

Reference No. HRRT 058/2016

UNDER THE PRIVACY ACT 1993

BETWEEN MICHAEL TAI RAKENA

PLAINTIFF

AND CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS

DEFENDANT

AT WELLINGTON

BEFORE:  
Mr RPG Haines QC, Chairperson

REPRESENTATION:  
Mr M Tai Rakena in person  
Ms V McCall and Ms G Taylor for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 19 June 2017

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**MINUTE OF CHAIRPERSON  
PERMITTING COUNSEL FOR DEFENDANT  
TO APPEAR BY AUDIO-VISUAL LINK<sup>1</sup>**

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[1] By memorandum dated 15 June 2017 the Chief Executive, Department of Corrections (Corrections) has applied for an order that counsel for Corrections be permitted to appear at the hearing via audio-visual link (AVL).

**BACKGROUND**

[2] These proceedings by Mr Tai Rakena under the Privacy Act 1993 are set down for hearing at the District Court, Whanganui on Thursday 22 June 2017.

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<sup>1</sup> [This decision is to be cited as *Tai Rakena v Corrections* (AVL) [2017] NZHRRT 23]

[3] Mr Tai Rakena is currently serving a term of imprisonment at Whanganui Prison. The events in question occurred when he was detained at Rimutaka Prison.

[4] For reasons which do not require elaboration here, the factual matters underlying Mr Tai Rakena's claim are not in dispute.

[5] Only two witnesses will be giving evidence at the hearing, being Mr Tai Rakena himself and Ms J Shand for Corrections. Ms Shand is the Health Centre Manager for Rimutaka and Arohata prisons and is Wellington based.

[6] By *Minute* dated 6 June 2017 it was ordered that for her safety, Ms Shand be permitted to appear at the hearing by audio-visual link from the Tribunals Unit, Ministry of Justice, Wellington. The particular reasons, as set out in the *Minute* at [14], were:

[14.1] The factual matters underlying Mr Tai Rakena's claim are not in dispute and it is unlikely there will be any issue as to the credibility of Ms Shand.

[14.2] Crown Counsel will appear from Wellington with Ms Shand to facilitate reference to any document Mr Tai Rakena wishes to put to Ms Shand in cross-examination.

[14.3] The detailed written statement of evidence by Ms Shand, dated 21 April 2017, has been both filed and served. Mr Tai Rakena is fully aware of the evidence to be given and has had ample time to prepare his cross-examination.

[14.4] It is necessary for the protection of Ms Shand that she appear by AVL.

[7] The last of these reasons is a reference to the evidence recorded by Ms Shand in her statement of evidence dated 21 April 2017 and summarised in the *Minute* of 6 June 2017 at [6.2] in the following terms:

[6.2] As noted by Ms Shand in her brief of evidence, following the events the subject of this claim Mr Tai Rakena embarked on a campaign of harassment towards her, sending frequent and abusive correspondence. As a consequence of this conduct and his increasingly obsessive behaviour, Mr Tai Rakena was transferred from Rimutaka Prison to Whanganui Prison. In addition, following the filing of this proceeding, Mr Tai Rakena was formally cautioned against continuing to communicate with Ms Shand. That caution noted that the correspondence Mr Tai Rakena had been sending was "likely to threaten or intimidate the person to whom it is being sent" and amounted to "objectionable material". Notwithstanding the clear terms of the caution, Mr Tai Rakena has continued to communicate with Ms Shand. These events have understandably caused Ms Shand a great deal of concern and a requirement that she appear in person at the hearing is likely to aggravate her already difficult position.

## **THE APPLICATION THAT COUNSEL FOR CORRECTIONS APPEAR BY AVL**

[8] Corrections now by application dated Thursday 15 June 2017 seeks an order that for reasons of safety, counsel for Corrections also be permitted to appear at the hearing by AVL.

### **The grounds of the application**

[9] The primary ground of the application is that Mr Tai Rakena has behaved in a threatening manner to Crown counsel and to others. In the memorandum filed by Crown counsel the following information is provided:

[9.1] Subsequent to the *Minute* issued on 6 June 2017 the Crown Law Office on 12 June 2017 received from Mr Tai Rakena an undated letter addressed to Crown

counsel. Taped to that letter was an object which appeared to be a chicken bone. The letter read:

08.06.17  
Keep this. Don't lose it.  
It's a wish bone.  
Can't wait to go to Court.

**[9.2]** On the same day counsel became aware that an Inspector of Corrections had received from Mr Tai Rakena a copy of a misconduct report laid against him in July 2015 for threatening a member of Corrections staff and his family. In this document are the words “behaves in a threatening manner” and “TaiRakena, Michael threatened staff and his family”. In the copy received by the Inspector these words had been highlighted and Mr Tai Rakena had added in his handwriting “Fuck You and Your Family”.

**[9.3]** Counsel is aware of other threatening correspondence sent by Mr Tai Rakena to various individuals and agencies, including a series of letters that have been referred by the Privacy Commissioner to the Police.

**[9.4]** Given the nature of, and apparent escalation in, Mr Tai Rakena’s conduct, Crown counsel has requested that the Prison Director ensure Mr Tai Rakena is accompanied to the hearing by no fewer than two Corrections officers.

**[9.5]** Given the potential health and safety concerns held and further given Assistant Crown counsel would be appearing at a hearing at which Mr Tai Rakena could act in a belligerent or threatening manner, a Crown counsel would need to appear as well. In this case, it is neither efficient, nor desirable, for two counsel to appear in Whanganui given the relatively confined nature of the matters for determination.

**[10]** In support of the application Crown counsel point out that it is difficult to envisage any disadvantage which will be caused to Mr Tai Rakena or to the Tribunal by counsel for Corrections appearing by AVL. Corrections have filed comprehensive written submissions and a bundle of documents will be filed in advance of the hearing. The credibility of counsel is not an issue.

### **Mr Tai Rakena not heard on the application**

**[11]** Although Mr Tai Rakena has been served with the present application I have decided he will not be given an opportunity to be heard. My reasons follow:

**[11.1]** As described in the *Minute* dated 6 June 2017, Mr Tai Rakena was given two clear opportunities to be heard on the application that Ms Shand be permitted to give her evidence by AVL. In the circumstances described at paras [7] to [11] of that *Minute* Mr Tai Rakena refused to make himself available for the teleconference hearings scheduled first, on 25 May 2017 and second, on 1 June 2017. I am of the view he should not be given further opportunity to again waste the time of the Tribunal and of counsel for Corrections by scheduling a teleconference for the present application. His past behaviour indicates an appreciable risk he will not make himself available, particularly given the proximity of the hearing.

[11.2] It is not possible to see how Mr Tai Rakena could in any way be prejudiced by counsel for Corrections participating in the hearing by AVL.

## THE MERITS OF THE APPLICATION – DISCUSSION

### The discretion

[12] The Tribunal’s discretion to permit a witness or other participant to appear by AVL was recently addressed in *Dotcom v Crown Law Office (AVL)* [2017] NZHRRT 13 and it is not intended to repeat what is said there. It is sufficient to note that as stated at para [20] of that decision, the guiding criterion is the need to ensure the fairness of the proceedings. This includes maintaining the rights of the parties to the proceedings, the ability to assess the credibility of witnesses and the reliability of the evidence presented to the Tribunal.

[13] While in civil proceedings the use of an audio-visual link most commonly arises in the context of the giving of evidence, remote participation is permissible in relation to a wide range of participants, a point made clear by the definition of “participant” in the Courts (Remote Participation) Act 2010. While that Act does not have application to proceedings before a tribunal it is nevertheless a helpful reference point. Section 3 defines “participant” in the following terms:

**participant**, in relation to a proceeding, means a person who is, in that proceeding, any of the following:

- (a) a party:
- (b) the defendant:
- (c) counsel:
- (d) a witness:
- (e) a member of the jury:
- (f) a judicial officer who is presiding over the proceeding:
- (g) a Registrar who is presiding over the proceeding:
- (h) any other person directly involved in the proceeding whom the judicial officer or Registrar considers appropriate

[14] There can be no doubt that counsel can be allowed to participate by AVL in proceedings before the Human Rights Review Tribunal provided an appropriate case is established and a balance of fairness maintained.

### An appropriate standard of behaviour to be observed by litigants

[15] Proceedings before the Tribunal are not to be used as an instrument of oppression or as a means of assaulting others with extravagant claims of wrongdoing. Nor are they to be a platform for insult or abuse. Papers filed are not to contain gratuitously insulting and derogatory comments about the parties, witnesses or about those employed by or associated with one or other of the parties. Lawyers representing a party are to be free from harassment, intimidation or threats. Nor are they to be gratuitously insulted or accused of criminal offending. Scandalous and offensive statements and allegations have no place in court or tribunal proceedings and cannot on any view be justified. Behaviour of the kind described is a needless distraction. It makes it more difficult for

the Tribunal to conduct the proceedings in an orderly manner and more difficult to identify the merits of the case or of the particular interlocutory application. Those against whom abusive behaviour or allegations are directed may believe it necessary to respond to the allegations and abuse, thereby drawing the Tribunal into collateral issues of doubtful relevance.

[16] In appropriate circumstances the Tribunal will not accept for filing proceedings, applications or other documents which do not comply with the foregoing requirements.

#### **Application of principle to the facts**

[17] In the present case the Tribunal's duty to ensure a fair hearing is owed not only to a self-represented plaintiff such as Mr Tai Rakena, but also to the defendant and those who represent the defendant.

[18] Given the nature of the alleged escalation of Mr Tai Rakena's conduct, Crown counsel have prima facie good reason to hold concerns about their health and safety.

[19] The Tribunal, in turn, has a duty to address those concerns in a manner consistent with Mr Tai Rakena's right to a fair hearing. Permitting counsel to appear by AVL will achieve that end. It is not possible to identify any potential prejudice to Mr Tai Rakena by conducting a hearing in which he appears in person before the Tribunal while counsel for Corrections and Ms Shand participate remotely from a Ministry of Justice site in Wellington. Weight must also be given to the fact that counsel have already filed comprehensive written submissions. A bundle of documents will also be filed and served by them in advance of the hearing.

[20] For these reasons the application is granted.

#### **ORDER**

[21] Counsel for Corrections is permitted to appear at the hearing of this proceeding by audio-visual link from the Tribunals Unit, Ministry of Justice, Wellington.

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**Rodger Haines QC**  
**Chairperson**