

Reference No. HRRT 014/2014

UNDER THE PRIVACY ACT 1993

BETWEEN DIRECTOR OF HUMAN RIGHTS PROCEEDINGS

PLAINTIFF

AND DAVID JAMES CRAMPTON

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Mr MJM Keefe JP, Member

REPRESENTATION:

Mr RW Kee, Director of Human Rights Proceedings with Ms JV Emerson

Ms L Caris and Mr J Miller for defendant

DATE OF HEARING: 22, 23 and 24 June 2015

DATE OF DECISION: 29 July 2015

DATE OF COSTS DECISION: 9 September 2015

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**DECISION OF TRIBUNAL ON COSTS APPLICATION BY PLAINTIFF<sup>1</sup>**

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**Background**

[1] These proceedings, brought by the Director of Human Rights Proceedings (the Director) pursuant to s 82(2) of the Privacy Act 1993, were filed on 20 May 2014.

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<sup>1</sup> [This decision is to be cited as: *Director of Proceedings v Crampton (Costs)* [2015] NZHRRT 39]

[2] In its decision given on 29 July 2015 the Tribunal made a declaration that Mr Crampton interfered with the privacy of the person aggrieved (Ms Chapman) by disclosing personal information about her when Mr Crampton did not believe, on reasonable grounds, that disclosure of the information was directly related to the purposes in connection with which the information had been obtained. Damages of \$18,000 were awarded against Mr Crampton for the humiliation, loss of dignity and injury to feelings experienced by Ms Chapman. A training order was also made.

## Legal aid

[3] Mr Crampton applied for legal aid on 3 June 2014 but a grant was not made until a year later on 13 April 2015, little more than two months prior to the hearing which commenced on 22 June 2015. One effect of the grant is that Mr Crampton is protected from an award of costs in the post-13 April 2015 period unless “exceptional circumstances” can be established. See s 45(2) of the Legal Services Act 2011:

### 45 Liability of aided person for costs

- (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
- (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
- (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
  - (a) any conduct that causes the other party to incur unnecessary cost;
  - (b) any failure to comply with the procedural rules and orders of the court;
  - (c) any misleading or deceitful conduct;
  - (d) any unreasonable pursuit of 1 or more issues on which the aided person fails;
  - (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;
  - (f) any other conduct that abuses the processes of the court.
- (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
- (5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.
- (6) If an order for costs is made against a next friend or guardian *ad litem* of an aided person who is a minor or is mentally disordered, then—
  - (a) that next friend or guardian *ad litem* has the benefit of this section; and
  - (b) the means of the next friend or guardian *ad litem* are taken as being the means of the aided person.

## The costs application

[4] The Director, by application dated 12 August 2015 acknowledges no “exceptional circumstances” can be established but seeks:

[4.1] \$3,937.50 in the form of an award of costs against Mr Crampton personally for the period between 20 May 2014 and 13 April 2015 when he was not legally aided.

[4.2] \$8,257.90 in the form of a “but for legal aid” order under s 45(5) of the Legal Services Act. Were such order made the Director could apply to the Legal Services Commissioner for payment of this sum by the Commissioner. See s 46 of the Act.

[5] As mentioned, the Director does not claim there are “exceptional circumstances” in terms of s 45(2) of the Act. This concession is properly made. Since the grant of legal aid on 13 April 2015 Ms Caris and Mr Miller have conducted Mr Crampton’s case with exemplary ability.

### **The Director’s case**

[6] In relation to the pre-legal aid period (20 May 2014 to 13 April 2015) the Director submits additional and unnecessary expense was incurred as a direct result of Mr Crampton’s conduct. Examples follow:

[6.1] The original statement of reply filed by Mr Crampton was described by the Chairperson as “bereft of meaningful content”. Mr Crampton then ignored the Director’s request that he (Mr Crampton) file a more explicit and particularised statement of reply resulting in the Director having to file an application for further and better particulars. That application was granted and Mr Crampton was directed to file a revised reply by 14 November 2014. He failed to comply with that direction, leaving the Director unclear as to what he (Mr Crampton) intended to argue in defence. This resulted in the Director preparing and filing witness evidence for Mr D Peirse which subsequently proved unnecessary.

[6.2] Mr Crampton’s correspondence with the Director was at times of an intimidating nature. For example, counsel for the Director was told not to contact Mr Crampton and that a complaint had been made to the Police that she (counsel) was criminally harassing Mr Crampton. This behaviour also meant it was impossible to meaningfully explore the option of settlement.

[6.3] Mr Crampton refused to read correspondence from the Director’s Office relating to the proceedings. Instead he opted to make requests under the Official Information Act 1982 and the Privacy Act for information which had already been sent to him.

[6.4] Mr Crampton failed to properly engage in the pre-hearing process, requesting numerous timetable extensions and failing to comply with procedural directions. This resulted in both delays to the proceedings and unnecessary costs being incurred by the Director.

### **Quantum**

[7] The submissions for the Director correctly point out a daily rate of \$3,750 is considered to represent a reasonable contribution to a successful party’s costs. This figure includes both a preparation and a hearing component. Disbursements can also be claimed. In this regard the Director seeks \$945.40 being a return flight to Auckland together with two nights accommodation.

[8] The Director submits an uplift of the “standard” rate is warranted given the additional costs incurred as a direct consequence of Mr Crampton’s behaviour. It is submitted a daily rate of \$4,500 is appropriate. As the hearing took approximately 2.5 days, preparation and hearing attendance costs of \$11,250 would have been sought had Mr Crampton not been legally aided.

[9] Given the extensive steps conducted prior to the grant of legal aid, the Director seeks \$3,937.50, being 35% of the total costs sought. No disbursements are sought for this period.

[10] In relation to the post-legal aid period, were it not for the operation of s 45(2) of the Legal Services Act, costs and disbursements would have been sought in the sum of \$8,257.90 made up as follows:

[10.1] Sixty-five percent of the total amount of \$11,250.

[10.2] Disbursements of \$945.40.

### Relevant principles

[11] The facts of the present case do not call for an extended discussion of the principles on which costs should be awarded or withheld by the Tribunal. It is sufficient to note that as recognised in *Commissioner of Police v Andrews* [2015] NZHC 745 the statutory discretion is broad and the means of the unsuccessful party are a relevant consideration:

[60] I accept that the development of guiding principles for the exercise of the discretion which leaves room for cases to be assessed on their individual merits is not inconsistent with the broad statutory discretion provided. Such principles assist in providing some degree of predictability as to the benefits and costs. But that is not to say that the guiding principles previously developed should remain in place for the future. The guiding principles that were adopted by the Tribunal are not specified in the legislation or in regulations, in contrast with the position under the District and High Court Rules. Greater flexibility in approach is available. New guiding principles may develop which better reflect the jurisdiction in which the Tribunal operates. If they are to be developed, it is appropriate that the Tribunal do so in the way that it did, by clearly signalling its intention to do so and the reasons why it wished to do so.

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[72] The Commissioner of Police submits that the Tribunal was wrong to take into account whether Mr Andrews could meet an award of costs. In the first place it is submitted that, as had been the Tribunal's previous approach, this is relevant to enforcement rather than to whether a costs order should be made. Secondly it is said that the Tribunal did not have sufficient information on which to conclude that Mr Andrews did not have the means to meet a costs order.

[73] In my view there was no error made by the Tribunal in taking into account Mr Andrews' means. The Tribunal noted that Mr Andrews' rehabilitation on his release from prison was likely to be challenging. It saw no sense in burdening Mr Andrews with an order for costs in those circumstances. I consider that there are parallels with orders for reparations. The factors the Tribunal referred to here are factors that are relevant to the Court's decision as to whether to make an order for reparation and, if so, the amount. I consider the Tribunal was correct to have regard to these matters. [Footnote citations omitted]

[12] In the context of the present case we would add the following principles:

[12.1] The purpose of a costs order is not to punish an unsuccessful party.

[12.2] Ordinarily, the Tribunal should not allow the prospect of an adverse award of costs to discourage a party from bringing proceedings (if a plaintiff) or from defending proceedings (if a defendant). See *Heather v IDEA Services Ltd (Costs)* [2012] NZHRRT 11.

[12.3] While litigants in person face special challenges and are to be allowed some latitude, they do not enjoy immunity from costs, especially where there has been needless, inexcusable conduct which has added to the difficulty and cost of the proceedings. See for example *Rafiq v Commissioner of Inland Revenue (Costs)* [2013] NZHRRT 30 and *Rafiq v Commissioner of Police (Costs)* [2013] NZHRRT 31.

[12.4] On the other hand, understanding and compassion are equally important. See *Meek v Ministry of Social Development* [2013] NZHRRT 28 and *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31 upheld on appeal in *Commissioner of Police v Andrews* [2015] NZHC 745 at [65], [68] and [73] to [74].

## Discussion

[13] Were Mr Crampton and his wife in better health the Director's application for costs would have been hard to resist. There is no question Mr Crampton's pre-legal aid conduct was inexcusable, adding substantially to the Director's costs. He also wasted the time of the Tribunal and harassed the Case Manager.

[14] However, we have decided no costs are to be awarded against Mr Crampton. Our reasons are largely those advanced by Ms Caris in her submissions:

[14.1] Mr Crampton has a family comprising his wife and two young children. His wife has recently been diagnosed with breast cancer and is awaiting an invasive surgical procedure to address that condition. For the foreseeable future Mr Crampton will be the sole breadwinner for the family. We have no details of his income but as a journalist his earnings are unlikely to be substantial.

[14.2] Mr Crampton has himself been unwell for some time as detailed in the report dated 10 June 2015 by Dr Steve Watson, Tawa Medical Centre. There is no need for the very personal content of that report to be recited here.

[14.3] The Tribunal is told by Ms Caris that since the Tribunal's ruling was given on 23 July 2015, Mr Crampton's health has deteriorated further.

[14.4] Mr Crampton is not financially able to accommodate a costs award. He now also has a debt of \$18,000, being the damages awarded by the Tribunal.

[14.5] Mr Crampton's pre-hearing conduct was contributed to by his personal difficulties and this underpinned his need for independent representation in the first place.

[15] In combination these factors have led us to the conclusion that no order for costs should be made. This applies to the pre-legal aid period as well as to the post-legal aid period.

## Order

[16] The application by the Director of Human Rights Proceedings for costs and for a "but for legal aid" order under s 45(5) of the Legal Services Act 2011 is declined.

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**Mr RPG Haines QC**  
Chairperson

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**Ms WV Gilchrist**  
Member

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**Mr MJM Keefe JP**  
Member