IN THE EMPLOYMENT COURT
WELLINGTON

WC 11/09
WRC 17/04
WRC 19/05

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for recusal
AND IN THE MATTER OF	an application for costs
BETWEEN	LYNNE FRANCES SNOWDON Plaintiff
AND	RADIO NEW ZEALAND LIMITED Defendant

Hearing: (Heard on the papers)
Submissions received 10 December 2008, 27 March and 7 April 2009

Judgment: 6 May 2009

COSTS JUDGMENT OF JUDGE C M SHAW

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[1] Radio New Zealand Limited has applied for costs following the discontinuance of the plaintiff's application for recusal of the presiding Judge. The costs application is opposed.

Background

[2] The substantive proceedings comprise the plaintiff's disadvantage grievance and a personal grievance removed to the Employment Court in 2004 and 2005. They have not yet been heard. In the intervening years the main focus of the plaintiff and her advisors has been on disclosure of documents in the proceedings.

[3] The majority of the grounds for the recusal application concerned the plaintiff's allegations about the process of disclosure through the Employment Court. This included the findings of the Court in three interlocutory judgments concerning disclosure.

[4] The first was on 16 December 2005.[1] The plaintiff sought leave to appeal unsuccessfully to the Court of Appeal.[2] The second dated 27 March 2006[3] followed the Court's inspection of documents disclosed by the defendant to determine relevance. The third dated 7 December 2006[4] included judgment on the plaintiff's applications for reconsideration of previously ordered disclosure against the defendant.

[5] On 5 February 2007 the plaintiff filed an application that Judge Shaw recuse herself from these proceedings. The grounds of the application were listed under the following headings:

- Gratuitous, unreasonable and unhelpful finding of lack of good faith (in a judgment dated 17 July 2003.[5])
- Unsustainable findings relating to notices requiring and objecting to disclosure (in a judgment dated 16 December 2005.)
- Extensive ad hoc excising and non-disclosure allowed by Judge.
- Full and proper disclosure evaded: proceedings miscarry.
- No comprehensive list or index of defendant's documents.
- No comprehensive list of objections or claims to privilege existing.
- Farcical discovery of electronic data allowed.
- Spirit, intent of regulations not given effect to resulting in lengthy delays and unnecessary expense.

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[1] [2005] ERNZ 905
[2] CA 28/06, 23 June 2006
[3] WC 4/06
[4] WC 4A/06
[5] [2003] 1 ERNZ 12

- Extensive information given Judge by defendant not inspected by, or disclosed to, plaintiff's counsel. (This concerned the judicial inspection of documents.)
- Full disclosure by defendant would be decisive.
- Further involvement of counsel and forensic accountants pointless.
- Plaintiff being denied fair process, natural justice.
- A case of allegations and counter-allegations of financial mismanagement and misreporting.
- Proper discovery process denied the plaintiff from outset.
- No discovery achieved in these proceedings.
- Miscarriage of justice already in these proceedings.
- Forensic accountants withdraw.
- Hearing without adequate discovery a veritable farce.

[6] The remedies sought in this application were:

1. That Judge Shaw recuse herself and have no further involvement in these proceedings.
2. That the defendant be ordered by the replacement Judge to make a full and proper response to the plaintiff's notice requiring disclosure dated 7 September 2004.
3. That independently managed electronic discovery of the material purportedly discovered on five CD ROMs be ordered by the Court as recommended by Mr Spence.
4. That the defendant pays the costs of and incidental to this application.

[7] The application was accompanied by an affidavit of David Stuart Vance sworn on 26 January 2007. On 19 February 2007, two further affidavits were filed on behalf of the plaintiff. One was from Mr Vance in reply. The other was a substantial affidavit from John Hickling.

[8] The recusal application was set down for hearing on Monday 19 February 2007 following a judicial conference.

[9] On 14 February 2007 the plaintiff sought an adjournment of the hearing of the recusal application. This was opposed and the Court declined the application for an adjournment.

[10] In preparation for the hearing the defendant prepared two affidavits in response to the first affidavit of Mr Vance.

[11] On 19 February 2007 there was no appearance on behalf of the plaintiff although documents had been submitted to the Court advising that counsel had been suspended from practice and that Ms Snowdon was too ill to proceed. The defendant made application for the recusal application to proceed notwithstanding the absence of the plaintiff. Following full submissions and consideration this was refused and the recusal application was adjourned.

[12] A further chambers conference was held on 25 August 2008 following which the plaintiff was granted leave to bring on the recusal application.

[13] On 28 August 2008 the plaintiff filed and served three further affidavits in support of the recusal application. Of these one was an IT specialist, Stephen Foris, who explained his detailed examination of computer disks disclosed by the defendant. Two further affidavits by Mr Vance, one appending over 300 pages and accompanied by 19 Eastlight folders of exhibits. The other was accompanied by two more Eastlight folders. The third was by Andrew McMillan, another IT specialist.

[14] On 28 August 2008 the plaintiff filed a statement of claim seeking compliance orders. The recusal application was adjourned pending the outcome of the compliance application.

[15] Following a hearing by another Judge the compliance application was struck out.[6] On 30 November 2008 the plaintiff discontinued the recusal application.

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[6] WC 19/08, 12 November 2008 and WC 19A/08, 11 December 2008

Submissions by Radio New Zealand

[16] Counsel for the defendant submitted that costs should follow the event of discontinuance in the usual way and seeks a reasonable contribution to those costs. He itemised the steps taken on behalf of the defendant from the receipt of the recusal application to receiving the notice of discontinuance and preparation of his memorandum in support of costs.

[17] The cost of this legal work to the defendant is approximately $45,000 plus GST. The defendant has also incurred costs of $41,504.93 plus GST. This was Price Waterhouse Cooper's fee for work the defendant judged necessary first to respond to the factual assertions in Mr Vance's first affidavit and then to consider and provide advice on the three further affidavits filed by the plaintiff in August 2008.

[18] Counsel referred to the Court's discretion under clause 19 of Schedule 3 of the Employment Relations Act 2000 and, in the absence of an applicable regulation in that Act, by analogy to rule 476C of the High Court Rules[7] which provides:

> *Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.*

[19] The principles as to costs under rule 476 were confirmed in *Oggi Advertising Ltd v McKenzie*[8]. Baragwanath J held that the normal principles as to costs were as stated in *North Shore City Council v Local Government Commission*[9] namely:

1. There is a presumption that a discontinuing plaintiff will be liable for costs.

2. Where, as is the usual case, the Court is unable to determine what would have been the outcome of the trial if it ever took place, it will not strive to speculate as to the answer when determining costs.

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[7] Now rule 15.23 of the new High Court Rules (Judicature (High Court Rules) Amendment Act 2008).
[8] (1998) 12 PRNZ 535
[9] (1995) 9 PRNZ 182

3. The presumption is rebuttable in the exceptional case where the merits are clear but subject always to the overriding provision that *"all matters relating to … costs … shall be in the discretion of the Court."*

[20] Baragwanath J also held that it is appropriate to determine whether the plaintiff acted reasonably in commencing the proceedings and whether a particular defendant acted reasonably in defending them.

[21] Otherwise costs are to be determined by the application of the well settled principles applying to costs in the Employment Court which were discussed in *Victoria University of Wellington v Alton-Lee*[10]. In that case the Court of Appeal referred to the balancing of a number of factors when considering what a reasonable contribution to costs actually and reasonably incurred should be.

[22] Counsel submitted that the factors to be taken into account in this case are that there were no conceivable grounds to warrant the application being brought to remove the presiding Judge, and that the orders sought by the plaintiff sought to re-litigate judgments of the Court relating to the proper scope of discovery and to obtain orders previously dismissed as not being available to her. It is the case for the defendant that its opposition to this application and the steps taken to oppose it were reasonably and necessarily incurred for which it ought to be compensated.

[23] The defendant does not seek indemnity costs but a reasonable contribution to its costs being 66 percent of actual legal costs and witness expenses. This amounts to $57,093.25.

Plaintiff's submissions

[24] In opposition to the application for costs counsel for the plaintiff submitted that the recusal application resulted from *"prolonged dissatisfaction on the part of the* [plaintiff] *and her accounting and legal advisers with their inability to get this Court to require Radio New Zealand and* [its] *legal representatives to make discovery in the proceedings in accordance with the wording, spirit and intention of the Employment Court Regulations 2000 and the Employment Court Act 2000* [sic]*."*

He further submitted that the plaintiff and her counsel do not resile from the criticism of the Judge and the Court contained in the recusal application and nor do they resile from the serious allegation that Ms Snowdon was denied natural justice in the Employment Court by the failure of the Court to order proper discovery.

[25] Counsel detailed steps taken by an IT specialist to analyse the electronic data records on five CD ROMs discovered by Radio New Zealand. It is submitted that he found *prima facie* evidence of fraud having been committed in the discovery process.

[26] In counsel's submission the reasons for the discontinuance of the recusal application were:

> *(a) the discovery of the alleged fraud on the discovery process …*
>
> *(b) the seriousness and extent of the alterations to and the deletions of electronic data; and*
>
> *(c) the inappropriateness of raising the extensive evidence of the alleged fraud in the context of allegations that a Judge's actions had contributed to what had occurred – which they clearly did.*

[27] The plaintiff has subsequently filed an application to have the earlier disclosure orders set aside on the grounds that they were obtained by fraud.

[28] As to costs, counsel for the plaintiff argued that the normal rule that costs follow the event is not immutable and that the appropriate course in the exceptional circumstances of this case is to allow costs to lie where they fall. In the alternative he submitted they should be reserved because this would avoid the possibility of the defendant being seen to benefit from its own fraud should the fraud allegations be proven.

[29] Finally, counsel submitted that although suggesting otherwise the defendant is in fact claiming indemnity costs against the plaintiff and there is no basis for an award of costs on that basis because the recusal proceedings never got past a very preliminary stage, were not heard, and were not subsequently set down for a hearing.

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[10] [2001] ERNZ 305 (CA)

Discussion

[30] As the recusal application was brought and discontinued, rule 15.23 of the High Court Rules applies by analogy. The defendant does not agree that the plaintiff should not have to pay costs and the question is therefore whether the Court should exercise its discretion to order costs or not.

[31] The reasonableness of the actions of the plaintiff and the defendant in commencing and defending the proceedings is relevant to the exercise of that discretion.

[32] It is clear from the grounds listed in the recusal application and the orders sought in paragraphs 59 to 61 of that application that its purpose was to attempt to re-litigate the judgments of the Court about disclosure and to obtain orders which had previously been sought by the plaintiff but refused.

[33] Of the 18 grounds listed by the plaintiff in support of the application for recusal 15 were expressly about the disclosure orders made in the three judgments referred to in paragraph 4 of this judgment.

[34] Two of the three remaining grounds were that the plaintiff was denied fair process and natural justice and that there had been a miscarriage of justice already in the proceeding.

[35] The particulars of these allegations were given in the recusal application:

> *14. That in all the above circumstances –*
>
> *(a) the plaintiff has been and is continuing to be denied her right to natural justice by the Judge; and/or*
>
> *(b) the Judge has by her actions-*
>
> *(i) denied the plaintiff her right to the confidence, and expectation, that her personal grievance applications (2) will receive a fair hearing before an impartial tribunal with all relevant information before it; and/or*
>
> *(ii) left the applicant with a presumption that her Honour is biased against her and biased in favour of the* [defendant] *in these proceedings; and*

> *(iii) caused the plaintiff's Counsel to seek the plaintiff's permission to withdraw because a miscarriage of justice has occurred, and must necessarily result should a substantive hearing proceed without disclosure by the* [defendant] *in accordance with the terms, intention and spirit of the Employment Court Regulations 2000; …*

[36] Although presented as a ground for recusal, those particulars are alleged outcomes of the alleged failures relating to disclosure. They are not stand-alone grounds in their own right.

[37] In the remaining ground the plaintiff was critical of the Court's judgment of 17 July 2003. That judgment did not concern disclosure. The appropriate forum for such criticism is by way of appeal to the Court of Appeal. The plaintiff did not bring an appeal. The Court cannot review its own decision other than in circumstances which would justify a hearing.

[38] The submission by the plaintiff's counsel that the recusal proceedings never got past a very preliminary stage and were not set down for hearing is not correct. The application was full and detailed and the affidavits in support were comprehensive. The defendant responded, as it was bound to, by way of a notice of opposition and affidavits in opposition. There is no basis for finding that the defendant acted unreasonably in its decision to defend the application.

[39] Although on this costs application it is not appropriate to speculate on the merits of the discontinued claim, I question whether it was necessary for the defendant to engage the services of Price Waterhouse Coopers for the purposes of the recusal application. The allegations in that application were initially directed at the Judge. The affidavits filed in August 2008 were, as counsel for the plaintiff pointed out, directed at allegations of fraud against the behaviour of the defendant and were unlikely to have been found relevant to the original application. I conclude that the evidence of Price Waterhouse Coopers obtained to respond to those allegations does not appear to be relevant to a recusal application.

[40] The application was set down to be heard on 19 February 2007. The plaintiff did not make an appearance at that hearing. In August the plaintiff sought and was

granted leave to bring the application on following which the plaintiff filed further affidavits. The proceedings were therefore well advanced towards a hearing.

[41] I am satisfied that the recusal application was a misconceived and unreasonable attempt to remove a Judge from a case because the plaintiff disagreed with the Judge's decisions. I am also satisfied that the defendant was obliged to commit significant legal and other resources to defending it.

Decision

[42] There are no circumstances in this case to displace the presumption that costs must be paid on the discontinuance of a proceeding.

[43] I do not accept the plaintiff's submission that an award of costs will mean that the defendant may be seen to be benefiting from its own fraud. The plaintiff's allegations of fraud are alleged in separate proceedings which will be determined on their own merits. The consequences to the defendant should those allegations be proven will be determined in that context. In any event the defendant will receive no benefit from a costs award in these proceedings other than a partial contribution to its actual costs.

[44] I conclude that the defendant is entitled to a contribution to its actual and reasonable costs on the discontinued application for recusal.

[45] The legal costs listed in the memorandum of counsel for the defendant were appropriate and necessary. The plaintiff is ordered to pay two-thirds of $45,000 to the defendant being the amount of $30,000. There will be no order in relation to the costs of Price Waterhouse Coopers incurred in the course of the recusal application. The work done by that firm will undoubtedly be relied on by the defendant in the course of the plaintiff's further applications before the Court including the substantive proceedings and the question of reimbursement of those costs can be determined, if necessary, as part of those continuing proceedings.

C M SHAW
JUDGE

Judgment signed at 3.30pm on 6 May 2009