

Reference No. HRRT 038/2010

IN THE MATTER OF A CLAIM UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN DAVID KEITH HEATHER  
FIRST PLAINTIFF

AND RHONDA JEAN HEATHER  
SECOND PLAINTIFF

AND IDEA SERVICES LTD/IHC NZ INC  
FIRST DEFENDANTS

AND DIRECTOR-GENERAL OF THE  
MINISTRY OF HEALTH  
SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson  
Dr S Hickey, Member  
Mr R Musuku, Member

REPRESENTATION:

Mr and Mrs Heather in person  
Mr A Darroch for First Defendants  
Ms M Coleman for Second Defendant

DATE OF DECISION: 23 May 2012

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DECISION OF TRIBUNAL ON COSTS

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## Introduction

[1] These proceedings were commenced by statement of claim dated 4 December 2010. Subsequently, following other discussions, Mr and Mrs Heather gave notice on 3 February 2012 that they were withdrawing their claim against all defendants. The first defendants now seek an award of costs of \$4,000. The second defendant does not apply for costs. The issue before the Tribunal is whether an award of costs should be made.

## Background

[2] Because these proceedings did not progress beyond the filing by the parties of the statement of claim and statements of reply (particulars of the statement of claim were requested and provided), the description of the circumstances of the case which follows is necessarily taken from the pleadings only.

[3] Mr and Mrs Heather have a son called [AB]. It is said that he has been unlawfully discriminated against in terms of s 21 of the Human Rights Act 1993 by virtue of his family status. [AB] is disabled. His disabilities are described in the statement of claim as follows:

Our son [AB] ... was born with congenital rubella syndrome. [AB] is deaf, blind and intellectually disabled. [AB] has no hearing, no speech, he cannot read or write and has very limited communication skill. [AB] has been in residential services with IHC NZ/Idea Services for 22 years. [AB] has lived at [a residential home] for eight years, being a foundation resident.

On 6 July 2010 [AB] was expelled from service because IHCNZ/Idea Services advised the Ministry of Health they could no longer communicate or interact with family/whanau or advocates.

[4] The first defendants plead in their statement of reply (inter alia) that:

- 5 IDEA Services Ltd decided it could not continue to deliver services to [AB] Heather because of the poor relationship with his family and advocates and the continued and repeated complaints. It gave notice to the Minister of Health and arranged for him to be transferred to another disability provider.
- 6 The decision to transfer [AB] Heather to another provider was discussed and agreed with the Ministry of Health. A transition plan to protect [AB]'s needs was agreed and put in place.
- ...
- 8 The plaintiffs have also complained to the Ministry of Health about the way IDEA Services Ltd has delivered services to [AB] Heather and the decision to transfer him to another provider. This complaint has not been resolved as yet.

[5] The statement of reply by the Ministry of Health, after referring to a meeting of IDEA Services and [AB] Heather's advocates states:

- 5 That meeting was held on 23 February 2010. At that meeting, the Ministry made it clear that it did not accept that IDEA Services could exit its contractual obligations unless and until there was an agreement in place for [AB] Heather to transition to an appropriate alternative provider of community residential support services.
- ...
- 7 The Ministry understands that [AB] Heather's advocates agreed to his transition from services provided by IDEA Services to those provided by MASH Trust.
- 8 At the request of the Heather family, the Ministry is currently undertaking a review of:

- 8.1 The processes followed by the Ministry, IDEA Services/IHC New Zealand Ltd and the NASC [Needs Assessment and Service Co-ordination organisation] leading up to and including the exit of [AB] Heather from IDEA Services;
  - 8.2 Whether IDEA Services/IHC New Zealand Ltd has complied with its obligations under its agreement with the Ministry for the delivery of disability supports.
- 9 That review includes the assistance of an independent reviewer and the participation of the Heather family/advocates, and is expected to be completed by late January 2011.

**[6]** The “Review” referred to in the second defendant’s reply was eventually concluded in favour of Mr and Mrs Heather. Although that report was released to the first defendants Mr and Mrs Heather say they had to resort to the Official Information Act 1982 before they, in turn, obtained a copy.

### **The apology**

**[7]** Subsequently, by letter dated 8 February 2012, the Director, National Services Purchasing, National Health Board, Ministry of Health, wrote to Mr and Mrs Heather accepting the key findings of the Review and tendering an apology. The terms of this letter are significant and bear repetition:

...

On behalf of the Ministry I confirm that we accept the findings and recommendations of the review, in particular that Idea Services did not comply with its contractual obligations in its decision to exit [AB] from its services, and that it did not act appropriately to protect and promote [AB]’s best interests or his family’s right to complain about the care he received. We agree that Idea did not communicate appropriately with you or with [AB]’s advocates in response to your requests for clarification of how funding was applied and provided misleading information.

We accept that the situation should not have been allowed to progress to the stage where [AB] was moved from his home. We acknowledge that the Ministry could have done more to ensure that [AB]’s interests were protected, and that different processes could have been followed to ensure your concerns were addressed. In addition, in hindsight, we could have acted differently and much earlier to support [AB] to remain in his home.

We acknowledge that our process of review was not sufficiently clear, and that this has added to the distress you feel.

We sincerely apologise for the disruption and hurt caused to [AB] and to you as a result of our failure.

We are committed to ensuring that a similar situation can not arise again. We will work with you to resolve the issues and with all providers to ensure that they also support the rights of clients and their families to question and resolve issues about care provided to their family member.

An important initial step is the implementation of a plan of action to address the concerns and I thank you for your contributions to date. I look forward to continuing to work with you to improve services for other consumers and their families.

**[8]** On any reading this letter is a comprehensive admission of failings by the Ministry of Health and by IDEA Services Ltd. It is a vindication of the untiring efforts by Mr and Mrs Heather to put right a grave injustice. It is little surprise that the Ministry has not sought costs on the withdrawal of these now-overtaken proceedings. What is surprising is that any party should be seeking costs. Be that as it may the application by the first defendants must be determined according to principle.

## **The costs application by the first defendants**

[9] The submission for the first defendants is that the prima facie rule in civil litigation is that a plaintiff who discontinues a proceeding must pay the costs of the defendant. Reference is made to the High Court Rules, r 15.23 and to the analogue in the District Court Rules, r 12.20.5. The Tribunal is asked to exercise its discretion in terms of these rules of civil procedure. Drawing on *McGechan on Procedure* (looseleaf ed, Brookers) at [HC15.23.01/DR12.20.5] along with *Oggi Advertising Ltd v McKenzie* (1998) 12 PRNZ 535 and *Kroma Colour Prints Ltd v Tridonicato NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 the following propositions were advanced:

[9.1] The prima facie position is that a discontinuing plaintiff is liable to pay the defendant's costs.

[9.2] That presumption may be displaced if there are just and equitable circumstances not to apply it.

[9.3] Any departure from the prima facie position may only be done in a particularised and principled way.

[9.4] As a general rule, in considering costs on discontinuance, the merits of the competing contentions in the proceeding will not be considered.

[9.5] It is appropriate to determine whether the plaintiff acted reasonably in commencing the proceeding and whether a particular defendant acting reasonably in defending it.

[10] The first defendants assert that they do not accept that [AB] Heather's rights were infringed by his "exit" from their service and transfer to a new provider. It is submitted that the Tribunal should not consider "isolated and untested evidence in relation to the merits of the complaint". As to the findings of the independent Review, it is submitted that neither of the defendants participated in that Review and neither of them accept the findings. Finally, the defendants point out that the Review did not consider and resolve the specific allegations made in the statement of claim. In particular, the Review did not purport to decide issues relating to the rights protected by the Human Rights Act. The submissions conclude by saying that this is not an exceptional case where the merits have been clearly demonstrated by Mr and Mrs Heather. "Normal principles" should apply in the exercise of the Tribunal's discretion on costs.

## **Discussion**

[11] Under s 92L of the Human Rights Act the Tribunal has a discretion to award costs. Section 92L states:

### 92L Costs

(1) In any proceedings under section 92B or section 92E or section 97, the Tribunal may make an award as to costs that it thinks fit, whether or not it grants any other remedy.

(2) Without limiting the matters that the Tribunal may consider in determining whether to make an award of costs under this section, the Tribunal may take into account whether, and to what extent, any party to the proceedings—

(a) has participated in good faith in the process of information gathering by the Commission:

(b) has facilitated or obstructed that information-gathering process:

(c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

**[12]** The basis on which the Tribunal has hitherto approached costs is found in *Herron v Speirs Group Ltd (Costs)* [2006] NZHRRT 29 (4 August 2006) and *Orlov v Ministry of Justice and Attorney-General* [2009] NZHRRT 28 (14 October 2009). Whether these decisions require review need not be determined in the present case.

**[13]** The jurisdiction of the Tribunal under Part 1A and Part 2 of the Human Rights Act cannot, without substantial qualification, be compared to the civil jurisdiction of the District Court or of the High Court. The subject matter is entirely different, as is the process of adjudication. The object and purpose of the Tribunal's jurisdiction can too easily be overlooked in the costs context:

**[13.1]** The purpose of the Human Rights Act, as stated in the Long Title, is (inter alia) "to provide better protection of human rights in New Zealand".

**[13.2]** The purpose provision in Part 3 of the Act (s 75) states that the procedures for dispute resolution under Part 3 must recognise the need for flexibility. Those procedures must also recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.

**[13.3]** The objects in s 75 of the Act are reinforced by s 105 which requires the Tribunal to act "according to the substantial merits of the case, without regard to technicalities". In addition, it is required that in exercising its powers and functions, the Tribunal must act:

**[13.3.1]** In accordance with the principles of natural justice; and

**[13.3.2]** In a manner that is fair and reasonable; and

**[13.3.3]** According to equity and good conscience.

**[14]** The discretion to award costs must promote, not negate, these objects. Above all, the discretion should not be exercised in a way which may discourage individuals (often self-represented) from bringing claims before the Tribunal, being claims under the Human Rights Act, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994. Otherwise human rights protection in New Zealand might be weakened. One of the overarching purposes of human rights is to protect the powerless and the vulnerable. They should not, by the prospect of monetary penalty, be discouraged from bringing proceedings to access that protection. See by analogy *Attorney-General v Udompun* [2005] 3 NZLR 205 (CA) at [186]. Cases which are trivial, frivolous or vexatious or not brought in good faith can be dismissed under s 115 of the Human Rights Act.

**[15]** Nor should the asserted "presumption" in favour of an adverse award of costs on discontinuance be allowed to inhibit achievement of the other purposes in s 75, particularly the promotion of the resolution of disputes by the parties themselves and the adoption of flexible procedures for dispute resolution. Parties should be encouraged to settle, not be financially disadvantaged by doing so.

[16] Here, the bringing of the present proceedings has resulted in not only an apology to Mr and Mrs Heather and their son but also an acknowledgement by the Ministry that both it and IDEA Services have failed in significant respects to discharge their legal obligations to [AB] Heather. This acknowledgement has wider implications. The Ministry has undertaken to improve services not only for [AB] Heather but also for the general community of disabled persons and their families. It is difficult to understand why the achievement of a public benefit of this kind should carry the consequence of having to pay costs.

[17] We are of the view that the application by the first defendants for costs proceeds on the mistaken assumption that the rules of civil procedure which apply in the District Court and High Court can be readily transplanted into the human rights jurisdiction of this Tribunal without regard to the specific statutory context in which the Tribunal works. The presumption that a discontinuance results in an award of costs is out of place in the human rights field. Rather than being visited with liability to pay costs, Mr and Mrs Heather are to be congratulated both for bringing these proceedings and for resolving them without the need for a substantive hearing. The Ministry has acknowledged specific failings by IDEA Services. The first defendants submit through counsel that they do not accept these findings. The truth of the matter cannot be explored in the context of this costs application. But Mr and Mrs Heather have demonstrated by a clear margin that in terms of s 105 of the Act, the substantial merits of the case fall on their side and that in equity and good conscience no costs should be awarded against them. Even were the civil litigation rule presumption to apply, the “just and equitable circumstances” exception would produce the same result. Mr and Mrs Heather have acted entirely reasonably in bringing these proceedings.

[18] Our conclusion is that the application for costs is misconceived and without merit. It is dismissed.

### **Decision**

[19] The decision of the Tribunal is that:

[19.1] The application by the first defendants for costs is dismissed.

[19.2] All parties are to bear their own costs.

[19.3] An order is made pursuant to s 107(3) of the Human Rights Act 1993 prohibiting publication of the name of Mr and Mrs Heather’s son, [AB].

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**Mr RPG Haines QC**  
Chairperson

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**Dr S Hickey**  
Member

.....  
**Mr R Musuku**  
Member