

- (1) ORDER PROHIBITING PUBLICATION OF ALL INFORMATION RELATING TO PLAINTIFF'S MEDICAL CIRCUMSTANCES
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON
-

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2017] NZHRRT 13

Reference No. HRRT 047/2016

UNDER THE PRIVACY ACT 1993

BETWEEN KIM DOTCOM

Plaintiff

AND CROWN LAW OFFICE

First Defendant

CONT.

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr BK Neeson JP, Member

REPRESENTATION:

Mr RM Mansfield and Mr SL Cogan for plaintiff
Mr P Gunn for defendants

DATE OF HEARING: 10 April 2017

DATE OF DECISION: 21 April 2017

DECISION OF TRIBUNAL PERMITTING PLAINTIFF
TO APPEAR BY AUDIO-VISUAL LINK¹

¹ [This decision is to be cited as: *Dotcom v Crown Law Office (AVL)* [2017] NZHRRT 13. Note publication restrictions.]

AND **ATTORNEY-GENERAL**
Second Defendant

AND **DEPARTMENT OF THE PRIME MINISTER**
AND CABINET
Third Defendant

AND **IMMIGRATION NEW ZEALAND**
Fourth Defendant

AND **MINISTRY OF BUSINESS, INNOVATION**
AND EMPLOYMENT
Fifth Defendant

AND **MINISTRY OF FOREIGN AFFAIRS AND**
TRADE
Sixth Defendant

AND **MINISTRY OF JUSTICE**
Seventh Defendant

AND **NEW ZEALAND POLICE**
Eighth Defendant

Background

[1] These proceedings were filed on 3 August 2016. Mr Dotcom thereafter sought an urgent hearing.

[2] By *Minute* dated 13 October 2016 the Chairperson directed that a nine day hearing commence on 11 April 2017. The agreed venue was Wellington as a hearing could be convened at the Tribunals Unit premises in Customhouse Quay more conveniently and at an earlier date than at a District Court (particularly the District Court at Auckland).

[3] Mr Dotcom and his legal representatives are Auckland-based while Ms Casey QC and the defendants' witnesses are located in Wellington.

[4] Mr Dotcom has filed one witness statement (his own) and the defendants have filed two witness statements. The Common Bundle of documents comprises 37 volumes.

[5] By joint memorandum dated 3 April 2017 counsel advised the parties are agreed that all documents in the Common Bundle are to be treated as evidence in the proceeding and do not need to be put to or admitted through a witness. The parties have further agreed that material referred to in the Common Bundle but not included (such as exhibits to affidavits) may be treated as evidence if and only if that material is either put to a witness or referred to in opening submissions by either party. Other material not in the Common Bundle may be introduced as evidence in the normal way through a witness.

The application to permit the plaintiff to appear by audio-visual link

[6] On the afternoon of Friday 7 April 2017 Mr Dotcom filed an urgent application seeking an order permitting him to appear by audio-visual link (AVL). The primary ground advanced in support of the application was that Mr Dotcom is presently medically unfit to travel to Wellington. Submitted in support of the application was a letter dated 7 April 2017 from Mr Dotcom's physician. The following additional submissions were made:

[6.1] The arrangements the parties have come to regarding the Common Bundle and admissibility are such that it will not be necessary for documents to be put to, or admitted through, a witness. Consequently there will be no prejudice to either party or to the witnesses arising from any perceived difficulty in putting documents to Mr Dotcom. Any remaining concerns would be addressed by a lawyer being present with Mr Dotcom to facilitate location of the relevant documents to be referred to in the course of the evidence.

[6.2] The primary issues in the proceedings were legal issues and any factual disputes narrowly confined.

[6.3] Any prejudice to the defendants would be outweighed by the prejudice to Mr Dotcom in having to travel to Wellington against medical advice.

[6.4] Grant of the application would be in keeping with the purpose of AVL which is now widely used to facilitate the administration of justice by courts and tribunals.

[6.5] Because aspects of counsel's memorandum and the letter from the physician are of a sensitive and confidential nature (relating as they do to Mr Dotcom's health), confidentiality orders would be necessary.

[6.6] Mr Dotcom does not waive confidentiality in the medical information.

Notice of opposition by defendants

[7] Because Ms Casey was absent from chambers when the application was served, her ability to respond in detail was constrained. She did, however, file an email stating that the defendants would be prejudiced by the proposal given the central importance of Mr Dotcom's evidence and the difficulties inherent in cross-examination where a witness appears by AVL, especially when a significant volume of documents is potentially involved. It was further submitted the medical information suggested chronic and ongoing conditions, not acute issues which had arisen at very short notice.

Mr Dotcom offered further opportunity to file further evidence and submissions

[8] In view of the urgency of the application it was not initially possible for the Tribunal to give careful consideration to the issues. On a first and possibly cursory examination of the medical evidence the Tribunal had doubts whether sufficient grounds had been established to justify Mr Dotcom giving evidence by AVL. It was also expected that if given further time the defendants might wish to file a more detailed opposition to the application. The Secretary was accordingly directed to advise the parties that before the Tribunal made a decision, it would allow Mr Dotcom opportunity to file further medical evidence in support of his application. The Tribunal also needed to know what specific arrangements were proposed should the giving of evidence by AVL be permitted. Mr Dotcom was given until 9am on Monday 10 April 2017 to file further evidence and submissions. The defendants were given opportunity to file their submissions by 10.30am on 10 April 2017.

The further submissions by Mr Dotcom

[9] Early in the morning on Monday 10 April 2017 the Tribunal received a further memorandum by counsel for Mr Dotcom. Counsel advised Mr Dotcom was now in possession of a further letter from his physician setting out more detailed medical evidence. While Mr Dotcom wished to place that further evidence before the Tribunal he first sought confidentiality orders that:

[9.1] The Tribunal's file be sealed in respect of the health information; and that

[9.2] Counsel for the defendants and Crown Law not disclose the medical information to the parties they represent, the United States of America or any other third party.

[10] Counsel for Mr Dotcom stressed three points:

[10.1] Although Mr Dotcom wished to attend the hearing in person he was now medically unfit to safely travel to Wellington and once there, to be in a condition to participate in the hearing as he had intended.

[10.2] The use of AVL is now commonplace in courts and tribunals and there was no principled basis for Mr Dotcom to be refused leave to appear by AVL. An urgent teleconference was sought for the parties to address the application.

[10.3] Were the AVL application to be declined Mr Dotcom would necessarily apply for an adjournment, a step he did not wish to take given the importance of the issues to be determined by the Tribunal.

[11] The following additional points were made.

[11.1] There was no strategic advantage to Mr Dotcom seeking to give evidence by AVL.

[11.2] He has given oral evidence in New Zealand court proceedings many times, always in person. He has never sought the indulgence of appearing by AVL. His application in the present proceedings was based entirely on medical grounds.

[11.3] A barrister fully briefed in the matter would be physically present with Mr Dotcom in Auckland during the course of his evidence so that a copy of the paginated bundle could be easily identified and located.

[11.4] No demonstrable prejudice would accrue to the defendants but the potential impact of Mr Dotcom of not being able to give evidence by AVL would be significant and could not be offset other than by way of an adjournment.

[11.5] The request for Mr Dotcom to appear by AVL was intended to avoid adjournment of the Tribunal proceedings.

The defendants' further reply

[12] By memorandum dated 10 April 2017 Crown Counsel advised that the accelerated timeframe within which the AVL application had to be determined meant there was insufficient time for instructions to be taken in respect of the undertakings sought by Mr Dotcom. In these circumstances it was suggested the new letter from Mr Dotcom's physician be provided to the Tribunal so that it could be considered in the context of a closed hearing. A determination could then be made whether confidentiality orders were appropriate. Counsel for the defendants would abide any decision made by the Tribunal in relation to the making of such orders but reserved the right to apply to vary those orders if necessary upon review of the physician's letter.

[13] In relation to the AVL application itself counsel for the defendants did not seek to respond further on the substance of the application before having opportunity to review the physician's letter. At that juncture the defendants continued to oppose the application.

The teleconference

[14] Shortly before 1pm on Monday 10 April 2017 the Tribunal convened a teleconference attended by Mr Mansfield, Mr Cogan and Mr Gunn. This allowed counsel opportunity to supplement their written submissions and for the Tribunal to more meaningfully engage with the issues.

[15] At the conclusion of the teleconference the Tribunal advised it would not be necessary for the new letter from the physician to be filed and that the AVL application would be granted. Confidentiality orders would also be made in relation to the original physician's letter dated 7 April 2017 and in relation to the memoranda filed in support of (and opposition to) the application because they contained references to the medical evidence and related matters concerning Mr Dotcom's personal circumstances.

[16] The Tribunal's reasons for so ruling now follow.

REASONS FOR DECISION

Jurisdiction

[17] The submissions for Mr Dotcom correctly point out that the appearance of witnesses by AVL is now commonplace in both civil and criminal proceedings. Participation by AVL is facilitated not only by the Courts (Remote Participation) Act 2010 ss 5 and 7 but also by the Evidence Act 2006 ss 102 to 105.

[18] The Tribunal has express statutory power to regulate its own procedure (see s 104(5) of the Human Rights Act 1993 which, being in Part 4 of that Act, is incorporated into proceedings under the Privacy Act 1993 by s 89 of the latter Act). In addition s 106 of the Human Rights Act gives the Tribunal wide latitude as to the evidence it can receive beyond the Evidence Act. The overriding principle as to admissibility is whether the Tribunal will be assisted to deal effectively with the matter before it. See s 106(1)(d).

[19] Given these provisions the parties did not dispute the jurisdiction of the Tribunal to permit Mr Dotcom to appear by AVL.

Fairness and the absence of prejudice

[20] The guiding criterion for giving directions under the Human Rights Act, s 104(5) and under the Evidence Act, s 103 regarding alternative ways of giving evidence is the need to ensure the fairness of the proceeding, a principle echoed by the Courts (Remote Participation) Act ss 5 and 7, specifically the effective maintenance of the rights of the parties to the proceedings, the ability to assess the credibility of the witness and the reliability of the evidence presented to the Tribunal.

[21] Turning to the circumstances of the present case we have taken into account:

[21.1] The parties are agreed on how the evidence in the Common Bundle is to be treated. Specifically all documents in the bundle are to be treated as evidence in the proceeding and do not need to be put to or admitted through a witness.

[21.2] Mr Dotcom has arranged for a barrister to be present with him in Auckland to assist with the location of the documents to be referred to in the course of his evidence.

[21.3] The Tribunal has had opportunity to read and consider the witness statement of Mr Dotcom as well as the statements made by the two witnesses to be called by the defendants. It would seem unlikely credibility will be a significant issue in the proceedings.

[21.4] The defendants have not demonstrated that they will be prejudiced by the grant of the application. There will, however, be substantial prejudice to Mr Dotcom by having to choose between travelling to Wellington against medical advice and applying for an adjournment.

The medical evidence

[22] We see no need in a relatively minor interlocutory ruling such as this to recite the medical evidence set out in the physician's letter dated 7 April 2017. That evidence is relevant only to the question whether Mr Dotcom is medically fit to make a return trip from Auckland to Wellington either by air or by road. Even to a lay audience such as the

Tribunal, the health issues identified in the letter have a logical connection to Mr Dotcom's fitness to travel.

Confidentiality orders

[23] For the following reasons we are satisfied confidentiality orders are necessary:

[23.1] Information regarding one's state of health is understandably a highly personal matter and where it is appropriate to do so the Tribunal must recognise a party's desire to maintain the confidentiality of that information.

[23.2] In the present case the information has only been disclosed because, for reasons of expediency, the venue of the hearing is Wellington rather than Auckland. While this has been to the benefit of the defendants, their counsel and their witnesses it has operated to Mr Dotcom's disadvantage in the sense he has been required to disclose information to the Tribunal and to the defendants which would not otherwise have been disclosed. Had the venue been in Auckland the subject of Mr Dotcom's health would have remained private as between him and his physician.

[23.3] The application by Mr Dotcom to give evidence by AVL is, in the scale of things an event of minor significance to these proceedings and that the present state of his health is of no relevance to his claim or to the defence to be advanced by the defendants.

[24] The documents to be the subject of the confidentiality orders are the physician's letter dated 7 April 2017 and the memoranda and email communications (collectively **the memoranda**) filed by counsel to the extent those memoranda refer to or address the medical evidence.

[25] The terms in which the confidentiality orders are to be expressed have been addressed by counsel in their Joint Memorandum of Counsel as to Confidentiality Orders dated 20 April 2017 at paras 4 and 5:

4. Counsel for the defendants has advised that the current position is that, besides Crown counsel instructed in this matter and external counsel for the defendants:
 - (a) The First Memorandum [memorandum of counsel for Mr Dotcom dated 7 April 2017] and Letter [of the physician dated 7 April 2017] have been distributed to the following recipients:
 - (i) Ministry of Foreign Affairs and Trade:
 - (aa) Phirak Appleton (Associate Counsel); and
 - (bb) Matthew Andrews (Corporate Counsel);
 - (ii) Department of Prime Minister and Cabinet:
 - (aa) Tania Warburton (Policy Advisor (Legal), Policy Advisory Group);
 - (bb) Nicola Purvis (Corporate Legal Services Manager); and
 - (cc) Sara Cunningham (Senior Solicitor);
 - (iii) Ministry of Business, Immigration and Employment: Iain McColl (Senior Solicitor);
 - (iv) Ministry of Justice:
 - (aa) Jeff Orr (Chief Legal Counsel);
 - (bb) Edrick Child (Deputy Chief Legal Counsel); and
 - (cc) Thomas McKearney (in-house solicitor); and
 - (v) New Zealand Police: Isobel Egerton (in house legal counsel) (together, **Recipients**).
 - (b) The Second Memorandum [memorandum of counsel for Mr Dotcom dated 10 April 2017] has not been distributed to any of the defendants.
5. Counsel have conferred and respectfully seek the following confidentiality orders by consent:

- (a) The defendants shall not disclose the First Memorandum, Letter and/or Second Memorandum, or the contents thereof, to any persons besides the Recipients or any other person holding an equivalent role or position to the Recipients within the respective agencies in the future.
- (b) The Tribunal's file be sealed such that the First Memorandum, Letter and/or Second Memorandum, and any document recording their contents, are not accessible to any persons besides the Tribunal, counsel and the Recipients.

[26] In the orders which follow the term **Recipients** is to have the same meaning as that in the Joint Memorandum.

ORDERS

[27] The following orders are accordingly made:

[27.1] Mr Dotcom is given permission to appear by audio-visual link. He must comply with all appropriate directions given by the Secretary to ensure his remote participation does not delay or obstruct the hearing or the taking of his evidence.

[27.2] The defendants shall not disclose the medical information contained in the physician's letter dated 7 April 2017 nor the references to that information in any of the memoranda filed by counsel for Mr Dotcom or by counsel for the defendants to any persons other than the Recipients identified in the Joint Memorandum of Counsel as to Confidentiality Orders dated 20 April 2017 at para 4. For the purpose of this order the term "Recipients" is to include any other person who may in the future hold an equivalent role or position to the Recipients within the respective agencies.

[27.3] The Tribunal's file is to be sealed to the extent that the physician's letter dated 7 April 2017 as well as the memoranda filed by the parties from and including 7 April 2017 to 20 April 2017 in connection with the plaintiff's application to appear by audio-visual link cannot be accessed by any persons other than the Tribunal, counsel and the Recipients.

[27.4] There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and defendants are to be notified of any request to search the file and given opportunity to be heard on that application.

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

.....
Mr RPG Haines QC
Chairperson

.....
Ms GJ Goodwin
Member

.....
Mr BK Neeson JP
Member