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Musa v Whanganui District Health Board [2010] NZEmpC 143 (28 October 2010)

Last Updated: 12 November 2010

IN THE EMPLOYMENT COURT WELLINGTON

[\[2010\] NZEMPC 143](#)

WRC 24/08

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN MEMO MUSA Plaintiff

AND WHANGANUI DISTRICT HEALTH BOARD

First Defendant

AND CLIVE SOLOMON Second Defendant

Hearing: 6 September 2010 (at Whanganui) and by memoranda of submissions filed on 20 and 24 September 2010

Appearances: Gerard Dewar, Counsel for Plaintiff

Michael Leggat, Counsel for Second Defendant

Judgment: 28 October 2010

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Mr Solomon seeks an order for contribution to his legal costs, having defended successfully Mr Musa's claims for penalties for reasons given in the judgment issued on 10 September 2010.^[1]

[2] Costs for or against the Whanganui District Health Board (the Board), the first defendant, do not come into consideration. Mr Musa and the Board settled his

claims against it and although the Board was represented at the hearing of the claims

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against the second defendant for two days in Whanganui in August, I indicated to its counsel, and I understood Mr Churchman to accept, that it would not be entitled to any costs in the circumstances. I am advised by counsel for Mr Musa and accept that the Board has not contributed to Mr Musa's costs of prosecuting his claims against Mr Solomon.

[3] For a claim for penalties that could not, at best or worst, have amounted to more than about \$10,000, the plaintiff and the second defendant have expended significant sums on legal fees. That is partly because of the way in which the proceeding went. Mr Musa's claims were originally brought in the Employment Relations Authority but removed to this Court. They were then for substantial sums of damages, more than \$200,000. These damages claims were struck out at a preliminary stage, but after an opposed hearing, and both parties incurred not insignificant costs in that exercise. The remaining claims for penalties under two heads occupied 2½ hearing days in Whanganui during which numerous witnesses gave evidence, documents were produced and submissions made. When the other causes of action were struck out, the Judge reserved costs on the strike out application to be dealt with at the same time as costs in the balance of the proceeding heard and determined

recently. This judgment therefore covers all costs in the proceeding between these parties at all stages.

[4] It is not surprising, in these circumstances, that Mr Solomon's legal costs have amounted to more than \$80,000 and Mr Musa's to not much less than those.

[5] In the normal course of events, Mr Solomon, having been successful, would be entitled to an order for contribution to his reasonable costs of representation. The Court would start by assessing the reasonableness of his actual legal costs and then determine what is a reasonable contribution to those, starting at a notional two-thirds level and adjusting up or down, depending upon the relevant particular factors of the case.

[6] Clause 19 of Schedule 3 to the [Employment Relations Act 2000](#) gives the

Court a very broad discretion to determine both if costs are to be awarded in any

particular proceeding and, if so, how much. That discretion must, however, be exercised in a principled and not arbitrary way.

[7] Mr Dewar for the plaintiff submits that as a "residual matter" the plaintiff's claim for a compliance order has not been dealt with by the Court. That is because, unless a breach is established, the Court cannot order compliance. The primary judgment found no breach by the second defendant. Mr Musa's concern appears to be that if Mr Solomon is now free from the undertaking that he gave to the Court, Mr Musa will be left "exposed to Mr Solomon's propensity to make public pronouncements about him."

[8] Whilst that may or may not be so, I simply observe that Mr Solomon is subject to the law of defamation but, more pertinently, is now aware of the fact and content of the settlement of Mr Musa's personal grievance with the Board. As the principal judgment confirmed, any "person" may breach [s 149\(4\)](#).

[9] Both parties claim the moral high ground of attempting, through the sorry history of this matter, to settle matters by mediation. Mr Musa claims to have attempted to do so but says that Mr Solomon consistently and adamantly declined to participate in those attempts to resolve these disputes. Mr Solomon says, likewise, that he has extended reasonable and sensible proposals to Mr Musa which have been spurned. It does, however, appear that when a draft statement of claim in potential District Court proceedings was sent to Mr Solomon in an attempt to resolve matters, this resulted in what Mr Dewar described as a "further media response" from Mr Solomon.

[10] The approaches by both parties in attempting to settle this litigation must be judged against the outcome of the court proceedings which have gone against the plaintiff. What can be said in the circumstances is that if Mr Solomon had been prepared to apologise publicly to Mr Musa, as I consider would have been appropriate, Mr Solomon could have saved himself a lot of money. Equally, had Mr Musa been prepared to cut his losses and walk away from this litigation, he too could have achieved a similar result, not only for himself but for the Board and Mr Solomon. Mr Musa was not, however, prepared to do so as a matter of principle.

[11] Although Mr Musa accepts that in the normal course, costs will follow the event, this is not an immutable rule and the conduct of the parties is a relevant consideration in the exercise of the Court's discretion: *Reid v NZ Fire Service Commission*^[2] and *New Zealand Labourers IUOW v Fletcher Challenge Ltd.*^[3]

[12] Mr Musa has been unsuccessful in his claims against Mr Solomon. However, I have concluded firmly that Mr Musa should not have to pay costs. That is for the following reasons.

[13] On the evidence heard by me, Mr Musa was hounded out of his position as Chief Executive Officer of the Board. His performance assessments conducted regularly by the Board showed no cause for concern about his performance in the role. When the Board was subjected to adverse external criticism, and even when it was exonerated from blame but others sought to portray that exoneration as criticism, Mr Musa was made the scapegoat of that criticism. Strident calls for his resignation or dismissal, including by some members of the Board, were unwarranted. If any acceptance of vicarious responsibility for fault, akin to the constitutional convention of ministerial responsibility, had been warranted, resignations might more appropriately have come from the Board rather than the CEO.

[14] Mr Musa elected responsibly to resign not only because it was very clear that his own position as CEO was untenable but also to attempt altruistically to end the deep rift between board members, board staff, and the community. Mr Musa resigned on terms that were substantially favourable to the Board. The benefits to Mr Musa of the settlement reached were very modest. As the Board's own legal opinion, which was circulated to board members, confirms, if Mr Musa had exercised his rights in law, he would probably have received substantially greater monetary compensation, public vindication of his position, and a judgment severely critical, if not of the Board, then of some members of it.

[15] What would have been Mr Musa's unjustified constructive dismissal was politically motivated. When the Board's legal position and that of its individual members was made known to it by its solicitors and counsel, some members ignored cynically that strong and objective legal advice. As Mr Laws said repeatedly in evidence about these matters, he for one dealt

with Mr Musa “politically” and in a “public governance” context. Ignoring employment law and professional advice about it when dealing with an employee is a bold and risky strategy.

[16] My reasons for declining to award costs are applicable to Mr Solomon. Although his motivations may have been in part driven by a concern, as a surgeon, an employee of the Board, and a member of it, to maintain and improve the quality of health care in the Board’s community, he was motivated primarily to rid himself and other Board members of Mr Musa and to promote the interests of another whom he promoted as CEO. Other Board members’ motivations for their unwarranted public attacks on Mr Musa (which are not among my reasons for declining costs) are less clear.

[17] Any order for costs would not contribute to the ending of very unfortunate and on-going fallout from this litigation, as is necessary. Although in one sense, Mr Solomon might be seen as entitled to a contribution to the costs of succeeding, it would be unjust overall to require Mr Musa to make that contribution.

[18] To his credit, Mr Solomon gave a solemn undertaking to comply with the terms of the settlement of Mr Musa’s personal grievance between him and the Board although this applied only until this court’s judgment was given. Nevertheless, I have no reason to believe that Mr Solomon will not continue to respect the spirit of the undertaking he gave to the Court. Mr Solomon is now well aware of the terms of the settlement between Mr Musa and the Board and which bind the Board, including Mr Solomon as a member, and the risks and costs attaching to a breach. Others also would do well also to put these events behind them in the interests of all concerned. Membership of elected public bodies imposes necessary disciplines upon members to act collectively, in compliance with the law, and to abide by self-imposed rules. The community served by the Board is entitled to expect the Board’s members to conduct themselves accordingly.

[19] For these unusual reasons, I consider that costs should be left to lie where they have fallen and I decline to make any order.

[20] I wish to say this finally. This case is hopefully the last episode in a very unfortunate saga for the Board, its staff, its members, and the Whanganui community. I have no doubt that it has been uneconomic for all concerned. It has been pursued by Mr Musa and defended by Mr Solomon as a matter of principle.

GL Colgan

Chief Judge

Judgment signed at 8.30 am on Thursday 28 October 2010

[1] [\[2010\] NZEmpC 120](#).

[2] [\[1995\] NZEmpC 192](#); [\[1995\] 2 ERNZ 38](#).

[3] [\[1990\] 1 NZILR 557](#).