IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 23**

	Reference No. HRRT 027/2010
UNDER	**THE HUMAN RIGHTS ACT 1993**
IN THE MATTER OF	**AN APPLICATION BY THE DEFENDANT FOR COSTS**
BETWEEN	**CLAIRE HINEKOIA IRENE HAUPINI**
	PLAINTIFF
AND	**SRCC HOLDINGS LIMITED**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Mr RK Musuku, Member

REPRESENTATION:
Mr SRG Judd for Plaintiff
Mr E St John for Defendant

DATE OF HEARING: 20 March 2013

DATE OF DECISION: 28 May 2013

DECISION OF TRIBUNAL ON COSTS APPLICATION BY DEFENDANT

Background

[1] These proceedings were heard over three days on 9 and 10 May 2011 and 8 July 2011 before a Tribunal comprising Mr RDC Hindle Esq, Chairperson, Mr GJ Cook JP, Member and Mr RK Musuku, Member. In a decision given on 28 September 2011 the plaintiff's claim was dismissed. Costs were reserved.

[2] By application dated 26 October 2011 the defendant company filed an application for indemnity costs in the sum of $40,494.74 (GST inclusive). In seeking such costs the

supporting memorandum placed substantial reliance on the Tribunal's decision in *IDEA Services Ltd v Attorney-General (No. 3)* [2011] NZHRRT 21 (28 September 2011). As that decision was then under challenge in the High Court by way of appeal and judicial review the application by the defendant company for costs was adjourned pending the outcome of the High Court proceedings. See the *Minute* dated 21 May 2012. On 3 December 2012 judgment was given by the High Court in *Attorney-General v IDEA Services Ltd (In Statutory Management)* [2012] NZHC 3229 (Mallon J, Ms J Grant and Ms S Ineson).

[3] Following a teleconference convened on 18 December 2012 the parties in the present proceedings were given leave to update their written submissions. At the request of Mr St John an oral hearing was convened on 20 March 2013 to allow the parties an opportunity to present their submissions in person. As the former Chairperson was statutorily ineligible to participate, the current Chairperson took his place. The other two members of the Tribunal continued to sit.

The role of the Director of Human Rights Proceedings

[4] The costs application was heard against the background that although the plaintiff in these proceedings, Ms Haupini, is the aggrieved person, representation was provided by the Director of Human Rights Proceedings pursuant to s 90(1) of the Human Rights Act 1993.

[5] The effect of s 92C(3) of the Act is that the Office of Human Rights Proceedings must pay all costs of representation provided by the Director to an aggrieved person. In addition, s 92C(4) stipulates that the Office must pay any award of costs made against the person for whom representation was provided by the Director. See s 92C(4):

> (4) The Office of Human Rights Proceedings must pay any award of costs made against a person in proceedings for which representation is provided for that person by the Director.

The case for the defendant company

[6] As mentioned, the defendant seeks indemnity costs of $40,494.74. By comparison, it is said that costs under the High Court Rules calculated on a 2B basis would have been $20,680.

[7] The defendant says that it is entitled to indemnity costs because:

[7.1] The plaintiff rejected an appropriate offer of settlement.

[7.2] The plaintiff's case was, at best, speculative. At worst, it had no prospect of success.

[7.3] Every aspect of the plaintiff's case was rejected.

[7.4] The plaintiff's expert witness was poorly briefed. Her evidence largely supported the defendant's case.

[7.5] The plaintiff's case was ill-conceived and poorly presented.

[7.6] The plaintiff unnecessarily and unreasonably attacked the reputation of the defendant and the credibility of the defendant's witnesses.

[8] In developing these points the supporting submissions asserted (inter alia):

[8.1] The plaintiff's case was always speculative:

> The submissions were unfocused, over long and overly dramatic. There was reference to international conventions and quite unnecessary, unhelpful and patronizing submissions as to indigenous cultural aspirations. From the outset the plaintiff failed to properly understand her case …

[8.2] In relation to the indirect discrimination claim the plaintiff had failed to produce sufficient evidence and:

> Somewhat desperately, the Commission went as far as attempting to assert the evidence could be taken by judicial notice.

[8.3] By opposing the terms of any settlement remaining confidential, Ms Haupini had:

> … signalled the quite ulterior purpose of wanting to harm the defendant's reputation.

[8.4] The case was "poorly pleaded", the plaintiff having to file a third amended statement of claim.

[8.5] The plaintiff had made "an unjustifiable attack on the credibility of the defendant's reputation and that of its witnesses".

[8.6] In relation to the evidence given by the expert witness:

> One can only presume the plaintiff did not read the book (written by the witness) and certainly had not properly briefed her.

[8.7] Much advanced by the plaintiff had been advanced "quite irresponsibly".

[8.8] By closing submissions:

> … the plaintiff's case was entirely confused and in places quite contrived. The plaintiff in its closing submissions was almost at the point of impeaching her own expert witness.

[8.9] The plaintiff advanced:

> … a speculative claim, rejected an appropriate settlement offer without good reason and then proceeded to attack the defendant's reputation and witnesses.

[8.10] In summary, the plaintiff's claim:

> … was poorly presented; the evidence poorly briefed and the legal submissions unhelpful, emotive and verbose.

[8.11] This was "complex litigation".

[9] For the defendant company Mr St John stressed that there was no dispute that Ms Haupini sincerely believed that her moko was of great significance to her. The "attack" by the defendant company was on the Director of Human Rights Proceedings.

The case for the Director

[10] The Director accepts that the defendant is entitled to an award of costs. In correspondence between the parties prior to the costs application being filed the Director offered $9,000 calculated on the basis of three days @ $3,750 per day discounted by a factor of 20% to reflect Mr St John's "late involvement in the matter". In his subsequent submissions dated 23 November 2011 the Director suggested an award of $11,250, calculated at $3,750 per day but without any discount factor.

[11] For the Director it was submitted (inter alia):

[11.1] The settlement offer was communicated orally by Mr St John to the Director on a without prejudice basis. It was not a written offer made on a "without prejudice save as to costs" basis, nor were any costs implications of refusing the offer communicated. Had a *Calderbank* O*ffer* been made, the Director would have assessed the offer in that light.

[11.2] The Director had responded by way of a detailed five page letter setting out his counter-offer and reasons for rejecting the verbal settlement offer communicated by Mr St John but no response was received. The Director had been surprised to learn from reading the front page of the *National Business Review* published on Friday 6 May 2011 that the defendant company had rejected the Director's settlement offer.

[11.3] In its decision, the Tribunal had not criticised the Director's conduct of the case.

[11.4] The proceedings had been responsibly brought. It was for the Tribunal to determine issues of credibility. In any event, no suggestion had been made that Ms Haupini's evidence had not been honestly given. There was no substance to the submission that the case was speculative and devoid of substance.

[11.5] The proceedings had originally been filed by the plaintiff herself prior to her application to the Director for legal representation. While two further amended statements of claim had been filed, the defendant had only been required to file a single statement of reply. The amended pleading could not be said to have caused extra preparation. This was not a complex case. The evidence took just under two days. Both parties had then indicated that they would like to present their closing submissions on a separate occasion.

[11.6] The claim that the expert witness had not been properly briefed was unfounded. The evidence of that witness supported the plaintiff's case in key areas. In any event the evidence of the expert witness had not been dispositive of the case.

[11.7] The Director did not seek to establish indirect discrimination solely on the basis of judicial notice. In any event, the Tribunal had not taken issue with judicial notice as a means of establishing indirect discrimination.

[11.8] It is important that account be taken of the fact that the Director is a statutory officer who is publicly funded and given the task by Parliament of providing legal representation for members of the public to bring discrimination claims before the Tribunal. Although these cases usually involve claims by individuals, they generally also raise human rights issues which have wider public interest dimensions than are commonly found in standard civil disputes.

[11.9] The Director had acted responsibly in the conduct of the litigation and there was no evidence that he had acted other than in good faith. It was not the role of the Tribunal to review the Director's decision to provide representation to a complainant in any particular case.

[11.10] The Director should not be discouraged by an award of indemnity costs from providing representation in cases where credibility will be a central issue.

[11.12] There was nothing on the facts to justify costs above a "reasonable contribution" scale. It was not appropriate to deploy the High Court scale given

that the High Court has jurisdiction over commercial claims over $200,000. Previous decisions of the Tribunal showed awards of about 30% of actual costs with $3,250 per day being the average award.

[11.13] None of the criticisms made by the defendant company as to the conduct of the case by the Director are supported by the terms of the Tribunal decision.

[11.14] The case had been properly brought and argued.

[12] The foregoing summaries of the competing contentions advanced by the parties are not exhaustive. We have endeavoured only to capture most of the main points.

Costs – general principles

[13] The Tribunal's jurisdiction to award costs is statutory. Section 92L of the Human Rights Act empowers the Tribunal to make any award as to costs that it thinks fit:

> **92L Costs**
>
> (1) In any proceedings under section 92B or section 92E or section 97, the Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
> (2) Without limiting the matters that the Tribunal may consider in determining whether to make an award of costs under this section, the Tribunal may take into account whether, and to what extent, any party to the proceedings—
> (a) has participated in good faith in the process of information gathering by the Commission:
> (b) has facilitated or obstructed that information-gathering process:
> (c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

[14] In *Herron v Spiers Group Ltd* (2008) 8 HRNZ 669 (Andrews J, J Binns and D Clapshaw) the High Court summarised at [14] the principles usually applied by the Tribunal when considering costs.

> [14] In its judgment of 4 August 2006 the Tribunal referred to the principles usually applied by the Tribunal when considering costs, at paras 6-8. Those principles may be summarised as follows:
> (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.
>
> [15] At para 7e (Decision No 29/06) the Tribunal observed that: "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."

[15] At [19] the Court agreed with the observation made by Harrison J in *Haydock v Sheppard* HC Auckland CIV-2007-404-2929, 11 September 2008 that these principles are "consistent with the broad discretionary powers vested by the statute".

[16] 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 (Application by First Defendants for Costs)* [2012] NZHRRT 11 (23 May 2012) and *Steele v Board of Trustees of Salisbury School (Application by Defendant for Costs)* [2012] NZHRRT 26 (23 November 2012) we record that the Tribunal may in the future 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, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994. For present purposes, however, we intend deploying the principles as set out in the passage cited from *Herron v Spiers Group Ltd* which we note were also the principles agreed to by the parties in *Attorney-General v IDEA Services Ltd (In Statutory Management)* at [240].

[17] In view of the concession by the Director that the defendant company is entitled to an award of costs, the question for the Tribunal is one of quantum only.

[18] As to this it has recently been held in *Attorney-General v IDEA Services Ltd (In Statutory Management)* that:

> **[18.1]** The principle of consistency does not require the Tribunal to make awards similar in quantum to previous cases without regard to the circumstances of the particular case. Nor does it require the Tribunal to make an award that equates to a similar rate per day of hearing. The cases the Tribunal hears vary widely in their complexity and significance. Complexity and significance are not accurately measured by the number of hearing days before the Tribunal. See [257].
>
> **[18.2]** It is appropriate for the Tribunal to look at what previous cases indicated was a reasonable contribution to actual costs. These cases indicated a figure of 30 percent of actual costs. On the facts, this approach was more likely to give an accurate comparison with other cases (provided the actual costs in those cases were reasonable). See [259].
>
> **[18.3]** While it had been submitted that large awards are likely to have a chilling effect on the Director's decision to represent complainants and potentially to affect the budget of the Office of Human Rights Proceedings, the Tribunal had made no error of principle in considering that cost awards should not be tailored to provide the Director with a protection that the legislation did not confer. See [265].
>
> **[18.4]** Costs in a particular case will depend on its particular circumstances. See [265]. The complexity and significance of the case is to be taken into account. See [266].

[19] Given that indemnity costs are sought in the present case it is necessary to address also the principles by which indemnity costs are to be assessed.

Costs – indemnity costs

[20] Had these proceedings been heard in the High Court, High Court Rules, r 14.6(4) would have applied. The analogue in the District Court's Rules 2009 is r 4.6.4. We intend referring to the High Court Rules only:

> **14.6 Increased costs and indemnity costs**
>
> (1) Despite rules 14.2 to 14.5, the court may make an order—
> (a) increasing costs otherwise payable under those rules (*increased costs*); or

(b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (*indemnity costs*).

(2) ….

(3) …

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[21] The party claiming increased or indemnity costs carries the onus of persuading the court that their award is justified: *Strachan v Denbigh Property Ltd* HC Palmerston North CIV-2010-454-232, 3 June 2011 at [27]. Generally, indemnity costs are awarded where a party has behaved either badly or very unreasonably: *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400 (CA) at [27] – [29]:

> [29] We therefore endorse Goddard J's adoption in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 at para [11] of Sheppard J's summary in *Colgate-Palmolive Co v Cussons* at pp 232 – 234. While recognising that the categories in respect of which the discretion may be exercised are not closed (see r 14.6(4)(f)), it listed the following circumstances in which indemnity costs have been ordered:
> (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
> (b) particular misconduct that causes loss of time to the court and to other parties;
> (c) commencing or continuing proceedings for some ulterior motive;
> (d) doing so in wilful disregard of known facts or clearly established law; or
> (e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[22] In *Prebble v Awatere Huata (No. 2)* [2005] NZSC 18, [2005] 2 NZLR 467 it was said that indemnity costs are awarded in "rare cases" only:

> [6] In New Zealand, costs have not been awarded to indemnify successful litigants for their actual solicitor and client costs, except in rare cases generally entailing breach of confidence or flagrant misconduct. Except in such cases, in both the Court of Appeal and the High Court orders for party and party costs have been limited to a reasonable contribution to the costs of the successful party. That approach is of long standing and may have been adopted partly for reasons of access to justice, as Williams J suggested in the course of argument in *Sargood v Corporation of Dunedin*.

[23] The Supreme Court held that a reasonable contribution to costs was just in most cases and it was not appropriate for the Supreme Court to depart from the long-established practice in New Zealand in the High Court and Court of Appeal.

[24] While neither the District Court's Rules nor the High Court Rules apply to the Tribunal's discretion as to costs, they are nevertheless a helpful guide. See *Herron v Spiers Group* at [36]. If in the District Court, High Court, Court of Appeal and Supreme Court, "a reasonable contribution" to costs is just in most cases, and if actual solicitor and client costs are only awarded in rare cases generally entailing flagrant misconduct, there is no good reason why the Tribunal should act differently. We therefore propose adopting, with all necessary modifications, High Court Rules, r 14.6(4).

DISCUSSION

[25] We do not intend addressing each and every of the points raised by the defendant company and by the Director. A broader brush is required in the costs context.

The Director's conduct of the case

[26] As earlier mentioned, the defendant company submits (inter alia) that the plaintiff's case "was always speculative", the submissions were "unfocused, overlong and overly dramatic … unhelpful and patronising" and the plaintiff failed to properly to understand her case. The difficulty with these and most of the other criticisms advanced by the defendant company is that they are not supported by the decision itself. In particular, the plaintiff was accepted by the Tribunal as a genuine and honest witness, (see [34]), the moko on her left forearm was accepted as "a most profound expression of who she is" (see [12]) and it was further accepted that she was "upset to the point of being in tears on several occasions" on the day in question (see [26]). There is no suggestion at all that the claim was not brought in good faith or that the claim was vexatious. There are no findings in the decision to support the submission that the proceedings were brought for the "ulterior purpose of wanting to harm the defendant's reputation".

[27] As to the claim that Ms Haupini made "an unjustifiable attack on the credibility of the defendant's reputation and that of its witnesses", the Tribunal expressly recorded:

> **[27.1]** Although there were pockets of disagreement in the evidence, the facts most important to the decision were straightforward and largely undisputed (para [9]).
>
> **[27.2]** As to the "pockets of disagreement", there were clearly differing perceptions of what happened but:
>
> > … not because any of the witnesses were not giving an account of events that was faithful to their recollection. It is just that each had very different perspectives.
>
> See [21].
>
> **[27.3]** And at [36] the Tribunal emphasised:
>
> > As noted, there were some areas of disagreement in the evidence. For the most part we think they are explained on the basis that the witnesses had such very different perspectives of events.
>
> **[27.4]** While there were aspects of what the plaintiff said which proved to be "a little unreliable on examination", there was no suggestion that her evidence was not honestly given. See [36] [b].

[28] In view of these findings it follows that the Director acted properly in relying on the plaintiff's evidence. On a costs application, the Director cannot be criticised for taking a case simply because the Tribunal later took a particular view of the evidence. There is no substance to the claim that the plaintiff's case "was always speculative".

[29] As to the claim that:

> The submissions were unfocused, over long and overly dramatic. There was reference to international conventions and quite unnecessary, unhelpful and patronizing submissions as to indigenous cultural aspirations,

the Tribunal's decision contains no element of such criticism. Indeed at [42] it recorded that "both sides provided full submissions". At [56] it described the argument received in

respect of both the direct discrimination and indirect discrimination limbs of the case as "detailed and helpful". Rather than dismissing as irrelevant the comparative survey of international human rights treaties and the international jurisprudence relevant to the issues in the case, the Tribunal at [50] to [52] drew on both the cited treaty law and case law in the course of its analysis. The footnote citations from fn 17 to fn 27 are extensive. There is no suggestion whatsoever that references made by the Director to the international jurisprudence was "unnecessary, unhelpful and patronizing".

[30] Against this background, the fact that at [53] the Tribunal drew a distinction between culture on the one hand and race on the other, does not establish that the plaintiff "failed to properly understand her case". The distinction between race and culture is not always an easy one to make. The plaintiff's case was certainly arguable. The fact that it ultimately failed does not establish that it was hopeless from the outset.

[31] As to the submission that the Director's reliance on judicial notice in the context of indirect discrimination was "somewhat desperate", it is to be noted that the Tribunal did not characterise the submission in this way. Indeed the submission was not criticised at all. The fact that the Tribunal at [63] ultimately declined to take judicial notice of the proposition advanced by the Director cannot on its own establish that the submission was an untenable one. As the Tribunal itself noted at [68], "context is everything".

[32] In contrast to the at times strident terms in which the defendant company now attacks the plaintiff's case, the Tribunal at [70] simply observed:

> The company has succeeded in its defence of the claim, but it does not follow that we approve of what it did in any general sense. Nor do we disapprove.

[33] Read as a whole, the decision recognises that the plaintiff's case was genuine and properly argued. While there were some differences over the evidence, those differences did not lead to the inference that the plaintiff had given anything other than honest evidence. There was no suggestion that the case had been unnecessarily drawn out or that the defendant company had been treated unfairly. Rather the clear conclusion is that the case had been genuinely brought and properly argued.

[34] The submissions advanced by the defendant company bear little relationship to the terms of the Tribunal decision. The submissions may be an accurate representation of the subjective views held by the defendant company, but they cannot be reasonably maintained in the face of the decision itself.

The "complex litigation" point

[35] As mentioned, the hearing of the evidence occupied two days. The third and final day of hearing was occupied with legal submissions. While the complexity of a case is not to be measured by the duration of the hearing, we are of the view that this cannot properly be described as a complex case. That term more appropriately attaches to litigation of the kind seen in *Smith v Air New Zealand Ltd* [2006] NZHRRT 13, (2005) 8 HRNZ 86 (22 September 2005) and *Smith v Air New Zealand Ltd* HC Wellington CIV-2005-485-2198, 15 December 2008, (2008) 8 HRNZ 639. That was also a case involving alleged discrimination under the Human Rights Act. The hearing before the Tribunal lasted four days and the total costs incurred by the successful defendant were in excess of $60,000. Costs of $15,000 were awarded along with $1,500 for costs on an interlocutory application. That costs award was upheld by the High Court. An exemplar of a case at the high end of complexity is the earlier cited *Attorney-General v IDEA Services Ltd (In Statutory Management)* where actual costs were in excess of $385,000 and the award (as adjusted on appeal) was $115,000.

The settlement offer

[36] We have been provided with a copy of a letter dated 20 April 2011 from the Office of Human Rights Proceedings to Mr St John. It would appear from the terms of this letter that on 19 April 2011 Mr St John telephoned Mr D Peirse. In this discussion Mr St John proposed the following terms of settlement:

> **[36.1]** $3,000 compensation for hurt, humiliation, loss of dignity and injury to feelings.
>
> **[36.2]** An apology for distress caused to Ms Haupini.
>
> **[36.3]** The defendant company would undertake training with the Human Rights Commission.
>
> **[36.4]** The terms of settlement to remain confidential.

[37] In his four page letter in response Mr Peirse set out the plaintiff's position. It is a detailed and reasoned reply, proposing different terms of settlement. It concludes with the following paragraph:

> As the hearing date is rapidly approaching and to avoid unnecessary further preparation and expense should a settlement be achieved I ask you to revert to me with your response, by COB Thursday 28 April 2011.

There was no response to the letter. Its terms were, however, reported in "Boss held up over 'moko' cover up" *National Business Review* May 6, 2011. Mr St John told the Tribunal on 20 March 2013 that the defendant company does not know how the National Business Review gained access to the letter and added that he "would not be surprised" were it to have been given by the Office of Human Rights Proceedings. As to this suggestion, we see no sensible reason why the Director or anyone in his Office would have taken this step.

[38] Be that as it may it is to be noted that the letter from Mr Peirse dated 20 April 2011 was marked "without prejudice save as to costs" and was what is sometimes referred to as a *Calderbank Offer*. *Calderbank Offers* are provided for in High Court Rules, r 14.10 and may be taken into account and have an effect on an ultimate award of costs at the discretion of the court as provided in r 14.11:

> **14.10 Written offers without prejudice except as to costs**
>
> (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.
>
> **14.11 Effect on costs**
>
> (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.
> (2) Subclauses (3) and (4)—
> (a) are subject to subclause (1); and
> (b) do not limit rule 14.6 or 14.7; and
> (c) apply to an offer made under rule 14.10 by a party to a proceeding (*party A*) to another party to it (*party B*).
> (3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.
(4) The offer may be taken into account, if party A makes an offer that—
(a) does not fall within paragraph (a) or (b) of subclause (3); and
(b) is close to the value or benefit of the judgment obtained by party B.

[39] Offers without prejudice except as to costs must, in terms of the High Court Rules, be in writing. In *Stevenson v Hastings District Council* [2006] NZHRRT 32 (21 August 2006) the Tribunal declined to take account of a settlement offer that was not made on a "without prejudice save as to costs" basis and which did not warn that the correspondence might be relied upon when determining costs. At [18] the Tribunal explained:

> [18] Had the message made it clear that refusal to accept might result in it being produced to the Tribunal on the issue of costs, we would have accepted Mr Gilmour's argument, at least in respect of the period after 29 September 2005. But it did not. As a result we do not think that it would be proper for us to take account of the message in the circumstances. The policy considerations that lie behind Rules 47G of the District Court Rules and Rule 48G of the High Court Rules apply to proceedings in the Tribunal with equal force. There is considerable importance in respecting the sanctity of 'without prejudice' correspondence. In the Tribunal (just as in the Courts) litigants ought not to have to be concerned that any and all pre-hearing offers of settlement that are received might later be produced as being potentially relevant to the allocation of costs unless they have been given clear notice, at the time of receiving the offer, that failure to accept might give rise to that consequence. In this respect we refer to the discussion about 'Calderbank' offers generally in *Cutts v Head* [1984] 1 All ER 597 and also to *Health Waikato Limited v Van Der Sluis* (1997) 10 PRNZ 514.

[40] Applying this principle, the verbal settlement offer made by Mr St John, not having been made in writing and on a "without prejudice save as to costs" basis, was not a *Calderbank Offer.* The letter from the Director clearly was such an offer. The offer made by the defendant company was not turned into a *Calderbank Offer* by being recorded in the without prejudice except as to costs letter from Mr Peirse.

[41] But even if we are wrong and must take the verbal offer by the defendant into account, the plaintiff's response to that offer was reasoned, detailed and responsible. We accept the submission that the Director's belief in the strength of the plaintiff's case was then reasonably held. In this regard the reasonableness or otherwise of a response to a settlement offer must be considered against the information available at the time and on which the claim could be assessed. See *McDonald v FAI Insurance* (2002) 16 PRNZ 298 at [17]. As the Director points out, at the time the verbal offer was rejected, the defendant company's evidence had yet to be filed and the plaintiff did not have a clear indication of the legal basis upon which the proceedings would be defended. Furthermore, the defendant company had the opportunity to make its own without prejudice except as to costs offer and chose not to do so. Indeed, it made no response to the terms proposed by the Director.

[42] In these circumstances, even if the verbal settlement offer made through Mr St John is to be taken into account, we attach little or no weight to the fact that it was not accepted. It has not been established that the failure by the plaintiff to accept the verbal settlement offer was unreasonable.

Indemnity costs

[43] We have already set out our understanding of the circumstances in which an award of indemnity costs is appropriate.

[44] The onus is on the defendant company to persuade the Tribunal that the award of indemnity costs is justified. In this regard we see no basis on which an award of costs of this kind could properly be awarded. As we have explained, these proceedings were properly brought and conducted. The fact that the plaintiff ultimately failed does not bring the case within any of the categories identified in *Bradbury v Westpac Banking Corp* at [29].

[45] The submissions for the defendant company have imputed to the plaintiff the ulterior motive of wanting to harm the defendant's reputation. This allegation is made three times in the submissions in support of the application for costs. See particularly paras 11, 13 and 19(a). The difficulty with this submission is that it is without evidentiary foundation. There is nothing whatsoever in the decision of the Tribunal given on 28 September 2011 which would support, still less justify, a finding in the terms sought by the defendant.

Proceedings where representation is provided by the Director

[46] While the Director is not immune from an adverse award of costs (see s 92C(4) of the Act) the fact that the Director has an important role in facilitating access to human rights protection in New Zealand, is publicly funded and has limited resources are all highly relevant factors in the assessment of costs. See *IDEA Services Ltd v Attorney-General (No. 3)* [2011] NZHRRT 21 (28 September 2011) at [76] [d]. On appeal in *Attorney-General v IDEA Services Ltd (In Statutory Management)* the High Court made reference to the submission that large awards are "likely to have a chilling effect" on the Director's decision to represent complainants. However, on the facts, the High Court found that the Tribunal had correctly taken into account and balanced the competing considerations and as costs in a particular case will depend on the particular circumstances, no error of principle in the Tribunal's approach had been demonstrated.

[47] In the present case the Director's concession that the Office of Human Rights Proceedings must meet an appropriate award of costs makes it unnecessary for much further to be said. We leave for future determination in an appropriate case the question whether the Director's important public function is a significant reason for departing from the civil litigation model in which costs follow the event. Good reason may well be found for determining that there need to be strong, if not compelling reasons for costs to be awarded against the Director. It can be argued that the Director is an integral part of the mechanism by which New Zealand, as a State Party to the International Covenant on Civil and Political Rights 1966, discharges its obligations under Article 2 not only to respect the rights recognised in the Covenant but also to "ensure" those rights and further, to ensure "an effective remedy". In addition due weight must be given to the mandatory considerations the Director must have regard to in deciding whether to provide representation in proceedings before the Tribunal. Those considerations have a substantial public interest component:

> **92 Matters Director to have regard to in deciding whether to provide representation in proceedings before Tribunal or in related proceedings**
>
> (1) In deciding under section 90(1)(a) or (c) or section 90(2) whether, and to what extent, to provide representation for a complainant, aggrieved person, group of persons, party to a settlement of a complaint, or the Commission, the Director—

(a) must have regard to the matters stated in subsection (2):
(b) may have regard to any other matter that the Director considers relevant.
(2) The matters referred to in subsection (1)(a) are—
(a) whether the complaint raises a significant question of law:
(b) whether resolution of the complaint would affect a large number of people (for example, because the proceedings would be brought by or affect a large group of persons):
(c) the level of harm involved in the matters that are the subject of the complaint:
(d) whether the proceedings in question are likely to be successful:
(e) whether the remedies available through proceedings of that kind are likely to suit the particular case:
(f) whether there is likely to be any conflict of interest in the provision by the Director of representation to any person described in subsection (1):
(g) whether the provision of representation is an effective use of resources:
(h) whether or not it would be in the public interest to provide representation.

[48] The public nature of the Director's role is underlined by the fact that the Director is required by s 92A to (inter alia) notify the Human Rights Commission of any decision as to representation as well as the reasons for that decision. The Director must also report to the Minister of Justice, at least once a year, on the Director's decisions and the Minister, in turn, must present a copy of the report to the House of Representatives.

[49] In short, it can be argued that while the Director is not exempt from adverse awards of costs, such awards must not be permitted to weaken the Director's statutory role. He should not, by the prospect of monetary penalty, be discouraged from bringing proceedings within the purposes identified in s 92(2) of the Act.

[50] Returning to the facts of the present case, the Director has conceded that an award of costs must be made in favour of the defendant company. The issue now before us is solely one of quantum. In making our assessment we have had regard to the Director's public role but, given the concession, have not given it greater weight than other factors.

Reasonable contribution

[51] We come now to determine the appropriate level of costs on a reasonable contribution basis. To this end comparison with other cases is useful.

[52] In *Smith v Air New Zealand* [2006] NZHRRT 13, $15,000 was awarded as against actual costs of $60,000 (there was an additional $1,500 in relation to an earlier interlocutory application). That was a more complex case than the present, though not at the upper end of the scale as exemplified by *Attorney-General v IDEA Services Ltd (In Statutory Management)*. As mentioned, we do not consider the present case to have been complex.

[53] In the schedule attached to the Tribunal decision in *IDEA Services Ltd v Attorney-General (No. 3)* [2011] NZHRRT 21 it can be seen that in *Tahiata v Nicholson* [2004] NZHRRT 29 (8 July 2004) a two day hearing about alleged racial and other discrimination resulted in an award of $8,000 against actual costs of $51,331.91. In *Lehmann v CanWest Radio Works Ltd* [2006] NZHRRT 47 (12 December 2006) a two and a half day hearing resulted in an award of $7,500 against actual costs of $26,850.

[54] Bearing in mind the factors we have earlier discussed and allowing for the reasonably straightforward nature of the current proceedings but also making allowance for a modest uplift to reflect inflation, we are of the view that the proper award in the present case is $15,000. This is slightly more than the 30 percent of actual costs which was accepted in *Attorney-General v IDEA Services Ltd (In Statutory Management)* at [259] as providing a useful cross-check. It is also slightly less than costs calculated under the High Court Rules on a 2B basis ($20,680). But we do not accept that the High

Court scale is the appropriate marker for costs in proceedings before the Tribunal. The scale is nevertheless useful for comparison purposes. In our view the difference between the figure we have awarded and the High Court scale appropriately recognises that there is a distinction between court and tribunal proceedings. Finally, we observe that our award at $5,000 per day is slightly higher than the average award of $3,750 per day.

Formal order as to costs

[55] Pursuant to s 92L of the Human Rights Act 1993 costs in the sum of $15,000 are awarded to SRCC Holdings Ltd. This sum is intended to be all inclusive.

.....	.....	.....
Mr RPG Haines QC	**Mr GJ Cook JP**	**Mr RK Musuku**
Chairperson	**Member**	**Member**