IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 33**

	Reference No. HRRT 036/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**RAM NAIDU**
	PLAINTIFF
AND	**ROYAL AUSTRALASIAN COLLEGE OF SURGEONS**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms K Anderson, Member
Hon KL Shirley, Member

REPRESENTATION:
Mr AR Bell for plaintiff
Mr AJ Knowsley for defendant

DATE OF HEARING:	**16 and 17 April 2018**
DATE OF SUBSTANTIVE DECISION:	**14 June 2018**
DATE OF DECISION ON COSTS:	**23 July 2018**

DECISION OF TRIBUNAL ON COSTS[1]

INTRODUCTION

[1] In a decision given on 14 June 2018 the Tribunal made two orders in favour of Dr Naidu:

> **[1.1]** A declaration that there had been an interference with the privacy of Dr Naidu by the refusal by the Royal Australasian College of Surgeons (RACS) to provide access to personal information requested by Dr Naidu under IPP 6.

[1] [This decision is to be cited as: *Naidu v Royal Australasian College of Surgeons (Costs)* [2018] NZHRRT 33]

[1.2] A compliance order requiring RACS to give Dr Naidu access to any personal information which had not been provided to him as at the date of judgment. In relation to the referee score information summary, the Tribunal ordered that Dr Naidu be provided with such information as might be necessary to make access to the scoring and assessment of his SET application meaningful. The information was required to be provided in a manner that was transparent, intelligible and easily accessible.

[2] For the reasons explained in the 14 June 2018 decision at [23], [24], [55] to [57] and [59] to [61] each and every of the other claims for relief by Dr Naidu, specifically the claims for pecuniary loss and damages were either abandoned or dismissed.

The application for costs

[3] Dr Naidu now applies for costs. His actual costs and disbursements are $30,114.31 but indemnity costs are not sought. Rather, Dr Naidu seeks an award of $10,000 as a reasonable contribution.

[4] The essence of Dr Naidu's application is that his key motivation for filing these proceedings was to obtain clear information which would allow him to understand why he had failed the selection process. He says that had RACS provided that information in a timely manner, filing of the claim before the Tribunal would have been unnecessary. Because Dr Naidu could not access the information by way of the appeal process, he had no choice but to file these proceedings in the Tribunal.

The law

[5] 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.

[6] 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:

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

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

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

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

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

[7] As a *Calderbank* offer was made by RACS to Dr Naidu it is necessary that reference be made to High Court Rules, rr 14.10 and 14.11 which we adopt subject to all modifications necessary to reflect the Tribunal's unique human rights jurisdiction. The two rules provide:

> **14.10 Written offers without prejudice except as to costs**
>
> (1) A party to a proceeding may make a written offer to another party at any time that—
> (a) is expressly stated to be without prejudice except as to costs; and
> (b) relates to an issue in the proceeding.
> (2) The fact that the offer has been made must not be communicated to the court until the question of costs is to be decided.
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> **14.11 Effect on costs**
>
> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
> (2) Subclauses (3) and (4)—
> (a) are subject to subclause (1); and
> (b) do not limit rule 14.6 or 14.7; and
> (c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).
> (3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—
> (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
> (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.
> (4) The offer may be taken into account, if party A makes an offer that—
> (a) does not fall within paragraph (a) or (b) of subclause (3); and
> (b) is close to the value or benefit of the judgment obtained by party B.

[8] As explained by Heath J in *Aldrie Holdings Ltd v Clover Bay Park Ltd* [2016] NZHC 1482, a *Calderbank* letter is one in which a party to court proceedings makes an offer to settle on a without prejudice basis, but reserves the right to produce the letter when the question of costs is addressed. The procedure encourages a realistic appraisal of a party's position in litigation.

[9] The "public" and "private" interests which underpin offers made without prejudice except as to costs are explained in *Moore v McNabb* (2005) 18 PRNZ 122 at [55] to [60]. The purpose of such offers is to encourage reasonable and early settlement of proceedings.

[10] However, as High Court Rules, r 14.11(1) emphasises, any effect on costs of an offer made without prejudice except as to costs is at the discretion of the court or tribunal. The offer does not afford automatic protection from costs in the event that the opposing party recovers less in the proceedings than that offered.

[11] The reasonableness of a party's rejection of an offer is to be assessed at the time the offer is made and declined, not against the subsequent result. See *Weaver v HML Nominees Ltd* [2016] NZHC 473 at [30].

The submissions for RACS

[12] It is not intended to recite at length the submissions made by RACS. A brief summary follows:

> **[12.1]** Although Dr Naidu was awarded a declaration of interference and an order that he be given access to certain personal information, his claims for pecuniary loss and damages failed. Because both parties were partly successful, costs should lie where they fall.
>
> **[12.2]** By letter dated 25 May 2017 a "without prejudice except as to costs" offer was made by RACS. That offer, made almost a year before the hearing, was never responded to yet the offer included terms to reopen the appeal, a refund and waiver of the appeal fee, an acknowledgement and an apology for the breach of privacy which was later found by the Tribunal (and conceded by RACS). Because Dr Naidu received substantially the same outcome from the two-day hearing before the Tribunal, this was further reason why the parties should bear their own costs.
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> **[12.3]** The $10,000 sought by Dr Naidu appears to be premised on the basis that his claim was entirely successful whereas in fact both parties were successful in part.

The reply submissions by Dr Naidu

[13] The reply submissions by Dr Naidu stressed:

> **[13.1]** The interference with privacy conceded by the settlement offer of 25 May 2017 related to the late supply of personal information, not to the failure to provide meaningful information about the assessment score. By letter dated 2 June 2016 Dr Naidu had sought from RACS the methodology used in the scoring. That request was refused by Mr Petrusch on the same day. That was the last exchange between the parties and was the exchange that informed the decision to file proceedings with the Tribunal.
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> **[13.2]** The without prejudice offer did not advance the matter further as it did not offer to remedy the complaint that the information relating to the scoring was not readily understandable.

Discussion

[14] There is superficial attraction to the submission by RACS that each party has enjoyed an equal measure of success. We say "superficial" because the submission overlooks the fact that from the outset, Dr Naidu has been driven by an understandable desire to know why he was not admitted to the SET programme. As the Tribunal's decision at [11] records, RACS by letter dated 25 May 2015 advised him only that his

application had been unsuccessful based on his referee scores. It was not until some eleven months later (after complaint to the Privacy Commissioner) that on 8 April 2016 those scores were disclosed to him. Yet on analysis, the scores provided little meaningful information about how Dr Naidu's application had been assessed, a point emphasised by Dr Naidu in his evidence at the hearing. It was a point picked up by the Tribunal in its questions of Dr Naidu. As the submissions for Dr Naidu stress, had RACS provided information about the scoring and assessment of Dr Naidu's SET application in a manner which was transparent, intelligible and easily accessible, the Tribunal proceedings would not have been brought. The only avenue available to Dr Naidu to secure the information was through the Tribunal.

[15] In these circumstances the without prejudice letter and the fact that Dr Naidu either abandoned claims to pecuniary loss and to compensation or was declined such relief is not as significant as the submissions for RACS contend. Nevertheless weight must be given to the fact that in its original form, the claim did seek substantial damages for loss of career opportunities. That claim was abandoned very late.

[16] Our initial starting point is that $10,000 would have been an appropriate contribution to Dr Naidu's costs. However, allowing for the measure of success enjoyed by RACS and the late withdrawal of the claim for damages for loss of future career benefits, we believe the appropriate award is $5,000.

ORDER

[17] We award costs against the Royal Australasian College of Surgeons in the sum of $5,000.

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Mr RPG Haines ONZM QC **Chairperson**	**Ms K Anderson** **Member**	**Hon KL Shirley** **Member**