

Reference No. HRRT 021/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN MARIKA NGATAUIRA BEAUCHAMP

PLAINTIFF

AND B & T CO (2011) LIMITED TRADING AS
ADZUKI BEAN CAFÉ AND RESTAURANT
(IN LIQUIDATION)

FIRST DEFENDANT

AND BING DU

SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms J Foster, Deputy Chairperson

Ms LJ Alaeinia JP, Member

Mr RK Musuku, Member

REPRESENTATION:

Mr G Robins for plaintiff

Both defendants unrepresented and did not file submissions on costs

DATE OF HEARING: 18 to 21 November 2019

DATE OF SUBSTANTIVE DECISION: 2 March 2022

DATE OF DECISION OF COSTS: 22 August 2022

DECISION OF TRIBUNAL ON COSTS¹

¹ [This decision is to be cited as *Beauchamp v B & T Co (2011) Ltd (Costs)* [2022] NZHRRT 30.]

INTRODUCTION

[1] Following a four-day hearing the Tribunal by decision in *Beauchamp v B & T Co (2011) Ltd* [2022] NZHRRT 10 (2 March 2022) found in favour of Ms Beauchamp and upheld her claim to have been discriminated against by both defendants on the grounds of her pregnancy. In addition to making a declaration of breach and a training order, the Tribunal ordered the defendants to pay damages of \$25,000 for humiliation, loss of dignity and injury to the feelings of Ms Beauchamp together with \$1,713.98 for pecuniary loss.

[2] The Tribunal reserved costs and set a timetable for the filing of submissions.

[3] In compliance with that timetable Ms Beauchamp filed submissions seeking \$17,000 costs. The defendants' submissions on costs were due on 31 March 2022 but none were filed. The solicitor on the record for the defendants (Mr Paul Cheng) subsequently advised the Tribunal he was without instructions. As a consequence, on 27 April 2022 an order was made by the Chairperson declaring Mr Cheng had ceased to be the solicitor on the record for the defendants.

[4] While the costs application was served on the first defendant on 14 May 2022, Ms Beauchamp was unsuccessful in locating the second defendant, Ms Bing Du. Consequently, the Tribunal on 16 June 2022 made an order for substituted service. By affidavit sworn on 26 July 2022 and by memorandum of the same date, the Director has satisfied the Tribunal that the order for substituted service has been complied with and that Ms Du is to be treated as having been served with the application for costs.

[5] The Tribunal's order for substituted service directed that Ms Du file her costs submissions by Friday 15 July 2022. No such submissions have been filed and Ms Du has made no effort to contact the Tribunal or Ms Beauchamp through her legal representative.

[6] On 7 June 2022 the first defendant was placed in liquidation with the consequence that proceedings against the company cannot be commenced or continued unless the liquidator agrees, or the High Court orders otherwise. See s 248(1)(c) of the Companies Act 1993.

[7] In these circumstances the decision of the Tribunal on the application for costs presently affects only Ms Du.

[8] Ms Beauchamp has obtained a charging order over two properties co-owned by Ms Du. The damages awarded by the Tribunal (\$26,713.98) remain unpaid.

THE APPLICATION FOR COSTS

[9] In these proceedings the plaintiff has been represented by the Director of Human Rights Proceedings but it is irrelevant that she has not personally incurred legal costs. Section 92C(4) and (5) of the Human Rights Act 1993 (HRA) proceed on the basis that where the Director is involved in proceedings by representing the plaintiff, costs for or against that plaintiff fall to be determined in the usual way except that the costs are either paid by or to the Office of Human Rights Proceedings rather than by or to the plaintiff or Director. Expressed another way, a plaintiff represented by the Director has the advantage of not being personally liable for costs. Nor is the Director personally responsible for the payment of any costs.

[10] Ms Beauchamp has asked for an award of \$17,000. It is said in submissions that by comparison a four-day hearing in the High Court would result in an award of \$41,108.00 if calculated on a 2B basis.

[11] The primary submissions made by the Director in support of the application are:

[11.1] Prior to filing her proceedings the plaintiff made an offer to settle the matter on a without prejudice save as to costs basis. That offer included a request for global compensation in the amount of \$35,000. Failure by the defendants to respond to this pre-litigation offer is said to have been unreasonable.

[11.2] The defendants applied (unsuccessfully) for their names to be suppressed. The plaintiff was required to file an affidavit and written submissions in opposition.

[11.3] The substantive hearing occupied four days. The plaintiff filed three witness statements and one in reply. The defendants filed six statements, increasing the time required by the Director to prepare his cross examination.

[12] The Director's actual costs in representing the plaintiff have not been disclosed. Instead, the Tribunal has been asked to apply a supposed daily rate of \$3,750.00, being a 'guide' the Tribunal has used on occasion. Those occasions, however, largely predate the Tribunal's change of approach to costs marked by the decision in *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31 given on 5 August 2014 and which was upheld by the High Court in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515.

[13] Notwithstanding the *Andrews* decisions, the Director submits a notional daily rate should be applied and increased to \$4,250.00 to take inflation into account.

DISCUSSION

[14] Ever since the Tribunal and High Court decisions in *Andrews* the Tribunal has explicitly rejected the civil litigation rule that the unsuccessful party will presumptively be ordered to pay a reasonable contribution to the costs of the successful party.

[15] Instead the Tribunal has applied (inter alia) the broad terms in which the discretion to award costs has been framed in all three of its jurisdictions, particularly HRA, ss 92L and 105 as well as the need to preserve access (by both plaintiffs and defendants) to justice. In the two recent decisions of *Director of Proceedings v Smith (Costs)* [2020] NZHRRT 35 (20 August 2022) and *Turner v University of Otago (Costs)* [2021] NZHRRT 48 (28 October 2021) the Tribunal has in some detail enlarged upon these basic principles. That being so it would not be helpful were subsequent decisions (including the present) to attempt a summary or rephrasing of the detailed discussion found in these two decisions. Both note that across all three of the Tribunal's jurisdictions costs are not routinely awarded to the successful party and a notional daily tariff is seldom applied. The reverse applies in proceedings in the High Court, District Court, Employment Court and Employment Relations Authority. See for example *Smith* at [5] and *Turner* at [7.1].

[16] In contrast, the task for the Tribunal is to exercise a broad judgment based on the general principles identified in *Smith* and *Turner* and applied to the specific facts of the case. See *Smith* at [47] and *Turner* at [7.2]. The explicit human rights dimension of the Tribunal's three jurisdictions requires that in principle costs should not be awarded as a matter of course and if awarded, the amount will usually be modest in nature. See *Smith*

at [5] and *Turner* at [7.1] and the table *Costs Awarded* published on the Tribunal's web page.

[17] In the present case we do not see the pre-litigation offer to settle (which was not responded to by the defendants) as significant in the context of costs. The outcome of the case always depended on a credibility assessment, an assessment the parties were ill equipped to themselves make prior to proceedings being filed. The defendants (and the plaintiff) at that time were justified in proceeding to a hearing so that their respective accounts could be tested and judged. As recognised by the High Court in *Andrews* at [65], it is often difficult for parties to understand the merits of their claim and there is a wider interest in allowing them access to a determination before an independent tribunal. The right of access to courts and tribunals to vindicate legal rights (whether those rights are held by a plaintiff or by a defendant) is of high constitutional value in New Zealand. See *Turner* at [6.2].

[18] The one clear point which can be made is that the application by the defendants for interim name suppression was insufficiently supported by evidence and at best, speculative. See *Beauchamp v B & T Co (2011) Ltd (Application for Interim Non-Publication Orders)* [2019] NZHRRT 46 [17] to [20]. The plaintiff was put to the unnecessary expense of filing a notice of opposition and an affidavit. However, this does not on its own justify an award of costs.

[19] Otherwise, as conceded by the Director in his submissions, this was a straightforward case and no complex issues of law were involved.

[20] Summarising the principle factors most relevant to the determination of the present application:

[20.1] Before an award of costs is made by the Tribunal against an unsuccessful litigant there is a duty to consider not only the implications of the award for the particular unsuccessful litigant, but also the effect on access to justice. See *Turner* at [6.1]. This point we have addressed earlier in this decision at [17]. Parties should not be unduly deterred from seeking a resolution of their dispute by the very tribunal created to resolve such disputes. See *Smith* at [8.5] and *Turner* at [7.5].

[20.2] Credibility being the sole substantive issue, the defendants were justified in defending the claim. They and the plaintiff were equally entitled to an impartial determination of the credibility of their respective witnesses. The fact that the evidence of the plaintiff's witnesses was preferred to that of the defendants does not detract from this principle or establish that the decision to defend was unjustified.

[20.3] The plaintiff was put to the unnecessary expense of resisting an unsuccessful application for name suppression but otherwise this was a straightforward case. No complex areas of law were in issue.

[20.4] Neither the decision to award costs nor the amount awarded should have the appearance of punishing an unsuccessful defendant for defending the plaintiff's claim (or an unsuccessful plaintiff for bringing a claim). See *Smith* at [8.4] and *Turner* at [7.4]

[21] For these reasons we have determined an award of costs in the amount of \$5,000 adequately reflects the overall interests of justice in the particular circumstances.

ORDER

[22] It is the decision of the Tribunal that the plaintiff is awarded \$5,000 in costs. The defendants are jointly and severally responsible for paying this sum to the Office of Human Rights Proceedings.

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Mr RPG Haines ONZM QC
Chairperson

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Ms J Foster
Deputy Chairperson

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Ms LJ Alaeinia JP
Member

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Mr RK Musuku
Member