

- (1) ORDER PROHIBITING PUBLICATION OF THE CONTENTS OF ANY DOCUMENT CONTAINED IN THE COMMON BUNDLE OF DOCUMENTS
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2020] NZHRRT 28

I TE TARAIPUNARA MANA TANGATA

Reference No. HRRT 018/2016

UNDER THE PRIVACY ACT 1993

BETWEEN DAVID ANDREW O'HAGAN

PLAINTIFF

AND NEW ZEALAND POLICE

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC ONZM, Chairperson

Ms DL Hart, Member

Hon KL Shirley, Member

REPRESENTATION:

Mr DA O'Hagan in person

Ms V McCall and Ms L Dittrich for defendant

DATE OF HEARING: 21, 22 and 23 March 2018

DATE OF DECISION: 5 June 2020

DATE OF COSTS DECISION: 23 July 2020

DECISION OF TRIBUNAL ON COSTS APPLICATION BY PLAINTIFF¹

¹ [This decision is to be cited as: *O'Hagan v Police (Costs)* [2020] NZHRRT 28. Note publication restrictions.]

BACKGROUND

[1] In these proceedings Mr O'Hagan alleged the Police did not respond to his IPP 6 request within the 20 working day timeframe allowed by the Privacy Act 1993 (PA), s 40. The Police have always admitted this breach and made apology when providing the requested information 18 days outside the 20 working day limit. In the decision delivered by the Tribunal as *O'Hagan v Police* [2020] NZHRRT 22 at [45] the Tribunal held that this apology was genuine.

[2] Mr O'Hagan sought the maximum sum of damages (\$200,000) which the Tribunal could then award. He succeeded, however, in obtaining only a declaration that the Police interfered with his privacy. See the decision at [73]. The balance of his claims were dismissed. Costs were reserved.

The application for costs

[3] Mr O'Hagan has represented himself at each stage of these proceedings. He now applies for approximately \$3,000 for legal fees and approximately \$6,000 for assistance from his therapist. No invoices, receipts, breakdown, itemisation or other form of verification has been provided.

[4] This omission is significant as it is apparent from Mr O'Hagan's submissions filed on 22 June 2020 that both categories of expense are guesstimates:

[4.1] He specifically acknowledges he has incurred legal fees in relation to other aspects of his dealings with the Police over the years and that these fees are "intertwined". No detail of any kind has been provided as to what his legal fees have been and what those fees relate to.

[4.2] The position in relation to his therapist is similar. Mr O'Hagan says he received many hours of support from the therapist in preparing himself for the hearing. This included having her read through all the materials, briefing him on the information, reading and proof-reading his documents and helping him with his thought process. He says he would estimate that since "the offending" by the Police he would have spent in excess of \$30,000. He accepts that it is hard to estimate how much of this sum relates to the Tribunal proceedings but believes a 20% or \$6,000 contribution would not be unreasonable.

The submissions for the Police

[5] For the Police it is pointed out that they have always acknowledged failure to comply with the statutory timeframe and for that reason not only offered an apology at the time, a further apology was made to Mr O'Hagan by letter dated 7 January 2016, two months before the claim was filed. In that letter Mr O'Hagan was offered \$500 as compensation.

[6] The Police submit the declaration of interference made by the Tribunal was not a substantially better outcome than the Police's acknowledgement of breach, the two apologies provided to Mr O'Hagan and the offer of compensation. Mr O'Hagan sought damages to the maximum amount within the Tribunal's then jurisdiction but was unsuccessful.

[7] The further point taken is that Mr O'Hagan does not provide any evidence to show that the claimed \$3,000 legal costs were incurred in relation to this proceeding and similarly in relation to the \$6,000 costs sought for assistance from his therapist.

DISCUSSION

[8] The primary rule, required to be applied unless legislatively altered, is that a lay litigant is not entitled to recover costs. See *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55] and [88]. The general understanding is that a person in Mr O'Hagan's situation (a lay litigant who is not a lawyer) is entitled to recover disbursements but not costs. See *Attorney-General v Taylor* [2019] NZSC 18 at [3].

[9] There is no evidence to establish that the \$3,000 in legal costs related to the preparation and presentation of Mr O'Hagan's case and the same observation must be made in relation to the "estimated" \$6,000 costs for the assistance said to have been given by the therapist. The application for costs must fail on this ground alone.

[10] There is, however, a second ground for our decision. The discretion conferred by PA, s 85(2) to award costs is broad in nature. See *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 (Mallon J) at [57] to [71]. In exercising our discretion to decline Mr O'Hagan's application we have taken into account:

[10.1] The early acknowledgement by the Police of the breach. Prior to these proceedings being issued the Police had made two apologies and offered compensation of \$500. On the facts, the filing of the proceedings was at best unwise.

[10.2] The statement of claim shows Mr O'Hagan had an unrealistic expectation as to what his proceedings could achieve. The remedies sought were:

[10.2.1] An order requiring the Police:

... to acknowledge the harm they have caused, change their procedures for dealing with failures within the police for not responding to requests.

[10.2.2] An order that the Police "to promise never to use this information against me".

[10.2.3] Damages in the amount of \$200,000.

It is difficult to accept Mr O'Hagan took legal advice either prior to formulating these claims or subsequent to that date. For the reasons given by the Tribunal at [39] the Tribunal does not have jurisdiction to grant the first of the two remedies and in addition, no pecuniary loss was pleaded. The claim for the maximum amount of damages the Tribunal could then award is further evidence of Mr O'Hagan's unrealistic expectations.

[10.3] It was plain to the Tribunal that in large measure (if not entirely) these proceedings were not really about non-compliance with the statutory timeframe. Rather, they were part of Mr O'Hagan's antagonistic relationship with the Police and his wish to express his unhappiness at a whole range of disparate issues regarding his dealings with them over the nine years in question and with his ex-wife. As recorded at [46] of the decision, Mr O'Hagan believes the Police are dishonest and he will never feel safe in his dealings with them. Bound up with

these beliefs is his fixed view his ex-wife is a serial perjurer, that he was wrongly convicted for assaulting her and one of their children and that the Family Court has erred in making protection and custody orders in favour of his ex-wife. See the decision at [46] and [67].

[11] Mr O'Hagan has little or no insight regarding his dealings with the Police, his ex-wife and the Family Court. Even his two sets of submissions in support of the costs application evidence the same hostility and antagonism to the Police. The application for costs is further evidence of a loss of perspective.

[12] Realistically, Mr O'Hagan could not expect these proceedings to produce anything more worthwhile than the two apologies and monetary compensation offered by the Police in January 2016. All his expenses were incurred in knowledge of that fact. Those expenses have not, in any event, been proved to our satisfaction.

[13] In these circumstances we conclude an award of costs should not be made. Each party having enjoyed a measure of success, they are to bear their own costs.

DECISION

[14] It follows the application for costs is dismissed.

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Mr RPG Haines ONZM QC
Chairperson

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Ms DL Hart
Member

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Hon KL Shirley
Member