

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 43  
EMPC 321/2023**

IN THE MATTER OF challenges to determinations of the  
Employment Relations Authority

AND IN THE MATTER OF an application for security for costs

BETWEEN SIMON MUTONHORI  
Plaintiff

AND WAIROA DISTRICT COUNCIL  
Defendant

Hearing: On the papers

Appearances: S Mutonhori, plaintiff in person  
C McGuinness, counsel for defendant

Judgment: 12 March 2024

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**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN  
(Application for security for costs)**

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[1] This judgment resolves an application by the Wairoa District Council for an order that Mr Mutonhori pay security for costs, and for an order staying the proceeding until that has been done.

[2] The substantive proceeding relates to two determinations of the Employment Relations Authority in which the Authority found that Mr Mutonhori's suspension (including the preceding events) and dismissal by the Wairoa District Council were

justifiable.<sup>1</sup> Mr Mutohori has challenged those two determinations on a de novo basis in this Court. In the Authority, Mr Mutohori initially succeeded in his claim for payment of wages in respect of a period of three weeks during which he was overseas and unpaid,<sup>2</sup> but the Authority has granted the Wairoa District Council's application to re-open the investigation on this issue.<sup>3</sup>

[3] The Wairoa District Council seeks security for costs of \$27,500 (or such other sum as the Court considers fair and just). The Wairoa District Council says this figure is based on a three-day hearing and calculated on a category 2B basis, using the guideline scale.<sup>4</sup>

[4] The grounds upon which the Wairoa District Council seeks the order for security for costs are:

- (a) Mr Mutohori does not live in New Zealand;
- (b) his claims are without merit;
- (c) the amount of security sought is appropriate in view of the likely costs that would be awarded to the Wairoa District Council if it is successful in defending the challenges; and
- (d) it is just in all the circumstances to order security for the Wairoa District Council's costs in defending the proceeding.

### **The Employment Court may order security for costs**

[5] As there are no particular provisions relating to security for costs in the Employment Relations Act 2000 or the Employment Court Regulations 2000, the

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<sup>1</sup> *Mutohori v Wairoa District Council* [2023] NZERA 468 (Member Loftus); and *Mutohori v Wairoa District Council* [2023] NZERA 469 (Member English).

<sup>2</sup> *Mutohori v Wairoa District Council* [2023] NZERA 469 at [61]-[64], [70].

<sup>3</sup> By direction dated 1 March 2024.

<sup>4</sup> "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 18.

Court looks to the provisions of the High Court Rules 2016 when dealing with such applications.<sup>5</sup>

[6] For present purposes, under r 5.45(1)(a)(i) and (b) of the High Court Rules, the Court first must be satisfied the plaintiff is resident out of New Zealand or there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in their proceeding.

[7] If either of those thresholds is met, the Court may make an order for security for costs if that is just in all the circumstances.<sup>6</sup> In exercising that discretion, the Court may consider the merits or nature of the proceedings and the interests of both parties, but the factors falling for consideration will vary depending on the circumstances of each case. The Court also has discretion as to the quantum of any security it orders.<sup>7</sup> Where an order for substantial security may effectually prevent a plaintiff from pursuing their claim, security should only be ordered where the plaintiff's claim has little chance of success.<sup>8</sup>

### **The Wairoa District Council points to evidence of impecuniosity**

[8] Mr Mutonhori is currently resident in Australia, having moved there from New Zealand to live and seek work in June 2023. Jurisdiction therefore exists for an order for security for costs pursuant to r 5.45(1)(a)(i) of the High Court Rules.

[9] In support of its application, the Wairoa District Council notes that Mr Mutonhori has previously raised that he is experiencing significant financial hardship. Specifically, the Wairoa District Council points to a directions conference in the Court in June 2023 during which Mr Mutonhori advised that he was currently living with his son in Australia while he searched for work due to his significant financial difficulties, and that he could not afford to travel to New Zealand to attend the Authority's investigation meeting in person.<sup>9</sup> The Authority has also noted

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<sup>5</sup> Employment Court Regulations 2000, reg 6(2)(a)(ii).

<sup>6</sup> High Court Rules 2016, r 5.45(2).

<sup>7</sup> Rule 5.45(3).

<sup>8</sup> *A S McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

<sup>9</sup> As recorded in the Court's minute: *Mutonhori v Wairoa District Council* EMPC 196/2023, 7 June 2023 at [4].

comments from Mr Mutohori renewing his request that leave be granted for him to attend the investigation meeting in June 2023 via video link on the grounds of his financial situation.<sup>10</sup>

[10] On 14 November 2023, Mr Mutohori replied to the application for security for costs. He submitted that Australia is not (or should not be) considered an overseas jurisdiction in respect of this matter given the number of bilateral agreements that exist between New Zealand and Australia. He advised he was employed on a short-term work contract in Australia while he looked for work in New Zealand. He claims his challenge has merit.

[11] Mr Mutohori also questioned the level of security for costs sought by the Wairoa District Council; he says it cannot be just and fair for there to be an order for security for costs at that level, which would affect his rights of access to justice. Finally, he claims that the case is of public interest but that is based only on the level of media reporting.

[12] The Chief Executive of the Wairoa District Council swore an affidavit in support of its application on 15 December 2023. He noted the various claims of impecuniosity from Mr Mutohori. He also pointed to the Wairoa District Council's own situation, noting that Wairoa is a low-income community that has been badly affected by Cyclone Gabrielle.

[13] The Chief Executive gave evidence of finding an online record from the Queensland Industrial Relations Commission that referred to a proceeding between Mr Mutohori and the Mt Isa City Council, with a video conference scheduled for Tuesday 12 December 2023.

[14] On 18 December 2023, Mr Mutohori swore an affidavit in opposition to the application for security for costs. He disputed that he is in any financial difficulty or unable to pay costs. He said he was employed as a senior executive manager with the Mt Isa City Council, that he owns property (with a mortgage) and a car in New Zealand

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<sup>10</sup> As recorded in the Authority's direction: *Mutohori v Wairoa District Council* 3196899, 8 June 2023 at [1].

and that he has substantial KiwiSaver savings in New Zealand as well as superannuation in Australia. No documentary evidence was provided. Mr Mutohori was critical of the Wairoa District Council's application.

[15] In an updating memorandum filed on 4 March 2024, the Wairoa District Council provided the Court with a record of a decision from the Queensland Industrial Relations Commission dated 15 February 2024, which shows that Mr Mutohori was dismissed by the Mt Isa City Council.<sup>11</sup> The date of his dismissal is not recorded but his application for reinstatement is noted as having been filed on 21 December 2023.<sup>12</sup> The decision records Mr Mutohori's annual remuneration while he was employed by the Mt Isa City Council as AUD 153,000, with accommodation provided to a value of AUD 16,000 and a motor vehicle to the value of AUD 15,000. Mr Mutohori's application for interim reinstatement was dismissed.<sup>13</sup>

### **Security for costs ordered**

[16] In exercising my discretion, I consider the evidence provided by the Wairoa District Council, including the statements Mr Mutohori has previously made to the Authority and to the Court in June 2023. The evidence indicates that Mr Mutohori then obtained employment with the Mt Isa City Council but, from the updating information provided by the Wairoa District Council, it seems clear that Mr Mutohori is no longer employed by the Mt Isa City Council. There is a basis for the concern that Mr Mutohori would be unable to pay the costs of the Wairoa District Council should he be unsuccessful in his challenge.

[17] Once the Wairoa District Council established a basis for its concern, it might be expected that Mr Mutohori would have provided documentary evidence in support of his assertions that the concern was unwarranted. He has not done so.

[18] On balance, I consider that it is just in all the circumstances for there to be an order for security for costs. However, I consider the amount sought to be higher than

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<sup>11</sup> *Mutohori v Mount Isa City Council* [2024] QIRC 41.

<sup>12</sup> At [1].

<sup>13</sup> At [35].

is warranted. There is real uncertainty as to whether 3 days would be required for this matter.

[19] Also, at this stage, I cannot assess Mr Mutohori's prospects of success, and I would be concerned if the level of security was such that Mr Mutohori was unable to pursue his challenge.

[20] Balancing the interests of both parties, I consider it appropriate that security for costs of \$15,000 be ordered. If Mr Mutohori's assets are as he says they are, that is not a figure that should be insurmountable for him to provide as security for costs, and having that level of security would be some protection for the Wairoa District Council, even though, if the challenge is unsuccessful, it may well be entitled to a greater sum for costs.

[21] Accordingly, security for costs is ordered of \$15,000, which Mr Mutohori is to pay to the Employment Court Registry within 14 days of the date of this judgment. That sum is to be held by the Registrar of the Court in an interest-bearing account until further order of the Court. This proceeding is stayed pending payment of security for costs.

[22] In the circumstances, costs on this application are reserved for consideration at the resolution of this proceeding.

J C Holden  
Judge

Judgment signed at 11.15 am on 12 March 2024