

Reference No. HRRT 030/2009 & 031/2009

UNDER THE HUMAN RIGHTS ACT 1993

AND UNDER THE PRIVACY ACT 1993

IN THE MATTER OF AN APPLICATION BY THE DEFENDANT FOR COSTS

BETWEEN TATSUHIKO KOYAMA

PLAINTIFF

AND NEW ZEALAND LAW SOCIETY

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr RK Musuku, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr Koyama in person

Mr P Collins for Defendant

DATE OF DECISION: 18 September 2013

FURTHER DECISION OF TRIBUNAL ON COSTS APPLICATION BY DEFENDANT

Introduction

[1] In a decision given on 28 May 2013 the Tribunal awarded the New Zealand Law Society (NZLS) costs in the sum of \$8,000.

[2] On 7 June 2013 Mr Koyama filed submissions opposing the NZLS costs application. Those submissions amount, in effect, to a request that the Tribunal recall its decision. Three grounds are advanced:

[2.1] The Tribunal decision of 28 May 2013 was given prior to the expiry of a 7 June 2013 deadline set by the Tribunal for the filing by Mr Koyama of his submissions in opposition to the NZLS application.

[2.2] The Tribunal should postpone addressing the costs application until after Mr Koyama's proceedings before the United Nations Human Rights Committee (UNHRC) have come to a conclusion.

[2.3] The three members of the Tribunal who made the decision published on 28 May 2013 were disqualified by reason of bias.

[3] For the NZLS it is submitted that the Tribunal is functus officio and cannot recall or vary the costs decision:

[3.1] The decision of the Tribunal was a final and determinative decision.

[3.2] The decision took into account the request that the Tribunal not address the question of costs until the petition to the UNHRC has been determined.

[3.3] Mr Koyama is not entitled to recall the costs decision as it has been perfected with the Tribunal's seal under s 117 of the Human Rights Act 1993 and published to the parties. Mr Koyama's remedies, if any, lie elsewhere.

[3.4] Where any order of the Court (and, by reasonable extrapolation, the Tribunal) has been perfected, there is no power to recall or vary the order. This includes an order for costs: *Thomson v Thomson* (1992) 6 PRNZ 591 (HC).

[3.5] As the Tribunal is functus officio it cannot recall or vary the costs decision.

[4] In this decision we find that:

[4.1] The points made by Mr Koyama in his submissions of 7 June 2013 have no substance.

[4.2] The Tribunal does not have power to recall a decision once it has been sealed and published to the parties.

[4.3] In any event even had the Tribunal possessed jurisdiction, the Tribunal would not in any event have recalled the decision.

Whether costs decision given prematurely

[5] The Tribunal's costs decision published on 28 May 2013 at paras [5] to [17] sets out the relevant chronology of events and will not be repeated here. For present purposes it is, however, necessary to refer more particularly to some of the correspondence passing between the Secretary to the Tribunal and Mr Koyama regarding the filing of his submissions. That correspondence shows that prior to the delivery of the 28 May 2013 decision Mr Koyama had made a clear representation that he had filed all of his submissions:

[5.1] On 13 February 2013 Mr Koyama filed 14 pages of submissions in opposition to the NZLS costs application.

[5.2] After the Court of Appeal on 17 April 2013 dismissed Mr Koyama's application for special leave to appeal, the Secretary of the Tribunal by email dated 21 May 2013 notified Mr Koyama that should he wish to take advantage of

a final opportunity to file submissions, those submissions were to be filed and served by 5pm on 7 June 2013.

[5.3] On 21 May 2013 Mr Koyama filed with the Tribunal a copy of his petition to the UNHRC and submitted that the costs decision should be delayed until his proceedings before the UNHRC had been completed.

[5.4] By email dated 21 May 2013 the Secretary replied that the Tribunal did not intend delaying its decision and that Mr Koyama was being offered a final opportunity to file submissions. If he wished to take advantage of that opportunity his submissions were to be filed by 7 June 2013:

Your email dated 21 May 2013 and the petition to the Human Rights Committee have been referred to the Chairperson.

I have been directed to advise that notwithstanding the petition, the Tribunal will now deal with the costs application by the NZLS. You are being offered a final opportunity to file submissions on that application. If you wish to take advantage of this opportunity, your submissions must be filed and served by 5pm on Friday 7 June 2013.

If no submissions are filed by that date, the costs application will be dealt with on the papers which you and the NZLS have filed to date.

Of course you are free not to file submissions. If you do elect not to file any further submissions, please let me know.

[5.5] On 21 May 2013 Mr Koyama replied by enquiring whether the Tribunal had received his submissions of 13 February 2013:

Did you receive the attached submissions of the plaintiff on the cost issue? If not, please let me know.

[5.6] On 22 May 2013 the Secretary replied in the affirmative and stated that if Mr Koyama had nothing further to add to those submissions, could he please let her know:

Yes, the Tribunal did receive those submissions. I acknowledged receipt of them on 13 February 2013 by return email. If you have nothing further to add to those submissions, please let me know.

[5.7] On 22 May 2013 Mr Koyama replied that he intended ignoring any decision of the Tribunal and reiterated his submission that the Tribunal wait until completion of the UNHRC process:

I inform you that I intend to ignore any order of the HRRT because of the illegality of the process in the case.

Again, I would like to reiterate what I stated: the state of New Zealand needs to comply with the international law, and it is appropriate and proper for the Tribunal to wait until the completion of the process at the United Nations Human Rights Committee.

I believe I have made it very clear on this matter.

[6] In view of these email exchanges, and in particular Mr Koyama's unambiguous email dated 22 May 2013, the Tribunal concluded that Mr Koyama had filed all of his submissions. Consequently the costs decision was published on 28 May 2013.

[7] The claim now made by Mr Koyama is that the Tribunal delivered its decision prematurely and without hearing him. This claim is unsustainable:

[7.1] Mr Koyama was offered every opportunity to present his case and took full advantage of that opportunity by filing his submissions dated 13 February 2013 and by filing on 21 May 2013 a copy of his petition to the UNHRC. On 21 May 2013 he sought confirmation that the 13 February 2013 submissions had been received and on the following day repeated his submission that determination of the costs application be deferred and in any event, that he intended to ignore any order of the HRRT because of an alleged illegality of process.

[7.2] The Tribunal received and took into account all of the submissions and communications received from Mr Koyama.

[8] Mr Koyama's first ground is accordingly without substance.

The Tribunal should have postponed its decision on the costs application

[9] The submission that the costs decision should have been postponed until the UNHRC process had been completed is unrealistic and is addressed in the 28 May 2013 decision at [18]:

[18] We are of the view that it would be wrong to accede to this latest deferral request. It is now almost three years since the Tribunal decision was given on 19 July 2010 and experience shows that proceedings before the UN Human Rights Committee can be protracted. The delay involved will be measured not in months, but in years. The interests of justice require the costs application to be dealt with without further delay, particularly given that Mr Koyama has exhausted his appeal possibilities within the New Zealand domestic legal system.

[10] Nothing new has been advanced by Mr Koyama in support of this aspect of his case. The second ground is without merit.

The bias point

[11] The bias allegation is directed at all three members of the Tribunal who participated in the costs decision given on 28 May 2013.

[12] As to Mr RK Musuku and Mr BK Neeson, both members participated in the earlier decision given in these proceedings, namely *Koyama v New Zealand Law Society* [2010] NZHRRT 13 (19 July 2010). No objection was taken then or at any subsequent time to their participation in that decision and the bias point may well have been waived. See *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA).

[13] The more important point is that the allegations now made by Mr Koyama against all three members of the Tribunal do not satisfy the bias test in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at para [3] to [5]. As more recently stated in *Siemer v Heron (Recusal)* [2011] NZSC 116, [2012] 1 NZLR 293 at [11]:

[11] It is well-established that apparent bias arises only if a fair-minded and informed lay observer might reasonably apprehend that there is a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. The observer will not adopt the perspective of a party seeking recusal unless objectively it is a justified one. It is necessary for those making decisions on whether there is apparent bias in a particular situation first to identify what is said that might lead a judge to decide the case other than on its merits and, secondly, to evaluate the connection between that matter and the feared deviation.

[14] Having regard to the allegations now made by Mr Koyama it is our view that a fair-minded and informed lay observer would not reasonably apprehend that there was a

real and not a remote possibility that any member of the Tribunal might not bring an impartial mind to the determination of the costs application. In particular, Mr Koyama has not identified what it is that might lead members of the Tribunal to decide his case on grounds other than its merits. Rather, he appears to have cited selectively from the decision of the Tribunal in *Deliu v New Zealand Law Society (Recusal Application)* [2011] NZHRRT 22 without addressing the relevant bias case law which is collected and addressed in that decision.

Whether Tribunal has jurisdiction to recall a decision

[15] The Tribunal does not have power to recall a decision once the decision has been sealed and published to the parties. See *Reid v New Zealand Fire Service Commission (Recall Application)* [2012] NZHRRT 27 (29 November 2012) at paras [28] to [51]. For this there are two overarching reasons:

[15.1] The Tribunal does not have express power to recall a decision. Nor does it have inherent power to do so.

[15.2] The remedies of appeal and judicial review protect against error by the Tribunal.

Alternative ground for decision

[16] Even if, contrary to *Reid v New Zealand Fire Service Commission (Recall Application)*, the Tribunal does have jurisdiction to recall a decision, we would not in any event find in favour of Mr Koyama. This is not a proper case in which the Tribunal should intervene:

[16.1] Mr Koyama has had full opportunity to present his submissions. He took advantage of that opportunity prior to publication of the costs decision.

[16.2] As can be seen from the terms of the correspondence passing between Mr Koyama and the Secretary, on 22 May 2013 Mr Koyama unambiguously represented that he had filed all of his intended submissions and made it clear that he intended ignoring any order of the Tribunal because of alleged “illegality of the process in the case”.

[16.3] The claim by Mr Koyama that he had a right to file submissions up to and including 7 June 2013 irrespective of his prior communications to the Tribunal is an unsustainable interpretation of the facts.

[16.4] In his submissions of 7 June 2013 Mr Koyama has advanced nothing new apart from the bias point. That point is unsustainable.

CONCLUSION

[17] For the reasons stated we have determined that the costs decision given on 28 May 2013 is to stand unaltered.

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Mr RPG Haines QC
Chairperson

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Mr RK Musuku
Member

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Mr BK Neeson
Member

