IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 22**

	Reference No. HRRT 030/2009 & 031/2009
UNDER	**THE HUMAN RIGHTS ACT 1993**
AND UNDER	**THE PRIVACY ACT 1993**
IN THE MATTER OF	**AN APPLICATION BY THE DEFENDANT FOR COSTS**
BETWEEN	**TATSUHIKO KOYAMA**
	PLAINTIFF
AND	**NEW ZEALAND LAW SOCIETY**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson, Member

REPRESENTATION:
Mr Koyama in person
Mr P Collins for Defendant

DATE OF DECISION: 28 May 2013

DECISION OF TRIBUNAL ON COSTS APPLICATION BY DEFENDANT

Background

[1] In these proceedings Mr Koyama has made two allegations. First, that the New Zealand Law Society (NZLS) discriminated against him by refusing to accept him as a member or preventing him from being admitted as a barrister and solicitor of the High Court of New Zealand. Second, that the NZLS failed to comply with various provisions of the Privacy Act 1993 in relation to personal information concerning him.

[2] In its first decision given as *Koyama v New Zealand Law Society* [2010] NZHRRT 2 (18 February 2010) this Tribunal (Mr RDC Hindle Esq., Chairperson, Ms J Grant, Member and Ms PJ Davies, Member) rejected Mr Koyama's recusal application and reserved costs.

[3] In the subsequent decision reported as *Koyama v New Zealand Law Society* [2010] NZHRRT 13 (19 July 2010) (Mr RDC Hindle Esq., Chairperson, Mr RK Musuku, Member and Mr BK Neeson, Member) the claim under the Privacy Act was dismissed and the claim under the Human Rights Act struck out. Costs were again reserved.

[4] Mr Koyama took proceedings in the High Court to challenge both decisions.

The NZLS costs application – procedural history

[5] On 9 August 2010 the NZLS sought costs on a reasonable contribution basis of $18,000.00 against actual costs of $26,379.00 including GST.

[6] The position taken by Mr Koyama was that the costs application should be dealt with after final determination by the courts.

[7] By memorandum dated 31 August 2010 Mr Collins advised that the NZLS was happy to accept adjudication of the costs application being delayed until Mr Koyama's challenge in the High Court had been determined.

[8] In *Koyama v New Zealand Law Society* [2012] NZHC 1725 (17 July 2012) Dobson J dismissed the appeal to the High Court by Mr Koyama and on 30 October 2012 Kós J refused leave to appeal to the Court of Appeal. See *Koyama v New Zealand Law Society* [2012] NZHC 2853.

[9] On the delivery of the judgment of Dobson J on 17 July 2012 Mr Collins, by memorandum dated 25 July 2012, sought the re-activation of the NZLS application which until then had been dormant pending the resolution of the appeal to the High Court.

[10] By email dated 20 December 2012 the Secretary wrote to Mr Koyama and to Mr Collins drawing their attention to the judgment in *Attorney-General (Ministry of Health) v IDEA Services Ltd (In Statutory Management)* [2012] NZHC 3229. That decision examined at some length awards of costs by the Tribunal. The parties were given an opportunity to reflect on the decision and to file such submissions as they wished. The NZLS was to file and serve its submissions by 5pm on Friday 8 February 2013 and any reply by Mr Koyama was to be filed and served by 5pm on Friday 22 February 2013.

[11] By way of reply, Mr Koyama on 20 December 2012 provided the Secretary with a copy of an application filed by him in the Court of Appeal seeking special leave to appeal and by email dated 21 December 2012 he advised that no hearing date had been set for the hearing of that application.

[12] By memorandum dated 12 February 2013 Mr Collins advised that having considered the *IDEA Services* decision he did not propose filing any further or different submissions from those set out in his earlier costs memoranda. He apologised for filing his memorandum four days late.

[13] For his part, Mr Koyama filed submissions dated 13 February 2013. The content of those submissions is addressed separately later in this decision.

[14] On 17 April 2013, in *Koyama v New Zealand Law Society* [2013] NZCA 115, the Court of Appeal dismissed Mr Koyama's application for special leave to appeal.

[15] On 21 May 2013, at the direction of the current Chairperson, the Secretary wrote again to Mr Koyama and to Mr Collins giving notice that the Tribunal now intended dealing with the costs application. The parties were afforded a final opportunity to file submissions. Mr Koyama was asked to file his submissions by Friday 7 June 2013 with the reply submissions by the NZLS to follow by 21 June 2013.

[16] By way of reply email dated 21 May 2013 Mr Koyama provided the Tribunal with a copy of a document said to be a petition to the UN Human Rights Committee. The covering email from Mr Koyama asserted that it was "proper and appropriate" for the Tribunal to delay determination of the costs application until the proceeding before the UN Human Rights Committee had come to completion.

[17] On 21 May 2013 the Secretary wrote to Mr Koyama advising that notwithstanding the petition, the Tribunal intended dealing with the costs application and that he was being offered a final opportunity to file submissions on that application. If he wished to take advantage of that opportunity, his submissions were required by Friday 7 June 2013. If no submissions were filed by that date, the costs application would be dealt with on the papers which he and the NZLS had already filed. On 22 May 2013 Mr Koyama replied by enquiring whether the Tribunal had received his submissions dated 13 February 2013. When the Secretary replied in the affirmative Mr Koyama wrote again in the following terms:

> I inform you that I intend to ignore any order of the HRRT because of the illegality of the process in the case.
>
> Again, I would like to reiterate what I stated: the state of New Zealand needs to comply with the international law, and it is appropriate and proper for the Tribunal to wait until the completion of the process at the United Nations Human Rights Committee.
>
> I believe I have made it very clear on this matter.

[18] We are of the view that it would be wrong to accede to this latest deferral request. It is now almost three years since the Tribunal decision was given on 19 July 2010 and experience shows that proceedings before the UN Human Rights Committee can be protracted. The delay involved will be measured not in months, but in years. The interests of justice require the costs application to be dealt with without further delay, particularly given that Mr Koyama has exhausted his appeal possibilities within the New Zealand domestic legal system.

The submissions for the NZLS

[19] In essence, the submission for the NZLS is that these proceedings have been an unnecessarily burdensome and intensive process for the NZLS, characterised by Mr Koyama taking every objection open to him. In support Mr Collins has drawn from the following chronology of events:

20&25 June 2009	Plaintiff files separate proceedings against defendant in HRRT – claim under Human Rights Act 1993 (HRRT 030/2009), and under the Privacy Act (HRRT 031/2009).
2 July 2009	Statements of claim in both proceedings received by defendant, with endorsed notices of proceeding.

31 July 2009	Defendant files notice of protest to jurisdiction in respect of both proceedings, and supporting affidavit by M E Ollivier.
28 Aug 2009	Plaintiff files "Amendment to Complaints" with supporting material.
25 Sept 2009	Initial telephone conference with Tribunal Chairperson who raises the issue of his membership of the defendant/NZLS and plaintiff indicates his "preliminary reaction", with concerns about bias. Detailed minute of telephone conference is provided to the parties on this issue and submissions are sought and timetable directions given (plaintiff to file and serve submissions by 9 October and defendant to file and serve submissions by 16 October 2009).
	Plaintiff files separate submissions, in some instances accompanied by irrelevant supporting material, on 30 September, 21 October, 24 October, 4 November and 5 November 2009.
15 Oct 2009	Defendant files submissions covering apparent bias issues, the concept of membership of NZLS, the statutory framework, established principles relating to apparent bias in a Judicial Officer, explaining the fair-minded lay observer test, and the procedures to be followed in resolving apparent bias issues.
22 Oct 2009	Further telephone conference with Tribunal Chairperson concerning *"…how and by whom the decision in relation to my position as chairperson should be decided"*.
5 Nov 2009	Defendant's further submissions on procedural issues.
18 Feb 2010	Tribunal's decision on *"objection to Chairperson's continued participation in these proceedings"*, in which the plaintiff's objection is dismissed.
23 Mar 2010	Plaintiff makes further written submissions of uncertain relevance.
31 Mar 2010	Further telephone conference with Tribunal Chairperson for purpose of giving directions concerning hearing of defendant's protest to jurisdiction. Timetable directions made concerning the filing and service of submissions and hearing on the papers.
8 May 2010	Plaintiff files and serves submissions on protest to jurisdiction, largely dealing with irrelevant background and issues substantive to his claims.
30 April 2010	Defendant files submissions in support of protest to jurisdiction, including analysis of transitional provisions in Lawyers and Conveyancers Act and analysis of complaints procedures disclosing lack of jurisdiction.
19 July 2010	Tribunal delivers its decision upholding the defendant's protest to jurisdiction and dismissing the plaintiff's claim under the Privacy Act and striking out his claim under the Human Rights Act.

The submissions by Mr Koyama

[20] By submissions dated 13 February 2013 Mr Koyama complained about the late filing of the NZLS response, made mention of various alleged failings by the NZLS in the conduct of its case in the Court of Appeal, alleged that the NZLS had refused to participate in the mediation offered by the Human Rights Commission at first instance, alleged that the NZLS had submitted false information to the Privacy Commissioner and concluded with the submission that:

> … the Defendant has clearly failed their duty to disclose information and facilitate the resolution of the issues, and obstructed the information-gathering process in this case. Furthermore, the bias of the Chairperson of the HRRT has not been resolved and the bias of the judge of the High Court became an issue in this case in the Court of Appeal. Therefore, any cost application in this case by the Defendant should be rejected or at least postponed until the resolution of the issues.

[21] Although not articulated precisely in these terms, Mr Koyama's position appears to be that he has been the victim of injustice at the hands of the NZLS (and of the Tribunal) and that notwithstanding the dismissal of his proceedings by the Tribunal and his unsuccessful challenges both in the High Court and in the Court of Appeal, he should not be required to pay costs of any kind.

Costs – general principles

[22] 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.

[23] The corresponding provision in the Privacy Act is s 85(2) and is not dissimilar:

> (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.

[24] 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.
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> [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."

[25] 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".

[26] It has more recently been held in *Attorney-General v IDEA Services Ltd (In Statutory Management)* that:

> **[26.1]** 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].
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> **[26.2]** 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].
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> **[26.3]** 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].

Discussion

[27] We do not intend addressing each and every of the points raised by the NZLS and by Mr Koyama.

[28] As Mr Collins has observed, these proceedings have taken a tortuous path. The chronology relied on by Mr Collins and which has been set out earlier in this decision bears this out.

[29] We accept the submission that this has been an unnecessarily burdensome and intensive process as far as the NZLS is concerned, characterised by Mr Koyama taking every objection open to him and then responding with irrelevant and unhelpful material. As Mr Collins further observes, the chronology does not disclose numerous further instances where Mr Koyama attempted to file historic records, purportedly relevant to the two substantive proceedings and placing the burden on the NZLS and the Tribunal to discern what was relevant (and might warrant a response) and what was not. While it was Mr Koyama's "right" to take every point, the consequence of his doing so is properly to be recognised in the assessment of costs.

[30] While there was no face to face hearing as such, there were three telephone conferences, a preliminary ruling by the Tribunal on the recusal application and a second decision upholding the NZLS submission that the Tribunal had no jurisdiction. This resulted in Mr Koyama's claim under the Privacy Act being dismissed and the claim under the Human Rights Act being struck out. The NZLS has succeeded on every substantive point taken and costs must, in this case, follow the event, particularly given that the Tribunal's substantive decision has been upheld on appeal.

[31] The fact that Mr Koyama subjectively (but mistakenly) believes he has been the victim of injustice and that the NZLS, the Tribunal and High Court have acted improperly are not factors to which weight can be given. The fact is that his appeal in the High Court has failed and he has been refused leave to appeal to the Court of Appeal. The Court of Appeal did not accept the allegations of bias made against both the Tribunal and the High Court.

Reasonable contribution

[32] Previous decisions of the Tribunal show awards of about 30 percent of actual costs with $3,250 per day being the average award. See the schedule annexed to the Tribunal decision in *IDEA Services Ltd v Attorney-General (No. 3)* [2011] NZHRRT 21 (28 September 2011). There are no cases in that schedule comparable to the present in that (unusually) no face to face hearing has been held. We have nevertheless found helpful *Director of Health and Disability Proceedings v Nikau* [2010] NZHRRT 26 (14 December 2010) which involved an undefended claim for breaches of the Health and Disability Commissioner Act 1994 where the hearing proceeded by way of formal proof. Total costs incurred were in excess of $15,000 but the plaintiff asked for an award of $7,500 only. Costs in that sum were awarded. In *Director of Human Rights Proceedings v Henderson* [2011] NZHRRT 10 (24 March 2011) a two day hearing in which the defendant was successful resulted in costs of $54,000. Indemnity costs were declined but the assessment of "reasonable contribution" costs took into account factors such as a failure to settle. The award was $18,000. As against these awards, there is *Smith v Air New Zealand* [2006] NZHRRT 13 (4 April 2006) which involved a four day hearing and complex legal issues. The costs of the successful defendant were in excess of $60,000. The award was $16,500.

[33] Bearing in mind the factors referred to above, particularly the taking of every point by Mr Koyama, his repeated filing of irrelevant and unhelpful material and the unnecessarily burdensome and intensive process he has imposed upon the NZLS on points which never had a realistic chance of success, we are of the view that the proper overall award in the present case is $8,000. However, given that the award is being made under two separate and distinct statutory provisions, we have determined that for convenience, $4,000 is to be awarded in relation to the Human Rights Act proceedings and $4,000 in relation to the Privacy Act proceedings. The intention is that the cumulative, all inclusive award is $8,000.

Formal order as to costs

[34] The formal order as to costs is as follows:

> **[34.1]** Pursuant to s 92L of the Human Rights Act 1993 costs in the sum of $4,000 are awarded to the New Zealand Law Society.
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> **[34.2]** Pursuant to s 85(2) of the Privacy Act 1993 costs in the sum of $4,000 are awarded to the New Zealand Law Society.

[35] The intention is that the awards of costs be cumulative, meaning that the total amount of costs to be paid by Mr Koyama to the New Zealand Law Society is $8,000.

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Mr RPG Haines QC	**Mr RK Musuku**	**Mr BK Neeson**
Chairperson	**Member**	**Member**