**(1) ORDER PROHIBITING PUBLICATION OF TRUE NAMES, ADDRESSES AND IDENTIFYING PARTICULARS OF THE PLAINTIFF, HER BROTHER AND OTHER THIRD PARTIES**

**(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON**

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**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2017] NZHRRT 1**

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| | **Reference No. HRRT 056/2015** |
| **UNDER** | **THE PRIVACY ACT 1993** |
| **BETWEEN** | **WENDY TAN** |
| | **PLAINTIFF** |
| **AND** | **NEW ZEALAND POLICE** |
| | **DEFENDANT** |

**AT WELLINGTON**

**BEFORE:**
**Mr RPG Haines QC, Chairperson**
**Dr JAG Fountain, Member**
**Hon KL Shirley, Member**

**REPRESENTATION:**
**Ms W Tan in person**
**Ms V McCall for New Zealand Police**

**DATE OF COSTS HEARING:** **Heard on the papers**

**DATE OF DECISION ON APPLICATION FOR COSTS:** **24 January 2017**

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## DECISION OF TRIBUNAL ON APPLICATION BY DEFENDANT FOR COSTS[1]

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**[1]** In *Tan v New Zealand Police* [2016] NZHRRT 32 (18 October 2016) the Tribunal found Ms Tan had failed to establish there had been a breach of Principles 1 and 4 of

[1] [This decision is to be cited as: *Tan v New Zealand Police (Costs)* [2017] NZHRRT 1.]

the information privacy principles. It further found that the Police had proved the relevant exceptions to Principles 2, 3 and 11. As there had been no breach of any information privacy principle there had consequently been no interference with Ms Tan's privacy as that term is defined in s 66 of the Privacy Act 1993. Ms Tan's claim was accordingly dismissed.

## THE COSTS APPLICATION

**[2]** By application dated 27 October 2016 the Police now seek costs of $4,000 as a contribution to their legal costs of approximately $25,800. Were the proceeding to be characterised as "band A" for the purpose of the District Court costs schedule (ie the category of case requiring the least amount of time to prepare for a hearing) the scale costs amount to $12,700 plus disbursements.

**[3]** The submissions by Ms Tan in opposition to the application were filed on 2 November 2016.

**[4]** Before a decision could be made the Tribunal on 17 November 2016 published its decision in *Lohr v Accident Compensation Corporation (Costs)* [2016] NZHRRT 36 (*Lohr*). It became necessary that the parties be afforded an opportunity to comment on that decision. Supplementary submissions for the Police were filed on 15 December 2016 while the further submissions by Ms Tan followed on 21 December 2016.

**[5]** It is not intended to recite at length the submissions for the parties. It is sufficient to note only the main points.

### The submissions for the Police

**[6]** The Police accept the discretion in s 85(2) of the Privacy Act to award costs is conferred in broad terms (see *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [71]) and that the civil litigation rule that costs follow the event does not apply in the Tribunal's jurisdiction. Two points are stressed:

> **[6.1]** The outcome of the proceedings was wholly in favour of the Police.
>
> **[6.2]** Ms Tan's conduct of the case needlessly prolonged the case causing additional time being unnecessarily expended on preparation of additional written evidence and additional oral evidence at the hearing dealing with allegations relating to:
>
> > **[6.2.1]** the bona fides of Police witnesses; and
> >
> > **[6.2.2]** the alleged conduct of Ms DE Hickey with respect to events irrelevant to Ms Tan's claim.

### The submissions by Ms Tan

**[7]** The main points made by Ms Tan (with our response) are:

> **[7.1]** The Tribunal's findings in favour of the Police are to be contrasted with comments made by the investigator in the Office of the Privacy Commissioner ("Police warned to be more careful in the future") and reference was made to an alleged concession in the Police submissions to the Privacy Commissioner that the information provided by the Police to the Capital and Coast District Health Board (CCDHB) was more than was needed. The response to this point, however, is that the investigation by the Privacy Commissioner under Part 8 of

the Privacy Act 1993 is conducted on the papers whereas a hearing before the Tribunal involves the attendance of the parties and their witnesses in person, thereby enabling the Tribunal to make an informed decision on credibility after hearing the witnesses directly and observing them under questioning. The Tribunal also receives more detailed submissions based on the evidence as heard. The hearing before the Tribunal is of a different character to an investigation by the Privacy Commissioner. It is common for the Tribunal to receive different evidence to that placed before the Commissioner.

**[7.2]** Simply because Ms Tan failed in her case it does not mean that case was without merit or that it was vexatious. As to this it is to be observed the submission is correct in principle but in the context of the present case is subject to qualification because it was apparent at the hearing that Ms Tan attacked all those who offered a view of the facts different to the one held by her.

**[7.3]** The Police could have addressed the case in a more effective way by seeking mediation. In this regard it is necessary to observe that the investigation by the Privacy Commissioner is the only opportunity for the parties to mediate their differences. Once proceedings are initiated before the Tribunal there is no jurisdiction for the case to be sent back to the Commissioner for mediation. While in cases brought under the Human Rights Act 1993 a referral back to the Human Rights Commission is both permitted and required by s 92D of the Human Rights Act in certain circumstances, there is no similar jurisdiction under the Privacy Act.

**[7.4]** The Tribunal favoured the Police and was merely going through a "tick the box" exercise. In addition, one member of the Tribunal should have been recused but Ms Tan felt pressured to get the hearing over and done with. In response we observe this is an example of Ms Tan's tendency to attack anyone who has a view different to her own. The recusal point was raised with Ms Tan during the course of the hearing but she elected not to advance the point. See the decision at para [3].

**[7.5]** Costs should not be awarded simply because, as a litigant in person, she was not familiar with the process and with what a party is permitted to say or do. There were proper grounds to challenge the evidence of Detective Sergeant DA Woodley (Mr Woodley) and Ms Hickey. However, for the reasons set out in the decision we do not accept there were such proper grounds.

**[7.6]** There is no evidence Ms Tan was actuated by improper motives. In our view Ms Tan's conduct of the case did unnecessarily prolong the hearing and make it more difficult.

**[7.7]** An award of costs will unreasonably penalise her for following the process set out in the Privacy Act when a person believes a government agency has released information in an inappropriate manner. The fact that Ms Tan feels frustrated, hurt and angry does not mean she is hostile or that her complaint is any less valid. Complainants should not be deterred by the prospect of having to pay costs. The response to these points is that a litigant is not thereby entitled to needlessly add to the cost and difficulty of the hearing.

## THE RELEVANT LEGAL PRINCIPLES

**[8]** The Tribunal's decision in *Lohr* does not attempt an exhaustive exposition of the principles to be applied in a costs application under s 85(2). The broad discretion in that provision is not to be fettered. Each case must turn on its own specific facts. As stated in *Taylor v Orcon (Costs)* [2015] NZHRRT 32 at [11] a large number of factors are to be taken into account in deciding whether an award of costs is to be made:

> … 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.

**[9]** For example, the distinguishing feature of *Lohr* was that it was a case involving the withholding of information by an agency under ss 27(1)(c) and 29(1)(a). In such cases the burden of justifying the withholding falls on the agency with the consequence that part of the hearing is closed to the plaintiff. While in the context of such hearing the Tribunal is able to inspect the withheld information, the plaintiff will not gain access to it unless, as a consequence of the closed hearing, the Tribunal orders that it be released. Such plaintiff cannot, prior to bringing the proceedings, make an assessment of the strength of his or her case and the prospects of success. Such is not the case here. Ms Tan was in possession of the email in question prior to her making complaint to the Privacy Commissioner and the subsequent bringing of the present proceedings. She was well able to assess for herself the prospects of the Tribunal upholding her various complaints. The more so after she was served with the Police witness statements as required by the case management timetable.

**[10]** For the purpose of the present case we refer to the following principles set out in *Lohr* at [6.8]:

> **[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.
>
> **[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].

## DISCUSSION

**[11]** In our view the Police correctly submit Ms Tan's conduct of the case needlessly added to the difficulty and cost of the proceedings. In arriving at this conclusion we have made allowance for the fact Ms Tan is self-represented.

**[12]** What cannot be overlooked is her undisguised antipathy to the Police, Mr Woodley and Ms Hickey. It was visible throughout the hearing and went well beyond a firm though possibly over-exuberant conduct of her case. Ms Tan was needlessly aggressive and confrontational during the hearing. She was quick to criticise when no cause for criticism had been given creating the impression of a person who preferred to attack rather than to listen. Examples follow:

**[12.1]** She alleged Mr Woodley was motivated by ill-will or malice in relation to herself and her brother. See the decision at [48].

**[12.2]** She alleged that after receipt of the Police email on 12 September 2014 Ms Hickey subjected her (Ms Tan) to audits and harassment, implying Ms Hickey had concerns about Ms Tan's trustworthiness. It was further alleged that after Ms Tan resigned from the CCDHB Ms Hickey questioned Ms Ternent on more than one occasion to ascertain where Ms Tan was now employed. The manner in which those requests were made implied Ms Hickey was prepared to telephone the new employer to discuss Ms Hickey's concerns regarding Ms Tan's suitability. See the decision at [25].

All of these attacks on the credibility of Mr Woodley and Ms Hickey were rejected in our decision.

**[13]** A further factor to be taken into account is that Ms Tan's basic contention was unrealistic and bound to fail. That contention asserted it was unnecessary for the Police to disclose her brother's conviction to the CCDHB. See the decision at [100] and [103] to [105]. Had she at the outset read the document with a minimal degree of objectivity she would have realised there was little prospect of her complaint succeeding before the Tribunal. Because Ms Tan had possession of the Police email prior to making the complaint to the Privacy Commissioner, she was not (unlike Mr Lohr) compelled to bring her case to the Tribunal not knowing what the Police had said to the CCDHB.

**[14]** In these circumstances we accept the submission made by the Police that Ms Tan's conduct of the case, especially the unjustifiable attack on the credibility of Mr Woodley and Ms Hickey, added to the cost and difficulty in preparing the case and in conducting the hearing.

**[15]** The Police seek a contribution of $4,000. However, in our view the degree to which the 1.5 day hearing was unnecessarily lengthened and made more difficult should not be overstated. An award of $1,500 is sufficient as a contribution to the legal costs incurred by the Police.

## NON-PUBLICATION ORDERS

**[16]** Of necessity the suppression orders made in relation to the Tribunal's decision delivered on 18 October 2016 must apply equally to the present decision.

## FORMAL ORDERS

**[17]** For the foregoing reasons the decision of the Tribunal is that:

**[17.1]** Pursuant to s 85(2) of the Privacy Act 1993 Ms Tan is ordered to pay to the New Zealand Police costs of $1,500.

**[17.2]** Pursuant to s 107 of the Human Rights Act 1993 a final order is made prohibiting publication of the names, addresses and identifying particulars of Ms Tan, of her brother Henry Tan, of Mrs Green and of her children as well as of any other details which might lead to their identification. In the case of Mrs Green and her children, this includes any information regarding their past, present or future location.

**[17.3]** There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson. Ms Tan and the New Zealand Police are to be notified of any request to search the file and given opportunity to be heard on that application.

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| **Mr RPG Haines QC** | **Dr JAG Fountain** | **Hon KL Shirley** |
| **Chairperson** | **Member** | **Member** |