

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *CH v Queensland Police Service* [2020] QCAT 309

PARTIES: **CH**  
(applicant)

v

**QUEENSLAND POLICE SERVICE**  
(respondent)

APPLICATION NO/S: OCL049-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 7 August 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Richard Oliver

ORDERS: **The application for costs is dismissed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE  
AND TERRITORY COURTS – COSTS – where  
application for costs under the *Queensland Civil and  
Administrative Tribunal Act 2009* (Qld) – where applicant  
successful in establishing a breach of privacy – where  
compensation already awarded under s 178 of the  
*Information Privacy Act* – whether further costs should be  
awarded for engaging counsel for the hearing – whether  
in the interests of justice to make a costs order in the  
circumstances.

*Queensland Civil and Administrative Tribunal Act 2009*  
(Qld) ss 100 and 102  
*Information Privacy Act 2009* s 178

*Ralacom Pty Ltd v Body Corporate for Paradise Island  
Island Apartments (No 2)* [2010] QCAT 412

REPRESENTATION:

APPEARANCES: This matter was heard and determined on the papers  
pursuant to s 32 of the *Queensland Civil and  
Administrative Tribunal Act 2009* (Qld)

## REASONS FOR DECISION

- [1] This is an application for costs by the applicant after he was successful in his claim that the respondent breached his privacy under the *Information Privacy Act 2009 (IPA)*. Pursuant to s.178 of the IPA, the Tribunal awarded compensation to the applicant in the sum of \$17,806.75. It also ordered that the respondent provide the applicant with an apology. The applicant now seeks an order that respondent pay the costs he incurred in briefing counsel to represent him on the hearing of the application fixed in the sum of \$6,875. The application for costs is opposed by the respondent. Both the applicant and the respondent have filed written submissions and agreed that the question of costs should be determined on the papers.
- [2] The usual starting point in any application for costs in the Tribunal is Section 100 of the *Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act)* which provides that each party to a proceeding must bear the parties' own costs for the proceeding. However, a discretion is conferred under s.102 if it can be shown that it is in the interests of justice to make a costs order against a party. Section 102(3) sets out those matters to which the Tribunal might have regard in determining whether or not to award costs. The Tribunal is not limited to those matters and can also consider anything else that is relevant to the application.
- [3] The applicant also relies on s.178(d) of the IPA which provides that the Tribunal can make "*an order that the complainant be reimbursed for expenses reasonably incurred in connection with making the complaint*".
- [4] Dealing with that submission first, in the primary decision, the Tribunal had regard to that section and awarded \$5,000 compensation for expenses reasonably incurred by the applicant including the conduct of the respondent in responding to the application. The respondent submits that the amount awarded under s.178(d) already includes costs. However the decision did not so far as to include the costs of the hearing. Specifically, the award included the "*additional time and if necessary taken because of the respondent's approach to the claim*".<sup>1</sup> It did not include the involvement of counsel on the hearing of the application, together with the preparation of written submissions. The steps taken to enforce the orders made are unrelated to the costs of the hearing. If the applicant is to succeed on the application for costs, he needs to establish that the interest of justice call for a costs order pursuant to s.102 of the QCAT Act
- [5] Multiple arguments were raised by the applicant to support the breach of privacy but the only basis upon which the applicant succeeded was because of the finding that Constable Smith, in his conversation with Wing Commander Deveney on the day after the incident, 28 April 2017, disclosed further information concerning the circumstances of the applicant's arrest. This disclosure, it was found breached s.27 of the IPA. Although Constable Smith contended that he did not provide further information, the objective evidence contradicted this assertion. In providing the further information it was assumed that Constable Smith thought he was being of assistance to Wing Commander Deveney in responding to his enquiry. There was no adverse inference drawn about Constable Smith conduct in doing so other than establishing breach of privacy.

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<sup>1</sup> CH v Queensland Police Service [2019] QCAT 297 at [49]

- [6] Then considering the various matters to be taken into account under s.102 of the QCAT Act, the applicant relies principally on the conduct of the respondent in resisting his allegation that his privacy had been breached. He contends that he was justified in briefing counsel to appear on his behalf at the hearing because the matter involved complex interpretation and application of Commonwealth legislation, State legislation, and the Operational Procedural Manuals of the QPS. I agree with that contention because the issues raised in the hearing and written submissions, particularly by counsel of the applicant, took some time to work through and comprehend. Having counsel for both parties at the hearing was of great assistance to the Tribunal.
- [7] The above comments also deal with the submission with respect to the novelty and complexity of the case in so far as they did raise matters of public interest which had not been considered in previous cases. There was obviously a lot of work involved in bringing these matters together in the written submissions from the applicant's counsel. There is also some justification in briefing counsel when the respondent had also engaged senior counsel to appear on its behalf. This also gives an indication to the complexity of the case.
- [8] The applicant relies on failed negotiations during the pre-Tribunal procedures undertaken with the Office of Information Commissioner. I have considered the matters raised in the applicant's affidavit filed with the application but do not regard the offers made to resolve the application as being in the nature of a formal offers to settle which would result in costs sanctions if not accepted. It is appropriate that steps be taken to resolve the matter prior to the commencement of Tribunal proceedings and even though one would hope that the respondent would engage in those discussions, if it legitimately took the view, as it did in this proceeding, that it had not breached any of its obligations under the IPA, then it is entitled to adopt that course.
- [9] In considering the position taken by the QPS and the findings of fact in the primary decision, is it the case that the interests of justice call for a costs order against the respondent? It is only then that s.102 is enlivened. The applicant relies on the pre-hearing conduct of the respondent which caused it a disadvantage but that has already dealt with in the earlier decision where the applicant was awarded compensation under s.178 of the IPA. I accept that the case did involve complex questions of law as already referred to and that is one reason why it was appropriate to engage Counsel so that the issues could be properly ventilated, and also to assist the Tribunal in understanding the position of the both parties. It is submitted that had Constable Smith been more forthright, in his recollection of events which occurred some time before he made his written statement on 5 November 2018, the whole Tribunal hearing may have been avoided. However, making findings contrary to the evidence of a particular witness is part, and sometimes the purpose, of the hearing process to get to the truth of a matter. It does not necessarily mean that a witness is being dishonest or deceitful as recollections of events can become clouded with time.
- [10] Although the applicant has made a convincing argument for costs, I still must have regard to the prescriptive words of s.100 of the QCAT Act. In the words of the then

President of QCAT, Justice Alan Wilson in *Ralacom Pty Ltd v Body Corporate for Paradise Island Island Apartments (no 2)*<sup>2</sup>:

Under the QCAT Act the question that will usually arise in each case in which costs are sought is whether the circumstances relevant to the discretion inherent in the phrase ‘the interests of justice’ point so compellingly to a costs award that they overcome the strong contra-indication against costs orders in s 100.

[11] Here I do not consider that the arguments put forward by the applicant are such to enliven the discretion to overcome the strong contra-indication against costs orders in the section.

[12] The application for costs is dismissed.

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<sup>2</sup> [2010] QCAT 412 at [29]