

Reference No. HRRT 034/2013

UNDER THE PRIVACY ACT 1993

BETWEEN DIRECTOR OF HUMAN RIGHTS
PROCEEDINGS

PLAINTIFF

AND JUERGEN SCHUBACH

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Mr BK Neeson, Member

REPRESENTATION:

Mr D Peirse for plaintiff
Mr J Schubach in person

DATE OF DECISION: 5 August 2014

**DECISION OF TRIBUNAL ON APPLICATION BY DEFENDANT THAT
PROCEEDINGS BE DISMISSED**

Background

[1] These proceedings are to be heard at Christchurch on 10 and 11 November 2014. By Minutes dated 23 May 2014 and 27 June 2014 the Chairperson gave case management directions to ensure that the case will be ready for hearing on those dates.

[2] On 4 July 2014 the Director filed written statements of the evidence he will call at the hearing. The timetable in the *Minute* of 27 June 2014 required any statements of evidence by Mr Schubach to be filed and served by 1 August 2014.

The application to dismiss

[3] By application dated 22 July 2014 Mr Schubach applied for the dismissal of the proceedings on the general ground that they “are about to fail to take the course of a due process of law as is consistent with justice and can thus no longer be an orderly and fair administration of justice”. The particular grounds advanced are, in summary:

[3.1] It is inaccurate for the statement of claim to describe Mr Schubach as:

... T/A the German law firm in New Zealand of Germany House, 10 Oakhurst Place, Christchurch.

[3.2] Mr Schubach’s business in New Zealand ceased on 30 November 2013 and he no longer lives in New Zealand.

[3.3] It is “bizarre” that the plaintiff and Tribunal assume Mr Schubach will travel to New Zealand from Denmark to attend the hearing in Christchurch.

[3.4] Not only did Mr Schubach have a right to appear at the hearing, he was “indubitably” a person whose presence before the Tribunal is necessary to justly determine the issues arising. He has a right also to cross-examine any witness.

[3.5] As Mr Schubach “has definitely no intention to travel around the world for the hearing” the Tribunal will not be able to comply with its duty under s 105 of the Human Rights Act 1993 to observe the principles of natural justice.

[3.6] The Tribunal has no power to require Mr Schubach to file evidence or to attend the proceedings to give evidence and therefore will be unable to “fully examine” Mr Schubach under s 106(1)(c) of the Act.

[3.7] This is a case in which the aggrieved individual was complaining about “the conduct and the fees of his lawyer”. As Mr Schubach was not and is not a solicitor of the High Court of New Zealand, the Tribunal has no jurisdiction to hear the complaint.

[3.8] The Regional Court of Cologne is the proper court in which the complaints against Mr Schubach are to be determined.

Discussion

[4] It is clear from the witness statements filed by the Director that the relevant events occurred in New Zealand while Mr Schubach was living in this country and in his application Mr Schubach admits he had a business in New Zealand up until 30 November 2013. The Director has a strong argument that in Mr Schubach’s dealings with the aggrieved individual Mr Schubach was an “agency” as that term is defined in the Privacy Act 1993, s 2 and therefore bound by the information privacy principles. The question whether an agency can contract out of those obligations is to be determined at the hearing itself on the evidence then put forward by the parties.

[5] The alleged misdescription of Mr Schubach is immaterial as is his present absence from New Zealand. If Mr Schubach chooses not to return to New Zealand for the purpose of the hearing he can apply to participate in the hearing by way of audio-visual link (AVL). He will thus be able to cross-examine the Director’s witnesses, make submissions and give his own evidence in person. He also has the right to instruct a New Zealand lawyer to appear on his behalf at the hearing. In addition he has a range of options for participating in the hearing including the filing, in advance, of sworn

evidence and submissions. While there may be a question as to the weight to be given to sworn but untested (by cross-examination) evidence, it is for Mr Schubach to decide how best to serve his own interests.

[6] However, Mr Schubach cannot, by absenting himself from the hearing, prevent the Tribunal from hearing and determining the Director's claim. Specifically, the Tribunal can determine the proceedings in the absence of Mr Schubach. See the Human Rights Review Tribunal Regulations 2002, Regulation 19(3) which provides:

19 Hearing

- (1) At the hearing, the persons who have a right to appear, or who are allowed to appear, before the Tribunal must, subject to subclause (4), each be given an opportunity to be heard.
- (2) The persons who have a right to appear, or who are allowed to appear, before the Tribunal may call evidence and may cross-examine any witness.
- (3) If the plaintiff or the defendant or both fail to appear before the Tribunal at the time and place fixed, the Tribunal may nevertheless, on proof of service of notice of the hearing, proceed to determine the proceedings.
- (4) The Tribunal may refuse to hear the defendant if, by the time of the hearing, the defendant—
 - (a) has not filed a statement of reply within the time required by or under regulation 15(1) or (2), or in accordance with leave of the Tribunal granted under regulation 15(3); and
 - (b) has not applied for the leave of the Tribunal, under regulation 15(3), to file a statement of reply outside the time required by or under regulation 15(1) or (2).

[7] Finally, this case is not about a complaint about the fees charged by a lawyer. It is about a complaint that Mr Schubach, as an “agency” under the Privacy Act, allegedly failed to comply with information privacy Principle 6.

Decision

[8] No grounds having been made out to justify the dismissal of the proceedings, the application for dismissal is refused.

Case management directions

[9] Should Mr Schubach, on receiving this decision, reconsider his position and determine that it is in his interests to participate in the hearing by instructing a New Zealand lawyer to appear on his behalf, by applying for his participation to be by way of audio-visual link or otherwise:

[9.1] Sworn written statements of the evidence to be called at the hearing by Mr Schubach are to be filed and served by 5pm on Friday 29 August 2014. By the same date Mr Schubach is to provide the Director with a list of documents he (Mr Schubach) wishes to have included in the common bundle of documents.

[9.2] Should the Director wish to file any statements in reply, such statements are to be filed and served by 5pm on Friday 12 September 2014.

[9.3] The Director is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 19 September 2014.

[9.4] The proceedings are to be heard at Christchurch on 10 and 11 November 2014. The venue is to be advised by the Secretary.

[9.5] Any application by Mr Schubach to participate in the hearing by audio-visual link is to be filed and served by 5pm on Friday 26 September 2014.

[9.6] Leave is generally reserved to both parties to make further application should the need arise.

[9.7] In case it should prove necessary we leave it to the Chairperson of the Tribunal to vary the foregoing timetable or to give further case management directions.

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Mr RPG Haines QC
Chairperson

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Mr GJ Cook JP
Member

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Mr BK Neeson
Member