

Reference No. HRRT 020/2011

UNDER THE HUMAN RIGHTS ACT 1993

IN THE MATTER OF AN APPLICATION BY A NON-PARTY  
FOR ACCESS TO THE TRIBUNAL FILE

BETWEEN ADOPTION ACTION INCORPORATED

PLAINTIFF

AND ATTORNEY-GENERAL

DEFENDANT

AT AUCKLAND

Mr RPG Haines QC, Chairperson  
Dr SJ Hickey, Member  
Mr BK Neeson, Member

Mr R Ludbrook for Plaintiff  
Ms M Coleman for Defendant  
Ms J Ryan for Director of Human Rights Proceedings

DATE OF DECISION: 22 February 2013

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

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**Background**

[1] The statement of claim by Adoption Action Incorporated was received on 22 July 2011 and the Attorney-General filed a statement of reply dated 30 August 2011.

[2] For reasons recorded in the *Minutes* issued by the Chairperson on 6 September 2011, 3 October 2011, 27 January 2012, 28 September 2012 and 16 October 2012 the proceedings are at the interlocutory stage with discovery expected to be completed by 22 February 2013. To date no amended statement of claim and no amended statement of reply have been filed.

## **The application for non-party access to the statement of claim and statement of reply**

[3] By letter dated 18 January 2013 Ms J Ryan, Senior Solicitor at the Office of Human Rights Proceedings, submitted a request to the Secretary for non-party access to the statement of claim and statement of reply. The letter explained that the Director of Human Rights Proceedings (the Director) has received an application for legal representation in relation to an issue which turns on the interpretation of the term “spouse” in s 3 of the Adoption Act 1955 and would like to know whether the same issue arises in the present proceedings (HRRT020/2011). The letter continues:

When considering any application for legal representation, the Director must have regard (among other things) to whether to do so is an effective use of resources, and whether it would be in the public interest. Because of this he is mindful of any litigation that is currently before the Tribunal; it would not generally be an effective use of resources or in the public interest to duplicate litigation that is already proceeding through the Tribunal.

I am aware that Adoption Action has brought proceedings in the Tribunal which may include the issue [concerning the reference to “spouse” in s 3 of the Adoption Act]. I would therefore like to request: (a) a copy of the operative Statement of Claim; (b) a copy of the operative Statement of Reply; and (c) information as to what stage the proceedings are at, such as whether a hearing date has been set.

[4] For the Director it is submitted:

[4.1] It would be in accordance with the principles of open justice and the freedom to seek, receive and impart information for the application to be granted.

[4.2] Any confidentiality or privacy interests can be protected by the redaction of information. In addition, the Office of Human Rights Proceedings could provide an assurance that it will not provide the documents to any person other than the individual who has submitted to the Director the request for legal representation (upon receiving an assurance by that person that he would not disclose the documents to any other person).

[4.3] When considering an application for legal representation, the Director must have regard to the factors set out in s 92 of the Human Rights Act 1993 which include: whether the provision of representation is an effective use of resources and whether or not it would be in the public interest to provide representation. To determine these points the Director needs to have a full understanding of what litigation is already before the Tribunal.

[4.4] The documents are sought for a matter of public interest, rather than for personal advantage.

## **Position of the plaintiff and defendant**

[5] On receipt of Ms Ryan’s letter dated 18 January 2013 the Secretary sent a copy to Mr Ludbrook and Ms Coleman and sought their response.

[6] By email dated 24 January 2013 Mr Ludbrook advised that Adoption Action is agreeable to the Office of Human Rights Proceedings being provided with a copy of the statement of claim and other pleadings as well as information as to the current state of the proceedings. Mr Ludbrook foreshadowed that Adoption Action will be filing an amended statement of claim and agrees to a copy of that document being provided to the Office of Human Rights Proceedings once it has been filed and served.

[7] By email dated 24 January 2013 Ms Coleman advised that the Crown has no objection to the statement of claim and statement of reply being made available as requested but suggests that provision await the filing of the foreshadowed amended statement of claim. Ms Coleman similarly has no objection to disclosure of the stage the proceedings have currently reached.

### **The law to be applied**

[8] The subject of non-party access to a Tribunal file was very recently considered by the Tribunal in *IHC New Zealand v Ministry of Education (Non-Party Access to Tribunal File)* [2013] NZHRRT 2 (31 January 2013). In that decision the Tribunal at [7], [8] and [21] described ss 107(1) and 108(1) of the Human Rights Act 1993 as the two key statutory provisions relevant in the current context:

[8.1] Section 107(1) of the Act stipulates that every hearing of the Tribunal shall be held in public subject to limited exceptions (addressed in subs (2) and (3) of that section).

[8.2] Section 108(1) of the Act provides (inter alia) that any person who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally, may appear and may call evidence on any matter that should be taken into account in determining the proceedings. A person who is not a party to the proceedings but who wishes to appear before the Tribunal must first give notice to the Tribunal and to every party, before appearing.

[8] The first point emphasises the open justice principle. The second point depends for its efficacy on the first. Unless the proceedings of the Tribunal are accessible to the public and to the legal profession the purpose of s 108 may be compromised or defeated.

[9] The Tribunal further held that provided the provisions of the Human Rights Act are at all times given precedence, the Tribunal would apply, with all necessary modifications, the High Court Rules, Part 3, specifically rr 3.5 to 3.16 because they prescribe a simple, clear and easy to follow procedure for determining requests by non-parties for access to a court (or tribunal) file.

[10] The circumstances of the present case underline the necessity for the open justice principle (s 107(1)) and the compelling policy reasons for ensuring that the proceedings of the Tribunal are accessible to the public and to the legal profession in particular.

[11] No substantive hearing having yet taken place we intend applying High Court Rules, r 3.16:

#### **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.

For the reasons given in *IHC New Zealand v Ministry of Education (Non-Party Access to Tribunal File)* at [22] and [23], all six matters identified in this Rule are to be weighed in the balancing exercise. Automatic primacy is not to be given to the principle of open justice.

### **The balancing exercise**

**[12]** Addressing first the nature of, and the reasons for, the present application, the circumstances set out in the application letter dated 18 January 2013 are compelling. It is self-evident that in deciding whether to provide representation in proceedings before the Tribunal or in related proceedings, the Director cannot properly address the matters specified by s 92 of the Human Rights Act without having regard to the litigation already in train before the Tribunal. Where, as here, there is a potential overlap between the proceedings already before the Tribunal and those which, for the purposes of the s 92 decision are in contemplation, the Director must consider whether the provision of representation by him would be an effective use of resources and in the public interest.

**[13]** Addressing the orderly and fair administration of justice, little more need be added. We mention only that we do not see the request by the Director as imposing any inconvenience or burden on the parties or the Tribunal.

**[14]** As to the protection of confidentiality and privacy interests, we cannot see any confidential or commercially sensitive or other privacy interests that require protection and none have been drawn to our attention by the parties. While the Office of Human Rights Proceedings has mentioned the possibility of redacting the two documents sought, neither Adoption Action nor the Crown have sought redactions and we ourselves can see no reason why redactions should be made. There is no confidential or private information in the documents. Should such information appear in the foreshadowed amended statement of claim (in relation to which the parties have signalled no objection in principle to disclosure to the Office of Human Rights Proceedings), the Secretary can be advised at the time of filing whether redactions are to be made to the document before disclosure to the Director.

**[15]** As to the principle of open justice, r 3.16(c) must necessarily be read subject to the provisions of the Human Rights Act. As explained in *IHC New Zealand v Ministry of Education (Non-Party Access to Tribunal File)* at [29], the High Court Rules approach open justice through the narrow prism of encouraging fair and accurate reporting and comment on court hearings and decisions. The Tribunal, on the other hand, is guided by the terms, objects and purposes of the Human Rights Act. These embrace concepts of a much broader nature:

**[15.1]** First, ss 107(1) and 108(1) highlight the importance of the open justice principle in the Tribunal's processes.

**[15.2]** Second, among the objects and purposes of the Act is the promotion and protection of the right to freedom from discrimination as set out in s 19 of the New Zealand Bill of Rights Act 1990. Where, in the context of a request for access by a non-party, the Tribunal is able to promote that right it ought to do so, provided this can be done consistently with the rights of others, including the need to protect confidentiality, privacy interests and any privilege held by, or available to, any person.

Allowing the Director access to the two requested documents will assist the Director to determine whether to provide representation in proceedings which will potentially raise

discrimination issues similar to those pleaded in the present case. There are strong policy grounds based on the interests of justice why such access should be given.

[16] The final factor (freedom to seek, receive, and impart information) is also directly relevant when determining whether to facilitate the Director's duties under s 92 of the Human Rights Act 1993. The following passage from *IHC New Zealand v Ministry of Education (Non-Party Access to Tribunal File)* at [30] encapsulates the point:

[30] .... In the human rights context the freedom in question is a significant one. Those working in the human rights field should not, without proper reason, be refused access to potentially significant information, particularly given that s 108 of the Human Rights Act provides that a non-party who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally, may appear and may call evidence on any matter that should be taken into account in determining the proceedings. This necessarily presumes ready access to some or all of the documents held by the Tribunal both at the stage when the non-party is taking advice whether to "appear" and at the stage when preparations are being made for the appearance itself. Safeguards are in place. If necessary the documents can be redacted or released on terms. While s 108 does not have application on the present facts, the underlying principle remains and must inform the framework for determining non-party access to records. In this context there is no real distinction between those who wish to join existing proceedings and those who wish to commence proceedings of their own. Both categories have an interest in knowing what cases are in train and the basis on which those cases have been brought.

[17] As to r 3.16(e), this provision has no application as no orders to date have been made by the Chairperson or by the Tribunal relating to access or non-publication of documents on this file.

[18] Finally, as to "any other matter" under r 3.16(f) we see no remaining issues to be addressed under this heading.

### **Decision**

[19] Weighing all relevant factors we are of the clear view that the application should be granted.

### **Order**

[20] We direct that the Director of Human Rights Proceedings be provided with a copy of the statement of claim filed on 22 July 2011 together with a copy of the statement of reply dated 30 August 2011. Neither document is to be redacted.

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

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

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**Mr BK Neeson**  
**Member**