

Reference No. HRRT 003/2014

UNDER THE PRIVACY ACT 1993

BETWEEN DIRECTOR OF HUMAN RIGHTS PROCEEDINGS

PLAINTIFF

AND WELLINGTON ADVKIT SERVICES LIMITED

FIRST DEFENDANT

AND MIKE DIXON-MCIVER (also known as DOUGLAS VINCENT DIXON-MCIVER)

PROPOSED SECOND DEFENDANT

AND MARK BASFORD

PROPOSED THIRD DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson  
Dr SJ Hickey MNZM, Member  
Mr RK Musuku, Member

REPRESENTATION:

Ms J Emerson for Plaintiff  
No appearance for First Defendant  
Mr P Paino for Mr Dixon-McIver, proposed Second Defendant  
Mr M Basford in person, proposed Third Defendant

DATE OF DECISION: 16 April 2015

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DECISION OF TRIBUNAL JOINING MR DIXON-MCIVER AND MR BASFORD AS  
SECOND AND THIRD DEFENDANTS<sup>1</sup>

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<sup>1</sup> [This decision is to be cited as: *Director of Human Rights Proceedings v Wellington Advkit Services Ltd (Joinder of Second and Third Defendants)* [2015] NZHRR 11]

## **Introduction**

**[1]** This is an application by the Director of Human Rights Proceedings that Mr Mike Dixon-Mclver (also known as Douglas Vincent Dixon-Mclver) and Mr Mark Basford be joined as second and third defendants to these proceedings.

## **Outline of Director's case**

**[2]** In broad outline the Director's case (yet to be proved) is:

**[2.1]** Mr Basford is the sole director and shareholder of Wellington Advkit Services Ltd.

**[2.2]** At all relevant times Mr Dixon-Mclver was an employee or agent of Wellington Advkit Services Ltd.

**[2.3]** The services provided by Wellington Advkit Services Ltd include advocacy on behalf of beneficiaries and Accident Compensation Corporation (ACC) claimants.

**[2.4]** The aggrieved person, Mr Apikotoa, engaged Wellington Advkit Services Ltd to challenge a decision by ACC to terminate his weekly compensation payments. Mr Dixon-Mclver, acting in his capacity as employee or agent of Wellington Advkit Services Ltd, was the advocate who assisted Mr Apikotoa.

**[2.5]** Subsequently Mr Apikotoa took legal advice and acting on that advice requested Mr Dixon-Mclver to provide a copy of his (Mr Apikotoa's) file. This Mr Dixon-Mclver declined to do on the grounds Mr Apikotoa allegedly owed money to Wellington Advkit Services Ltd.

**[2.6]** On 28 August 2012 a lawyer representing Mr Apikotoa made a written Privacy Act request to the company, Mr Dixon-Mclver and Mr Basford for a full copy of Mr Apikotoa's file. No response was received to that letter and the requested personal information has never been provided.

**[3]** When these proceedings were originally instituted on 3 February 2014 Wellington Advkit Services Ltd was named as the sole defendant. The Director later became concerned a favourable judgment against the company would in practice be unenforceable because a Companies Office search dated 28 April 2014 indicated the company was then overdue filing its annual return and would be removed from the Companies Register unless one was filed "immediately".

**[4]** Although the original investigation by the Privacy Commissioner related to Wellington Advkit Services Ltd only, the aggrieved person subsequently made a complaint against Mr Dixon-Mclver and Mr Basford personally. The Privacy Commissioner then carried out an investigation in relation to both persons and by certificate dated 17 October 2014 advised the Tribunal he had formed the final opinion that both Mr Dixon-Mclver and Mr Basford interfered with Mr Apikotoa's privacy.

**[5]** After giving Mr Dixon-Mclver and Mr Basford an opportunity to be heard in accordance with s 82(3) of the Privacy Act 1993, the Director now applies to have them joined as second and third defendants respectively.

**[6]** The Director submits Mr Dixon-Mclver and Mr Basford ought to be joined to this proceeding because:

[6.1] The allegations contained in the statement of claim relate to their actions and omissions; and

[6.2] They stand to be personally liable for all or some of the matters that are the subject of this proceeding. It is further submitted their presence before the Tribunal is necessary to adjudicate on and settle all questions involved in the proceeding.

[7] Filed in support of the application is an affidavit affirmed on 12 March 2015, a draft amended statement of claim and a memorandum by Ms Emerson dated 13 March 2015.

### **Procedural history**

[8] At the teleconference convened by the Chairperson on 17 October 2014 the joinder application was foreshadowed by Ms Emerson. For his part Mr Basford said he was undergoing serious medical issues which kept him incapacitated for considerable periods of time. The teleconference was adjourned to allow the Director to give further consideration to the foreshadowed joinder application and Mr Basford was required to file and serve a full medical certificate explaining his current state of health and stating whether he was medically fit to cope with these proceedings. See further the *Minute* issued by the Chairperson on 17 October 2014.

[9] The teleconference scheduled for 16 December 2014 was adjourned following advice by the Director that he anticipated filing the joinder application in January 2015. See the *Minute* issued by the Chairperson on 12 December 2014 which further recorded Mr Basford had not filed the promised medical certificate and indeed no correspondence had been received from him. He was reminded any continued failure to file a medical certificate could result in his claims to ill health being disregarded by the Tribunal.

[10] The joinder application was eventually filed on 13 March 2015. A teleconference convened on 20 March 2015 could not proceed as there had been insufficient time for Mr Paino to be properly instructed by Mr Dixon-Mclver. See the *Minute* issued on 20 March 2015.

[11] When the teleconference was convened by the Chairperson on 26 March 2015 Mr Paino appeared for Mr Dixon-Mclver but Mr Basford did not take part in the proceedings, possibly in the mistaken belief that Mr Paino would represent him as well as Mr Dixon-Mclver. In these circumstances the joinder application could not be progressed but Mr Paino did raise a preliminary matter on behalf of Mr Dixon-Mclver namely, that on 8 November 2010 he (Mr Dixon-Mclver) had been adjudicated bankrupt. His discharge date was 4 April 2014. These dates are of potential significance given the proposed amended statement of claim alleges the relevant events occurred from about mid-2012 to early February 2013. Mr Paino said while he had not had opportunity to research the point the provisions of the Insolvency Act 2006 might present difficulty. Some discussion of the relevant provisions of the Insolvency Act followed and mention was made of the recent consideration of those provisions by the Tribunal in *Fehling v Appleby (Bankruptcy)* [2014] NZHRRT 17 at [3] to [14]. Further reference can be made to the *Minute* issued on 26 March 2015.

[12] By subsequent email dated 8 April 2015 Ms Emerson properly drew attention to the decision in *Gapuzan v Pratt & Whitney Air NZ Services* [2015] NZEmpC 37 (26 March 2015). On one interpretation this decision might appear to support the contention that as the acts alleged against Mr Dixon-Mclver occurred during the period of his bankruptcy, his joinder to these proceedings is statute barred by the Insolvency Act 2006.

[13] At the subsequent teleconference held on 8 April 2015 Mr Paino advised the Chairperson that Mr Dixon-McIver reserved his position on the effect of the Insolvency Act, sensibly acknowledging the relevance of the bankruptcy was more appropriately an issue to be determined at trial after a full hearing of the evidence.

#### **Position taken by Mr Dixon-McIver on the joinder application**

[14] At the teleconference held on 8 April 2015 Mr Paino advised that while Mr Dixon-McIver did not consent to be joined as second defendant to these proceedings, no grounds in opposition would be advanced.

#### **Position taken by Mr Basford to the joinder application**

[15] Mr Basford, who participated in the 8 April 2015 teleconference in person, reiterated he was unwell, pointing out he is in need of a liver transplant and is presently unable to work. He could not afford a lawyer. While he did not know what position to take in relation to the joinder application, he advanced no reason why he should not be joined.

[16] On the question of his ill-health he said that he was in possession of a medical certificate dated 23 March 2015 issued by his GP, Dr Peter Gillies of Upper Hutt. It was a certificate he had very recently provided to WINZ. As undertaken he sent a copy of the certificate to the Tribunal on 9 April 2015. It relevantly states that:

Unless this patient is eligible for a liver transplant (which is under consideration) then he will not work again.

[17] Mr Basford also undertook to obtain from Hutt Hospital further information about his medical condition. This process might take some two to three weeks. He said because of frequent periods of hospitalisation and the unpredictability of his health status any timetable set by the Tribunal would need to make allowance for his disability.

#### **Joinder – the law**

[18] Neither the Human Rights Act 1993 nor the Privacy Act 1993 make explicit provision for the striking out or addition of parties but Regulation 16 of the Human Rights Review Tribunal Regulations 2002 allows the Tribunal and the Chairperson to give any directions and to do other things:

[18.1] That are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and

[18.2] That are not inconsistent with the Human Rights Act or, as the case requires, the Privacy Act or with the Human Rights Review Tribunal Regulations.

[19] In the absence of an explicit statutory regime addressing the joinder of parties, we intend adopting, with all necessary modifications, High Court Rules, r 4.56 which provides:

##### **4.56 Striking out and adding parties**

- (1) A Judge may, at any stage of a proceeding, order that—
  - (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
  - (b) the name of a person be added as a plaintiff or defendant because—
    - (i) the person ought to have been joined; or
    - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.

- (2) An order does not require an application and may be made on terms the court considers just.
- (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

**[20]** On the facts, it is r 4.56(1)(b)(i) and (ii) which have application. These provisions are to be read with High Court Rules, r 4.3 which relevantly provides a person may be joined as a defendant if it is alleged there is a right to relief against that person:

#### **4.3 Defendants**

- (1) Persons may be joined jointly, individually, or in the alternative as defendants against whom it is alleged there is a right to relief in respect of, or arising out of, the same transaction, matter, event, instrument, document, series of documents, enactment, or bylaw.
- (2) It is not necessary for every defendant to be interested in all relief claimed or every cause of action.
- (3) The court may make an order preventing a defendant from being embarrassed or put to expense by being required to attend part of a proceeding in which the defendant has no interest.
- (4) A plaintiff who is in doubt as to the person or persons against whom the plaintiff is entitled to relief may join 2 or more persons as defendants with a view to the proceeding determining—
  - (a) which (if any) of the defendants is liable; and
  - (b) to what extent.

**[21]** The current approach in New Zealand to joinder is liberal. See *Chan v The Seyip Association of New Zealand Inc* [2008] NZAR 37 at [12]. Once jurisdiction is established, joinder is usual. See *NZI Insurance Ltd v Hinton Hill & Coles Ltd [Joinder]* (1996) 9 PRNZ 615 at 619.

**[22]** It has always been the Director's case that Mr Dixon-McIver was the person who declined to deliver the file to Mr Apikotoa on the grounds Mr Apikotoa owed fees to Wellington Advkit Services Ltd. See the original 29 January 2014 statement of claim at paras 10, 12, 14, 15 and 31. It is clear from a comparison of that statement of claim with the draft amended statement of claim that were Mr Dixon-McIver and Mr Basford joined as defendants, the Director's case will be little different to that originally proposed in the first statement of claim and that the relief claimed against the company, Mr Dixon-McIver and Mr Basford arises out of the same matter or event.

#### **Application of the law to the facts**

**[23]** We are of the view that under both limbs of High Court Rules r 4.56(1)(b) the joinder application should be granted in relation to both Mr Dixon-McIver and Mr Basford:

**[23.1]** Wellington Advkit Services Ltd was at the relevant time a small enterprise in which both Mr Basford and Mr Dixon-McIver were involved in its day to day operations, Mr Basford as sole director and Mr Dixon-McIver as employee. It was Mr Dixon-McIver who allegedly declined to provide the file when requested and the letter to the company (marked for the attention of Mr Dixon-McIver) making a further request was not replied to. It is further alleged the file was destroyed by the company and the proposed defendants. In these circumstances the Director's case is that information privacy principles 5 and 6 were breached by the company, its sole director and its employee.

**[23.2]** On these alleged facts the Director would have (potentially) a right to relief against the company, Mr Dixon-McIver and Mr Basford. This is confirmed by the forms of remedies articulated in para 49 of the draft amended statement of claim.

**[23.3]** Given the apparent risk of Wellington Advkit Services Ltd being removed from the companies register it is only appropriate the human “actors” responsible for the alleged breaches of the information privacy principles be joined as parties. In the event of the Director being successful in obtaining a remedy or remedies from the Tribunal it is important those remedies be effective. This will not happen if, as the only defendant, the company is in effect defunct and without assets.

### **Conclusion on joinder application**

**[24]** With the benefit of hindsight Mr Dixon-Mclver and Mr Basford should have been investigated by the Privacy Commissioner and joined in the present proceedings from the outset. Subsequent events (the imperilled status of the company as a registered company) have shown the presence of all three defendants before the Tribunal may be necessary to adjudicate on and settle all questions involved in the proceedings. Furthermore, their presence before the Tribunal will enable the proceedings to be determined fairly and consistently with the interests of justice as required by Regulation 16(1) of the Human Rights Review Tribunal Regulations.

### **Formal order**

**[25]** The joinder application is granted in relation to both Mr Dixon-Mclver and Mr Basford. Mr Dixon-Mclver is joined as second defendant and Mr Basford as third defendant.

### **Consequential orders**

**[26]** At the teleconference convened by the Chairperson on 8 April 2015 the parties were in agreement on the case management steps to follow any joinder order. These steps may have to take account of Mr Basford’s health. The timetable which follows reflects the agreement that the proper venue for the hearing is Wellington and that two days should be set aside.

**[27]** The following orders are made:

**[27.1]** The Director must finalise, file and serve an amended statement of claim by 5pm on Wednesday 10 April 2015.

**[27.2]** Statements of reply by all three defendants are to be filed and served by 5pm on Tuesday 12 May 2015.

**[27.3]** Discovery and inspection of documents are to be attended to on an informal basis in the first instance and achieved to the satisfaction of all parties by 5pm on Friday 29 May 2015.

**[27.4]** Written statements of the evidence to be called at the hearing by the Director are to be filed and served by 5pm on Friday 19 June 2015. By the same date the Director is to provide the defendants with a list of documents the Director wishes to have included in the common bundle of documents.

**[27.5]** Written statements of the evidence to be called at the hearing by the defendants are to be filed and served by 5pm on Friday 10 July 2015. By the same date each of the defendants is to provide the Director with a list of any additional documents they wish to have included in the common bundle of documents.

**[27.6]** Should the Director wish to file any statements of evidence in reply, such statements are to be filed and served by 5pm on Friday 31 July 2015.

**[27.7]** In consultation with the defendants, the Director is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 14 August 2015.

**[27.8]** The proceedings are to be heard at Wellington on Monday 19 October 2015 and Tuesday 20 October 2015. The venue is the Tribunals Unit, Level 1, AMP Building, 86 Customhouse Quay.

**[27.9]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

**[27.10]** Leave is reserved to all parties to make further application should the need arise.

**[28]** It has been stressed to Mr Basford by the Chairperson, Ms Emerson and Mr Paino he (Mr Basford) must maintain contact with all parties and seek their assistance in understanding his timetable obligations. If Mr Basford becomes too ill to complete any timetable steps, he must communicate this immediately to the Case Manager and to the parties. If he is hospitalised, his wife is to give notice to the Case Manager of that fact in case any timetable accommodation is required.

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**Mr RPG Haines QC**  
**Chairperson**

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**Dr SJ Hickey MNZM**  
**Member**

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**Mr RK Musuku**  
**Member**