IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2019] NZEmpC 24
EMPC 57/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	BLUE WATER HOTEL LIMITED Plaintiff
AND	VBS Defendant

Hearing:	On the papers
Court:	Chief Judge Christina Inglis Judge B A Corkill Judge K G Smith
Appearances:	P McBride, counsel for plaintiff S Govender, counsel for defendant
Judgment:	6 March 2019

COSTS JUDGMENT OF THE FULL COURT

Introduction

[1] In its judgment of 7 November 2018, the Court dealt with the important question of whether the three-year time limit referred to in s 114(6) of the Employment Relations Act 2000 (the Act) is absolute; and whether that period is capable of being extended under ss 219(1) or 221, which contain broad powers for extending time.[1]

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1 *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128.

[2] The Court determined that the powers of the latter sections could not be used to extend the three-year time limitation provision under s 114(6) of the Act. Costs were reserved.

[3] Now, the plaintiff seeks costs both in respect of its successful challenge, and in respect of the hearing before the Employment Relations Authority (the Authority).

[4] For her part, the defendant says she was legally aided both in the Authority and in the Court.

[5] The plaintiff, however, argues that the following three issues entitle it to orders under the Legal Services Act 2011 (the LSA), or under the Court's wide jurisdiction as to costs:

a) That there are exceptional circumstances which would justify a finding under s 45(2) of the LSA; such a finding would impose a personal liability on the defendant for the plaintiff's costs, notwithstanding the fact she is legally aided.

b) Alternatively, an award of costs should be made against counsel for the plaintiff personally.

c) Alternatively, the Court should make an order in terms of s 45(5) of the LSA as to the costs that would have been made but for the grant of legal aid; this would then entitle the plaintiff to apply to the Legal Services Commissioner (the Commissioner) for payment of a contribution to its costs under s 46 of the LSA.

[6] Counsel for the plaintiff, Mr McBride, submitted that his instructions were to advance these points, but his primary focus was on the third one.

[7] Counsel for the defendant, Mr Govender, strongly opposed the possibility of a finding being made that exceptional circumstances exist, or that orders should be made against him as counsel; he also submitted that the Court should not exercise its discretion under s 45(5) of the LSA, since there was no reason for doing so.

[8] We will now deal with each of the propositions which have been raised, summarising counsel's submissions where relevant.

Exceptional circumstances?

[9] Section 45 of the LSA materially states:

> **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:
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> (a) any conduct that causes the other party to incur unnecessary cost:
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> (b) any failure to comply with the procedural rules and orders of the court:
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> (c) any misleading or deceitful conduct:
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> (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
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> (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 specifying 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.
>
> ...

[10] It is trite that the threshold for a finding of exceptional circumstances must be "sufficiently egregious" to warrant forfeiture of the protections otherwise afforded by the LSA: *Checkmate Precision Cutting Tools Ltd v Tomo*.[2]

[11] In that decision, (now) Chief Judge Inglis referred, first, to *Laverty v Para Franchising Ltd,* where the Court of Appeal observed that:[3]

> For circumstances to qualify as exceptional, however, they have to be "quite out of the ordinary".

[12] Reference was also made to *Johns v Johns & Holloway*, where Asher J stated:[4]

> The word "exceptional" in itself has a clear meaning. It must be something distinctly out of the ordinary which warrants the Court departing from the rule set out in s 40(2) [of the Legal Services Act 2000].

[13] For the purposes of this submission, Mr McBride relied on three grounds:

a) the defendant deliberately decided to delay the bringing of proceedings against the plaintiff;

b) she has rights of recourse against her advisors in respect of any deficiencies in advice or representation; and

c) her original claims were unmeritorious, as was her defence to the challenge.

[14] With regard to the first ground, the reasons for the delay which occurred in this case are explained fully in the Authority's determination.[5] A key contextual matter was that the defendant was indecently assaulted by the director of the plaintiff, which resulted in serious criminal charges being brought against him.[6] This led to the circumstances on which the personal grievance was based. After reviewing medical information provided by the defendant to the Authority, the Member accepted she had been advised by doctors not to pursue a personal grievance whilst the related criminal

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2 *Checkmate Precision Cutting Tools Ltd v Tomo* [2013] NZEmpC 107 at [10].
3 *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA) at [31].
4 *Johns v Johns & Holloway* HC Auckland CIV 2000-404-5101, 23 August 2007 at [6].
5 *VBS v FCL* [2018] NZERA Wellington 8.
6 At [44]-[52].

proceedings in which she was a complainant were ongoing, as she was too emotionally fragile.[7] On the evidence before the Authority, it was concluded that the plaintiff's explanations as to delay were both "understandable and credible".[8]

[15] The finding of the Authority as to delay must be accepted. It was satisfactorily explained. There is no contrary evidence before the Court. This aspect of the matter does not qualify as an exceptional circumstance for the purposes of s 45(2) of the LSA.

[16] Secondly, the merits. The defendant succeeded in persuading the Authority that there was a sound legal basis for extending time, and that there were appropriate grounds for doing so on the facts. The challenge was allowed by the Court on legal grounds. Those issues were not without difficulty. It could not be said that the defence was so hopeless it should never have been advanced having regard to the legal framework. This factor is not an exceptional circumstance.

[17] Finally, we refer to the assertion that the defendant may have legal rights against her advisors. The Court has no evidence as to the advice she was given; in any event we have found that it was not unreasonable to seek leave to bring the late claim, although it was ultimately determined the necessary jurisdiction to extend time was not available for such a claim to be initiated. Any possibility of a claim against legal advisors is not relevant for present purposes.

[18] We are not satisfied, therefore, that a finding of exceptional circumstances under s 45(2) of the LSA should be made.

Order against counsel?

[19] Mr McBride submitted that there were a range of factors that would properly warrant an order against counsel. These were, he said, a combination of:

a) A delayed notice of the grant of aid in the Court under the LSA.

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7 *Green v R* [2015] NZCA 324.
8 *VBS v FCL*, above n 5, at [52].

b) A legally advised deliberate decision to delay the initiation of the proceeding in the Authority.

c) The fact that counsel argued the challenge when he allegedly had a conflict of interest.

[20] Such orders are made only in extraordinary circumstances.[9] Moreover, no application has been made to the Court for Mr Govender to be joined as a party for costs purposes. As we will now explain, there is no possible basis on which such a costs order could be made which would justify joinder, or the making of such an order.

[21] The history with regard to the provision of advice that the defendant was legally aided for the purposes of the challenge is as follows:

a) Legal aid was granted for the purposes of the investigation by the Authority in correspondence from the Legal Services Commissioner (the Commissioner) dated 3 September 2014 and 16 November 2015. Advice of legal aid in that forum was given to the Authority and to the plaintiff's representative on 17 April 2017, shortly after the investigation meeting but prior to the filing of multiple submissions by the parties.

b) Legal aid for the purposes of the challenge was granted to the defendant by letter from the Commissioner dated 22 March 2018. That letter referred to the obligation arising under s 24 of the LSA that other parties and the Registrar were to be advised of the grant of aid.

c) The Court held a telephone directions conference with the parties on 1 May 2018, after which the Court recorded in a minute to the parties that it had been advised the defendant was legally aided. We interpolate that Mr McBride understood Mr Govender to have said the defendant was seeking legal aid; that is not as recorded by the Court and is unlikely since legal aid had in fact been granted.

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9 *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd* [1998] 2 ERNZ 107 (EmpC) and *Aarts v Barnardos New Zealand Ltd* [2013] NZEmpC 145.

[22] On 13 November 2018, approximately a week after the issuing of the judgment of the full Court, Mr Govender confirmed again to Mr McBride that his client was legally aided.

[23] Mr McBride referred to the Court of Appeal judgment in *Moir v IHC New Zealand Inc*, where there was a discussion as to the effect of s 24 of the LSA which provides that when a party to civil proceedings is granted legal aid, the provider under the grant must "at once give notice of that fact to every other party to the proceedings, and to the Registrar of the relevant court."[10] In *Moir*, the Court was considering whether a notice under that section would be binding on the Registrar of the High Court, for the purposes of reg 18 of the High Court Fees Regulations 2013.

[24] The Court said:[11]

> ... The legal aid provider's obligation to provide notice under s 24 of the Legal Services Act is separate from the obligation of the party personally to provide proof of a grant of legal aid for the purposes of the fee waiver. The principal purpose of the statutory requirement under s 24 is to notify the other party or parties to the proceeding of the grant of legal aid because of the costs implications, both as to any provision of security for costs or for the purposes of the making of any costs order on the disposition of the proceeding. *Bare notice of the grant from a third party is sufficient for that purpose* ...

[25] For the purposes of the present case, we are satisfied that the statement made by Mr Govender in the course of the telephone directions conference on 1 May 2018 constituted bare notice of the grant of aid. Such a possibility was unsurprising, since the defendant had been legally aided for the purposes of the Authority's investigation. Mr Govender's advice put the plaintiff squarely on notice as to the defendant's legal aid status, and the potential consequences of that. No issue as to security for costs could arise, since all the defendant was doing was resisting a challenge on a point on which she had succeeded in the Authority; she was not a party against whom such an application could be made.

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10 *Moir v IHC New Zealand Inc* [2018] NZCA 130, (2018) 24 PRNZ 45.

11 At [14] (emphasis added).

[26] Although there was some delay in providing the advice, this could not possibly in the circumstances lead to a conclusion that an order should be made against counsel personally, given the exceptionally high threshold for doing so.

[27] It is asserted that there was a "legally advised" and deliberate decision to delay the application to the Authority. We have already reviewed the evidence concerning the circumstances creating the original delay as summarised by the Authority, which described the medical circumstances which existed. We also accept Mr Govender's submission that there was no evidential basis for the assertion that he had in fact advised the defendant to deliberately delay her application to the Authority.

[28] This point could not found an order against counsel personally; and the related point that counsel argued the challenge when he had a conflict of interest has no adequate basis either.

[29] Like the first point, this point is entirely misconceived.

An order under s 45(5)?

[30] The final point relates to the question of whether an order should be made under s 45(5) of the LSA.

[31] Mr McBride submitted that this was appropriate. He said that for the purposes of this section an allowance for two notional days' work in the Authority should be made, $8,000. Costs in the Court on a Category 2, Band B basis were sought, being $19,066.50 for those costs, as well as $204.44 for disbursements.

[32] Mr Govender says that both estimates of costs are excessive, and that in any event there is no reason for the Court to exercise its discretion to make an order in terms of s 45(5) of the LSA.

[33] Mr Govender is correct in stating that the Court has a discretion under the subsection: *P v Attorney-General*;[12] and of course that is also the position under cl 19 of sch 3 of the Act.[13]

[34] At the request of the Court, counsel were asked for submissions as to whether this proceeding should be regarded as a test case, it being well established that in such an instance, costs may lie where they fall.

[35] Mr McBride referred to a legal commentary, which states that a number of authorities have concluded a test case may be one that:

a) is agreed or intended to apply to other similar circumstances involving other parties; or

b) concerns the practice or procedure of the Court or some generalised ruling affecting many parties; or

c) affects the practice or procedure of the Court in novel substantive proceedings under new or different legislation.[14]

[36] He argued that although this case dealt with an important point, that did not convert into one which should be regarded as a test case.

[37] Mr Govender submitted that the judgment of the Court resolved a live issue of interpretation, and was now what he described as the "defining authority" on whether or not ss 219 or 221 provided jurisdiction for an extension of the three-year period provided in s 114(3) of the Act.

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12 *P v Attorney-General* (2010) 20 PRNZ 78 at [11].

13 As discussed in *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [45] and *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

14 *Employment Law* (online looseleaf ed, Thomson Reuters) at ERSch3.19.07: *NZ Labourers etc IUOW v Fletcher Challenge Ltd* (1990) ERNZ Sel Cas 644 (LC); *Adams v Alliance Textiles (New Zealand) Ltd* [1992] 3 ERNZ 822 (EmpC); *Vaughan v Canterbury Spinners Ltd*, EmpC, Christchurch, CC18A/03, 29 October 2003; *Service & Food Workers Union v Vice Chancellor of the University of Otago (No 2)* [2003] 2 ERNZ 707 (EmpC); *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corp Ltd* EmpC Auckland, AC9/07, 23 February 2007; and *New Zealand Meatworkers' Union Inc v Alliance Group Ltd* EmpC Christchurch CC10/07, 18 May 2007.

[38] In our view, this was a test case. It is apparent from the determination that the legal issue was a significant one, and was fully argued. The challenge to that determination warranted a full court, where those legal issues were again the subject of comprehensive submissions. The proceeding plainly resolved a very difficult issue which had not been authoritatively settled on any previous occasion; indeed, a divergence of judicial opinion had emerged. The Court's findings will likely apply to proceedings involving other parties in similar circumstances. The case falls into the first category of test cases referred to by Mr McBride.

[39] It is appropriate to conclude, therefore, that the proceedings involved a test case, in the Authority and in the Court. We are satisfied that costs at both levels should lie where they fall.[15]

[40] Accordingly, we decline to exercise the Court's discretion under s 43(2) of the LSA.

[41] There will be no order for costs in respect of this application.

B A Corkill
Judge
for the full Court

Judgment signed at 12.30 pm on 6 March 2019

[15] At the conclusion of the substantive judgment the Court provisionally indicated that costs would follow the event. That view has been overtaken by the issues raised in counsel's submissions.