IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 53**

	Reference No. HRRT 036/2013
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**THE DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**CAMERON JOHN SLATER**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr RK Musuku, Member

REPRESENTATION:
Mr SRG Judd for plaintiff
Mr CJ Slater in person

DATE OF HEARING: 28 and 29 October 2014

DATE OF MINUTE: 29 October 2014

MINUTE OF TRIBUNAL
RECORDING REASONS FOR ADJOURNMENT OF HEARING PART-HEARD

[1] During closing submissions on the afternoon of 29 October 2014 the Tribunal adjourned the hearing to allow Mr Slater a final opportunity to file evidence. The purpose of this *Minute* is to provide a brief account of the circumstances in which that decision was made.

Background

[2] Following a teleconference convened by the Chairperson on 12 March 2014 a *Minute* was issued that day directing Mr Slater to provide certain particulars by 11 April 2014

with the Director's evidence to follow on 13 June 2014. Mr Slater's own written statements of evidence were required to be filed by 11 July 2014.

[3] Because Mr Slater did not provide the particulars as ordered, a second teleconference was convened on 7 August 2014. Mr Slater agreed to file the requested particulars by 19 August 2014. The timetable was reset. The Director's date for filing of evidence was 26 September 2014 and Mr Slater's deadline was 17 October 2014. See the *Minute* issued on 7 August 2014.

[4] While the Director complied with the timetable, Mr Slater filed no evidence. He did, however, on 14 August 2014 file a "Clarification of Particulars".

[5] On 22 October 2014 a teleconference was held to discuss an indication by Mr Slater that he would be seeking an adjournment of the hearing scheduled to commence on 28 October 2014. As it turned out the application was not pursued, Mr Slater advising he would take one point only at the hearing, namely that by virtue of the "news medium" exception in the definition of "agency", the information privacy principles did not apply to him when the documents in question were published on his websites. See the *Minute* dated 22 October 2014.

[6] In the result, when the hearing commenced on 28 October 2014 the only written statement of evidence before the Tribunal was that of the Director's witness, Mr MJ Blomfield.

Course of the hearing

[7] Mr Judd opened the Director's case on the basis that it was Mr Slater's unequivocal position that he would not call evidence.

[8] Mr Blomfield then gave evidence and was cross-examined by Mr Slater. The case for the Director ended and Mr Judd commenced his closing submissions at about 2.45pm on 28 October 2014.

[9] Listening to the Director's submissions it occurred to the Tribunal that Mr Slater might invite the Tribunal to adopt and apply the findings of fact made by Asher J in *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835 (12 September 2014). The Tribunal enquired of Mr Slater whether such was his position. Mr Slater and Mr Judd were given overnight to consider the question. When the hearing resumed on the morning of 29 October 2014 Mr Judd said that the Director opposed the adoption by the Tribunal of the findings made by Asher J. There was no good reason for the Tribunal to depart from the ordinary rule that each case is to be determined only on the evidence given in the particular proceedings.

[10] Mr Slater, on the other hand, submitted the Tribunal should adopt the findings of fact made by Asher J.

[11] The Tribunal drew Mr Slater's attention to his election to call no evidence and enquired what his position would be should the Tribunal determine that he was not outside the definition of "agency" in the Privacy Act and therefore required to observe the information privacy principles. At one point in the exchange Mr Slater said he would rely on Principle 11(f) (disclosure necessary to prevent or lessen a serious and imminent threat to public safety) but acknowledging there was no evidence of this his final position was that he would advance only the claim that he was not an "agency" by reason of being a news medium whose business or part of whose business consisted of a "news activity".

[12] Mr Slater began his closing submissions at approximately 12 noon on 29 October 2014. At one point he spoke to those categories of documents in the common bundle which Mr Judd had characterised as having been simply uploaded onto a website, an action (it was submitted) which could not be regarded as a "news activity" as defined in s 2(1) of the Privacy Act. To this submission Mr Slater asserted that all of the documents in question had in fact been part of articles posted on Mr Slater's website whaleoil.co.nz. Addressing the fact that the documents (without the article) appeared on Scribd.com, Docshut.com and Slashdocs.com, Mr Slater said that while Scribd.com was his website, the appearance of the documents on the other two websites was not his responsibility. Explaining the absence of the articles on Scribd.com, he said that the articles had been posted on whaleoil.co.nz but to avoid having to manage large files on that website, the linked documents were posted on Scribd.com.

[13] Mr Slater further asserted that in many instances the article around which the Scribd.com documents had been written had been deleted by him in an effort to settle the defamation proceedings brought by Mr Blomfield. Because there was no back up copy or cache from which the articles could be retrieved he would find it difficult to establish that the so-called "dumped" documents on Scribd.com and the other two websites had been part of an article concerning news, observations on news or current affairs.

[14] Potentially, the assertions of fact made by Mr Slater in his closing submissions go directly to the question whether, for the purpose of the Privacy Act, he was at the relevant time a news medium whose business consisted of a news activity.

[15] When the hearing resumed at 2pm the Tribunal drew Mr Slater's attention to the legal position that the assertions of fact made in the course of his closing submissions could not be taken into account by the Tribunal. The Tribunal further observed that with one exception, those factual assertions had not previously been advanced. The exception was the pleading in the statement of reply that he had not uploaded the documents onto Docshut.com or Slashdocs.com. The Tribunal asked Mr Slater whether in these circumstances he sought opportunity to file evidence. Mr Slater answered in the affirmative.

[16] For the Director Mr Judd understandably opposed the application, pointing out that it was advanced after the Director had closed his case and indeed after he had presented his closing submissions. It was far too late for Mr Slater, in closing submissions, to seek a reopening of the case.

The decision to adjourn

[17] The frustration expressed by Mr Judd in his submissions is understandable. From the time of the first teleconference Mr Slater has had at least seven months to prepare his case and two timetable opportunities to file his evidence. While he is a litigant in person his litigation experience has been expanding both in the High Court and in the District Court. The rules regarding the need to file evidence can hardly be new to him. Nevertheless, the remedies sought by the Director are of a substantial nature (eg damages of $50,000 for emotional harm, the practical equivalent of a restraining order, a cease and desist order and a training order).

[18] What the Tribunal cannot overlook is the need to comply with s 105 of the Human Rights Act 1993 which is incorporated into proceedings under the Privacy Act by s 89 of the latter Act. It requires the Tribunal to act according to the substantial merits of the

case without regard to technicalities and in exercising its powers and functions the Tribunal must (inter alia) act in a manner that is fair and reasonable:

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

[19] The following factors, taken cumulatively, led the Tribunal to conclude Mr Slater should be given a final opportunity to file evidence to support the defence advanced in his closing submissions:

> **[19.1]** The proposed evidence goes directly to the heart of the primary issue in the case, namely whether Mr Slater was at the time a "news medium" carrying out a "news activity".
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> **[19.2]** It would be artificial to determine the case by ignoring Mr Slater's assertion that there is evidence showing he was a news medium.
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> **[19.3]** Mr Slater is a litigant in person. Even a fundamental error by him (failing to file evidence) cannot deflect the Tribunal from the statutory obligation to decide the case on its substantial merits rather than on technicalities. The Tribunal's decision may well be seen by some as an over-generous indulgence but no real unfairness or prejudice to the Director by granting the adjournment has been identified.

[20] In these circumstances it was decided that Mr Slater should be given a final opportunity to file all evidence on which he intends relying when advancing his defence. As stressed at the hearing, "all evidence" means "everything". Because Mr Slater has not in the past adhered to timetable directions and because the adjournment application was made in the last minute of the eleventh hour, such evidence as he files must be in the form of a sworn affidavit or affidavits. Hopefully this will reinforce the seriousness of the situation in which Mr Slater finds himself and the need for both the Director and the Tribunal to know that whatever Mr Slater's final position is with regard to the evidence, he is able to swear to the truth of his assertions.

[21] Obviously fairness requires the Director to have opportunity to respond to such evidence as is filed by Mr Slater and it will be seen that the timetable which follows makes provision for this. Because Mr Judd will shortly be engaged in a lengthy High Court hearing the Director's deadline cannot be brought forward.

[22] Mr Judd mentioned the possible need for discovery and foreshadowed that it may even be necessary for the Director to apply for an order that Mr Slater disclose the source of his information. Mr Slater said he would oppose any such application.

[23] The decision of the Tribunal is that questions relating to discovery and disclosure of sources are best left for consideration once Mr Slater has filed all his evidence. A more realistic assessment can then be made as to the nature and degree of the discovery required.

Costs

[24] Mr Judd asked that the Tribunal record that it is the Director's position that whatever the outcome of the case Mr Slater should meet the costs of the disrupted hearing. Fairly Mr Judd did not ask that payment be a condition of the adjournment. Mr Slater responded he had no money. The Tribunal does not intend entering into an examination of the costs issue at this stage. Costs are reserved.

Timetable order

[25] The following timetable orders are made:

> **[25.1]** All evidence on which Mr Slater intends relying in support of his case is to be filed in affidavit form. All such affidavit evidence is to be filed and served by 5pm on Friday 7 November 2014.
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> **[25.2]** Written statements of the evidence to be called by the Director in reply are to be filed and served by 5pm on Friday 12 December 2014.
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> **[25.3]** A further teleconference is to be convened at 10am on Wednesday 17 December 2014 to review what further steps are required to ensure that the hearing can continue and hopefully, to allocate a date of hearing for the resumed hearing.
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> **[25.4]** Leave is reserved to both parties to make further application should the need arise.

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Mr RPG Haines QC	**Ms GJ Goodwin**	**Mr RK Musuku**
Chairperson	**Member**	**Member**