

Reference No. HRRT 040/2017

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN ALEX KAPIARUMALA

PLAINTIFF

AND NEW ZEALAND CATHOLIC BISHOPS CONFERENCE

FIRST DEFENDANT

AND MICHAEL GIELEN

SECOND DEFENDANT

AND SEXUAL ABUSE PROTOCOL COMMITTEE

THIRD DEFENDANT

AND BISHOP STEPHEN LOWE

FOURTH DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms K Anderson, Member

Dr SJ Hickey MNZM, Member

REPRESENTATION:

Mr CG Tuck for plaintiff

Mr S O'Sullivan and Mr M Booth for first defendant

Mr DS McGill for second defendant

Mr I Millard QC and Mr B Cullen for third and fourth defendants

DATE OF STRIKE-OUT DECISION: 11 May 2018

DATE OF DECISION ON COSTS: 19 June 2018

DECISION OF TRIBUNAL ON COSTS¹

¹ [This decision is to be cited as: *Kapiarumala v New Zealand Catholic Bishops Conference (Costs)* [2018] NZHRRT 24]

Introduction

[1] In a decision given on 11 May 2018 these proceedings were struck out as against all four defendants because the plaintiff's case is hopelessly misconceived and bound to fail.

The application for costs

[2] All four defendants now apply for costs. While the first and second defendants defended separately, the third and fourth defendants joined their defence. The actual costs incurred by the defendants (disbursements and GST included) and the contribution now sought from the plaintiff are set out in the following table:

	Costs – Actual	Costs sought
First defendant	\$31,892.27	\$9,567.70
Second defendant	\$27,869.75	\$14,000.00
Third and fourth defendants	\$38,461.75	\$19,230.00

The law

[3] 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.

[4] 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:

- [4.1] A flexible approach can be taken by the Tribunal to costs. See [60].
- [4.2] There must be caution about applying the conventional civil costs regime in the Tribunal's jurisdiction. See [61].
- [4.3] The Tribunal has broad powers to do justice even if this means departing from the conventional rules applying to civil proceedings. See [62].
- [4.4] 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.
- [4.5] Nevertheless, some claims in the Tribunal should have costs consequences. See [65].

[4.6] 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].

The submissions for the defendants

[5] It is not intended to recite at length the submissions made by the defendants and with which we agree. A brief summary follows.

[6] For the first defendant the main points are:

[6.1] Prior to the proceedings being filed the first defendant by letter dated 26 April 2016 informed the plaintiff that if he brought proceedings against it, it would apply to have those proceedings struck out and would also seek costs against him.

[6.2] After the proceedings were filed the first defendant by letter dated 12 September 2017 again wrote to the plaintiff and clearly informed the plaintiff why he should discontinue. It repeated that it would pursue him for costs if he did not do so.

[6.3] The plaintiff having unjustifiably persisted with his proceedings the first defendant has now successfully applied to have the claim struck out. The Tribunal has agreed with the first defendant's reasons as to why the claim against it could not succeed. The first defendant gave those same reasons to the plaintiff in its letter dated 12 September 2017 when warning him to discontinue.

[6.4] The actual costs incurred by the first defendant are \$31,892.27. Applying as a rule of thumb the previous decisions of this Tribunal which show awards of about 30% of actual costs, the first defendant seeks costs of \$9,567.70. The 30% figure is to be found in *Koyama v New Zealand Law Society (Costs)* [2013] NZHRRT 22 at [32].

[7] The submissions for the second defendant emphasise the following:

[7.1] The second defendant was entirely successful in striking out the plaintiff's claim.

[7.2] The facts giving rise to the plaintiff's claim against the second defendant took place between December 2009 and May 2010. That is some seven years before the plaintiff's claim was filed. This supports a finding that the claim was vexatious.

[7.3] The plaintiff would have known he had no employment relationship with the second defendant but filed his claim in any event.

[7.4] By letter dated 14 November 2017 marked "without prejudice save as to costs" the second defendant made a settlement offer of \$10,000 not because there was any merit to the plaintiff's case but simply to avoid the second defendant himself incurring legal expenses which were unlikely to be recovered in full once the proceedings were (inevitably) struck out. The plaintiff did not accept this offer.

[7.5] The interlocutory steps leading to the filing of the strike-out applications were extensive.

[7.6] The second defendant incurred actual costs of \$27,869.75 and is seeking \$14,000.00.

[8] The submissions for the third and fourth defendants are:

[8.1] There was at no time jurisdiction for the Tribunal to entertain the plaintiff's claim against the third and fourth defendants. Neither defendant had been the subject of a complaint to the Human Rights Commission and in any event neither were the employer of or in an employment relationship with the plaintiff.

[8.2] The plaintiff brought and prosecuted proceedings which had no reasonable prospect of success.

[8.3] That is, the third and fourth defendants were required to defend proceedings which should never have been brought. This had been made clear to the plaintiff at the very beginning of the proceedings.

[8.4] The third and fourth defendants were required to undertake significant work to defend the proceedings.

[8.5] On this basis it is submitted the third and fourth defendants should receive an uplift from 30% of actual costs to 50% of actual costs.

[8.6] Actual costs were \$38,461.75 with the result that costs in the sum of \$19,230.00 are sought.

No submissions by the plaintiff

[9] The plaintiff has not filed a notice of opposition nor submissions in respect of the three costs applications.

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. All four defendants have been put to considerable trouble and expense in resisting the claim and filing the various strike-out applications and extensive supporting affidavits.

[12] Letters were sent to the plaintiff explicitly alerting him to the fact that his claim was groundless and that he was exposing himself to costs. The second defendant even went to the lengths of making a written settlement offer of \$10,000 without prejudice except as to costs. It is difficult to escape the conclusion that the plaintiff chose to commence and to pursue these proceedings in full knowledge his claim lacked merit and had no reasonable prospect of success. As is apparent from the High Court decisions referred to in *Commissioner of Police v Andrews* at [32] to [42], a substantial award of costs is appropriate where the claim is, as here, vexatious.

[13] Unsurprisingly we are of the view that such an award must be made in favour of all defendants.

[14] 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.

[15] In our view there was good reason for the several defendants to defend the proceedings separately. While there was some overlap as to the various strike-out grounds, their cases were separate, discreet and in need of separate representation.

[16] Nevertheless the overarching point underpinning r 14.15 is that in a case such as the present a global award of costs is to be made to be divided between the defendants.

[17] As to the facts, the actual costs of all defendants are roughly comparable. This is because the work required was much the same. In these circumstances there is little to justify a differential apportionment of the global award.

ORDER

[18] We make a global award of costs against the plaintiff in the sum of \$36,000 to be divided as follows: \$12,000 in favour of the first defendant, \$12,000 in favour of the second defendant and \$12,000 in favour of the third and fourth defendants.

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Mr RPG Haines ONZM QC
Chairperson

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Ms K Anderson
Member

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Dr SJ Hickey MNZM
Member