IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 28**

	Reference No. HRRT 017/2013
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**LOUISA HARERUIA WALL**
	Plaintiff
AND	**FAIRFAX NEW ZEALAND LIMITED**
	First Defendant
AND	**THE MARLBOROUGH EXPRESS**
	Second Defendant
AND	**THE CHRISTCHURCH PRESS**
	Third Defendant

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr MJM Keefe JP, Member

REPRESENTATION:
Ms PJ Kapua for plaintiff
Mr RKP Stewart for defendants
Ms SA Bell and Mr MJV White for Human Rights Commission as intervener

DATE OF SUBSTANTIVE DECISION: 12 May 2017

DATE OF DECISION ON COSTS: 31 July 2017

DECISION OF TRIBUNAL ON COSTS[1]

Introduction

[1] The Tribunal's substantive decision given on 12 May 2017 dismissed the plaintiff's claim because the Tribunal found that while the two cartoons were insulting, they were

[1] [This decision is to be cited as: *Wall v Fairfax New Zealand Ltd (Costs)* [2017] NZHRRT 28.]

not likely to excite hostility against or to bring into contempt Māori and Pacifika on the ground of their colour, race, or ethnic or national origins.

[2] By application dated 30 May 2017 the defendants seek $45,000 as a contribution to their actual costs which to the end of April 2017 amounted to $155,839.89. This sum includes disbursements of $27,437.44.

[3] The plaintiff opposes the application, submitting costs should lie where they fall.

[4] No costs are sought by or against the Human Rights Commission which intervened in the proceedings under s 92H(1) of the Human Rights Act 1993.

The statutory provisions

[5] The Tribunal's discretion to award costs in cases under the Human Rights Act is statutory and conferred in broad terms. Section 92L(1) states that the Tribunal may make any award as to costs "that it thinks fit". Subsection (2) goes on to provide that without limiting this broad discretion, the Tribunal "may" take into account whether, and to what extent, any party to the proceedings:

> **[5.1]** Has participated in good faith in the process of information-gathering by the Human Rights Commission.
>
> **[5.2]** Has facilitated or obstructed that information-gathering process.
>
> **[5.3]** Has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

[6] As pointed out in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [68], these factors indicate an intent that the motivations and behaviour of the parties are particularly important factors in deciding whether there should be any costs award in the Tribunal's jurisdiction under the Human Rights Act.

The particular character of the Tribunal's jurisdiction

[7] In *Andrews* at [63] the particular character of the Tribunal's jurisdiction was recognised as being highly relevant:

> **[63]** … Public or constitutional issues arise. The Tribunal provides a forum through which individuals, who are potentially vulnerable, can challenge the exercise of state power over them. The Tribunal noted in *Heather* that the long title to the Human Rights Act states that it is to "provide better protection for human rights in New Zealand" and that the discretion to award costs should promote, not negate, this purpose. Access to the Tribunal should not be unduly deterred.

[8] More significantly the Tribunal is one of the primary instruments through which New Zealand implements at domestic level the human rights obligations it has undertaken in international law. Here the relevant treaties are the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) and the International Covenant on Civil and Political Rights, 1966 (ICCPR). It is wrong in principle that contest between private parties over the meaning of legislation domesticating international obligations carries an expectation that the losing party will bear the costs of the successful party. Responsibility for "respecting and ensuring" the ICCPR rights is a State obligation (Article 2(1)), as is the responsibility to enact domestic legislation which is both clear and without ambiguity.

[9] There is also the principle of access to justice as recognised in *Andrews* at [57]. It is a principle of some significance in the costs context. It is particularly important that the

Tribunal recognise that the risk of having to pay the legal costs of the opposing side (or a contribution to those costs) if one loses and the uncertainty at the outset of the proceedings as to how large those costs will be are likely to be a barrier to the bringing of proceedings, or at the very least, to have a significant chilling effect. The prospect of bankruptcy would, to most litigants, be too high a price to pay for bringing proceedings before the Tribunal. The facts in *Haydock v Gilligan Sheppard* HC Auckland CIV2007-404-2929, 11 September 2008 are illustrative. The Tribunal (as then constituted) awarded costs of $12,500 against the unsuccessful plaintiff (Ms Haydock). On her unsuccessful appeal to the High Court she was ordered to pay a further $7,500. She is recorded at [45] of the decision as stating that her financial position was parlous and that she intended declaring herself bankrupt.

A case of public importance

[10] The defining feature of the present case is its public importance. Such importance is self-evident from the circumstances, namely the wide publication and dissemination of two controversial editorial cartoons which led to an extended public discussion of race and poverty in New Zealand.

[11] This in turn led to an examination by this Tribunal of the degree to which New Zealand honours its obligation to respect freedom of expression while also preventing discrimination in the form of the publication or distribution of written matter which is threatening, abusive or insulting and likely to excite hostility against or likely to bring into contempt any group of persons on the ground of their colour, race or ethnic or national origins. This issue is without question a matter of public interest. The defendants' own submissions of 30 May 2017 underline the point:

> Accordingly, the issues raised by the plaintiff and the Commission were of fundamental importance to the defendants as a media organisation and a publisher of news and opinions. Any limitation on the defendants' right to freedom of expression – to impart information – and the public's corresponding right to receive information – in any form, was directly at issue and required a comprehensive response.

[12] The importance of the case was underscored by the decision of the Human Rights Commission to exercise its right under s 92H(1) of the Human Rights Act to appear and to be heard in the proceedings. In giving notice of its intention to appear the Commission stated the proceedings raised issues of general and public importance that would have an impact on the development of human rights jurisprudence in New Zealand. As noted in the Tribunal's decision at [7] the Commission also pointed out s 61 of the Act has seldom been the subject of judicial examination and that the case would involve significant issues of interpretation about the application of the Act, its relationship with the Bill of Rights and the role of the Commission's disputes resolution process.

[13] The public interest profile of the case was underlined by the evidence called by the Commission which included statistics showing that in the period 1 January 2010 to 24 July 2014 it received 499 individual complaints or enquiries regarding 20 "events" which caused people to approach the Commission regarding s 61.

Public interest and the award of costs

[14] Given that the defining feature of these proceedings is their public importance we are of the clear view no award of costs is to be made.

[15] While it is unnecessary to draw on analogues from the civil jurisdiction it is to be noted that provision is made in r 14.7(e) of the High Court Rules for costs to be refused (or reduced) in civil proceedings where a case concerns a matter of public interest:

14.7 Refusal of, or reduction in, costs

Despite rules 14.2 to 14.5, the court may refuse to make an order for costs or may reduce the costs otherwise payable under those rules if—

…

(e) the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding; or

…

[16] The exercise of this discretion requires the court to be satisfied that the unsuccessful litigant has acted reasonably in the conduct of the proceeding and that a private interest is not being dressed up as a public one. See *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 993, (2014) 21 PRNZ 766 at [10].

[17] The public interest exception must, in the Human Rights Act context, be approached within the context of the human rights character of the Tribunal's jurisdiction and, where appropriate, the "matters" listed in s 92L(2).

[18] As to s 92L, the Human Rights Commission took the view no prima facie breach of s 61 had occurred. Mediation was accordingly not offered. See the decision of the Tribunal at [93] and [103] to [108]. In these circumstances the factors listed in s 92L largely fall away. We are also of the view the plaintiff has acted reasonably in the conduct of the proceedings. We see little, if anything, to support the criticisms made of her by the defendants.

[19] The defendants submit in their submissions dated 30 May 2017 (at para 10.3) that the plaintiff "would gain political capital from a decision in her favour". In our view the submission is entirely without justification. As can be seen from the Tribunal's decision at [1] to [17], child poverty has for a substantial number of years been a significant issue in New Zealand. It is an issue which has preoccupied politicians, policy-makers, community leaders and the public. The evidence establishes that both Māori and Pacifika children are over-represented in child poverty statistics. See the Tribunal's decision at [13].

[20] While it is true the plaintiff is an elected Member of Parliament for Manurewa, it is equally true that, as recorded in the decision at [33], some 92.3% of school pupils in Manurewa attend decile 1 to 4 schools to which the breakfast in schools extension was targeted when it was announced in May 2013. Virtually all of the decile 1 to 4 schools in the electorate participate in some form of a food in schools programme. Some 37.3% of school pupils are Pacifika and 35.7% are Māori. As the Tribunal observed at [35], given the prevalence of child poverty in New Zealand and its particular impact on Māori and Pacifika children, the views expressed by Ms Wall (and by her witnesses) were entirely understandable and reasonable.

[21] It must also be emphasised that having seen and heard Ms Wall give evidence we are satisfied that in bringing these proceedings she was motivated not by the prospect of gaining political capital, but by a genuine desire to give voice to a disenfranchised minority group (young Māori and Pacifika) who properly felt insulted by their representation in mainstream media. The expert evidence called by the plaintiff underlined the serious purpose of these proceedings and while the relevance of much of that evidence fell away once the Tribunal found that the test in s 61(1) is an objective one, it is plain these proceedings and all those who participated in it (both for the plaintiff and for the defendants) were genuine and sincere. We saw no evidence of political posturing by the plaintiff.

[22] In the circumstances the submission that the plaintiff was seeking to gain political capital from a decision in her favour is rejected.

Conclusion

[23] For the reasons given we are of the view all parties should bear their own costs. The application by the defendants is dismissed.

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Mr RPG Haines QC	**Ms GJ Goodwin**	**Mr MJM Keefe JP**
Chairperson	**Member**	**Member**