IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2021] NZHRRT 57**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 066/2017
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**ALISHA MARIE COOK**
	PLAINTIFF
AND	**MANAWATU COMMUNITY LAW CENTRE**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms GJ Goodwin, Deputy Chairperson
Mr MJM Keefe QSM JP, Member
Sir RK Workman KNZM QSO, Member

REPRESENTATION:
Ms R Oakley for plaintiff
Ms N Flint for defendant
Mr J Goddard for Ms Abraham as second defendant (removed)

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **20 December 2021**

DECISION OF TRIBUNAL ON COSTS[1]

INTRODUCTION

[1] Following a three-day hearing from 6 to 8 July 2020 the Tribunal, in *Cook v Manawatu Community Law Centre* [2021] NZHRRT 10, upheld Ms Cook's claim of an interference with her privacy and awarded damages of $6,000 against the Manawatu Community Law Centre (MCLC) under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 (PA) for hurt and humiliation and injury to the feelings of Ms Cook. Costs were reserved.

[1] [This decision is to be cited as *Cook v Manawatu Community Law Centre (Costs)* [2021] NZHRRT 57]

[2] Costs submissions have now been received and in brief:

[2.1] Ms Cook seeks costs of $7,500 (with no GST) against the MCLC;

[2.2] The MCLC seeks costs of $24,416 (plus GST) from Ms Cook, as a result of her rejection of a certain *Calderbank* offer of $10,000. In the alternative, the MCLC seeks costs at a rate of $3,750 per day.

[2.3] Ms Abraham, the removed second defendant, seeks costs of $6,400 (plus GST) on a joint and several basis against Ms Cook and the MCLC.

[3] The submissions of the parties and Ms Abraham as to costs are briefly summarised below. It is to be emphasised that the following is a summary of the main points raised by the parties and Ms Abraham. In reaching its decision in this case the Tribunal has, however, considered the submissions in their totality.

APPLICATIONS FOR COSTS

Ms Cook's application

[4] By application dated 18 February 2021 Ms Cook applied for an order that the MCLC pays costs of $7,500 (with no GST). This amount was reached acknowledging that costs are discretionary in the Tribunal, but nevertheless considering the range of costs awards made by the Tribunal in the last three years (as recorded by *Westlaw NZ* as at February 2021) from $765 per day at the low end to $4,166 per day at the high end, with an average around $2,500 per day. Ms Cook says these proceedings should be considered of average difficulty justifying an award of $2,500 per day for the three-day hearing.

The MCLC's application

[5] On 2 March 2021, in reply to Ms Cook's application for costs, the MCLC submitted, inter alia, that:

[5.1] On 31 July 2019 it had made a realistic and timely *Calderbank* offer of $10,000, save as to costs, which was rejected by Ms Cook. In light of the MCLC's *Calderbank* offer, no award of costs can be made to Ms Cook.

[5.2] As the *Calderbank* offer made by the MCLC was $4,000 greater than the award made by the Tribunal, and as there was no reasonable basis for Ms Cook to reject that offer, from the date of the MCLC's *Calderbank* offer costs should be awarded to the MCLC on an actual and reasonable contribution basis.

[5.3] The actual costs incurred by it in relation to this case, from the date of the *Calderbank* offer, were $34,880 ($40,112 inclusive of GST). In the circumstances of this case 70 percent of the actual costs would be reasonable. In the alternative, the MCLC should be awarded costs at a rate of $3,750 per day.

[6] Ms Cook's reply submissions in relation to the *Calderbank* offer, inter alia, were:

[6.1] There were matters justifying her reasonable rejection of the *Calderbank* offer, including the lack of admission of any wrongdoing by the MCLC and the lack of any apology for the wrongdoing. The *Calderbank* offer was not a genuine attempt at resolution but cold and calculating, continuing the message of denial and deflection.

[6.2] There was no amount of money offered by the MCLC that could overcome the lack of remorse and lack of acceptance or responsibility which was the ultimate barrier to resolution between the parties. Getting to the truth and personal vindication were most important to Ms Cook.

Ms Abraham's application

[7] On 25 May 2021 counsel for Ms Abraham, the removed second defendant, sought costs of $7,416 plus GST on a joint and several basis against Ms Cook and the MCLC. This was subsequently reduced to $6,400 plus GST, being those costs directly linked to the proceeding before the Tribunal and the preceding investigation by the Privacy Commissioner, with an uplift of $750, based on Ms Cook's late abandonment of her claim against Ms Abraham.

[8] By way of background, Ms Cook had initially commenced her case against the MCLC and also Ms Abraham, a former employee of the MCLC. In June 2020 approximately a month before the scheduled hearing, as a result of Ms Abraham providing discovery of a certain email sent by her to a Ms Jonassen in November 2016, Ms Cook agreed to file a notice of discontinuance against Ms Abraham. By *Minute* dated 25 June 2020 the Tribunal granted the application for removal of Ms Abraham as second defendant, following Ms Cook filing her notice of discontinuance, but reserved its decision on costs until after the conclusion of the hearing.

[9] In support of her costs application against Ms Cook, Ms Abraham, inter alia, said:

[9.1] Ms Cook named Ms Abraham as a defendant in December 2017 even though the claim was obviously only against the MCLC.

[9.2] She had incurred fees in responding to Ms Cook's application for discovery of 11 June 2020, in making an application for her removal as a party on 19 June 2020 and in responding to Ms Cook's and the MCLC's responses to her application for removal.

[10] In support of her costs application against the MCLC, Ms Abraham, inter alia, said

[10.1] As the Tribunal found Ms Abraham was acting in her capacity as an employee at all material times and that the MCLC was liable for Ms Abraham's actions and could not rely on a defence under PA, s 126(4), costs should be awarded against the MCLC.

[10.2] It was reckless and procedurally unfair for the MCLC to proceed with its attack on Ms Abraham after she had been removed as a party.

[11] Both Ms Cook and the MCLC made submissions in reply to Ms Abraham, which are considered subsequently.

APPROACH TO COSTS

Submissions of the parties

[12] It was submitted by the parties that the principles and guidelines that can be used by the Tribunal to decide whether to award costs in this case can be found in *Herron v Speirs Group Ltd (*2008) HRNZ 699 (HC)*, Haydock v Gilligan Sheppard* HC Auckland CIV-

2007-404-2929, NZHC 1431 (11 September 2008), *Horne v Bryant (No. 2)* [2003] NZHRRT 36 and *Holmes v Commissioner of Police* [2009] NZHRRT 20. It was also submitted that, while costs are discretionary, the Tribunal typically awards costs following the event, where quantum will usually be fixed so as to reflect a reasonable contribution (rather than full recovery) of the costs actually incurred by the party.

Approach of the Tribunal

[13] The Tribunal's power to award costs in respect of proceedings is conferred by s 110 of the Privacy Act 2020. This gives the Tribunal a broad discretion to award costs against a party, whether or not it makes any other order. Ms Abraham was a party at the time the decision to reserve costs in relation to her discontinuance was determined.

[14] In a line of cases beginning with *Heather v IDEA Services Ltd* [2012] NZHRRT 11 (*Heather*) and *Holmes v Commissioner of Police* [2012] NZHRRT 17 the Tribunal departed from the civil litigation approach previously adopted by it, that costs follow the event.

[15] This change in approach was challenged in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 (*Andrews*). At [61] and [62] of *Andrews*, the High Court acknowledged that the Tribunal was right to express caution in applying the conventional civil costs regime to its jurisdiction. The High Court also acknowledged that the Tribunal was correct to regard s 105 of the Human Rights Act 1993 (HRA) as reflecting the different nature of its jurisdiction from that of the ordinary civil courts. Pursuant to HRA, s 105:

> **105 Substantial merits**
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> (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.

[16] The Tribunal's approach to costs has recently been discussed in *Fisher v Foster (Costs)* [2020] HRRT 29 at [8] and *Director of Proceedings v Smith (Costs)* NZHRRT [2020] 35 at [4] to [13].

[17] The Tribunal must also consider the effect of the *Calderbank* offer made by the MCLC. While, from the discussion above, it is clear that the Tribunal is not bound by the High Court Rules, nevertheless it is appropriate that reference be made to rr 14.10 and 14.11 which specifically deal with *Calderbank* offers, as these may inform the Tribunal as to its approach:

[18] In relation to the High Court Rules two points are to be made:

[18.1] First, r 14.11(1) emphasises that any effect on costs of a *Calderbank* offer made without prejudice except as to costs is at the discretion of the court or tribunal. The offer does not afford automatic protection from costs in the event that the opposing party recovers less in the proceedings than that offered.

[18.2] Secondly, the Tribunal's discretion in relation to a *Calderbank* offer must be exercised in accordance with HRA, s 105; so that the Tribunal must act in accordance with the principles of natural justice, in a manner that is fair and reasonable and according to equity and good conscience.

APPLICATION OF THE ABOVE PRINCIPLES TO COSTS IN THIS CASE

Calderbank offer

[19] Turning first to the MCLC's *Calderbank* offer of 31 July 2019. This was made in terms that expressed the MCLC's view that Ms Cook's claim before the Tribunal was low level and defensible and that Ms Abraham was acting outside of her employment duties, without instructions from the MCLC, when she made the requests for information from WINZ. The offer was for $10,000 on a without prejudice basis, save as to costs. The offer was expressed to remain open for 10 working days.

[20] On 22 August 2019 counsel for Ms Cook responded on her behalf, rejecting the *Calderbank* offer, but leaving open an opportunity to settle the matter provided the MCLC apologised genuinely in writing, accepted responsibility for the breaches and accepted that Ms Abraham was not a rogue employee. Ms Cook also asked for damages, in "band 3" from *Hammond v Credit Union Baywide* [2015] NZHRRT 6 and legal costs, in an amount to be agreed.

[21] The reasonableness of a party's rejection of an offer is to be assessed at the time the offer is made and declined, not against the subsequent result; see *Weaver v HML Nominees Ltd* [2016] NZHC 473 at [30].

[22] At the time when the Calderbank offer was made:

> **[22.1]** An independent report done for the MCLC had earlier concluded that Ms Abraham had made requests for Ms Cook's personal information on behalf of the MCLC, that Ms Cook's complaint relating to a breach of privacy had merit, that the evidence strongly supported a finding that Ms Cook's privacy was breached and that the MCLC was not entitled to the information it requested of WINZ.
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> **[22.2]** The Privacy Commissioner had concluded that the MCLC had interfered with Ms Cook's privacy in the March 2017 collection of information and that Ms Abraham was acting in the performance of her duties as an employee when the information was collected.

[23] In its decision the Tribunal upheld Ms Cook's submissions that her privacy had twice been interfered with by the MCLC, finding that Ms Cook's personal information was sought by the MCLC not to assist her, but to discredit her in an employment dispute and to call into question her veracity.

[24] In Ms Cook's submissions she wanted to get to the truth, she required vindication in relation to her veracity and she wanted to clear her name. We accept Ms Cook's submissions. Ms Cook's motives are important aspects of the fundamental principle of natural justice, namely access to justice. Pursuing these objectives required Ms Cook to continue her case before the Tribunal.

[25] Exercising our discretion in accordance with HRA, s 105, in the circumstances of this case, given Ms Cook's desire for vindication and to get to the truth, we find that it was reasonable for Ms Cook to have rejected the *Calderbank* offer and to have continued to pursue her case. We find, accordingly, that the MCLC is not entitled to the costs claimed by it following the making of the *Calderbank* offer and that Ms Cook is not disqualified from an award of costs against the MCLC.

[26] For the sake of completeness, in relation to the costs sought by the MCLC, the Tribunal notes that Ms Cook pleads that she is impecunious and so in no financial position to make a contribution to anyone's costs, be it her own or those of the MCLC.

Costs sought by Ms Cook

[27] Ms Cook seeks costs of $7,500 from the MCLC.

[28] While we have found that it was reasonable for Ms Cook to reject the *Calderbank* offer, this does not mean that Ms Cook should necessarily be awarded costs against the MCLC.

[29] We first note that Ms Cook was represented on a pro-bono basis.

[30] The impact on any costs award of a party being represented on a pro-bono basis was considered in *Taylor v Orcon (Costs)* [2015] NZHRRT 32 at [12]:

> [12] Third, the Tribunal is conscious 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)* at [10]:
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> > [10] As to the submission that Mr Nakarawa has incurred no costs, three points are made. First, Mr Benefield has confirmed that he represented Mr Nakarawa on a fee paying basis though the quantum was not fixed and if Mr Nakarawa was ultimately unsuccessful, the fee would be waived. Second, it is also necessary to bear in mind that s 92L does not require a party to the proceedings to have received or paid a bill of costs. It is sufficient that the party has been represented and there is an expectation that a fee will be payable on success. Third, s 105 of the Act requires the Tribunal to act according to the substantial merits of the case, without regard to technicalities, in a manner that is fair and reasonable and according to equity and good conscience. With these obligations in mind the Tribunal should not, by withholding costs, discourage an impecunious but ultimately successful plaintiff from being represented by a public spirited lawyer who has agreed to waive his fee if the plaintiff does not succeed.

[31] In this case, there is no reason that a costs award for Ms Cook should be withheld, solely because she was represented on a pro-bono basis.

[32] Turning then to the quantum, if any, that Ms Cook should be awarded by way of costs. As previously discussed, Ms Cook was motivated by a desire to get to the truth and to clear her name. As discussed at [24], pursuing these objectives required Ms Cook to continue her case before the Tribunal. Ms Cook was represented at the three-day hearing. She was successful in her claim that the MCLC had twice breached her privacy, albeit she was not awarded the level of damages she sought.

[33] Ms Cook seeks costs of $7,500 from the MCLC. This amount is far from unreasonable for a three-day hearing. In this case, the Tribunal considers that it is acting in a manner that is fair and reasonable and according to equity and good conscience in awarding Ms Cook costs of $7,500.

Costs sought by Ms Abraham

[34] Ms Abraham seeks costs of $6,400 plus GST on a joint and several basis against Ms Cook and the MCLC.

[35] Turning first to consider her claim for costs against Ms Cook, Ms Abraham says Ms Cook named Ms Abraham as a defendant in December 2017 even though the claim was obviously against the MCLC and that Ms Cook was on notice of this from 8 February 2018 when Ms Abraham filed her statement of reply.

[36] For the reasons set out below, we do not accept this submission.

[37] Ms Abraham's initial stance, from her statement of reply dated 8 February 2018, was that in relation to the first collection of information on 8 July 2016, she sought information about Ms Cook following a request from Ms Cook. Filed as an attachment to that statement of reply was a letter dated 1 November 2017 from Ms Abraham's then counsel to the Office of the Privacy Commissioner stating, on behalf of Ms Abraham, that nobody at the MCLC had asked Ms Abraham to collect information about Ms Cook on 8 July 2016.

[38] This stance changed on 17 June 2020 when, in her affidavit in support of her interlocutory application to be removed as a defendant from the proceeding, Ms Abraham referred to Ms Herbert at the MCLC directing her (Ms Abraham) in July 2016 to obtain information from WINZ about Ms Cook's benefits and entitlements.

[39] Accordingly, on the basis of the evidence it was anticipated Ms Abraham would be giving at the hearing, up until she received Ms Abraham's affidavit of 17 June 2020 it was reasonable for Ms Cook to continue her claim against Ms Abraham personally. Once in receipt of Ms Abraham's affidavit of 17 June 2020 and the discovery referred to below Ms Cook did elect to discontinue her claim against Ms Abraham.

[40] Ms Abraham also says she incurred fees in responding to Ms Cook's application for discovery of 11 June 2020. While this is correct, through the discovery process Ms Cook was able to obtain the email that, in Ms Cook's submissions, was probative evidence of the pressure the MCLC placed on Ms Abraham to furnish the MCLC with information about Ms Cook and which was, accordingly, highly relevant to the case.

[41] This discovery process facilitated Ms Cook and the Tribunal getting to the truth of the matter. In these circumstances the Tribunal's unique jurisdiction of upholding access to justice is important. Fairness, reasonableness and equity and good conscience do not justify a costs award for Ms Abraham against Ms Cook.

[42] Turning then to consider Ms Abraham's claim for costs against the MCLC, she says the MCLC's argument that Ms Abraham was the responsible agency was unsuccessful and costs should follow the event. Ms Abraham also says that it was reckless and procedurally unfair for the MCLC to proceed with its attack on Ms Abraham after she had been removed as a party and was not called by either party to be a witness in the substantive hearing.

[43] These submissions are not accepted. As referred to above, the Tribunal has moved away from automatic application of a rule that costs follow the event. While the MCLC did object to Ms Abraham's application to be removed as a defendant, ultimately the MCLC had no control over this matter. Only Ms Cook could discontinue against Ms Abraham.

Following Ms Abraham's removal as a defendant the MCLC was still entitled to maintain its defence that Ms Abraham had acted outside her role as an employee and so seek to rely on a defence under PA, s 126(4). There was no procedural unfairness in the MCLC continuing to do this.

[44] As with the costs sought against Ms Cook, reasonableness and equity and good conscience do not justify a costs award for Ms Abraham against the MCLC.

DECISIONS AND ORDER

[45] Given our conclusions at [25], [33], [41] and [44] above:

[45.1] The Manawatu Community Law Centre is ordered to pay to Ms Cook costs of $7,500.

[45.2] The Manawatu Community Law Centre's application for costs against Ms Cook is dismissed.

[45.3] Ms Abraham's application for costs on a joint and several basis against Ms Cook and the Manawatu Community Law Centre is dismissed.

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Ms GJ Goodwin	**Mr MJM Keefe QSM JP**	**Sir RK Workman KNZM QSO**
Deputy Chairperson	**Member**	**Member**