

Reference No. HRRT 035/2015

UNDER THE PRIVACY ACT 1993

BETWEEN DEBORAH WAXMAN

PLAINTIFF

AND JITENDRA PAL

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms LJ Alaeinia, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Dr D Waxman in person

Dr J Pal in person

DATE OF COSTS HEARING:

Heard on the papers

DATE OF DECISION ON APPLICATION FOR COSTS:

25 January 2017

DECISION OF TRIBUNAL ON APPLICATION BY DEFENDANT FOR COSTS¹

Introduction

[1] In *Waxman v Pal* [2016] NZHRRT 28 (11 August 2016) the Tribunal found there had been no interference by Dr Pal with Dr Waxman's privacy. The claim by Dr Waxman under the Privacy Act 1993 was accordingly dismissed. On the question of costs the decision at [41] stated:

[41] Where a self-represented party is successful the only form of costs which can be awarded are disbursements, that is out of pocket expenses. In the present case such expenses would include the reasonable travel and accommodation costs incurred by Ms Insley and by Ms Wilson-Hoyes.

¹ [This decision is to be cited as: *Waxman v Pal (Costs)* [2017] NZHRRT 3.]

THE COSTS APPLICATION

[2] By application dated 24 August 2016 Dr Pal sought costs in the form of disbursements then totalling \$1,722.20. By email dated 6 October 2016 a claim for an additional \$2,208.00 was made bringing the total to \$3,930.20.

[3] In the main, the disbursements relate to the travel expenses incurred by two witnesses called by Dr Pal being Ms Claire Insley of Queenstown and Ms Morgan Wilson-Hoyes of Auckland. It is to be recalled Ms Insley was the practice manager for the surgeries operated by Dr Jitendra Pal and his wife Dr Promila Pal, a position she held until 30 August 2013. Ms Wilson-Hoyes was the medical receptionist/Reception Manager at the Panmure Surgery from 14 August 2013 to 20 February 2015. Their evidence related to the issue whether Dr Waxman and her witnesses (Ms ME Midgley and Ms G Butler) were told that all telephone calls to and from the surgeries were recorded.

[4] The disbursements claimed for Ms Insley are:

Jetstar return airfare Queenstown to Auckland	\$393.00
Connectabus from home to Queenstown Airport	\$12.00
Skybus from Auckland Airport to Copthorne Hotel	\$28.00
Copthorne Hotel (3 nights)	\$321.00
Meals etc	\$80.00

[5] For Ms Wilson-Hoyes the amount claimed is \$6.20 being the train fare from her home to the Auckland District Court.

[6] In addition to these conventional witness expenses Dr Pal seeks an award for the earnings lost by Ms Insley, Ms Wilson-Hoyes and Dr Promila Pal as a consequence of attending the hearing to give evidence. However, lost earnings are not recognised by the Tribunal as a disbursement for the purpose of calculating costs.

[7] Dr Jitendra Pal and Dr Promila Pal have submitted a claim for the following disbursements:

30 May 2016 Train fare	\$18.00
31 May 2016 Taxi to Auckland District Court (train cancelled due to an accident)	\$48.00
31 May 2016 return trip by taxi at conclusion of hearing	\$50.00

[8] A claim of \$24.00 is also made for lunch. However this is not a conventional disbursement as lunch would have been purchased irrespective whether Dr Pal and his wife attended the hearing.

[9] In the result the claim for disbursements is, in effect, \$956.20.

THE SUBMISSIONS BY DR WAXMAN

[10] In her detailed submissions dated 20 October 2016 Dr Waxman raises a number of points, many focused on the claim for lost wages. As it is clear such claim is not ordinarily considered to be a disbursement for the purpose of a costs award we do not

intend addressing this issue further. The main points made by Dr Waxman (and our response) follow:

[10.1] None of the defence witnesses were summonsed to attend the hearing. This, however, is irrelevant. It is not a precondition to an award of witness expenses that the witness first be served with a witness summons.

[10.2] Not all the claims submitted by Dr Pal are supported by receipts. In this regard it is to be noted that the major expenses (the airfare and accommodation) are supported by receipts. The Tribunal does not expect receipts for smaller sums particularly where, as here, there is little doubt the disbursement was incurred and the amount claimed is transparently reasonable.

[10.3] Ms Insley should not have been accommodated at the Copthorne Hotel (described by Dr Waxman as “a luxury establishment”). It is submitted accommodation at a backpackers hostel in the CBD would have been more appropriate. In addition, only two nights accommodation could be justified, not three. In this regard we do not believe the hotel in question can reasonably be described in the terms used by Dr Waxman. Its status is more modest. Accommodating Ms Insley there was appropriate in the circumstances. As to the number of nights accommodation Ms Insley has explained (unsurprisingly) that at the time the bookings were made it was not known how long the hearing before the Tribunal would last and when Ms Insley would be free to return home. We accept that Ms Insley purchased the cheapest flights available to her at the time and that three nights accommodation is reasonable.

[10.4] As to the travel expenses claimed by Dr Pal and his wife, in addition to complaining about the lack of receipts for the train and taxi fares, Dr Waxman submits that the return taxi fare of \$50 incurred on 31 May 2016 should be disallowed as the trains had resumed running by the afternoon. The short answer is that the disbursement must be reasonably incurred. It is not required that the party claiming reimbursement reach a standard of perfection in choosing whether to adopt one form of transport over another. In our view the taxi fare was reasonably incurred.

[10.5] The fundamental point made in relation to Ms Insley is that as her term of employment by Dr Pal had ended prior to Dr Waxman’s retention as a locum, it was unnecessary she be called as a witness. We do not agree. As is apparent from the 11 August 2016 decision at [18] Ms Insley was responsible for installing the computer system and the VOIP telephone system when at the end of 2011 the surgeries in Panmure and Howick moved premises. Her evidence established Ms Midgley (a witness for Dr Waxman) was made aware the new system meant all telephone conversations would be recorded. This same information was communicated by Ms Insley to all new staff members as they joined. That is, there was an unbroken chain of instruction regarding the recording system from the time of its installation to the point at which Ms Wilson-Hoyes told Ms Butler (also a witness for Dr Waxman) and Dr Waxman herself that all incoming and outgoing phone calls on the surgery lines were recorded. In our view Ms Insley was an important witness, as was Ms Wilson-Hoyes. No rational objection can be raised to the request that the expenses incurred in securing their attendance at the hearing should be reimbursed.

Conclusion as to quantum of claim

[11] Having dismissed the claims made on behalf of Ms Insley, Ms Wilson-Hoyes and Dr Promila Pal for loss of earnings and having also disallowed the claim by Dr Pal for lunch we accept the balance of the disbursements claimed (\$956.20) were reasonably incurred by Dr Pal in defending the claim brought by Dr Waxman. The question is whether an order should be made that Dr Waxman reimburse Dr Pal for this amount.

THE RELEVANT PRINCIPLES

[12] The Tribunal's discretion to award costs in proceedings under the Privacy Act are conferred in broad terms. This was recognised in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [60] and [71]. Section 85(2) provides:

(2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

[13] The Tribunal has in recent years emphasised that costs orders should not have the effect of deterring the bringing of claims involving human rights. Consequently the rules which govern the awarding of costs in conventional civil litigation do not apply to proceedings before the Tribunal. The human rights dimension of cases brought before the Tribunal requires a different approach to costs. The Tribunal's approach has been upheld in *Commissioner of Police v Andrews* at [59] to [71] and for a recent illustration of the application of this approach see *Lohr v Accident Compensation Corporation (Costs)* [2016] NZHRRT 36 at [5] to [6].

[14] While decisions such as *Director of Proceedings v Crampton (Costs)* [2015] NZHRRT 39 and *Lohr v Accident Compensation Corporation (Costs)* provide useful guidance to the Tribunal's approach to costs it must be borne in mind that the broad discretion in s 85(2) must not be fettered. Each case must be decided on its own particular facts. As stated in *Taylor v Orcon (Costs)* [2015] NZHRRT 32 at [11] a large number of factors are to be taken into account in deciding an award of costs and:

... decisions on costs must be made by exercising a broad judgment based on general principles applied to specific fact situations. The jurisdiction should not be governed by complex and technical refinements or rules.

DISCUSSION

[15] In the present case the particular features are:

[15.1] Both parties are litigants in person. As they have not incurred legal expenses in bringing and defending the claim costs understood as lawyer-client costs cannot be claimed. The successful self-represented party can, however, ask for reimbursement of conventional expenses, particularly travel costs incurred in bringing witnesses to the hearing.

[15.2] While the means of the parties is a relevant factor (see *Commissioner of Police v Andrews* at [73]), in the present case both parties are medical practitioners and impecuniosity has not been raised as an issue.

[15.3] This was not a case in which one of the parties complained of a breach of his or her rights by the state or one of its agencies. The litigation was between two private citizens.

[15.4] The award of modest disbursements fixed at \$956.20 will not serve as a deterrent to others contemplating bringing (or defending) similar claims.

[15.5] Just as plaintiffs should not be deterred by a potentially adverse award of costs from bringing proceedings before the Tribunal, defendants should not be deterred from resisting such claims by the prospect of being left out of pocket for witness expenses should they be successful in the proceedings. As always, the question whether to make an award of costs requires the exercise of a broad judgment taking into account all of the circumstances of the particular case. Here we have found Dr Waxman was mistaken in her assertion she was not told incoming and outgoing telephone calls from the surgeries were recorded. Dr Pal should not be left out of pocket for establishing that mistake.

DECISION

[16] For the reasons given the application for costs by Dr Pal is granted. Dr Waxman is ordered to pay to Dr Pal the sum of \$956.20 by way of witness expenses and disbursements.

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Mr RPG Haines QC
Chairperson

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Ms LJ Alaeinia
Member

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Mr BK Neeson JP
Member