**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2014] NZHRRT 33**

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| | **Reference No. HRRT 026/2012** |
| **UNDER** | **SECTION 50 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994** |
| **BETWEEN** | **DIRECTOR OF PROCEEDINGS** |
| | **PLAINTIFF** |
| **AND** | **RUTH NELSON** |
| | **DEFENDANT** |

**AT WELLINGTON**

**BEFORE:**
**Mr RPG Haines QC, Chairperson**
**Ms K Anderson, Member**
**Ms WV Gilchrist, Member**

**REPRESENTATION:**
**Mr A Martin, Director of Proceedings, Plaintiff and Ms H Cook**
**Mr AC Beck for defendant**

**DATE OF HEARING: 26, 27, 28, 29 and 30 August 2013**

**DATE OF DECISION: 30 October 2013**

**DATE OF DECISION ON COSTS APPLICATION: 11 August 2014**

## DECISION OF TRIBUNAL ON COSTS APPLICATION BY DEFENDANT

### Background

**[1]** In a decision given on 30 October 2013 the Tribunal found that of the eight breaches of the Code of Health and Disability Consumers' Rights (the Code of Rights) alleged by the Director, only one (breach of Right 4(1)) could be determined in favour of the Director. The Tribunal made a declaration that Mrs Nelson had breached the Code of

Rights in that single respect. It declined the request for damages in the form of pecuniary loss, loss of benefit, punitive damages and damages for humiliation, loss of dignity and injury to feelings. As Mrs Nelson was in receipt of legal aid the Director's application for costs was also declined.

**[2]** Mrs Nelson, however, now seeks an award of costs in her favour.

**The application by Mrs Nelson for costs**

**[3]** The grounds on which Mrs Nelson applies for costs are, in abbreviated form:

> **[3.1]** While Mrs Nelson accepts that the Tribunal has found that she breached Right 4(1) of the Code of Rights, most of the allegations made against her were not established.
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> **[3.2]** Because of the significant divergence in the factual positions of the parties, a substantial hearing was required before the Tribunal.
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> **[3.3]** The Tribunal accepted the evidence put forward by Mrs Nelson and reached its conclusions based on the acceptance of that evidence.
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> **[3.4]** Although Mrs Nelson's position has been accepted, she has been left with a large legal aid bill. The amount owing to legal aid for legal costs is just under $20,000. The costs paid to Dr Malpas, the expert called by Mrs Nelson, amount to $3,152.
>
> **[3.5]** Mrs Nelson is a person of very limited means. The legal aid bill she faces amounts to a substantial financial burden for someone in her position.
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> **[3.6]** Mrs Nelson accordingly seeks an order that the Director contribute the sum of $10,000 towards her costs and that he also pay the costs of Dr Malpas.

**The grounds of opposition by the Director**

**[4]** In summary, the Director submits that:

> **[4.1]** The Tribunal is *functus officio* and has no jurisdiction to entertain the application for costs.
>
> **[4.2]** To grant the application would effectively reverse the result, which is that the Director succeeded, albeit to a limited extent.
>
> **[4.3]** An award of costs against the Director would substantially undermine and negate the Tribunal's finding that Mrs Nelson breached Right 4(1) of the Code of Rights.
>
> **[4.4]** Alternatively, having regard to the Director's role, the public interest in claims of this kind and the significance of the finding of a breach of the Code of Rights, the application for costs must be declined.

**Jurisdiction**

**[5]** We address first the question whether the Tribunal is *functus officio* where the party applying for costs did not seek costs in the course of the hearing.

**[6]** We propose following the decision of Fogarty J in *Wilson v Selwyn District Council* (2004) 17 PRNZ 461 at [14] where it was held that hearing an application for costs when

the main judgment is silent on the issue does not amount to varying or altering a decision already given. The application for costs is supplemental and the court or tribunal has jurisdiction to consider it. The principle of the need for finality of litigation is not undermined. There ought to be basic reciprocity of ability of parties to apply for costs. We accordingly reject the submission that the Tribunal is *functus*.

## Costs – general principles

**[7]** The jurisdiction to award costs in proceedings under the Health and Disability Commissioner Act 1994 (HDC Act) is statutory. Section 54(2) empowers the Tribunal to make any award of costs as it thinks fit:

> (2) In any proceedings under section 50 or section 51, the Tribunal may award such costs against the defendant as it thinks fit, whether or not it makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
>
> (3) Where the Director of Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Commissioner, and the Commissioner shall not be entitled to be indemnified by the complainant or, as the case may be, the aggrieved person.

**[8]** The general principles usually applied by the Tribunal when considering costs were recently reviewed by the Tribunal in *Haupini v SRCC Holdings Ltd (Costs)* [2013] NZHRRT 23 (28 May 2013) at [13]-[18]. We repeat the caveat in para [16] of that decision. The civil litigation rule that costs follow the event may not be appropriate in the context of the human rights-centred jurisdiction of the Tribunal under the Human Rights Act 1993, the Privacy Act 1993 and the HDC Act. Too little 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). Section 105 provides:

> **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.

**[9]** Given the broad terms of this provision it has application (inter alia) where an application for costs is made. It emphasises that the determination of any such application 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 the costs awarded are within the normal range applicable to that court.

**[10]** 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. See further the recent decision in *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31 (5 August 2014). Each case must be addressed on its own facts.

## Award of costs against apparently successful party

**[11]** In the present case the Tribunal is called on to determine an issue which for the Tribunal is novel, namely whether costs can be awarded against an apparently successful party.

**[12]** In conventional civil litigation an award of costs can be made in favour of an unsuccessful party, but only in extreme cases. See *Body Corporate 97010 v Auckland City Council* (2001) 15 PRNZ 372 (CA) at [20] to [21]:

> [20] In England it has been said by the Court of Appeal that where the successful party raises issues or makes allegations improperly or unreasonably, "the Court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs", from which it is implicit that "a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs" (In *re Elgindata Ltd (No 2)* [1992] 1 WLR 1207, 1214).
>
> [21] In this country there is, as we have observed, a general discretion and, although it is qualified by the specific rules, we do not understand the drafter of those rules to have attempted the impossible task of covering every possibility. We consider, therefore, that in an extreme case an award of costs could be made in favour of an unsuccessful party, as envisaged in *Elgindata*. But this is far from being such a case.

**[13]** Taking into account the s 105 principles of substantial merits, fairness, reasonableness and equity and good conscience, we see no reason in principle why costs should not be awarded against an apparently successful party, particularly if, for example, the conduct of that party has unnecessarily raised issues, prolonged the hearing or imposed unnecessary expense to the opposing party.

## Discussion

**[14]** Applying the statutory criteria in s 105 of the Human Rights Act we are of the view that there are two key factors which justify an award of costs in favour of Mrs Nelson:

> **[14.1]** First, seven of the alleged breaches of the Code of Rights were either not proved or found to be a duplication of the (established) breach of Right 4(1). The Tribunal's decision refers at [190] to the alleged breach of Right 4(2) being a repetition of the breach of Right 4(1). Paragraph [199] comments on the "unfortunate appearance of 'overcharging'" and at [205] comment is made on the inappropriate deployment of Right 4(3).
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> **[14.2]** Second, the Tribunal was much assisted by Dr Phillipa Malpas, senior lecturer in clinical medical ethics at the University of Auckland. Dr Malpas was called by Mrs Nelson, not the Director.

**[15]** We address first the evidence of Dr Malpas. Her appearance as a witness for Mrs Nelson must be seen against the background that the report by the Deputy Health and Disability Commissioner appended Appendix A, being the independent advice to the Commissioner from ethicist Professor Grant Gillett. Professor Gillett was asked to give his advice first on the basis that the facts were to be assumed to be those put forward by Mrs Maine's family and second, those put forward by Mrs Nelson. Professor Gillett concluded that if the events were as Mrs Nelson claimed, she did not appear to have violated any ethical standards except, perhaps, to have been too accommodating to a patient's wishes in a highly unusual situation.

**[16]** The Director did not call Professor Gillett as a witness. Dr Malpas was, however, cross-examined extensively by the Director on Professor Gillett's advice. There seemed little difference between her evidence and Professor Gillett's advice.

**[17]** As recorded in the Tribunal's decision at [178], helpful as the evidence of Mr Cottingham was, the Tribunal was substantially assisted by the evidence of Dr Malpas as well as the evidence of Professor Gillett indirectly incorporated into evidence through Dr Malpas. At [195] the Tribunal commented that the evidence of Dr Malpas had had a significant impact in view of her appreciation of the complexities of the ethical issues brought about by a highly unusual set of circumstances. The Tribunal stated:

> **[196]** In view of our reservations concerning Mr Cottingham's evidence and further given our acceptance of the evidence given by Dr Malpas we find that the Director has not established that there was a failure to set and maintain professional boundaries as alleged in particular (b).

**[18]** In view of the clear need for the Tribunal to be assisted by an expert medical ethicist, we do not see why Mrs Nelson should carry the burden of paying the cost of calling Dr Malpas when Professor Gillett was available to be called by the Director. Our finding is that an order that the Director pay this expense is appropriate on the facts. Without Dr Malpas the Tribunal would not have had squarely before it evidence which the Director himself could have called and indeed relied on. An impecunious defendant who responsibly calls expert evidence to fill a gap left by the Director's evidence should not be left without recompense in the event of the Director largely failing to establish the allegations made against the defendant.

**[19]** On the question of "overcharging" and duplication, the statement of claim, in alleging eight breaches, pleaded no fewer than 21 particulars:

- Right 4(1) – four particulars with five sub-particulars given in relation to the last allegation
- Right 4(2) – three particulars
- Right 4(3) – two particulars with two sub-particulars given in relation to the last allegation
- Right 4(4) – two particulars
- Right 4(5) – one particular
- Right 6(1) – four particulars with four sub-particulars given in relation to the last allegation
- Right 6(2) – four particulars with four sub-particulars given in relation to the last allegation
- Right 7(1) – one particular.

**[20]** We are mindful of the need for the Director to properly particularise the allegations made against a defendant and we also recognise that the Director cannot predict in advance what view of the facts will be taken by the Tribunal. It may be tempting to plead all available perceived breaches of the Code of Rights. But as happened in the present case this can lead to unnecessary complexity and duplication. The cost of defending such proceedings is not a burden which should be borne by the defendant alone when the Director is largely unsuccessful. This does not negate the point made in *Haupini* at [46] that a statutory officer such as the Director of Proceedings has an important role under the HDC Act and that the Director should not be deflected from bringing proceedings before the Tribunal by the prospect of an adverse award of costs. The "chilling effect" of an award, even in cases where the Director is successful to a limited degree, cannot be lightly ignored.

**[21]** However, recognition must also be given to the fact that while the Director brings proceedings under the HDC Act in the public interest, care must be taken not to overwhelm a defendant and overburden the Tribunal's processes by alleging breaches of every conceivable provision of the Code of Rights. While there is no challenge to the fact that it is for the Director and the Director alone to select which allegations to bring before the Tribunal, unnecessary duplication is best avoided by concentrating on the truly significant breaches believed by the Director to be established by the evidence.

**[22]** We take these factors into account in determining that rather than the Director contributing the requested $10,000 costs plus $3,152 for Dr Malpas, the demands of fairness and equity will be satisfied by an award of costs in the sum of $5,000 made up of $3,152 for Dr Malpas with the balance underlining the duplication and overcharging factors referred to earlier.

**[23]** Such award will not reverse or undermine the result. Rather it will give recognition to the fact that it was Mrs Nelson's expert witness who assisted the Tribunal most and that the Director secured no remedy in relation to seven of the eight allegations made in the statement of claim. Just as the Director should not be discouraged from the proper enforcement of the Code of Rights, defendants should not be discouraged from defending proceedings because of a perception that the Director is de facto immune from having costs awarded against him or her. We believe that a modest award of costs achieves a proper reconciliation of these competing interests.

**Formal order as to costs**

**[24]** Pursuant to s 54(2) the Tribunal awards costs against the Director in the sum of $5,000.

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| **Mr RPG Haines QC** | **Ms K Anderson** | **Ms WV Gilchrist** |
| **Chairperson** | **Member** | **Member** |