IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 29**

	Reference No. HRRT 076/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**TE RINGA MANGU NATHAN MIHAKA**
	PLAINTIFF
AND	**HOUSING NEW ZEALAND CORPORATION**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms WV Gilchrist, Member
Ms DL Hart, Member

REPRESENTATION:
Mr TRMN Mihaka in person assisted by Ms K Raue as *McKenzie* friend – no appearance
Ms S Shaw for defendant

DATE OF HEARING: **19 July 2017**

DATE OF DECISION: **8 August 2017**

DECISION OF TRIBUNAL DISMISSING PROCEEDINGS[1]

Introduction

[1] When this two day fixture commenced on 19 July 2017 neither Mr Mihaka nor Ms Raue (his *McKenzie* friend) appeared. Housing New Zealand Corporation (HNZC) made oral application for the proceedings to be dismissed. In this decision we set out our reasons for granting that application.

[1] [This decision is to be cited as: *Mihaka v Housing New Zealand Corporation (Dismissal)* [2017] NZHRRT 29.]

[2] The statement of claim was filed on 30 November 2015. A reply by HNZC followed on 23 December 2015. Since that time every effort to hear and determine the case has been thwarted, sometimes by Mr Mihaka and sometimes by circumstances. Some fourteen case management *Minutes* have been issued as well as two interlocutory decisions. It is not practicable for the events over the past one year and eight months or so to be detailed in this decision. For that reason reference must be made to the fourteen *Minutes* and to the two decisions referred to. They are to be regarded as incorporated within this decision. For the purpose of explaining the reasons for the dismissal of the claim, only a general summary of the main points is now given.

Mr Mihaka and HNZC

[3] Mr Mihaka has been a tenant with HNZC since November 2003. His rental property is located in Paraparaumu. The particular issue which led HNZC to issue a 90 day notice to end his tenancy was an assault by him on a neighbouring tenant on 30 June 2014. By letter dated 31 October 2014 HNZC gave Mr Mihaka 90 days formal notice under s 51(1)(d) of the Residential Tenancies Act 1986. On the subsequent 21 November 2014 application by HNZC the Tenancy Tribunal on 24 April 2015 granted HNZC a possession order.

[4] Mr Mihaka has appealed against the grant of that order to the District Court. That appeal was on 23 December 2015 stayed on the basis that the present proceedings before the Human Rights Review Tribunal had been brought. The District Court was told by the parties that they would give urgency to those proceedings.

[5] In the meantime a decision of the District Court found Mr Mihaka guilty of assault. His conviction appeal was dismissed in *Mihaka v New Zealand Police* [2015] NZHC 1318 although the sentence of 80 hours community work was quashed. His subsequent appeal to the Court of Appeal was dismissed. See *Mihaka v R* [2015] NZCA 560.

[6] This history is mentioned because at times the conduct of Mr Mihaka's case before the Tribunal suggested he mistakenly viewed the present proceedings as an opportunity to re-litigate issues already determined by the Tenancy Tribunal, by the District Court, by the High Court and by the Court of Appeal.

Mr Mihaka's claim under the Human Rights Act 1993

[7] The claim made by Mr Mihaka against HNZC under the Human Rights Act 1993 (HRA) is one of discrimination based on the grounds of age and race. The allegations, as articulated in the statement of claim, are:

> **[1]** It is therefore alleged that HNZ has indirectly discriminated against Mr Mihaka in terms of s 21(1)(i) of the Human Rights Act 1993 in that their practices in evicting Mr Mihaka amount to indirect/disparate impact discrimination by virtue of the disproportionate adverse impact on a person in a protected class (here Mr Mihaka having s 21(1) Human Rights Act 1993 characteristics, relevantly age).
>
> **[2]** Further, given the over-representation of Maori males in criminal justice statistics in New Zealand, it is alleged that the eviction of Mr Mihaka on account of a conviction for a criminal offence disproportionately/disparately impacts on Maori and as such constitutes indirect discrimination on the basis of race from which Mr Mihaka is protected by s 2(1)(f) of the Human Rights Act 1993.

[8] The statement of claim was drafted and filed by Mr N Bourke, Barrister of Wellington, who was then representing Mr Mihaka. His involvement in the case before the Tribunal was, however, short lived, as we now explain.

Mr Mihaka and his legal representation

[9] As mentioned, the statement of claim was drafted and filed by Mr Mihaka's then lawyer, Mr N Bourke. Through Mr Bourke, Mr Mihaka consented to the 4 March 2016 order in which the Tribunal referred Mr Mihaka's complaint back to the Human Rights Commission for mediation pursuant to s 92D of the Human Rights Act. See the Chairperson's *Minute* dated 26 February 2016 and the subsequent decision of the Tribunal in *Mihaka v Housing New Zealand Corporation (Referral back to Human Rights Commission)* [2016] NZHRRT 8.

[10] By memorandum dated 28 March 2016 Mr Bourke notified the Tribunal the parties had attended mediation on 14 March 2016 but no resolution had been reached. The Chairperson was asked to convene a further teleconference at short notice for case management directions to be given. This was done. However, by further memorandum dated 7 April 2016 Mr Bourke advised that he had been contacted by Mr Mihaka on 6 April 2016 and told that he (Mr Mihaka) no longer required Mr Bourke's representation. Mr Mihaka informed Mr Bourke that another lawyer, Mr J Gwilliam of Wellington, would now be representing him.

[11] However, it is a matter of record that since 6 April 2016 Mr Mihaka has not been represented in these proceedings by a lawyer. Neither Mr Bourke nor Mr Gwilliam have appeared or filed any documents since 7 April 2016.

[12] It will be seen an unsuccessful attempt was subsequently made by Mr Mihaka to obtain representation by the Director of Human Rights Proceedings under s 90 of the Human Rights Act.

Whether proceedings brought with Mr Mihaka's knowledge and consent

[13] Two days after Mr Mihaka dismissed Mr Bourke a case management teleconference was convened by the Chairperson but adjourned for one week to give Mr Mihaka time to meet with Mr Gwilliam and to arrange representation by him.

[14] When the teleconference was reconvened on 15 April 2016 Mr Mihaka reported he was still without legal assistance. Both in this teleconference and in the one held in the preceding week Mr Mihaka told the Chairperson, in strong terms, that the proceedings had been brought by Mr Bourke without Mr Mihaka's knowledge or consent. However, when the Chairperson offered Mr Mihaka the opportunity to withdraw the proceedings, he declined to do so on the grounds he was not sure what the ramifications might be. Because Mr Mihaka declined to withdraw the proceedings the Chairperson ordered that the case be heard on 4 and 5 July 2016. Timetable directions were given for the parties to file their evidence. The deadline for Mr Mihaka to file his evidence was 13 May 2016. See the *Minutes* dated 8 April 2016 and 15 April 2016.

[15] The July dates were subsequently amended to 3 and 4 August 2016 on the application of HNZC as their principal witness had been scheduled for an operation in the last week of June 2016 and would be unavailable.

Mr Mihaka's *McKenzie* friend

[16] On 16 May 2016 Ms Raue called in person at the Tribunals Unit, Ministry of Justice, Wellington and advised the Case Manager she was assisting Mr Mihaka with his case and that Mr Mihaka had decided to reinstate Mr Bourke as counsel. She also advised Mr Mihaka would not be able to file his statement of evidence until he had received a copy of the Police file (which had been requested by him).

[17] On or about 25 May 2016 the Tribunal received from Mr Mihaka a handwritten note advising he had authorised Ms Raue to act "as Māori agent" regarding all court and tribunal matters arising from the allegations made by his neighbour.

[18] As noted in the *Minute* issued by the Chairperson on 13 October 2016 at [2], while Mr Mihaka and Ms Raue would prefer that she be referred to as Mr Mihaka's "Māori agent", the difficulty is that the Tribunal knows of no legal basis for such term to be used in proceedings such as the present. By contrast it is well-established in New Zealand law that a litigant in person may be assisted during the course of the hearing by a lay person known as a *McKenzie* friend. The proper role and function of such person is explained in *Mihaka v Police* [1981] 1 NZLR 54 at 56 and *R v Hill* [2004] 2 NZLR 145 (CA) at [48]. In these circumstances the Tribunal has continued to refer to Ms Raue as Mr Mihaka's *McKenzie* friend. At oral hearings both Mr Mihaka and Ms Raue have addressed the Tribunal. Outside of hearings it has been Ms Raue who has corresponded with the Tribunal by email though it is to be noted all communications passing between her, HNZC and the Tribunal have been copied to Mr Mihaka's email address. Even were Ms Raue to be described as a Māori agent, such description would make no difference to the extensive role the Tribunal has permitted her to play in these proceedings.

[19] In the event the timetable was enlarged so that Mr Mihaka was given until 1 July 2016 to file his evidence. See the *Minute* dated 9 June 2016.

[20] Through Ms Raue, Mr Mihaka then made a number of complaints regarding various matters. Those complaints were addressed by the Chairperson in *Minutes* dated 21 June 2016 and 7 July 2016.

The hearing on 3 August 2016

[21] By the time the hearing convened on 3 August 2016 Mr Mihaka had not filed his statement of evidence. By contrast HNZC had filed its evidence on 22 July 2016 as required.

[22] When the hearing commenced Mr Mihaka sought an adjournment on the following grounds:

> **[22.1]** The proceedings had been brought without his knowledge or consent.
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> **[22.2]** He wished to obtain legal advice as to whether the proceedings were to be continued with and if so, assistance with the preparation of his evidence.
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> **[22.3]** He and Ms Raue had only on the previous day learnt of the possibility of applying for representation by the Director of Human Rights Proceedings and he wished to make such application.

[23] The adjournment was granted. Nevertheless the Tribunal noted that on one view the decision was an indulgence and cautioned Mr Mihaka that he would not find the Tribunal sympathetic to any further delay, postponement or adjournment. Bearing in mind that a stay of the District Court appeal had been obtained on the basis that the proceedings before the Tribunal would be prosecuted with urgency and would resolve the claim of discrimination made by Mr Mihaka, the Tribunal, in granting the application stated (Transcript p 496):

> We are therefore troubled by the fact that Mr Mihaka says that he does not know why the case has been brought, does not understand what the case is about, and is only continuing with it because Mr Bourke thought it a good idea to bring the case and Mr Gwilliam has said that if Mr Bourke thought it was a good idea, then perhaps it probably was. It is the real risk of prejudice

> and unfairness to Mr Mihaka which has persuaded us, albeit reluctantly, to grant the adjournment. However, Mr Mihaka, we are putting you on notice that on one view this is an indulgence at the far edge of the Tribunal's duty to act fairly. You will not find the Tribunal sympathetic to any further delay, postponement or adjournment. We have decided to set a tight timetable to ensure that the delay is kept to a minimum and our case management directions now follow.

The approach to the Director of Human Rights Proceedings

[24] The adjournment granted on 3 August 2016 was subject to various terms, all of which were explained to Mr Mihaka in person on 3 August 2016 and subsequently set out by the Case Manager in her email dated 5 August 2016. For present purposes it is relevant to note:

> **[24.1]** Any request by Mr Mihaka to the Director of Human Rights Proceedings that he provide representation had to be made by Mr Mihaka on or before 12 August 2016.
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> **[24.2]** Mr Mihaka's statements of evidence were required to be filed and served by 9 September 2016.
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> **[24.3]** The proceedings were to be heard on 28 and 29 September 2016.
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> **[24.4]** Mr Mihaka and Ms Raue were to confirm Mr Mihaka had arranged his affairs, particularly his medical appointments, in such a way as to ensure he would attend the hearing on 28 and 29 September 2016.

[25] By *Minute* dated 10 August 2016 the Chairperson (inter alia) made suggestions regarding the material Mr Mihaka could usefully provide to the Director and emphasised the need for Mr Mihaka to implement the timetable directions with urgency.

[26] By email dated 11 August 2016 Ms Raue reported Mr Mihaka had a medical appointment with a specialist on 29 September 2016 (the second day of the fixture) and by email dated 12 August 2016 reported the application to the Director had been submitted by email.

[27] To accommodate Mr Mihaka's medical appointment the Chairperson gave a direction on 15 August 2016 that the hearing proceed on 28 September 2016 only.

[28] Unfortunately, between 8 and 18 August 2016 the Director's Office suffered an email outage which meant some emails were not received. The IT providers to the Director confirmed Ms Raue sent an email to the Director on 12 August 2016 but the contents of that message were irretrievable.

[29] Mr Greg Robins, Senior Solicitor in the Director's Office by email dated 9 September 2016 informed the Tribunal that in a conversation held on 17 August 2016 and in an email exchange of 26 August 2016 a member of the Director's Office asked Ms Raue to re-submit the application but as at 9 September 2016 this step had not been taken. Mr Robins emphasised the Director's Office would be unable to take any action on Mr Mihaka's application until the application had been received and the Director was confident he had all the information necessary to make a decision regarding representation.

[30] As recorded in the Chairperson's *Minute* dated 21 September 2016, on the last day for Mr Mihaka to file his evidence, Ms Raue, by email dated 9 September 2016 (addressed to the Director but copied to the Tribunal) applied on Mr Mihaka's behalf for an extension of time to submit his written statements of evidence and for an

adjournment of the hearing scheduled for 28 September 2016. The application was based on the loss of the 12 August 2016 email from Ms Raue to the Director.

[31] The adjournment application made no mention of the 17 and 26 August 2016 requests by the Director's Office that the application be resubmitted by Mr Mihaka. All that Ms Raue said on this subject was:

> I will endeavour to print the application form again and resubmit it as soon as possible, but urgently request an extension of time to submit Mr Mihaka's evidence which was required to be in today …

Despite ample opportunity to do so, neither Mr Mihaka, nor Ms Raue placed before the Tribunal evidence that the application had been resubmitted.

[32] In an earlier email dated 8 September 2016 addressed to (inter alia) Meredith Connell (the solicitors for HNZC) and the Tribunal, medical grounds were also advanced in support of the adjournment application:

> We request an adjournment pending the Office of Human Rights Proceedings finding a way to access their emails, as well as Mr Mihaka's medical appointment – his doctors have expressed disquiet regarding the proximity of the dates of the hearing and Mr Mihaka's medical procedure and this rush is unnecessary, unseemly and totally unwarranted.

[33] By email dated 9 September 2016 the Secretary requested a medical certificate (or certificates) to verify the unspecified medical reasons advanced in support of the adjournment application. Ms Raue replied on 12 September 2016 stating that the adjournment request was based "primarily" on the inability of the Office of Human Rights Proceedings to access emails. No medical certificate was provided.

[34] Notwithstanding these troubling features the adjournment was granted as there was independent confirmation that an email outage had occurred in the Director's Office between 8 and 18 August 2016. The Chairperson directed that the hearing take place on 15 and 16 November 2016. To that end Mr Mihaka was required to make his representation request to the Director by 30 September 2016 and to file his evidence by 28 October 2016. It was also emphasised to Mr Mihaka and Ms Raue that Mr Mihaka was required to arrange his affairs in such a way as to ensure that he would attend the hearing on 15 and 16 November 2016. This direction was given to ensure Mr Mihaka did not again use a medical appointment as a reason for being unable to proceed. The relevant direction was in the following terms:

> **[20.5]** Mr Mihaka and Ms Raue are by 5pm on Wednesday 28 September 2016 to confirm Mr Mihaka has arranged his affairs, particularly his medical appointments, in such a way as to ensure he will attend the hearing on 15 and 16 November 2016. Failure to provide confirmation will be taken as acceptance there are no medical reasons why the hearing should not proceed on 15 and 16 November 2016.

[35] As various issues continued to be raised by Mr Mihaka and Ms Raue, the Chairperson issued further *Minutes* on 28 September 2016 and 13 October 2016.

The 14 November 2016 earthquake

[36] The hearing on 15 and 16 November 2016 was unexpectedly cancelled as a consequence of the 7.8 magnitude Kaikoura earthquake which struck at 12:02am on Monday 14 November 2016. All Ministry of Justice sites in Wellington were closed while buildings were checked by engineers. The Tribunal's Unit did not reopen until Wednesday 16 November 2016.

[37] When on Monday 14 November 2016 the Secretary gave notice to the parties the hearing had, of necessity, been cancelled they were asked to advise whether they or

their witnesses had availability issues through to March 2017. While Ms Shaw advised HNZC would be unable to proceed on certain dates, no communication was received from Mr Mihaka or from Ms Raue.

The recusal issue

[38] At different times Mr Mihaka has raised the possibility of seeking the recusal of a member (Hon KL Shirley) of the Tribunal panel which convened to hear the case on 3 August 2016. By *Minute* dated 21 June 2016 the Chairperson explained to Mr Mihaka the legal test for identifying when circumstances give rise to an appearance or apprehension of bias. Mr Mihaka was given until 1 July 2016 to file an application for the recusal of Mr Shirley. As Mr Mihaka failed to comply with this first deadline a further deadline was subsequently set for 15 July 2016. No application was filed.

[39] At the hearing on 3 August 2016 the Tribunal was told no recusal application was intended. See Transcript p 17. Subsequently, however, in an email dated 30 November 2016 from Ms Raue to Ms Shaw it was asserted Mr Shirley "should have recused himself". The Chairperson accordingly directed by *Minute* dated 2 December 2016 that any recusal application be filed by 16 December 2016. No such application was made.

[40] However, in a two sentence email dated 19 February 2017 from Ms Raue it was announced that Mr Mihaka "formally applied" for the recusal of Mr Shirley.

[41] That application was the subject of a detailed decision by the Tribunal given on 2 March 2017. See *Mihaka v Housing New Zealand Corporation (Recusal Application)* [2017] NZHRRT 7. The application was dismissed.

Mr Mihaka's brief of evidence

[42] On 3 April 2017 Mr Mihaka finally filed his statement of evidence. It conspicuously failed to address the two causes of action pleaded in the statement of claim and concentrated on the circumstances which gave rise to the Police prosecution. For example, Mr Mihaka asserted the actions of the Police in bringing the prosecution amounted to discrimination because the Police relied on the account of events given by the complainant rather than that given by Mr Mihaka. The claims made against HNZC were equally misconceived. For example, it was claimed that the HNZC witness (Ms KA Furfie) discriminated against Mr Mihaka by meeting with the complainant, not with Mr Mihaka. HNZC is alleged to have "clearly discriminated" by ignoring Mr Mihaka's interpretation of events. In similar vein it was alleged there was discrimination "amounting to a witch hunt against Mr Mihaka" as a result of the complainant's "false allegation and the discrimination demonstrated by Police".

[43] The statement concluded with the following assertion:

> The reference to all the tenants being elderly also points to the discrimination against Māori, and against elderly Māori, and against elderly Māori in particular by the fact that Housing NZ Corp have no policies for elderly tenants or Māori, and are clearly acting against the principles of Te Tiriti o Waitangi.

[44] This "discrimination" claim is not the one advanced in the statement of claim and is in any event devoid of particulars and supporting evidence. The proposed evidence cannot, even if accepted at face value, establish Mr Mihaka's case as pleaded in the statement of claim.

[45] What the statement of evidence shows is that Mr Mihaka and Ms Raue have little or no understanding of the nature of the proceedings before the Tribunal. Most importantly, there is little understanding that Mr Mihaka is the plaintiff and that he carries

the burden of establishing the two causes of action pleaded in the statement of claim. They have singularly failed to grasp that the hearing before the Tribunal is not a rehearing of the Police prosecution or of the Tenancy Tribunal hearing. As noted in the *Minute* dated 13 October 2016 at [9] this fundamentally misconceived understanding of the Tribunal proceedings has persisted from the beginning to the end despite repeated efforts by the Tribunal to explain that the Tribunal has no jurisdiction to revisit the criminal case or the tenancy hearing.

The hearing on 3 April 2017 and the revival of the recusal application

[46] The substantive hearing convened on 3 April 2017.

[47] At 6:31am on the morning of 3 April 2017 (ie the first day of the hearing) Mr Mihaka filed a document which revealed neither its source nor its date; nor was the identity of the author given. Nevertheless when the hearing commenced at 10am on 3 April 2017 it was used as the platform to advance a new recusal application directed against Mr Shirley. The argument occupied most of the morning.

[48] Because the repeated applications for Mr Shirley's recusal had consumed (and continued to consume) a substantial if not inordinate amount of time, Mr Shirley decided to step aside so that the case could proceed to a hearing without further distraction or diversion. See the *Minute* issued by the Tribunal on 3 April 2017 "*Minute* of Chairperson recording decision by Hon KL Shirley to step aside".

[49] As the Tribunal is required to sit as a panel of three it was necessary that Mr Shirley be replaced by another member of the Panel. At short notice Ms WV Gilchrist of Christchurch agreed to travel to Wellington overnight thereby enabling the Tribunal to sit on the second of the allocated days. These arrangements were communicated to the parties and, in the presence of Mr Mihaka and of the Tribunal, both Ms Raue and Ms Theron confirmed they would be ready to proceed at 9am on Tuesday 4 April 2017. See the *Minute* at paras [5] and [7].

[50] Regrettably, in the circumstances described in the *Minute* dated 4 April 2017, neither Mr Mihaka nor Ms Raue appeared on 4 April 2017. Instead at 7:53am on 4 April 2017 Ms Raue telephoned the Case Manager and left a voicemail message to the effect Mr Mihaka was unwell and unable to attend the hearing.

[51] Being unable to contact Ms Raue at the telephone number given by Ms Raue, a voicemail message followed by a text message from the Secretary required Mr Mihaka or Ms Raue to appear in person to make the adjournment application.

[52] When the Tribunal (comprising the Chairperson, Ms Hart and Ms Gilchrist) convened at 9am counsel for HNZC were in attendance, as was the witness for HNZC. However, neither Ms Raue nor Mr Mihaka were present. The Tribunal decided to wait one hour to see whether either would respond to the voicemail and text messages sent to Ms Raue. However, neither at 10am nor at any other time during the day did Ms Raue or Mr Mihaka attend the hearing venue.

[53] HNZC submitted the Tribunal should decline the adjournment application given the inordinate length of time being taken to reach a hearing on the merits. This was also the second adjournment application by Mr Mihaka. The delays were being compounded and the cost to HNZC increased.

[54] It should also be mentioned that the claim that Mr Mihaka was unwell was first made by Ms Raue in her voicemail message left at 7:53am on 4 April 2017. It had not been mentioned in her lengthy email sent earlier that morning at 6:01am. More

importantly, no mention of health issues had been made by Mr Mihaka on the previous day in the course of the argument on the recusal issue. During that hearing he had ample opportunity to raise any issue and in his presence Ms Raue confirmed both she and he would be ready to proceed at 9am the following morning knowing Ms Gilchrist would be travelling to Wellington overnight.

[55] Nevertheless, against the Tribunal's better judgment, a decision was made to grant the application as it was not inconceivable that while Mr Mihaka was able to attend the hearing on the previous day and to participate vigorously in it, he had become ill overnight and could not attend the second day of the hearing. However, as recorded in the *Minute* dated 4 April 2017, the adjournment was subject to two conditions:

> **[20.1]** That Mr Mihaka provide to the Tribunal and to the solicitors for HNZC a medical certificate from a registered medical practitioner setting out the reasons why Mr Mihaka was unable to attend the hearing on 4 April 2017.
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> **[20.2]** That that medical certificate also specify the length of time Mr Mihaka will be medically unfit to participate in the hearing before the Tribunal.

[56] The medical certificate was to be provided no later than 4pm on Tuesday 11 April 2017 and a new date of hearing then notified. The *Minute* concluded with a warning to Mr Mihaka and Ms Raue that the limits to the Tribunal's indulgence had been reached:

> **[25]** It is to be further noted by Mr Mihaka and Ms Raue that the limits to the Tribunal's indulgence have been reached and that any future failure to attend the hearing of these proceedings may well result in the proceedings being summarily dismissed. HNZC is also likely to seek an award of costs.

[57] A medical certificate was not provided until the afternoon of 18 April 2017. Not only was the certificate filed late, it did not contain the detail requested by the Tribunal. The document was provided by Hora Te Pai Health Services, Paraparaumu, dated 4 April 2017 and signed by Dr C Fawcett. Its terms follow:

> Te Ringa Mangu was unwell today and due to his medical conditions unable to attend the Human Rights Tribunal as requested.

[58] The sparse terms of the medical certificate are to be contrasted with an email dated 6 June 2017 from Ms Raue in which she asserted that Mr Mihaka:

> Is currently being assessed regarding a serious head injury, this injury is directly relevant to his ability to communicate with the Tribunal, the Police, Housing NZ Corporation and other parties, which is exactly why he appointed a Māori agent.

[59] None of the medical certificates filed by Mr Mihaka refer to a head injury or to Mr Mihaka's ability to communicate.

The hearing on 19 July 2017 and the non-appearance of Mr Mihaka and Ms Raue

[60] By email dated 16 May 2017 the Secretary gave notice to the parties that the new fixture date was 17 and 18 July 2017.

[61] By email dated 1 June 2017 Ms Raue said that she was unavailable on those dates as she had been summoned to appear "in the District Court on the 17th and had a medical appointment on the 18th".

[62] By email dated 8 June 2017 the Secretary replied that if the email from Ms Raue was an application for adjournment, it was necessary that it be supported by proper grounds given the history of adjournments in the case. To that end Ms Raue was requested to provide (by 9 June 2017):

[62.1] The location of the District Court to which she had been summoned, the date on which she had been served with the summons and the likely duration of the hearing she was required to attend. If Ms Raue so wished, her response could include a copy of the summons.

[62.2] The reason why a medical appointment on 18 July 2017 was arranged notwithstanding that by email dated 16 May 2017 Ms Raue had been given notice that the hearing before the Tribunal would take place on 17 and 18 July 2017. It was also necessary for her to explain why the medical appointment could not be changed.

The email went on to advise that subject to the requested information being provided, the Chairperson had directed the hearing dates of 17 and 18 July 2017 be changed to 19 and 20 July 2017. This would address Ms Raue's availability problems.

[63] By separate email also dated 8 June 2017 the Secretary replied to Ms Raue's email of 6 June 2017 in which she asserted Mr Mihaka had a head injury affecting his ability to communicate. The Secretary pointed out that none of these circumstances had been mentioned in the medical certificate dated 4 April 2017. Ms Raue and Mr Mihaka were advised that the Chairperson had directed that if Mr Mihaka did have the claimed injury he was required to provide a full medical report from a registered practitioner setting out details of the injury and the degree to which, if any, that injury would affect Mr Mihaka's ability to participate in the hearing of his claim against HNZC. The report was also required to specify the length of time Mr Mihaka would be affected by his injury. The certificate was to be filed and served by 5pm on Friday 16 June 2017.

[64] The information requested from Ms Raue regarding her District Court commitment and her medical appointment on 18 July 2017 was never provided. Nor was the Tribunal provided with a medical report concerning the claimed head injury said to have been sustained by Mr Mihaka. Ms Raue did respond by email dated 13 June 2017 asserting that unless Mr Shirley was recused, an application for judicial review would be made. She also objected to being described as a *McKenzie* friend instead of a Māori agent. The email made no attempt to address the information requested both from her and from Mr Mihaka. On 6 July 2017 the Secretary gave further notice confirming the next hearing date was 19 and 20 July 2017.

[65] At 4:48pm on 18 July 2017 (the afternoon before the hearing) the Tribunal received an email from Ms Raue in which she stated:

[65.1] She had just received notification from Mr Mihaka's doctors that Mr Mihaka would not be well enough to attend the hearing on 19 and 20 July 2017. She added:

> He is under close medical supervision and has another appointment today, his health is being closely monitored and is at significant risk from stress, exertion, etc.

[65.2] She had "just received" a letter from Mr Mihaka's doctors:

> To confirm that he is unwell and unable to attend the hearing on medical grounds as there is significant risk to his health. His doctors are monitoring him closely and we will inform the Tribunal when he is well enough to attend.

[65.3] Ms Raue then addressed the circumstances of the criminal prosecution against Mr Mihaka.

[66] The email had an attachment, being a Word document (there is no letterhead) purporting to be a medical certificate dated 13 July 2017 issued by Dr Fawcett. It was in the following terms:

> This is to certify that Te Ringa Mangu Mihaka is unwell with multiple medical problems and unable to attend the Human Rights Review Tribunal hearing on 19th and 20th July 2017.

[67] It is to be seen the certificate contains little, if anything, to support the assertions made by Ms Raue in her email of 18 July 2017. In fact the certificate contains conspicuously little information. No explanation was given for the delay between the date of the certificate (13 July 2017) and the date on which the certificate was provided to the Tribunal (18 July 2017).

[68] On the morning of 19 July 2017 the Secretary instructed Ms Raue the Tribunal had directed that all parties (including Ms Raue) attend the hearing at 10am.

[69] At 10am the Tribunal convened. The witness and counsel for HNZC were present. There was no appearance by Mr Mihaka or by Ms Raue.

[70] Ms Shaw opposed the adjournment application and sought the dismissal of the proceedings on the following grounds:

[70.1] The stay in the District Court had been granted on the basis this proceeding would be heard with urgency.

[70.2] This was the third application for an adjournment by Mr Mihaka. In granting the two earlier applications the Tribunal had warned Mr Mihaka he could not expect further indulgences. It was also noted that the original hearing dates of 17 and 18 July 2017 had been moved to 19 and 20 July 2017 to accommodate Ms Raue's other commitments.

[70.3] It was now two years and seven months since Mr Mihaka had been served with the 90 day notice and over two years since the Tenancy Tribunal had granted HNZC a possession order.

[70.4] While the proceedings were on foot before the Tribunal Mr Mihaka remained in occupation of his HNZC tenancy thereby undermining HNZC's anti-social behaviour guidelines.

[70.5] No sufficient detail had been provided in the medical certificate dated 13 July 2017 to justify an adjournment. In addition the document was not on letterhead and was unsigned.

[70.6] There was ongoing prejudice to HNZC. With each fixture coming and going without resolution HNZC's legal costs were escalating. In addition its witness (Ms KA Furfie) faced the ongoing stress of having to prepare repeatedly for hearings which did not eventuate. The Tribunal was reminded that Ms Furfie had only just undergone emergency surgery to her eye and indeed had been required to attend an appointment at Wellington Hospital on the afternoon of 19 July 2017. These difficulties notwithstanding, Ms Furfie had attended the hearing to give evidence.

[71] The Tribunal decided that in the circumstances the claim by Mr Mihaka would be dismissed.

[72] By email timed at 2:57pm on 19 July 2017 Ms Raue asserted (inter alia) that she also had been:

> Too unwell to attend this morning also and am trying to get an appointment with my doctor to confirm this …

[73] In this regard it is noted that there is no mention in Ms Raue's email of 18 July 2017 that she herself was too unwell to attend the hearing on 19 July 2017.

[74] It is a matter of record that neither the original letterhead copy of the medical certificate dated 13 July 2017 nor any medical certificate for Ms Raue's claimed indisposition on 19 July 2017 have been received by the Tribunal.

DISCUSSION

[75] The context in which these proceedings have been brought cannot be lightly put aside. The Tenancy Tribunal granted HNZC a possession order on 24 April 2015. Mr Mihaka has appealed against the grant of that order to the District Court. That appeal has been stayed pending determination of Mr Mihaka's proceedings before this Tribunal, proceedings which were filed on 30 November 2015. From the outset the parties have been under an unmistakable obligation to bring the case to the earliest possible hearing.

[76] It must be made clear we do not attribute to Mr Mihaka responsibility for the adjournment of the fixture scheduled for 28 and 29 September 2016. That adjournment was made necessary because of IT problems within the Office of the Director of Human Rights Proceedings. Similarly we attribute no responsibility for the adjournment of the 15 and 16 November 2016 hearing as the closure of courts and tribunals in the Wellington area followed a significant earthquake.

[77] But while these adjournments were not caused by Mr Mihaka, the accumulating delays emphasised his responsibility to ensure his case was ready to proceed at the next available opportunity offered by the Tribunal. The hearings on 3 and 4 August 2016, 3 and 4 April 2017 and on 19 and 20 July 2017 were such opportunities. Three times Mr Mihaka had opportunity to proceed and on each of those occasions he sought an adjournment. The last two applications were made *in absentia*.

[78] We make due allowance also for the fact Mr Mihaka has been self-represented (albeit assisted by Ms Raue as *McKenzie* friend) and that he may not enjoy the best of health. These factors cannot, however, explain or excuse his singular lack of application to the task of proving his case to the Tribunal. He is, after all, the plaintiff in these proceedings and as the beneficiary of a stay order in the District Court, he is under an obligation not to waste the time and resources of the Tribunal, particularly when those resources are under severe pressure as the Tribunal endeavours to cope with an unprecedented increase in its workload.

[79] As already detailed, in the period of one year and three months which has followed the unsuccessful mediation and which ended on 19 July 2017 Mr Mihaka has wasted every opportunity to have his case heard on the merits. In deciding to bring his proceedings to an end we have taken into account the whole background to this case and list below possibly the most conspicuous features of the case:

> **[79.1]** On at least three separate occasions (being the teleconferences held on 8 April 2016 and 15 April 2016) and at the hearing on 3 August 2016 Mr Mihaka stated, with some emphasis, that the proceedings had been brought without his knowledge or consent. He added he did not know why the case had been brought, did not understand what the case was about and was continuing with it because Mr Bourke thought it a good idea to bring the case and Mr Gwilliam had said that if Mr Bourke thought it was a good idea, then perhaps it probably was.

[79.2] Mr Mihaka's self-admitted bafflement as to why these proceedings have been brought may, to a large measure, explain his indifference to the multiple timetable directions, his responsibility to attend hearings and when adjournments have been sought on medical grounds, to produce medical certificates containing meaningful information.

[79.3] It may also help explain first, why despite several directions, he failed to file his brief of evidence until the morning of the hearing on 3 April 2017; and second, why that statement contains little or no evidence relevant to the claim pleaded in the statement of claim. Instead it addresses complaints regarding the Police prosecution and the steps taken by HNZC to evict him from his tenancy. The statement, even if accepted at face value, could not possibly establish either of the two causes of action under the Human Rights Act which are pleaded in the statement of claim.

[79.4] At the risk of repetition, there have been multiple adjournment applications and, in the case of the hearings on 4 April 2017 and 19 and 20 July 2017, a complete failure by Mr Mihaka and Ms Raue to attend the hearing. That failure on 4 April 2017 was egregious given that following the stepping aside of Mr Shirley on 3 April 2017, Mr Mihaka and Ms Raue explicitly confirmed they would be ready to proceed when the hearing resumed at 9am the following morning. They knew Ms Gilchrist would be travelling overnight to Wellington for the hearing the next day. Yet neither Mr Mihaka nor Ms Raue appeared. The resumed hearing for 17 and 18 July 2017 was changed to 19 and 20 July 2017 to accommodate Ms Raue's circumstances yet neither she nor Mr Mihaka attended the hearing on those dates.

[79.5] At each adjournment the Tribunal required the filing of medical certificates which provided sufficient information to enable the Tribunal to decide whether the adjournment application had proper foundation. See for example the explicit directions given in the *Minute* of 4 April 2017 at [27.2]:

> **[27.2]** That adjournment is subject to the following conditions:
>
> > **[27.2.1]** That no later than 4pm on Tuesday 11 April 2017 Mr Mihaka is to provide to the Tribunal and to the solicitors for HNZC a medical certificate from a registered medical practitioner setting out the reasons why Mr Mihaka was unable to attend the hearing at 9am on 4 April 2017.
> >
> > **[27.2.2]** The medical certificate must also specify the length of time Mr Mihaka will be medically unfit to participate in the hearing before the Tribunal.

See also the email from the Secretary dated 18 June 2017 at [1].

> **1.** As your email of 1 June 2017 is an application for adjournment, it is necessary that it be supported by proper grounds, particularly given the history of adjournments in this case. To that end, please provide:
>
> > **1.1** The location of the District Court to which you have been summonsed, the date on which you were served with the summons and the likely duration of the hearing you have been required to attend. If you so wish, your response can include a copy of the summons.
> >
> > **1.2** The reason why a medical appointment on 18 July 2017 was arranged notwithstanding that by email dated 16 May 2017 you were given notice that the hearing before the Tribunal will take place on 17 and 18 July 2017. It will also be necessary to explain why the medical appointment cannot be changed.

> **2.** The Chairperson has directed that the requested information be filed and served by 5pm on Friday 9 June 2017.
>
> **3.** Subject to the requested information being provided, the Chairperson has directed the hearing dates of 17 and 18 July 2017 be changed to 19 and 20 July 2017.

All that the Tribunal received were certificates framed in terms which were so general they were practically meaningless. See for example the certificate dated 13 July 2017:

> This is to certify that Te Ringa Mangu Mihaka is unwell with multiple medical problems and unable to attend the Human Rights Review Tribunal hearing on 19th and 20th July 2017.

[79.6] The recusal application in respect of Mr Shirley illustrates the cavalier tactics employed by Mr Mihaka. After electing at the 3 August 2016 hearing not to seek the recusal of Mr Shirley and after failing to file an application by 16 December 2016, formal "application" was filed on 19 February 2017. After the Tribunal dismissed that application in a detailed decision given on 2 March 2017, Mr Mihaka and Ms Raue filed further documents at 6:31am on the morning of the resumed hearing on 3 April 2017. Consequently most of that day was occupied with the hearing of the recusal application instead of the merits of the substantive case itself. Eventually Mr Shirley elected to step aside simply to avoid further time being wasted. Then on the following day Mr Mihaka and Ms Raue did not turn up for the hearing.

[79.7] The resources of the Tribunal are presently under sustained pressure. The reasons are set out in *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8. Briefly, in 2015 the number of new cases filed with the Tribunal increased 113% over 2014 and in 2016 that increase was 145%. Owing to legislative oversight, the Human Rights Act does not allow the appointment of a deputy chair (or chairs) to assist the Chairperson to keep pace with a large inflow of new cases. Consequently the Tribunal has a backlog of cases awaiting hearing as well as a backlog of cases awaiting determination. Because the Tribunal's resources are limited it has a responsibility to all litigants to ensure those resources are employed effectively and not needlessly wasted. The substantial time consumed by Mr Mihaka's case could have been applied to other cases in which the parties want the earliest hearing of their claim.

[79.8] There is also the question of the prejudice to HNZC as outlined in Ms Shaw's oral application that the proceedings be dismissed. The stay in the District Court prevents it from obtaining a determination of Mr Mihaka's appeal. In the meantime Mr Mihaka remains in possession of his tenancy notwithstanding the decision of the Tenancy Tribunal. The HNZC witness, herself undergoing medical treatment, is under real strain. The legal costs to HNZC continue to mount.

[80] Taking into account the entire history of the case and in particular the factors listed above, we were not on 19 July 2017 prepared to grant Mr Mihaka a further adjournment.

DECISION

[81] Mr Mihaka having failed to appear at the hearing on 19 July 2017 his proceedings under the Human Rights Act 1993 are dismissed.

.....	.....	.....
Mr RPG Haines QC	**WV Gilchrist**	**Ms DL Hart**
Chairperson	**Member**	**Member**