**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2013] NZEmpC 145**
ARC 14/12

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | JOHAN AARTS<br>Plaintiff |
| AND | BARNARDOS NEW ZEALAND<br>First Defendant |
| AND | COMMISSIONER OF NEW ZEALAND POLICE<br>Second Defendant |
| AND | MINISTRY OF SOCIAL DEVELOPMENT<br>Third Defendant |
| AND | THE PRIVACY COMMISSIONER<br>Fourth Defendant |
| AND | THE OMBUDSMAN<br>Fifth Defendant |
| AND | MINISTRY OF SOCIAL DEVELOPMENT<br>Sixth Defendant |
| AND | THE SERIOUS FRAUD OFFICE<br>Seventh Defendant |
| AND | THE DIRECTOR OF HUMAN RIGHTS PROCEEDINGS<br>Eighth Defendant |
| AND | THE INDEPENDENT POLICE CONDUCT AUTHORITY<br>Ninth Defendant |
| AND | LANCE LAWSON BARRISTERS & SOLICITORS<br>Tenth Defendant |

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| Hearing: | By memoranda of submissions filed on 27 May, 7 and 10 June, 1, 2 and 29 July 2013 |
| Representatives: | Robert Lee, advocate for plaintiff<br>Sally McKechnie, counsel for second, third and sixth defendants<br>Katrine Evans, counsel for fourth defendant<br>Andrew Schulze, counsel for tenth defendant |
| Judgment: | 1 August 2013 |

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**COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1] This supplementary judgment deals with the applications for costs' awards by several of the remaining defendants. One of these, the fifth defendant the Ombudsman, does not seek an order for costs.

[2] Filed first in time is the Privacy Commissioner's costs application. Because in-house counsel were used and it is difficult to quantify legal costs in these circumstances, the Privacy Commissioner has referred to the High Court Rules for guidance. She emphasises that she filed written submissions at the start of the proceeding although elected not to participate at the hearing but, rather, to abide the Court's decision. The Privacy Commissioner points out that this has minimised costs to her and, ultimately, to Mr Aarts although counsel had to give at least a preliminary consideration to the voluminous documentation received from the Court and the parties in the period leading up to the hearing to ascertain what, if any, impact this might have on the Privacy Commissioner. The Privacy Commissioner emphasises that she is not making any claim for the time spent on supplementary submissions, filed on 24 April 2013, because this was as a result of concerns expressed by the Court and counsel for the second, third and sixth defendants, but not Mr Aarts.

[3] The Privacy Commissioner submits that Mr Aarts's claim against her was without merit and this should have been evident from an early stage.

[4] In these circumstances the Privacy Commissioner claims a contribution towards costs of $1,320.

[5] I agree that the Privacy Commissioner's claim is a reasonable one to reasonably incurred costs. I agree also with the Privacy Commissioner's submission that, in addition to questions of timing limitations, Mr Aarts's claim against the Privacy Commissioner was both without merit and that this ought to have been apparent from the outset. This was one of the examples to which I referred in the primary judgment[1] when I said that Mr Aarts was not entitled to tack onto his personal grievance proceedings a claim for a penalty against a person with whose decision he disagreed in relation to those proceedings.

[6] The Privacy Commissioner is entitled to an award of costs against the plaintiff in the sum of $1,320.

[7] Filed next in time is the combined application for costs from the second, third and sixth defendants who were commonly represented by Crown counsel. These were really the prime defendants on the challenge and their counsel bore the primary responsibility for defending the Authority's determination[2] and otherwise resisting the challenge.

[8] It was in respect of one of these defendants, the Commissioner of Police, that Mr Aarts enjoyed his only, albeit not insubstantial, success in the proceeding. Although the claims against these defendants were dismissed for limitations reasons, the bulk of the serious argument at the hearing dealt with the question of whether the Employment Relations Authority is entitled in law to call for the evidential videotape records on which I found the Authority to have been wrong.

[9] Despite having represented the second, third and sixth defendants (in reality two parties although one of them in enigmatically different capacities), Crown counsel has submitted separate costs' applications for them.

[1] [2013] NZEmpC 85.
[2] [2012] NZERA Auckland 22.

[10] Dealing first with the third and sixth defendants in respect of whom time limitation was the only point on the challenge, Ms McKechnie notes, correctly, that the third and sixth defendants were completely successful. Their legal costs were $11,548.50 (inclusive of GST). The method of calculation (an hourly charge out rate) was reasonable for the particular circumstances of the proceeding. I accept, also, Ms McKechnie's submissions that the large number of defendants sued by Mr Aarts added significantly to the costs of each because of the need to review and consider memoranda and submissions filed affecting all parties. I accept, also, that the scheduled substantive hearing of the proceeding had to be adjourned at the plaintiff's request when other parties were prepared and that the hearing of the case was unnecessarily extended because Mr Aarts did not file a brief or briefs of evidence as he had been required to do by the timetable.

[11] Ms McKechnie is correct, also, that the case involved an unusually high volume of pre-hearing case management requiring a greater than usual number of memoranda to be filed. These included 18 memoranda by the plaintiff and resulted in the Court issuing more than 20 pre-hearing minutes or directions. Ms McKechnie says, and I accept, that between March 2012 and April 2013 Mr Lee sent no fewer than 66 emails about the case to the Crown Law Office, many of which required a response. Finally, some additional but, I conclude, unavoidable additional expense was incurred by the hearing being in Auckland although many of the Wellington based defendants, who also had Wellington counsel, participated by video conference call. It was, nevertheless, appropriate for counsel for these defendants to attend in person as she did in Auckland.

[12] Crown counsel on behalf of the second, third and sixth defendants bore the burden of the arguments advanced at the hearing and which prevailed, including some arguments which applied to other defendants. The third and sixth defendants' legal costs totalled $9,195.86 (inclusive of GST) and those defendants seek a 75 per cent contribution to that figure of $8,661.37 and full recovery of their disbursements of $534.49 (inclusive of GST).

[13] In respect of the second defendant, the Commissioner of Police, who succeeded in one of the two significant issues decided by the Court, the sum of

$6,563.26 (inclusive of GST) is sought as a contribution towards his costs and disbursements in the Employment Court. This is said to represent approximately 40 per cent of the Commissioner's actual legal costs of $14,524.60 and disbursements of $753.66 (both inclusive of GST).

[14] Having seen copies of the invoices for legal services rendered to the second, third and sixth defendants disclosed to the Court, and being aware of the unnecessarily protracted, complex and intensive way in which this challenge came to hearing over many months, I accept that the legal costs and disbursements incurred by the second, third and sixth defendants were reasonable. The question now is what should be a reasonable contribution payable by Mr Aarts to those costs reasonably incurred.

[15] Although the defendants were successful in the majority by numbers of the issues before the Court, the second defendant was unsuccessful in what transpired to be an important issue (access to the videotaped evidence) which occupied a proportion of the Commissioner's costs that I assess to have been roughly similar to the other issues combined. For that reason, I have concluded that the most just costs outcome in respect of that part of the proceedings between the plaintiff and the Commissioner of Police, is that each should meet his own costs of representation without contribution from the other. I therefore decline to make any award of costs and disbursements in favour of the second defendant.

[16] In respect of the third and sixth defendants, I agree that an uplift from the two-thirds starting point is warranted, given the complete success enjoyed by those parties, and what must, by any reasonable view, have been the hopeless nature of the claims brought by Mr Aarts against them and of the challenges to the Authority's determination. The suggested uplift to 75 per cent of actual and reasonable costs is appropriate and I therefore allow costs in favour of the third and sixth defendants (in effect the same party) of $8,661.37 (inclusive of GST) and disbursements of $534.49 (inclusive of GST).

[17] Finally, there is the application for costs by the tenth defendant. Lance Lawson not only seeks costs against Mr Aarts personally, but has applied for leave to

join the plaintiff's advocate, Robert Lee, as a party so that Lance Lawson's application for costs against Mr Lee personally can be considered.

## Application to join agent as a party for the costs' purposes

[18] This has been made as part of the memorandum filed by the tenth defendant in support of its claim for costs against Mr Aarts. It invokes s 221 of the Employment Relations Act 2000 (the Act) which provides materially:

> In order to enable the court … to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
> (a) direct parties to be joined or struck out; and
> (d) generally give such directions as are necessary or expedient in the circumstances

[19] Unlike the position in High Court proceedings, where there are express rules providing for awards of costs against non-parties, the position in the Employment Court has been developed by case law in reliance on broadly worded statutory provisions.

[20] In this Court such applications have been considered in stages because the power to award costs under cl 19 of Schedule 3 to the Act is confined to parties to proceedings. In order, therefore, for an award to be made against the representative of a party, there has had to be recourse to s 221 to first join, as a party, the representative or other person against whom an award might be made. That, in turn, requires the Court to be satisfied that the statutory test for joining someone as a party is made out. That is "to enable the court … to more effectually dispose of any matter before it according to the substantial merits and equities of the case …". Such an order may be made "at any stage of the proceedings" and the Court may make an order directing the joining of a party "of its own motion or on the application of any of the parties". Finally, such an order joining a party may be made "upon such terms as [the Court] thinks fit …". These conditions are met in the circumstances of this case, but an order joining Mr Lee will only be made if an award of costs is also to be made against him.

[21] There have been several cases in which the issue has arisen and been considered by the Court. The first was *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd.*[3] In that case an employer sought an award of costs against counsel for the unsuccessful plaintiffs. The basis for doing so was said to be not only s 108 of the Employment Contracts Act 1991 (the predecessor of cl 19 of Schedule 3 to the Employment Relations Act 2000) but also what were contended to be the Court's inherent powers. The Court expressed reservations about having inherent powers to make orders for costs against persons who were not parties without joining them as such. It rejected an argument that the statutory provision (s 108 of the Employment Contracts Act 1991) gave the Court a discretion to vary or alter an award of costs against a party so as to make the award payable by that party's legal representative. The Court held that s 108 (now cl 19(2) of Schedule 3) was limited to the making of orders only against parties to the proceedings.

[22] On the merits, the Court accepted that the conduct of counsel in that case did not reach such a level of dereliction of duty as would justify joining counsel as a party for the purposes of costs. The Court concluded, nevertheless, that the delays in increased costs that the actions of counsel for the plaintiffs had caused the defendants would be reflected in the award against the plaintiffs.

[23] More recently, in *McKean v the Board of Trustees of Wakaaranga School*[4] the Court held that if not the commencement of proceedings, then at least their maintenance and complication was attributable to the plaintiff's counsel so that, in the ordinary course of events, the defendant may have been entitled to an award of costs against the plaintiff reflecting this conduct in litigation. Although the parties were given an opportunity to seek leave to join counsel as a party for the purposes of costs, the defendant elected not to do so. The Court commented[5] that, had the unsuccessful plaintiff's former counsel been joined as a party for the purposes of costs, "he would have very likely faced a substantial order made against him personally". *McKean* was a very unusual case as the judgment records[6] "for reasons in part connected with the conduct of this case by counsel for Mr McKean, his

[3] [1998] 2 ERNZ 107.
[4] AC38/08, 24 September 2008.
[5] At [16].
[6] At [3].

lawyer does not now practise as a barrister or solicitor." As the judgment notes, the plaintiff's counsel misrepresented many important elements of the litigation during its course that encouraged the plaintiff to pursue and prosecute it. The judgment records:[7]

> … during the adjournment of the hearing Mr McKean's counsel told him he had settled the case for an extraordinarily substantial amount of money in Mr McKean's favour. That was not only inherently implausible, at least to others involved in the case, but simply wrong. I accept, also, that Mr McKean's counsel misled him about legal aid and did not make application for it as he intimated he would, but charged Mr McKean fees directly.

[24] At [12] the judgment records:

> … new causes of action were developed by the plaintiff as the hearing proceeded. It is correct, also, that new documentary exhibits were added by the plaintiff in the course of the trial. I have to say, however, that although the plaintiff must ultimately be responsible for the conduct of his case vis-à-vis the defendant, I was left with the abiding impression that many of the causes of these delays and substantial additional hearing time were attributable to Mr McKean's counsel's undiscriminating, albeit thorough, conduct of the case.

[25] Although no order was made against counsel, the foregoing extracts from the judgment illustrate both the extraordinary circumstances of the case and the significant personal element of professional misconduct of the proceedings by counsel that would warrant an award being made against counsel personally.

[26] Part 14 of the High Court Rules deals with costs and includes expressly the following provisions for orders against persons who are not parties including parties' representatives. The first relevant case, although decided under an earlier version of the High Court Rules, is *Carborundum Adhesives Ltd v Bank of New Zealand (No 2) Ltd*.[8] The Court confirmed that what was then r 46 (now r 14.1) can apply in favour of or against a person who is not a party to the litigation. The test for awarding costs against a non-party includes that the person must have some connection with, or involvement, in the proceedings and that an order will be justified only where the circumstances demonstrate that the connection or involvement was such as to justify the making of what the Court accepts should be regarded as an exceptional order.

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[7] At [17].
[8] [1992] 3 NZLR 757 at 763-764.

[27] This test is not satisfied only in circumstances of impropriety, fraud or bad faith on the part of the non-party although such conduct in relation to the litigation may be a persuasive reason for making an order. Those principles have been affirmed in a number of subsequent cases including *Erwood v Maxted*,[9] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*[10] and *SH Lock (NZ) Ltd v New Zealand Bloodstock Leasing Ltd.*[11]

[28] Of particular relevance is the judgment in *Gordon v Treadwell Stacey Smith Gordon.*[12] This confirmed that while legal advisers who misconduct litigation may be ordered personally to pay costs incurred by an opposing party, on some occasions it may even be appropriate to require them to pay costs on a solicitor and client basis.[13] The judgment also confirms that "legal advisers" is a broad enough phrase to encompass both barristers and solicitors. The potential inclusion of lay advocates or agents in this Court is not, of course, examined in *Gordon* or any of the other High Court cases because such persons are simply not entitled to appear or represent parties. No guidance is thus available from High Court cases as to the respective positions of lay advocates or agents. They include advocates who may hold law degrees, may have been admitted as barristers and solicitors but do not currently practise, or may be unqualified lay advocates or agents as is the situation, as I understand it, of Mr Aarts's agent in this case.

[29] In *Harley v McDonald*[14] the Privy Council confirmed the High Court's inherent power to order costs personally against a lawyer acting for one of the parties. The Council's opinion noted:

> The undoubted inherent jurisdiction of the Courts in New Zealand to make a costs order against a client's solicitor rests upon the principle that, as officers of the Court, solicitors owe a duty to the Court, while the Court for its part has a duty to ensure that its officers achieve and maintain an appropriate level of competence and do not abuse the Court's process. The Court's duty is founded in the public interest that the procedures of the Court to which litigants and others are subjected are conducted by its officers as economically and efficiently as possible. In New Zealand barristers are also

[9] [2010] NZCA 93, (2010) 20 PRNZ 466 at [18].
[10] [2004] UKPC 39, [2005] 1 NZLR 145 at [25].
[11] [2011] NZCA 675 at [14].
[12] [1996] 3 NZLR 281.
[13] At 293.
[14] [2001] UKPC 18, [2002] 1 NZLR 1 at [45].

> officers of the High Court. This being so, there would seem to be no reason in principle why the Court should not exercise the same jurisdiction over them as it does over solicitors.

[30] The Privy Council in *Harley* highlighted that the High Court's jurisdiction is not merely punitive but also compensatory. That is in the sense because it may be used to require a lawyer to pay costs thrown away or lost because of the lawyer's conduct complained of. It is also punitive in that its purpose is to punish the offending practitioner for a failure to fulfil that practitioner's duty to the Court. Those joint objectives may be achieved in appropriate cases by ordering a practitioner personally to pay costs which would otherwise have fallen on a party to the proceeding. The opinion of the Privy Council in *Harley* is also useful because it identifies the standard required as being a "serious breach of duty to the Court". A simple mistake or oversight or mere error of judgment is insufficient.[15]

[31] There are at least two significant differences in this case, however. The first is that, following the *Capital Coast Health* judgment, I agree that the Employment Court does not have inherent powers enabling it, without more, to award costs against persons who are not parties to litigation and, in particular, to parties' representatives. The second distinction relates to the High Court's supervision of lawyers engaged in litigation and who are officers of that Court. The Employment Court does not have a similar supervisory role over the parties' representatives in this jurisdiction, whether they be practising lawyers or lay advocates or agents. While this Court controls the litigation before it and in this sense, what parties and their representatives do in relation to a proceeding, the Employment Court does not have the dual function of the High Court of overall supervision of the conduct of enrolled barristers and solicitors. This analysis therefore eliminates in this Court, the punitive function of a High Court order for costs payable by a party's lawyer. That falls under the professional supervisory role of that Court.

[32] Finally, in *Dominion Finance Group Ltd (in receivership and liquidation) v Sade Developments Ltd*[16] the receiver of the plaintiff sought costs against counsel for a defendant after the receiver had discontinued the plaintiff's proceedings. It was

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[15] At [55].
[16] HC Auckland CIV-2009-419-1556, 6 October 2011.

alleged that the practitioner had breached his duty to the Court. As to the exercise of its discretion, the Court held:[17]

> At its core, the jurisdiction is directed to ensuring the solicitor displays a basic level of competence in handling a case and does not abuse the Court's process. The solicitor must not mislead the Court. As the parties agree, there must be a serious dereliction of duty akin to gross negligence or gross inaccuracy on a matter that was within the solicitor's duty to ascertain. An allegation of serious breach must be capable of summary disposal. The facts relating to the impugned conduct must be easily verifiable. A hopeless case is not proof by itself of serious misconduct or incompetence. Finally, an erroneous assertion in pleadings with some evidential foundation is not the type of misconduct that attracts a wasted costs order.

[33] The foregoing remarks, although not directly applicable to this case, are nevertheless useful in describing the degree of egregious conduct which it might be appropriate to sanction by an order for costs against a party's representative if joined as an independent party for that purpose.

[34] The Court must be very careful to ensure that a claim for costs against a representative is not an attempt to ensure a greater likelihood of payment either by spreading the costs' burden more widely than on a sometimes impecunious party, but also in circumstances where a representative may be insured against consequences. That latter consideration is, however, unlikely to be the position in this case. As I understand it, Mr Lee does not otherwise represent litigants, whether in this jurisdiction or elsewhere, and his training, qualifications and experience are in an another discipline altogether.

[35] The question must, however, be decided by the application of principles that apply more broadly than the particular characteristics of this case, including the circumstances of parties represented by lawyers, full-time lay advocates in business as such, representation by unions, and the whole variety of non-party representation of litigants in this jurisdiction.

[36] Another implication of joining a representative and making an order for costs against that representative, especially where full indemnity costs may be contemplated by the Court, is whether the party primarily liable for costs should be

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[17] At [32].

relieved of some of that liability as may be a consequence of making an order against the representative. In this case, the Court has had a good opportunity, over many months of slow progress towards a hearing on what was, in many ways, a series of preliminary issues, to observe and evaluate the prospective roles of Messrs Aarts and Lee. Unlike, for example, the *McKean* case referred to above, I do not think that this can be said to be one of a rogue representative embarking on frolics for his own purposes and leaving the party he represents either mystified about what is going on and why, or even in ignorance of it. Mr Aarts clearly trusts Mr Lee implicitly and they have operated very closely in the case. As I noted in the primary judgment, Mr Aarts trusts no-one else at all about his case. Although, no doubt, Mr Lee has advised Mr Aarts about courses of action in the litigation, I detect no suggestion of other than complete agreement by Mr Aarts with Mr Lee's proposed strategies.

[37] The Act, as did its predecessor Acts, allows anyone to represent any party in proceedings in this Court (and in the Employment Relations Authority) including practising lawyers, professional lay advocates, unions, and what the legislation terms "agents" as I would describe Mr Lee.

[38] An award of costs against an unsuccessful litigant in this court is a long established and well known possibility. Persons engaging in litigation as a party ought either to be aware of such prospects or at least given sober advice by a representative. The possibility of a costs' award against a representative is, however, and at least in this jurisdiction, significantly less well established and so may therefore be less well known. This in turn affects whether a representative, when agreeing to act for a litigant and in the course of advising that party and advocating that party's cause in the proceedings, will so advise a party. Whilst practising lawyers are probably and more acutely aware of such possibilities, professional lay advocates may not be and agents such as Mr Lee, representing someone on a one-off basis, may be even less cognisant of the possibility. Judgments such as this will serve to put representatives on notice of this possibility.

[39] At paragraphs 36 and 49 of memorandum of counsel for the tenth defendant, the grounds for joining Mr Lee as a party and for an award of costs against him in that capacity are set out. Although purporting to be critical of Mr Lee personally, I

conclude that the majority of those criticisms are really of Mr Aarts's case and it is difficult, if not impossible, to separate out criticism of Mr Lee alone. In those submissions that do constitute justifiable criticism of Mr Lee in his conduct of the case as Mr Aarts's agent, I do not consider that they establish anything much more than the usual difficulty that lay persons (whether they be unrepresented litigants or unqualified and inexperienced agents) display in proceedings in this Court which involve questions of law and more than simple questions of fact.

[40] For a representative to be added as a party to a proceeding solely for the purpose of an award of costs against that representative, there must be some extraordinary feature of the litigation which elevates the representative's role beyond that which is played by an effective, even passionate, advocate for a party. This may amount to circumstances in which the representative has, in effect, taken on the case as his or her own, although still on behalf of the party represented. Looked at another way, the Court will need to be satisfied that the costs incurred by the successful parties would have been less had another representative competently acted in that role. In other words, the Court needs to ask itself the extent to which, if any, the particular representative's representation of the party against whom costs are to be awarded contributed independently to an increase in those costs in circumstances where proper and dispassionate representation would not have.

[41] Although I accept that it is frustrating and, at times, more difficult and costly for parties who are professionally and competently represented to deal with parties who are not, that is the nature of employment litigation. It would be unrealistic to expect from all representatives of parties the same high standards applicable to qualified and experienced lawyers. It would also be unjust to penalise in costs those who exercise a statutory right of indiscriminate representation of litigants, even where the standard of their advocacy is poor and the litigation is dealt with by others at greater cost.

[42] Although, with some exceptions amongst both professional advocates and lawyers, it is this Court's experience generally that the more complex and legalistic proceedings are, the less well suited to conduct them are agents (such as Mr Lee) or even many employment law advocates. So it follows that whilst not every case,

indeed most cases for mediation and Employment Relations Authority purposes, do not require the advocacy of senior legal practitioners, the interests of all concerned are usually better served at appellate level by competent specialist counsel.

[43] Examining the compensatory elements of a costs' award against a representative, I am not satisfied (although by a narrow margin) that it would be appropriate to compensate the tenth defendant for its wasted costs (in effect its wasted time and deprivation of remunerative work because it is itself a firm of solicitors) by requiring Mr Lee to contribute to those losses. The near indemnity award of costs that I have made against Mr Aarts will fulfil that requirement adequately.

[44] I conclude that the justice of the tenth defendant's claim for costs can be addressed most appropriately by requiring Mr Aarts alone to contribute to the tenth defendant's costs. Because no order should be made against Mr Lee, he will not be joined as a party for that purpose.

## Tenth defendant's costs' award against plaintiff

[45] After his dismissal, Mr Aarts engaged Lance Lawson to advise him and to take appropriate steps on his instructions. When it appeared to Lance Lawson that the plaintiff was receiving other advice not in accordance with its, the lawyers, justifiably in my view, put to Mr Aarts the option of accepting their professional advice or terminating their services. Mr Aarts chose the latter course as he was entitled to do. Although other solicitors were subsequently engaged by the plaintiff, their services too were dispensed with.

[46] After the Employment Relations Authority dismissed Mr Aarts's penalty claims against Lance Lawson, the firm offered, generously in my view, not to pursue costs against him if he, in turn, agreed not to pursue his claims against it. Mr Aarts's decision to challenge that part of the Authority's determination on which it had delivered a reasoned and correct assessment of the legal position, was as ill-advised as the original decision to issue proceedings against Lance Lawson. It is difficult to find any level of objective justification for those decisions.

[47] Finally, even as late as a week or so before the eventual hearing in this Court, Lance Lawson again proposed to Mr Aarts, through Mr Lee, that if he discontinued his claim against the firm, it would not pursue costs although by that time it had incurred further not insubstantial costs and expenses. Mr Aarts's decision to spurn that offer was as unwise as his rejection of previous opportunities to escape from a hopeless position.

[48] Viewed objectively, joining Lance Lawson to seek a penalty against that firm for aiding and abetting Barnardos's breach of its employment agreement with Mr Aarts, was a rash and unwise strategy. There was no factual foundation to support the allegations brought against Lance Lawson. Indeed, viewed objectively, that firm had done its best in the short time that it had to advance Mr Aarts's interests in respect of its claim of unjustified dismissal. To seek to penalise the firm because it had not achieved Mr Aarts's unrealistic expectations in the circumstances at the time, was reckless, and this was compounded by the decision to pursue that claim after it had been rejected by the Authority.

[49] The tenth defendant, a firm of lawyers, is, as a party, in a different position from most others in litigation. That is because, in this case at least, it has chosen to be unrepresented by outside counsel or lawyers although it has been represented very adequately by, at different times, a staff solicitor and a partner. It can, in these circumstances however, not produce a bill of costs that it has had to pay for the purposes of seeking a reimbursement of some or all of that account.

[50] What has happened is that the tenth defendant has created a form of bill of costs addressed to itself as if it were a separate client entity. This approach provides no difficulty as far as out of pocket disbursements are concerned. I accept, also, that to the extent that the tenth defendant has had to deploy its professional in-house resources to defend its own position, it has been unable to take on and deal with other fee paying work and so has incurred a loss of income. Is such a loss in these particular circumstances a "cost" covered by cl 19 of Schedule 3 to the Act? I have concluded that it is.

[51] The case is not dissimilar to, but then again not identical to, that of a corporate party to litigation which uses an in-house lawyer to represent it. Such a party does not incur externally generated legal costs for the litigation but, equally, the time devoted to it by the in-house lawyer comes at a cost to the party. There is some case law history about orders for compensation of such costs and, indeed, compensation for other executive time in the cases of corporate parties.

[52] It is difficult, in these circumstances, to think of any reason why Mr Aarts should not be relieved of paying reasonable near-indemnity costs to Lance Lawson in accordance with the principles applying to such awards of costs.

[53] Lance Lawson appears to have billed itself for its own fees and disbursements although its representation has, to my knowledge, remained in-house. The majority of the work was undertaken by a staff solicitor, Mr Greg Burt, and counsel who appeared at the hearing, Mr Andrew Schulze, who is a partner of the firm. No external advice or representation appears to have been taken and, therefore, charged for so that the firm's own invoice to itself, charging $17,267.25, is to be regarded as an indication of what a client would have been billed for the same work.

[54] As a matter of principle, this Court has allowed, in an order for contributory costs, an allowance for work by in-house counsel.[18] Lower hourly rates for in-house counsel than for privately engaged lawyers have generally been allowed.[19].

[55] As to compensation for executive time, the Court has also allowed for this in appropriate cases. In *AC Nielsen (New Zealand) Ltd v Pappafloratos*[20] the Court, although allowing in principle for some reimbursement for executive time, declined to do so because of an insufficient factual basis and that the two executives involved were also defendants. The Court said that if executive time is to be reimbursed, there must be a proper quantification for time spent and its actual costs to the party. In *Murphy and Routhan t/a Enzo's Pizza v van Beek*[21] the Court said that it is not an

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[18] See, for example *Godfrey Hirst v National Distribution Union* AC62/04, 27 October 2004 and *Carter Holt Harvey Ltd v Nicholas* CC5/01, 21 March 2001.
[19] *Godfrey Hirst*; *Carter Holt Harvey*; *Smith v Air New Zealand Ltd* AC17/01, 19 March 2001 and *McIntosh v Air New Zealand Ltd* AC9/01, 22 February 2001.
[20] WC17B/03, 5 September 2003.
[21] [1998] 3 ERNZ 736 at 741.

absolute rule in all cases but a party who is not represented by a lawyer cannot recover anything for that party's time and trouble in attending to the proceeding. Exceptions to that general rule include time spent by in-house lawyers and union advocates and other representatives preparing for cases where the Court may award "expenses" in recognition of the principle that the unsuccessful party should contribute to the paid time of its opponent's representative. Finally, in *Clarke v Attorney-General in respect of the Secretary of Labour*[22] the Court stated:[23]

> In appropriate cases, costs can be awarded to corporate litigants for executive time when it can be shown that such has been incurred at the expense of productive work. The main point, however, is that there is no power to award more costs than have been incurred. An employer of in-house counsel is not entitled to recover from the unsuccessful opponent a profit on the employee's time.

[56] In these circumstances I am assisted by the tenth defendant's submissions identifying what equivalent proceedings in the High Court may have warranted under scale charges for litigation there. On a 2B basis, the tenth defendant claims:

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| Statement of defence | $3,980 |
| Teleconference callovers (2) | $796 |
| Preparation of evidence | $4,975 |
| Preparation for hearing | $5,970 |
| Hearing costs – 1 day | $1,990 |
| **TOTAL** | **$17,711** |

[57] Unlike the other defendants whose cases were dealt with by legal submissions, the proceeding against the tenth defendant was, by consent, dealt with also on its merits. In effect, it went to trial.

[58] Allowing less than the High Court scale for the preparation of a statement of defence but a little more for telephone conference calls, a little less for the preparation of evidence, and less for the preparation for hearing on very limited issues, but more for attendance by counsel at the hearing, I would assess reasonable close-to-indemnity costs in favour of the tenth defendant as the sum of $14,000.

[22] WC44/97, 24 October 1997.
[23] At 2.

Added to this must be the travel (and, if incurred, accommodation costs) of the tenth defendant's witness, Mr Lawson, and counsel, Mr Schulze. Added, also, are disbursements totalling $218.50. These travel costs have not been quantified by the tenth defendant although I accept that they must have been incurred and so should be settled by the Registrar after information detailing them is lodged and Mr Aarts has had a reasonable opportunity to respond if he objects to the amounts.

[59] Very belatedly, Mr Lee, on behalf of Mr Aarts, filed submissions both in opposition to the orders sought by the defendants and claiming substantial costs for himself. Large parts of those submissions constitute a reiteration of the merits of the plaintiff's case which have already been decided. They cannot be re-litigated on an application for costs. In any event, I am aware that there are applications for leave to the Court of Appeal to both appeal and cross appeal against this Court's judgment.

[60] As to Mr Aarts's claim for costs against the remaining defendants, Mr Lee submits that he has put in an estimated 7,000 hours of work on this case on behalf of Mr Aarts, 2,000 of which he is prepared to forego, reflecting any inefficiency or time wasting as a result of his inexperience. Mr Aarts claims the sum of $410,000 in costs, calculated by multiplying 5,000 hours by an hourly rate of $82 for attendances since 2006.

[61] Because this counterclaim for costs is dismissed, I have not needed to hear from any of the defendants on it. The dismissal of this counterclaim is for the following reasons.

[62] First, there is no suggestion that Mr Aarts has paid Mr Lee $410,000 for legal advice and representation or indeed any sum at all. Whilst, no doubt, Mr Lee has been very generous with his time and effort in support of Mr Aarts, there is no evidence of any actual cost having been incurred by Mr Aarts, let alone $410,000 worth of costs.

[63] Next, any award of costs to be made by this Court can only relate to the proceedings before it. The claim, however, is said to date to attendances from 2006

and there is no breakdown at all of what, if any, costs Mr Aarts may have incurred in relation to the challenge before this Court.

[64] Third, to the extent that Mr Aarts was successful on part of his challenge, that success is negated, in a costs setting, by his failure on other aspects of the challenge. That has already been reflected in this judgment by my decision not to award costs in favour of the Commissioner of Police, being the defendant against whom Mr Aarts was successful. The same principle of costs neutrality applies to the plaintiff's counterclaim.

[65] The only issue on which I have obtained any real assistance from Mr Lee's submissions, concerns Mr Aarts's current financial circumstances. These are addressed at paragraphs 101-107 of Mr Lee's submissions. Mr Lee says that Mr Aarts is engaged as a part-time contractual caregiver for brain injured people, working on average 22-26 hours per week at little more, or even less, than the minimum wage calculated hourly. Mr Lee advises me that Mr Aarts does not own any major assets such as a house: he is said to own a modest car and to live in rented accommodation. Mr Lee submits that Mr Aarts has no surplus income from which reasonably to make a payment of costs.

[66] Unlike the majority of the very voluminous submissions made on behalf of Mr Aarts on the question of costs, his ability to meet an award is a very relevant consideration but unfortunately the information in support of the plaintiff's financial position is very scant. I have, however, weighed that information in the balance in making the orders in favour of the defendants that I have.

## Summary of judgment

a. The plaintiff is directed to contribute to the costs of the fourth defendant (the Privacy Commissioner) in the sum of $1,320 (inclusive of GST).

b. No order for costs is made in favour of the second defendant (the Commissioner of Police).

c. The plaintiff is ordered to contribute to the costs of the third and sixth defendants (the Ministry of Social Development) in the combined sum of $8,661.37 (inclusive of GST) for costs and $534.49 (inclusive of GST) for disbursements.

d. The application to join Robert Lee as a party to the proceeding for the purpose of awarding costs against him is refused.

e. The plaintiff is directed to contribute to the costs of the tenth defendant in the sum of $14,000 (inclusive of GST) and to pay the tenth defendant's disbursements of $218.50 (inclusive of GST). The plaintiff is also required to pay the reasonable travel costs of the tenth defendant as settled by the Registrar.

f. The plaintiff's counterclaim for costs against the defendants it not upheld.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Thursday 1 August 2013