QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Simonova v State of Queensland (costs)* [2021] QCAT 45
PARTIES:	**MILKA SIMONOVA** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
APPLICATION NO/S:	ADL086-17
MATTER TYPE:	Anti-discrimination matters
DELIVERED ON:	5 February 2021
HEARING DATE:	2 October 2020
HEARD AT:	Brisbane
DECISION OF:	Member Traves
ORDERS:	**The application for costs 'thrown away' filed by the respondent on 17 June 2020 is dismissed.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL MATTERS – POWER TO AWARD COSTS GENERALLY – where applicant given leave to amend statement of contentions to withdraw claim of direct discrimination – where respondent claims costs relating to preparation of the defence of that part of the complaint – where applicant has impaired capacity for legal matters – where complaint made by Ms Krzeva, the applicant's daughter/attorney, on her mother's behalf – whether Ms Krzeva is a 'party' for the purposes of s 39 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') – if not, whether Ms Krzeva is a 'party' for the purposes of s 102 of the QCAT Act – whether costs can be awarded against a non-party under s 102 of the QCAT Act – whether costs can be awarded against Ms Krzeva as 'representative' under s 103 of the QCAT Act – whether grounds to make costs order *Anti-Discrimination Act* 1991 (Qld), s 134, s 166, Schedule 1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 39, s 43, s 48, s 100, s 102, s 103, Schedule 3 *Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd* [2015] QCA 114 *Fashion Warehouse Pty Ltd v Pola* [1984] 1 QdR 251

Gillespie v Goodwin [2000] 1 QdR 517
Harris v Carter [2020] NSWSC 196
Kebaro Pty Ltd v Saunders [2003] FCAFC 5
Knight v FP Special Assets Limited (1992) 174 CLR 178
N (on behalf of her son) v State of Queensland (Acting through the Dept of Education and the Arts) [2007] QSC 208
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412
Stokes v McCourt (Costs) [2014] NSWSC 63
Yakmor v Hamdoush (No 2) (2009) 76 NSWLR 148

APPEARANCES & REPRESENTATION:

Applicant:	S. Keim SC and M. Rawlings, K. Hillard of counsel, instructed by Anderson Fredericks Turner
Respondent:	C. Murdoch QC and D. Keane of counsel, instructed by Crown Law

REASONS FOR DECISION

[1] By its application dated 17 June 2020, the respondent applied for costs thrown away as a result of the proposed amendments to the applicant's case and that the order to pay costs be made against the applicant's daughter and duly appointed attorney, Ms Krzeva.[1]

[2] Ms Krzeva is the person who made the complaint of discrimination, the subject of these proceedings, to the Queensland Human Rights Commission ('QHRC') on behalf of her mother. She was authorised to do so by the QHRC under s 134 of the *Anti-Discrimination Act* 1991 (Qld) ('AD Act'). The complaint alleged direct discrimination and indirect discrimination against the respondent, in effect, due to their management of Ms Simonova's Department of Housing accommodation and ultimately for the termination of her tenancy and subsequent eviction which, it says, was based on conduct of the applicant that was associated with her impairment.

[3] On 17 August 2020, the Tribunal granted leave to the applicant to amend her contentions in accordance with 'Schedule C (Further Amended Contentions)' annexed to the application for leave to file further amended contentions filed by the applicant on 3 June 2020. The effect of the amendments was to withdraw the applicant's direct discrimination complaint in its entirety and to amend the complaint of indirect discrimination. The amendment is the fourth time the applicant has amended her contentions.

[4] The respondent, in its reply submissions of 10 July 2020, seeks costs reasonably incurred that related to work done which has been wasted as a result of the action giving rise to its application namely, the fourth amendment to the applicant's contentions.

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[1] Enduring power of attorney appointing Antoneta Krzeva as attorney for financial and personal/health matters dated 4 July 2011, effective immediately for financial matters and upon losing capacity for personal matters.

[5] Ms Krzeva is acting as her mother's attorney for legal matters.[2] It is accepted that the applicant does not have capacity to give legal instructions. Ms Krzeva is not currently named as a party to the discrimination proceedings but made the complaint on her mother's behalf and, the respondent submits, is the 'driving force' behind the proceedings. Ms Krzeva also made the decision to refer the complaint on behalf of the complainant. The respondent also submits that Ms Krzeva is the person who stands to benefit from the litigation because the bulk of the compensation sought is for capital improvements to her property that were made in order to accommodate her mother.

[6] Section 102 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') gives the Tribunal the power to award costs against a 'party to the proceeding'. The issues therefore are:

(a) whether Ms Krzeva is a 'party' for the purposes of s 39 of the QCAT Act;

(b) if not, whether Ms Krzeva is nonetheless a 'party' for the purposes of s 102 of the QCAT Act; and

(c) if not, whether the Tribunal may award costs against Ms Krzeva as a 'non-party' under s 102; or alternatively,

(d) if s 102 does not apply, whether costs can be awarded against Ms Krzeva as a 'representative' under s 103 of the QCAT Act.

[7] As considered below, although Ms Krzeva is not a party as defined by s 39 of the QCAT Act, authority exists for the proposition that 'party' for the purposes of costs provisions in other jurisdictions should be read so as to include a person acting as litigation guardian, next friend or tutor.[3] Further, and in the alternative, the Tribunal has held that s 102 can be used to award costs against a non-party director.[4]

Relevant statutory provisions

[8] Section 28 of the QCAT Act governs the general conduct of proceedings in the Tribunal. Relevantly, in conducting a proceeding, the Tribunal must act with as little formality and technicality and with as much speed as the requirements of the QCAT Act, an enabling Act or the Rules and a proper consideration of the matters before the Tribunal, permit.[5] By s 45 the parties are obliged to act quickly in any dealing relevant to the proceeding.

[9] Section 48 deals with the situation where one party acts to the disadvantage of the other party in the proceedings. The respondent submits that the provision as italicised is relevant to their application. Section 48 provides:

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2 Ibid; *Powers of Attorney Act* 1998 (Qld), Sch 2, definition of 'personal matter'.

3 *Yakmor v Hamdoush (No 2)* (2009) 76 NSWLR 148; *Harris v Carter* [2020] NSWSC 196; *Stokes v McCourt (Costs)* [2014] NSWSC 63.

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

5 QCAT Act, s 28(3)(d).

48 Dismissing, striking out or deciding if party causing disadvantage

(1) This section applies if the tribunal considers a party to a proceeding is *acting in a way that unnecessarily disadvantages* another party to the proceeding, including by—

(a) *not complying with a tribunal order or direction without reasonable excuse*; or

(b) not complying with this Act, an enabling Act or the rules; or

(c) asking for an adjournment as a result of conduct mentioned in paragraph (a) or (b); or

(d) *causing an adjournment*; or

(e) attempting to deceive another party or the tribunal; or

(f) vexatiously conducting the proceeding; or

(g) failing to attend conciliation, mediation or the hearing of the proceeding without reasonable excuse.

(2) The tribunal may—

(a) if the party causing the disadvantage is the applicant for the proceeding, order the proceeding be dismissed or struck out; or

(b) if the party causing the disadvantage is not the applicant for the proceeding—

(i) make its final decision in the proceeding in the applicant's favour; or

(ii) order that the party causing the disadvantage be removed from the proceeding; or

(c) *make an order under section 102, against the party causing the disadvantage, to compensate another party for any reasonable costs incurred unnecessarily.*

Note—

See section 108 for the tribunal's power to order that the costs be paid before it continues with the proceeding.

(3) In acting under subsection (2), the tribunal must have regard to the following—

(a) the extent to which the party causing the disadvantage is familiar with the tribunal's practices and procedures;

(b) the capacity of the party causing the disadvantage to understand, and act on, the tribunal's orders and directions;

(c) whether the party causing the disadvantage is acting deliberately.

(4) The tribunal may act under subsection (2) on the application of a party to the proceeding or on the tribunal's own initiative. …

[10] The costs provisions are contained in Chapter 2, Division 6 of the QCAT Act. The usual position is that, unless the enabling Act provides otherwise, the parties bear their own costs.

[11] Section 100 provides:

> **100 Each party usually bears own costs**
>
> Other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding.

[12] Section 102 provides:

> **102 Costs against party in interests of justice**
>
> (1) The tribunal may make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order.
>
> (2) However, the only costs the tribunal may award under subsection (1) against a party to a proceeding for a minor civil dispute are the costs stated in the rules as costs that may be awarded for minor civil disputes under this section.
>
> (3) In deciding whether to award costs under subsection (1) or (2) the tribunal may have regard to the following—
>
> (a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48 (1) (a) to (g);
>
> (b) the nature and complexity of the dispute the subject of the proceeding;
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> (c) the relative strengths of the claims made by each of the parties to the proceeding;
>
> (d) for a proceeding for the review of a reviewable decision—
>
> (i) whether the applicant was afforded natural justice by the decision-maker for the decision; and
>
> (ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;
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> (e) the financial circumstances of the parties to the proceeding;
>
> (f) anything else the tribunal considers relevant.

[13] In addition to the power to award costs against a party, the Tribunal has power, under s 103 to award costs against a representative of a party. Section 103 of the QCAT Act provides:

> **103 Costs against representative in interests of justice**
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> (1) If the tribunal considers a representative of a party to a proceeding, rather than the party, is responsible for unnecessarily disadvantaging another party to the proceeding as mentioned in section102 (3) (a), the tribunal may make a costs order requiring the representative to pay a stated amount to the other party as compensation for the unnecessary costs.
>
> (2) Before making a costs order under subsection (1), the tribunal must give the representative a reasonable opportunity to be heard in relation to making the order.

[14] Pursuant to s 106, costs may be awarded at any stage of the proceedings. The power in s 106 is not at large; it only applies if the Tribunal 'may award costs

under this Act or an enabling Act'.[6] Under s 108, the Tribunal may make an order requiring that costs be paid before it continues with the proceeding.

[15] Relevant to the status of Ms Krzeva is s 134 of the AD Act. Section 134 provides:

> **134 Who may complain**
>
> (1) Any of the following people may complain to the commissioner about an alleged contravention of the Act —
>
> (a) a person who was subjected to the alleged contravention;
>
> (b) an agent of the person;
>
> (c) a person authorised in writing by the commissioner to act on behalf of a person who was subjected to the alleged contravention and who is unable to make or authorise a complaint.
>
> (2) Two or more people may make a complaint jointly.
>
> (3) A relevant entity may complain to the commissioner about a relevant alleged contravention.
>
> (4) However, the commissioner may accept the relevant entity's complaint under section 141 only if the commissioner is satisfied that—
>
> (a) the complaint is made in good faith; and
>
> (b) the relevant alleged contravention is about conduct that has affected or is likely to affect relevant persons for the relevant entity; and
>
> (c) it is in the interests of justice to accept the complaint.
>
> (5) In this section—
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> "relevant alleged contravention" means an alleged contravention of section 124A.
>
> "relevant entity" means a body corporate or an unincorporated body, a primary purpose of which is the promotion of the interests or welfare of persons of a particular race, religion, sexuality or gender identity.
>
> "relevant persons", for a relevant entity, means persons the promotion of whose interests or welfare is a primary purpose of the relevant entity.

[16] 'Complainant' is defined to mean:

> (a) in relation to a representative complaint—a person named in the complaint or otherwise identified in the complaint as a person on whose behalf the complaint is being made; or
>
> (b) in relation to a complaint by a relevant entity under section 134 —the relevant entity; or
>
> (c) otherwise—the person who is the subject of the alleged contravention of the Act.[7]

[17] Within 28 days of being notified that the complaint can not be resolved by conciliation, the complainant may, by written notice, request the commissioner to

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6 *Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd* [2015] QCA 114, [83].

7 AD Act, Schedule 1.

refer the complaint to the Tribunal.[8] The complainant, by s 166(5) of the AD Act, is the 'applicant' for the purposes of the relevant Tribunal Act. Neither 'party' or 'agent' are defined in the AD Act.

The respondent's submissions

[18] The respondent says that the proceedings have been on foot for almost 3 years and that the applicant has now been given leave to recast her case and effectively put the parties back to the inception of the proceedings. The respondent disputes that the disclosure process is the reason why the amendments were made. It submits that the case of direct discrimination was always bound to fail given the outcome of the tenancy dispute, which held the eviction of Ms Simonova to be valid.[9] While the reasons of the Court of Appeal in the tenancy matter were given on 5 February 2019, the orders were made on 30 April 2018.

[19] The respondent seeks an order that costs 'thrown away' be paid by Ms Krzeva, that is, the costs reasonably incurred that related to work done which has been wasted as a result of the event or action giving rise to its application namely, the proposed amendment to the applicant's contentions.[10] It submits that the applicant has misunderstood the nature of its application for costs 'thrown away' and that, under s 102 of the QCAT Act, it is in the 'interests of justice' that costs be awarded. Further, that if the Tribunal accepts that the more focussed pleading is the one that ought to have been put on from the outset, that it is entirely appropriate that costs be awarded for the expense incurred in responding to multiple sets of contentions. The nature of the amendments sought is irrelevant to the application for costs thrown away. What is relevant, it is submitted, is the number of times the applicant has amended her contentions and that: (i) each amendment necessitated an amended response; and (ii) the respondent did work that was no longer required as a result of those amendments. The respondent submits that all of this occurred which constitutes, objectively, 'unnecessary disadvantage' within the meaning of s 48(1) of the QCAT Act and warrants an award of costs.

[20] The reasons the respondent submits that costs should be paid by Ms Krzeva are that: she is the applicant's daughter, attorney and, in effect, litigation guardian; the compensation sought is largely to reimburse Ms Krzeva for capital improvements she made to her home allegedly so that her mother could be accommodated; Ms Krzeva has the conduct of the proceedings; and, Ms Krzeva was authorised under s 134 of the AD Act to act on behalf of her mother in these proceedings[11] and is, as a matter of substance, the complainant for the purposes of the complaint. The respondent submits that the Ms Krzeva has such a close connection to the proceeding that she must be a party for the purposes of s 39 of the QCAT Act, if not expressly named on the record then, by necessary implication.

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8 AD Act s 166(1).

9 *Simonova v State of Queensland through the Department of Housing and Public Works* [2019] QCA 10.

10 Respondent's Reply to application for costs thrown away filed on 10 July 2020 at [10] citing *Andromeda Handelsaktieselskab v Holme* (1924) 130 LT 329; *Fashion Warehouse Pty Ltd v Pola* [1984] 1 QdR 251, 254.

11 Ibid at [21] referring to the letter from the ADCQ (as it was then known) dated 22 May 2017 accepting the complaint which specifically stated that Ms Krzeva had been authorised by the Commissioner to act on behalf of Ms Simonova.

[21] Finally, the respondent submits that it would be appropriate to join Ms Krzeva as a party and that, if joined, the matter would become *Krzeva on behalf of Simonova v State of Queensland*. If that were done, Ms Krzeva would neatly fit within the definition of party in s 39 of the QCAT Act and Ms Simonova would also be a party as a person in relation to whom a decision of the Tribunal is sought by the applicant. Alternatively, as the attorney, purported litigation guardian and the person who made the complaint, Ms Krzeva ought to be regarded as the applicant's representative for the purposes of s 103 of the QCAT Act and the costs order be made on that basis.

The applicant's submissions

[22] The applicant submits that, under s 48 of the QCAT Act, the question of whether there has been any unnecessary disadvantage has to be viewed by taking into account the purpose and scope of the amendments on the substantive proceeding, rather than within the prism of the present amendments alone. Whether there is a disadvantage should be considered having regard to the reduced scope of the proceedings and the lessened burden on the parties in the substantive hearing. Both time and costs will be saved by the truncation of the proceedings. The applicant submits that the respondent does not cavil with the amendments, only that they should have been made earlier. Further, that the fourth contentions are narrower and that there was nothing wrong with the other three versions.

[23] The applicant submits that the amendments were largely a result of the impact of the disclosure of documents which revealed communications between officers of the respondent regarding decisions to commence the eviction process which may have contravened s 10 of the AD Act. The applicant submits that the law regarding direct discrimination is very difficult and the claim is not necessarily unavailable where indirect discrimination is also able to be proved. However, it is submitted, a claim in indirect discrimination is easier, having a clearer set of principles.

[24] The application of the reasoning in *PGC Holdings Pty Ltd v Jalfire Pty Ltd*[12] is inappropriate as the dispute there related to false and misleading evidence of the applicant's director causing a mistrial. This conduct could not be construed as assisting the Tribunal to determine the justiciable issues whereas the truncation of the applicant's case can be viewed as aiding the Tribunal to determine the real issues in dispute.

[25] Finally, the applicant submits that the Tribunal has no power, having regard to the plain words of s 102, to award costs against a non-party. Ms Krzeva does not become the complainant under s 134. She is the agent for her mother, who remains the principal. Further, there is no order appointing Ms Krzeva litigation guardian for her mother.

Consideration

[26] The power to award costs is statutory.[13] It has been held that the nature and extent of the power to award cost must be determined by close consideration of the terms

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12 [2018] QCAT 29.

13 *Knight v FP Special Assets Limited* (1992) 174 CLR 178, 193.

of the statute which created and prescribed the occasions and conditions for its exercise.[14]

[27] Ordinarily, whatever the precise wording of the relevant power, costs will only be awarded against 'a party' strictly so called. The rationale for this is explained in GE Dal Pont's, *Law of Costs*:

> There are clear reasons in justice for this, as the parties, by their involvement in the proceeding, have taken the risk of exposure to an adverse costs order. To impose a costs liability upon a non-party is potentially to expose such a person to a liability that in justice he or she should not have to bear, as he or she has not ordinarily chosen to initiate or defend the proceedings, and may lack any real interest in or connection with them.[15]

[28] Section 102 provides the Tribunal may make an order requiring 'a party to a proceeding' pay all or a stated part of the costs of another party to the proceeding. The express reference to 'a party' is of note: by contrast, for example, order 91 rule 1 of the *Queensland Supreme Court Rules*, the provision considered by the High Court in *Knight v FP Special Assets Limited*,[16] provided relevantly and more broadly that 'the costs of and incident to all proceedings in the court shall be in the discretion of the court or judge'.

[29] An important preliminary issue therefore is the status of Ms Krzeva in these proceedings, in particular, whether she is a party to these proceedings or, at least, a party for the purposes of the costs provisions.

Is Ms Krzeva a 'party' for the purposes of s 39?

[30] Section 39 of the QCAT Act provides that a person is a party to a proceeding in the Tribunal's original jurisdiction if the person is:

> (a) the applicant; or
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> (b) a person in relation to whom a decision of the tribunal is sought by the applicant; or
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> (c) intervening in the proceeding under section 41; or
>
> (d) joined as a party to the proceeding under section 42; or
>
> (e) someone else an enabling Act states is a party to the proceeding.

[31] In *Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd*[17] the Queensland Court of Appeal held that s 39 was important in construing the meaning of the expression 'party to a proceeding' for the purposes of s 102,[18] in particular, in the context of determining whether a costs order could be made in favour of a person unsuccessfully joined to a proceeding under s 42. This was said to be the case because 's 42 does not specify the jurisdiction exercised in determining a joinder application nor that the proposed party is a "party to a proceeding" whether or not the joinder application succeeds'.[19] In my view, s 39,

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14 *Tamawood Ltd v Paans* [2005] 2 QdR 101, 110.
15 GE Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed), 744.
16 (1992) 174 CLR 178.
17 [2015] QCA 114.
18 Ibid [40], [62].
19 Ibid [40], (Gotterson JA).

while important, does not purport to exclusively define those who might be considered a 'party' for the purposes of s 102.

[32] Sub-paragraphs (b) to (e) of s 39 are of no potential relevance. Nor is Ms Krzeva the applicant within the meaning of sub-paragraph (a). That is so for the following reasons.

[33] 'Applicant' is defined in the QCAT Act, Sch 3 dictionary to mean:

> (a) for an application or a proceeding to be started on application—the person who makes the application; or
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> (b) for a referral or a proceeding to be started on referral—
>
> (i) the person who makes the referral; or
>
> (ii) if the enabling Act under which the referral is made states another person is the applicant for the referral or proceeding—the person stated in the enabling Act.[20]

[34] This is a case where the enabling Act states that a person other than the person who made the referral, is the applicant. Section 166(5) of the AD Act provides:

> …
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> (5) The ***complainant*** is the applicant for the purposes of the QCAT Act.[21]

[35] The 'complainant' in discrimination proceedings is defined relevantly to be the person the subject of the alleged contravention of the Act.[22]

[36] The person the subject of the alleged contravention of the AD Act in these proceedings is Ms Simonova. Therefore, although Ms Krzeva made the complaint, Ms Simonova is the complainant. Ms Simonova becomes the applicant once the matter is referred to the Tribunal and is, therefore, a party to the proceedings. Ms Krzeva does not fall within s 39(a).

Is Ms Krzeva a 'party' for the purposes of s 102?

[37] Although Ms Simonova is a 'party' to these proceedings within the meaning of s 39, Ms Simonova has impaired capacity for legal matters. She is incapable of bringing or defending an action without the assistance of another person. Here, that person is her attorney, Ms Krzeva. Relevantly, Ms Krzeva is appointed for all personal matters. 'Personal matter' is defined in the *Powers of Attorney Act* 1998 (Qld), Sch 2 to include 'a legal matter not relating to the principal's financial or property matters' which would, in my view, include giving instructions to lawyers representing Ms Simonova in these proceedings.

[38] There is no formal order appointing Ms Krzeva litigation guardian. Nonetheless, Ms Krzeva was able to make the complaint with the authority of the QHRC under s 134 of the AD Act and to give instructions as her mother's attorney. There is also a letter from the Anti-Discrimination Commission Queensland (now the QHRC) to the Director General, Department of Housing and Public Works dated 22 May 2017 which states:

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20 QCAT Act Schedule 3.
21 QCAT Act, s 166(5) (emphasis added).
22 AD Act Schedule 3.

> If a complainant is unable to make the complaint themselves, they can have an agent act on their behalf. In this complaint Antoneta Krzeva has been authorised by the Commissioner to act on behalf of the complainant.

[39] In my view, Ms Krzeva's role is similar, if not equivalent to that of a litigation guardian, 'next friend' or tutor. I do not consider that the absence of a formal order to this effect affects the question of her liability for costs. In this context I refer to Giles JA in *Yakmor v Hamdoush (No 2)*:[23]

> Under the *Uniform Civil Procedure Rules* a tutor need not be appointed by a court order, and in this case the tutor was not appointed by a court order. It may be that the view that a next friend was an officer of the court involved appointment by court order. I have not gone into the appointment of a next friend in earlier times, because even if a tutor is regarded as an officer of the court I do not think that an order that a tutor pay costs would ordinarily be an order made "in the exercise of [the court's] supervisory jurisdiction over its own officers". Such an order would ordinarily not be consequential on or incidental to supervision of the tutor's discharge of his or her office; as I have said, it falls to be made as an incident of the office. Perhaps if a tutor misconducted himself or herself and a costs question thereby arose, r 42.3(2)(g) could be invoked. That is not this case.[24]

[40] The weight of authority supports the proposition that a litigation guardian, next friend or tutor is not a party to the proceeding.[25] However, the authorities also show that such a person can be liable for costs,[26] although such orders are not lightly made. In GE Dal Pont's, *Law of Costs*, it is said:

> That a next friend is regarded as an officer of the court appointed to safeguard an infant's interests and to conduct the proceedings does not make a next friend a party to the action. The next friend is on the record so that there is a person answerable to the opposing party for the costs of the litigation in the event that a costs order is made against the infant.

[41] The issue is whether s 102 of the QCAT Act can be read to apply to a person acting in a role similar to litigation guardian, next friend or tutor.

[42] In this context, I refer first to *N (on behalf of her son) v State of Qld (Acting through the Dept of Education and the Arts)*[27] a decision which upheld a costs order made against a mother who had made a complaint on behalf of her son who she alleged was the subject of discrimination at school. It appears that the decision was made on the basis that the mother was the 'complainant' or alternatively, was acting in the role of litigation guardian, though not formally appointed as such.

[43] In *N (on behalf of her son)* costs were awarded against a person *N*, who brought a complaint on behalf of her child. Section 213 of the AD Act (now repealed) gave the Tribunal the power to order a 'party' to pay such costs as the Tribunal considered reasonable. Costs were originally awarded against N's mother in the

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23 (2009) 76 NSWLR 148.
24 Ibid [34].
25 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62.
26 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 85; *Farrell v Royal Kings Park Tennis Club (Inc)* [2007] WASCA 173.
27 [2007] QSC 208.

Anti-Discrimination Tribunal.[28] This decision was upheld on appeal to the Supreme Court where it was held:

> [58] The appellant also essentially contends that the member made an error of law in making the costs order against her and not her son. The appellant also states she had "clarification" from the Tribunal that the costs order was against her son and not her personally. The appellant provides no evidence in support of this specific allegation of clarification.
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> [59] The order of 30 March 2007 clearly orders the complainant to pay costs in the sum of $28,168.25. The expression the "complainant" is defined in the Schedule to the Act to relevantly mean "the person who is the subject of the alleged contravention of the Act" and s 134(1) of the Act then provides that a number of people may make a complaint and that includes an agent or the person or a person authorised by the Commissioner to act on behalf of the person who was subjected to the alleged contravention.
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> [60] Counsel for the respondents has referred me to correspondence that indicates that such authorisation was in fact given for the appellant to act. In addition, the member's reasons make it very clear that "the complaints were brought by Ms N as complainant" [*N on behalf of N v State of Queensland (No 2)* [2007] QADT 12 at [3]] and that the costs order is indeed against the appellant and not her son.
>
> [61] The function of a person who is authorised to act under s 134(1)(c) is the same as that of a litigation guardian or next friend and it enables proceedings to be brought on behalf of a person who does not have capacity but it also means that that person is liable for costs. [See *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62] As Sackville J stated in *NSW Insurance Ministerial Corporation v Abualfoul* [[1999] FCA 43 at [27]-[29]]:
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> > "One reason for requiring an infant plaintiff to sue by a next friend was so that there would be a person answerable to the defendant for the costs of the litigation, although the defendant could waive this benefit: *Daniell's Chancery Practice*, p 116; *Ex parte Davis* [1901] NSWStRp 71; (1901) 1 SR (NSW) 187 at 189. The next friend was liable for all costs incurred in the actions brought by the infant, until the infant attained his or her majority: *Bligh v Tredgett* [1851] EngR 903; (1851) 5 De G & SM 74; 64 ER 1024; *Simpson on the Law of Infants* (3rd ed, 1909), p 391. The next friend could be attached for the non-payment of the costs of an action in which the defendant obtained a verdict: *Radford v Cavanagh* [1899] NSWLawRp 11; (1899) 15 WN (NSW) 226."
>
> [62] The member clearly identified the appropriate party and made the appropriate order having come to the conclusion that the complainant had failed to appear "without reasonable excuse".[29]

[44] It seems from the reasons in *N* that Lyons J assumed that because the mother could make a complaint on behalf of her child, that this meant the mother was also a 'complainant'. The definition, however, of 'complainant' was the same then as it is now, that is, the complainant is the person who is the subject of the alleged contravention of the Act. I do not, therefore, consider *N* support for the position

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28 [2007] QADT 12.

29 *N (on behalf of her son) v State of Queensland (Acting through the Dept of Education and the Arts)* [2007] QSC 208, [58]-[62].

that the Tribunal may award costs against a person who makes a complaint on behalf of another pursuant to s 134(1)(c) of the AD Act. An alternative basis for the costs order was, as Lyons J reasoned, that a person authorised under s 134(1)(c) was authorised to act in the same way as a next friend and that therefore, similarly, could be liable for costs.[30]

[45] Although I do not agree that Ms Krzeva is the 'complainant' and therefore the 'applicant' or 'party to the proceeding' for the purposes of s 39 of the QCAT Act, there are authorities which, in relation to costs, have expanded the concept of 'party' beyond the applicant and respondent on the record. These include:

(a) *Yakmor v Hamdoush (No 2)*,[31] *Harris v Carter*,[32] and *Stokes v McCourt (Costs)*[33] which have held that a costs provision expressed to apply to a 'party' can nonetheless be read to extend to a litigation guardian, next friend or tutor; and

(b) *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)*[34] where Justice Wilson held a director of a company in receivership was a 'non-party' but nevertheless was liable for costs under s 102.

[46] A number of authorities have held that, notwithstanding a litigation guardian or its equivalent is not a party to a proceeding, such a person may be regarded as a party *for the purposes of costs provisions which by their terms apply only to a 'party'*.

[47] In arriving at that view, it was held that since, in principle, litigation guardians or their equivalent are responsible for costs, it made sense that the costs provisions, though technically restricted to parties, should be read to include them.

[48] The issue of whether a party for the purposes of a costs provision should be read to extend to a tutor was considered by the New South Wales Court of Appeal in *Yakmor v Hamdoush (No 2)*.[35] There, rule 42.3, which is closely aligned to s 102 of the QCAT Act, provided:

> Subject to rule 42.27, the court may not, in the exercise of its powers and discretions under section 98 of the *Civil Procedure Act* 2005, make any order for costs against a person who is not a party.

[49] The court accepted that the authorities support the proposition that a litigation guardian or next friend is not generally to be regarded as a party to a proceeding[36] but held, notwithstanding, that such a person is a 'party' for the purposes of the relevant costs provision.

[50] Giles JA (with whom Ipp and Tobias JJA agreed) held that a 'tutor' is a 'party' for the purposes of NSW r 42.3, reasoning that 'it would be astonishing that, given the established liability of a tutor for costs, it was intended by r 42.3 to exclude the power to make an order for costs against a tutor'. Giles JA said, relevantly:

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30 Ibid [61].
31 (2009) 76 NSWLR 148, 156-157 [44]-[45] (Giles JA, Ipp and Tobias JJA agreeing).
32 [2020] NSWSC 196, [207].
33 [2014] NSWSC 63, [7] (McDougall J).
34 [2010] QCAT 412.
35 (2009) 76 NSWLR 148.
36 *Ash v Ash-Grimm (by her litigation guardian Ash)* [2018] VSC 687, [16], citing *Dyke v Stephens* (1885) 30 ChD 189; *Pink v Sharwood Ltd* [1913] 2 Ch 286. See also *Tasker v Algar* [1928] NZLR 529.

> [44] In my opinion, a tutor is a party for the purposes of r 42.3. In *Catt v Wood* [1908] 2 KB 458 rules of a friendly society provided that an arbitration committee could charge "either party" with costs. A member took a dispute to arbitration on behalf of his son, a lunatic, who was also a member. He contended that costs had not properly been charged against him. Kennedy LJ gave a judgment prepared by Farwell LJ, with which he agreed, in which it was held that "party" included a person who claimed on behalf of a member as well as a member who claimed in his own right, and meant (at 473) "all persons who initiate claims, whether they do so for themselves or on behalf of others". So here, in my view, "party" in the rule includes a tutor who commences or carries on proceedings on behalf of a person under legal incapacity.
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> [45] A tutor represents the person under incapacity, and does on the person's behalf in relation to the conduct of the proceedings whatever the person could do. A tutor is on the record at least in the sense that consent to act has been filed. The person under incapacity is named on the record, but cannot do anything for himself or herself. The tutor cannot have any conflicting interest. There is practical identity between the tutor and the represented party in bringing and conducting the proceedings, albeit the name on the record as plaintiff or defendant (in this case, as appellant) is the name of the person under incapacity. The costs liability of the tutor, as an incident to the office, gives legal identity for costs purposes, on the rationale that one of the reasons a tutor is required is that there should be a person answerable for costs. For costs purposes, then, the tutor is to be regarded as a party.[37]

[51] In my opinion, the preferable view is that a person in Ms Krzeva's position falls within the meaning of the word 'party' in s 102. I rely on the reasoning of the New South Wales Court of Appeal in *Yakmor.*

Is Ms Krzeva a 'non-party' but nonetheless potentially liable for costs under s 102?

[52] In the alternative, I refer to *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)*[38] a decision of the Tribunal, where Wilson J found that the power of the Tribunal to award costs under s 102 extended to a non-party who was not acting in the role of litigation guardian or its equivalent.

[53] In *Ralacom,* Wilson J made a costs order under s 102 and s 103 of the QCAT Act respectively against a director and a representative of a company to which receivers had been appointed in circumstances where they had continued proceedings in the name of the company without the consent of the receiver. The order appeared to have been made under s 102 on the basis that although the director was not a party, she 'played an active role in the instigation and conduct of the proceedings and was, in truth, the real applicant'.

[54] Wilson J referred, in support of his decision to award costs against a non-party, to *Knight v FP Special Assets Limited*[39] where costs were awarded against non-party liquidators. There the High Court held that although, in principle, costs orders should only be made against parties to the litigation, there will be circumstances where considerations of justice support an order for costs against third parties.

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37 *Yakmor v Hamdoush (No 2)* (2009) 76 NSWLR 148, [44]-[45].
38 [2010] QCAT 412.
39 (1992) 174 CLR 178.

They include where a non-party has played an active part in the conduct of the litigation and where the non-party has an interest in the subject of the litigation.

[55] Wilson J also referred to *Kebaro Pty Ltd v Saunders*[40] where the Full Federal Court held:

> Whilst such an order is extraordinary, the categories of case are not closed, although in order to warrant its exercise, a sufficiently close connection, or as Gobbo J expressed it, a "real and direct and … material" connection with the principal litigation, must be demonstrated; in the words of Callinan J, the non-party can fairly be liable if adjudged by its conduct, to be a real party to the litigation, even if not the real party.[41]

[56] It should be noted that *Knight* concerned order 91 of the *Rules of the Supreme Court of Queensland* which was expressed in broader terms than s 102. This was not the subject of discussion by His Honour and is potentially a point of distinction between *Ralacom* and the present circumstances. Order 91 r 1 provided that 'the costs of and incident to all proceedings in the court…shall be in the discretion of the court or Judge', the wording of which was held to be 'sufficiently expansive to enable the Court to make an order for costs against a person, whether that person is formally a party to the proceedings or not'. The same cannot be said of the costs provisions in the QCAT Act. Section 102 is confined to costs orders against a 'party' to the proceeding.

[57] Similarly, in *Kebaro* the issue was the court's power to award costs against a non-party under s 43(1) of the *Federal Court of Australia Act* 1976 (Cth) which relevantly provided that the court or judge has jurisdiction to award costs in proceedings and, under s 43(2) that the award of costs is 'in the discretion of the Court or Judge'.

[58] In *Ralacom*, His Honour determined that 'the interests of justice warranted a costs order' having regard to the factors in s 102(3), in particular, that the body corporate had been 'forced to appear at and resist misconceived and unauthorised proceedings'. His Honour proceeded to determine 'against whom costs should be ordered, and on what basis' and observed in this regard:

> What the authorities do suggest, however, is that if the conduct of the company officer is sufficiently connected to the matter in important and critical respects, such that they may be described in fact as the real party to the proceeding, and there is evidence showing bad faith, misconduct, or an improper purpose and a personal interest in the successful conclusion of the litigation, then it may be appropriate to order costs against them.[42]

[59] In determining that costs should be awarded against the director, His Honour was satisfied that she was, in truth, the applicant and that she had persisted with the proceedings in circumstances where her behaviour could 'fairly be categorised as misconduct, or as acting in bad faith'[43] and, accordingly, that it was in the interests of justice to award costs against her.[44]

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40 [2003] FCAFC 5.
41 Ibid, [103].
42 *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412, [39].
43 Ibid [43].
44 Ibid [44].

[60] I find, in the interests of consistency, that the power to award costs in s 102 extends to a power to award costs against a non-party in certain circumstances on the basis of *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)*.[45] If Ms Krzeva is not be a 'party' for the purposes of s 102, then I find that she is a 'non-party' and potentially liable for costs under s 102.

[61] In either circumstance, the discretion to award costs would not be lightly exercised. I consider this further below.

Is Ms Krzeva a 'representative' for the purposes of s 103?

[62] There is also an argument that s 103 of the QCAT Act, which grants to the Tribunal power to make an order for costs against a 'representative', extends to a power to make an order against Ms Krzeva. Whether Ms Krzeva is also her mother's representative within the meaning of s 103 is not clear.

[63] I note the Tribunal has not at any point recognised Ms Krzeva as having the status of a 'representative' under s 43, whether by order or administrative act. While the matter is not entirely clear, the preferable view is that some act of recognition in that regard is necessary for a person to be a 'representative' under s 43. This accords with the underlying rationale, as outlined above, for confining costs orders to 'parties' in effect that, by becoming a party, a person is on notice that they may be liable for costs.[46]

[64] The respondent submitted that Ms Krzeva could be regarded as the 'representative' for Ms Simonova within the meaning of s 103 of the QCAT Act, being her agent for the purposes of the proceedings. It is not clear whether, accepting the QHRC has authorised Ms Krzeva to make the complaint under s 134 of the AD Act, this means she is necessarily a 'representative' within the meaning of s 43 or s 103. To make the complaint is not necessarily thereafter to have its conduct.[47]

[65] In the circumstances, in my view, it is not open to make an order against Ms Krzeva under s 103.

Are there grounds for making a costs order in any event?

[66] Personal costs orders against litigation guardians are not lightly made.[48] In *Ash; Ash v Ash-Grimm*[49] it was held:

> The general rule is that a litigation guardian will not be ordered to pay personally the costs incurred by the person under disability, except in the case of unreasonable behaviour or misconduct on the part of the litigation guardian.[50]

[67] The same applies for costs orders against non-parties who are not litigation guardians. Even where the power exists, non-party costs orders in general have been said to be exceptional.[51] In *Yu v Cao*[52] the New South Wales Court of Appeal

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45 [2010] QCAT 412.
46 See Reasons above at [26].
47 See *Gillespie v Goodwin* [2000] 1 QdR 517 (Williams J).
48 *Re Hutchinson* [2019] VSC 495, [39].
49 [2018] VSC 687.
50 Ibid [16].
51 *Yu v Cao* (2016) 91 NSWLR 190, 216 [138], citing *Symphony Group Plc v Hodgson* [1994] QB 179, 192-193.
52 (2016) 91 NSWLR 190.

held, in considering the broad costs discretion under s 98 of the *Civil Procedure Act* 2005 (NSW) and whether a non-party costs award should be made:

> They should not be made where "an exercise of the jurisdiction against a non-party would be extravagant and unjust."[*Knight v FP Special Assets Limited* (at 185)] Elsewhere it has been said that such applications should be treated "with considerable caution" [*Symphony Group Plc v Hodgson* [1994] QB 179 (at 193)] and that the power should be "exercised sparingly".[*Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] HCA 26; (2001) 179 ALR 406 at [34]][53]

[68] It has been held that the non-party's connection to the proceedings was central to the inquiry of whether a non-party costs order should have been made.[54] There must have been a causal connection between the actions of the non-party and the occasion for ordering costs. Improper conduct, or the absence of improper conduct, on the part of the non-party was a relevant factor in the exercise of the discretion.[55]

[69] If the discretion to award costs is properly affected by principles of the nature brought to account in respect of costs and litigation guardians, or costs and non-parties, then in neither case would I award costs. There is, for the reasons considered below, insufficient culpability in the conduct of Ms Krzeva.

[70] There is an argument that if Ms Krzeva be a party that s 102 should be applied without regard to the discretionary factors of the like applied to litigation guardians (or, for that matter, non-parties). Even if that be the correct position, I would make no order as to costs against Ms Krzeva. I consider this issue now.

Did the conduct of Ms Krzeva 'unnecessarily disadvantage' the respondents within the meaning of s 48?

[71] Section 48 requires regard to the conduct of the proceeding as a whole by the applicant and, more particularly in the present circumstances, whether the commencement of the claim for direct discrimination, and its withdrawal, unnecessarily disadvantaged the respondent. The amendment which reduced the proceedings to a claim of indirect discrimination will have a positive impact on the proceedings in terms of cost by reducing the issues in dispute.

[72] The direct discrimination claim was first made on 22 December 2017 when the first set of contentions were filed by the applicant's legal representatives. The contentions were amended on 19 March 2018 and again on 28 June 2018. The amended contentions filed on 3 June 2020, to which the costs application relate, are the fourth version of the contentions.

[73] The effect of the amendments is to remove the direct discrimination case and to substantially recast the indirect discrimination case.

[74] The decision to abandon the direct discrimination claim occurred after the provision of extensive disclosure which, the applicant submits, enabled the parties to discover the 'real issues' in the proceeding. In reliance on the disclosed documents, the applicant obtained expert opinion evidence from Ms Aitken on 14 February 2020. The applicant considered her case in light of that report.

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53 Ibid 216 [138].
54 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.
55 Ibid. See also *Wentworth v Wentworth* (1999) 46 NSWLR 300.

[75] A proposed amended statement of facts and contentions dated 17 April 2020 was given to the respondent in advance of the application for leave to amend.

[76] Section 48 of the Act is expressed in inclusive terms, such that the power to award costs under s 102 is enlivened if a party to a proceeding acts in a way which unnecessarily disadvantages the other, whether or not any of subsections (1)(a) to (e) are satisfied.

[77] I accept that the respondent has, in some respects, been disadvantaged by the applicant's conduct. In particular, it has been required to address on each occasion the applicant's amended contentions, incurring costs in so doing. Has that disadvantage been 'unnecessary' within the meaning of s 48?

[78] I am not persuaded by the respondent that it was. The mere fact of the amendments does not demonstrate that the conduct of the applicant caused 'unnecessary disadvantage'. The amendments to the contentions might equally be seen as conduct consistent with the proper conduct of the litigation, maintaining the case as consistent with the available material. I accept the applicant's submission that the topic of 'direct discrimination' is not straightforward, and the respondent has not demonstrated that its abandonment was not, as the applicant maintains, the consequence of the disclosure. The direct discrimination case was open on the facts (as referred to by the QHRC early in the proceedings). The findings made in the tenancy proceedings do not, in my view, necessarily mean that a claim in discrimination would not succeed.

[79] Finally, I accept the applicant's submissions that the amendment of the contentions served to refine the issues in dispute, a step to be encouraged as the issues in the proceeding become clearer as, inevitably, they do.

[80] Accordingly, the application for costs 'thrown away' filed by the respondent on 17 June 2020 is dismissed.