

Reference No. HRRT 036/2011

IN THE MATTER OF

A CLAIM UNDER THE HUMAN RIGHTS  
ACT 1993

BETWEEN

JENNIFER MAPA SIONEPULU

PLAINTIFF

AND

DOWNER NZ LTD

FIRST DEFENDANT

AND

COMMISSIONER OF POLICE

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr R Musuku, Member

Mr B Neeson, Member

REPRESENTATION:

Mr J Butler, husband of Plaintiff

Ms CF Parkhill and Ms A Miller for First Defendant

Mr C O'Brien and Ms CM Scott for Second Defendant

DATE OF HEARING: 2 July 2012

DATE OF REASONS FOR DECISION: 17 July 2012

DATE OF COSTS DECISION: 8 October 2012

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## DECISION ON COSTS

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### Introduction

[1] At the conclusion of the evidence of Ms Sionepulu on 2 July 2012 these proceedings were struck out on the grounds that there was a complete absence of evidence that Ms

Sionepulu had been the victim of discrimination of any kind, whether direct or indirect, by the first or second defendants. Both defendants immediately foreshadowed applications for costs.

[2] By application dated 31 July 2012 Downer seeks \$6,750, being less than one third of its actual costs of \$20,025 (this does not include preparing the costs submissions) and disbursements of \$83.50.

[3] By application dated 10 August 2012 the Commissioner of Police seeks \$3,750. Mr O'Brien and Ms Scott are in-house lawyers but this does not disentitle the Commissioner of Police from seeking costs. See *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23.

[4] The costs applications made by Downer and the Commissioner of Police are supported by detailed and helpful memoranda and bundles of authorities. In the interests of brevity we do not intend providing a detailed summary of these submissions. A broad outline only is required.

### **The costs application by Downer**

[5] The submissions for Downer are that there are no circumstances which would support a departure from the orthodox approach that costs should follow the event. It is submitted that it is both fair and reasonable that a costs award be granted in the circumstances of the case. Attention is drawn to the fact that the Tribunal's decision characterised Ms Sionepulu's proceedings as "entirely misconceived". In addition Downer had from the outset raised in correspondence between the parties the issue of lack of evidence. The deficiency in evidence had also been made clear by the ruling of the Human Rights Commission that there was "no evidence to suggest that what happened was connected to the grounds of discrimination you have put forward". Downer says that Ms Sionepulu and Mr Butler were "hostile and unresponsive" to the attempts by Downer to elicit evidence in support of the allegations of discrimination and to the further suggestion by Downer that the complaint be more appropriately articulated before the Disputes Tribunal rather than under the Human Rights Act 1993. Downer says that Mr Butler was "aggressive, rude and threatening" in his correspondence as evidenced by an email dated 15 July 2011 and throughout her dealings with Downer, Ms Sionepulu "attempted to extract money ... by threatening legal proceedings and media attention. The sum claimed by the plaintiff grew exponentially". It is submitted that Ms Sionepulu is responsible for choosing Mr Butler as her representative and as he is her husband, any award of costs would come from the same pool of money. Accordingly, a costs award would have the effect of censoring the type of behaviour complained of by Downer. It is submitted that an award of costs would act as a deterrent to wholly unmeritorious claimants and that on the facts no points of public interest required clarification, a factor which might in some cases result in an amelioration of a costs award.

### **The costs application by the Commissioner of Police**

[6] The submissions for the Commissioner address two matters foreshadowed by the Tribunal as having possible relevance to the costs application namely:

[6.1] Whether the possibility of an award of costs may deter claimants from coming forward; and

**[6.2]** The implications of a potential finding that Ms Sionepulu is not the person responsible for the manner in which the case has been conducted.

**[7]** On the question of deterring potential claimants from coming forward with complaints of discrimination, the submissions for the Commissioner fairly concede that had Ms Sionepulu's case had underlying merit (even though unsuccessful) this would be a relevant factor when assessing costs:

If the plaintiff's case had been fairly brought and successfully defended, there need not be an application for an award of costs as the nature of the proceedings may have been fair and reflective of the societal need to advance worthy claims in the Tribunal. Future litigants could have had confidence that a properly brought case will not result in an award of costs against them. However, this claim was misconceived and in the opinion of the second defendant, entirely unmeritorious.

**[8]** The submissions then refer to the potentially damaging nature of claims alleging sexual, ethnic and indirect discrimination. It is pointed out that:

The second defendant is the entity responsible for this country's law enforcement. Police actively seek a partnership with the public of New Zealand whereby citizens are confident in the manner in which law enforcement occurs. The Police aspire to be representative of society. Diversity and equal opportunity are encouraged. Claims such as those made by the plaintiff are capable of damaging the confidence the public may have in their Police service.

**[9]** The Commissioner, while recognising the public interest in having a forum such as the Tribunal which is accessible to every citizen, submits that it must also be in the public interest to prevent unmeritorious claims, even allowing for the latitude which may be afforded to lay litigants.

**[10]** As to the responsibility of Ms Sionepulu for the actions of her husband, the submission for the Commissioner is that one can only surmise at the level of influence and responsibility Mr Butler had in relation to the advancement of the claim by Ms Sionepulu. Even had Mr Butler dominated the advancement of the claim, the Commissioner says that it is "overly generous" to say that Ms Sionepulu is not responsible for most of the allegations the parties found objectionable. In the alternative it is submitted that:

It is possible, but unlikely that Ms Sionepulu may have left everything in the hands of Mr Butler and been unaware of the unpleasantness of the claim. It is also possible, but unlikely that Ms Sionepulu may have buried her head in the sand and not wanted to deal with the disagreeable aspects of her claim. Ms Sionepulu is an educated adult woman who is presumed to understand the consequences of her actions.

### **The response of Ms Sionepulu and of Mr Butler to the costs applications**

**[11]** The plaintiff, Ms Sionepulu, is employed as a course director. Her income is not known. Her husband, Mr Butler, is a tertiary student who either is or hopes to be accepted as a PhD student by an education provider in Wellington. From the very outset the complaints against Downer and the Commissioner of Police have been advanced vigorously by Mr Butler. The only visible involvement of Ms Sionepulu in the case has been the making of the complaint to the Police and her appearance before the Tribunal to give evidence. She did not seem to be entirely comprehending of the purpose of the hearing. Nevertheless she was frank in her responses to the questions put to her in cross-examination, as can be seen from the numerous concessions she readily made against her own interests (see Decision at [12]). She conceded that there was no evidence of any discrimination of any kind. It was a concession properly made. It is a concession which Mr Butler is never likely to make.

[12] Mr Butler can be both cooperative and aggressive. It is through him that an original claim for \$7,000 was transformed first into \$50,000 (see the email dated 15 July 2011) and then later into an improbable \$100,000 (see the statement of claim at p 6). He is not a man who wears disappointment easily. The following description of his behaviour at the conclusion of the hearing appears in the Downer submissions on costs:

Mr Butler was disrespectful, threatening and inappropriate in his behaviour at the end of the hearing. He called the first defendant's witnesses (who had not given evidence) "fucking liars" and was censored by the Registrar. He then rolled up his sleeves to display his tattoos and called out "Black Power" to the defendants and their witnesses as he left the courtroom.

[13] In his email to the Secretariat dated 15 August 2012 on the question of costs he asserted (inter alia):

My wife and I (plaintiffs) have decided *not* to proceed nor participate in the discriminatory Palangi justice system in Auckland but will instead present our appeal to the Maori and Pacific Island radio and press media, and selected Members of Parliament.

After wrongly asserting that a member of the Tribunal (Mr Musuku) "has a brother who works for the same law firm (Kensingtonswan lawyers) as the Downer NZ Ltd counsel Charlotte Parkhill" Mr Butler goes on to say:

The hearing was a whitewash right from the start. The consequence of this decision is that we will be dispossessed and made bankrupt. Why? because the collision on the Auckland Harbour Bridge exposed a cosy little relationship of misfeasance between the Mt Wellington defendants.

The end result is that the Tribunal has little information as to the financial circumstances of Ms Sionepulu.

[14] It is telling that in his email of 15 August 2012 Mr Butler refers to himself as being one of the "plaintiffs". As will be seen, we are of the view that this case has been brought by Mr Butler for his own purposes and that Ms Sionepulu has played but a minor part in the conduct of the case.

[15] The assertion by Mr Butler that no submissions will be made on the costs applications is very much in line with his initial comments to the Tribunal at the close of the hearing on 2 July 2012. In the course of setting the timetable for the filing of submissions by the parties the Tribunal asked Mr Butler how much time he would need to reply to the foreshadowed applications by Downer and the Commissioner of Police. His reply was to the effect that as Ms Sionepulu was in employment she would pay whatever costs were ordered. He made it clear that he did not intend participating in the costs hearing and the Tribunal was, in effect, to send his wife "the bill". Ms Sionepulu was not in the hearing room at the time this stance was taken in somewhat defiant terms. The Tribunal nevertheless made provision in the timetable for Ms Sionepulu to file submissions in opposition to the costs applications. It will be clear from the preceding paragraphs that no such submissions have been filed.

[16] The Tribunal has been left with the task of addressing the applications by Downer and by the Commissioner of Police without any assistance from Ms Sionepulu or Mr Butler.

## **Discussion**

[17] The jurisdiction of the Tribunal to award costs is set out in s 92L of the Human Rights Act:

## 92L Costs

(1) In any proceedings under section 92B or section 92E or section 97, the Tribunal may make any 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.

**[18]** We do not have enough information to make any assessment concerning s 92L(2)(a) and (b). We have, however, done the best we can to address (c).

**[19]** The discretion in s 92L(1) has been described by this Tribunal in *Horne v Bryant (No. 2)* (HRRT Decision 36/03, 18 December 2003) as being:

[15] ... as wide and flexible as the diversity of the different cases that come before the Tribunal demands.

...

[18] It follows that our power to award costs is as set out in section 92L(1), which confers the widest discretion to make such award as we consider appropriate to meet the justice of the case.

**[20]** In the past it has been said that costs in the Tribunal will usually be awarded to follow the event and quantum will usually be fixed so as to reflect a reasonable contribution (rather than full recovery) of the costs actually incurred by the successful party: *Herron v Speirs Group Limited (Costs)* [2006] NZHRRT 29 (4 August 2006) at [7] and [14]. Nevertheless it would be wrong to apply either the District Court schedule or the High Court scale: *Smith v Air New Zealand* (HRRT Decision 37/02, 4 April 2006) at [8].

**[21]** However, it has equally been recognised that Parliament has conferred the particular jurisdictions which the Tribunal exercises in part to protect access to justice for litigants who might otherwise be deterred by the costs and complexities of proceeding in the courts: *Herron* at [7]. Each case must be decided on its own facts: *Orlov v Ministry of Justice and Attorney-General* [2009] (NZHRRT 28, 14 October 2009). The decision in *Heather v Idea Services Ltd* [2012] NZHRRT 11 (23 May 2012) at [14] makes the point that the discretion to award costs should not be exercised in a way which may discourage individuals (often self-represented) from bringing claims before the Tribunal.

**[22]** We turn now to the circumstances of the present case. Both Downer and the Commissioner of Police have justifiably submitted that they have been put to some inconvenience and expense in defending a wholly unmeritorious claim which from the outset lacked substance. More specifically, because claims alleging sexual, ethnic and indirect discrimination are particularly damaging both defendants have properly gone to considerable lengths to investigate the allegations and to prepare comprehensive, evidence-based defences. Ordinarily there would be strong grounds for an award of costs.

**[23]** But the difficulty lies not in finding justification for an award of costs in favour of both defendants. The difficulty lies in sheeting home to Ms Sionepulu responsibility for the

irresponsible and at times aggressive presentation of the case by her partner, Mr Butler. It is with him that Downer and the Commissioner of Police have had to contend with from the outset. While it was Mrs Sionepulu who reported the accident to the Police on the day of the event, it has been Mr Butler who has attempted to elevate a straightforward traffic incident into an assertion that Downer and the Police discriminated against Ms Sionepulu by reason of her sex and ethnicity.

**[24]** At the hearing the Tribunal had opportunity to assess Ms Sionepulu and Mr Butler in person. Mr Butler initially appeared to be sincere in advancing a complaint of discrimination, albeit one without evidentiary foundation. But the show of petulance when he was offered opportunity to make submissions in reply to the foreshadowed costs applications together with the show of aggression (necessitating the intervention of the Registrar) in the closing stages of the hearing betrayed the image of a sincere but mistaken advocate for Ms Sionepulu. His subsequent misrepresentation of the fact that Mr Musuku's brother had at an earlier time taken advice from KensingtonSwan (not from Ms Parkhill) in relation to an unrelated matter is also indicative of a refusal to listen and to place on events a slanted construction.

**[25]** Our reading of the situation is that for reasons of his own, Mr Butler has taken advantage of the traffic incident to mount litigation which while nominally in the name of his wife, has been by him. We doubt very much that his wife is a knowing or willingly complicit party. There is a reference to a separate matter before the Disputes Tribunal at Manukau also involving Ms Sionepulu and her vehicle, but a matter about which Ms Sionepulu appeared to know little. She said it was being handled by her husband. Ms Sionepulu even appeared confused and uncertain as to the purpose of the hearing before the Tribunal. She seemed surprised that she would have to give evidence. When she did give evidence she spoke in a straightforward and direct manner, conceding time and again the absence of evidence of any discriminatory behaviour by the defendants. On her evidence coming to an end the Tribunal advised her that she was free to stay to hear the rest of her case or to leave. She elected to leave and did so immediately. The Tribunal was left with the clear impression that she was simply doing that which Mr Butler told her to do without any real comprehension of the nature of the proceedings and the wisdom of bringing them in the first place.

**[26]** In the circumstances we have difficulty sheeting home to Ms Sionepulu the responsibility for bringing and prosecuting these misconceived and baseless proceedings. We take into account also the fact that Ms Sionepulu is the sole breadwinner of the family. It is safe to assume that she also carries the burden of caring for her child. Many of the complaints made by the defendants attach to Mr Butler, not to Ms Sionepulu. Yet it is she who will be legally liable to pay any costs award. She and her young child will bear the burden of Mr Butler's ill-fated "talking up" of a traffic incident into a claim for damages of \$100,000.

**[27]** On these unique facts the Tribunal, taking into account s 105 of the Human Rights Act, has decided that it would not be fair or reasonable or in accordance with equity and good conscience for Ms Sionepulu to be made financially responsible for the manner in which her husband has irresponsibly brought and conducted her case.

**[28]** Our conclusion is that both applications for costs are to be dismissed.

## **Decision**

**[29]** The decision of the Tribunal is that:

**[29.1]** The applications by the first and second defendants for costs are dismissed.

**[29.2]** All parties are to bear their own costs.

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**Mr RPG Haines QC**  
**Chairperson**

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

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**Mr B Neeson**  
**Member**