[INDUSTRIAL RELATIONS COURT OF AUSTRALIA]

NILSEN v LOYAL ORANGE TRUST

North J

11 September 1997

Termination of Employment — Application dismissed — Costs — Whether proceeding instituted vexatiously or without reasonable cause — ''Vexatiously'' — ''Without reasonable cause'' — Purpose of instituting proceedings — Award of costs against non-parties — Solicitor — Principles — Workplace Relations Act 1996 (Cth), s 347.

NORTH J. On 20 February 1997, I gave judgment in this proceeding and dismissed the applicant's claim that her dismissal was in breach of the *Workplace Relations Act* 1996 (Cth) (the Act). I adjourned the question of costs. The parties have made submissions in writing on this subject. As the substantive hearing of this matter had commenced in the Industrial Relations Court of Australia prior to 26 May 1997 this matter remains in the jurisdiction of that Court under item 64, Sch 16 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth).

The respondent seeks the costs of the initial application before Judicial Registrar Chancellor and of the review before me. The respondent relies on s 347 of the Act, which provides:

> ''(1) A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 170CP) shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.
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> (2) In subsection (1):
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> **costs** includes all legal and professional costs and disbursements and expenses of witnesses.''

The review is a proceeding for the purposes of s 347: *Shackley v Australian Croatian Club Ltd* (1996) 141 ALR 736. In *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257 at 274, Northrop J said, in relation to a predecessor of s 347:

> ''Great care must be exercised to ensure that in finding that a party has instituted proceedings vexatiously or without reasonable cause, that party is not improperly deprived of his freedom from liability to pay costs to an opposing party. The test is a substantial one.''

In *Thompson v Hodder* (1989) 21 FCR 467 at 470, the Full Court of the Federal Court said:

> ''It is apparent from these authorities that an applicant who has the benefit of the protection of s 347 will only rarely be ordered to pay the costs of a proceeding in exceptional circumstances.''

In relation to the meaning of ''without reasonable cause'', in *R v Moore;*

Ex parte Federated Miscellaneous Workers Union of Australia (1978) 140 CLR 470 Gibbs J said at 473:

> ''... a party cannot be said to have commenced a proceeding 'without reasonable cause', within the meaning of that section, simply because his argument proves unsuccessful.''

In *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 157 at 264-265, Wilcox CJ said:

> ''It seems to me that one way of testing whether a proceeding is instituted 'without reasonable cause' is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being 'without reasonable cause'. But where, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.''

The applicant's central argument on the review was that the reason for her dismissal was her association with others who had challenged those in power in the Trust and the Loyal Orange Institution of Victoria (LOIV), and not the financial position of the Trust and the LOIV as asserted by the respondent. I rejected this argument and, in doing so, formed the clear view that it was not maintainable. This does not mean that the review was instituted without reasonable cause. This was not a case in which the evidence to be called by the applicant could not have sustained the applicant's case. Rather, the applicant depended for her success on the Court drawing inferences favourable to her and accepting evidence called on her behalf. For instance, she depended on the Court inferring that her dismissal was linked to her expulsion from membership of the LOIV. She depended on the Court accepting the evidence of Mr Simpson that the resolution of 25 November 1994 terminating her employment was pre-arranged. She was entitled to hope that the Court would draw inferences favourable to her and to accept the evidence of Mr Simpson. In the result, I did not draw those inferences and I did not accept Mr Simpson's evidence. These examples show that, when the review was instituted, the review was not utterly hopeless in the sense that it was doomed to failure. For the reasons expressed in my judgment, the applicant's case was weak, but the fact that it did not have a strong chance of success does not mean that it was instituted without reasonable cause. The evident policy behind s 347 is to allow an applicant, without the risk of paying the costs of the opposing party, to institute a weak case as long as it is not utterly hopeless.

The next question is whether the proceeding was instituted vexatiously. This looks to the motive of the applicant in instituting the proceeding. It is an alternative ground to the ground based on a lack of reasonable cause. It therefore may apply where there is a reasonable basis for instituting the proceeding. This context requires the concept to be narrowly construed. A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage: see *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491. The approach of the High Court in an application for a permanent stay of criminal proceedings on the ground of abuse of process constituted by

improper purpose is instructive. In *Williams v Spautz* (1992) 174 CLR 509 at 522, Mason CJ, Dawson, Toohey and McHugh JJ said:

> ''Bridge LJ identified one difficulty when he said (*Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 503; [1977] 2 All ER 566 at 586):
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> > 'What if a litigant with a genuine cause of action, *which he would wish to pursue in any event*, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it.' (Emphasis added.)
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> So would we. But his Lordship, by implication, evidently sees no difficulty with the case in which the plaintiff does not wish to pursue his or her cause of action to a conclusion because he or she intends to use the proceedings for a collateral and improper purpose.''

In the present case, the review was part of a long-running, bitter antagonism between the applicant and the respondent. As was pointed out in my judgment, much of the evidence of the applicant and the conduct of her case was focused on vindicating her view that her expulsion from the LOIV was unjustified and illegal. At times, it appeared that this issue was the dominant reason for the proceeding. It was surprising to reach the applicant's final submission and to hear nothing about the relief which the applicant claimed. However, on reflection, I am not persuaded that the applicant instituted the review vexatiously. It is difficult to separate the various motivations of the applicant. I am sure that part of her motivation in instituting the review was to vindicate her position on the expulsion. At the same time, she certainly was motivated to challenge the dismissal. She saw the expulsion as linked to the dismissal, and thought that it gave rise to a cause of action to challenge that dismissal. It was not a case of seeking to ventilate the legitimacy of the expulsion for no genuine purpose connected to the unlawful termination claim. Consequently, the review was not instituted vexatiously within the meaning of s 347 of the Act.

The respondent did not address any separate argument on its claim under s 347 for costs of the proceedings before the judicial registrar. Consequently, in the light of my conclusion that the applicant should not pay the costs of the review, the same result follows in respect of the costs of the proceeding before the judicial registrar.

The respondent also sought an order for payment of part of the costs of the review against Mr Nilsen, the solicitor for the applicant. I referred to his position in my reasons, at pp 66-67, as follows:

> ''Miss Nilsen's brother, Mr Nilsen, is an active organiser of bodies promoting the Protestant cause. He was a major participant in the events which led up to the expulsion of Miss Nilsen. He was also blackballed. Prior to his expulsion, he had joined with Dr Ely in criticising the administration of the Institution and the Trust. Mr Nilsen is a solicitor and acted as Miss Nilsen's solicitor in these proceedings. He appeared in Court as her advocate in the last eight of the eleven hearing days. In the light of his sister's distress at her expulsion, and his own personal involvement in the events, it is perhaps not difficult to understand why the conduct of the case concentrated on the expulsion. The evidence of witnesses called by the applicant and cross-examination of the respondent's witnesses was largely concerned with this event, and a substantial part of the written and

oral final submissions were concerned with arguments that the expulsion was invalid.''

The respondent contended that the trial was extended unnecessarily because of Mr Nilsen's undue attention to the circumstances of the expulsion and this was, at least in part, a result of Mr Nilsen's own involvement with those events. In its written submissions, the respondent described some of the problems which it contended arose from the involvement by Mr Nilsen in the events which were the subject of the hearing, as follows:

''(a) Raymond Nilsen's focus in cross-examining the witnesses for the Respondent in respect of their roles surrounding the loss of membership of the Applicant and him;

(b) the extensive evidence that was led in chief through the Applicant's witnesses regarding the events surrounding the loss of membership, including on many occasions exactly the same evidence being led from many witnesses for the Applicant involving the disputes at Lodge 111 although the evidence of these meetings was not in any real dispute;

(c) the difficulty Raymond Nilsen had in separating the putting of his instructions to the witnesses for the Applicant as distinct from just stating from the Bar Table his personal version of events where he was involved;

(d) the domination of the issues concerning the meeting of 1 June 1994 when the Applicant and Raymond Nilsen's membership was reballoted in oral and written final submissions to the point where they overshadowed critical questions concerning the question of the validity of the Applicant's termination;

(e) the inability at times for Raymond Nilsen to distinguish between putting the case for the Applicant and attempting to vindicate his own role in the affairs of the LOIV, such as his comment on 25 March 1997 rejecting the Court's suggestion of mediation on the question of costs. Raymond Nilsen stated, 'I am about a higher principal' (sic) when rejecting the offer of mediation although the subject of the mediation not only involved the question of the risk of him paying costs but also of the Applicant.''

The respondent contended that the hearing, which took 11 days, would have taken no more than five days if Mr Nilsen had not been so personally involved in the issues. Consequently, it sought the costs of six days of the hearing, amounting to $8,700, to be paid by Mr Nilsen. The respondent also sought the costs of perusing affidavits filed by the applicant, which were allegedly full of irrelevant material, and the costs of responding by affidavit to the applicant's affidavits, such costs totalling $5,000.

It is of the essence of the function of a legal adviser, and particularly an advocate before the Court, that such person is independent from the parties represented and the events in issue. Otherwise, there is a danger that the objectivity needed will be compromised when the legal adviser is called upon to advise and make decisions in matters in which that person was a participant. For this reason, it would have been far preferable for the applicant to have been represented by a person independent of the events which were in issue before the Court. However, whether Mr Nilsen caused a lengthening of the trial and, if so, whether he should bear the respondent's costs of such extension is another

question to be answered by an objective assessment of the way the hearing was conducted.

In *Canceri v Taylor* (1994) 1 IRCR 120; 55 IR 316 Moore J held that the Industrial Relations Court of Australia has an implied power to award costs. The power was limited by s 347. In *Nicolson v Heaven & Earth Gallery Pty Ltd* (1994) 1 IRCR 199 at 202; 57 IR 50 at 52 Wilcox CJ said that:

> ''The limitation upon the court's power to order payment of costs that is imposed by s 347 of the *Industrial Relations Act* applies only in relation to inter-parties orders. The section has no application in relation to costs orders made in favour of, or against, third parties.''

As to the test to be applied in considering orders for costs against non-parties, in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192, Mason CJ and Deane J said:

> ''... there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party.''

In relation to orders for costs against solicitors, the considerations of justice and the general principles relating to the award of costs were considered by the House of Lords in *Myers v Elman* [1940] AC 282. Viscount Maugham (with whom Lord Russell of Killowen agreed at 307) said (at 290) that costs would only be awarded against a solicitor for negligence of a serious character. The standard referred to (at 304) by Lord Atkin was ''gross negligence'' and Lord Wright described the necessary conduct (at 319) as ''gross neglect''. In *Ridehalgh v Horsefield* [1994] Ch 205 at 227, the Court of Appeal summarised the approach of the House of Lords in *Myers v Elman* as follows:

> ''While their Lordships used different language, and may to some extent have seen the issues somewhat differently, the case is authority for five fundamental propositions. (1) The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors. (2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not. (3) The court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice. (4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross. (5) The jurisdiction is compensatory and not merely punitive.''

In *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 at 547-548, French J said in relation to costs orders against solicitors:

> ''I accept the proposition that the jurisdiction is to be exercised with care and discretion and only in clear cases. The mere fact that litigation fails is plainly no ground for its exercise. There has to be something which amounts to a serious dereliction of duty.''

In *Re Bendeich (No 2)* (1994) 53 FCR 422 at 426-427, Drummond J said:

> ''The cases show that this jurisdiction must be exercised with caution.

> There is good reason for caution. Too ready an exposure of the lawyer for a party to personal liability for the costs of his client or of the other party is likely to inhibit the way the lawyer acts in conducting the litigation. It frequently happens that a lawyer will have to make judgments as to which of a number of courses is the optimum one to follow, bearing in mind his duty to advance his client's interests by all proper means and his duty to the court to conduct the litigation in proper fashion. The introduction of a third consideration into every day litigation that requires a solicitor to keep in mind the need to minimise the chances of a costs order being made against him personally, would raise a conflict between the lawyer's duties to his client and to the court, on the one hand, and his own interests, on the other. As is understandable, such a conflict would likely be resolved by the solicitor concentrating on identifying and adopting the course most likely to minimise his own personal exposure at the expense of following courses best fitted to advantage his client and to bring the action to an expeditious end.''

This approach has recently been applied in the Industrial Relations Court of Australia in *Robertson v CSR Readymix* (1997) 73 IR 431. For the purpose of this case, I will assume that the power to award costs against a solicitor applies equally to a solicitor acting as an advocate. The approaches outlined above guide my approach to this case.

Although I have found that the termination of Ms Nilsen was not a result of her loss of membership of the LOIV, it was not unreasonable for Mr Nilsen, as her solicitor, to have argued the case on that basis. The evidence-in-chief and cross-examination on the issue of loss of membership was, therefore, not irrelevant and the mere fact that the claim was unsuccessful is not a ground for ordering costs against Mr Nilsen. However, the criticism of Mr Nilsen is that the issue of loss of membership was pursued by excessive examination and cross-examination, and associated submissions to the Court. I agree that the detailed examination of this issue and events associated with the issue was excessive. I do not accept the respondent's submission that the excessive concentration on these matters caused the trial to run for six days more than it would have if these matters had been dealt with appropriately. If the conduct of Mr Nilsen had more than doubled the proper length of the case, the inappropriate conduct would have been of such a serious character as to attract an order for some costs against him. In order to warrant an award of costs against a solicitor for the opposing party, the law requires a serious departure from acceptable standards. This case comes close to that point. However, the authorities referred to above emphasise that the jurisdiction must be exercised with care. It is not designed solely to punish the solicitor, but to compensate the other party. A litigant always runs the risk that the opposing legal adviser may be less competent and less focused on the issues than some other opposing legal adviser. In the result, the excessive time spent by Mr Nilsen on some issues in the case and in the affidavits, while a departure from the proper conduct of the case, was not of such a serious degree as to justify the order for costs sought. There will be no order for costs.