

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 78
5421195

BETWEEN

PIOUS GOMEZ
Applicant

A N D

RAPPONGI EXCURSIONS
LIMITED t/a DENNY'S
RESTAURANTS NEW
ZEALAND
Respondent

Member of Authority: T G Tetitaha

Representatives: G Presland, Counsel for Applicant
G Pollock, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 3 March 2014 from Applicant
3 March 2014 from Respondent

Date of Determination: 6 March 2014

DETERMINATION OF THE AUTHORITY

A. The application for security for costs is dismissed.

Employment relationship problem

[1] The respondent seeks an order that the applicant pay a contribution of \$7,500 to be secured in the Employment Relations Authority's trust account and held and disbursed in accordance with the ultimate directions of the Employment Relations Authority.

[2] The grounds for the application are:

- (a) The applicant resides in Malaysia where he works in the restaurant business;

- (b) It vigorously denies the applicant's claims of constructive unjustified dismissal;
- (c) The respondent will be put to considerable time, cost and inconvenience in defending the various claims which have become protracted and more complicated due to the applicant's emigration from New Zealand;
- (d) As is customary in the Employment Court or High Court, where litigants reside overseas, a reasonable security for costs is required to be lodged with the Court;
- (e) There is a question mark whether any Authority costs determination in the respondent's favour would be enforceable in Malaysia.

Issue

[3] There are two issues arising:

- a) Does the Authority have jurisdiction to order security for costs?
- b) Should security for costs be ordered in these circumstances?

Does the Authority have jurisdiction to order security for costs?

[4] Both parties were directed by the Authority to file further submissions addressing the issue of its jurisdiction to order security for costs and the full Court decision of *Reid v NZ Fire Service Commission* [1996] 1 ERNZ 228 which concluded the (then) Employment Tribunal did not have the power to order security for costs.

[5] The applicant submits that the Authority does not have an express power to order security for costs. This power was specifically conferred upon the Employment Court and High Court. The Authority's powers should be interpreted and applied in accordance with Regulation 4, Employment Relations Authority Regulations 2000 which negates the need for any such implied or inherent power.

[6] The respondent filed further submissions attempting to distinguish *Reid* because the order sought there would have the effect of determining the substantive matter i.e. the party against whom costs is ordered could no longer afford to progress his claims. In this matter, there was no possibility security for costs would prevent

this Applicant from prosecuting his claims. The Authority’s jurisdiction is broader than the Tribunal and it operates like a Court. There is no good reason why the Authority does not have jurisdiction to award security for costs.

[7] The Authority was created by statute. As such, it “... *can only do what the statute creating it has authorised it to do*”¹. The power to award costs in the Authority is contained in clause 15, Schedule 2, Employment Relations Act 2000 (the Act). This power allows the Authority to order “*any party to a matter to pay to any other party*” costs and expenses. It does not expressly allow the Authority to order security for payment of costs into a trust account.

[8] Inherent or implied powers may be necessary if the Authority “...*could not perform its functions under its express powers or could not do so efficiently*”².

[9] The Employment Court has relied upon regulation 6(2) to order security for costs for challenges against Authority determinations.³ There is no equivalent in the Act or regulations pertaining to the Authority. The Authority has a broader power to “*follow whatever procedure the Authority considers appropriate*” (s160(f)).

[10] Its role is to resolve employment relationship problems “*without regard to technicalities*” (s157(1)). This role is reinforced in the Act’s objects and regulations.⁴

[11] This is a low level, speedy and cost-effective jurisdiction. The implication of a power to award security for costs does not sit well with objects and role of the Authority. Such a power is not required for the Authority to perform its express role more efficiently.

Should security for costs be ordered in these circumstances?

[12] Practically the order for security for costs would create problems for the Authority. The Authority has not and does not operate a trust account for the purposes of holding funds on behalf of parties.

[13] At best the starting point for costs before the Authority is its daily notional tariff of \$3,500. This matter would only require one to 1½ days’ hearing time. The

¹ *Reid v NZ Fire Service Commission* [1996] 1 ERNZ 228 at 238

² See above at 239

³ *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129; *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2008] ERNZ 196 at [23]

⁴ s3(a)(vi) and s.143(f); Reg 4 Employment Relations Authority Regulations 2000

starting point for any costs award would be \$5,250. There does not appear to be any suggestion this applicant could not meet an award of costs of this amount.

[14] The Court's willingness to order security for costs against an overseas party reflects the difficulties associated with overseas enforcement.⁵ This judgment could be enforced in Malaysia. The Reciprocal Enforcement of Judgments Act 1958 allows judgments to be registered and enforced in that country. In the circumstances, the Authority is not persuaded this respondent would not be able to enforce a costs award against a Malaysian resident.

Determination

[15] Given the absence of any express power and the lack of any necessity for an implied power to enable the discharge of its role, the Authority determines there is no jurisdiction to order security for costs. Even if it had jurisdiction, the Authority would not be minded to grant the order in these circumstances. The application for security for costs is dismissed.

T G Tetitaha
Member of the Employment Relations Authority

⁵ See *Liu* above at [14]; *Neely v Attorney-General* [1984] 2 NZLR 636