IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-584
CIV-2021-485-595
[2021] NZHC 3420

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER OF	an application for judicial review of an order made under the COVID-19 Public Health Response Act 2020
BETWEEN	FOUR MIDWIVES Applicants
AND	MINISTER FOR COVID-19 RESPONSE and ATTORNEY-GENERAL Respondents

Continued…

Hearing:	On the papers
Counsel:	C J Griggs and C F J Reid for the Four Midwives W C Pyke for NZDSOS and NZTSOS D Jones and R M McMenamin for the Respondents
Judgment:	13 December 2021

JUDGMENT NO 2 OF PALMER J
(Costs)

Solicitors:
Stephens Lawyers, Wellington
Haigh Lyon, Auckland
Crown Law, Wellington

… Continued

CIV-2021-485-595

UNDER	the Judicial Review Procedure Act 2016 and the Declaratory Judgments Act 1908
IN THE MATTER OF	the making and amendment of the COVID-19 Public Health Response (Vaccinations) Order 2021 under s 11 of the COVID-19 Public Health Response Act 2020
BETWEEN	NZDSOS INC First Applicant
	NZTSOS INC Second Applicant
AND	MINISTER FOR COVID-19 RESPONSE, DIRECTOR-GENERAL OF HEALTH and ATTORNEY-GENERAL Respondents

What happened?

[1] On 12 November 2021 I issued judgment in judicial review proceedings brought by the Four Midwives and on one cause of action in proceedings brought by NZDSOS and NZTSOS.[1] In summary, I said:

> [1] Under the COVID-19 Public Health Response Act 2020 (the Act), the responsible Minister has made orders requiring individuals in certain occupations to be vaccinated against COVID-19. In this case, four midwives challenge the order relating to them. That challenge was heard together with the first cause of action brought by two incorporated societies, NZDSOS and NZTSOS (New Zealand Doctors and Teachers, respectively, Speaking Out with Science). They argue the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) is not legally valid because the Act does not empower it to be made, if interpreted consistently with the right to refuse medical treatment under the New Zealand Bill of Rights Act 1990 (Bill of Rights) and the principle of legality. A second cause of action of NZDSOS and NZTSOS, that the Order is invalid because it is not a reasonable and justified limit on the right under s 5 of the Bill of Rights, has yet to be heard.
>
> [2] The words of the Act encompass the power to require a person not to associate with others unless vaccinated, and to be vaccinated in order to engage in an activity. Interpreting the empowering provision in light of its purpose and context does not detract from that. The right to refuse to undergo medical treatment under s 11 of the Bill of Rights is engaged here. No order can be made under the empowering provision that limits the right unless it is reasonable, prescribed by law and can be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights. In this case, the applicants do not argue the Order is an unjustified limit. The Bill of Rights does not require the usual purposive interpretation of the empowering provision to be narrowed to mean that the Order is outside its scope. Indeed, the text of the Act explicitly indicates that Parliament envisaged that orders may be made which limit rights under the Bill of Rights, as long as the limits are justified under s 5. The common law principle of legality, which requires legislative limitations on fundamental rights to be clearly expressed, does not require a different interpretation.
>
> [3] I decline the application. I anonymise the four midwives in this judgment. I direct their court file not be searched without permission of a Judge, for three years, to preserve their effective exercise of the right of access to justice, in light of concerns for them and their family members deriving from current social division.

[2] I also said:

> [85] Because of the public interest in clarification of an important legal issue directly affecting the rights and employment of the applicants, and they have acted reasonably, I am inclined to let costs lie where they fall under r 14.7(e) of the High Court Rules 2016. However, I have not heard the parties

[1] *Four Midwives, NZDSOS and NZTSOS v Minister for COVID-19 Response* [2021] NZHC 3064.

on costs. If the Crown wishes to pursue costs, they may file submissions of no more than 10 pages within 10 working days of the judgment and the applicants may file submissions in response within 10 working days of that.

Submissions

[3] Despite my indicated inclination, the Crown seeks "modest costs" of $7,369.25 against the Four Midwives and $4,976.45 against NZDSOS and NZTSOS in accordance with category 2, band A for specified steps. Mr Jones, for the Crown, accepts the proceedings concerned a matter of genuine public interest and importance. But he submits the applicants did not act reasonably in the conduct of the proceedings. That is because he submits reasonable applicants:

(a) would not have sought an urgent hearing;

(b) would have had regard to the judgment in *GF v Minister for COVID-19 Response* about a similar issue;[2] and

(c) would have awaited a further judgment about a similar issue, in *Four Aviation Security Service Employees v Minister for COVID-19 Response*, that was pending at the time of the hearing of these proceedings.[3]

[4] Mr Griggs, for the Four Midwives, opposes the Crown's claim and seeks indemnity costs for doing so, because the Crown has acted inexplicably and unreasonably. Mr Pyke, for NZDSOS and NZTSOS, also submits the claim for costs against them should be declined. He submits the point argued was not put in issue in *GF*, as the Crown appears to concede. It was not argued in *Four Aviation Security Employees* in the depth it was here, and that judgment was delivered after the hearing.

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2 *GF v Minister for COVID-19 Response* [2021] NZHC 2526.

3 *Four Aviation Security Service Employees v Minister for COVID-19 Response* [2021] NZHC 3012.

Should costs be awarded?

[5] The fundamental principle is that the party who fails in a proceeding pays costs to the party who succeeds.[4] But the Court may refuse to award costs if the proceeding concerns a matter of public interest and the party opposing costs acted reasonably in the conduct of the proceeding.[5] As the Supreme Court said in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*:[6]

> We should emphasise that our decision on the SOS appeal does not mean that whenever a group claiming to be acting in the public interest brings an appeal to this Court, it will be insulated from paying costs if unsuccessful. Rather, the outcome will be determined by the particular circumstances of this case. Here, it is the fact that SOS did have some success in the appeals that persuades us that costs should lie where they fall, **although it is also relevant that the appeals concerned matters of public interest, that SOS was not pursuing a commercial benefit and that it acted reasonably in its conduct of the appeal.**

[6] I do not accept the Crown's submission that the applicants acted unreasonably. As the Crown concedes, these proceedings concern matters of genuine public interest and importance. As the Crown also concedes, the *GF* judgment did not deal with the particular issue raised here. Judgment in the *Four Aviation Security Service Employees* case had not been issued when the applicants sought urgency. Given the interests at stake, and the mandatory vaccination deadline, the applicants were entitled to seek urgency. Mallon J considered whether the Four Midwives' case should be heard urgently or not. She indicated her preliminary view on 28 October 2021 that it should be heard urgently.[7] On 29 October 2021, Mallon J rejected the Crown's submissions to the contrary, saying she was "satisfied that the importance of the issue and the imminent consequences for the applicants warrant this proceeding being allocated an urgent hearing".[8] It is difficult to see how the Four Midwives could have been acting unreasonably in making a submission that was accepted by the Court and has not been the subject of appeal.

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4 High Court Rules 2016, r 14.2(1)(a); *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8].

5 *Ratepayers and Residents Action Assoc Inc v Auckland City Council* [1986] 1 NZLR 746 (CA); affirmed in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA555 at [13].

6 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 167, (2014) 25 PRNZ 637 at [45] (emphasis added)

7 *F v Minister for COVID-19 Response* HC Wellington CIV-2021-485-584, 28 October 2021 at [6].

8 *F v Minister for COVID-19 Response* HC Wellington CIV-2021-485-584, 29 October 2021 at [2].

[7] Furthermore, the Crown's argument does not even apply to NZDSOS and NZTSOS. It was the Crown itself which suggested their first cause of action be heard together with the Four Midwives proceeding, in a memorandum of 2 November 2021. NZDSOS and NZTSOS responsibly agreed, in the interests of efficiency. It is difficult to conceive how the Crown can argue NZDSOS and NZTSOS acted unreasonably in going along with the Crown's own suggestion.

[8] I consider that the Four Midwives and NZDSOS and NZTSOS have behaved responsibly in the way they pursued these proceedings. They sought to uphold their human rights. Their substantive arguments were comprehensive and well put. The existing case law was not entirely clear. With the benefit of the further argument here, I reject the Crown's surprising submissions that the applicants acted unreasonably. That is consistent with my previous finding to that effect, with which the Crown has not engaged, in paragraph [85] of the substantive judgment. By a narrow margin, because I left the opportunity open for the Crown to pursue costs, I decline to award indemnity costs against the Crown for doing so.

[9] It has been a long year. I hope everyone enjoys the benefits of a good break over the upcoming festive season.

Result

[10] I decline to award costs against the applicants or against the Crown for seeking them.

Palmer J