IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 3**

	Reference No. HRRT 020/2013
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**MARK CHRISTOPHER MEULENBROEK**
	PLAINTIFF
AND	**VISION ANTENNA SYSTEMS LIMITED**
	DEFENDANT

AT INVERCARGILL

BEFORE:
Mr RPG Haines QC, Chairperson
Ms DL Hart, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr RW Kee and Ms JV Emerson for plaintiff
Ms RK Brazil and Ms H Young for defendant

DATE OF HEARING:	**15, 16, 17 and 18 September 2014**
DATE OF DECISION:	**14 October 2014**
DATE OF DECISION ON COSTS:	**19 February 2015**

DECISION OF TRIBUNAL ON COSTS APPLICATION BY PLAINTIFF[1]

Background

[1] The Tribunal decision given on 14 October 2014 in *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51 reserved the question of costs. Written submissions by the parties have now been received and considered.

[2] Mr Meulenbroek, having been successful in every respect, seeks costs of $17,626.12 made up as follows:

[1] [This decision is to be cited as: *Meulenbroek v Vision Antenna Systems Ltd (Costs)* [2015] NZHRRT 3]

[2.1] $13,125.00 hearing fee.

[2.2] $3,689.12 travel and accommodation costs for counsel.

[2.3] $812.00 travel costs for Mr Victor Kulakov, a witness.

Jurisdiction to award costs

[3] The Tribunal's power to award costs is contained in s 92L of the Human Rights Act 1993. The power is discretionary:

> **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] Because the written submissions filed by the parties are in agreement as to the principles to be applied we do not intend rehearsing those principles. We address only those matters which in our view are the main points.

The *Calderbank* offers

[5] On 15 February 2013 Vision Antenna Systems Ltd (Vision) made a "without prejudice except as to costs" offer to settle by letter to Mr Meulenbroek's former counsel for an all-inclusive amount of $6,000. That offer was rejected on 17 April 2013.

[6] Shortly before the substantive hearing Vision itself rejected two "without prejudice except as to costs" offers made by Mr Meulenbroek. Each offer was for an amount less than that later awarded by the Tribunal:

> **[6.1]** In the first offer dated 22 July 2014 Mr Meulenbroek said he would settle the matter for an acknowledgement of breach; an apology; a work reference; payment of $8,128 for pecuniary loss; $6,929.90 for legal expenses; and $22,500 for humiliation, loss of dignity and injury to feelings. This offer involved payment of $2,500 less than what the Tribunal ultimately ordered. Vision rejected this offer on 30 July 2014.
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> **[6.2]** In the second offer made on 22 August 2014 the amount sought for humiliation, loss of dignity and injury to feelings was reduced from $22,500 to $18,000. That is, the offer involved payment of $7,000 less than what the Tribunal ultimately ordered. Vision rejected this offer also.

[7] Mr Meulenbroek submits both offers were reasonable and had they been accepted he would not have incurred the considerable costs involved in having to conduct the hearing. He further submits he could justifiably seek an uplift of the $3,750 per day average payment in reliance upon the rejection of the *Calderbank* offers, but does not do so. However, he submits the rejection of the offers by Vision should be taken into account in requiring Vision to meet the accommodation and travel costs incurred by Mr Meulenbroek's counsel.

[8] Vision criticises Mr Meulenbroek for delaying his settlement offers until eight weeks before the hearing by which time the majority of case preparation had been completed. Vision also submits this was a test case of national significance and now provides guidance to employers when facing similar situations. In participating in the test case Vision has learnt a hard lesson financially and it would be unreasonable for further monetary penalty to be imposed simply because it happened to be the "test case" on the s 28(3) defence under the Act.

Commentary on the *Calderbank* offers

[9] The purpose of a *Calderbank* letter is to encourage settlement prior to the commencement of the hearing. Such offers are governed by High Court Rules, rr 14.10 and 14.11. For convenience we adopt and apply those provisions which make it clear that the effect of a *Calderbank* offer on the question of costs remains at the discretion of the Tribunal.

[10] It is understandable the amount offered by Vision ($6,000) was unacceptable to Mr Meulenbroek.

[11] Once the decision in *Nakarawa v AFFCO NZ Ltd* [2014] NZHRRT 9 had been published the parties knew in a not dissimilar case involving discrimination consequent upon a worker wishing to observe the Sabbath from sunset on Friday to sunset on Saturday, an award of $15,000 had been made for humiliation, loss of dignity and injury to feelings and in addition $12,118 had been awarded for lost wages.

[12] In these circumstances the subsequent settlement offers made by Mr Meulenbroek on 22 July 2014 and 22 August 2014 were reasonable and should not have been rejected, particularly the second offer. This was a clear case of discrimination and there was little or no evidence to support the "unreasonable disruption" defence advanced by Vision under s 28(3) of the Act.

[13] We cannot accept the submission by Vision that this was a test case. Most, if not all of the primary legal issues were settled in *Nakarawa* as can be seen from the *Meulenbroek* decision at [103] to [110]. The main task of the Tribunal was to apply the law (as set out in *Nakarawa* and expressly not challenged by Vision) to the facts. When the Tribunal addressed s 28(3) of the Act at [135] it specifically cited *Nakarawa* as correctly setting out the manner in which s 28(3) was to be interpreted and applied. Far from Mr Meulenbroek's proceedings being a test case, it is, as mentioned, more a case of applying unchallenged law to the specific facts. The Tribunal reached the conclusion at [159] that by the "widest of margins" Vision had failed to establish to the civil standard the "unreasonable disruption" exception in s 28(3). The decision by Vision to defend these proceedings was fundamentally misguided.

[14] Vision submits the awarding of costs against a small business will compound a negative situation. That may be so but we do not accept it follows an award of costs is therefore punitive. The fact remains the evidence produced in support of the "defence" fell well short of satisfying the civil standard of proof. If anything, the small size of Vision's business, its limited resources and its weak evidence ought to have led to acceptance of the amended *Calderbank* offer dated 22 August 2014.

[15] Next we address the relevance of the fact that Mr Meulenbroek was represented by the Director of Human Rights Proceedings.

The role of the Director of Human Rights Proceedings

[16] Mr Meulenbroek was represented by the Director of Human Rights Proceedings as anticipated by s 90(1)(a) of the Act.

[17] The effect of s 92C is that should an award of costs be made against Mr Meulenbroek, that award must be paid by the Director. Conversely, any award of costs made in favour of Mr Meulenbroek must be paid to the Office of Human Rights Proceedings. See s 92C:

> (4) The Office of Human Rights Proceedings must pay any award of costs made against a person in proceedings for which representation is provided for that person by the Director.
>
> (5) Any award of costs made in favour of a person in proceedings for which representation is provided for that person by the Director must be paid to the Office of Human Rights Proceedings.

[18] The Director does not assert that his statutory role under the Act confers an immunity from an adverse award of costs although the Director's public function may be reason for departing from the civil litigation model in which costs follow the event. The issue was referred to but left open in *Haupini v SRCC Holdings Ltd* [2013] NZHRRT 23 at [47] to [49]. On the facts, the issue does not arise for consideration and we determine the costs application on the basis that just as the Director is not immune from a costs award, he is not to be denied costs when a plaintiff represented by him is successful. This much is clear from the fact that s 92C(4) and (5) anticipate costs being awarded in both directions.

[19] In *Haupini* $15,000 was awarded to SRCC Holdings Ltd following a three day hearing. That award was calculated at $5,000 per day, a figure slightly higher than the average award of $3,750 per day usually made by the Tribunal.

Quantum

[20] In relation to counsel's travel and accommodation costs Vision submits the Director should have instructed Invercargill counsel. We are of the view, however, that litigation under the Human Rights Act is a specialised area of law and it is appropriate the Director and staff of the Office of Human Rights Proceedings appear on such matters where there are not sufficiently countervailing factors. Furthermore, instructing Invercargill counsel would have resulted in double-handling and would possibly have cost more.

[21] Vision submits the evidence of Pastor Victor Kulakov was not essential and could have been given by telephone or audio-visual link. As to this it is to be noted no pre-trial application was made by Vision that Mr Kulakov's evidence be given otherwise than in person. Second, we accept the submission for the Director that Mr Kulakov was an important witness and that his evidence formed part of the central narrative in at least four ways. First, he spoke authoritatively about the tenets of the Seventh Day Adventist Church and the significance of the Sabbath. Second, he witnessed Mr Meulenbroek's re-integration into the Church and described how Mr Meulenbroek's faith gradually evolved. This evidence was corroborative of Mr Meulenbroek's own evidence. Third, Mr Kulakov was directly involved in the central events. He made pleas to Vision to respect Mr Meulenbroek's religious beliefs and tried to negotiate a resolution. These efforts were relevant to the central issue whether Vision adequately tried to accommodate Mr Meulenbroek's religious beliefs. Fourth, Mr Kulakov gave pastoral support and was Mr Meulenbroek's counsellor throughout the relevant events. He was able to describe first-

hand how Mr Meulenbroek suffered as a result of Vision's actions. Given the significance of Mr Kulakov's evidence it was appropriate he attend in person and be available for cross-examination by Vision and questioning by the Tribunal.

[22] As to the hearing costs, the Director seeks costs at the moderate level of $3,750 per day when a higher fee of $5,000 could have been justified on the grounds that the *Calderbank* offers were unreasonably rejected.

Overall conclusion

[23] For the reasons given we conclude an award of costs is appropriate and that the amounts sought by Mr Meulenbroek are a fair and reasonable contribution. Unfortunately Vision has only itself to blame as it embarked upon a hearing without evidence sufficient to establish its defence and knowing the *Nakarawa* decision underlined the risks it was running.

Formal order as to costs

[24] Pursuant to s 92L of the Human Rights Act 1993 costs in the sum of $17,626.12 are awarded to Mr Meulenbroek. This sum is intended to be all inclusive.

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Mr RPG Haines QC	**Ms DL Hart**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**