IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2021] NZHRRT 48**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 011/2015
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**LISA TURNER**
	PLAINTIFF
AND	**THE UNIVERSITY OF OTAGO**
	DEFENDANT

AT DUNEDIN

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms GJ Goodwin, Member
Ms DL Hart, Member

REPRESENTATION:
Dr L Turner in person
Mr M Couling for defendant

DATE OF HEARING:	**12 and 13 October 2015; 2 to 5 May 2016**
DATE OF SUBSTANTIVE DECISION:	**25 March 2021**
DATE OF DECISION ON COSTS:	**28 October 2021**

DECISION OF TRIBUNAL ON COSTS[1]

[1] [This decision is to be cited as *Turner v University of Otago (Costs)* [2021] NZHRRT 48.]

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INTRODUCTION

[1] Following a six day hearing the Tribunal by decision in *Turner v University of Otago* [2021] NZHRRT 18 (25 March 2021) dismissed in their entirety the claims made by Dr Turner in her third statement of claim dated 15 January 2016.

[2] The University of Otago now by application dated 29 April 2021 applies for an order that Dr Turner pay costs of $138,948 (excl GST) which represents two-thirds of the total actual and reasonable legal costs incurred by the University ($208,422).

[3] The justification for the University seeking two-thirds rather than 30 per cent (a percentage used occasionally by the Tribunal in the past as a rough guide) is that:

> **[3.1]** Dr Turner refused two reasonable settlement offers made between August 2015 and October 2015. The first was made before the failed hearing which commenced on 12 October 2015. The second was made just one week following that hearing.
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> **[3.2]** In the submission of the University Dr Turner's conduct has from the outset been unreasonable and demanding. Further, the proceedings were so severely deficient it resulted in the University incurring wasted costs.
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> **[3.3]** The University further says the costs sought can be contrasted with the High Court Rules 2016 (HCR) scale costs, which would be $63,335 on a 2B basis, without any uplift for wasted costs or consideration of Dr Turner's failure to accept reasonable settlement offers. Two-thirds of scale costs as allowed by HCR, r 14.2(1)(d) would amount to $42,223. The University acknowledges the Tribunal does not apply the High Court scale and that the discretion is broad.

[4] Dr Turner, who on this application was self-represented, has acknowledged the University is entitled to seek a contribution to its actual and reasonable costs and disbursements. She further accepts it is more likely than not the University will be awarded costs but submits the award should be less than $22,500.

THE OVERARCHING PRINCIPLES – PROMOTING AND PROTECTING HUMAN RIGHTS AND PRESERVING ACCESS TO JUSTICE

[5] We have decided an appropriate award is $45,000. This is the highest sum awarded against an unsuccessful party since the standard-setting decision in *Heather v IDEA Services Ltd (Costs)* [2012] NZHRRT 11 (*Heather*) which at [14] held that the Tribunal's discretion to award costs must promote, not negate the objects of the relevant statute under which it has jurisdiction. In that case the purpose of the Human Rights Act 1993 (HRA), as expressed in the Long Title, was noted to be the "better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights". The purpose of the Privacy Act 1993 (PA 1993), as explained in the Long Title, included the promotion and protection of individual privacy in accordance with the OECD *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*. The now Privacy Act 2020 (PA 2020), s 3 is even more explicit in articulating the promotion and protection of individual privacy by (inter alia) giving effect to internationally recognised privacy obligations and standards in relation to the privacy of personal information, including the OECD *Guidelines* and the International Covenant on Civil and Political Rights, 1966 (ICCPR). The Long Title to the Health and Disability Commissioner Act 1994 (HDCA) also opens with a reference to the promotion

and protection of rights, namely the rights of health consumers and disability services consumers. The relevance of this human rights context to the Tribunal's discretion to award costs was explicitly recognised in *Heather* and approved by the High Court in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 (*Andrews*) at [61] to [66] and [71].

[6] To avoid the present award in favour of the University of Otago being seen as a precedent or as an indication by the Tribunal that its approach to awarding costs against an unsuccessful party has changed since *Heather*, it is necessary at the outset to reaffirm that in deciding whether to make an award of costs, the Tribunal must take into account the fundamental principle of better protection of human rights in New Zealand and in particular, the fundamental principle of preserving access to courts:

> **[6.1]** Court fees and costs burdens may de facto prevent people from pursuing the vindication of their rights in proceedings available to them before the Tribunal, thereby violating their right under the ICCPR, art 14(1) to equal access to courts. See the decision of the Human Rights Committee in *Lindon v Australia* Communication No. 646/95, 25 November 1998 at [6.4] and the Human Rights Committee *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial* (CCPR/C/GC/32, 23 August 2007) at para 11. The Human Rights Committee has further expressed the view in *Äärelä and Näkkäläjärvi v Finland* Communication No. 779/1997, 24 October 2001 at para 7.2 that before an award of costs is made against an unsuccessful litigant there is a duty to consider not only the implications of the award for the particular unsuccessful litigant, but also the effect on access to court of other similarly situated litigants. Failure to do so could constitute a violation of the litigants' right under art 14(1), in conjunction with art 2. See also Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel Kehl, 2005) at 312 and Sarah Joseph and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford, 2014) at [14.41].
>
> **[6.2]** The right of a person to access courts and tribunals in order to vindicate their legal rights has a high constitutional value in New Zealand, against however powerful or popular a defendant. See *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [60].
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> **[6.3]** The deterrent effect of an actual or potential adverse order of costs has been explicitly recognised by the Tribunal in a line of cases which includes *Heather* at [13] to [14]. While the High Court in *Andrews* accepted that some claims in the Tribunal should have costs consequences, it also recognised there is a wider interest in allowing access to the Tribunal even if the particular claim is without merit in the legal sense:
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> > [65] I accept that some claims in the Tribunal should have costs consequences. However it does not follow that the costs consequences in respect of all claims in the Tribunal should be those that apply in civil litigation in the Courts. The other avenues for redress are more informal and are aimed at achieving an agreed outcome. The Director of Human Rights Proceedings points out that in this area it is often difficult for claimants to understand the merits of their claim in any legal sense. There is a wider interest in allowing them access to a determination before the Tribunal even if the claim is without merit in a legal sense. The legislation recognises the importance of this access by enabling them to bring a claim regardless of whether the Privacy Commissioner or the Director of Human Rights Proceedings considers the matter should proceed to the Tribunal. It might be said that the point at which the usual civil litigation costs regime

> should apply is when the claims are before the Courts. Even at that stage, the human rights dimension they entail may lead to a different approach to costs.

[6.4] The prospect of bankruptcy as the price for bringing (or defending) proceedings before the Tribunal will have a significant chilling effect. See *Wall v Fairfax New Zealand Ltd (Costs)* [2017] NZHRRT 28 at [9]:

> **[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.

[6.5] Claims before the Tribunal more often than not involve an unequal, if not asymmetrical contest between the parties. Depending on the circumstances this could be because one party might have limited or no resources while the other (often, but not necessarily, an institution or an agency of the state) might have access to greater resources. In addition, a plaintiff represented by the Director of Human Rights Proceedings has the advantage of not being personally liable for costs (HRA, s 92C(4) and PA 2020, s 110(2)). Nor is the Director of Human Rights Proceedings personally responsible for the payment of any costs. See HRA, s 92C(4) which requires the Office of Human Rights Proceedings to pay any award of costs. Under PA 2020, s 110 the costs are paid by the Privacy Commissioner while in proceedings under the HDCA costs awarded against the Director of Proceedings are required to be paid by the Health and Disability Commissioner. See ss 47(5) and 55(4).

[6.6] A significant proportion of cases coming before the Tribunal involve litigants who are self-represented and who either cannot afford legal representation or see no need for representation. On average, over the past five years the number of cases in which one or more litigants have been self-represented has ranged between 65 per cent and 75 per cent. A grant of legal aid for proceedings before the Tribunal is almost unheard of. For context see Farah Hancock "Legal aid system 'broken and may collapse' – Chief Justice" (12 October 2021) Radio New Zealand News <www.rnz.co.nz> and Farah Hancock "Minimum wage earners, pensioners no longer qualify for legal aid" (14 October 2021) Radio New Zealand News <www.rnz.co.nz>.

[7] Given the constitutional and international human rights dimensions potentially engaged by a decision on costs it is possibly unwise to attempt an exhaustive summary of the factors to be taken into account in every case in which a successful party makes an application to the Tribunal for costs. But having emphasised that the award of costs to be made against Dr Turner does not foreshadow a departure from the Tribunal's established approach to costs, it is sufficient for the purpose of determining the present application to adopt the formulation recently applied in *Director of Proceedings v Smith (Costs)* [2020] NZHRRT 35 (*Smith*) at [2] to [16]:

[7.1] The explicit human rights dimension of the Tribunal's three jurisdictions requires that in principle costs should not be routinely awarded (see *Smith* at [5], [9.6] and [9.8]) and if awarded, the amount will usually be modest in nature. Simply expressed, the Tribunal must preserve meaningful access to justice.

[7.2] To be consistent with the HRA, s 105, decisions on costs must be made by exercising a broad judgment based on general principles applied to specific fact situations. Compare, for example, the contrasting circumstances in the three relatively recent decisions of *Smith*, *Lohr v Accident Compensation Corporation (Costs)* [2016] NZHRRT 36 (*Lohr*) and *Marshall v IDEA Services Ltd (Costs)* [2021] NZHRRT 28. Each of these decisions exemplifies why the jurisdiction should not be governed by complex and technical refinements or rules.

[7.3] The Tribunal has broad powers to do justice even if this means departing from the conventional rules applied to civil proceedings.

[7.4] The purpose of a costs order is not to punish an unsuccessful party. Access to the Tribunal should not be unduly deterred.

[7.5] Ordinarily, the Tribunal should not allow the prospect of an adverse award of costs to discourage a party from bringing proceedings (if a plaintiff) or from defending proceedings (if a defendant).

[7.6] While litigants in person face special challenges and are to be allowed some latitude, they (as well as litigants represented by a lawyer) do not enjoy immunity from costs, especially where there has been needless, inexcusable conduct which has added to the difficulty and cost of the proceedings.

[7.7] It is essential the Tribunal does not use its discretion to award costs in a manner which might deter lay litigants (and for that matter, those represented by a lawyer) from the inexpensive and accessible form of justice which is the hallmark and strength of a tribunal. This is an aspect of preserving meaningful access to justice.

[8] As will now be explained, Dr Turner's case is characterised by four unique features which, in combination, make the proposed award of $45,000 truly exceptional. The decision sets no precedent.

[9] Each of the unique features will now be addressed in turn.

DISCUSSION

[10] This was a case in which Dr Turner made a request under IPP 6 for access to information held by the University about her. The University complied with the request. However, Dr Turner and her then counsel formed the misconceived view the University had concealed information. Dr Turner and her counsel thereafter pursued a relentless campaign to uncover evidence of the suspected concealment. To that end repetitive IPP 6 requests were made, followed by a complaint to the Privacy Commissioner and then proceedings before the Tribunal under PA 1993.

[11] The Tribunal having found that the University fully complied with its obligations under the Privacy Act and that each of the causes of action pleaded by Dr Turner failed, the application for costs will, as mentioned, turn on four conspicuous features of the case.

THE WASTED HEARING ON 12 AND 13 OCTOBER 2015 AND THE DIFFICULTY IN OBTAINING PARTICULARS OF DR TURNER'S CASE

[12] A four day hearing commenced on 12 October 2015. On the morning of the second day the Tribunal drew to the attention of the parties that while the then statement of claim pleaded a cause of action under PA 1993, s 66(1), counsel for Dr Turner had on the previous day opened on the basis Dr Turner was also advancing separate causes of action under the distinctly different provisions of PA 1993, s 66(2). In the presence of Dr Turner the Tribunal explained the differences between the two separate definitions of interference with privacy set out in s 66(1) and (2) and their very different requirements.

[13] In response the University confirmed it had prepared its defence and its witness statements on the understanding the breaches alleged by Dr Turner were those pleaded in paragraphs 32 to 37 of the then statement of claim, that is a claim based on an interference with privacy as defined in s 66(1). The University had not come to the hearing prepared to deal with an interference with privacy as defined in s 66(2) and in particular the alleged breaches of the time provisions on which reliance had been placed by counsel for Dr Turner in his opening submissions. For those reasons the University sought an adjournment.

[14] In a brief oral decision the Tribunal granted the application, emphasising that going forward there should be no further doubt or confusion as to the basis on which Dr Turner's case was advanced. A direction was made that an amended statement of claim be filed incorporating the missing information identified by the Tribunal and any further allegations or particulars which would help the University and the Tribunal to understand the basis on which Dr Turner's case was to be put forward.

[15] While a second statement of claim was filed on 30 October 2015 the University contended it provided few of the additional details required by the Tribunal. It was submitted the only new allegation was that the University's actions had not met the statutory requirements of the Privacy Act and consequently ss 66(3) and (4) had been triggered. This new claim had not been particularised as required by the Tribunal.

[16] A teleconference followed on 18 November 2015. For the reasons set out in his *Minute* dated 18 November 2015, the Chairperson determined the particulars sought by the University were to be provided by Dr Turner. To that end the University was directed to file a memorandum setting out the draft orders sought. Notwithstanding opposition from counsel for Dr Turner the Chairperson by further *Minute* dated 11 December 2015 formally directed the particulars requested by the University be provided by way of a third statement of claim. The overriding imperative was to ensure there would be no reason for the resumed hearing to be bedevilled by arguments over the sufficiency of the pleadings with the potential of a yet further adjournment.

[17] While a third statement of claim was filed on 15 January 2016 and became the document on which Dr Turner's claim was eventually determined, the University was put to the needless expense of a wasted hearing, the filing of detailed memoranda and an attendance at a teleconference. Thereafter, following receipt of the third claim the University had been required to file an amended statement of reply and to revisit and amend the witness statements on which it would rely. Extensive written submissions also required reframing.

[18] In the result the failure by Dr Turner to make early disclosure of the true nature and extent of her claim and her reluctance (if not opposition) to providing the particulars ordered by the Tribunal resulted (inter alia) in:

> **[18.1]** The abandonment of a four day fixture at which only the evidence of Dr Turner herself could be taken.
>
> **[18.2]** Unnecessary and protracted arguments in support of (and in opposition to) the University's justifiable request for particulars of her claims.

NEEDLESS COMPLEXITY AND PROLIXITY

[19] The second and extraordinary feature of the case (from the outset) was its unnecessary prolixity. In the four month period from 14 February 2013 to 25 June 2013 and in the context of an employment dispute in which the issues were narrowly confined no fewer than 12 "requests" were made by Dr Turner for access to her personal information held by the University and relevant to that dispute. Every request (apart from the first) substantially repeated or overlapped an earlier request.

[20] Each of the twelve "requests" was relied on in the 25 page third (and final) statement of claim (143 paragraphs) as a separate cause of action, each allegedly triggering a separate 20 working day compliance period under PA 1993, s 40. Tabulation of the consequential timeframes relied on by Dr Turner occupied seven full pages, each with 11 columns of information. Dr Turner's closing submissions were 375 paragraphs in length (86 pages).

[21] The Tribunal found at [184] of its decision:

> **[21.1]** Of the 12 "requests" pleaded in the third statement of claim, three were not requests at all.
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> **[21.2]** Of the remaining nine requests, the first three had been properly responded to by the on time delivery of the requested information to Dr Turner's barrister on 11 March 2013. The remaining six requests repeated the earlier requests even though the requested information had already been provided. Contextually, there had in fact been a single request for everything related to Dr Turner's employment dispute and which was readily retrievable. The fine-grained complexity which had characterised Dr Turner's access request from the outset had obscured the simplicity of the case from its origins through to the prolix closing submissions.
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> **[21.3]** The access requests had consistently stipulated compliance timeframes other than those prescribed by the Act itself. The unilateral timeframes demanded by Dr Turner had been both unreasonable and unrealistic compared with those prescribed by the Act itself (ss 40(1) and 66(4)), as the table at [182] of the Tribunal's decision illustrates.
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> **[21.4]** Delivery by the University of the information on 11 March 2013 had been within the statutory timeframe prescribed by s 40(1) of the Act and there had been no undue delay. In the circumstances there had also been no requirement for separate confirmation the information was held by the University or for formal notice of the decision on the request to be given. The in-time delivery of the information necessarily satisfied the statutory requirements of s 40.

[21.5] The University had correctly refused to provide information held in the minds of staff on the ground that the information was not readily retrievable.

[21.6] Dr Turner had not established that any of the information allegedly not provided by the University was information which, at the time of the relevant "request", was held in such a way it could readily be retrieved.

[21.7] The University had not been required to give Dr Turner access to any personal information about her which did not relate to the employment dispute and which was readily retrievable.

[21.8] There had been no duty on the University to list the information not provided or which did not exist.

[21.9] The University had not been shown to be in breach of the urgency provisions in the Act.

[22] The University submission is that ponderous, pedantic and poorly pleaded cases naturally take longer to analyse and respond to than concise and focused ones. The consequential legal costs the University had reasonably incurred were directly attributable to Dr Turner. The complexity of the case related more to the way in which it was pleaded and presented than to the legal issues themselves.

[23] Even Dr Turner in her submissions spoke of "ponderous presentation on both sides". She does concede, in fairness, that the University had been obliged to respond to her claim to the same scale as it had been advanced by her.

THE UNSUCCESSFUL PRIVILEGE CHALLENGE

[24] The University had relied on PA 1993, s 29(1)(f) (legal professional privilege) when withholding 75 documents from Dr Turner. Dr Turner challenged that decision. The University had also sought to withhold two further documents under s 29(1)(b) (evaluative material) but that latter claim had been abandoned at the conclusion of the hearing and was not addressed in the decision. The issue left for determination by the Tribunal was whether the 75 documents were properly subject to legal professional privilege of one kind or another.

[25] By virtue of PA 1993, s 87 the University had the onus of proving that disclosure of the withheld information would breach legal professional privilege.

[26] Having inspected the documents (in the absence of Dr Turner and her counsel) and having taken into account the open submissions presented by both parties the Tribunal was readily satisfied the onus had been discharged.

[27] Once again the factual issues were not complex. When the requested information had been delivered to Dr Turner's counsel on 11 March 2013 no documents had in fact been withheld. Consequently no withholding ground had been relied on. It was not until 23 April 2013 that the University contemplated litigation and it was plain that (as the Tribunal held at [214] of the decision) the communications or information which had thereafter been withheld had been made, received, compiled or prepared for the dominant purpose of preparing for the proceedings or apprehended proceedings by Dr Turner.

[28] Dr Turner relies on the statement in *Lohr* at [15] that in an IPP 6 case where an agency has withheld personal information it would be wrong in principle for the individual to be deterred by the possibility of an adverse award of costs from challenging the withholding decision. Not having access to the withheld information the litigant would have no practical way of assessing the litigation risk attaching to the agency's case. See to similar effect the more recent decision of the Tribunal in *Beattie v Official Assignee (Costs)* [2021] NZHRRT 40 (*Beattie*) at [14] and [18].

[29] However, the comments in those two decisions do not relate specifically to circumstances where the information has been withheld on the grounds of legal professional privilege. The issue did not arise in *Lohr* and in *Beattie* the privilege claim was not ultimately challenged by the plaintiff. In the present case no information was withheld on the ground of privilege until after the first seven "requests" pleaded in the third statement of claim and after Dr Turner had on 23 April 2013 commenced legal action under the Employment Relations Act 2000 and simultaneously lodged a complaint with the Privacy Commissioner under PA 1993. Both steps thereafter necessarily required the University to obtain legal advice on a continuing basis. There was therefore only a remote prospect of the claim to legal professional privilege from and after 23 April 2013 being successfully challenged.

[30] In these circumstances we conclude the challenge to legal professional privilege was no more than a high risk, speculative exercise which was not at all justified by the facts known to Dr Turner and her advisers.

THE SETTLEMENT OFFERS MADE BY THE UNIVERSITY

[31] The University submits it did everything it could to reduce its legal fees by twice attempting to settle the proceedings. The relevance of those attempts lies in the fact that under PA 1993, s 85 the Tribunal has a wide discretion to award costs against a plaintiff or a defendant, or to decline to award costs against either party. It follows that, depending on the particular circumstances, a written settlement offer made by a party on the basis of "without prejudice except as to costs" might be a relevant (but not determinative) consideration. See by analogy the jurisdiction of the High Court under HCR, rr 14.10 and 14.11(1):

> **14.10 Written offers without prejudice except as to costs**
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> (1) A party to a proceeding may make a written offer to another party at any time that—
> (a) is expressly stated to be without prejudice except as to costs; and
> (b) relates to an issue in the proceeding.
>
> (2) The fact that the offer has been made must not be communicated to the court until the question of costs is to be decided.
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> **14.11 Effect on costs**
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> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

[32] In view of the University's application for increased costs HCR, r 14.6(3)(b)(v) is also of assistance. That rule provides that increased costs may be awarded where a party fails to accept an offer of settlement without reasonable justification with the result that they contribute unnecessarily to the time or expense of the proceeding or step in it. Each case is necessarily fact specific. While the High Court Rules are not binding on the Tribunal they reflect sound practice and are referred to when their provisions are relevant and helpful to matters before the Tribunal, subject always to such modification as may be

necessary to reflect the Tribunal's unique human rights jurisdiction. Under the Human Rights Act, s 104(5), the Tribunal can regulate its procedure as it thinks fit.

The first settlement offer

[33] The University says that by letter dated 6 August 2015 (which was prior to the first hearing and before the University had expended significant costs), the University made a written settlement offer of $15,000 without prejudice except as to costs.

[34] That offer was rejected by Dr Turner on 13 August 2015 on the grounds that at the heart of her claim was her belief the University had wrongly withheld personal information. Her response made it clear that until the University properly acknowledged "this failure" and provided the information "that has never been provided", she would not be willing to settle.

[35] The University believes this mistaken belief on the part of Dr Turner was the impediment to settlement.

The second settlement offer

[36] In its submissions the University has explained that following the adjournment of the hearing which had commenced on 12 and 13 October 2015 the University again turned its mind to settlement and approximately one week later, on 21 October 2015 made a second "without prejudice except as to costs" settlement offer. It described this five page offer as more nuanced and carefully constructed than the first. Without any admission of liability, the University offered to pay Dr Turner the sum of $15,000, which included any claim for compensation and a contribution to her legal costs. In making this offer the University sought to bring an end to the protracted proceedings which, by that stage, had cost the University approximately $80,000. The University expressly acknowledged it understood that Dr Turner's claim was not driven by the issue of compensation. Rather Dr Turner was driven by the belief and perception the University was withholding information. In the interests of achieving settlement and in recognition that Dr Turner had a fixed mind-set, the University offered to provide to her all documents considered by the Privacy Commissioner in the course of his investigation and in respect of which the University had claimed litigation privilege and/or evaluative material and/or confidentiality. The University was not prepared to provide communications covered by legal professional privilege. Within two weeks of receiving the documents Dr Turner would provide the University with details of any corrections she wished to have recorded and annotated alongside any of the documents provided to her under the Privacy Act. The University would also acknowledge it was under a duty and requirement under the Privacy Act to disclose Dr Turner's personal information in a timely manner and without undue delay.

[37] By letter dated 27 October 2015 Dr Turner rejected the offer on the basis that fundamental to her was a requirement the University publicly acknowledge it had breached the Privacy Act. She also required an apology.

[38] The University submits it could not provide any such acknowledgement or any such public apology given its unequivocal position it had not interfered with Dr Turner's privacy at any stage.

[39] The University responded by letter dated 28 October 2015 repeating its offer. Dr Turner, in turn, repeated her rejection.

Submissions made by the parties

[40] The University submits the Tribunal must take into account the rejected offers of settlement which, had they been accepted, would undeniably have placed Dr Turner in a far better position than the one she has ultimately obtained following a full hearing. It is the University's further submission that rejection of the settlement offers together with the wasted costs that were incurred means an award of two-thirds of the University's actual legal costs would be both flexible and meaningful enough to do justice. An award at this level, it is submitted, would not punish. Rather it would recognise a wholly successful party cannot and should not be put to the unreasonable expense of defending groundless litigation driven by false beliefs.

[41] The first point made by Dr Turner is that while the University submissions describe the settlement offers as *Calderbank* offers, such term is inappropriate where the party making the without prejudice offer is ultimately the successful party. As to this, the submission is of course correct but a *Calderbank* letter is but a subset of written offers made without prejudice except as to costs. High Court Rules, rr 14.10 and 14.11 are general provisions applicable to all settlement offers, not just to the *Calderbank* subset in HCR, r 14.11(2), (3) and (4). In any event, in the context of the present case, nothing material turns on the point as the issue of costs remains at the discretion of the Tribunal.

[42] Other points made by Dr Turner included:

> **[42.1]** Her claim was for more than just a monetary sum with the result a simple payment of money without more would not address the heart of her concerns. As to this, while the submission may go some way to address the first settlement offer, it does not address the second in which the University acknowledged it understood Dr Turner's claim was not driven by the issue of compensation. The settlement offer was tailored accordingly.
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> **[42.2]** To preserve access to justice and privacy rights which cannot be measured in monetary terms it should be permissible for a plaintiff to litigate without being later penalised by an award of costs (or by an uplift in costs) because a settlement offer was rejected. As to this submission, litigants before the Tribunal are not immune from costs. It is well-recognised some claims in the Tribunal should have costs consequences, especially where there has been needless, inexcusable conduct which has added to the difficulty and cost of the proceedings. See *Andrews* at [65] and [68] as well as *Fisher v Foster (Costs)* [2020] NZHRRT 29 at [8] and more recently *Smith* at [11] to [13].
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> **[42.3]** An appropriate outcome would be an award of costs on a standard basis without any uplift.

The settlement offers – conclusion

[43] The timing of the two settlement offers is significant, the one preceding the first hearing and the second following within days of the adjournment. Proximity of the offers to the original hearing meant Dr Turner had full opportunity to make a realistic appraisal of the wisdom of proceeding with her case rather than agreeing to a settlement. The second offer in particular had been carefully calibrated to reconcile the diametrically opposed positions of the parties. Dr Turner also knew from the Tribunal's comments made in her presence at the commencement of the second day of the hearing that her pleadings

were inadequate to support the case on which her counsel had opened and that both parties would thereafter incur unanticipated and potentially substantial costs.

CONCLUSION

Whether costs to be awarded

[44] Access to justice and reputational considerations mean that a costs benefit analysis cannot be confined solely to economic considerations. Nevertheless the University has had to bear the substantial cost of a six day hearing involving (inter alia):

> **[44.1]** The failure by Dr Turner to make early disclosure of the true nature and extent of her claim and the consequential abandonment of a four day hearing. This was followed by unnecessary and protracted resistance to the University's justified request for particulars.
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> **[44.2]** The needless complexity and prolixity which characterised Dr Turner's case from the outset.
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> **[44.3]** A speculative, high risk challenge to the University's claim to legal professional privilege.
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> **[44.4]** The unreasonable rejection of the University's sensible settlement offers made at a time when major expense by the University (and by Dr Turner) had not yet been incurred.

[45] In these exceptional, if not unique circumstances we are of the view an award of costs should be made not to "punish" Dr Turner but to recognise:

> **[45.1]** The substantial cost the University has incurred by deciding to defend the claim, a decision fully justified on the facts.
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> **[45.2]** The broader public interest which requires that needless, inexcusable conduct which adds to the difficulty and cost of proceedings before the Tribunal is likely to have costs consequences.

Quantum

[46] The University has incurred legal fees of $208,422 and asks for two-thirds, being $138,948. The University contrasts this figure with the fact that two-thirds of scale costs as allowed by HCR, r 14.2(1)(d) would amount to $42,223. Although $208,422 is a substantial sum, we are of the view the costs were actually and reasonably incurred given the history of the proceedings and the manner in which Dr Turner's case was presented and conducted. Two counsel were justified and it is noted Dr Turner herself was represented by two counsel.

[47] For her part Dr Turner submits the award should be less than $22,500. She reasons the University's legal costs ought to have been in the region of $75,000, being the approximate sum of her own legal fees. If the rough guide of 30 per cent is applied the amount is $22,500.

[48] In assessing the quantum of costs to be awarded the Tribunal has not in the past ten years routinely used any particular formula such as the two-thirds rule applied in the High Court or taken the costs actually and reasonably incurred as the relevant starting

point. Rather the Tribunal has been guided by the requirement in HRA, s 105 (applied to the PA 1993 by s 89 of that Act) to act in accordance with the substantial merits of the case, in a manner that is fair and reasonable and in accordance with equity and good conscience.

> **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.

[49] In the context of the present case, the second settlement offer of 21 October 2015 should have been accepted. The preparation for trial which followed as well as the subsequent resumed hearing itself could have been avoided. We accordingly find the following of significance:

> **[49.1]** In the period between 31 March 2015 and 30 October 2015 the University's total and actual legal costs amounted to $83,566 (excluding GST and disbursements). Those fees included the costs associated with the adjourned hearing on 12 and 13 October 2015 as well as the University's attempts to settle the proceedings.
>
> **[49.2]** Once the settlement discussions ended with rejection by Dr Turner, in the period 1 November 2015 to 31 May 2016 the University incurred legal costs of a further $124,856 (excluding GST and disbursements).

[50] We do not intend apportioning the award of $45,000 between the first and second stages of the hearing as we doubt whether there is a persuasive formula which would allow that task to be carried out satisfactorily. As the four identified factors permeated the whole of the proceedings, an assessment must be made in the round.

[51] We are in no doubt an award of the whole of the $138,948 sought by the University would be punitive in character. In addition New Zealand's international obligations require that account be taken of the deterrent effect such an award would have on the right of others to access the Tribunal to vindicate rights under the Human Rights Act, the Privacy Act and the Health and Disability Commissioner Act.

[52] There is also the question whether past awards by the Tribunal provide insight as to whether the proposed sum of $45,000 would be either excessive or too low.

[53] The difficulty is twofold. First, few applications for costs are made and even fewer granted, as can be seen from the table published on the Tribunal's web page. Second, the unique human rights jurisdiction and the statutory focus on the particular circumstances of the individual case mean direct comparisons with other cases will always be difficult and of limited assistance. With these cautions in mind we make reference to the following four cases:

> **[53.1]** *Meulenbroek v Vision Antenna Systems Ltd (Costs)* [2015] NZHRRT 3 (19 February 2015). After two settlement offers by Mr Meulenbroek had been rejected, a four day hearing followed. Mr Meulenbroek (represented by the Director of Human Rights Proceedings) was successful and sought $13,125 together with travel and accommodation costs of $3,689 and witness travel expenses of $812.

The Tribunal found the settlement offers should have been accepted and awarded $17,626.

[53.2] *Singh v Singh and Scorpion Liquor (2006) Ltd* [2016] NZHRRT 38 (23 December 2016). Following a three day hearing the plaintiff was successful in part and sought $15,000 costs plus $1,789 in disbursements. There was also a claim for $3,750 for wasted costs relating to an earlier hearing. The Tribunal awarded $15,539.

[53.3] *Kapiarumala v New Zealand Catholic Bishops Conference (Costs)* [2018] NZHRRT 24 (19 June 2018). The plaintiff's claim against four defendants was found to be vexatious and struck out. No substantive hearing took place. The plaintiff had also rejected a settlement offer. Although the defendants sought separate awards the Tribunal applied the "one set of costs principle" and made a global award to be divided between the defendants. The total amount awarded was $36,000.

[53.4] *Director of Proceedings v Smith (Costs)* [2020] NZHRRT 35 (20 August 2020). Although the defendant admitted liability there had been a two day hearing of her opposed application for permanent name suppression. Upon that application being granted the defendant sought costs of $19,922 (actual $66,408). The application was successful, the defendant being awarded the full amount of $19,922. Both parties had been represented by two counsel. The award took this factor into account.

[54] Each of these decisions illustrates the principle that decisions on costs must be made by exercising a broad judgment based on general principles applied to specific fact situations. The aim is to do justice in the particular circumstances. Seldom will one award of costs align closely with another. This notwithstanding, the decisions do indicate an award in the region of $45,000 following a six day hearing would not be incongruous.

[55] The four overarching features of the present case earlier discussed lead us to conclude that in these exceptional circumstances not only should a costs order be made but also that the "30 per cent of costs sought" guide read together with HRA, s 105 does provide some assistance in determining what proportion of those costs should be awarded. If applied, the rounded amount is $45,000. Although this sum is far less than that sought by the University and substantially more than that proposed by Dr Turner, we are of the view it is the appropriate sum to do justice in the particular unique circumstances.

ORDER

[56] It is therefore the decision of the Tribunal that Dr Turner pay to the University costs of $45,000.

.....	.....	.....
Mr RPG Haines ONZM QC	**Ms GJ Goodwin**	**Ms DL Hart**
Chairperson	**Member**	**Member**