

Reference No. HRRT 011/2011

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN JALESI NAKARAWA

PLAINTIFF

AND AFFCO NEW ZEALAND LIMITED

DEFENDANT

AT HAMILTON

BEFORE:

Mr RPG Haines QC, Chairperson
Ms PJ Davies, Member
Mr MJM Keefe JP, Member

REPRESENTATION:

Mr MD Benefield for Plaintiff
Ms RA Webster for Defendant

DATE OF DECISION: 17 April 2014

DECISION OF TRIBUNAL ON COSTS APPLICATION BY PLAINTIFF

Background

[1] Following a teleconference held on 30 September 2011 these proceedings were heard at Hamilton on 19 December 2011. By *Minute* dated 31 October 2013 the parties were invited to update their submissions and to respond to cases and other material found by the Tribunal. By further *Minute* (dated 13 December 2013) the parties were invited to make submissions on remedies and a teleconference followed on 19 December 2013. Consequent on that teleconference the Chairperson on the same day issued a *Minute* giving directions as to the filing of further evidence and submissions by the parties.

[2] In the merits decision given by the Tribunal on 24 February 2014 the plaintiff was awarded a declaration and damages. The formal orders were as follows:

[108] For the foregoing reasons the decision of the Tribunal is that:

[108.1] A declaration is made under s 92I(3)(a) that AFFCO committed a breach of s 22(1) of the Human Rights Act 1993 by discriminating against Mr Nakarawa for reason of his religious beliefs.

[108.2] Damages of \$12,118.00 are awarded against AFFCO under ss 92I(3)(c) and 92M(1)(b) of the Human Rights Act 1993 for loss of benefit in the form of wages Mr Nakarawa might reasonably have been expected to obtain but for the breach.

[108.3] Damages of \$15,000.00 are awarded against AFFCO under ss 92I(3)(c) and 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of Mr Nakarawa.

[108.4] It is ordered pursuant to s 92I(3)(f) of the Human Rights Act 1993 that AFFCO, in conjunction with the Human Rights Commission, provide training to its management staff in relation to their and AFFCO's obligations under the Human Rights Act 1993 in order to ensure that they are aware of those obligations.

[3] Costs were reserved.

The application for costs

[4] By submissions filed with the Tribunal on 16 March 2014 Mr Nakarawa sought an award of costs of \$7,500 for all attendances comprising 46 hours. Mr Benefield submits that the effective "hearing" time in this matter was the equivalent of 2.5 days spread over several months.

The case for the defendant

[5] For AFFCO it is submitted that it would appear Mr Nakarawa has not actually incurred any costs; the \$7,500 draft bill of costs attached to the submissions was just that, a draft. On the basis that no costs have been actually incurred it is submitted that no costs can be awarded.

[6] In the alternative it is submitted that costs should be awarded on a reasonable contribution basis, the hearing time being one day, not 2.5 days as submitted by the plaintiff.

Mr Nakarawa's reply

[7] The submissions for Mr Nakarawa in reply draw attention to the fact that at all stages he has sought costs and reference is made to the specific documents which bear that out. Mr Benefield says in addition that he has practised in (inter alia) Fiji and other Pacific jurisdictions and although he retired from legal practice when he turned 75 (he is now 77) he provides legal assistance to Pacific Islanders who lack the financial reserves to retain a lawyer. Such representation is usually on the basis that a fee will be charged but only if the proceedings are successful. The purpose of the draft bill submitted with the costs application was to demonstrate that the amount sought by Mr Nakarawa was within the Tribunal's own guidelines.

Discussion

[8] For present purposes it is relevant to note that the jurisdiction to award costs is to be found in s 92L(1) of the Human Rights Act 1993:

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.

[9] The general principles applicable to the award of costs in proceedings before the Tribunal were most recently reviewed in *Haupini v SRCC Holdings Ltd* [2013] NZHRRT 23 (28 May 2013) at [13] to [18] and it is not intended to repeat what is said there. The average award is approximately \$3,750 per day.

[10] As to the submission that Mr Nakarawa has incurred no costs, three points are made. First, Mr Benefield has confirmed that he represented Mr Nakarawa on a fee paying basis though the quantum was not fixed and if Mr Nakarawa was ultimately unsuccessful, the fee would be waived. Second, it is also necessary to bear in mind that s 92L does not require a party to the proceedings to have received or paid a bill of costs. It is sufficient that the party has been represented and there is an expectation that a fee will be payable on success. Third, s 105 of the Act requires the Tribunal to act according to the substantial merits of the case, without regard to technicalities, in a manner that is fair and reasonable and according to equity and good conscience. With these obligations in mind the Tribunal should not, by withholding costs, discourage an impecunious but ultimately successful plaintiff from being represented by a public spirited lawyer who has agreed to waive his fee if the plaintiff does not succeed.

[11] The submissions for the defendant are more on point in noting that costs in the Tribunal are usually fixed on a reasonable contribution rather than on an indemnity basis and there is a need for some consistency in the way in which costs in the Tribunal are approached and assessed.

[12] Bearing in mind the broad discretionary power conferred by s 92L and the discussion of that power in *Herron v Spiers Group Ltd* (2008) 8 HRNZ 669 (Andrews J, J Binns and D Clapshaw) and in the more recent *Attorney-General v IDEA Services Ltd (In Statutory Management)* [2012] NZHC 3229 (Mallon J, Ms J Grant and Ms Ineson) we take particular account of the following:

[12.1] On the findings made by the Tribunal, the bringing of these proceedings by Mr Nakarawa were fully justified and he has comprehensively succeeded. An award of costs is appropriate.

[12.2] While the proceedings were not inherently of a complex kind and while an award of indemnity costs cannot be justified it must nevertheless be recognised that the bringing of proceedings before the Tribunal is not a straightforward task and few litigants can do so effectively without professional assistance. Where they are successful the award of costs should be meaningful and not discouraging of the bringing of proceedings to vindicate important rights. These considerations are inherent in the assessment of what is “reasonable” for the unsuccessful defendant to pay by way of contribution to the plaintiff’s costs.

[12.3] Although the hearing did last one day only there were additional attendances both before and after the hearing. Some allowance must be made for those attendances.

[13] Taking these factors into account we are of the view that an award of costs of \$4,500 is appropriate. This sum is intended to be all inclusive.

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Mr RPG Haines QC
Chairperson

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Ms PJ Davies
Member

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Mr MJM Keefe JP
Member