

Reference No. HRRT 033/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN YASODHARA DA SILVEIRA
SCARBOROUGH

PLAINTIFF

AND KELLY SERVICES (NEW ZEALAND)
LIMITED

FIRST DEFENDANT

AND ASSA ABLOY (NEW ZEALAND) LIMITED

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr RK Musuku, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Ms Y Scarborough in person

Mr CHB Bennett, agent for first defendant

Mr AJ Lloyd and Mr JCS Kimpton for second defendant

DATE OF HEARING: 2 and 3 December 2015

DATE OF DECISION: 16 December 2015

DATE OF COSTS DECISION: 24 February 2016

DECISION OF TRIBUNAL ON COSTS APPLICATION BY KELLY SERVICES LTD¹

¹ [This decision is to be cited as: *Scarborough v Kelly Services (NZ) Ltd (Costs)* [2016] NZHRRT 3]

Background

[1] Following a hearing at Auckland on 2 and 3 December 2015 the Tribunal on 16 December 2015 delivered its decision in *Scarborough v Kelly Services (NZ) Ltd* [2015] NZHRRT 53 dismissing the claims made by Ms Scarborough. Costs were reserved.

[2] Since then:

[2.1] On 11 January 2016 Kelly Services (New Zealand) Ltd (Kelly Services) applied for costs in the sum of \$10,500.00. The claim is not particularised and disbursements are not mentioned.

[2.2] By email dated 22 December 2015 Assa Abloy (New Zealand) Ltd (Assa Abloy) gave notice through its solicitors it would not be applying for costs as it is highly unlikely Ms Scarborough has the means to make payment of any award.

The costs application by Kelly Services

[3] The main points made by Kelly Services in support of its costs application are:

[3.1] It believes the claim by Ms Scarborough was spurious, opportunistic and never likely to succeed. It should never have been pursued beyond mediation.

[3.2] Ms Scarborough was never in possession of evidence to establish her harassment claim with the result there was never any possibility of the claim being successful.

[3.3] She was fully aware her claim would be unsuccessful and openly admitted as such on several occasions both during the teleconferences convened by the Chairperson and during the substantive hearing itself.

[3.4] Her sole reason for pursuing the matter was to put pressure on Kelly Services and Assa Abloy to offer her employment.

[3.5] An award of costs in favour of a successful litigant should not be withheld without good reason, particularly where it is clear the claim is vexatious and "bordering on extortion".

Submissions by Ms Scarborough in opposition

[4] On 25 January 2016 Ms Scarborough filed submissions in reply. They are characteristically discursive in nature. The main points appear to be:

[4.1] Mr CHB Bennett who represented Kelly Services at the hearing was disqualified from acting as he had misleadingly represented himself to be a lawyer.

[4.2] Contrary to the findings made by the Tribunal, Ms Scarborough has been the victim of "some sort of" sexual harassment.

[4.3] Kelly Services should have settled the claim by offering Ms Scarborough three months work at \$20.00 an hour.

The evidence – Mr Bennett's standing

[5] In the statement of reply filed by Kelly Services on 19 August 2015 Mr Bennett was named as the company's representative. When Ms Scarborough challenged his

standing to act for Kelly Services Mr Bennett gave notice on 2 September 2015 that although he no longer practised as a lawyer, he did hold an Authority to Act from Kelly Services. In a *Minute* issued on 3 September 2015 the Chairperson at [10] to [14] rejected Ms Scarborough's objection and made an order under s 108(3) of the Human Rights Act 1993 permitting Mr Bennett to appear for Kelly Services as agent and to represent that company in all aspects of these proceedings.

The evidence – Ms Scarborough's financial position

[6] At the close of the hearing on 3 December 2015 Ms Scarborough provided the following details of her then financial position:

[6.1] She has been unemployed since her temporary assignment at Assa Abloy ended on 12 December 2014.

[6.2] She is in receipt of a job-seeker benefit of some \$373.00 per week.

[6.3] As at December 2015 she faced bankruptcy proceedings over a credit card debt of some \$3,653.00.

[6.4] As a result of unsuccessful proceedings brought by her in the Employment Court against a previous employer (Micron Security Products Ltd) she has been ordered to pay two sets of costs of approximately \$19,000.00 and \$5,500.00 respectively. Those orders have been appealed by her to the Court of Appeal.

[6.5] She supports a 20 year old daughter who attends University and Ms Scarborough also pays \$74 per week in child support for her son.

Discussion

[7] The Tribunal's discretion to award costs is a broad one and costs do not follow the event. See *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [59] to [71] approving the Tribunal decision in *Andrews v Commissioner of Police* [2014] NZHRRT 31 (5 August 2014).

[8] Three features of this case stand out:

[8.1] Kelly Services was represented before the Tribunal by a lay person, not by a lawyer holding a current practising certificate. The general rule in both the High Court and District Court is that in such circumstances an award of costs is confined to disbursements as costs are understood as legal costs. The Tribunal's practice is the same. It is noted the application by Kelly Services makes no mention of disbursements and the global figure of \$10,500.00 is not particularised.

[8.2] Ms Scarborough's financial circumstances can only be described as precarious. She is not in a position to pay an award of costs, a fact properly recognised by Assa Abloy when giving notice it would not be applying for costs.

[8.3] Ms Scarborough is, on one view, unwell. She has relentlessly pursued untenable points and has become preoccupied, if not obsessed, with (inter alia) the standing of Mr Bennett and Mr Lloyd to represent their respective clients. See the decision of the Tribunal at [7], [11] and [12] to [15]. The assessment of the Tribunal at [44] and [45] is that she is delusional:

[44] Our assessment of Ms Scarborough is, however, the opposite. She lives in a world of her own and is not anchored in reality. Sadly, she believes her perception and understanding of events is the truth and cannot be shaken from that view. Her evidence was inherently implausible, characterised by outlandish if not bizarre claims which made no sense at all. There is no evidence to independently support her account.

[45] It is accepted Ms Scarborough honestly believes everything she has narrated to the Tribunal. But the world inhabited by her is not the world inhabited by the witnesses, the Tribunal and most other people. Her sincerely expressed but objectively baseless illusions cannot in any way establish a case of sexual harassment against Mr McColl, Assa Abloy and Kelly Services.

Decision

[9] These three features, particularly the last, lead us to the conclusion no award of costs should be made against Ms Scarborough. She should not suffer the consequences of an adverse costs order because of her mental disability.

[10] The application by Kelly Services for costs is dismissed.

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Mr RPG Haines QC
Chairperson

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Mr RK Musuku
Member

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Mr BK Neeson JP
Member