

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF NURSE A AND NURSE B
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON
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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2016] NZHRRT 4

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Reference No. HRRT 019/2013

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN MARK ANTHONY MCCREATH

PLAINTIFF

AND ATTORNEY-GENERAL

FIRST DEFENDANT

AND NURSE A

SECOND DEFENDANT

AND NURSE B

THIRD DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson  
Ms WV Gilchrist, Member  
Mr BK Neeson JP, Member

REPRESENTATION:

Mr MA McCreath in person  
Ms K Laurenson for Attorney-General  
Ms A O'Brien for Nurse A and Nurse B

DATE OF DECISION: 24 February 2016

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DECISION OF TRIBUNAL ON COSTS APPLICATION BY ATTORNEY-GENERAL <sup>1</sup>

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<sup>1</sup> [This decision is to be cited as: *McCreath v Attorney-General (Costs)* [2016] NZHRRT 4]

## **Introduction**

[1] On 14 June 2012 in the District Court at Christchurch Mr McCreath was sentenced to six years and three months' imprisonment on a number of charges including theft and burglary. By statement of claim filed on 19 July 2013 he alleged the Attorney-General as well as Nurse A and Nurse B discriminated against him on the basis of his sex at a time when he was an inmate at Christchurch Men's Prison and receiving medical treatment. Following long delay these proceedings were allocated a five day hearing commencing on Monday 2 November 2015. There were five witnesses for Mr McCreath, eight for the Attorney-General and one each for Nurse A and Nurse B.

[2] By email dated 29 October 2015 Mr McCreath withdrew his claim. The Attorney-General now by application dated 11 November 2015 seeks an award of costs in the sum of \$5,000. While supportive of this application Nurse A and Nurse B have not submitted a costs application of their own.

## **Brief history of claim**

[3] As stated, these proceedings were commenced on 19 July 2013. A statement of reply followed promptly on 30 August 2013.

[4] When in September 2013 the Secretary endeavoured to arrange a case management teleconference Mr McCreath responded he had made an application for legal aid and in his view the holding of a teleconference prior to a grant of legal aid was premature. He undertook to notify the Secretary once the outcome of the legal aid application was known. Nothing further having been heard the Chairperson by *Minute* dated 20 December 2013 gave notice the proceedings could not be delayed indefinitely and directed the Secretary to arrange a teleconference at the earliest practical opportunity.

[5] By memorandum dated 7 January 2015 Ms CR Scott of Cooper Legal, solicitors of Wellington explained that Mr McCreath's perceived inactivity had been due to difficulties over legal aid issues and she detailed the protracted history of Mr McCreath's dealings with Legal Aid in the period 6 January 2014 to 23 December 2014. At a teleconference convened on 11 February 2015 Ms Scott confirmed Mr McCreath intended prosecuting the proceedings but requested no timetable directions be made until the grant of legal aid. It was anticipated a decision would be made within the next two weeks. The teleconference was adjourned.

[6] By further memorandum dated 4 March 2015 Ms Scott gave notice Mr McCreath had been granted legal aid and that an amended statement of claim would be filed. At the reconvened teleconference on 20 March 2015 timetable directions were made with a view to the proceedings being heard at Christchurch Men's Prison over five days commencing on 2 November 2015.

[7] The amended statement of claim was duly filed on 24 March 2015 and replies followed by the Attorney-General on 24 April 2015 and by Nurse A and Nurse B on 25 March 2015 respectively.

[8] Subsequently, by memorandum dated 16 June 2015 Cooper Legal gave notice that as from that date Mr McCreath would be acting for himself consequent upon a decision by the Legal Services Commissioner to decline a grant of legal aid for these proceedings. By *Minute* dated 30 June 2015 the Chairperson made slight amendments to the timetable dates but there was no alteration to the fixture date of 2 November 2015. Further teleconferences were convened on 18 August 2015, 11 September 2015 and 9 October 2015.

[9] The 9 October 2015 teleconference was made necessary because by letter dated 28 September 2015 Mr McCreath advised he would be released on parole on 12 October 2015 and would have no means of travelling from Christchurch to the Prison. He sought a change of venue. That application was opposed on the grounds the four witnesses summonsed by Mr McCreath were then detained at Christchurch Men's Prison and in addition, most of the witnesses for the defendants were also employed there. By *Minute* dated 9 October 2015 the change of venue application was declined.

[10] By email dated 29 October 2015 Mr McCreath advised he withdrew his claim:

It has become clear that attending the Hearing next week would be pointless and would cause myself to be subjected to undue stress and worry.

As effective immediately I hereby withdraw my claim and which to proceed with my case.

I apologise for the late withdrawal. I thank those at the Human rights review tribunal for their help.

My mental health is not worth the extra stress which would be caused by proceeding.

If you have any questions please contact me.

[11] Bearing in mind the claim was abandoned two working days before the five day hearing it is understandable the Attorney-General has sought a contribution to his costs.

### **The costs application by the Attorney-General**

[12] The Attorney-General's costs application was filed on 11 November 2015. By *Minute* dated 18 November 2015 the Chairperson directed Mr McCreath to file his submissions in opposition by 2 December 2015. He was asked to provide also the length of the term of imprisonment recently served by him, his present employment status, his income and current assets and liabilities. In response Mr McCreath advised the Secretary that he (Mr McCreath) had been ill and would file his submissions by Monday 7 December 2015. Nothing has in fact been filed.

[13] On 20 January 2016 counsel for the Attorney-General advised the Tribunal Mr McCreath was back in prison and there was a recall application to be heard by the Parole Board.

[14] The principal points made in support of the costs application follow:

[14.1] In *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [68] it was recognised the motivations and behaviour of the parties are particularly important factors in deciding whether there should be any costs award by the Tribunal in its jurisdiction under the Human Rights Act 1993. It is submitted Mr McCreath's explanation for not proceeding (undue stress and worry and his mental health) is not supported by any medical evidence and there has been no real attempt to explain the last minute nature of the withdrawal.

[14.2] While it is accepted a litigant in person cannot be held to the same standards as a represented party, Mr McCreath could have withdrawn the proceedings earlier, thereby saving the other parties considerable trouble and expense. He had had disclosure as well as the defendants' witness statements since 6 October 2015. The last minute withdrawal was, at the least, discourteous.

[14.3] The witness statements filed in advance of the hearing demonstrated a conflict in the evidence on the key points of the claim. In the absence of any

testing of the evidence, the Tribunal was not able to assess the relative strengths of the case and Mr McCreath's withdrawal ought to be treated as a failure on his part to make out any aspect of his claim. It was accepted Mr McCreath may have a limited ability to pay costs and this had been appropriately recognised by the reduced sum sought. Actual costs incurred by the Attorney-General were \$26,120.95 with disbursements of \$624.19. It was submitted a reasonable contribution would be in the order of \$5,000, less than a fifth of the actual costs incurred.

[14.4] In summary, a claim which had taken two years to get to a hearing only to be withdrawn at the last minute merited a relatively modest award of costs being made against Mr McCreath.

### **Mr McCreath's personal circumstances**

[15] Although Mr McCreath has not made any submissions the Attorney-General has filed the Sentencing Notes of Judge AD Garland when on 14 June 2012 he sentenced Mr McCreath to six years and three months' imprisonment.

[16] The following points made by Judge Garland can be noted:

[16.1] Mr McCreath appeared for sentence on one charge of theft, 13 charges of burglary as well as charges of possession of instruments for burglary and breach of a protection order. He had also pleaded guilty to two charges of breaching a sentence of intensive supervision and an application to cancel that sentence of intensive supervision was before Judge Garland.

[16.2] Mr McCreath, then 39 years of age was described as having an extensive history for dishonesty offending primarily relating to burglary, fraud and breach of sentence conditions. While he often presented with good rehabilitative intentions, completion of sentences and special conditions was described as "rare". His risk of reoffending was assessed as high. He was described as a recidivist burglar with (then) 14 previous convictions for burglary with 68 other dishonesty offences as well as breaches of protection orders.

[16.3] The charges in respect of which he appeared for sentencing involved a spree of offending committed between September 2009 and December 2010. The offences involved property valued at approximately \$80,000 to \$85,000.

[16.4] At the time of his offending Mr McCreath already owed \$21,000 in reparation. In relation to the new offending one victim was \$48,000 out of pocket and reparation of \$1,100 was sought in relation to the other offences. Judge Garland noted Mr McCreath had no ability to pay reparation.

[16.5] A total sentence of six years and three months' was imposed. A direction was made that he serve a minimum term of three years' imprisonment.

### **Discussion**

[17] 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). The determination of any application for costs must take into account a broad range of factors which include the human rights character of the Tribunal's jurisdiction as well as the particular circumstances of the case. In the present case two features stand out:

[17.1] From the outset Mr McCreath understood he needed legal assistance for two reasons. First, the complexity of the legal and evidentiary issues. Second, the fact that he was in prison. The memorandum dated 7 January 2015 filed by Ms CR Scott provides strong support for the view the delay in progressing this case from July 2013 to December 2014 was due to the tardiness of Legal Aid, rather than any fault of Mr McCreath. In the period he was in receipt of legal aid a clear, articulate amended statement of claim was filed by his solicitors and a case management timetable agreed to. The case ran into difficulty as soon as legal aid was withdrawn in June 2015. It is from this time Mr McCreath was increasingly out of depth (see the *Minutes* issued by the Chairperson on 18 August 2015, 26 August 2015, 11 September 2015 and 9 October 2015). When Mr McCreath was released from prison just before the fixture it is reasonable to infer he simply could not manage simultaneously the pressure of his release from prison and the pressure of preparing for and conducting the hearing. He could not even find a way to get to the prison itself for the hearing. In our view it is likely his withdrawal of the proceedings was not so much a belated recognition the claim was without merit but an acknowledgement he was unable to cope. Had the grant of legal aid continued it is unlikely the claim would have been withdrawn. In short, his motivation and behaviour (*Andrews* at [68]) are not as blameworthy as might first appear to be the case.

[17.2] Mr McCreath is a recidivist burglar and without means. This is a relevant factor to be taken into account. See *Andrews* at [73]. In addition, Mr McCreath has now been returned to prison.

[18] While there is superficial attraction to the submission Mr McCreath should make a modest contribution to the costs of the Attorney-General, the fact remains he is without means and back in prison. There is little point to an award of costs which all parties know will never be paid. Saddling a recidivist dishonesty offender with a debt of \$5,000 could well be an incentive to further offending when he is next released.

[19] Our assessment of the circumstances is that:

[19.1] In the conduct of these proceedings Mr McCreath has endeavoured to work within the system but the sudden termination of his legal aid assistance left him ill equipped to conduct the proceedings unassisted.

[19.2] The costs application is unrealistic. A fair and reasonable outcome is that all parties should bear their own costs.

## Decision

[20] The application by the Attorney-General for costs is dismissed. All parties are to bear their own costs.

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**Mr RPG Haines QC**  
Chairperson

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**Ms WV Gilchrist**  
Member

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**Mr BK Neeson JP**  
Member