest in a family trust in New Zealand.

[26] However, she herself says that she would not have cash funds sufficient to meet any order directed by the Court for security, and that if such an order were to be made she may be required to forego her challenge.

[27] At the time Ms Robinson affirmed her affidavit, counsel for Gillon & Maher had not formulated the amount that was being sought as security for costs.

[28] Having regard to the sums incurred to date, including in the Authority, I infer that Ms Robinson's statement that she would not proceed with her challenge if ordered to pay security stemmed from an assumption that any such order would indeed be significant.

[29] In their submissions the parties also referred to each of their claims to be owed by the other. Ms Robinson states that she is currently owed $1,500 as a result of the Authority's determination, but she is not currently enforcing that liability. I take that factor into account.

[30] For its part, Gillon & Maher submits that it is owed in excess of $6,000 for the drainage costs that were incurred. On the face of it, that is a liability owed by a third party. The Authority has determined it had no jurisdiction to deal with this issue. That conclusion is not the subject of challenge by Gillon & Maher.

[31] That said, Ms Robinson in her affirmation appeared to accept that this liability could be offset against any established bonus. Her acknowledgment amounts to agreement that the third party liability could be offset against a sum owed

to her by way of bonus, if established. For the purposes of the threshold issue as to whether Ms Robinson "will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding" the Court must assume that Ms Robinson's challenge fails. In that event, her agreement to set off the drainage costs would not take effect, because she would not be in receipt of a bonus.[8] For the purposes of the present application, then, this particular liability should be put to one side.

[32] When considering Ms Robinson's ability to meet any obligation to pay the defendant's costs, the Court must consider not only her disclosed means but also the fact she will have to meet her own costs.

[33] Standing back, I find that Ms Robinson would indeed have difficulty in paying the costs of Gillon & Maher were her challenge to fail, and were an order for costs then to be made in favour of the company in the sum of approximately $20,000. But given the extent of her assets, I am not satisfied she would be wholly unable to meet any court-ordered costs. It may well be difficult for her to do so, but I do not conclude that Ms Robinson would be unable to meet such a liability.

Discretionary factors

[34] Since the Court is satisfied that one of the threshold tests has been met, the Court must now turn to consider whether it is appropriate to exercise its discretion.

[35] Earlier in this judgment I referred to factors that are often considered. Two of them may be ruled out immediately. There is no evidence that any financial difficulties Ms Robinson may be experiencing at present are due to the actions of Gillon & Maher. Nor could it be said that there has been any relevant delay in applying for security for costs. In my judgement the key matters that now need to be considered relate to the merits of the proposed challenge, and then the appropriate balancing of all relevant factors.

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8 High Court Rules, r 5.45(1).

Merits

[36] I referred earlier to the substantive issue which the Authority was required to consider. It pertained to Ms Robinson's assertion that she was entitled to a bonus. The Authority determined that such an entitlement was agreed, but that the terms of that entitlement were uncertain and thus unable to be enforced.

[37] For provisional purposes, I consider that although the issue of certainty went against Ms Robinson in the Authority, there are arguable points in her favour as the Authority itself acknowledged. The issues involved are not straightforward.

[38] The second aspect of the challenge relates to Ms Robinson's unjustified disadvantage personal grievance. Although Ms Robinson succeeded in establishing that claim, including a remedy of $5,000 compensation, the bringing of a de novo challenge potentially sets that matter at large. The issues involved are more straightforward, and are arguable.

[39] Standing back, my provisional assessment at this stage is that it cannot be said, to use the language adopted by the Court of Appeal in *McLachlan*, that neither of Ms Robinson's claims have "little chance of success"; they are both viable.

Balancing

[40] Against the various factors I have identified, I regard the challenge brought by Ms Robinson as being genuine, and that the Court must accordingly consider the access to justice issue which is alluded to in the authorities. This is a case, in my view, where an order should not be made which would give rise to significant difficulties for Ms Robinson which could result in her electing not to pursue her claim.

[41] Assessing the matter from the point of view of Gillon & Maher, I am not persuaded that it can be concluded at this stage that Ms Robinson's claim is unjustified. I also take into account the fact that the prospects of enforcement in Australia are not unduly difficult, given the processes which are mandated by the Australian Trans-Tasman Act 2010.

Conclusion

[42] In all the circumstances, I am not persuaded that security for costs should be ordered. The application brought by Gillon & Maher is accordingly dismissed.

[43] I reserve costs in respect of this application; that issue may be resolved at the conclusion of the substantive proceeding.

[44] I direct the Registrar to schedule a telephone directions conference for the disposition of this proceeding for as soon as possible. I indicate to the parties that the Court is likely to be able to hear this matter, substantively, in late February or early March 2017.

B A Corkill
Judge

Judgment signed at 12.15 pm on 16 December 2016