IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 32**

	Reference No. HRRT 022/2014
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**BRETT JAMES TAYLOR**
	PLAINTIFF
AND	**ORCON LIMITED**
	DEFENDANT

AT PALMERSTON NORTH

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Hon KL Shirley, Member

REPRESENTATION:
Ms SN Taylor for plaintiff
Mr BR Edwards for defendant

DATE OF HEARING:	**20 April 2015**
DATE OF DECISION:	**14 May 2015**
DATE OF DECISION ON COSTS:	**23 July 2015**

DECISION OF TRIBUNAL ON COSTS APPLICATION BY PLAINTIFF[1]

Background

[1] The decision in *Taylor v Orcon Ltd* [2015] NZHRRT 15 (14 May 2015) reserved the question of costs.

[2] As the successful party, Mr Taylor seeks an award of $7,519.12 made up as follows:

[2.1] $3,750 hearing fee.

[1] [This decision is to be cited as: *Taylor v Orcon (Costs)* [2015] NZHRRT 32]

[2.2] $64 disbursements comprising photocopying ($12), courier envelopes ($27) and telephone calls ($25).

[2.3] $813.12 travelling expenses being a round trip by Ms Taylor by road from Whakatane to Palmerston North and comprising $636.48 vehicle expenses (826.6 kms x .77c) and $176.64 in fuel.

[2.4] $2,392 for pre-hearing attendances and preparation.

[2.5] $500 for post-hearing attendances.

[3] The primary submission for Orcon is Mr Taylor should receive no award of costs because he was represented by his mother. While it is acknowledged she is a lawyer, it is claimed there was no professional engagement. Orcon has two alternative positions:

[3.1] First, an award of $600 costs would be reasonable with no allowance for disbursements because there is no proof the disbursements were actually incurred.

[3.2] Second, an award of $600 costs plus all the disbursements claimed except for the vehicle expenses of $636.48.

Jurisdiction to award costs

[4] The Tribunal's power to award costs is contained in s 85(2) of the Privacy Act 1993. The power is discretionary:

> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

The principles to be applied

[5] No statutory factors relevant to the exercise of the discretion are specified in s 85(2), a point noted by Mallon J in *Commissioner of Police v Andrews* [2015] NZHC 745 at [67].

[6] The Tribunal has moved away from the conventional civil litigation rule that ordinarily costs are awarded to the successful party. Each case is now decided on its own facts. This change in approach was approved in *Commissioner of Police v Andrews* at [61] to [65].

[7] While the Tribunal cannot fetter the broad discretion conferred by the phrase "may award such costs … as the Tribunal thinks fit", the guiding principles commonly referred to by the Tribunal are to be found in the decisions of *Heather v IDEA Services Ltd (Costs)* [2012] NZHRRT 11, *Nakarawa v AFFCO New Zealand Ltd (Costs)* [2014] NZHRRT 11, *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31 and *NOP & TUV v Chief Executive, Ministry of Business, Innovation and Employment (Costs)* [2014] NZHRRT 36.

[8] The application of these principles and the abandonment of the "costs follow the event" model having recently been approved by the High Court in *Commissioner of Police v Andrews*, we address only those principles of direct application to the present case.

[9] First, the right not to be subjected to unlawful interference with privacy is a significant right and is explicitly recognised in Article 17 of the International Covenant on Civil and Political Rights, 1966. See *Commissioner of Police v Andrews* at [69]. New Zealand's privacy legislation (ie the Privacy Act) has as its object the promotion and protection of individual privacy and the establishment of certain principles with respect to the collection, use and disclosure, by public and private sector agencies, of information relating to individuals. Such agencies can exercise considerable power and an individual should be free to challenge that power without the chilling effect of an adverse award of costs automatically following should the challenge be unsuccessful. Equally, an award of costs in favour of a successful plaintiff should not be withheld without good reason.

[10] Second, consistent with the human rights setting of its jurisdiction, the Tribunal must act according to the substantial merits of the case, without regard to technicalities. It must also act according to equity and good conscience. See s 105 of the Human Rights Act 1993 which applies also in proceedings under the Privacy Act (see s 89 of that Act):

> **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.

[11] This provision emphasises the determination of any application for costs must take into account a broad range of factors. See further *Commissioner of Police v Andrews* at [62]. To be consistent with s 105, decisions on costs must be made by exercising a broad judgment based on general principles applied to specific fact situations. The jurisdiction should not be governed by complex and technical refinements or rules.

[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]:

> **[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.

Application of principles to the facts

[13] In these proceedings Mr Taylor succeeded comprehensively in establishing Orcon interfered with his privacy. He has been awarded a declaration of interference, damages of $10,000 for loss of benefit and damages of $15,000 for humiliation, loss of dignity and injury to feelings. Because Orcon Ltd seemingly failed entirely to evince an understanding of its obligations under the Privacy Act, a training order was also made.

[14] Such is not disputed by Orcon on the present application. The single substantive point taken is that because the solicitor who acted for Mr Taylor is his mother, there was no expectation a fee would be payable. Complaint is also made that Mr Taylor has not submitted in evidence an account from his mother for her services.

[15] The latter point is of no merit. At best it is a technicality which can be overcome by the Tribunal affording Ms Taylor an opportunity to submit an account. This would be a pointless exercise given there is no challenge to the fact Ms Taylor did the work or that her charge out rate is anything but reasonable. We fail to see why, in these circumstances, the absence of a formal account should disentitle an award of costs. Section 105 of the Human Rights Act was meant to free the Tribunal from such empty manoeuvres. As pointed out in *Commissioner of Police v Andrews* at [61] tribunals such as the Human Rights Review Tribunal exist to provide simpler, speedier, cheaper and more accessible justice than do ordinary courts. Little would be achieved by postponing our decision on costs while Ms Taylor drafts a formal account containing the very same information already before the Tribunal.

[16] We address now the first point, namely that Ms Taylor's role in these proceedings was in her capacity as mother, not solicitor. In our view the submission is untenable. From the first teleconference held on 21 November 2014 Ms Taylor appeared in her capacity as solicitor and was so treated by the Tribunal. See the *Minute* dated 21 November 2014 issued by the Chairperson. Without her solicitor skills, discovery and inspection would have been beyond Mr Taylor's ability, leading to substantial unfairness if not delay. See the *Minutes* issued on 28 January 2015 and 5 February 2015. Similarly, without Ms Taylor's litigation experience, the witness statement filed by Mr Taylor would not have been detailed, cross-referenced to the exhibits and helpful. It was also likely Mr Taylor would not have assembled the core documents appropriately and presented them in the form of a common bundle of documents. Put another way, the legal representation provided by Ms Taylor was of significant assistance not only to Mr Taylor but also to the Tribunal. At the hearing itself the Tribunal was left in no doubt Ms Taylor appeared as counsel, not as "mother".

[17] This leaves the contention Ms Taylor appeared without expectation a fee would be payable. This is not an objection of substance for the reasons set out in *Nakarawa* at [10]. The fact that Ms Taylor would not charge a fee if her son was unsuccessful is no reason to deny an award of costs in the event of success. The Tribunal should not, by withholding costs, discourage an impecunious but ultimately successful plaintiff from being represented by a publicly spirited lawyer (or a lawyer who is a relative) who will charge no fee if the plaintiff does not succeed.

[18] It is also inherently unfair for a company such as Orcon to assert no costs should be paid to a legally qualified family member who comes to the aid of a relative who has suffered harm consequent upon Orcon's breach of its obligations under the Privacy Act.

[19] In the present case the time spent by Ms Taylor preparing the case and appearing at the hearing was time away from her practice, including a round trip by road from Whakatane to Palmerston North.

[20] We conclude the only fair and reasonable outcome of this application is that an award of costs in favour of Mr Taylor must be made.

Quantum

[21] It is correct the average sum considered to be a reasonable contribution to a successful party's case is presently in the region of $3,750. This sum includes both a preparation and a hearing component. The only error in the claim for costs made by Mr Taylor is the claim for the additional amount of $2,392. An award of this sum would amount to double recovery.

[22] The only issue is whether the "average" award should be adjusted up or down in the particular circumstances of the case. In our view the amount should be adjusted upwards to take account of the fact the Tribunal requested post-hearing submissions on remedies. See the *Minute* dated 20 April 2015. An uplift of $500 is justified.

[23] As to the disbursements, they can only be described as modest given Ms Taylor had responsibility for preparing the common bundle of documents and in addition had to travel a considerable distance. The "absence of proof" point is not one to which we are prepared to give weight bearing in mind the minimal amounts claimed and their self-evident necessity. The disbursements are allowed in full. The travel expenses have been calculated at legal aid rates and should also be allowed in full.

Overall conclusion

[24] Standing back and looking at the circumstances as a whole we conclude a reasonable contribution to Mr Taylor's legal expenses is $5,500 inclusive of disbursements and GST.

Order

[25] Pursuant to s 85(2) of the Privacy Act 1993 Orcon Ltd is ordered to pay costs of $5,500 to Mr Taylor.

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Mr RPG Haines QC	**Mr RK Musuku**	**Hon KL Shirley**
Chairperson	**Member**	**Member**