

- (1) ORDER PROHIBITING PUBLICATION OF TRUE NAMES, ADDRESSES AND IDENTIFYING PARTICULARS OF BOTH PLAINTIFFS
- (2) ORDER PROHIBITING PUBLICATION OF INFORMATION REGARDING SECOND PLAINTIFF'S HEALTH AND DISABILITIES
- (3) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2016] NZHRRT 39

Reference No. HRRT 026/2016

UNDER THE PRIVACY ACT 1993

BETWEEN SARAH GREEN

FIRST PLAINTIFF

AND JEREMY GREEN

SECOND PLAINTIFF

AND INSTITUTE OF TECHNOLOGY

DEFENDANT

[Redacted]

BEFORE:

Mr RPG Haines QC, Chairperson

Ms LJ Alaeinia, Member

Mr MJM Keefe JP, Member

REPRESENTATION:

Mrs S Green in person and as agent for Jeremy Green

Mr J Opie for defendant

DATE OF HEARING: 19 and 20 December 2016

DATE OF DECISION: 20 December 2016

**DECISION OF TRIBUNAL REINSTATING SECOND PLAINTIFF AS A PARTY
TO PROCEEDINGS AND GIVING TIMETABLE DIRECTIONS¹**

¹ [This decision is to be cited as: *Green and Green v IT (Reinstatement of Second Plaintiff)* [2016] NZHRRT 39. Note publication restrictions. Those restrictions require this decision to be anonymised by the redaction of the true names of the plaintiffs. In substitution the plaintiffs are to be referred to as "Sarah Green" and "Jeremy Green" (not their true names).]

Background

[1] The first plaintiff, Mrs S Green, is a registered nurse. The second plaintiff (Jeremy) is her son, currently some 20 years of age. He has been diagnosed as having Autistic Spectrum Disorder (ASD) as well as an intellectual disability in the moderate range. He has also developed a co-morbid anxiety disorder.

[2] In these proceedings filed on 9 May 2016 it is alleged the [Redacted] Institute of Technology (IT) breached information privacy principles 5, 10 and 11 and as a consequence there was an interference with the privacy of both Mrs Green and Jeremy.

[3] In a statement of reply filed on 13 June 2016 IT denies the allegations and by letter also dated 13 June 2016 has sought more information and further particulars. It is possible an amended statement of reply will be filed once the requested information has been provided.

[4] On 22 June 2016 the Tribunal received an Authority to Act signed by Jeremy in favour of his mother.

The “withdrawal”

[5] On 2 August 2016 Jeremy signed a letter addressed to the Tribunal stating he was withdrawing his complaint. The letter was in the following terms:

I [Jeremy Green] have made the decision to withdraw my complaint regarding IT. I do not wish to pursue this matter any further.

[6] The letter was filed by [redacted] who signed her email as “Mental Health Advocate, [Redacted]”. The covering email from [redacted] was in the following terms:

[Jeremy Green] has spoken to me regarding the complaint that is identified in the letter attached. [Jeremy] has made the decision to withdraw his part of the complaint.

I spoke to him yesterday, today I saw him again and read the letter to him and he decided to sign it. In both visits another person was in the room so he did not feel coerced or pressured to do this. I have given him my business card and have not immediately sent this email, waiting for an hour in case he decided to change his mind.

[7] On 9 August 2016 the Tribunal sent Jeremy’s letter to Mrs Green and to the solicitors for IT.

[8] At the first teleconference convened on 12 August 2016 Mrs Green expressed concern regarding the withdrawal, pointing out not only that she holds her son’s Authority to Act, she was not consulted by him or by [the mental health advocate] before the withdrawal letter was signed. She mentioned her son was presently not well, under enormous stress and not coping, difficulties exacerbated by his recent move away from home.

[9] Subsequent to the teleconference Mrs Green by email dated 17 August 2016 gave notice to the Tribunal and to the solicitors for IT that she had been told by Jeremy he wished to continue with the claim. On 29 September 2016 Jeremy applied to be reinstated as a party to these proceedings. A second teleconference held on 7 October 2016 resulted in case management directions for the filing of a notice of opposition by IT and the filing of the evidence and submissions to be relied on by the parties. See the *Minute* dated 7 October 2016.

[10] It is not intended to detail here the papers filed by the parties. It is sufficient to note that a notice of opposition by IT was received on 11 November 2016 along with four affidavits and detailed legal submissions. Both Jeremy and his mother also filed affidavits.

[11] An oral hearing was convened at [redacted] on 19 and 20 December 2016.

The appointment of a Communication Assistant

[12] Given Jeremy's disabilities, particularly the ASD diagnosis, the Tribunal of its own motion gave a direction under s 80(4) of the Evidence Act 2006 that communication assistance be provided to him. Section 80 provides:

80 Communication assistance

- (1) A defendant in a criminal proceeding is entitled to communication assistance, in accordance with this section and any regulations made under this Act, to—
 - (a) enable the defendant to understand the proceeding; and
 - (b) give evidence if the defendant elects to do so.
- (2) Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant in the proceeding or on the initiative of the Judge.
- (3) A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and any regulations made under this Act to enable that witness to give evidence.
- (4) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the Judge.
- (5) Any statement made in court to a Judge or a witness by a person providing communication assistance must, if known by the person making that statement to be false and intended by that person to be misleading, be treated as perjury for the purposes of sections 108 and 109 of the Crimes Act 1961.

[13] The term "communication assistance" is defined in s 4(1) of the Act as follows:

communication assistance means oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who—

- (a) does not have sufficient proficiency in the English language to—
 - (i) understand court proceedings conducted in English; or
 - (ii) give evidence in English; or
- (b) has a communication disability

[14] The Communication Assistant who attended both days of the hearing was Mrs Stamatina Bell, Outreach Coordinator, Autism New Zealand Wellington Branch. The Tribunal wishes to place on record the indispensable assistance given by her throughout what was at times a difficult hearing given the stress and anxiety exhibited by Jeremy, particularly during the course of his evidence.

The hearing on 19 and 20 December 2016

[15] At the commencement of the hearing the Tribunal made interim orders (the terms of which follow at the end of this decision) suppressing the name and identifying details of Jeremy and of Mrs Green. This was done in the interests of Jeremy given his disability and various medical conditions. Extension of the orders to include his mother was inevitable given the ease with which he can be identified through her.

[16] Because [redacted], a witness for IT, was available to give evidence only on the morning of 19 December 2016, her evidence was heard first.

[17] Jeremy was the second witness. His evidence in chief was taken as read (he had sworn two affidavits in support of the reinstatement application) and cross-examination

by Mr Opie followed. Owing to the stress of the occasion cross-examination was interrupted by Jeremy's need to take a break. The Tribunal understands that during this break the parties entered into discussions.

[18] When the Tribunal reconvened on the morning of Tuesday 20 December 2016 it was advised by Mr Opie that:

[18.1] Mrs Green and Jeremy wished to continue with the hearing.

[18.2] Nevertheless this was a case in which there was a clear need for a direction from the Tribunal that the parties enter into mediation.

[19] The Tribunal pointed out that while in proceedings under the Human Rights Act 1993 the Tribunal has specific statutory power to refer a case to the Human Rights Commission for mediation, there is no similar power in the context of proceedings under the Privacy Act. However, it is always possible for parties to proceedings under that Act to mediate privately.

[20] In later discussion the Tribunal drew attention to an issue which had not yet been addressed by the parties in their submissions, namely the Tribunal's statutory responsibility under Part 4 of the Human Rights Act to (inter alia) exercise its powers according to equity and good conscience. That Part of the Human Rights Act has application to proceedings under the Privacy Act by virtue of s 89 of the latter Act. Section 105 of the Human Rights 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.

[21] At the conclusion of the discussion Mr Opie sought a short adjournment. On the hearing resuming after the morning break Mr Opie advised he was now instructed not to oppose Jeremy's application for reinstatement provided no issue as to costs arose.

[22] Mrs Green advised she and Jeremy were happy to accept the offer. No application for costs would be made by them in relation to the reinstatement application.

[23] In the circumstances the Tribunal ordered that Jeremy be reinstated as second plaintiff to these proceedings. The interim name suppression for Jeremy and his mother are continued. The formal orders of the Tribunal follow at the end of this decision.

CASE MANAGEMENT DIRECTIONS

[24] The case management directions which follow are those agreed to at the hearing following lengthy discussion with Mrs Green and Mr Opie.

Duration of the merits hearing

[25] Given Jeremy's disabilities it is anticipated the taking of his evidence will occupy at least one full day. Allowing time for Mrs Green to give evidence as well the plaintiffs' evidence is likely to occupy two days. Mr Opie currently anticipates IT will call between four and five witnesses. Their evidence is anticipated to take two days. Allowing an additional day for submissions the hearing would ordinarily be allocated five days.

However, given the difficulty in predicting the pace of the hearing and further given fairness requires Jeremy's special needs to be accommodated, it has been agreed two additional days be set aside in reserve to ensure that once the hearing commences it runs its full course without the interruption of a part heard hearing. It has been further agreed that provided a courtroom can be made available, the hearing will commence at [redacted] on [redacted] and continue each consecutive day through to (and including) [redacted].

[26] As there is a clear need for Jeremy to receive communication assistance Mrs Bell has been asked to attend the hearing as Communication Assistant. Her availability may, however, be in doubt. She will advise by 20 January 2017. If she is unavailable she will suggest a suitable person to take her place.

The Facebook discussion

[27] In his letter of 13 June 2016 and in his memorandum dated 12 August 2016 Mr Opie has requested that Mrs Green and Jeremy advise whether the copy of the Facebook discussion annexed to the statement of claim is complete and whether there are any other copies in their possession or control.

[28] Today Jeremy has responded he will endeavour to download a complete sequence of the discussion. This, of course, will not be possible if the thread has been deleted and cannot now be retrieved. The timetable makes provision for Mrs Green and Jeremy to advise Mr Opie by 27 January 2017 whether the requested information can be provided.

The request for particulars

[29] In the letter dated 13 June 2016 the solicitors for IT requested that Mrs Green and Jeremy provide particulars in respect of:

[29.1] The allegation in para 2 of the statement of claim that the Facebook discussion "incited hatred towards my son"; and

[29.2] The claim for damages in the statement of claim.

[30] It will be seen a direction has been made that the particulars be provided by 27 January 2017.

The Harassment Act proceedings

[31] IT has requested from Mrs Green and Jeremy copies of the following documents:

[31.1] The application for a restraining order referred to in para 4 of the statement of claim.

[31.2] The affidavits referred to in paras 5 to 8 of the statement of claim.

[31.3] All other documents relating to the proceedings brought against Mrs Green and Jeremy under the Harassment Act 1997 including any documents relevant to the outcome of those proceedings.

[32] As it would appear non-publication orders have been made in the harassment proceedings IT has also asked for the consent of Mrs Green and Jeremy to IT gaining access to those proceedings.

[33] Both Mrs Green and Jeremy have today told the Tribunal they give their consent.

[34] It is understood IT will now apply to the District Court for access to the harassment proceedings. The understanding is that copies of all documents obtained by IT will be provided to Mrs Green and Jeremy.

[35] The case management timetable steps which follow anticipate such access will be gained by 3 March 2017. If not the timetable may require revision.

Jurisdiction and para 9 of the statement of claim

[36] By letter dated 12 May 2016 the Privacy Commissioner alerted the Tribunal to the fact that the matters set out in para 9 of the statement of claim had not (as at 12 May 2016) been the subject of an investigation by the Privacy Commissioner with the result there was a question whether the Tribunal has jurisdiction over those matters.

[37] Happily the issue will not require resolution because Mrs Green today advises paragraph 9 of the statement of claim is withdrawn.

Particulars regarding claimed loss

[38] In the letter dated 13 June 2016 IT refers to the fact that the orders sought by Mrs Green and Jeremy include damages of \$40,000 for (inter alia) “time off work, lack of employment, expenses and lawyers, grief, emotional trauma”. IT asks that Mrs Green and Jeremy:

[38.1] Provide individualised particulars of the loss each alleges that he or she has suffered; and

[38.2] Each identify which of the alleged breaches of privacy referred to in the statement of claim relate to each head of claimed loss (eg which of the alleged breaches of privacy has resulted in “expenses”, what “expenses” are claimed, the amount of any such expense and which plaintiff has incurred what expense).

[39] While the request for particulars regarding claimed loss was not the subject of discussion today it is understood Mrs Green and Jeremy are happy to provide information reasonably required by IT. As further detail regarding the claimed loss has been reasonably requested by IT it will be seen the information is to be provided by the same date as the other particulars, namely 27 January 2017.

Amended statement in reply

[40] It is possible, but not certain, that IT might file an amended statement of reply. The timetable makes provision for this step to be taken.

The common bundle of documents

[41] While preparation of the common bundle of documents is ordinarily the responsibility of the plaintiff, Mr Opie sensibly recognised that as Mrs Green and Jeremy are self-represented the preferable course is for IT to prepare the bundle. The Tribunal is grateful for this offer.

ORDERS

Reinstatement of Jeremy as second plaintiff

[42] Jeremy Green is reinstated as second plaintiff in these proceedings. The parties are to bear their own costs in relation to the application and hearing.

Interim order

[43] Given Jeremy's disabilities and further given the very personal information likely to be disclosed during the course of these proceedings the following orders are made pursuant to ss 95 and 107 of the Human Rights Act 1993:

[43.1] Publication of the name or of any details which could lead to the identification of Jeremy Green or of his mother Mrs Sarah Green is prohibited pending further order of the Chairperson or of the Tribunal.

[43.2] Publication of information regarding Jeremy Green's health and disabilities is similarly prohibited pending further order of the Chairperson or of the Tribunal.

[43.3] There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiffs and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.

[43.4] Leave is reserved to all parties to make further application should the need arise.

CASE MANAGEMENT TIMETABLE DIRECTIONS

[44] The following directions are made:

[44.1] By 5pm on Friday 27 January 2017 Mrs Green and Jeremy are to provide to IT (through Mr Opie) the information about the Facebook discussion requested by Mr Opie in his letter dated 13 June 2016 at para 3.

[44.2] By 5pm on Friday 27 January 2017 Mrs Green and Jeremy are to provide to IT (through Mr Opie) the particulars requested in paragraphs 4 and 14 of Mr Opie's letter dated 13 June 2016.

[44.3] Any application by IT to the District Court for access to the proceedings brought under the Harassment Act 1997 is to be made no later than 5pm on Friday 3 February 2017. All documents obtained by IT regarding the Harassment Act proceedings are to be provided to Mrs Green and to Jeremy.

[44.4] Should IT elect to file an amended statement of reply that document is to be filed and served by 5pm on Friday 17 March 2017.

[44.5] Written statements of the evidence to be called at the hearing by Mrs Green and Jeremy are to be filed and served by 5pm on Friday 28 April 2017. By the same date Mrs Green and Jeremy are to provide Mr Opie with a list of documents they wish to have included in the common bundle of documents.

[44.6] Written statements of the evidence to be called at the hearing by IT are to be filed and served by 5pm on Friday 2 June 2017. By the same date Mr Opie is

to provide Mrs Green and Jeremy with a list of documents IT wishes to have included in the common bundle of documents.

[44.7] Should Mrs Green and Jeremy wish to file any statements of evidence in reply, such statements are to be filed and served by 5pm on Friday 16 June 2017. By the same date they are to provide Mr Opie with a list of any additional documents they wish to have included in the common bundle of documents.

[44.8] In consultation with Mrs Green and Jeremy, Mr Opie is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 23 June 2017.

[44.9] The proceedings are to be heard at [redacted] commencing on [redacted].

[44.10] A Communication Assistant is to be present throughout the hearing. Mrs Bell is to advise by 20 January 2017 whether she will be available.

[44.11] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

[44.12] Leave is reserved to all parties to make further application should the need arise.

.....
Mr RPG Haines QC
Chairperson

.....
Ms LJ Alaeinia
Member

.....
Mr MJM Keefe JP
Member