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Obtaining security for costs in unfair dismissal proceedings

The AIRC recently dismissed unfair dismissal proceedings brought under section 170CE of the *Workplace Relations Act 1996* (WR Act) after a self-represented applicant failed to provide security for costs.

Dominika Lis and Suncorp-Metway Staff Pty Ltd

Australian Industrial Relations Commission, 4 March 2005, Richards C, PR955459

On 7 January 2005 the respondent made application for an order that Ms Lis provide security for costs. On 3 February 2005 Richards C ordered Ms Lis to pay \$7,350 as security for costs within 28 days.

On 4 March 2005 Richards C dismissed Ms Lis's unfair dismissal proceedings in accordance with a general discretion under rule 47 of the *Australian Industrial Commission Rules 1998*. Rule 47A applies to applications or proceedings brought under section 170CE of the WR Act, lodged on or after 1 March 2003. It provides the AIRC with discretion to stay or dismiss an application where a party is in breach of a security for costs order.

Background

The respondent terminated Ms Lis's employment because she stored and/or distributed emails that included images of the genitalia of naked men and women. Ms Lis admitted to storing and/or distributing the images but considered the images were 'unique' or 'weird'. She did not admit the images were pornographic or in breach of the respondent's computer use policy.

Ms Lis applied for relief under 170CE of the WR Act because she claimed that:

- she was prevented from attending a company social function in circumstances where other employees whose employment was also terminated for breaches of the computer policy had been allowed to attend; and
- the respondent had made the decision to terminate her employment before allowing her time to respond to the allegations put to her.

Findings

Rule 47A provides the AIRC with a discretion to order security for costs, subject to provisos. In this case, the provisos were met. In view of all of the circumstances, Richards C concluded that there was nothing which dissuaded him from exercising his discretion and making an order for security for costs. In reaching this decision, Richards C's salient considerations were:

- Ms Lis had not demonstrated that she had the resources or assets to meet any future costs order. Richards C did not consider her financial situation arose solely from the respondent's actions.

- The AIRC had conducted three directions conferences aimed at obtaining particulars from Ms Lis so that the respondent could reply.
- Richards C did not consider the respondent made the application with the purpose of delaying the matter.
- Richards C considered there was no developed or comprehensive submissions or available evidence which suggested that Ms Lis had a sustainable case. He also doubted whether her application could result in an outcome providing any appreciable relief. In this regard, Richards C noted Kirby J's comments, in *Meribee Pastoral Industries*, that lack of apparent merit might be a reason for ordering security for costs.
- As Ms Lis was not legally represented, a costs order would not affect her ability to proceed with the application.

Implications

This is a rare exercise of this discretion. The decision follows from the recent decision of Whelan C in *Polaris Sales Australia and Pettigrew* PR946259. Both decisions demonstrate that particular factors must be present in order for the AIRC to make an order for security for costs. When determining whether a respondent is likely to be successful in an application for security for costs, the respondent needs to consider the following factors:

- The applicant's financial situation should not be an automatic bar to making the order; nor should it automatically mean that an order should be made.
- Has the applicant's financial situation been caused by their employment being terminated?
- Will the order frustrate the applicant's right to litigate their claim?
- Is the application without merit, without reasonable prospect of success or vexatious?
- If the application is brought at a later stage of the proceedings, has the applicant acted unreasonably?
- Are there any public interest considerations which should be taken into account and are there any unusual aspects to the case?

Text of the decision is available at:

<http://www.airc.gov.au/decisionssigned/html/PR955459.htm>

This is to be read in conjunction with the orders of Richards C of 4 March 2005 dismissing the application which is available at:

<http://www.airc.gov.au/decisionssigned/html/PR956250.htm>

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