

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF AGGRIEVED PERSON
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL
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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2014] NZHRRT 4

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Reference No. HRRT 002/2014

UNDER SECTION 50 OF THE HEALTH AND  
DISABILITY COMMISSIONER ACT 1994

BETWEEN DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND NELSON MARLBOROUGH DISTRICT  
HEALTH BOARD

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr GJ Cook JP, Member

REPRESENTATION:

Mr A Martin, Director of Proceedings

Dr J Coates for Defendant

DATE OF DECISION: 4 February 2014

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#### DECISION OF TRIBUNAL

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[1] These proceedings under s 50 of the Health and Disability Commissioner Act 1994 were filed on 28 January 2014.

[2] Prior to the filing of the proceedings the parties resolved all matters in issue and the Tribunal has now been asked to make a consent declaration. The parties have filed:

**[2.1]** A Consent Memorandum dated 18 December 2013.

**[2.2]** An Agreed Summary of Facts, a copy of which is annexed and marked "A".

**[3]** The Consent Memorandum is in the following terms:

**MAY IT PLEASE THE TRIBUNAL**

1. The plaintiff and defendant have agreed upon a summary of facts, a signed copy of which is filed with this memorandum.
2. The plaintiff requests that the Tribunal exercise its jurisdiction in respect of the following matters:
  - (a) A declaration pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 ("the Act") that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 ("the Code") in respect of Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill, Right 4(4) by failing to provide services in a manner that minimised the potential harm to, and optimised the quality of life of the aggrieved person, and Right 6 by failing to provide people entitled to give consent on behalf of the aggrieved person with information that a reasonable consumer, in the aggrieved person's circumstances, would expect to receive.
3. In relation to the declaration being sought in paragraph 2(a) above, the parties respectfully refer to the agreed summary of facts. The parties are agreed that it is not necessary for the Tribunal to consider any other evidence for the purpose of making the declaration sought. The parties request that the agreed summary of facts be published by the Tribunal as an addendum to the decision.
4. The defendant consents to the Tribunal making the above declaration based on the facts set out in the agreed summary of facts.
5. In the statement of claim the plaintiff also sought the following relief:
  - (a) Damages pursuant to s 57(1)(c);
  - (b) Costs.
6. These other aspects of the relief claimed by the plaintiff have been resolved between the parties by negotiated agreement.
7. There is no issue as to costs.
8. The plaintiff seeks a final order prohibiting publication of the name of the aggrieved person in this matter .... The defendant consents to such a final order being granted.
9. The defendant does not seek any order prohibiting publication of the defendant's name.

**[4]** Having perused the Agreed Summary of Facts the Tribunal is satisfied on the balance of probabilities that an action of the defendant was in breach of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 and that a declaration should be made in the terms sought by the parties in paragraph 2 of the Consent Memorandum.

**DECISION**

**[5]** By consent the decision of the Tribunal is that:

**[5.1]** A declaration is made pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in respect of Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill, Right 4(4) by failing to provide services in a manner that minimised the potential harm to, and optimised the quality of life of the aggrieved person, and Right 6 by failing to provide people entitled to give consent on behalf of the aggrieved person with information that a reasonable consumer, in the aggrieved person's circumstances, would expect to receive.

**[5.2]** A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the aggrieved person. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

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

.....  
**Ms GJ Goodwin**  
**Member**

.....  
**Mr GJ Cook JP**  
**Member**

**BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL**

**UNDER** Section 50 of the Health and Disability Commissioner Act 1994

**BETWEEN** **DIRECTOR OF PROCEEDINGS**, designated under the Health and Disability Commissioner Act 1994

**Plaintiff**

**AND** **NELSON MARLBOROUGH DISTRICT HEALTH BOARD**

**Defendant**

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**AGREED SUMMARY OF FACTS**

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Health and Disability Commissioner  
*Te Toihou Hauora, Hauatanga*

Level 11, 86 Victoria Street, Wellington 6011

PO Box 11934, Wellington 6142

Phone: 04 494 7900 Fax: 04 494 7901

Aaron Martin - Director of Proceedings

## **AGREED SUMMARY OF FACTS**

### **INTRODUCTION**

1. The plaintiff is the Director of Proceedings, a statutory position created by s 15 of the Health and Disability Commissioner Act 1994 (“the Act”). The aggrieved person is S.
2. At all material times, the defendant, Nelson Marlborough DHB was a health care and disability services provider within the meaning of s 3 of the Act, and was providing disability services to the aggrieved person.
3. On 14 August 2011 the aggrieved person’s parents complained to the Health and Disability Commissioner about services provided to the aggrieved person.
4. On 21 June 2013 the Health and Disability Commissioner (appointed under s 9 of the Act) finalised his opinion that the defendant had breached the aggrieved person’s rights under the Health and Disability Commissioner (Code of Health and Disability Service Consumers’ Rights) Regulations 1996 (“the Code”) and in accordance with s 45(2)(f) of the Act, referred the defendant to the plaintiff.

### **BACKGROUND**

5. In April 2009, S, aged 15 years, was accepted into the care of a community home operated by Intellectual Disability Support Services (IDSS) in Nelson (“the home”). S is a young man with Down Syndrome and Autism, and he has high needs and is sometimes aggressive. S is the only client in the home, and he has two carers with him for 24 hours a day, seven days a week. The carers are managed by a team leader.
6. Within about three months of S moving into the home, concerns about the care he was receiving from the team leader, Ms Linda Ericson, were brought to Mr and Mrs S attention by some of the carers in the house. In December 2009, two carers met with staff at Nelson Marlborough District Health Board (NMDHB) and raised concerns about the care provided to S by Ms Ericson, in particular, concerns that she was physically and verbally abusive towards S.
7. Following those meetings, NMDHB staff met with S’s carers and asked them not to swear in the house, and to work through issues “honestly and respectfully”. Staff were also advised at that meeting that discussions with staff about other staff, or with family about other staff, were not appropriate and may result in disciplinary action. There is no evidence that the concerns about Ms Ericson’s behaviour were formally investigated. Mr and Mrs S were not informed by NMDHB of the carers’ complaints and actions taken at that time.
8. Throughout 2010, Mr and Mrs S remained concerned about the care S was receiving. In August 2010, one of S’s carers informed Mr and Mrs S of two incidents where he witnessed Ms Ericson physically and verbally abusing S. Mr and Mrs S made a complaint to the Police and to the National Health Board.
9. In September 2010, following the complaint to the National Health Board, NMDHB’s Sentinel Event Core Group (the Group) investigated the complaint to identify whether a full Sentinel Event investigation was required. The Group conducted a paper-based investigation into the complaints about the care provided to S. In the course of the paper based investigation the Group met with the Service Manager and discussed the complaint with him. No staff were interviewed by the Group and Mr and Mrs S were not

involved in the investigation process. The review concluded that the complaints were not substantiated, and it was not necessary to conduct a full Sentinel Event investigation. A further review conducted between August 2011 and April 2012, which involved staff interviews, subsequently found that there was a high probability that Ms Ericson had physically and verbally abused S. Ms Ericson is no longer employed by NMDHB.

10. NMDHB accepts that its response to the serious concerns that were brought to its attention in December 2009 was inadequate. In particular, no formal investigation was carried out (two staff were interviewed to ascertain whether a full investigation should take place. Those staff members raised serious concerns about Ms Ericson's behaviour). Staff were left concerned for their jobs if further concerns were raised, and Mr and Mrs S were not informed by NMDHB of the complaint and actions taken in response to that complaint. NMDHB also accepts that its investigation in September 2010 was inadequate. This includes the decision to conduct only a paper-based review in response to serious allegations of abuse of a vulnerable consumer.

11. NMDHB's response to the concerns raised about the care provided to S fell well short of the expected standard, and its failures in that regard put S's safety at risk. NMDHB breached Rights 4(1)<sup>1</sup> and 4(4)<sup>2</sup> of the Code for failing to adequately respond to concerns about S's care, and breached Right 6<sup>3</sup> for failing to provide S's legal guardian with adequate information. Particulars of these breaches are set out below.

## **BREACHES OF CODE OF RIGHTS**

### **Breach – Right 4(1)**

12. The defendant has breached Right 4(1) of the Code by failing to provide services to the aggrieved person with reasonable care and skill.

13. In particular the defendant failed to:

(a) Appropriately respond to the concerns raised by care workers employed at the home about the care provided to S by Ms Linda Ericson; and/or

(b) Appropriately respond to concerns raised by Mr S and Mrs S about the care provided to S by Ms Linda Ericson.

### **Breach – Right 4(4)**

14. The defendant has breached Right 4(4) of the Code by failing to provide services to the aggrieved person that minimised the potential harm to and optimised the quality of life of the aggrieved person.

15. In particular by failing to provide services with reasonable care and skill as particularised in 13(a) and 13(b) the defendant put the aggrieved person's safety at risk.

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<sup>1</sup> Right 4(1) of the Code states: "Every consumer has the right to have services provided with reasonable care and skill."

<sup>2</sup> Right 4(4) of the Code states: "Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer."

<sup>3</sup> Right 6 of the Code is the right to be fully informed.

**Breach – Right 6**

16. The defendant has breached Right 6 of the Code by failing to provide the aggrieved person’s legal guardians with information that a reasonable consumer in the circumstances would expect to receive.

17. In particular the defendant failed to provide the aggrieved person’s legal guardians with information about the:

- (a) concerns that had been raised relating to the care of the aggrieved person by the caregivers at the home; and/or
- (b) response of the defendant to the concerns raised relating to the care of the aggrieved person by the caregivers at the home.

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Aaron Martin

**Director of Proceedings**

Nelson Marlborough District Health Board agrees that the facts set out in this Summary of Facts are true and correct.

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**NMDHB**

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Date