FEDERAL COURT OF AUSTRALIA

Gaynor v Chief of the Defence Force (No 4) [2015] FCA 1461

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| Citation: | Gaynor v Chief of the Defence Force (No 4) [2015] FCA 1461 |
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| Parties: | **BERNARD GAYNOR v CHIEF OF THE DEFENCE FORCE** |
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| File number(s): | NSD 692 of 2014 |
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| Judge(s): | **BUCHANAN J** |
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| Date of judgment: | 18 December 2015 |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) |
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| Cases cited: | *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107  *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370  *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 |
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| Date of hearing: | Heard on the papers |
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| Date of last submissions: | 15 December 2015 (Respondent)  18 December 2015 (Applicant) |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | No Catchwords |
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| Number of paragraphs: | 14 |
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| Solicitor for the Applicant: | Mr R Balzola of Robert Balzola & Associates |
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| Counsel for the Respondent: | Mr J Kirk SC with Mr D Robertson |
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| Solicitor for the Respondent: | Clayton Utz |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 692 of 2014 |

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| BETWEEN: | BERNARD GAYNOR  Applicant |
| AND: | CHIEF OF THE DEFENCE FORCE  Respondent |

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| JUDGE: | BUCHANAN J |
| DATE OF ORDER: | 18 DECEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. Order 4 made on 4 December 2015 is vacated.
2. Except as hereafter provided, the respondent is to pay 50% of the applicant’s costs of the proceedings, to be taxed if not agreed.
3. The applicant is to pay the respondent’s costs of the interlocutory application filed on 15 December 2015, to be taxed if not agreed.
4. The respondent is to pay the applicant’s costs of the directions hearing on 18 December 2015, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
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| BETWEEN: | BERNARD GAYNOR  Applicant |
| AND: | CHIEF OF THE DEFENCE FORCE  Respondent |

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| JUDGE: | BUCHANAN J |
| DATE: | 18 DECEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. On 4 December 2015, I upheld the applicant’s claim that a decision on 10 December 2013 to terminate his service and commission with the Australian Defence Force should be set aside (*Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370).
2. In that judgment I granted relief to the applicant based on one of two constitutional arguments put on his behalf. I rejected a wide range of propositions upon which he relied which sought to invoke virtually every ground of relief available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
3. I ordered, as a default position, that the respondent pay the applicant’s costs unless some special order for costs was sought, as the respondent had foreshadowed it might be.
4. The respondent has now sought an order that its obligation to pay costs be reduced to 50%. The grounds were stated in written submissions as follows:

3. The Respondent’s application is based on the following four matters:

(a) The Applicant failed in all but one of his grounds of challenge.

(b) The Applicant’s case was not properly pleaded (Reasons [176], [181]).

(c) The Applicant abandoned some of his pleaded grounds of challenge prior to the hearing (Reasons [179], [180]).

(d) The Applicant alleged bad faith on the part of the Respondent without having any basis for doing so (Reasons [189]).

1. Costs are in the discretion of the Court. That discretion extends to an order which refuses costs in whole or in part where the conduct or outcome of proceedings justifies such a course (see *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [11], [15]; *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107at [3]-[5]).
2. The respondent’s written submissions stated:

10. On this application, the Respondent does not seek an order to recover any of his costs from the Applicant, though it would have been reasonable to do so. Nor does the Respondent seek an order that there be an issue-by-issue apportionment of costs – to take that approach would be inefficient and costly in terms of undertaking a costs assessment. Nor does the Respondent seek that there be no order as to costs – although, again, it would have been reasonable to do so.

11. Rather, the Respondent simply seeks an order limiting the Applicant to recovering 50 per cent of his costs of the proceedings, as taxed if not agreed. This global calculation takes account of the fact that the Applicant failed on most of his grounds of challenge, and also takes account of the several delinquencies by the Applicant in the conduct of the proceedings.

1. Then, a series of particular reasons were advanced in support of the application to reduce costs to 50%. Those submissions related to particular aspects of the conduct of the applicant’s case. It is sufficient to record that I accept, as well founded, each of those submissions.
2. The applicant’s response may be reduced to three propositions. First, the Court retains a discretion to award the applicant full costs, notwithstanding the criticisms of the respondent. Secondly, the applicant did the best he could procedurally in the context of a complicated and groundbreaking case. Thirdly, the Court should recognise the significant benefit which the applicant achieved, not only for himself but for all Defence personnel in what should be regarded as a significant public interest matter.
3. I do not regard any of those matters to be persuasive in the present case.
4. The first ground of opposition is not in issue, but it does not bear upon the question for decision. I place no weight upon any suggestion that the applicant achieved some public interest outcome for others. He was intent on vindicating his asserted private rights.
5. I do not accept the attempted defence of the procedural shortcomings which I referred to in the judgment. Most of the applicant’s case miscarried. In my view, the appropriate and just outcome is, as the respondent submitted, to award the applicant 50% of his costs.
6. I uphold the respondent’s application to limit its obligation for costs to 50%. The applicant must pay the costs of that application.
7. One further minor procedural matter must be mentioned. In the orders made on 4 December 2015 the question of costs was listed for directions today in the event that an application was made departing from the usual order. The fact that both parties very helpfully, and unprompted, filed written submissions about the issue of costs made such a directions hearing unnecessary.
8. The hearing was, however, retained to possibly deal with an interlocutory application for a stay of the order setting aside the decision to terminate the applicant’s service and commission. In the meantime, an appeal against that order had been filed. In my view, the disposition of the interlocutory application is not a matter for me in those circumstances and, in any event, the respondent accepted that late service of voluminous documents in support of the application rendered it inappropriate to deal with the matter in any substantive way this morning. As a consequence, the hearing this morning was unnecessary. The applicant sought his costs. In my view, the applicant is entitled to those costs.

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| I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan. |

Associate:

Dated: 18 December 2015