**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2012] NZHRRT 26**

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| | **Reference No. HRRT 022/2011** |
| **IN THE MATTER OF** | **A CLAIM UNDER THE PRIVACY ACT 1993** |
| **BETWEEN** | **MARCUS JAMES STEELE** |
| | **PLAINTIFF** |
| **AND** | **BOARD OF TRUSTEES OF SALISBURY SCHOOL** |
| | **DEFENDANT** |

**AT NELSON**

**BEFORE:**
**Mr RPG Haines QC, Chairperson**
**Ms J Grant MNZM, Member**
**Ms S Ineson QSM, Member**

**REPRESENTATION:**
**Mr Steele in person**
**Mr DM O'Neill for Defendant**

**DATE OF HEARING: 16 December 2011 and 23 January 2012**

**DATE OF COSTS DECISION: 23 November 2012**

## DECISION OF TRIBUNAL ON COSTS

### Introduction

**[1]** The decision of the Tribunal given on 7 September 2012 found that while there had been an interference with Mr Steele's privacy no remedy would be granted:

> **Relief**
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> **[54]** Against this background we have reached the clear conclusion that, while there has been an admitted interference with Mr Steele's privacy by the out of time delivery of the documents mentioned, he has not, in terms of s 88 of the Privacy Act, suffered any pecuniary loss, loss of benefit or humiliation, loss of dignity or injury to feelings. As to the claim for $2,000 for

"interference with the care of my child", this is not relief of the kind encompassed by ss 85 and 88 of the Act. In any event, we would not be minded to grant such relief even if it was within our jurisdiction to do so.

**[55]** The only remaining issue is whether a declaration should be made under s 85(1)(a) of the Privacy Act that there has been an interference with Mr Steele's privacy.

**[56]** We are of the view that no such declaration should be made. Mr Steele's communications with school management on 19 November 2010 (the email addressed to Mr Heal and copied to Ms Kennedy) and on 21 November 2010 (the email to Ms Davies) were written in aggressive and offensive terms. So too was the email he sent to Mr Dennis on 25 November 2010 making a request under the Privacy Act. His submissions to the Tribunal have contained unfounded allegations against the School, including an assertion that Ms Kennedy has made up "stories" and that the lawyers representing the School have advised their client to defend the proceedings so that they (the lawyers) could make money in preference to settling the case.

**[57]** In our view there has been a clear and serious breach of the standards to be expected of a litigant in terms of *Geary v New Zealand Psychologists Board* [2012] NZHC 384 at [108]. For this reason we have decided that our discretion to grant declaratory relief should be denied.

**[58]** On the same basis we decline to award internet, telephone and travel costs.

**Summary of findings**

**[59]** The only breach of Principle 6 established by the evidence is the admitted failure by the School to provide the twenty pages of documents included in the Bundle of Documents. However, we decline to make a declaration that there has been an interference with Mr Steele's privacy.

**Formal orders**

**[60]** For the foregoing reasons the decision of the Tribunal is that:

**[60.1]** A declaration of interference with privacy is denied.

**[60.2]** No damages or other forms of remedy under ss 85 and 88 of the Act are to be awarded.

**[60.3]** The proceedings brought by Mr Steele are dismissed.

**[2]** While the Tribunal hoped that its decision would bring an end to these proceedings, costs were reserved.

## Application by Board of Trustees for costs

**[3]** By application dated 28 September 2012 the Board of Trustees of Salisbury School has sought costs on two grounds:

**[3.1]** The Board successfully opposed Mr Steele's proceedings.

**[3.2]** On 30 September 2011 the solicitors for the Board sent to Mr Steele a letter written without prejudice save as to costs inviting Mr Steele to withdraw his proceedings immediately. It concluded:

> If you do not take advantage of this offer and you lose in the Tribunal, then the school reserves the right to place this letter before the Tribunal in seeking higher than usual costs against you.

**[4]** The School has paid $47,182.40 plus GST in costs. These costs are broken down as follows:

- Costs – Cooney Law $11,375.00 plus GST
- Costs – DM O'Neill $34,400.00 plus GST

- Disbursements $1,407.40 plus GST
- Total $47,182.40 plus GST.

It is acknowledged that a small downward adjustment of approximately $400 plus GST is to be made to allow for time spent dealing with the School's insurer.

**[5]** Without repeating in detail the submissions in support of the application the argument in general terms is that:

> **[5.1]** The School successfully defended the claims by Mr Steele and costs should follow the event.
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> **[5.2]** Because Mr Steele is a lay litigant his evidence was not sharply focussed or presented. The School incurred greater expense because the case was not conducted by Mr Steele through a lawyer. In this regard the School refers to the Tribunal's finding at para [57] of the decision that Mr Steele breached the standards to be expected of a litigant.
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> **[5.3]** Through no fault of its own, the School was put to the expense of an adjourned hearing on 23 January 2012. The Chairperson's *Minute* of 16 December 2011 recorded that Mr O'Neill had, in opposing the adjournment application by Mr Steele, foreshadowed an application for costs.
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> **[5.4]** While the School acknowledges that it did not provide access to twenty pages of personal information about Mr Steele, the reason was understandable and the Tribunal has upheld this view of the evidence. Reference is made to the decision at para [51]:
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> > **[51]** While these twenty pages of personal information were initially withheld the cause was the confusing way in which the requests of 19 November 2010 and 22 November 2010 were worded as well as by the school having to deal simultaneously with Mr Steele and his lawyer. It is to be noted that whenever the request for personal information was clear and unambiguous, the school complied within a matter of hours. These factors are relevant to the assessment to be made in terms of s 85(4) of the Act.
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> **[5.5]** Most of Mr Steele's points were "unmeritorious, lacked substance and lacked credibility". Reliance is also placed on the fact that the Privacy Commissioner concluded that although there had been an interference with Mr Steele's privacy, no real practical disadvantage had resulted.
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> **[5.6]** The *Calderbank* or "without prejudice save as to costs" letter dated 30 September 2011 was unequivocal and unambiguous. It was made clear in that letter that the School believed that the claim had no basis and no merit. The School wanted the matter finished then. As Mr Steele has advanced his claim in the face of that proposal it is appropriate that Mr Steele pay a higher than usual contribution towards the costs of the School. At the time the "without prejudice save as to costs" offer was made negligible legal costs had been incurred by the School. In particular, counsel's costs at that point were approximately $780.

**The submissions by Mr Steele**

**[6]** In his memorandum dated 30 October 2012 Mr Steele, in part, invites the Tribunal to revisit the facts. This we are unable to do. He also raises irrelevant matters relating to the School's insurer and to his appeal to the High Court against the Tribunal's decision.

Doing the best we can it would appear that the submissions relevant to the costs issue are:

> **[6.1]** At the commencement of the proceedings Mr Steele would have settled for a $3,000 payment and an apology for the interference with his privacy.
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> **[6.2]** It was not necessary for the School to have instructed a solicitor and counsel based in Cambridge and Hamilton respectively. As a result unnecessary costs for travel and accommodation were incurred.
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> **[6.3]** The failure by the School to provide the documents in question was an avoidable failure by persons who ought to have known better the obligations of the School under the Privacy Act 1993.
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> **[6.4]** Mr Steele left school in Form 3, owns nothing and has been on a benefit for the last 30 years.

**[7]** In his Reply submissions Mr O'Neill points out that any proposal made by Mr Steele to settle was without prejudice and should not now be raised by Mr Steele. In a subsequent memorandum dated 6 November 2012 Mr Steele takes issue with this point. It will be seen that we do not need to resolve the dispute.

**Discussion**

**[8]** The principles hitherto applied by the Tribunal (differently constituted) when considering costs are summarised in *Herron v Spiers Group Ltd* HC Auckland CIV-2006-404-2277, 30 October 2008, (2008) 8 HRNZ 669 (Andrews J, J Binns and D Clapshaw) at [14]:

> (a) The discretion to award costs is largely unfettered, but must be exercised judicially;
> (b) Costs in the tribunal will usually be awarded to follow the event, and quantum will usually be fixed so as to reflect a reasonable contribution (rather than full recovery) of the costs actually incurred by the successful party;
> (c) The Tribunal's approach to costs is not much different from that which applies in the Courts although, as there is no formal scale of costs for proceedings in the Tribunal (as there is in the Courts), caution needs to be exercised before applying an analysis of what might have been calculated under either the High Court or District Court scales of costs. Such an analysis can be no more than a guide.
> (d) An award of costs that might otherwise have been made can be reduced if the result has been a part-success, only;
> (e) Assessment of costs must take account of the relevant features of each case, but there must be some consistency in the way costs in the Tribunal are approached and assessed;
> (f) Offers of settlement "without prejudice except as to costs" are a relevant consideration.
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> [15] At para 7e (Decision No 29/06) the Tribunal observed that:
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> > it is not immaterial that Parliament has conferred the particular jurisdictions which the Tribunal exercises in part to protect access to justice for litigants who might otherwise be deterred by the costs and complexities of proceeding in the Courts.

**[9]** In that case the Tribunal had awarded $32,503.82 following a without prejudice save as to costs *Calderbank* letter. This award was reduced by the High Court to $27,628.00.

**[10]** Whether the Tribunal's approach to costs requires review need not be determined in the present case. However, as in *Heather v Idea Services Ltd* [2012] NZHRRT 11, we indicate that we may require persuasion that the Tribunal's earlier approach to costs has given sufficient weight to the special nature of the Tribunal's jurisdiction under the Human Rights Act 1993, the Privacy Act 1993 and the Health and Disability

Commissioner Act 1994. For present purposes we mention the following as having potential bearing on the issue:

> **[10.1]** The Long Title of the Privacy Act 1993 opens with the statement that it is an act "to promote and protect individual privacy".
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> **[10.2]** Principle 6 of the information privacy principles confers on an individual two "entitlements". First, to obtain from an agency holding personal information confirmation of whether or not the agency holds such personal information; and second, to have access to that information. These two entitlements, alone among the information privacy principles, are recognised as conferring legal rights and are enforceable in a court of law. See s 11 of the Privacy Act. The entitlements are clearly significant.
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> **[10.3]** The discretion to award costs must promote, not negate the objects of the Privacy Act and in particular, the realisation of the entitlements conferred by Principle 6(1). See *Heather* at [14]:
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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.

**[11]** We will return to these points shortly.

**[12]** As noted by the High Court in *Herron v Spiers Group Ltd* at [49], costs decisions by the Tribunal vary considerably. The specific facts of a case largely determine the outcome of the particular costs application. This observation is true of the present case. In our view two features stand out.

**[13]** First, as the Tribunal noted in its decision at paras [9] and [40], the Board of Trustees and the School management became enmeshed in the unhappy relationship between Mr Steele and Ms Thompson, the mother of his daughter. An aspect of the case which cannot be overlooked is that Ms Thompson was at the relevant time a member of the Board of Trustees. In an email sent to Mr Steele on 16 November 2010 she inappropriately made reference to a claimed ability, as a member of the Board, to give directions to School management as to how they should deal with Mr Steele. See the decision at para [10]. It would appear that this email was the catalyst, or one of the main catalysts, for the events which followed and which are described in the decision at paras [11] to [34]. While it might be difficult for the Board to accept, the uncomfortable fact is that one of their own members shares some responsibility for setting in motion events which eventually led Mr Steele to bring his proceedings before the Tribunal. To an objective observer she was not acting as a Board member when sending her email. Subjectively, however, it is understandable that Mr Steele came to be suspicious of the School and of its management.

**[14]** Second, it is significant that it is acknowledged by the Board that documents containing personal information about Mr Steele were not provided to him until after a complaint had been made by Mr Steele to the Privacy Commissioner. See the decision

at para [37]. While this breach did not ultimately lead to a formal declaration that there had been an interference with privacy, the fact remains that there was an admitted interference with Mr Steele's privacy by the out of time delivery of the documents in question. See the decision at para [54].

**[15]** In our view it was not unreasonable for Mr Steele to seek a remedy for that failure. The fact that he was ultimately unsuccessful in securing any remedy at all does not mean that he did not otherwise have good grounds for bringing and continuing the proceedings. That he is a lay litigant should not of itself afford grounds for an award of costs. Lay litigants generally often cause proceedings to be longer and more difficult than they need to be but there is no requirement that litigants before the Tribunal be represented by a lawyer. Indeed a growing number of litigants are self-represented. This is an inevitable consequence of the Tribunal's jurisdiction, the nature of the rights it is required to adjudicate upon and the limits to legal aid. The Tribunal must be careful to ensure that human rights protection is not weakened by a punitive costs regime which discourages individuals from bringing proceedings before the Tribunal.

**[16]** The fact that Mr Steele was successful in securing an adjournment at the conclusion of the hearing on 16 December 2011 should likewise not count against him. He was entitled to a fair hearing and the absence of his witness (Mr Heal) arose out of circumstances beyond control. Ultimately, when the evidence of Mr Heal was taken on 23 January 2012, that evidence was largely favourable to the School.

**[17]** As to the submission that the Board successfully opposed Mr Steele's proceedings, this is true in the sense that, at the end of the day, Mr Steele has been left without remedy. However he has not been unsuccessful in the sense that the decision of the Tribunal does record that there has been an admitted interference with his privacy by the out of time delivery of the twenty documents in question. In the context of the costs application the Board does not stand as a party whose actions have been entirely vindicated by the Tribunal.

**[18]** Overall, our view is that while this case may well sit on the borderline we are not persuaded that the merits clearly favour an award of costs.

**Formal order**

**[19]** For the foregoing reasons the decision of the Tribunal is that the application by the Board of Trustees for costs is dismissed.

**[20]** The costs of the present application are to lie where they fall.

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| **Mr RPG Haines QC** | **Ms J Grant MNZM** | **Ms S Ineson QSM** |
| **Chairperson** | **Member** | **Member** |