

Reference No. HRRT 085/2016

UNDER THE PRIVACY ACT 2020

BETWEEN ALAN GREER

PLAINTIFF

AND DEPARTMENT OF CORRECTIONS

DEFENDANT

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Chairperson

Ms L Ashworth, Member

Ms NJ Baird, Member

REPRESENTATION:

Mr A Greer in person for plaintiff

Ms H Carrad and Mr J Watson for defendant

DATE OF HEARING: Heard on the papers

DATE OF SUBSTANTIVE DECISION: 21 December 2020

DATE OF DECISION OF COSTS: 24 November 2022

DECISION OF TRIBUNAL ON COSTS¹

[1] The Tribunal by decision in *Greer v Corrections (Strike-Out Application)* 2020 NZHRRT 49 struck-out Mr Greer's claim. Mr Greer had failed to file any evidence and the claim was struck out as an abuse of process.

¹ [This decision is to be cited as *Greer v Corrections (Costs)* [2022] NZHRRT 44.]

[2] On 5 January 2021 the Department of Corrections (Corrections) filed submissions seeking \$8,840 in costs. Mr Greer provided no submissions on costs.

THE APPLICATION FOR COSTS

[3] Corrections has asked for an award of \$8,840 in costs, noting however that the actual legal fees incurred were \$26,519.60 (excluding GST).

[4] Corrections does not seek indemnity costs but rather a reasonable contribution to those costs. Corrections acknowledges that the Tribunal takes a flexible approach to costs and may depart from the principle that costs follow the event in order to provide justice between the parties but that this was a claim where cost consequences should arise.

[5] The primary submissions made in support of the application are:

[5.1] That the Tribunal has previously upheld the idea that some claims in the Tribunal should have cost consequences.

[5.2] That a plaintiff's status as a litigant in person does not mean they are immune from costs.

[5.3] That the actions of Mr Greer in filing scandalous material and then failing to take reasonable steps to prosecute the claim resulted in significant time being wasted by the defendant and the Tribunal.

[5.4] By contrast the defendant engaged constructively with the case, spending significant resources to recreate a response to a Privacy Act request from 20 October 2014 to provide Mr Greer with a factual foundation to ventilate his concerns.

DISCUSSION

[6] Following the Tribunal decision in *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31 which was upheld by the High Court in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515, 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. 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 s 105 of the Human Rights Act 1993, as well as the need to preserve access (by both plaintiffs and defendants) to justice.

[7] In *Beauchamp v B & T Co (2011) Ltd (Costs)* [2022] NZHRRT 30 (*Beauchamp*) the Tribunal canvassed at [15] and [16] the most recent decisions in which the Tribunal had expanded upon those basic principles. Those cases were *Director of Proceedings v Smith (Costs)* [2020] NZHRRT 35 (*Smith*) and *Turner v University of Otago (Costs)* [2021] NZHRRT 48 (*Turner*). As noted in *Beauchamp* at [15], 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.

[8] The task for this Tribunal in considering an application for costs is to exercise judgement 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].

[9] Summarising the principal factors most relevant to the determination of the present application:

[9.1] 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] and *Smith* at [9.8].

[9.2] 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 [9.6] and *Turner* at [7.5].

[9.3] Whether a party was put to the unnecessary expense of filing a strike-out application when a claim could instead have been withdrawn if a plaintiff chose not to pursue the matter further. Similarly, whether a party has been required to respond to inappropriate (in this claim scandalous) material.

[9.4] 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].

[9.5] Some claims in the Tribunal should have costs consequences; see *Smith* at [9.7]. Claims struck out for being an abuse of the Tribunal's process are more likely to attract such consequences.

[10] In this claim the Tribunal struck out the proceedings because Mr Greer failed to comply with the timetabling directions issued by the Tribunal over a period of almost six months. If Mr Greer did not wish to continue with his claim, he could have simply withdrawn it. He did not take that action.

[11] The Tribunal acknowledges the submissions by Corrections that significant resources were expended in responding to this claim, including responding to the filing of scandalous material by Mr Greer and Corrections' efforts in recreating a response to a Privacy Act request from 20 October 2014. However, those two factors have differing relevance to this application for costs.

[12] The filing by Mr Greer of scandalous material required a response by Corrections, given its nature, and when that was coupled with the failure by Mr Greer to engage in good faith with the Tribunal's timetable it is accepted there were additional extra costs to Corrections in this interlocutory phase, caused by Mr Greer's choices around the prosecution of this claim. Although it is noted the strike-out application was determined on the papers.

[13] The Tribunal does not, however, consider that the re-creation of the Privacy Act request response is a factor that is relevant to consideration of cost. Corrections have an obligation to comply with the Privacy Act irrespective of any claim filed. This is only relevant in so far as reiterating the good faith engagement of Corrections in this proceeding.

[14] The Tribunal accepts that, given the unnecessary expense incurred by Corrections in responding to the scandalous material filed and the need to file a strike-out application to bring these proceedings to a conclusion, a contribution to Corrections' costs is appropriate.

[15] The Tribunal has also had regard to the impact on Mr Greer and on access to justice generally of an award of costs in these proceedings. Because Mr Greer chose to not engage with the Tribunal in good faith, including filing scandalous material, it is appropriate to award costs against him. Parties who choose not to engage in good faith must be aware that costs may be ordered against them, but this should not deter those who act in good faith.

[16] For these reasons, it is appropriate for a contribution to Corrections' costs be made by Mr Greer. However, taking into account all of the principles above, that amount is limited. The Tribunal determines that an award of costs in the amount of \$1,500 adequately reflects the overall interests of justice in these particular circumstances.

ORDER

[17] Mr Greer is to pay the Department of Corrections the sum of \$1,500.

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Ms SJ Eyre	Ms L Ashworth	Ms NJ Baird
Chairperson	Member	Member