

**NOTE: ORDER MADE IN THE HIGH COURT PROHIBITING
PUBLICATION OF THE APPELLANT'S NAME REMAINS IN PLACE.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA524/2013
[2014] NZCA 65**

BETWEEN B
 Appellant

AND WAITEMATA DISTRICT HEALTH
 BOARD
 Respondent

Counsel: R K Francois for Appellant
 J P Coates and P W Le Cren for Respondent

Judgment: 12 March 2014 at 12.30 pm
(On the papers)

**JUDGMENT OF ELLEN FRANCE J
(Review of Registrar's decision)**

- A The application for an extension of time to apply for review is granted.**
- B The application for review of the Registrar's decision is allowed in part.
 Security for costs is fixed at \$3,000.**
- C Security for costs of \$3,000 must be paid to this Court by 10 April 2014.**
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REASONS

Introduction

[1] The appellant and two others brought a proceeding in the High Court challenging the policy of the respondent to prohibit smoking in its hospitals and surrounding grounds. Asher J dismissed the claims concluding that the policy was

consistent with the relevant legislation, was implemented after consideration of relevant matters and was not discriminatory.¹

[2] The appellant has appealed against the decision of Asher J.

[3] The Registrar set security for costs in the sum of \$5,880. The appellant sought dispensation from the requirement to pay security. In a letter dated 23 December 2013, the Registrar declined to waive security and ordered that the security of \$5,880 be paid by 12 February 2014. The appellant seeks a review of the decision refusing to dispense with security. The application for review is out of time. No issue is taken with that and I extend time for filing the application.

Approach

[4] In the normal course, appellants in civil proceedings in this Court are required to pay security for costs.² An appellant may apply to the Registrar for a waiver and the Registrar may vary or waive security “if satisfied that the circumstances warrant it”.³ The circumstances in which security will be waived have been described as follows:⁴

[7] Security for costs will be waived where it is in the interests of justice to do so. There must be some exceptional circumstance to justify waiver. The appellant must honestly intend to pursue the appeal and it must be arguable, as respondents should not face the threat of hopeless appeals without provision for security. The importance of the issues raised in the appeal will be significant, as will the question whether there is any public interest in having them determined. Impecuniosity alone is not usually sufficient to justify a waiver, but may be a reason to reduce the quantum of security.

Discussion

[5] The principal grounds for the application for dispensation to the Registrar were that the appellant was impecunious and that the appeal raised novel questions

¹ *B v Waitemata District Health Board* [2013] NZHC 1702, [2013] NZAR 937.

² Court of Appeal (Civil) Rules 2005, r 35(2).

³ Rule 35(6).

⁴ *Spicer v Credit Link Factors Ltd* [2012] NZCA 69 (footnotes omitted); see also *Easton v Broadcasting Commission* [2009] NZCA 252, (2009) 19 PRNZ 675 at [5]; *Fava v Zaghoul* [2007] NZCA 498, (2008) 18 PRNZ 943 at [9]; *Hills v Public Trust* [2010] NZCA 401, (2010) 20 PRNZ 707 at [13]–[15]; *Clark v Clark* [2013] NZCA 284 at [6]; and *Siemer v Judicial Conduct Commissioner* [2013] NZCA 334 at [8].

of more general importance. On the first aspect, the Registrar observed that although reference was made to the appellant being on an invalid's benefit, there was no information to support this or about any other assets or liabilities he may have. In any event, impecuniosity alone did not mean security should be dispensed with. On the second aspect relating to the nature of the appeal, the Registrar did not consider the circumstances were exceptional.

[6] In seeking a review, the appellant essentially emphasises the same factors, that is, he says he is impecunious and the appeal raises important and novel issues.

[7] The respondent submits security should be paid and if not in full then the appellant should still be required to pay an amount in security.

[8] I am not satisfied on the information before me that the appellant is impecunious in the sense contemplated by the authorities relating to security for costs. He is in receipt of an invalid's benefit. But, as counsel for the respondent submits, his financial position (for example his assets) remains unclear. The appellant says that although he would be eligible for legal aid, he has not applied for legal aid.

[9] As to the proposed appeal, the respondent argues the case is not a finely balanced one. The appellant's case was the subject of a comprehensive and careful decision in the High Court. However, this is not an appeal which at this stage can be characterised as hopeless. Moreover, as the respondent accepts, the case does raise questions of broader public interest. In the present case, I do not accept that the respondent's submission that this interest has been satisfied by the review in the High Court.

[10] In these circumstances, I am satisfied that the Registrar was right to require the appellant to pay an amount by way of security for costs. I propose however to reduce the amount to \$3,000 to reflect the public interest in the appeal. This amount provides some protection against costs for the respondent, but at the same time may enable the appellant to proceed with what he regards as an appeal of some

consequence. Security for costs of \$3,000 must be paid to this Court by 10 April 2014.

[11] This judgment may be cited as *Brown v Waitemata District Health Board*.

Solicitors:
W F Simpson, Auckland for Appellant
Claro Law, Wellington for Respondent