

Reference No. HRRT 020/2018

UNDER SECTION 51 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994

BETWEEN CORINDA TAYLOR
FIRST PLAINTIFF

AND SIDNEY NORRIS TAYLOR
SECOND PLAINTIFF

AND SOUTHERN DISTRICT HEALTH BOARD
FIRST DEFENDANT

AND RICHARD MULLEN
SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms GJ Goodwin, Member

Mr RK Musuku, Member

REPRESENTATION:

Mr BC Nevell for plaintiffs

Mr G Gallaway and Ms M Nicol for first defendant

Ms K Wills for second defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 2 July 2018

DECISION OF TRIBUNAL GRANTING FIRST AND SECOND DEFENDANTS
EXTENSION OF TIME FOR FILING STATEMENT OF REPLY¹

¹ [This decision is to be cited as *Taylor v Southern District Health Board (Extension of Time)* [2018] NZHRRT 30.]

Background

[1] The events in question occurred in 2012 and 2013. The Report by the Mental Health Commissioner was not published until 16 February 2017 and it was not until one year and three months after that that the present proceedings were filed in the Tribunal on 18 May 2018.

The time for filing a statement of reply

[2] Regulation 15(1) of the Human Rights Review Tribunal Regulations 2002 stipulates that a defendant who intends to defend proceedings must, within 30 days after the day on which the notice of proceedings is served on him or her, file in the office of the Tribunal a statement of reply to the plaintiff's claim and must serve a copy of the statement of reply on the plaintiff and any other party:

15 Filing and service of statement of reply

- (1) A defendant who intends to defend the proceedings—
 - (a) must, within 30 days after the day on which the notice of proceedings is served on the defendant, file in the office of the Tribunals Division of the Ministry of Justice in Wellington a statement of reply to the plaintiff's claim; and
 - (b) must serve a copy of the statement of reply on the plaintiff and any other party.

Discretion to grant leave to file out of time

[3] However, the Tribunal retains a discretion to grant leave for a statement of reply to be filed out of time. Regulation 15 further provides:

- (3) A defendant who fails to file a statement of reply within the time required by or under subclause (1) or (2) may do so only with the leave of the Tribunal.
- (4) Leave may be granted on any terms or conditions the Tribunal specifies.

The extension application by the first defendant

[4] By memorandum dated 20 June 2018 the solicitors for the Southern District Health Board (SDHB) advised the SDHB was assembling a response which would hopefully deal fully with the matters raised by the plaintiffs but the filing deadline of 20 June 2018 could not be met for two reasons:

[4.1] The volume of material required to be reviewed was significant.

[4.2] Time had been lost in discussions between the SDHB and the plaintiffs regarding the question whether the present proceedings should be delayed until after an inquest is held by the Coroner.

The SDHB sought an extension of seven days to 5pm on 27 June 2018 to file its defence.

[5] By email dated 20 June 2018 Mr Nevell advised the plaintiffs consented to the extension.

[6] The request for extension having been referred to the Chairperson, the Secretary was directed to advise the parties that it was impractical for the request to be referred to a three member Panel of the Tribunal at short notice. They were further advised that in such circumstance it is common practice for a statement of reply to be filed out of time

with the extension being addressed retrospectively. It was suggested the parties assume the SDHB would be granted the requested extension.

The extension application by the second defendant

[7] By email dated 26 June 2018 the solicitors for Dr Mullen advised their client also required an extension of time for filing his statement of reply for the following reasons:

[7.1] It had been incorrectly understood the prescribed timeframe referred to 30 **working days**, not 30 consecutive days.

[7.2] Time had been lost due to Dr Mullen believing his attendance was required at a Restorative Conference. It was only in the middle of the preceding week that he had been notified the conference would not proceed.

[7.3] The solicitors advising Dr Mullen had been aware of discussions between the SDHB and the plaintiffs in relation to the question whether the Coronial inquest ought to proceed in advance of the proceedings before the Tribunal. They had been awaiting the outcome of those discussions prior to commencing drafting a reply. They had only on 26 June 2018 been provided with an update of the outcome of those discussions and had in that way become aware of the need to proceed with the statement of reply.

[8] By memorandum dated 28 June 2018 Mr Nevell for the plaintiffs opposed Dr Mullen's request on the following grounds:

[8.1] The papers served on Dr Mullen had made it abundantly clear a statement of reply had to be filed within 30 consecutive days after the date of service.

[8.2] The Restorative Conference did not relate to settlement of the case before the Tribunal, but to complaints generally about the SDHB mental health service.

[8.3] While discussions had taken place regarding the timing of the Coronial inquest, the plaintiffs had made it clear they were not willing to allow that inquest to delay the filing of pleadings and evidence in the proceedings before the Tribunal.

[8.4] In the circumstances no genuine reasons had been given for the delays.

Discussion

[9] As stated in *Sax v Commissioner of Police (Extension of Time)* [2015] NZHRRT 18 at [40] to [43], the key considerations are surprise and prejudice.

[10] On the facts, it is difficult to see how the two applications for extension of time could be declined:

[10.1] The extensions sought are minimal. The SDHB has asked for seven days to 27 June 2018 and Dr Mullen has sought a further five days beyond that date ie 2 July 2018.

[10.2] The plaintiffs have consented to the application by the SDHB while opposing the request made by Dr Mullen. They have asserted no prejudice. Their own delay between the 16 February 2017 Report by the Mental Health Commissioner and the filing of these proceedings is one year and three months.

There may be good reason for that delay and no criticism is intended of the plaintiffs. The point being made is that delays and mistakes will occur in even the best ordered systems and the Tribunal must give recognition to this fact in view of the special nature of its human rights jurisdiction.

[10.3] While time limits have a purpose and are of importance, the Tribunal is nevertheless required by law to avoid technicalities and when exercising its powers and functions it must act in a manner that is fair and reasonable and according to equity and good conscience. Section 105 of the Human Rights Act 1993, a provision incorporated into proceedings under the Health and Disability Commissioner Act 1994 by s 58 of that Act, provides:

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.

[10.4] The need for flexibility is reinforced by the fact that the Human Rights Review Tribunal Regulations 2002, reg 15(3) and (4) make specific provision for leave to be granted for the filing of a statement of reply out of time.

[10.5] Section 108(1) of the Human Rights Act must also be taken into account. Under that provision a broad range of persons are entitled to be heard, including persons who have an interest in the proceedings greater than the public generally. There is no time limit for such persons to give notice to the Tribunal of their intent to appear.

[10.6] No sensible reason has been advanced for the Tribunal to bar the defendants from participating in proceedings in which serious allegations are made against them and substantial damages sought. The allegations arise out of a complicated set of facts and a comprehensive inquiry conducted by the Mental Health Commissioner in which both defendants participated. It is also relevant that both defendants have positions of responsibility in the mental health system and that the requests for extension have been responsibly advanced.

[10.7] Finally, there is the pragmatic point that it is in the interests of a plaintiff and of the Tribunal that when a statement of reply is filed, it is comprehensive and deals substantively with the allegations made by the plaintiff. In many cases a defendant will need time to prepare such reply. The 30 day period allowed by the regulations will not always be sufficient. The Tribunal frequently receives requests for more time on the grounds that the extension will enable the filing of a more substantive reply which, in turn, will assist the Tribunal and the plaintiff to better understand the defendant's position and ultimately lead to a more efficient resolution of the claim. There is good practical reason why flexibility must be exercised in relation to the 30 day filing period.

Decision

[11] In the circumstances outlined it is inevitable that both defendants must be granted leave to file their statements of reply out of time. There is no reason for terms or conditions to be attached to such leave.

Formal orders

[12] The following orders are made:

[12.1] The Southern District Health Board is granted leave to file its statement of reply by 5pm on 27 June 2018.

[12.2] Dr Mullen is granted leave to file his statement of reply by 5pm on 2 July 2018.

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Mr RPG Haines ONZM QC
Chairperson

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Ms GJ Goodwin
Member

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Mr RK Musuku
Member