IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA798/2023
[2024] NZCA 515

BETWEEN	RICHARD LINCOLN Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	5 September 2024
Court:	Collins, Whata and Grice JJ
Counsel:	Appellant in Person Z R Hamill for Respondent
Judgment:	11 October 2024 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Whata J)

[1] This is an appeal by Mr Lincoln against the High Court's declinature of his application for judicial review of two decisions made by the New Zealand Police | Nga Pirihimana o Aotearoa to issue formal warnings to Mr Cavell, the second respondent in the High Court, instead of prosecuting him.[1]

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[1] *Lincoln v Attorney-General* [2023] NZHC 3822 [judgment under appeal]. McQueen J later awarded costs to the Attorney-General: see *Lincoln v Attorney-General* [2024] NZHC 326.

[2] With the benefit of argument, the central issue on this appeal is whether formal warnings are an inherently unlawful alternative to prosecution. We are satisfied they are not. The appeal must be dismissed with costs. Our reasons follow.

Background

[3] On 15 June 2020, Mr Lincoln reported an incident to the police where Mr Cavell allegedly entered his property, refused to leave, and assaulted him. In a letter dated 16 August 2020, Constable Wayne Stapley informed Mr Cavell that a formal warning had been issued against him in regard to this incident. The formal warning stated:

> On 15/06/2020 at … Christchurch, it is alleged that you assaulted a person.
>
> There is enough evidence to charge you with the following offence(s)
>
> - *1653 – Common Assault (Manually)*
>
> On this occasion, a decision has been made to issue you with a Formal Warning letter. You will not be charged and you are not required to attend court. This Formal Warning letter will not result in a criminal conviction.
>
> However, this Formal Warning letter will be recorded and stored in Police information systems. If you offend again, it may be taken into account when deciding on any action(s) that will be taken.

[4] On 5 September 2022, Mr Lincoln reported Mr Cavell to the police for breaching a restraining order by sending a text message and posting on his business' Facebook page. The police issued a formal warning to Mr Cavell on 17 October 2022. The formal warning was expressed in the same terms as the first with the exception that the alleged offence was breach of a restraining order rather than common assault. We refer to both warnings as the Cavell warnings.

[5] Mr Lincoln was not happy about the decision to not prosecute Mr Cavell. He therefore commenced judicial review proceedings challenging their legality. The police then decided to withdraw the formal warnings in light of the High Court's decision in *S v Commissioner of Police*.[2] In that decision the High Court held that there is no statutory nor common law power for the police to issue a formal warning

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2 *S v Commissioner of Police* [2021] NZHC 743, [2021] 3 NZLR 392.

in the absence of an unequivocal admission of the offending by the offender.[3] On 21 July 2023, the police sent a letter to Mr Lincoln that acknowledged the judicial review proceedings and informed him the formal warnings had been withdrawn. Mr Lincoln pressed on with his review claim regardless. He has also since privately and successfully prosecuted Mr Cavell for two charges of contravening a restraining order.[4]

[6] For completeness, Mr Lincoln complains that while the letters contain formal warnings, they are better described as "devices" promulgated as alternatives to prosecution. However, we prefer to refer to them simply as the formal warnings for ease of reference.

High Court decision

[7] In the High Court, the following issues were identified by the Judge:[5]

(a) Whether Mr Lincoln's application for review was entirely moot because the Police had withdrawn the formal warnings as a result of the decision in *S v Commissioner of Police*?

(b) Did the formal warnings constitute an unlawful bargain not to prosecute Mr Cavell?

(c) Were the two formal warnings issued in breach of Mr Lincoln's right to natural justice?

[8] The claim that the application was now moot in light of *S v Commissioner of Police* was not accepted by the Judge, noting that Mr Lincoln's specific grounds were not addressed in that case.

[9] The claim that the formal warnings constitute an unlawful bargain was also rejected by the Judge. The Judge stated:

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3 At [106]–[107].
4 *Lincoln v Cavell* [2022] NZDC 6362.
5 Judgment under appeal, above n 1, at [12].

> [26] Rather, the Police, in exercising their prosecutorial discretion elected not to prosecute Mr Cavell, despite their belief that they had sufficient evidence to do so. In one sense, that decision did stifle the prosecution of Mr Cavell. However, that decision was not the product of a bargain acting so as to right the private wrong alleged by Mr Lincoln, to the detriment of the public interest and prosecution. That would have required Mr Cavell to provide some consideration to Mr Lincoln with the view to the Police making a decision not to prosecute him. That did not occur on the evidence presented before this Court. I am satisfied that the decision not to prosecute Mr Cavell was not the result of an unlawful bargain.

[10] However, the Judge did find that the formal warnings were detrimental to Mr Cavell because the effect of issuing the warnings against him were akin to a conviction. The Cavell warnings were contrary to the principle laid down *S v Commissioner of Police,* to the effect that such warnings infringe the right of the defendant to natural justice as affirmed by the New Zealand Bill of Rights Act 1990. The Judge therefore reasoned that the warnings were unlawful but not for the reasons advanced by Mr Lincoln.

[11] The Judge went on to assess whether there was some other reason for finding that the formal warnings to Mr Cavell were unlawful. In forming a view about this, the Judge had regard to the Solicitor-General's Prosecution Guidelines, noting the criteria in terms of the exercise of prosecutorial discretion.[6] We will come back to those below.

[12] The Judge reached the view that but for the illegality already identified, the decision not to prosecute Mr Cavell appears to have been a justifiable exercise in prosecutorial discretion; a matter in which the courts do not lightly interfere.[7]

[13] The Judge also addressed the residual issue raised by Mr Lincoln, namely that any issuing of a Police practice for giving warnings is unlawful because there is no express statutory or common law authority for such warnings, citing *Entick v Carrington*.[8] The Judge did not respond to this fully, instead simply noting that the Police protocol in relation to warnings is established with the benefit of

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6 At [29]–[31], citing Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013).
7 Judgment under appeal, above n 1, at [33].
8 *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807 (KB).

guidance provided by Davison J in *S v Commissioner of Police* and the requirement to not give formal warnings in the absence of an unequivocal admission by the offender.[9]

[14] Finally, the Judge addressed the claim that the formal warnings issued breached Mr Lincoln's right to natural justice. The Judge found there was no basis for such a right to be heard in the context of a prosecutorial discretion.[10]

Warnings

[15] Before turning to Mr Lincoln's appeal grounds, it is helpful to explain what formal warnings are, their purpose and the guidelines for issuing a formal warning. Following *S v Commissioner of Police*, the Crown Law Office released a supplement to the Solicitor-General's Prosecution Guidelines concerning the use of warnings in December 2021.[11] The supplement describes the scope of warnings, when they should be used, their purpose, the policies and processes for administering warnings and the content of a warning.

[16] Most relevantly, the Guidelines identify the purpose of a warning as follows:

> 4.7 Agencies may issue warnings for a range of different purposes, for example, to:
>
> 4.7.1 show that the agency takes the matter seriously;
>
> 4.7.2 impress on the person that, in the agency's view, the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but the agency has chosen not to prosecute;
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> 4.7.3 mitigate the risk of the behaviour recurring in the future;
>
> 4.7.4 give the person an opportunity to amend or address the behaviour to avoid the risk of prosecution in the future; and/or
>
> 4.7.5 send a signal to the person, but also to others in similar situations, including the general public.

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9 Judgment under appeal, above n 1, at [34]–[36].
10 At [39]–[41].
11 Crown Law Office *Solicitor-General's Guidelines for the Use of Warnings* (23 December 2021).

[17] The Guidelines describe warnings as an "alternative to prosecution" and say they can "adversely affect the people to whom they are issued."[12] Natural justice considerations are emphasised and it is expected that an agency's warning policy will, among other things:

> 5.3.4 describe the process for issuing warnings, which should include a process for engaging with the person under investigation in order to give effect to natural justice. Giving effect to natural justice will vary depending on the behaviour and the consequences for the person concerned but may mean putting potential adverse findings to the investigated person for comment before a final decision to issue a warning is reached. It may also include:
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> 5.3.4.1 the person consenting to receiving the warning and having the matter resolved in that way.
>
> 5.3.4.2 the person admitting to the behaviour in respect of which they are being warned.

[18] In terms of content of warnings, the Guidelines state:[13]

> 6.1 A warning should include the context for issuing a warning including:
>
> 6.1.1 *accurately* setting out the key facts that led to the issuing of the warning; and
>
> 6.1.2 the reasons for issuing the warning.
>
> 6.2 A written warning has greater potential than a verbal warning to have future and/or unforeseen consequences. Therefore, where an agency issues a written warning, it should, in addition to the matters in [6.1], set out:
>
> 6.2.1 the consequences related to the warning including:
>
> 6.2.1.1 where the warning will be held and for how long;
>
> 6.2.1.2 how the warning may be used (for instance with whom it may be shared and if it will be published); and
>
> 6.2.1.3 any likely consequences if, in the future, the person engages in similar behaviour.
>
> 6.2.2 the person's rights in relation to the warning including:
>
> 6.2.2.1 how they will be engaged with in the process of issuing the warning; and

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12 At [5.1].

13 Emphasis in original.

6.2.2.2 rights under the Privacy Act or the agency's privacy policy, for instance, the right to have the warning reviewed within a certain period.

6.2.3 any relevant response of the person to the proposed warning, for example, whether they admit the facts or conduct alleged or dispute it; or whether they consent to the matter being dealt with by a warning.

[19] Consequently, the police released instructions specifically on formal warnings in July 2022.[14] These are recorded in the Police Manual. A formal warning is described as an alternative to prosecution when certain requirements are met and is considered an appropriate tool for resolving offences that require police intervention where the public interest may not support prosecution.[15] The benefits of formal warnings are said to include; timely outcomes for people through resolving offences at the time they occur, reduction in court appearances and court workload, faster processing time for offenders and swifter redeployment of police staff.

[20] The Police instructions specify the following requirements for making formal warnings:[16]

(a) The offender must be 18 years or over.

(b) The evidential sufficiency threshold for the offence must be obtained, referring to the Solicitor-General's Prosecution Guidelines.

(c) The public interest must be in favour, referring to the Solicitor-General's Prosecution Guidelines.

(d) The offender must clearly admit to the offending or alleged behaviours.

(e) The offender must provide informed consent to take part in the warning process.

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14 *Police Instructions: Formal Warnings* (New Zealand Police, 13 July 2022).
15 At 4.
16 At 6.

[21] As well as the eligibility criteria described above the Officer in Charge and supervisor must also take into account the following factors when assessing the suitability of an offender for a formal warning:

(a) the nature or seriousness of the offence;

(b) offender considerations (for example mental health issues, financially struggling, homelessness);

(c) victim considerations, including vulnerability;

(d) reparation considerations;

(e) criminal history and/or previous warnings; and

(f) whether there are multiple offences stemming from one incident.

Grounds of appeal

[22] Before us Mr Lincoln's primary claims were as follows:

(a) The Judge was wrong to impose on him an evidential burden to prove some illegality beyond what was established in *S v Commissioner of Police*.

(b) Contrary to the findings of the Judge, the warnings were also inherently unlawful because:

(i) They were promulgated as alternatives to prosecution without any statutory or common law authority to do so.

(ii) They involve a coercive disciplinary process with immediate punitive consequences regardless of any purported consent or admission of guilt.

[23] Mr Lincoln also claimed that the Commissioner's policy and framework as a whole was unlawful. However, we agree with Ms Hamill, for the respondent, that as this claim was not pleaded or argued in the High Court there is no proper basis to resolve that issue in this Court.

Evidential burden

[24] We can deal with the evidential burden point succinctly. We agree with Ms Hamill that the High Court did not impose an evidential burden on Mr Lincoln to prove additional illegality. Rather the Judge was simply responding to the argument that the case was now moot given the withdrawal of the formal warnings and observing that it was still available to Mr Lincoln to show that they were flawed for other reasons.[17]

Legality of warnings

[25] Mr Lincoln submits that the concept of an alternative to prosecution is a deeply alarming and constitutionally dangerous legal fiction. It presupposes that there is more than one due process to conduct a criminal proceeding, and he submits (in summary) the Solicitor-General's Guidelines (and the law) posits a binary position, either the public interest justifies prosecution or it does not. There is no hybrid prosecution or coercive alternative to prosecution.

[26] Mr Lincoln refers to *S v Commissioner of Police*, noting that Davison J confirmed the orthodox view that a prosecutor is bound by the New Zealand Bill of Rights Act and the warning process in S's case had unlawful punitive consequences.[18] What followed he says was that the Commissioner issued a policy purporting to remedy this illegality, but in effect promulgated exactly the same device criticised in *S v Commissioner of Police*.

[27] Mr Lincoln further submits that the Commissioner continues to promulgate "ad-hoc devices with punitive consequences deriving his power … magically from thin air". Critically he says, formal warnings subject the warned person to punishment

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17 Judgment under appeal, above n 1, at [14].
18 *S v Commissioner of Police*, above n 2, at [78] and [101].

without any chance of avoiding that punishment. Conversely, the warning is also flawed and unlawful insofar as it purports to establish a mechanism that absolves an offender of a criminal offence. It also lacks transparency and infringes principles of open justice. Furthermore, to the extent that the warnings are voluntarily accepted, that is an unlawful agreement, operating to stifle prosecution.

[28] Mr Lincoln also refers to the "vetting service" implicit in the warning process that has no statutory or common law basis which nevertheless has an effect on the warned person when they are screened for employment purposes. The warning process also involves what Mr Lincoln describes as "causal absolution". Mr Lincoln characterises formal warnings as "devices with indeterminate and determinate punitive consequences including causal absolution as a purported alternative to prosecuting a subject in court under the Criminal Procedure Act". He says that "[a]bsolution is a causal consequence of punishment. The inclusion of absolution consequences is a red flag that punishment consequences are also being imposed."

[29] Overall, Mr Lincoln submits that the warnings promulgate ultra vires absolution and illegal punitive consequences for warned persons.

Assessment

[30] We commence by defining the proper scope of the present appeal. The Cavell warnings were withdrawn by the police because they were inconsistent with the High Court's findings in *S v Commissioner of Police.* From that point, all affected rights and interests including Mr Lincoln's were restored to the position they would have been in but for the warnings. Accordingly, we are not concerned here with whether the Cavell warnings are valid or have any ongoing operative effect. In addition, the Cavell form of warnings is no longer used by police. Whatever punitive effect they may have is a matter of historical and theoretical interest only.

[31] The only potentially "live" issue before us then is whether formal warnings are inherently unlawful given, as Mr Lincoln contends, they are promulgated as punitive

alternatives to prosecution without any statutory or common law authority to do so.[19] While we accept that warnings that adversely affect the rights and interests of affected persons may be amenable to review on legality grounds, we do not agree that warnings are inherently unlawful alternatives to prosecution. We make four related points.

[32] First, the current Police policy in respect of warnings is illustrative of the lawful exercise of the warnings process. The Police Manual stipulates that there must be an admission and any participation in the warnings process must have that individual's informed consent. While such a warning might still be amenable to challenge, for example in cases of unlawful bargain[20] or abuse of process, given the requirement for admission and consent, formal warnings are not an inherently unlawful interference with the rights and interests of the warned person. For this reason also the issuance of a formal warning of this kind does not involve the exercise of a power to impose a punishment.

[33] Second, formal warnings do not absolve the warned person of criminal liability for their alleged offending. The warning does not have the effect of an acquittal or otherwise purport to afford immunity from prosecution to the warned person, as Mr Lincoln's successful private prosecution of Mr Cavell amply illustrates.

[34] Third, the prosecutorial discretion to commence (or not) a public prosecution has long been recognised by the law.[21] The exercise of that discretion, including the use of formal warnings, is guided by the Solicitor-General's Prosecution Guidelines. Those Guidelines are recognised by statute. As Elias CJ explained in *Osborne v Worksafe New Zealand*:[22]

> As public prosecutions, the informations were subject to the general responsibilities of the Solicitor-General and the Guidelines established by the Solicitor-General. Since the coming into effect of the Criminal Procedure Act 2011, the role of the Solicitor-General in the "general oversight of public

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19 Mr Lincoln did not elaborate before us as to why at law the police had no power to issue formal warnings, as he put, as an alternative to due process. But the High Court judgment records his argument that there is no statutory power or common law authority underpinning it, citing *Entick v Carrington* for the proposition that the state may do nothing but that which is expressly authorised by law: see *Entick v Carrington*, above n 8.

20 *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [70]–[80].

21 See *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL) at 59; and *Fox v Attorney General* [2002] 3 NZLR 62 (CA) at [30]–[31]

22 *Osborne v Worksafe New Zealand,* above n 20, at [27] (footnotes omitted).

> prosecutions", including through the maintenance of guidelines and general advice and guidance, has been recognised by statute. In the present case, the decision to offer no evidence explicitly invoked the Solicitor-General's Prosecution Guidelines. That reliance is consistent with the expectations expressed in the Guidelines that "[a]ll public prosecutions … whether conducted by Crown prosecutors, government agencies or instructed counsel, should be conducted in accordance with these Guidelines".

[35] In this regard, s 185 of the Criminal Procedure Act 2011 states:

> (1) The Solicitor-General is responsible for maintaining general oversight of the conduct of public prosecutions.
>
> (2) In discharging his or her responsibility under subsection (1), the Solicitor-General may—
>
> (a) maintain guidelines for the conduct of public prosecutions; and
>
> (b) provide general advice and guidance to agencies that conduct public prosecutions on the conduct of those prosecutions.
>
> (3) Nothing in this section requires the Solicitor-General to supervise the conduct of any particular public prosecution or makes the Solicitor-General responsible for the conduct of any public prosecution.

[36] Accordingly, provided the warning process is incidental to the exercise of that discretion and accords with those Guidelines, warnings are not inherently unlawful.[23] Put another way, to the extent that formal warnings of this kind are an alternative to prosecution, they enjoy the imprimatur of both the common law and statute.

[37] This does not mean that formal warnings are immune from challenge. The exercise of prosecutorial discretion must itself be lawful. Formal warnings that purport to interfere with the rights and interests of the warned person without their consent may well be amenable to challenge on legality grounds. Hence the significance of our first point in relation to police warnings and the fact that police warnings require an admission and the consent of the warned person.

[38] We note for completeness the submissions for the Attorney-General that the Guidelines are not a code and should not be treated as such. We accept they are guidelines rather than rules but we think it better to leave full consideration of this

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[23] As to the legality of incidental powers, see *Attorney-General ex relatione Lewis v Lower Hutt City* [1964] NZLR 438 (SC and CA) at 453–456; and Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 224–226.

issue to a case where the facts demand proper consideration of it. We simply make the reverse proposition, namely that exercises of prosecutorial discretion and corresponding formal warnings that clearly conform to the Solicitor-General's Prosecutorial Guidelines are not inherently unlawful.

[39] Finally, we do not consider that the High Court decision in *S v Commissioner of Police* supports Mr Lincoln's claims. In that case S complained that the formal warning had a punitive effect insofar as the details of that warning were made available to a supervisory panel, with immediate consequences for S's employment. The Judge observed that the police had a common law power to give a warning where the offending had been unequivocally admitted.[24] However, the Judge concluded there was no statutory or common law power to issue such a warning if there was no admission. But for present purposes the Court most relevantly said:

> [106] In my view, the scope and extent of the common law power of the Police to issue formal warnings is ultimately informed by reference to the basis upon which warnings are given and the consequences of the warning.

[40] We agree. The legality of a formal warning will depend on the facts of the given case and in particular whether the warning can be said to be incidental to the exercise of prosecutorial discretion, the nature and form of the warning and the consequences of it. Contrary to Mr Lincoln's submission, they are not inherently unlawful.

Costs

[41] Mr Lincoln complains that he was not given a proper opportunity to submit on the costs issues in the High Court. He also claims that this is a matter of public interest as it deals with human rights considerations and on that basis costs should lie where they fall in this Court and the High Court.

[42] We are not persuaded that costs should lie where they fall. While public interest considerations are engaged by this appeal, it is clear to us that Mr Lincoln pursued this matter for personal reasons, exemplified by the fact that he commenced a private prosecution against Mr Cavell. Given we have dismissed his appeal, we see

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[24] *S v Commissioner of Police*, above n 2, at [103].

no reason to revisit the order of costs in the High Court and costs should follow the event in this Court.

Outcome

[43] The appeal is dismissed.

[44] The appellant must pay the respondent costs for a standard appeal on band A basis and usual disbursements.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent