

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFF AND OF THE DEFENDANT
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2013] NZHRRT 27

Reference No. HRRT 029/2012

UNDER

SECTION 51 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994

BETWEEN

ABC

PLAINTIFF

AND

XYZ

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr RK Musuku, Member

REPRESENTATION:

Mr CG Tuck for plaintiff

Mr GM Harrison for defendant

DATE OF HEARING: 24, 25 and 26 June 2013

DATE OF DECISION ON COSTS: 19 August 2013

DECISION OF TRIBUNAL ON COSTS APPLICATION BY DEFENDANT

Background

[1] These proceedings were heard over three days on 24, 25 and 26 June 2013. In a decision given on 12 July 2013 the plaintiff's claim was dismissed. Costs were reserved. Non-publication orders were also made.

[2] By application dated 16 July 2013 the defendant sought costs in the sum of \$34,526.50 (GST inclusive). There being no statutory scale of costs applicable to proceedings before the Tribunal, the amount claimed has been calculated in accordance with the High Court Rules, Schedules 2 and 3 on the basis that category 2B costs are appropriate.

[3] By memorandum dated 31 July 2013 Mr CG Tuck, Barrister of Tauranga advised that, acting pro bono, he was submitting for consideration an affidavit by the plaintiff (to which we turn shortly). He advised that she was a person of very limited means but she nevertheless acknowledged that she would have to make a financial contribution to the defendant's costs. A request was made that any award of costs be one which was realistically possible for her to pay.

[4] In an affidavit affirmed on 31 July 2013 the plaintiff deposed (inter alia) that:

[4.1] She realised that the bringing of her claim before the Tribunal was a mistake.

[4.2] She regretted the imposition, inconvenience and cost she has caused to the defendant.

[4.3] Prior to the hearing she had tried to find a lawyer who would represent her on legal aid but had been unsuccessful. It had been a mistake for her to represent herself.

[4.4] Within her means she was willing to contribute to the defendant's legal costs. However, at most she only had \$35 per week available as discretionary income.

[4.5] The costs claim by the defendant will have a serious impact on the daily lives of her and her children. It could effectively bankrupt her.

[4.6] Since publication of the Tribunal's decision she has required medication for anxiety.

[5] In his reply submissions dated 7 August 2013 Mr Harrison made the following points:

[5.1] The apology now made by the plaintiff is not surprising given the comprehensive adverse findings of credibility made by the Tribunal.

[5.2] The plaintiff has a significant university degree and is half way through completion of another. She should perhaps seek gainful employment. It is irrelevant that she has little discretionary income.

[5.3] The defendant was supportive of the plaintiff until she complained to the Health and Disability Commissioner. He has suffered ever since with sleepless nights and distress within his family and friends.

[5.4] The award of costs should reflect the extensive work required to defeat the claim and the effect it has had on the defendant.

[5.5] It is accepted that the amount fixed should be consistent with other costs awards made by the Tribunal.

DISCUSSION

Costs – general principles

[6] The Tribunal's jurisdiction to award costs is statutory. Section 54(2) of the Health and Disability Commissioner Act 1994 empowers the Tribunal to award costs "as it thinks fit":

54 Powers of Human Rights Review Tribunal

(1) ...

(2) In any proceedings under section 50 or section 51, the Tribunal may award such costs against the defendant as it thinks fit, whether or not it makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

(3) ...

[7] This provision is materially the same as s 92L of the Human Rights Act 1993 and s 85(2) of the Privacy Act 1993. The Tribunal's approach to costs across all three jurisdictions has not differed and for that reason we draw in this decision on case law pertaining to all three statutes.

[8] In *Herron v Spiers Group Ltd* (2008) 8 HRNZ 669 (Andrews J, J Binns and D Clapshaw) the High Court summarised at [14] the principles usually applied by the Tribunal when considering costs.

[14] In its judgment of 4 August 2006 the Tribunal referred to the principles usually applied by the Tribunal when considering costs, at paras 6-8. Those principles may be summarised as follows:

(a) The discretion to award costs is largely unfettered, but must be exercised judicially;

(b) 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;

(c) The Tribunal's approach to costs is not much different from that which applies in the Courts although, as there is no formal scale of costs for proceedings in the Tribunal (as there is in the Courts), caution needs to be exercised before applying an analysis of what might have been calculated under either the High Court or District Court scales of costs. Such an analysis can be no more than a guide.

(d) An award of costs that might otherwise have been made can be reduced if the result has been a part-success, only;

(e) Assessment of costs must take account of the relevant features of each case, but there must be some consistency in the way costs in the Tribunal are approached and assessed;

(f) Offers of settlement "without prejudice except as to costs" are a relevant consideration.

[15] At para 7e (Decision No 29/06) the Tribunal observed that: "it is not immaterial 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."

[9] At [19] the Court agreed with the observation made by Harrison J in *Haydock v Sheppard* HC Auckland CIV-2007-404-2929, 11 September 2008 that these principles are "consistent with the broad discretionary powers vested by the statute".

[10] In view of the concession by the plaintiff that the defendant is entitled to an award of costs, the only question for the Tribunal is that of quantum.

[11] As to this it has recently been held in *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 (Mallon J, Ms J Grant and Ms S Ineson) that:

[11.1] The principle of consistency does not require the Tribunal to make awards similar in quantum to previous cases without regard to the circumstances of the particular case. Nor does it require the Tribunal to make an award that equates to a similar rate per day of hearing. The cases the Tribunal hears vary widely in

their complexity and significance. Complexity and significance are not accurately measured by the number of hearing days before the Tribunal. See [257].

[11.2] It is appropriate for the Tribunal to look at what previous cases indicated was a reasonable contribution to actual costs. These cases indicate a figure of 30 percent of actual costs. See [259].

[11.3] Costs in a particular case will depend on its particular circumstances. See [265]. The complexity and significance of the case is to be taken into account. See [266].

[12] This decision also records at [245] that the pattern of previous awards made by the Tribunal on a “reasonable contribution” basis shows a starting point is often worked out to be at about \$3,750 per day of hearing time.

DISCUSSION

[13] A costs regime based on a “reasonable contribution” basis requires a broad brush approach. Importantly, the power to award costs to a successful party must not be allowed to deter a litigant with a deserving case being able to access justice through the Tribunal. A deserving case is not necessarily a winning case.

[14] In the present case the plaintiff has acknowledged that the bringing of the proceedings was a mistake and has apologised to the defendant. Welcome though the apology no doubt is to the defendant, it does not alter the fact that he has been put to the expense of preparing for and conducting a three day hearing. Applying the rule of thumb of \$3,750 per day of hearing time, an award of costs of \$11,250 would not be inappropriate. This is approximately thirty percent of the amount claimed (\$34,526.50).

[15] We see no basis for increasing this sum. While the plaintiff failed in her proceedings, this was largely due to the Tribunal’s credibility findings and not the manner in which she conducted her case. On the other hand, we do see reason to reduce the sum given the plaintiff’s poor financial circumstances.

[16] The most recent award made by the Tribunal in *Haupini v SRCC Holdings Ltd (Costs)* [2013] NZHRRT 23 (28 May 2013) was for \$15,000 following a three day hearing. That case was, however, of higher complexity than the present and in addition, the unsuccessful plaintiff in that case was not personally liable for the costs, the Director of Human Rights Proceedings having provided the plaintiff with representation. In the present case the plaintiff will bear the costs herself and there will be an impact on her children. We are conscious also that costs are awarded not to punish the unsuccessful party but to provide the opposing party with a reasonable contribution to his or her costs.

[17] Taking all these factors into account we are of the view that \$8,000 properly reflects the competing interests in this case.

Formal order as to costs

[18] Pursuant to s 54(2) of the Health and Disability Commissioner Act 1994 costs in the sum of \$8,000 are awarded to the defendant. This sum is intended to be all inclusive.

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Mr RPG Haines QC
Chairperson

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Ms GJ Goodwin
Member

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Mr RK Musuku
Member

