

Reference No. HRRT 032/2011

UNDER THE PRIVACY ACT 1993

IN THE MATTER OF AN APPLICATION BY THE DEFENDANT FOR COSTS

BETWEEN RAZDAN RAFIQ

PLAINTIFF

AND COMMISSIONER OF POLICE

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Dr SJ Hickey, Member
Dr AD Trlin, Member

REPRESENTATION:

Mr Rafiq in person (no appearance)
Mr E Child and Mr T Hallett-Hook for Defendant

DATE OF DECISION: 18 September 2013

DECISION OF TRIBUNAL ON COSTS APPLICATION BY DEFENDANT

Background

[1] These proceedings were heard at Wellington on 11 and 12 April 2012. In a decision given on 23 May 2012 Mr Rafiq's claim was dismissed. The Tribunal determined that all of the information which the New Zealand Police had refused to disclose in response to Mr Rafiq's Principle 6 request had been properly and justifiably refused under the Privacy Act 1993, ss 27(1)(c) and 29(1)(a).

The Commissioner's application for costs

[2] The Commissioner was represented by Crown Counsel. The actual legal fees and disbursements invoiced to the Commissioner by Crown Law were:

[2.1] Legal fees: \$25,268.63 (GST incl.).

[2.2] Disbursements: \$502.23 (GST incl.).

[3] Indemnity costs are not sought. Rather the Commissioner seeks costs of \$13,130 (GST inclusive) as a contribution to his legal fees together with disbursements of \$502.23 (GST inclusive). Neither figure includes time billed for junior counsel's attendance at the hearing as it is accepted that as Mr Rafiq did not appear, two counsel are unlikely to have been necessary.

[4] In support of the application for increased costs the Commissioner submits:

[4.1] This was not a finely balanced case. The Tribunal found that the Commissioner's decision to withhold information from Mr Rafiq was justified "by a wide and substantial margin".

[4.2] Mr Rafiq conducted these proceedings without regard to his obligation to participate in them meaningfully and in good faith. That is, after filing the documentation necessary to commence his claim, Mr Rafiq refused to participate in telephone conferences and declined to file meaningful evidence or submissions. He subsequently declined to attend the hearing itself despite being warned both by the Commissioner and by the Tribunal that this could have costs implications for him. The effect of this conduct was that the Commissioner ended up bearing the burden of progressing this matter to a hearing. By way of contrast, Mr Rafiq, through non-participation, largely avoided the expense and inconvenience of pursuing his claim. It is submitted that it is reasonable for this imbalance to be redressed through increased costs.

[4.3] Mr Rafiq's unpredictable behaviour and failure to properly participate in the Tribunal's pre-hearing processes created significant uncertainty for the defendant. In particular the Commissioner was forced to (unnecessarily) prepare for all contingencies.

[4.4] The statement of claim inappropriately raised a range of issues outside of the scope of this proceeding. In addition to alleging a breach of Principle 6, allegations were also made of breaches of information privacy Principles 1, 3, 4, 5, 7, 8, 10 and 11.

[4.5] Allegations made by Mr Rafiq included accusations that the Commissioner had vindictively circulated information about Mr Rafiq to damage his reputation, had threatened his associates to obtain personal information about him and had fabricated information about him.

[4.6] Furthermore, Mr Rafiq accused the Commissioner of having "a history of racial discrimination and false allegations". The Commissioner's witness, Ms Baird, was accused of abusive behaviour, of being an "artist in generating false profiles/information" and of making false and unsubstantiated allegations. For the Commissioner it is submitted that (unsubstantiated) allegations of this nature are both improper and irresponsible. It is appropriate that the Tribunal award increased costs to reflect this. See *Moffat v Barrett* HC Auckland CIV-2010-404-7116, 29 November 2011, Bell AJ.

[4.7] On 6 March 2012 the Commissioner wrote to Mr Rafiq providing him with an opportunity to discontinue his proceedings without costs being sought against him. Mr Rafiq did not accept this offer when he knew or should have known that his proceedings were unlikely to succeed, he having declined to file any meaningful evidence and being then in receipt of the Commissioner's statement of reply and evidence. The Commissioner's settlement offer was made over a month before the matter was heard. Had it been accepted, the Commissioner would not have had to incur significant trial preparation costs including researching and drafting submissions, preparing further closed (confidential) evidence and preparing for and attending the hearing itself.

Mr Rafiq's reply

[5] In a characteristically incoherent and abusive reply, Mr Rafiq has conspicuously failed to address the submissions advanced by the Commissioner in support of the costs application. Instead Mr Rafiq abuses the Tribunal, alleging corruption, bribery, racism and general incompetence. He also alleges that:

The Tribunal is responsible for adducing false witness, forgery documents, fabricated evidence, corrupting the expelled Chairperson and engaging in money laundering.

DISCUSSION

[6] The general principles applicable to the award of costs in proceedings before the Tribunal were recently reviewed in *Haupini v SRCC Holdings Ltd* [2013] NZHRRT 23 (28 May 2013) at [13] to [18]. The circumstances in which indemnity costs will be appropriate are addressed at [20] to [24]. Generally indemnity costs are awarded where a party has behaved either badly or very unreasonably.

[7] In the present case indemnity costs could have been sought but because they have not we must determine what, in the circumstances, is a reasonable contribution to the Commissioner's costs.

[8] Each of the points made by the Commissioner in support of the costs application are ones we agree with. Mr Rafiq from the outset pursued tactics designed to ensure that his proceedings were as difficult and protracted as he could make them.

[9] For all the reasons given by the Commissioner in support of his application we agree that this is a clear case in which increased costs are justified, particularly given Mr Rafiq's rejection of a reasonable and responsible settlement offer.

Formal orders as to costs

[10] Pursuant to s 85(2) of the Privacy Act 1993 costs in the sum of \$13,130 plus disbursements of \$502.23 are awarded to the Commissioner of Police. The total sum is \$13,632.23. This sum includes GST.

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Mr RPG Haines QC
Chairperson

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Dr SJ Hickey
Member

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Dr AD Trlin
Member

