

Reference No. HRRT 024/2012

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN IHC NEW ZEALAND

PLAINTIFF

AND MINISTRY OF EDUCATION

FIRST DEFENDANT

AND SECRETARY FOR EDUCATION

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson, Member

REPRESENTATION:

Ms F Joychild QC for Plaintiff

Ms M Coleman and Mr SJ Humphrey for First and Second Defendants

DATE OF DECISION: 16 May 2014

**DECISION OF TRIBUNAL GRANTING NON-PARTY
ACCESS TO STATEMENT OF CLAIM AND STATEMENT OF REPLY**

Background

[1] These proceedings were filed on 27 September 2012. For reasons set out in the *Minutes* dated 22 November 2012, 15 February 2013, 24 May 2013, 28 June 2013 and 4 July 2013, little progress has been made.

[2] The plaintiff has since engaged a new instructing solicitor and new counsel. On 30 April 2014 an amended statement of claim was filed.

[3] By email dated 1 May 2014 Ms Kristin Hall, Reporter for Breakfast, *One News*, requested permission to access and to copy documents held on the Tribunal file. In substance, the request is for access to the amended statement of claim.

[4] The parties having a right to be heard on the application, submissions have now been received from Ms Joychild QC for the plaintiff and from Mr Humphrey for the first and second defendants.

[5] The plaintiff does not oppose the application and submits that the following factors point towards access being given to the pleadings:

[5.1] The application by *One News* is an application by the news media for the purpose of providing information to the public.

[5.2] The claim raises a matter of significant public interest, namely the rights of tens of thousands of New Zealand children and young persons to an education equal to that given to other children.

[5.3] The facts of the case are complex and as such make fair and accurate reporting difficult. Access to the primary documents themselves will assist such reporting.

[5.4] There is no confidential or personal information in the pleadings. Furthermore, as they are pleadings only, the principle of open justice should have prominence.

[5.5] There are no countervailing considerations and in addition s 107(1) of the Human Rights Act 1993 highlights the importance of the open justice principle in the Tribunal's processes.

[6] The defendants do not oppose the release of the information requested *per se*. They do, however, oppose the immediate grant of the application and submit that *One News* should be permitted access to the Tribunal file only after the defendants have filed their amended statement of reply, due by Friday 30 May 2014. It is submitted this is consistent with:

[6.1] First, the orderly and fair administration of justice (High Court Rules, r 3.16(a)). The purpose of pleadings is to assist the parties and the Tribunal to separate agreed from contested facts and to identify the key legal issues. Such an analysis is only possible once a defendant has filed a statement of reply. Permitting access to a Tribunal file containing only a plaintiff's statement of claim would present an incomplete picture of both the relevant facts and issues. The delay requested in the present case is short and would be unlikely to cause prejudice to any party or non-party.

[6.2] Second, the principle of open justice and the promotion of fair and accurate reporting (r 3.16(c)) requires waiting until both parties' sides of the story are recorded on the Tribunal's file before access by journalists is permitted.

[7] The parties are in agreement that access to the file can be granted by the making of copies or by the provision of documents in PDF format.

The law to be applied

[8] The circumstances in which a non-party may be given access to a Tribunal file have been addressed at length in *IHC New Zealand v Ministry of Education (Non-Party Access to Tribunal File)* [2013] NZHRRT 2 (31 January 2013), *Adoption Action Incorporated v Attorney-General (Non-Party Access to Tribunal File)* [2013] NZHRRT 4 (22 February 2013) and *Director of Human Rights Proceedings v Sensible Sentencing Group Trust (Application by the New Zealand Herald for Access to Tribunal File)* [2013] NZHRRT 20 (14 May 2013). No purpose would be served by adding to what has been said in these cases.

[9] No substantive hearing having yet taken place and the parties being in agreement that the non-party request be granted (but in disagreement as to the terms of access), it is sufficient to note only that the Tribunal is to apply, with all necessary modifications, the High Court Rules, Part 3, rr 3.5 to 3.16. Rule 3.16 provides:

3.16 Matters to be taken into account

In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge or Registrar must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

- (a) the orderly and fair administration of justice:
- (b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
- (c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:
- (d) the freedom to seek, receive, and impart information:
- (e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:
- (f) any other matter that the Judge or Registrar thinks just.

[10] The six factors listed in r 3.16 are not prioritised. The relevance and weight to be given to each sub clause will depend on the context of each request and in particular the nature of and the reasons for the request. See *Schenker AG v Commerce Commission* [2013] NZCA 114 (17 April 2013) at [37]:

[37] Rule 3.16(c) neither heightens nor diminishes that principle. Rule 3.16 is not hierarchical. None of its subclauses, including subcl (c), can be prioritised. The relevance and weight ascribed to each subclause will depend on the context of each r 3.9 request and in particular the nature of and the reasons for an application or request. It is trite to observe that each request will give rise to different considerations and will require a specifically focussed evaluation.

Discussion

[11] As neither party opposes the application and there being no proper grounds for it to be declined, it is granted.

[12] The sole issue to be addressed is the submission that access to the amended statement of claim be delayed until after the statement of reply has been filed.

[13] The defendants, rely first on r 3.16(a) (the orderly and fair administration of justice) and second, on r 3.16(c) (the principle of open justice and the promotion of fair and accurate reporting).

[14] As to the first ground, it is difficult to see how the orderly and fair administration of justice is engaged by the implicit submission by the defendants that if there is to be a

trial by media, that that trial be fair. If the defendants in this regard have any case at all, it must rest on the “fair and accurate reporting” limb of the rule. It is necessary, however, to remember that the full phrase deployed in r 3.16(c) is:

the **principle** of open justice, namely, **encouraging** fair and accurate reporting of, and comment on, court hearings and decisions: [Emphasis added]

[15] Open justice, however, is a principle, not a freestanding right. See *Schenker AG v Commerce Commission* at [36] approving the decision of Asher J in *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271:

[36] The principle of open justice which has common law origins has been examined by this Court and the Supreme Court alongside the s 14 right contained in the New Zealand Bill of Rights Act 1990 to seek, receive, and impart information of any kind in any form. Undoubtedly the fundamental right enshrined by s 14 and the principle of open justice overlap. Citing leading Australian authority, Asher J concluded that open justice is a principle, not a freestanding right. We agree with that approach.

[16] Furthermore it is important not to allow r 3.16 to overreach its purpose. That purpose is centred around providing access to court documents, not controlling or guiding the media or other non-party as to how the particular proceedings should be reported or commented on. The clear principle is that by providing greater access to court documents, the non-party will have better opportunity to be properly informed and this, indirectly, will encourage the fair and accurate reporting of, and comment on, court hearings and decisions. But providing access to documents with that purpose in mind is an entirely different proposition to the one advanced by the defendants which is that the court or tribunal should actively intervene by refusing access to the amended statement of claim until an amended statement of reply is filed. This will turn the principle of open justice (understood as the encouragement of fair and accurate reporting) into an enforceable right to fair and accurate reporting (no access to the statement of claim until a statement of reply is filed).

[17] Expressed another way, the criteria listed in r 3.16 are to provide guidance on how a court or tribunal should exercise its discretion **as to access**. They are not there to provide guidance on how the court or tribunal should control any reporting by the media which may indirectly result from the media exercising their rights to inspect the court file. See *Fontein v Bank of New Zealand* [2010] NZAR 749 at [4] and [5] (Associate Judge Doogue):

[4] It is important in my view to understand that this provision was inserted into the rules to provide guidance on the question of whether the Court should make an order for access to documents on the Court file. It was not intended to also control the indirect consequences of making such an order which might include that a media representative would, after sighting documents on the Court file, decide to produce a publication. That is to say, I do not consider that it was an objective of the rule that the Court should have power to give directions to the media as to the quality and nature of the media coverage that they should give to the proceedings in which orders for access are made. It would be surprising in my opinion that in reliance on subordinated legislation designed to regulate the procedures of the High Court, the Court could make orders trenching on basic rights of freedom of expression, underpinned as they are by s 14 of the New Zealand Bill of Rights. In my view the reference to the principles of open justice and fair and accurate reporting in the rules are founded on the assumption that granting access to Court files will be conducive to those socially valuable objectives being attained. But they do not confer upon the Court the added duty of ensuring that beyond the stage where the right to inspect has been exercised, the Court should have a responsibility to make sure that what indirectly results is actually fair and accurate reporting etc.

[5] In other words, the presence in the rules of the various criteria under r 3.16 is to provide guidance to the Court on how it should exercise its decision, and is not there to provide guidance to the Court on how it should control any reporting by the media which may indirectly result from the media exercising their rights to inspect the Court file.

[18] It follows that the provisions of r 3.16 relied on by the defendants cannot be used to prevent access to the amended statement of claim until such time as an amended statement of reply has been filed.

[19] In any event, the order sought by the defendants would involve the Tribunal embarking upon a futile exercise. The Tribunal cannot compel a non-party to read or to interest him or herself in a specific document on the file such as (here) the intended amended statement of reply. Nor can the Tribunal give access to a file on condition that the information thereby obtained is used in, and only in, a report of or comment on the proceedings that meets the description of “fair and accurate reporting”. It is also difficult to see how the Tribunal could provide a remedy in the event of a failure of fair and accurate reporting. All of these factors underline the point that the defendants attribute to r 3.16 a purpose for which it was never intended.

Decision

[20] The Tribunal cannot accept the submission that *One News* be denied access to the amended statement of claim until an amended statement of reply has been filed.

Order

[21] *One News* is granted immediate access to the amended statement of claim filed on 30 April 2014 and to the amended statement of reply (when filed). Such access may be granted by the provision of the document(s) in PDF format.

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Mr RPG Haines QC
Chairperson

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Ms GJ Goodwin
Member

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Mr BK Neeson
Member