IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 9
EMPC 68/2018

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER	of an application for costs
BETWEEN	ROLAND SAMUELS Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	CAROLYN LANG Second Respondent
AND	GOURMET FOODS LIMITED Third Respondent

Hearing:	On the papers
Appearances:	Applicant, in person V McCall, counsel for first respondent No appearance for the second and third respondent J Catran, counsel to assist
Judgment:	11 February 2021

COSTS JUDGMENT OF CHIEF JUDGE INGLIS

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[1] Mr Samuels pursued an application for judicial review in relation to the approach adopted by the Employment Relations Authority to costs in a case he appeared as an advocate on. The Authority took no active part in defending the proceeding, and no steps were taken by the second and third respondents. Counsel was appointed to assist the Court.

[2] The application for review succeeded, although not on all of the grounds that were ultimately pursued. Mr Samuels seeks a contribution to the costs said to have been incurred in pursuing the application in the Court and also seeks costs in the Authority. The Authority has filed submissions opposing the application. It says that it is effectively immune from costs awards in all but exceptional circumstances and costs ought not to be awarded here. It is further said that an advocate acting on their own behalf before the Court ought to be treated as a litigant in person and accordingly not entitled to costs. Ms Catran, counsel appointed to assist the Court, has filed submissions opposing costs against herself and identifying a number of legal issues in respect of any award of costs that might be made. The second and third respondents have taken no steps in relation to costs.

The approach to costs against members of the Authority

[3] It is well established that costs are only awarded against judicial officers in the rarest of circumstances.[1] It is submitted on behalf of the Authority that, because its members are judicial officers, the same approach ought to be adopted in this case.

[4] No authority is cited for the proposition that Authority members are judicial officers, and the point does not appear to have previously been considered. However, I note that s 176 of the Employment Relations Act 2000 (the Act) provides that, in the performance of their duties, Authority members enjoy the same protections as a Justice of the Peace and that:[2]

> For the avoidance of doubt as to the privileges and immunities of members of the Authority and of parties, representatives, and witnesses in the proceedings of the Authority, *it is declared that such proceedings are judicial proceedings*.

[5] I note too that the High Court has previously held that Legal Complaints Review Officers, when dealing with complaints against lawyers, are undertaking quasi-judicial functions and *Newton* was applied on this basis.[3] I accept that the

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1 *Coroner's Court v Newton* [2006] NZAR 312 (CA).
2 Emphasis added.
3 See, for example, *C v Legal Complaints Review Officer* [2019] NZHC 2381 at [6]-[7]; *U v Legal Complaints Review Officer* HC Auckland CIV-2010-404-6350, 3 June 2011 at [55]-[57].

approach adopted by the Court of Appeal in *Newton* should be applied in assessing costs in relation to claims against the Authority, including having regard to the nature and range of orders that can be made in that forum. That means that the usual approach, namely that costs follow the event, does not apply and the Court will be slow to award costs against the Authority absent compelling circumstances.

Is this an appropriate case for costs to be awarded?

[6] The decision at issue in *Newton* was a Coroner's decision to discharge an order suppressing Dr Newton's evidence at an inquest without first hearing from Dr Newton as to whether the order should be discharged. Publication could have affected Dr Newton adversely. The Court of Appeal described this as an "elementary error" of procedural fairness. Despite the elementary nature of the error and its potential impact on the applicant, the Court was not prepared to make an order of costs against the Coroner. As the Court made clear, a high threshold applied:[4]

> … Costs will only be awarded (even in judicial review proceedings) against judicial officers such as Justices or coroners in the rarest of circumstances when such a judicial officer has done something which calls for strong disapproval. It is certainly not the practice to grant costs against Justices or a coroner merely because that person has made a mistake in law. *It must be shown that the judicial officer concerned has acted perversely, oppressively or in bad faith.*
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> …
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> In short, errors of law will not of themselves support an award of costs; errors of process will normally not support an award of costs; and judicial misconduct in *the way in which the hearing was conducted will normally have to be of a particularly egregious kind for costs to be awarded*. …

[7] In the present case the Authority member did not provide Mr Samuels with an opportunity to be heard prior to determining costs and making statements about him. This gave rise to the finding of breach of natural justice. While Mr Samuels has expressed reservations about the motivations for the approach adopted by the Authority member, and the perceived need for a strong message to be sent in relation

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4 *Coroner's Court v Newton*, above n 1, at [44]-[46] (emphasis added).

to those presumed motivations, I do not regard the procedural breach in this case as falling into the limited category of case the Court of Appeal has described as being suitable for costs.

[8] I have no difficulty accepting that Mr Samuels invested a considerable amount of time and effort into pursuing the claim. He succeeded on his claim that the Authority member had acted in breach of his rights. He is entitled to feel aggrieved about that, and it is not surprising, against this backdrop, that he considers that a costs order would be appropriate against the Authority. However, and as the Court of Appeal observed in *Newton*:[5]

> The question is not whether the applicant is in some sense "deserving" of costs – in a large sense, such a person often will be. The critical point is that the order for costs is an expression of disapproval of the conduct of the judicial officer in character. There must be a clear basis for such an order.

Conclusion

[9] I am not satisfied that a clear basis for the making of a costs order against the Authority has been made out and I decline to make the order sought. That means that I do not need to consider the alternative argument that, because Mr Samuels is an advocate, he did not incur any costs which the Court can award in its discretion. That argument is best left for another day.

[10] I did not understand Mr Samuels to be seeking costs against either the second or third respondent and I would not have ordered them in any event.

[11] Nor did I understand Mr Samuels to be seeking costs against counsel appointed to assist the Court, although counsel covered this point in submissions (presumably on a "just-in-case-basis"). For the avoidance of doubt, I would not have been prepared to grant costs against counsel appointed to assist the Court even if a contribution had been sought.

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5 At [46].

[12] The application for costs is dismissed.

Christina Inglis
Chief Judge

Judgment signed at 3.50 pm on 11 February 2021