IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 2**

	Reference No. HRRT 021/2013
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**RICKEE TE WINI**
	PLAINTIFF
AND	**GRAEME ASKELUND**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr R Te Wini in person
Mr G Askelund in person

DATE OF HEARING: **4 February 2015**

DATE OF DECISION: **10 February 2015**

DECISION OF TRIBUNAL REMOVING SECOND PLAINTIFF AND GRANTING ADJOURNMENT[1]

[1] These proceedings were set down for hearing today but have been adjourned on the application of Mr Askelund.

[2] In this decision we record our reasons for granting the application. We also set out our reasons for removing Mr McQuoid (the father of Mr Te Wini) as second plaintiff.

The adjournment application – background

[3] These proceedings were filed on 14 August 2013. No statement of reply has ever been filed by Mr Askelund. After some difficulty the Chairperson convened a teleconference on 15 November 2013. The Chairperson raised three issues:

[1] [This decision is to be cited as: *Te Wini v Askelund (Removal of Second Plaintiff)* [2015] NZHRRT 2]

[3.1] The absence of a statement of reply by Mr Askelund.

[3.2] The fact that Mr McQuoid has no standing to be a plaintiff in these proceedings.

[3.3] Whereas the statement of claim alleges breach of Information Privacy Principles 1, 4, 6, 7, 8 10 and 11, the Tribunal has jurisdiction only in relation to Principle 6 because the investigation by the Privacy Commissioner was confined to that Principle alone.

[4] In his *Minute* issued on 15 November 2013 the Chairperson required each of these preliminary matters to be addressed by the parties and a timetable was set for specific steps to be taken by them. The relevant directions were:

> **[20.1]** Any application by Mr Askelund for leave to file a statement of reply out of time together with any supporting evidence and submissions is to be filed and served by 5pm on Friday 6 December 2013.
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> **[20.2]** Any response to that application by the first and second plaintiffs is to be filed and served by 5pm on Friday 13 December 2013.
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> **[20.3]** By Friday 6 December 2013 Mr McQuoid Snr is to file a memorandum stating whether he consents to being struck out as the second plaintiff in these proceedings. If he maintains that he is properly a party to these proceedings the memorandum must set out the grounds for that contention.
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> **[20.4]** The first and second plaintiffs must by 5pm on Friday 6 December 2013 file a memorandum stating whether it is their submission that the jurisdiction of the Tribunal is not confined to the Principle 6 application of 5 May 2009. If that is their submission the memorandum must set out the grounds for this claim in light of the case law cited earlier.
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> **[20.5]** A further teleconference is thereafter to be convened at a suitable time.
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> **[20.6]** Leave is reserved to both parties and to the Privacy Commissioner to make further application should the need arise.

[5] Over the following 13 months neither party complied with these directions and neither party took any steps to progress the proceedings.

[6] On 22 December 2014 the Chairperson convened a further teleconference. He noted in particular that:

[6.1] Mr McQuoid had failed to file a memorandum setting out the reasons why he should remain as a party to these proceedings.

[6.2] Neither Mr Te Wini nor Mr McQuoid had filed a memorandum setting out their reasons for contending the jurisdiction of the Tribunal is not confined to the Principle 6 application made on 5 May 2009.

[6.3] Mr Askelund had not sought leave to file a statement of reply and indeed had taken no steps since his participation in the teleconference on 15 November 2013. He had also failed to respond to communications sent by the Secretary.

[7] Having concluded that none of the parties appeared to have an incentive to comply with directions or to prepare the case for hearing the Chairperson allocated a date of hearing and required the parties to file and exchange their written statements of evidence in advance. The following directions were made:

> **[6.1]** All correspondence exchanged between Mr McQuoid Snr and the Office of the Privacy Commissioner since 15 November 2013 is to be filed and served by 5pm on Tuesday 6 January 2015

> **[6.2]** Written statements of the evidence to be called at the hearing by Mr Te Wini and Mr McQuoid Snr are to be filed with the Tribunal and served (on Mr Askelund) by 5pm on Friday 9 January 2015.
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> **[6.3]** Written statements of the evidence to be called at the hearing by Mr Askelund are to be filed and served by 5pm on Friday 16 January 2015.
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> **[6.4]** The proceedings are to be heard at Auckland on Wednesday 4 February 2015. The venue is Hearing Room 5, Chorus House, 41 Federal Street, Auckland.

[8] At the request of Mr Te Wini the timetable was amended in that the date for him to file his written statements of evidence was changed from 9 January 2015 to 20 January 2015 and the date for Mr Askelund to file his written statements consequently changed from 16 January 2015 to 30 January 2015.

[9] On 20 January 2015 Mr Te Wini filed a document described as "Plaintiff Submissions". The document is a mixture of evidence and submissions. On 21 January 2015 a statement of evidence by Mr McQuoid was filed. There is little in this statement that is relevant to the alleged breach of Principle 6. The statement does, however, contain a large number of allegations against Mr Askelund relating to the period 2002 to 2007 when Mr Askelund was Counsel for the Child in respect of Mr Te Wini.

[10] Nothing was filed by Mr Askelund and no communication was received from him.

The hearing on 4 February 2015 – grounds for the adjournment application

[11] At the commencement of the hearing on 4 February 2015 Mr Askelund appeared in person and requested an adjournment. The grounds were:

> **[11.1]** The "Plaintiff Submissions" filed by Mr Te Wini is not a written statement of evidence with the result that Mr Te Wini has not complied with the timetable directions of 22 December 2014 and Mr Askelund, not knowing what Mr Te Wini intends to say in evidence, cannot file a written statement in reply.
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> **[11.2]** Mr Askelund did not return to work until 19 January 2015. He was at that time still unwell due to a stomach complaint which developed while on holiday and he had been required to take time off work. He had also attended a number of court hearings. Not having received Mr Te Wini's Plaintiff Submissions until 21 January 2015 he had had only five working days to read the material filed and to respond. In relation to the statement of evidence by Mr McQuoid, Mr Askelund submitted the statement was inadmissible, containing as it does material not relevant to the claim brought by Mr Te Wini.

[12] Mr Askelund also explained he had not been able to find Mr Te Wini's file for the period 2002 to 2007. However, it had occurred to Mr Askelund that after Mr Ashmore took over representing Mr Te Wini in 2007 Mr Askelund had most likely handed his file to Mr Ashmore. Mr Askelund today spoke to Mr Ashmore who agreed to retrieve Mr Te Wini's files from storage and if those files include the file received from Mr Askelund, that file will be returned to Mr Askelund. Mr Askelund said because he did not wish to prevent the flow of information to Mr Te Wini he (Mr Askelund) would release all documents on the file apart from those in relation to which there were proper withholding grounds.

[13] Mr Te Wini opposed the adjournment application, pointing to the long delays which have occurred in this case. He fairly accepted, however, that he could not demonstrate any prejudice should the adjournment application be granted.

Conclusion on adjournment application

[14] It is essential to a fair hearing that the parties have adequate time to prepare, including by way of drafting and filing written statements of evidence. In the circumstances outlined by Mr Askelund we are of the view that such fair opportunity has not been given to him. Because Mr Te Wini properly concedes no prejudice will arise by granting the application it would be wrong in principle for the application to be declined. In the result we are of the view the adjournment application must be granted.

[15] By the same token it is necessary for Mr Askelund to give notice to Mr Te Wini and to the Tribunal of the grounds on which he intends defending the proceedings. He is accordingly directed to file a statement of reply. We grant leave under Regulation 15(3) of the Human Rights Review Tribunal Regulations 2002 for that statement of reply to be filed out of time.

Whether Mr McQuoid properly a party to the proceedings

[16] The information privacy request investigated by the Privacy Commissioner was a request dated 5 May 2009 from Mr Te Wini to Mr Askelund. That being so, the Tribunal has undoubted jurisdiction to inquire whether, in relation to that request, there was an interference with Mr Te Wini's privacy as defined in s 66 of the Act. The Tribunal does not have jurisdiction to inquire into any other request which may have been made by **Mr McQuoid** to Mr Askelund seeking access to Mr Te Wini's personal information. See for example see *Rafiq v Ministry of Business, Innovation and Employment* [2013] NZHRRT 9 (8 April 2013) at paras [10] and [11] and *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at paras [58] to [59].

[17] Mr McQuoid nevertheless asserts that because he himself addressed access requests to Mr Askelund he had standing in the present proceedings. This is an untenable position, a point which Mr Te Wini conceded. He did point out that his father has a substantial emotional investment in the present proceedings. That may well be true but it is not a proper basis for recognising standing.

Conclusion on standing

[18] For the reasons given we are of the clear view that Mr McQuoid has no standing in these proceedings and must be removed as a party. This does not, however, affect his eligibility to give evidence as a witness, provided that evidence is confined to the Principle 6 claim and is relevant to Mr Te Wini's case.

Mr Te Wini to provide particulars

[19] According to Mr Te Wini, the statement of claim was drafted by Mr Stevens, a barrister instructed by the then Director of Human Rights Proceedings to advise the Director whether the Director should bring proceedings against Mr Askelund. As mentioned, the statement of claim pleads a large number of matters which lie well outside the Tribunal's jurisdiction. The relevant point for noting in the present context is that while there is a request for a remedy in the form of damages, that request is couched in oblique terms and might be missed on a first reading of the document.

[20] Today Mr Te Wini made mention he would be seeking damages for the loss of a benefit as well as damages for humiliation, loss of dignity and injury to feelings.

[21] Because Mr Askelund has not yet been given fair notice of these claims together with particulars, Mr Te Wini has been directed to provide Mr Askelund with this

information. In particular, the benefit allegedly lost must be identified by sufficient particularisation together with details of the causative link between the alleged loss and Mr Askelund's alleged failure to comply with Mr Te Wini's request for access to personal information. Similarly any damages claim for humiliation, loss of dignity and injury to feelings, must be particularised both as to grounds and as to causation. Finally, the written statements of evidence must set out the evidentiary basis for the claims.

Mr Te Wini to file fresh statements of evidence

[22] Because the document filed by Mr Te Wini on 20 January 2015 is more in the nature of a submission than evidence and because the statement filed by Mr McQuoid on 21 January 2015 is full of irrelevant information it has been agreed by Mr Te Wini both documents are to be put aside. They will be replaced by fresh witness statements by him and his father. In this context it is appropriate to reiterate our comments to Mr Te Wini at the hearing that only relevant evidence can be placed before the Tribunal.

The need for evidence to be relevant

[23] It is a fundamental principle of law that evidence that is not relevant is not admissible in a proceeding. See specifically s 7(2) of the Evidence Act 2006. Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding. See s 7(3). Evidence will be irrelevant if it is not offered about a material issue in the proceeding, or has no tendency to prove or disprove anything about a material point in the case. We underline the necessity for Mr Te Wini to observe this rule given the substantial degree to which his existing documents contain irrelevant material.

Orders

[24] The following orders are made:

> **[24.1]** Mr McQuoid is removed as a party to these proceedings. The proper intituling is henceforth to be as set out on the first page of this decision.
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> **[24.2]** By 4pm on Monday 9 February 2015 Mr Te Wini is to file and serve full particulars of the damages sought by him under s 88(1) of the Privacy Act 1993.
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> **[24.3]** A statement of reply by Mr Askelund is to be filed and served by 5pm on Friday 13 February 2015.
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> **[24.4]** Written statements of the evidence to be called at the hearing by Mr Te Wini are to be filed and served by 5pm on Friday 27 February 2015. All documents referred to in such written statements are to be attached to and filed with the statements.
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> **[24.5]** Written statements of the evidence to be called at the hearing by Mr Askelund (together with all documents referred to in those written statements) are to be filed and served by 5pm on Friday 20 March 2015.
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> **[24.6]** Should Mr Te Wini wish to file any statements of evidence in reply, such statements are to be filed and served by 5pm on Wednesday 1 April 2015.
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> **[24.7]** These proceedings are to be heard at Auckland at 10am on Tuesday 7 April 2015. The venue is to be advised by the Secretary.

[24.8] Leave is reserved to both parties to make further application should the need arise.

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

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Mr RPG Haines QC	**Mr RK Musuku**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**