

Reference No. HRRT 029/2017

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN KATHY APOSTOLAKIS

PLAINTIFF

AND ATTORNEY-GENERAL

FIRST DEFENDANT

AND ROB GARLICK

SECOND DEFENDANT

AND SIMON NICOLAS MEIKLE

THIRD DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mrs K Apostolakis in person

Mr RS May and Ms R Kós for first defendant

Mr C Matsis for second defendant

Mr SN Meikle in person

DATE OF STRIKE-OUT DECISION: 17 January 2019

DATE OF DECISION ON COSTS: 4 March 2019

DECISION OF TRIBUNAL ON COSTS¹

¹ [This decision is to be cited as: *Apostolakis v Attorney-General No. 3 (Costs)* [2019] NZHRRT 11.]

Introduction

[1] In a decision given on 17 January 2019 these proceedings were struck out as against all three defendants on the grounds:

[1.1] There was no foundation in the facts pleaded in the statement of claim to support the allegation by Mrs Apostolakis that, through the actions of the defendants, she had suffered discrimination on the grounds of family status or on any other ground.

[1.2] The claim was a collateral attack on decisions of the High Court and Family Court and sought to re-litigate matters already determined by those courts.

The application for costs

[2] The first and second defendants now apply for costs. A detailed memorandum has been filed by the Attorney-General. Mr Garlick (the second defendant) has filed no submissions of his own but by email dated 31 January 2019 has given notice that he is content that the Tribunal make such order as it sees fit.

[3] The actual costs and disbursements incurred by the Attorney-General are \$11,991 (GST exclusive). A reasonable contribution to costs is sought in the sum of \$4,000. No indication has been given as to Mr Garlick's actual costs but it is unlikely they will be much different to those incurred by the Attorney-General as Mr Garlick was required to file a separate statement of reply, strike-out application, supporting affidavit and submissions.

[4] The third defendant (Mr Meikle) has taken no steps in the proceedings and no application for costs has been made by him.

The submissions for the Attorney-General

[5] The primary points made by the Attorney-General are:

[5.1] No reasonably arguable discrimination case could be found in the papers filed by Mrs Apostolakis.

[5.2] The claim attempted to inappropriately use the Tribunal as a forum to dispute matters determined in both the High Court and Family Court.

No submissions by the plaintiff

[6] Mrs Apostolakis has filed neither notice of opposition nor submissions in respect of the applications by the first and second defendants for costs.

The law

[7] The Tribunal's power to award costs in respect of proceedings under the Human Rights Act 1993 is in the following terms:

92L Costs

- (1) In any proceedings under section 92B or section 92E or section 97, the Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.

- (2) Without limiting the matters that the Tribunal may consider in determining whether to make an award of costs under this section, the Tribunal may take into account whether, and to what extent, any party to the proceedings—
- (a) has participated in good faith in the process of information gathering by the Commission;
 - (b) has facilitated or obstructed that information-gathering process;
 - (c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

[8] The principles to be applied were reviewed in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515. For the purpose of the present case we mention only the following:

[8.1] A flexible approach can be taken by the Tribunal to costs. See [60].

[8.2] There must be caution about applying the conventional civil costs regime in the Tribunal's jurisdiction. See [61].

[8.3] The Tribunal has broad powers to do justice even if this means departing from the conventional rules applying to civil proceedings. See [62].

[8.4] Costs orders should not have the effect of deterring claims involving human rights. See [64] and also *Wall v Fairfax New Zealand Ltd (Costs)* [2017] NZHRRT 28, (2017) 11 HRNZ 337.

[8.5] Nevertheless, some claims in the Tribunal should have costs consequences. See [65].

[8.6] The three mandatory considerations identified in s 92L(2) recognise that it is relevant to enquire whether the claim by the plaintiff is frivolous or vexatious or was activated by improper motives. See [68].

[9] In *Lohr v Accident Compensation Corporation (Costs)* [2016] NZHRRT 36 at [6.8.3] the Tribunal said that 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.

Discussion

[10] In *Commissioner of Police v Andrews* at [61] it was recognised that the Tribunal is right to be cautious about applying the conventional civil costs regime to its jurisdiction. Statutory tribunals exist to provide simpler, speedier, cheaper and more accessible justice than do the ordinary courts. The imposition of large fees to bring a claim and the imposition of adverse costs orders undermines the cheapness and accessibility long recognised as important advantages of tribunals over courts.

[11] Nevertheless it was equally recognised some claims in the Tribunal should have costs consequences. The present case is one such claim. From beginning to end it was without merit or justification. The first and second defendants have been put to the trouble and expense of resisting a claim utterly devoid of merit.

[12] In its decision delivered on 17 January 2019 the Tribunal drew attention to the following aspects of Mrs Apostolakis' case:

[12.1] The statement of claim was incoherent. See [11]. It was bereft of any meaningful information as to the grounds and circumstances on which Mrs Apostolakis relied to support her ephemeral allegations. See [13].

[12.2] There was no foundation for the discrimination claim. See [15].

[12.3] The claim against Mr Garlick was untenable in the face of the affidavit evidence filed by Mr Garlick. Furthermore, the statement of claim provided no plausible basis for the assertion by Mrs Apostolakis she had been discriminated against by Mr Garlick on the basis of her family status. See [17].

[12.4] With regard to Mr Meikle the claim was unintelligible and without a plausible basis. See [19].

[13] As pointed out by the submissions for the Attorney-General, the present case is not an isolated instance. Mrs Apostolakis has filed numerous proceedings in the Tribunal that have been struck out on the basis they are an abuse of process and, in the case of at least three (including at least one relating to the same property as the present proceedings), an attempt had been made to relitigate matters decided in the Family Court, or dismissed.

[14] In these circumstances an award of costs must be made in favour of the Attorney-General and Mr Garlick.

[15] As to quantum, it is necessary that we be mindful of the “one set of costs” principle reflected in High Court Rules, r 14.15 which deals with the situation of defendants defending separately:

14.15 Defendants defending separately

The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—

- (a) several defendants defended a proceeding separately; and
- (b) it appears to the court that all or some of them could have joined in their defence.

[16] The overarching point underpinning r 14.15 is that a global award of costs is to be made to be divided between the defendants.

[17] In our view there was good reason for the first and second defendants to defend the proceedings separately. The Attorney-General has a special role under Part 1A of the Act as well as in those cases where there is an allegation of a breach of Part 2 by a person or body referred to in s 3 of the New Zealand Bill of Rights Act 1990. Mr Garlick had no choice but to defend the proceedings separately.

[18] As to quantum a global award of \$6,000 is appropriate. A differential apportionment is justified given the fact the burden of the strike-out argument was carried by the Attorney-General. In these circumstances we award \$4,000 to the Attorney-General and \$2,000 to Mr Garlick. As earlier mentioned, Mr Meikle played no part in the proceedings apart from filing a statement of reply denying the allegations made by Mrs Apostolakis.

ORDER

[19] We make a global award of costs against Mrs Apostolakis in the sum of \$6,000 to be divided as follows:

[19.1] \$4,000 in favour of the first defendant; and

[19.2] \$2,000 in favour of the second defendant.

[20] No award of costs is made in favour of the third defendant.

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Mr RPG Haines ONZM QC
Chairperson

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Ms GJ Goodwin
Member

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Mr BK Neeson JP
Member