

Reference No. HRRT 004/2014

UNDER SECTION 50 OF THE HEALTH AND  
DISABILITY COMMISSIONER ACT 1994

BETWEEN GARY LANCE GRAVATT

PLAINTIFF

AND DAVID BULMER

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr GL Gravatt in person

Mr WG Manning for defendant

DATE OF DECISION: 1 September 2014

DATE OF DECISION ON COSTS: 10 September 2014

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

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[1] In the background to these proceedings under the Health and Disability Commissioner Act 1994 (HDC Act) is the tragic death of Mr Gravatt's son. It is clear that this event has taken a toll not only on Mr Gravatt and his family, but also on Dr Bulmer and his family.

[2] In a decision given on 1 September 2014 the Tribunal found it had no jurisdiction to hear Mr Gravatt's claim that in his treatment of Mr Gravatt's son, Dr Bulmer breached the Code of Health and Disability Consumers' Rights (the Code of Rights). At the request of Mr Manning, costs were reserved.

[3] By application dated 3 September 2014 Dr Bulmer has sought an award of \$3,600 as representing a reasonable contribution to his actual costs of \$12,057.86 (GST inclusive). Reference was made to the Tribunal's decision in *ABC v XYZ (Costs)* [2013] NZHRRT 23:

#### **Costs – general principles**

[6] The Tribunal's jurisdiction to award costs is statutory. Section 54(2) of the Health and Disability Commissioner Act 1994 empowers the Tribunal to award costs "as it thinks fit":

#### **54 Powers of Human Rights Review Tribunal**

(1) ...

(2) In any proceedings under section 50 or section 51, the Tribunal may award such costs against the defendant as it thinks fit, whether or not it makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

(3) ...

[7] This provision is materially the same as s 92L of the Human Rights Act 1993 and s 85(2) of the Privacy Act 1993. The Tribunal's approach to costs across all three jurisdictions has not differed and for that reason we draw in this decision on case law pertaining to all three statutes.

[8] In *Herron v Spiers Group Ltd* (2008) 8 HRNZ 669 (Andrews J, J Binns and D Clapshaw) the High Court summarised at [14] the principles usually applied by the Tribunal when considering costs.

[14] In its judgment of 4 August 2006 the Tribunal referred to the principles usually applied by the Tribunal when considering costs, at paras 6-8. Those principles may be summarised as follows:

- (a) The discretion to award costs is largely unfettered, but must be exercised judicially;
- (b) Costs in the tribunal will usually be awarded to follow the event, and quantum will usually be fixed so as to reflect a reasonable contribution (rather than full recovery) of the costs actually incurred by the successful party;
- (c) The Tribunal's approach to costs is not much different from that which applies in the Courts although, as there is no formal scale of costs for proceedings in the Tribunal (as there is in the Courts), caution needs to be exercised before applying an analysis of what might have been calculated under either the High Court or District Court scales of costs. Such an analysis can be no more than a guide.
- (d) An award of costs that might otherwise have been made can be reduced if the result has been a part-success, only;
- (e) Assessment of costs must take account of the relevant features of each case, but there must be some consistency in the way costs in the Tribunal are approached and assessed;
- (f) Offers of settlement "without prejudice except as to costs" are a relevant consideration.

[15] At para 7e (Decision No 29/06) the Tribunal observed that: "it is not immaterial that Parliament has conferred the particular jurisdictions which the Tribunal exercises in part to protect access to justice for litigants who might otherwise be deterred by the costs and complexities of proceeding in the Courts."

[9] At [19] the Court agreed with the observation made by Harrison J in *Haydock v Sheppard* HC Auckland CIV-2007-404-2929, 11 September 2008 that these principles are "consistent with the broad discretionary powers vested by the statute".

[10] In view of the concession by the plaintiff that the defendant is entitled to an award of costs, the only question for the Tribunal is that of quantum.

[11] As to this 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:

[11.1] 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].

**[11.2]** 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].

**[11.3]** 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].

**[12]** 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.

**[4]** A revision of the cited cases is not in the circumstances required. The distinctive features of the present case are:

**[4.1]** The jurisdiction objection was identified by the Tribunal from the outset. See the Chairperson’s *Minute* dated 13 February 2014. Mr Gravatt was on notice that his proceedings were high risk.

**[4.2]** Unfortunately, because he has been so affected by the death of his son, Mr Gravatt was unable to make a dispassionate assessment of that risk. Being self-represented compounded the problem.

**[4.3]** There can be no doubt of his sincerity or of his diligent compliance with all directions made by the Chairperson.

**[4.4]** Equally, Dr Bulmer has been ably represented by Mr Manning who, in his dealings with Mr Gravatt, has been both courteous and understanding of the deep emotions experienced by both parties.

**[4.5]** It is tragic that Mr Gravatt’s pursuit of these proceedings has come at so heavy a price not only in respect of his own health, but also in respect of the health of others, including Dr Bulmer and his family. We do not intend narrating the evidence submitted both by Mr Gravatt and by Mr Manning on this point. The information should remain private. It has, however, been considered and taken into account.

**[5]** The amount sought (\$3,600) has been shown to be reasonable when cross-checked against the cost scales of both the High Court and the District Court. On the other hand, Mr Gravatt submits that costs should lie where they fall, asking the Tribunal to take into account the reasons why he brought the proceedings and the toll on his health.

**[6]** Our conclusion is that these proceedings should never have been brought and once brought, should have been abandoned as soon as the Chairperson’s *Minute* was published on 13 February 2014. In fairness, it is acknowledged that almost immediately after the Tribunal’s decision of 1 September 2014 was issued Mr Gravatt finally accepted that the proceedings were misguided and he has apologised to Dr Bulmer and his wife. Had such acceptance occurred much earlier an award of costs may well have been avoided. Instead Dr Bulmer has now unnecessarily incurred legal expenses and in our view an award of costs must be made. However, the background circumstances are, as mentioned, tragic. They are also unique. We cannot but fail to take into account the impact on Mr Gravatt’s health. The consequences of the events of 8 July 2009 have been both devastating and long term. We do not wish to compound those consequences.

[7] In these circumstances we have concluded that an award below that sought by Dr Bulmer is justified on compassionate grounds and that costs in the sum of \$1,500 will be a sufficient contribution.

**Formal order as to costs**

[8] Pursuant to s 54(2) of the Health and Disability Commissioner Act 1994 costs in the sum of \$1,500 are awarded to Dr Bulmer. This sum is intended to be all inclusive.

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

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**Mr GJ Cook JP**  
**Member**

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**Mr BK Neeson**  
**Member**