

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

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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2013] NZHRRT 39

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Reference No. HRRT 001/2012

UNDER THE PRIVACY ACT 1993

BETWEEN IAN RUSSELL GEARY

PLAINTIFF

AND ACCIDENT COMPENSATION CORPORATION

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Mr MJM Keefe JP, Member

Dr AD Trlin, Member

REPRESENTATION:

Mr AC Beck for Plaintiff

Mr I Hunt and Ms S Grieve for Defendant

DATE OF HEARING: 3, 4, 5 and 6 September 2012

DATE OF DECISION ON COSTS: 14 November 2013

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**DECISION OF TRIBUNAL ON COSTS APPLICATION BY PLAINTIFF**

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[1] These proceedings heard on 3, 4, 5 and 6 September 2012 concluded on 20 September 2013 with a decision comprehensively in favour of Mr Geary. Costs were reserved.

## **The application for costs**

[2] Mr Geary was in receipt of legal aid for these proceedings. The Tribunal is advised that his legal aid costs amount to \$18,000 with disbursements of \$612.95. By application dated 1 October 2013 he has sought an award of costs against the Accident Compensation Corporation (ACC) in these amounts. It is submitted that:

[2.1] Because of the way in which the legal aid scheme operates, Mr Geary's costs are much lower than they would have been at commercial rates.

[2.2] Mr Geary has faced a fight with a major government corporation with virtually unlimited funds to spend on the litigation. ACC has spent well in excess of \$50,000 defending the case.

[2.3] ACC made no meaningful concessions in the case. It took a strongly adversarial line and has argued every point, often at length. Its processes have been found by the Tribunal to be wanting in several respects.

[2.4] The case has involved considerably more than a four day hearing and there have been extensive additional submissions.

[2.5] The damages awarded by the Tribunal reflect the failures of ACC. It would be a somewhat pyrrhic victory for Mr Geary if he had to refund a substantial part of those damages to repay his debt to legal aid.

[2.6] To provide proper protection of privacy rights, the costs award in this case needs to ensure that Mr Geary is genuinely compensated. An award of \$15,000 (4 x \$3,750) would not achieve that goal.

## **The submissions for ACC**

[3] In submissions dated 1 November 2013 ACC concedes that the Tribunal having found that there was an interference with Mr Geary's privacy rights, a costs award in his favour is appropriate.

[4] ACC further accepts that while indemnity costs may in certain circumstances be awarded, those circumstances are not present on the facts. However, given that the costs sought by Mr Geary are reasonable, ACC has no objection to an award of costs at the level sought by Mr Geary, notwithstanding that an award of such costs would be equivalent to Mr Geary's actual costs.

[5] ACC nevertheless does not accept the submission that it had virtually unlimited funds to spend on the litigation. ACC says it had good grounds to defend the claims made by Mr Geary.

## **DISCUSSION**

[6] The Tribunal's jurisdiction to award costs is statutory. Section 85(2) of the Privacy Act 1993 empowers the Tribunal to award costs "as the Tribunal thinks fit":

- (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

[7] This broad discretion must be exercised judicially but is not fettered by any scale. See *Herron v Spiers Group Ltd* (2008) 8 HRNZ 669 (Andrews J, J Binns and D Clapshaw) at [14].

[8] As to the question of quantum 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:

[8.1] 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].

[8.2] 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].

[8.3] 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].

[9] 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.

[10] In view of the concession by ACC that Mr Geary is entitled to an award of costs in the amount sought, the only question for the Tribunal is that of quantum.

## DECISION

[11] Were costs to be calculated according to the “average” award of \$3,750 per day of hearing, the award would be \$15,000. But as submitted by Mr Geary this sum would not adequately reflect the following factors special to this case:

[11.1] Considerably more than a four day hearing was involved in that there have been additional post-hearing submissions. The case was factually and legally complex.

[11.2] The damages awarded by the Tribunal reflect the failures by ACC. It would be a hollow victory for Mr Geary were he to end up in a situation where he had to apply a substantial part of the damages to repay his legal expenses.

[11.3] To provide proper protection of privacy rights, the costs award in this case must ensure that Mr Geary has overall received an effective remedy.

[12] There is also the factor that awards to successful plaintiffs must not lag behind awards to successful defendants. In this regard we have taken into account the following relatively recent awards which are summarised in the Schedule found on the Tribunal’s website at <http://www.justice.govt.nz/tribunals/human-rights-review-tribunal/decisions-of-the-hrrt/costs-awarded-as-at-1-october-2013>:

Director of Human Rights Proceedings v Henderson [2011] NZHRRT 10	PA - successful defendant incurred actual costs of \$54,000 to defend claim – two day hearing, although extended hours on the second day – claim for reasonable contribution cost down to date of <i>Calderbank</i> offer then indemnity costs thereafter – indemnity costs declined, but reasonable contribution assessed to take into account factors such as failure to settle.	\$18,000 (24 March 2011)
Haupini v SRCC Holdings Ltd [2013] NZHRRT 23	HRA - plaintiff represented by Director of Human Rights Proceedings – three day hearing – claim by successful defendant for indemnity costs of \$40,495.00 – declined but reasonable contribution assessed – obiter comments on costs when plaintiff represented by Director	\$15,000 (28 May 2013)
Rafiq v Commissioner of Police (Costs) [2013] NZHRRT 31	PA – plaintiff self-represented – did not appear at the hearing – finding that plaintiff had pursued tactics to ensure proceedings as difficult and protracted as he could make them – rejection of reasonable and responsible settlement offer – successful defendant incurred fees of \$25,268.63 plus disbursements of \$502.23 but indemnity costs not sought – defendant sought \$13,130 and disbursements of \$502.23.	\$13,632.23 (18 September 2013)

[13] Compared with these cases an award of \$15,000 plus disbursements would be on the low side and fail to adequately reflect the factors properly stressed by Mr Geary.

[14] Given the amount of time and skill involved in preparing and conducting Mr Geary's case over four days, including the filing of post-hearing submissions, we are of the view that the "higher" amount sought by Mr Geary of \$18,000 plus disbursements can only be described as appropriate, if not modest. However, the Tribunal cannot award a sum higher than the actual cost to the legal aid scheme.

[15] Taking all these factors into account we are of the view that costs should be awarded in the amount sought by Mr Geary and consented to by ACC.

#### **Formal order as to costs**

[16] Pursuant to s 85(2) of the Privacy Act 1993 the sum of \$18,000 together with disbursements of \$612.95 is awarded to Mr Geary. This sum is intended to be all inclusive.

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

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**Mr MJM Keefe JP**  
**Member**

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**Dr AD Trlin**  
**Member**

