TASCAT

TASMANIAN CIVIL & ADMINISTRATIVE TRIBUNAL

Citation:	EC & DT v BX (Costs) [2024] TASCAT 16
Division:	General
Stream:	Anti-Discrimination
Parties:	EC & DT (Complainants) BX (Respondent)
Hearing Date:	15 September 2023
Hearing Location:	Hobart
Date of Orders:	16 January 2024
Date Reasons Issued:	16 January 2024
Panel:	Mr M Trezise, Ordinary Member
Orders Made:	(a) The Respondent will pay one-half of the complainants' costs of and incidental to the inquiry as and from 1 July 2022, such costs to be calculated on a party/party basis at 80% of the scale of fees presently allowed to practitioners and counsel under the Supreme Court Rules 2000, Part 1 of Schedule 1. (b) In the absence of agreement as to the costs sum in order (a) above, the costs are to be taxed by the Registrar of the Tribunal.
Catchwords:	Costs application – Complainants substantially successful at enquiry – Whether costs order to be made – Whether costs are to be fixed or are to be assessed.
Legislation Cited:	*Anti-Discrimination Act 1998;* ss 95 and 99A, *Tasmanian Civil and Administrative Tribunal Act 2020; Rule 18, Family Law Act 1975.*
Cases Cited:	*EC & DT v BX [2023] TASCAT 71, Orchard v Higgins (Costs) (No. 2) [2023] TASCAT 171, MM v The State of Tasmania (Department of Education) and Ors. (No. 2) [2023] TASCAT 126, Maree Summers v State of Tasmania (Department of Education) and Ors. [2020] TASADT 5, Northern Territory v*

Sangore [2019] HCA 25; (2019) 265 CLR 184, PBF as Child Representative for AF (Legal Aid Commission of Tasmania) & TRF & LKL [2005] FamCA 158, Idoport Pty Ltd v National Australia Bank Ltd & Ors., Idoport Pty Ltd v Donald Robert Argus [2007] NSWSC 23.

Representation:	Complainants: D Loganathan – Logan & Partners Respondent: Self-represented
File No:	A/2021/30
Publication Restriction:	The decision has been anonymised for the purpose of publication.

REASONS FOR DETERMINATION

Introduction

1. These reasons concern an application for a costs order following the determination of the Tribunal in *EC & DT v BX [2023] TASCAT 71* (the primary decision).

2. The complainants' complaint was received by Equal Opportunity Tasmania for the Anti-Discrimination Commissioner (the Commissioner) on 5 January 2021. On 20 August 2021, the Commissioner determined that the complaint proceed to an inquiry by the Tribunal. After several interlocutory steps, the inquiry proceeded before the Tribunal for hearing on 15 August, 12 September, and 3 October 2022. The complainants were legally represented, by leave previously granted. The respondent was self-represented. The primary decision followed on 12 April 2023.

3. The complaint against the respondent for direct discrimination and prohibited conduct was substantiated. A complaint for sexual harassment was not established. The Tribunal ordered that the relief substantially sought by the complainants in their complaint, and subsequently maintained, be granted, specifically that the respondent provide a written apology to the complainants for his statements and conduct and an undertaking not to engage in discriminatory or prohibited conduct towards them in the future.

4. The question of costs was reserved at the complainants' request. They now press for an order that the respondent pay their legal costs.

Applicable law

5. While the inquiry was determined after the commencement of the *Tasmanian Civil and Administrative Tribunal Act 2020* (the TASCAT Act), the inquiry was referred to the Tribunal before its commencement. Accordingly, the applicable law for the purposes of this application is to be found in the relevant provisions of the *Anti-Discrimination Act 1998* (ADA). See *Orchard v Higgins (Costs) (No. 2) [2023] TASCAT 171* at [10] and *MM v The State of Tasmania (Department of Education) and Ors. (No. 2) [2023] TASCAT 126* at [4] – [5]. The relevant provisions of the ADA are ss 95 and 99A. They provided that:

> **95. Costs**
>
> Subject to section 99A, each party to an inquiry is to pay his or her own costs.
>
> **99A. Order for costs**
>
> (1) The Tribunal may make an order as to costs in relation to any inquiry or review before it if the Tribunal considers circumstances justify the order.
>
> (2) Without limiting subsection (1), the Tribunal may make an order that a party's representative at any inquiry or review before it pay all or part of the costs of the inquiry or review.
>
> (3) The Tribunal may make an order that costs in relation to an inquiry or review before it be taxed by a district registrar of the Magistrates Court (Civil Division), the registrar of the Tribunal or such other person as the Tribunal considers appropriate.

(4) The provisions of the Division 2 of Part 9 of the Magistrates Court (Civil Division) Rules 1998 apply to the taxation of costs referred to in subsection (3) as if references to an action were read as references to an inquiry or review.

6. In *Maree Summers v State of Tasmania (Department of Education) and Ors. [2020] TASADT 5,* the authorities from both the Supreme Court of Tasmania and the Anti-Discrimination Tribunal of Tasmania concerning ss 95 and 99A were extensively examined. At [8], these observations were made:

> The following principles can be distilled from the relevant authorities:
>
> - The Tribunal must consider whether there are particular circumstances to justify an order for costs, displacing the general principle that parties must each pay their own costs of an inquiry.
>
> - The Tribunal's power to order costs must be exercised judicially, and not arbitrarily, capriciously or so as to frustrate the intent of the Act.
>
> - Circumstances which may be relevant to the exercise of the discretion in relation to costs include:
>
> - Conduct of the parties to the proceedings.
>
> - The motivation of the complainant in making the complaint.
>
> - Whether there was a reasonable basis to make the complaint.
>
> - Whether the complaint was trivial, vexatious or lacking in substance.
>
> - Whether the position taken by the applicant was genuine (if ultimately found to be misconceived).
>
> - Public interest considerations.
>
> - In circumstances where one party has made a *Calderbank* offer, whether the other party's failure to accept such an offer was unreasonable.
>
> - The discretion to award costs is not limited to or is restricted by previous decisions in relation to questions that have been relevant to the operation of s 99A of the [ADA].
>
> - What is not relevant to the exercise of the Tribunal's discretion are matters that are unconnected with the proceedings. In particular, the financial circumstances of a party, or an imbalance between the respective financial resources of the parties are not relevant.

7. The Tribunal adopts these observations for the purposes of these reasons. To the final observation, the Tribunal would add that it is well-established more broadly that impecuniosity is not a basis for refusing to make a costs order. See *Northern Territory v Sangore [2019] HCA 25; (2019) 265 CLR 184* at [27].

8. Further, under a statutory costs regime in analogous terms, s 117 of the *Family Law Act 1975*, it is well-settled law that no one factor is determinative and the Court may give

such weight as it considers relevant to any factor. In *PBF as Child Representative for AF (Legal Aid Commission of Tasmania) & TRF & LKL [2005] FamCA 158*, the Court observed:

> …Nowhere in subs (2A) or elsewhere in s 117, is there any prescription that more than one factor must be present before an order for costs is made nor of comparative weight of the factors set out in subs (2A). As a consequence, there is nothing to prevent any factor being the sole foundation for an order for costs.

Submissions

9. What follows immediately is an account only of the submissions received by the Tribunal and not findings of fact.

10. Mr Loganathan, for the complainants, gave emphasis to their long-stated contention for an apology from the respondent. This was stated in the original complaint, repeated at a directions hearing conducted by a Registrar of the Tribunal on 25 November 2021, and was maintained in subsequent communications with the respondent and during the course of the inquiry proceedings. He told the Tribunal that the respondent had been "warned about costs" but significantly did not produce any written *Calderbank*-type communication to the respondent to that effect. It was however common ground that the request for an apology, and the complainants' satisfaction with that outcome, had been evident from the commencement of the process and that the respondent had declined that request.

11. Submissions were also made about the respondent's conduct of the proceedings.

12. The Commissioner had determined on 20 August 2021 that there was little prospect of any conciliated outcome; that is, that the prospects for successful conciliation were considered to be remote. Mr Loganathan sought to attribute this determination to the respondent.

13. Mr Loganathan referred to a contention raised by the respondent that the complaint, as ultimately referred by the Commissioner to the Tribunal for the inquiry, comprised only two (2) and not three (3) allegations. This contention was rejected by the Tribunal in the primary decision. The inference that the Tribunal was asked to draw was that this had prolonged the proceedings, leading to additional expense.

14. Reference was also made by Mr Loganathan to interlocutory steps which were necessitated by the respondent's opposition to the complainants' election to engage legal representation, requiring an earlier determination by the Tribunal, and to at least one procedural event which was effectively wasted by the respondent's objection, expressed after the event, regarding the making of oral and not written submissions. The Tribunal was asked to draw the same inference.

15. It was further submitted that the respondent's serious allegation that the complainants had 'manipulated' the audio/video evidence which they had exhibited during the inquiry, an allegation rejected in the primary decision, had necessarily led to an application to re-open the complainants' case and therefore additional expense.

16. Mr Loganathan sought to introduce matters relating to the respondent's compliance with the order resulting from the primary decision. This was disregarded as an

enforcement issue to be dealt with separately, and elsewhere, as the complainants may be advised.

17. Finally, an itemised schedule of the legal costs said to have been incurred by the complainants for the period 20 August 2021 to 21 June 2023 was tendered. It was drawn in accordance with the scale of fees allowed the practitioners under the *Supreme Court Rules 2000*, Part 1 of Schedule 1, and amounted to approximately $14,700.00 inclusive of GST. It was submitted by Mr Loganathan that the complainants' costs would not have exceeded $4000.00 had the complaint been resolved by apology from the respondent at or shortly after the directions hearing on 25 November 2021.

18. For his part, the respondent submitted that the complainants and, particularly their legal practitioners, had unnecessarily extended the proceedings. He attributed "80% of the time" to their actions. He maintained his position that the complaint could have been confined to two (2) allegations, by reference to a remark made by another Tribunal member in the earlier determination referred to at [14] above, but accepted the primary decision in that respect. He maintained the objective wisdom of his objection to the involvement of legal practitioners by the complainants, indicating that they could have chosen to self-represent but "*only wanted to generate costs*".

19. The demonstration which was attempted by the complainants by way of rebuttal in re-opening of his allegation that audio/video evidence had been manipulated was described by the respondent as "a farce", wasting hearing time. (In the primary decision the Tribunal characterised it as not particularly helpful evidence.) The complainants were *"hostile and evasive"* in their evidence, and he had progressed his case to the best of his ability.

20. The respondent reminded the Tribunal that the allegation of sexual harassment had not been substantiated by the complainants.

21. He referred to his state of health, his employment circumstances, and to generally unenviable financial circumstances.

22. The respondent was assured that submissions concerning his compliance with the order emanating from the primary decision were not required. That issue is disregarded as an irrelevant consideration for the purposes of this application.

23. None of the other factors referred to in [6] above were engaged in submissions.

Consideration

24. The inquiry and the primary decision principally involved and turned upon a finding of fact i.e. whether or not the respondent had spoken the words alleged by the complainants in their complaint. The respondent stated that he had simply never spoken any of those words which formed the basis for the complaint. On a finding of credit, and on the balance of probabilities (informed by the well-known caution expressed in *Briginshaw v Briginshaw)*, the Tribunal determined as matter of fact that the respondent had made the statements as alleged by the complainants. On a finding of law, the Tribunal agreed with the complainants that the statements established direct discrimination and prohibited conduct on the respondent's part. On a further finding of

law, the Tribunal did not agree with the complainants that the statements established sexual harassment on the respondent's part.

25. It therefore could not be said that the complainants were entirely successful. They did however achieve their requested outcome, stated in their complaint dated 5 January 2021 of securing an order for an apology and undertaking from the respondent, albeit (and importantly) in terms excluding reference to alleged sexual harassment. The requested outcome was not inflated by considerations of compensation nor the imposition of any punitive measures.

26. The Tribunal found, as a matter of fact, that the respondent engaged in direct discrimination and prohibited conduct towards the complainants. An acknowledgement and an expression of some contrition would have been an appropriate, and modest, provision for the respondent to make for the complainants. Following inquiry, the Tribunal has determined accordingly. It was unreasonable in these circumstances for the respondent to pu the complainants to the expense of the inquiry. This militates in favour of an order that the respondent pay the complainants' costs.

27. Turning to the other submissions, the Tribunal is not actively persuaded one way or another by considerations of the parties' conduct in the course of the proceedings. The complainants were entitled to engage legal representation, as found in the earlier determination of the Tribunal, and the respondent was self-represented. The Tribunal acknowledged the respondent's disadvantage in that respect in the primary decision. There was nothing particularly remarkable in the 'running' of the cases by the parties when these natters are considered. In short, neither party has identified factors which to the satisfaction of the Tribunal would justify a departure from the general principle under s 95 on this basis.

28. The respondent's financial circumstances are to be considered as unconnected with proceedings and irrelevant, as above.

29. Having considered all of the relevant factors which the parties have identified, and in the exercise of its discretion, the Tribunal determines that the circumstances justify the making of an order that the respondent pay costs in relation to the inquiry. Noting the finding of law concerning the allegation of sexual harassment and informed to some extent by the itemised schedule of costs referred to in [17] above, the Tribunal considers that the appropriate order is that the respondent pay one-half of the complainants' costs of the inquiry as and from 1 July 2022.

How are the costs to be calculated?

30. Typically, where an order has been made for costs under the ADA, it is for costs to be as assessed or as agreed calculated on a party/party basis at the rate of 80% of the Supreme Court scale of fees set out in the *Supreme Court Rules*. The quite recent decisions referred to in [5] above did not depart from this usual practice.

31. Decisions under the ADA on costs which follow this are more likely, naturally enough, to fall for consideration under the TASCAT Act and its Rules. The Tribunal notes Rule 18 of the *Tasmanian Civil and Administrative Tribunal Rules 2021* which is in these terms:

18. Costs

(1) Subject to an order of the Tribunal and the provisions of the relevant Act, if the Tribunal has not ordered the payment, in relation to proceedings, of a lump sum in costs –

(a) costs, in relation to proceedings, awarded by the Tribunal are to be assessed –

(i) at the percentage, determined by the Tribunal, of the scale of costs applicable from time to time for the purposes of the *Supreme Court Civil Procedure Act 1932*; or

(ii) if no other percentage has been determined by the Tribunal – at 75% of the scale of costs applicable from time to time for the purposes of the *Supreme Court Civil Procedure Act 1932*; and

(b) if costs are not agreed by the parties, the Tribunal may, on the application of a party, determine the amount of costs payable.

(2) In determining the costs to be awarded to a party to proceedings, the Tribunal may take into account that the party did not accept an offer as favourable as, or more favourable than, the Tribunal's order or decision in the proceedings,

…

32. There is much to be found in favour of the Tribunal setting a specified lump sum for costs. In *Idoport Pty Ltd v National Australia Bank Ltd & Ors., Idoport Pty Ltd v Donald Robert Argus [2007] NSWSC 23* at [9], Einstein J set out the principles underpinning both the reason for, and the approach to, a fixed sum costs order. They included:

- Avoiding the expense, delay and aggravation involved in protracted litigation arising out of taxation.
- The Court must be confident that the approach taken to estimate costs is logical, fair and reasonable.
- The fairness parameter includes the Court having a sufficient confidence in arriving at an appropriate sum on the materials available.
- A gross sum assessment, by its very nature, does not envisage that a process similar to that involved in a traditional taxation or assessment of costs should take place and the sum "can only be fixed broadly having regard to the information before the Court".

33. This is a case where it may have been possible for the Tribunal to specify a fixed sum for the costs awarded on the information available to it. It will not, however, depart from the practice established under the relevant authorities which are applicable for the reasons set out in [5] above.

Orders

34. The Tribunal therefore makes the following orders:

(a) The Respondent will pay one-half of the complainants' costs of and incidental to the inquiry as and from 1 July 2022, such costs to be calculated on a party/party basis at 80% of the scale of fees presently allowed to practitioners and counsel under the Supreme Court Rules 2000, Part 1 of Schedule:

(b) In the absence of agreement as to the costs sum in order (a) above, the costs are to be taxed by the Registrar of the Tribunal.