(1) ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFFS AND OF THEIR CHILDREN

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 36**

	Reference No. HRRT 025/2008
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**NOP AND TUV**
	PLAINTIFFS
AND	**CHIEF EXECUTIVE, MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms ST Scott, Member
Ms M Sinclair, Member

REPRESENTATION:
Mr R Small for Plaintiffs
Mr GR La Hood for Defendant
Ms K Evans for Privacy Commissioner

DATE OF HEARING: 28, 29 and 30 May 2012; 11 and 12 July 2012

DATE OF DECISION: 17 April 2014

DATE OF DECISION ON COSTS: 12 August 2014

DECISION OF TRIBUNAL ON COSTS

The substantive decision

[1] In a decision given by the Tribunal on 17 April 2014 each party enjoyed a measure of success and of failure. The plaintiffs succeeded in their claim under Principle 6 of the information privacy principles but failed in their claim under Principle 8. In relation to the former they obtained a declaration that Immigration New Zealand had interfered with their privacy and were awarded $2,500 damages for pecuniary loss. In relation to the latter Immigration New Zealand secured a helpful ruling on the degree to which Principle 8 has application in the context of the Immigration Act 2009.

[2] Both parties apply for costs in respect of the issue determined in their favour and oppose an adverse award in relation to that part of the case in which they were unsuccessful.

The amount sought by the parties

[3] The plaintiffs have accumulated legal expenses of approximately $23,000 (GST exclusive). They are ineligible for legal aid because of their immigration status (they are overstayers) and in addition they are not permitted to work lawfully in New Zealand. Mr Small took on their case on the basis that no account would be rendered until the case was over. His account would be waived if and to the extent that the plaintiffs were unsuccessful. In relation to the Principle 6 aspect of the case (in which they have succeeded) the plaintiffs seek a modest award of $2,000.

[4] The Chief Executive was represented by in-house counsel and no direct dollar cost to the Ministry of Business, Innovation and Employment has been provided. However, the Chief Executive takes as a starting point the "average" award made by the Tribunal of $3,750 per day, making a total of $18,750. Deducting an allowance for that part of the case determined against the Chief Executive, it is submitted a reasonable contribution by the plaintiffs would be between $7,500 and $10,000.

Procedural history discounted

[5] These proceedings took an inordinate length of time to be readied for a hearing. The statement of claim was filed on 6 August 2008 and by the time the hearing commenced on 28 May 2012 some twenty four *Minutes* had been issued by the Chairperson in relation to pre-trial matters.

[6] As the Chairperson noted in the *Minute* dated 11 October 2011, the primary obstacles to bringing this case to a hearing were the seemingly irreconcilable differences between the parties on the question of discovery and inspection.

[7] The legacy of these differences was apparent at the merits hearing itself, with the Chief Executive producing the common bundle of documents only at the commencement of the hearing and with new documents emerging during the course of the hearing.

[8] We see no point in dissecting the unhappy procedural history with a view to allocating blame. Indeed the exercise would not only be inordinately time-consuming, it would shed little light on the question whether an award of costs should be made in favour of either party. Each side bears a measure of blame and we are of the view that the pre-hearing history of the case is to be regarded a neutral factor.

Whether there should be an award of costs – discussion

[9] As best we can tell from the submissions for the Chief Executive, a breach of Principle 6 was conceded prior to the hearing before the Tribunal but the claim was defended because the Chief Executive took the view that no harm had followed the breach. However, on the third day of the hearing a concession was made that a declaration of interference with privacy should be made. There was no dispute as to the quantum of damages sought by the plaintiffs. This concession came late and should have been made earlier.

[10] As can be seen from the Tribunal's decision, the substantive issue which fell for determination at the hearing was the application of Principle 8 in the immigration context. The plaintiffs raised a novel point which, while undoubtedly of importance to their own immigration case, was of even greater significance to the Chief Executive and those administering the immigration legislation. In that sense the "winner" was not so much the Chief Executive as defendant but the system for the lawful and orderly processing of immigration applications.

[11] As recognised in *Attorney-General v IDEA Services Ltd (In Statutory Management)* [2012] NZHC 3229, [2013] 2 NZLR 512 (Mellon J, J Grant and S Ineson) at [240] the Tribunal's discretion to award costs is largely unfettered. The High Court scale is no more than a guide and an award can be reduced if the party in question has been successful in part only. The assessment of costs must take account of the particular features of each case though some consistency must be attempted.

[12] In the present case, the Tribunal is conscious that many litigants who appear before it, either as plaintiffs or defendants, are impecunious and are either self-represented or rely on counsel who has agreed to act *pro bono* or on the basis that the fee is to be waived if the client is unsuccessful. In this regard the Tribunal has held that it should not, by awarding or withholding costs discourage such litigants from bringing or defending proceedings. See for example *Nakarawa v AFFCO New Zealand Ltd (Costs)* [2014] NZHRRT 15 (17 April 2014) and *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31 (5 August 2014). In *Heather v IDEA Services Ltd (Costs)* [2012] NZHRRT 11 (23 May 2012) the Tribunal stated:

> 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.

[13] In the present case the plaintiffs' claim under Principle 8 was novel but nevertheless justified. It was inevitable that at some point the issue would fall for determination and the plaintiffs should not, given their present immigration status and accompanying disadvantages, be required to carry the costs consequence of an adverse determination. See by analogy High Court Rules, r 14.7(e) (public interest litigation pursued reasonably).

[14] It is true that the merits decision of the Tribunal at [12] indicates a degree of frustration at the unhelpful manner in which the case for the plaintiffs was at times presented. But as to this there can be no doubting of the sincerity of counsel for the

plaintiffs or of the enormous amount of time and effort he invested in this case. Above all, however, we see no good reason why, in the circumstances of the case, the plaintiffs should face an award of costs simply because the case was not presented by counsel with optimum clarity.

[15] Bearing in mind that the Tribunal has a statutory duty under the Human Rights Act 1993, s 105 and the Privacy Act 1993, s 89 to act in a manner that is fair and reasonable and according to equity and good conscience, we are of the view that costs should lie where they fall.

Order

[16] The cross-applications made by the plaintiffs and defendant for costs are dismissed. The parties are to bear their own costs.

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Mr RPG Haines QC	**Ms ST Scott**	**Ms M Sinclair**
Chairperson	**Member**	**Member**