IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 31**

	Reference No. HRRT 009/2012
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**SHANNON RICHARD ANDREWS**
	PLAINTIFF
AND	**COMMISSIONER OF POLICE**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson, Member

REPRESENTATION:
Mr SR Andrews in person
Mr DJ Perkins and Ms S McKenzie for Defendant
Ms K Evans and Ms S Thompson for Privacy Commissioner

DATE OF HEARING: 12 and 13 November 2012

DATE OF DECISION: 4 March 2013

DATE OF DECISION ON COSTS: 5 August 2014

DECISION OF TRIBUNAL ON COSTS

Introduction

[1] Mr Andrews is currently in prison serving a sentence of six years' imprisonment for burglary and receiving offences with a minimum non-parole period of three years.

[2] In the Tribunal's substantive decision given on 4 March 2013 the Tribunal dismissed a complaint by Mr Andrews that the Police had improperly disclosed personal information about him contrary to information privacy Principle 11. In dismissing the

claim the Tribunal at [71] presumed that given Mr Andrews' current circumstances no application for costs would be made. In case the Tribunal was wrong, costs were reserved.

The application by the Commissioner of Police for costs

[3] By application dated 22 March 2013 the Commissioner of Police sought a reasonable contribution to his costs in an amount between $7,500 and $10,000. The costs actually incurred by the Commissioner are approximately $21,000.

[4] It is submitted that there are no features of these proceedings which ought to displace the "presumption" that costs should follow the event, with the amount fixed to reflect a reasonable contribution of the costs actually incurred by the Commissioner. The submissions emphasise the following:

> **[4.1]** Mr Andrews made allegations of bad faith against Constable Potaka, allegations which had no evidentiary foundation.
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> **[4.2]** Mr Andrews made "over-inflated and unrealistic" monetary claims. It is submitted that this supports a higher award of costs.
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> **[4.3]** In preparing for the proceeding counsel for the Commissioner was required to review an unusually large volume of evidentiary material (almost 8,000 SMS text messages, written in difficult-to-interpret "text speak"). In addition there was preparation of written submissions on legal issues of some novelty and complexity, preparation of the common bundle and the briefing of a witness who lives outside Wellington.
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> **[4.4]** No allowance should be made for the fact that Mr Andrews is unrepresented.
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> **[4.5]** Although the proceeding was something of a test case as to the interaction between the relevant provisions of the Privacy Act 1993 and the Criminal Disclosure Act 2008, this should not affect the assessment of costs. Mr Andrews stood to gain financial advantage if he succeeded and the Commissioner did not seek out an opportunity to test the points determined by the Tribunal.

[5] Mr Andrews has not filed submissions in reply.

[6] The delay in delivering this decision is acknowledged and an apology offered to the parties. The regrettable delays occurred because all members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously.

Discussion

[7] It is correct that under the previous Chairperson the approach taken by the Tribunal was that costs followed the event. Whether this approach is correct does not appear to have been interrogated to any degree by the High Court in *Herron v Speirs Group Ltd* (2008) 8 HRNZ 669 at [14] or in *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [240]. The Tribunal's (then) jurisprudence appears to have been taken at face value. We, however, are of the view that in proceedings before the Tribunal an assumption that costs follow the event must be approached with considerable caution, if not rejected altogether:

[7.1] The discretion to award costs in the Tribunal's three jurisdictions is statutory and conferred in broad terms. In each case the Tribunal has power to make such award "as it thinks fit". The Tribunal cannot fetter a broad discretion by applying a "presumption" that costs are to be awarded to the successful party. The relevant provisions are the Human Rights Act 1993, s 92L, the Privacy Act 1993, s 85(2) and the Health and Disability Commissioner Act 1994, s 54(2). We reproduce only s 85(2) of the Privacy Act:

> (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.

[7.2] Little or no attention has hitherto been given to the terms of s 105 of the Human Rights Act which applies also in proceedings under the Privacy Act (see s 89 of that Act) and under the HDC Act (see s 58 of that Act):

> **105 Substantial merits**
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

This provision emphasises that the determination of any application for costs must take into account a broad range of factors which no doubt include the human rights character of the Tribunal's jurisdiction as well as the particular circumstances of the case. This is to be contrasted with the principle which applies in conventional civil litigation namely, that in all the general courts in New Zealand costs follow the event. See *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7] and [8]. So predictable is the application of this civil rule that a court does not have to give reasons for a costs order where it is simply applying the rule and that the costs awarded are within the normal range applicable to that court. This approach has brought certainty to the costs regime and relieved courts of a substantial administrative burden. See *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [8] to [17]. However, the Tribunal sits outside the civil costs regime and its jurisdiction to award costs is necessarily different, if not unique.

[7.3] The incorporation of a civil litigation rule into a system for the determination of New Zealand's human rights obligations is deeply problematical. The form of proceedings (statement of claim, statement of reply, oral evidence and adjudication by a tribunal of three persons) may in some respects resemble conventional civil litigation but form must not be confused with substance. That "substance" is the determination not of disputes between citizen and citizen in relation to private law but the determination of quintessentially public law or "constitutional" issues:

> **[7.3.1]** New Zealand has an obligation under the International Covenant on Civil and Political Rights, 1966, Article 2(1) "to respect and to ensure" the right to non-discrimination, a right incorporated directly into New Zealand domestic law by the New Zealand Bill of Rights Act 1993, s 19. Reference can be made here to Part 1A, Part 2 and Part 4 of the Human Rights Act. The State, as guarantor of this right, should not as a matter of

course be favoured with an award of costs simply because an individual has unsuccessfully put in issue an alleged violation of the right. The State must expect and tolerate individuals to challenge the exercise of state power. Such challenge should not be inhibited by the fear of potentially ruinous financial consequences.

[7.3.2] New Zealand's privacy legislation (ie the Privacy Act) has as its object the promotion and protection of individual privacy and the establishment of certain principles with respect to the collection, use and disclosure, by public and private sector agencies of information relating to individuals and access by each individual to information relating to that individual and held by public and private sector agencies. Such agencies can exercise considerable power and an individual should be free to challenge the exercise of such power without the chilling effect of an adverse award of costs automatically following should the challenge be unsuccessful.

[7.3.3] The promotion and protection of the rights of health consumers and disability services consumers and in particular the provision of a system for the resolution of complaints relating to infringements of those rights. See the Health and Disability Commissioner Act. In a quasi-regulatory environment of this kind a civil costs regime is not necessarily appropriate.

[7.4] As stated in *Heather v Idea Services Ltd (Costs)* [2012] NZHRRT 11 at [13] to [14], the discretion to award costs must promote, not negate the objects of these three statutes:

> **[13]** The jurisdiction of the Tribunal under Part 1A and Part 2 of the Human Rights Act cannot, without substantial qualification, be compared to the civil jurisdiction of the District Court or of the High Court. The subject matter is entirely different, as is the process of adjudication. The object and purpose of the Tribunal's jurisdiction can too easily be overlooked in the costs context:
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> > **[13.1]** The purpose of the Human Rights Act, as stated in the Long Title, is (inter alia) "to provide better protection of human rights in New Zealand".
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> > **[13.2]** The purpose provision in Part 3 of the Act (s 75) states that the procedures for dispute resolution under Part 3 must recognise the need for flexibility. Those procedures must also recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.
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> > **[13.3]** The objects in s 75 of the Act are reinforced by s 105 which requires the Tribunal to act "according to the substantial merits of the case, without regard to technicalities". In addition, it is required that in exercising its powers and functions, the Tribunal must act:
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> > > **[13.3.1]** In accordance with the principles of natural justice; and
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> > > **[13.3.2]** In a manner that is fair and reasonable; and
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> > > **[13.3.3]** According to equity and good conscience.
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> **[14]** The discretion to award costs must promote, not negate, these objects. Above all, the discretion should not be exercised in a way which may discourage individuals (often self-represented) from bringing claims before the Tribunal, being claims under the Human Rights Act, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994. Otherwise human rights protection in New Zealand might be weakened. One of the overarching purposes of human rights is to protect the powerless and the vulnerable. They should not, by the prospect of monetary penalty, be discouraged from bringing proceedings to access that protection. See by analogy

> *Attorney-General v Udompun* [2005] 3 NZLR 205 (CA) at [186]. Cases which are trivial, frivolous or vexatious or not brought in good faith can be dismissed under s 115 of the Human Rights Act.
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> …
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> **[17]** We are of the view that the application by the first defendants for costs proceeds on the mistaken assumption that the rules of civil procedure which apply in the District Court and High Court can be readily transplanted into the human rights jurisdiction of this Tribunal without regard to the specific statutory context in which the Tribunal works. The presumption that a discontinuance results in an award of costs is out of place in the human rights field.

[8] We turn now to the submission that the means of Mr Andrews are not relevant. We see no merit to this point. He is presently in prison and his rehabilitation on release is likely to be challenging. There is no sense burdening him with an award of costs well beyond his means (both now and into the foreseeable future) and which he in any event is unlikely to pay. It is true he sought damages at an unrealistic level and made unfounded allegations against Constable Potaka. But as a self-represented litigant with a low level of education, these features of his case are not surprising or unique and should not be used to disadvantage or punish him.

[9] At the end of the day Mr Andrews raised an important and novel point. As counsel for the Commissioner has properly conceded, the proceedings were something of a "test case" as to the interaction between the Privacy Act 1993 and the Criminal Disclosure Act 2008. Even under the High Court Rules, r 14.7(e) the "test case" point would justify a refusal of costs and at the end of the day the benefit of the Tribunal's decision will accrue entirely to the advantage of the Police and others involved in the administration of the criminal law.

[10] We conclude by referring again to the statement in *Heather v Idea Services Ltd (Costs)* that the discretion to award costs should not be exercised in a way which may discourage individuals (often self-represented) from bringing claims before the Tribunal. One of the overarching purposes of human rights is to protect the powerless and the vulnerable. They should not, by the prospect of monetary penalty, be discouraged from bringing proceedings to access that protection.

[11] Overall, our conclusion is that the costs application is unrealistic. A fair and reasonable outcome is that each party should bear his own costs.

Formal order as to costs

[12] The application by the Commissioner of Police for costs is dismissed. The parties are to bear their own costs.

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Mr RPG Haines QC	**Mr RK Musuku**	**Mr BK Neeson**
Chairperson	**Member**	**Member**