IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 36**

	Reference No. HRRT 037/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DANIEL LOHR**
	PLAINTIFF
AND	**ACCIDENT COMPENSATION CORPORATION**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Dr JAG Fountain, Member
Mr MJM Keefe JP, Member

REPRESENTATION:
Dr D Lohr in person
Mr PA McBride and Ms FM Lear for defendant

DATE OF HEARING:	**8 and 9 September 2016**
DATE OF DECISION:	**29 September 2016**
DATE OF COSTS DECISION:	**17 November 2016**

DECISION OF TRIBUNAL ON COSTS APPLICATION BY DEFENDANT[1]

BACKGROUND

[1] In its decision in *Lohr v Accident Compensation Corporation* [2016] NZHRRT 31 given on 29 September 2016 the Tribunal found the Accident Compensation Corporation (ACC) had discharged its burden of proving the information withheld from Dr Lohr fell within the exceptions in ss 27(1)(c) and 29(1)(a) of the Privacy Act 1993. As information

[1] [This decision is to be cited as: *Lohr v Accident Compensation Corporation (Costs)* [2016] NZHRRT 36]

privacy principle 6 had not been breached there had consequently been no interference with Dr Lohr's privacy as that term is defined in s 66 of the Act. Costs were reserved.

THE COSTS APPLICATION

[2] By application dated 13 October 2016 ACC seeks costs in the sum of $15,000.00. The actual legal costs incurred by ACC were $27,500.00 (GST exclusive) plus disbursements of $2,074.23. We accept the invoiced amount of $33,699.23 (which includes a GST component of $4,125.00) is reasonable in the circumstances.

[3] Dr Lohr has not filed any submissions notwithstanding the costs timetable in the Tribunal's decision of 29 September 2016 at [50] made provision for him to do so.

[4] It is not intended to repeat at length the submissions for ACC in support of its application. It is sufficient to note only the following summary set out in the submissions. An award of costs is said to be justified because:

> **[4.1]** The Tribunal's clear and repeated directions to Dr Lohr were repeatedly ignored.
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> **[4.2]** Dr Lohr raised issues which were without merit or which were a waste of time.
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> **[4.3]** Dr Lohr behaved in a manner that was neither reasonable nor appropriate.
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> **[4.4]** Dr Lohr consequently put ACC to substantial additional and wholly unnecessary costs and he is properly to be held liable to compensate ACC for some of that cost.

THE RELEVANT LEGAL PRINCIPLES

[5] The facts of the present case do not call for an extended discussion of the principles on which costs should be awarded or withheld by the Tribunal. The discretion is broad in nature. For present purposes the following passages from the judgment in *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 (Mallon J) are of particular assistance:

> [57] [The Tribunal] is in a position to assess the importance of access to justice that its jurisdiction can provide and the consequences of adverse costs awards being made too readily.
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> …
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> [61] I consider the Tribunal is right to express caution about applying the conventional civil costs regime to its jurisdiction. Statutory tribunals exist "in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts." The imposition of large fees to bring a claim and the imposition of adverse costs orders "undermines the cheapness and accessibility long recognised as important advantages of tribunals over courts."
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> …
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> [63] Moreover, as the Tribunal recognised, the particular character of the jurisdiction is highly relevant. Public or constitutional issues arise. The Tribunal provides a forum through which individuals, who are potentially vulnerable, can challenge the exercise of state power over them. The Tribunal noted in *Heather* that the long title to the Human Rights Act states that it is to "provide better protection for human rights in New Zealand" and that the discretion to award costs should promote, not negate, this purpose. Access to the Tribunal should not be unduly deterred.
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> …

> [65] I accept that some claims in the Tribunal should have costs consequences. However it does not follow that the costs consequences in respect of all claims in the Tribunal should be those that apply in civil litigation in the Courts. The other avenues for redress are more informal and are aimed at achieving an agreed outcome. The Director of Human Rights Proceedings points out that in this area it is often difficult for claimants to understand the merits of their claim in any legal sense. There is a wider interest in allowing them access to a determination before the Tribunal even if the claim is without merit in a legal sense. The legislation recognises the importance of this access by enabling them to bring a claim regardless of whether the Privacy Commissioner or the Director of Human Rights Proceedings considers the matter should proceed to the Tribunal. It might be said that the point at which the usual civil litigation costs regime should apply is when the claims are before the Courts. Even at that stage, the human rights dimension they entail may lead to a different approach to costs.
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> [Footnote citations omitted]

[6] These statements of principle are to be applied and developed within the context of the particular facts of the present case:

[6.1] The High Court in *Commissioner of Police v Andrews* at [57] recognised that the range of litigants and the types of cases coming before the Tribunal are relevant to the issue of costs. We accordingly record that consistent with long term trends, in some 75% of cases presently before the Tribunal one or both litigants are self-represented. That percentage is gradually rising as the Tribunal's workload increases. In the 2015 calendar year the number of new claims filed with the Tribunal increased by over 110%. In the present calendar year filings to date indicate the 2015 figures are likely to be duplicated, if not exceeded. The number of litigants in person is certain to increase.

[6.2] It follows the Tribunal's processes and procedures must be appropriately adapted to ensure lay litigants are not unduly deterred by the unjustifiable adoption by the Tribunal of the procedural formulism which can characterise court proceedings and by the prospect of an adverse award of costs should the litigant fail in his or her case. In *Heather v IDEA Services Ltd* [2012] NZHRRT 11 (a case under the Human Rights Act 1993) the Tribunal at [13] and [14] had regard to the fact that the long title to the Human Rights Act 1993 states that the purpose of the Act is to "provide better protection for human rights in New Zealand", a point which, as noted by Mallon J in *Commissioner of Police v Andrews* at [63], has some significance in the context of costs. It is therefore necessary to note in the context of the present case that the long title to the Privacy Act similarly states that it is an Act to "promote and protect individual privacy". This includes the establishment of principles with respect to access by individuals to information relating to them and held by public and private sector agencies. Applying *Heather*, the discretion to award costs should promote, not negate these purposes.

[6.3] The twin principles of access to justice (in the sense of access to a court or tribunal) and access to effective justice would be hollow if barriers prevented parties from gaining that access.

[6.4] Although the grounds on which an agency may properly refuse to disclose personal information requested by an individual under Principle 6 are limited to those permitted by ss 27 to 29, the effect of those provisions is that such information can indeed be lawfully withheld. Without the independent oversight of the Tribunal an individual in such a case would have no means of testing the decision or of obtaining an effective remedy should the information have been wrongfully withheld. The Tribunal's role in withholding cases is therefore central

to the achievement of the statutory purpose of promoting and protecting individual privacy while protecting the public interests recognised by ss 27 to 29.

[6.5] Without the Tribunal's oversight a withholding decision would otherwise be impregnable. The Tribunal's decision is in large measure reached on evidence received in closed hearing and which the plaintiff does not see. The plaintiff is in no position to gauge the strength of the agency's case and to then make an informed decision whether to assume the litigation risk of mounting a challenge to that case. Asking the Tribunal to assess and review the agency's decision to withhold is the only practical remedy available to the litigant.

[6.6] Where, as here, an agency has on evidence closed to the plaintiff succeeded in justifying the decision to withhold caution must be exercised when assessing the agency's application for costs. Access to personal information under information principle 6 is a legal right (see s 11) and the reverse onus provision in s 87 recognises that in withholding cases it is for the agency to justify, not the plaintiff to prove.

[6.7] There is no other forum or mechanism for a plaintiff to test an agency's withholding decision under ss 27 to 29. Judicial review does not provide a merits review of the kind available before the Tribunal and is a remedy which for most lay litigants is beyond personal and financial resources. It is therefore essential that the Tribunal does not use its discretion to award costs in a manner which might deter lay litigants (and, for that matter, those represented by a lawyer) from the inexpensive and accessible form of justice which, as remarked in *Commissioner of Police v Andrews* at [61], is the hallmark and strength of a tribunal.

[6.8] To the foregoing can be added the following principles of more general application:

> **[6.8.1]** The purpose of a costs order is not to punish an unsuccessful party.
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> **[6.8.2]** Ordinarily, the Tribunal should not allow the prospect of an adverse award of costs to discourage a party from bringing proceedings (if a plaintiff) or from defending proceedings (if a defendant). See *Heather v IDEA Services Ltd (Costs)* [2012] NZHRRT 11.
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> **[6.8.3]** While litigants in person face special challenges and are to be allowed some latitude, they do not enjoy immunity from costs, especially where there has been needless, inexcusable conduct which has added to the difficulty and cost of the proceedings. See for example *Rafiq v Commissioner of Inland Revenue (Costs)* [2013] NZHRRT 30 and *Rafiq v Commissioner of Police (Costs)* [2013] NZHRRT 31.
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> **[6.8.4]** On the other hand, understanding and compassion are equally important. See *Meek v Ministry of Social Development* [2013] NZHRRT 28 and *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31 upheld on appeal in *Commissioner of Police v Andrews* [2015] NZHC 745 at [65], [68] and [73] to [74].

APPLICATION OF THE LAW TO THE FACTS

Overview

[7] It is true Dr Lohr has not been a model litigant. But few self-represented parties are. It must be observed the hearing dates of 8 and 9 September 2016 agreed to at the very first case management teleconference convened on 26 February 2016 were achieved notwithstanding Dr Lohr's failure to file his witness statements on time and notwithstanding disagreement over such matters as the content of the common bundle of documents and the mode by which Dr Lohr and his witnesses were to give evidence. It is Dr Lohr's view that ACC itself contributed to some of the difficulties which led the Chairperson to issue no fewer than nine case management *Minutes*. The seventh such *Minute* published on 29 August 2016 noted both parties had expressed frustration with each other and a degree of acrimony appeared to have surfaced.

[8] It is also true that Dr Lohr, now resident in the USA, participated in the two day substantive hearing by way of AVL and his New Zealand witnesses variously gave evidence by audio-link, AVL (Skype) or in person. But these different ways of giving evidence are becoming commonplace both in tribunals and in courts. Dr Lohr was conscientious in following the Tribunal's directions regarding maintaining constant communication notwithstanding the inevitable breaks in transmission. The interruptions to the hearing were kept to a minimum.

The primary submissions for ACC

[9] For ACC the main complaints appear to be that Dr Lohr brought a claim wholly without merit and caused unnecessary cost to ACC by:

> **[9.1]** Filing unnecessary documentation. This appears to be a reference to the filing by Mr Lohr of the documents released to him by ACC in their redacted form, presumably to demonstrate to the Tribunal that which had been withheld. While this was strictly unnecessary given the reverse onus provisions of s 87, it could not be expected Dr Lohr would know or understand this. In any event, as remarked in the decision at [26] to [27], the Tribunal found Dr Lohr's documentation of assistance.
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> **[9.2]** Filing witness statements containing a large amount of irrelevant evidence. As to this it is commonplace for lay litigants (and indeed parties represented by lawyers) to tender inadmissible evidence. Given the relaxed rules of evidence which apply before the Tribunal (see ss 105 and 106 of the Human Rights Act which apply in proceedings under the Privacy Act by virtue of s 89 of the latter Act) this criticism does not on these facts have much force, particularly when there was little difficulty identifying those passages in Dr Lohr's statements which were not to be read into evidence.
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> **[9.3]** Failure to comply with timetable directions. This point has been addressed earlier. Frustrating though the delays were for ACC, no demonstrated prejudice arose and the fixture was not jeopardised.
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> **[9.4]** Participating in the hearing by AVL. This submission is not accepted. No discernible additional cost was incurred by ACC. Dr Lohr went to considerable lengths to maintain the link. While on the first day he was located at home, on the second day he was delayed by traffic and was able to improvise an internet

connection by variously using someone else's business premises, the wifi facilities of a fast food restaurant and (finally) the lobby of a hotel.

[9.5] Dr Lohr failed to appreciate the jurisdiction of the Tribunal was confined to determining matters under the Privacy Act and was not a forum for him to air his wider grievances against ACC and the investigation into his chiropractic and acupuncture practices. However, this is not an unusual error for a lay litigant to make and the evidence filed by ACC properly refrained from engaging with Dr Lohr on these wider issues. No real additional cost to ACC resulted.

[10] The Tribunal is asked by ACC to take into account that Dr Lohr is "already indebted to [ACC] and third parties for substantial unsatisfied costs awards made by the Employment Relations Authority, as well as indemnity costs in the High Court". However, we are not impressed by this submission. The present application for costs must be determined within the context of the case heard by the Tribunal. Decisions on costs reached in different circumstances in other proceedings before other courts and tribunals are in this case of no assistance.

[11] The Tribunal was also asked to take into account the fact that ACC had proper grounds to investigate Dr Lohr's billing practices and his alleged breach of his witnesses' privacy. We do not accept these matters are relevant and the allegations are in any event unproven.

[12] The last two points are suggestive that the Tribunal can include a punitive element in any award of costs. This we believe to be wrong in law.

Discussion

[13] While it has at times been frustrating for the Tribunal and for ACC to deal with Dr Lohr, we are not persuaded there has been needless, inexcusable conduct justifying an award of costs.

[14] The most important factor, not addressed by ACC, is that for the reasons explained earlier, a person in respect of whom an agency raises the withholding grounds in ss 27 to 29 of the Privacy Act has only one practical remedy and that is to ask the Tribunal to view the withheld information and to reach an independent decision whether the withholding ground has been made out. The fact that in such hearing the onus is on the agency to justify the withholding decision underlines the fact that there is little "work" for a plaintiff to do in such cases. Once an agency makes a decision to rely on one of the statutory withholding grounds it must be prepared to justify that decision before the Tribunal. While at the hearing the agency enjoys all the advantages of an audience before the Tribunal closed to the plaintiff, the plaintiff nevertheless has an effective remedy to the prima facie denial of the statutory right to personal information explicitly recognised in s 11(1).

[15] Expressed more simply, a litigant in the position of Dr Lohr has a binary choice between accepting the decision by the agency to withhold personal information or to challenge that decision before the Tribunal. In our view it would be wrong in principle for an individual to be deterred from challenging the decision by the prospect of an adverse award of costs should that challenge fail. After all, the individual does not know what is in the withheld information or what evidence the agency has in its possession to justify the withholding decision. The intending plaintiff has no practical way of assessing the litigation risks in testing the agency's case before the Tribunal.

[16] Finally, as noted by Mallon J in *Commissioner of Police v Andrews* at [63], the Tribunal provides a forum through which individuals, who are potentially vulnerable, to challenge the exercise of state power over them. The discretion to award costs should promote, not negate the protection of individual privacy and access to the Tribunal should not be unduly deterred.

DECISION

[17] It follows the application for costs is dismissed.

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Mr RPG Haines QC	**Dr JAG Fountain**	**Mr MJM Keefe JP**
Chairperson	**Member**	**Member**