

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFF, OF THE THREE SEX WORKERS AND OF THE RECEPTIONIST WHO GAVE EVIDENCE**
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF CHAIRPERSON OR OF THE TRIBUNAL**

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2014] NZHRRT 18

Reference No. HRRT 018/2011

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN DML

PLAINTIFF

AND AARON MONTGOMERY

FIRST DEFENDANT

AND M & T ENTERPRISES LIMITED

SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Ms WV Gilchrist, Member
Ms M Sinclair, Member

REPRESENTATION:

Mr RW Kee, Director of Human Rights Proceedings
Mr DG Dewar for First and Second Defendants

DATE OF DECISION: 6 May 2014

DECISION OF TRIBUNAL ON COSTS APPLICATION BY PLAINTIFF

Background

[1] These proceedings were heard over three days on 5, 6 and 7 March 2012. The plaintiff was represented by the Director of Human Rights Proceedings under s 90(1) of the Human Rights Act 1993 (HRA).

[2] In a decision given on 12 February 2014 the plaintiff was awarded a declaration together with damages of \$25,000. In addition restraining and training orders were made against the defendants. The formal orders were as follows:

FORMAL ORDERS

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

[155.1] A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that the first and second defendants have committed a breach of Part 2 of the Act in that the plaintiff was subjected to language of a sexual nature which was unwelcome and offensive to the plaintiff and which was repeated and of such a significant nature that it had a detrimental effect on the plaintiff in the course of her employment.

[155.2] An order is made under s 92I(3)(b) of the Human Rights Act 1993 restraining the defendants from continuing or repeating the breach of s 62 of the Act, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach.

[155.3] An order is made under s 92I(3)(f) of the Human Rights Act 1993 that the first and second defendants, in conjunction with the Human Rights Commission, provide training to the first defendant and to the management staff of the second defendant in relation to their obligations under the Human Rights Act 1993 in order to ensure that the first defendant and the management staff of the second defendant are aware of those obligations, particularly the obligations under s 62 of the Act.

[155.4] Damages of \$25,000 are awarded against the first and second defendants 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 the plaintiff.

[3] Costs were reserved.

The application for costs

[4] By application dated 26 February 2014 the Director sought an award of costs on a reasonable contribution basis in the sum of \$11,250 calculated at the rate of \$3,750 per day. In his submissions the Director conceded that there were no particular circumstances such as complexity and significance which the Tribunal should take into account by way of increasing the "average" award of \$3,750 per day.

The case for the defendants

[5] In submissions dated 5 March 2014 Mr Dewar, after noting difficulties in contacting the defendants and the absence of express instructions, nevertheless submitted that as the plaintiff had paid no costs (representation being provided by the Director), the plaintiff had not actually incurred costs and therefore none could be awarded.

The Director's response

[6] In reply submissions dated 17 March 2014 the Director drew attention to s 92C of the HRA and in particular subs (4) and (5) which proceed on the basis that where representation is provided to a person by the Director, all costs of such representation and any award of costs made against that person must be paid by the Office of Human Rights Proceedings and any award of costs made in favour of that person must be paid to the Office of Human Rights Proceedings:

92 C Representation in civil proceedings arising from complaints

- (1) A party to proceedings before the Tribunal or related proceedings may appear and be heard—
 - (a) in person, or by a barrister or solicitor provided by the person; or
 - (b) by a barrister or solicitor provided by the Director if, and to the extent that, the Director has decided, under section 90(1)(a) or (c) or (2), to provide representation for the party in the proceedings.
- (2) The Tribunal may, on an application for the purpose by any person, give directions as to the representation, in proceedings before it, of a plaintiff of a kind referred to in section 92N(1) to (3) or of any other party to the proceedings who may be able to bring, take part in, or defend the proceedings, only through a representative.
- (3) The Office of Human Rights Proceedings must pay all costs of representation provided—
 - (a) by the Director for a complainant, aggrieved person, group of persons, or party to a settlement of a complaint; and
 - (b) in accordance with a decision of the Director under section 90(1)(a) or (c).
- (4) The Office of Human Rights Proceedings must pay any award of costs made against a person in proceedings for which representation is provided for that person by the Director.
- (5) Any award of costs made in favour of a person in proceedings for which representation is provided for that person by the Director must be paid to the Office of Human Rights Proceedings.
- (6) Nothing in this Act limits or affects the entitlement to legal aid (if any) of a party in respect of proceedings or intended proceedings (whether or not representation for the party in the proceedings may, or is to be, is being, or has been, provided in accordance with a decision of the Director under section 90(1)(a) or (c)).

[7] The Director submits that it follows that it is no more open to a defendant to argue he or she should pay no costs on the grounds the plaintiff has incurred no expense than it would be for the Director to argue that the Office of Human Rights Proceedings should pay no costs because it is the plaintiff who is liable for them. If defendants were exempt from costs awards in cases where the Director decides to provide representation, not only would the Office of Human Rights Proceedings (funded by the New Zealand taxpayer) be unfairly disadvantaged, there would be a reduced incentive for defendants to consider their litigation risk and to endeavour to settle matters in appropriate circumstances. The Director points also to the fact that the jurisdiction of the Tribunal to award costs in favour of a plaintiff represented by the Director has not been challenged in the past.

The defendants' reply

[8] In further submissions dated 4 April 2014 the defendants press their initial point that the plaintiff has not incurred costs and the Office of Human Rights Proceedings is not to be compensated for fulfilling its statutory functions. As the Office of Human Rights Proceedings was not a party to the proceedings it is not entitled to a costs award. Section 92C(5) is not specifically empowering and does not alter the principles applicable to costs.

Discussion

[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]. Where an award is made, the average is approximately \$3,750 per day.

[10] For present purposes it is relevant to note that jurisdiction to award costs is to be found in s 92L(1) of the HRA and that that jurisdiction applies in “any proceedings” under s 92B. The present proceedings are such proceedings. It follows that there is jurisdiction to make the award sought by the Director:

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.

[11] The submission by the defendants (that because the plaintiff has personally paid no costs, no costs can be recovered) is untenable:

[11.1] Section 92L(1) confers jurisdiction on the Tribunal to make an award of costs in “any” proceedings under s 92B of the Act.

[11.2] Section 92C(4) and (5) proceed on the basis that where the Director is involved in proceedings by representing the plaintiff, costs for or against that plaintiff fall to be determined in the usual way except that the costs are either paid by or to the Office of Human Rights Proceedings rather than by or to the plaintiff or the Director.

[12] The Director has properly conceded that there are no particular circumstances of complexity and significance to this case and that the average award of \$3,750 per day is appropriate. It is to be noted that quantum has not been challenged as such. In addition, none of the parties have submitted that there are any particular matters listed in s 92L(2) which the Tribunal should consider in determining the current application.

[13] The important public function of the Director and his Office must not be weakened by the withholding of an award of costs when the decision to represent a plaintiff has been (as here) thoroughly vindicated. Where taxpayer funds have been expended upholding significant rights (here, the right to be free from sexual harassment) it is only appropriate that the unsuccessful defendant (or defendants) be required to make a reasonable contribution towards that expenditure.

[14] The plaintiff having comprehensively succeeded an award of costs is appropriate.

Formal order as to costs

[15] Pursuant to s 92L of the Human Rights Act 1993 costs in the sum of \$11,250 are awarded against the first and second defendants. This sum is intended to be all inclusive.

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Mr RPG Haines QC
Chairperson

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Ms WV Gilchrist
Member

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Ms M Sinclair
Member