IN THE COURT OF APPEAL OF NEW ZEALAND

CA400/2013
[2014] NZCA 16

BETWEEN	COMMISSIONER OF POLICE Applicant
AND	JOHAN AARTS First Respondent
	BARNARDOS NEW ZEALAND Second Respondent
	MINISTRY OF SOCIAL DEVELOPMENT Third Respondent
	THE PRIVACY COMMISSIONER Fourth Respondent
	THE OMBUDSMAN Fifth Respondent
	LANCE AND LAWSON BARRISTERS & SOLICITORS Sixth Respondent

Court:	Randerson, French and Miller JJ
Counsel:	S V McKechnie and R Garden for Applicant First Respondent in person J Douglas for Second Respondent S V McKechnie for Third Respondent K Evans for Fourth Respondent J Pohl for Fith Respondent G B Burt and A Schulze for Sixth Respondent
Judgment: (On the papers)	14 February 2014 at 2:30pm

JUDGMENT OF THE COURT

A The Commissioner's application for leave to appeal is adjourned for oral argument on the following question:

(i) Whether this Court has jurisdiction to hear the Commissioner's appeal, or ought to exercise it, in the circumstances.

B If the jurisdiction question is answered in the Commissioner's favour the Court proposes to grant leave to appeal on the following question:

(i) Whether the Employment Court was correct in law to hold that the Employment Relations Authority may compel the Commissioner to produce evidential video interviews for use in proceedings brought under the Employment Relations Act 2000.

The two questions of law are to be argued at the same hearing.

C Mr Aarts' applications for leave to cross-appeal and to appeal the Employment Court costs judgment of 1 August 2013 are dismissed.

REASONS OF THE COURT

(Given by Miller)

[1] We give brief reasons to clarify the identified questions of law, and to explain why we have dismissed Mr Aarts' applications for leave to cross-appeal, and to appeal the Employment Court's costs judgment.

[2] The first question of law addresses the issue whether the Commissioner of Police may bring an appeal to this Court when he is no longer a party to the proceedings under appeal.

[3] The second question of law is intended to establish whether the Evidence Regulations 2007 preclude the Employment Relations Authority from issuing a summons to the police to produce evidential video interviews of child complainants

in proceedings for unjustified dismissal brought by Mr Aarts against his former employer, Barnardos New Zealand Inc.

[4] The first question should logically be answered before leave can be given to argue the second, but in the interests of efficiency we will hear argument on both at the same hearing.

[5] The Commissioner was not Mr Aarts' employer, but he was named as a party; he was one of eight persons against whom Mr Aarts brought claims before the Authority alleging that they had incited or procured a breach of his employment agreement with Barnardos. In a determination dated 18 January 2012 the Authority declined to issue a summons compelling the Commissioner to produce the videos and held that any claim against the Commissioner was out of time.[1]

[6] Mr Aarts challenged those decisions before the Employment Court, which heard the matter as a de novo application. In a judgment delivered on 20 May 2013 the Court upheld the Authority's decision striking the Commissioner out as a party, but it also struck out the other accessory defendants, and it decided that the Authority might compel production of the videos if they were relevant.[2] The Commissioner then moved for leave to appeal the latter decision.

[7] In the unusual circumstances of this case we have not thought it appropriate without full argument to determine whether the Commissioner may bring this appeal under the Employment Relations Act 2000 or whether the Court should refuse relief on the ground that the Commissioner has an alternative remedy available to him, should the Authority actually require the police to produce the evidential videos at the substantive hearing of Mr Aarts' claim against Barnardos. The first question of law addresses those matters and any other jurisdiction issues.

[8] Mr Aarts' application for leave to cross-appeal cited nine grounds. Shortly before the scheduled hearing before us he abandoned that application, but we have

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1 *Aarts v Barnardos New Zealand* [2012] NZERA Auckland 22.
2 *Aarts v Barnardos New Zealand* [2013] NZEmpC 85, (2013) 10 NZELC 79-028 at [92].

allowed him to reinstate it. We record that no hearing was actually held; the parties were content to have the applications decided on the papers.

[9] Some of Mr Aarts' grounds addressed admissibility of the video interviews. He wanted to expand on the question of law proposed by the Commissioner by invoking the Privacy Act 1993 and the Official Information Act 1982 and pointing to proceedings that he has brought in tort. However, the second question of law allows him to invoke those matters, to the extent that they inform the Court's decision under the Employment Relations Act.

[10] Mr Aarts' remaining grounds focus on the Ministry of Social Development, the Privacy Commissioner, the Ombudsman, and Lance Lawson, solicitors.[3] He wishes to argue that they are liable as accessories or parties to Barnardos' breach of his employment contract. It is said that they aided or abetted the breach some time afterward. The question whether a person can be liable under s 134 of the Employment Relations Act for aiding and abetting a concluded breach is certainly one of law. However, the Employment Court held that the question need not be decided, for Mr Aarts is on any view of it long out of time. He was dismissed with effect from 14 August 2006, and s 135(5) fixes a 12-month limitation period. Not until 18 February 2011 did he bring his claim. The Court surveyed the evidence at some length, and found that limitation barred his claims against all the party defendants. Its reasons varied; in some cases (the Police, the Ministry of Social Development, and Lance Lawson) it found that he knew or ought to have known of his cause of action by 2007, while in others it found on undisputed facts that his claims had no prospect of success. Nothing in Mr Aarts' submissions leads us to doubt these conclusions. That being so, the question of party liability is moot: his claims have no prospect of success. We decline leave to cross-appeal.

[11] The application for leave to cross-appeal is diffuse. To the extent that Mr Aarts also sought leave to appeal on other grounds, such as questions of pleading,

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[3] These, with Barnardos, are the parties named in his application for leave. We record that in the Employment Court there were no fewer than ten defendants; the others were the Commissioner of Police, the Serious Fraud Office, the Director of Human Rights Proceedings and the Independent Police Conduct Authority.

whether the striking out was premature, and whether the Police acted ultra vires, we record simply that there is nothing of substance in them.

[12] Mr Aarts also belatedly sought leave to appeal a separate Employment Court costs judgment in which he was ordered to pay costs and disbursements of $24,734.36.[4] He contended that the judgment was wrong in three respects: he substantially succeeded in the Employment Court; the award ought to have been reduced because he earns less than the minimum wage, having lost his career as a result of his dismissal; and he was ordered to pay costs of in-house counsel for two respondents, the Privacy Commissioner and Lance Lawson, a firm of solicitors.

[13] Of these grounds, the only one that might raise a question of law meriting the attention of this Court[5] is the last; whether the jurisdiction to award costs extends to work done by employed in-house counsel whose wages would have been paid by the employer in any event. As to that, the Employment Relations Act confers jurisdiction to award such costs and expenses as it thinks reasonable,[6] and the Employment Court has used the jurisdiction to permit occasional recovery of a reasonable contribution to in-house costs and expenses verifiably and reasonably incurred. The general rule is that a party cannot recover anything for its time and trouble in handling litigation, but exceptions can be made, as for example where the successful party has done work that would otherwise be left to external counsel.[7] The Court will set rates intended to exclude any element of profit,[8] and the applicant must be able to show that the time involved would otherwise have been spent on productive work.[9] In this case the Court discussed and applied those principles, except that because near-indemnity costs were appropriate for Lance Lawson, that firm was allowed costs based on normal charge-out rates. We see nothing in the costs judgment that warrants the attention of this Court.

[14] The application for leave to appeal the costs judgment is dismissed.

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4 *Aarts v Barnardos New Zealand* [2013] NZEmpC 145.
5 Employment Relations Act 2000, s 214(1).
6 *Murphy v Van Beek* [1998] 3 ERNZ 736 (EmpC) at 741. See also *Smith v Air New Zealand* EmpC Auckland AC17/01, 19 March 2001 and *Phillips v Telecom (NZ) Ltd* [2006] ERNZ 415 (EmpC).
7 *Murphy v Van Beek* above n 6, at 741.
8 *Smith v Air New Zealand*, above n 6.
9 *Clarke v Attorney-General* EmpC Wellington WEC29A/97, 24 October 1997 at [2].

[15] The Court has previously declined Mr Aarts' request that he be represented by a lay advocate. He may appear personally or by counsel when the Commissioner's appeal is argued. On the basis that he will not engage counsel, the Registrar is to appoint counsel to assist the Court.

Costs

[16] Costs in respect of the Commissioner of Police are reserved. In relation to Mr Aarts' applications we make no award for costs for the second to fifth respondents since they were all content to abide the Court's decision. The sixth respondent, Lance Lawson actively opposed both Mr Aarts' applications. Accordingly, we award costs of $1000 to the sixth respondent to be paid by Mr Aarts.

Solicitors:
Crown Law Office, Wellington for Applicant and Third Respondent
Lance Lawson, Rotorua for Sixth Respondent