IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 31**

	Reference No. HRRT 012/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**HUNTER CLIFFORD BOYCE**
	PLAINTIFF
AND	**WESTPAC NEW ZEALAND LIMITED**
	DEFENDANT

TRIBUNAL: Rodger Haines QC, Chairperson

REPRESENTATION:
Mr HC Boyce in person
Ms K Verkerk for defendant

DATE OF MINUTE: 21 July 2015

MINUTE OF CHAIRPERSON FOLLOWING TELECONFERENCE ON 21 JULY 2015 AT 4.35PM[1]

[1] In two weeks time (11 and 12 August 2015) these proceedings will be heard at Taupo.

[2] In terms of the case management timetable set out in the *Minute* issued on 25 June 2015 Mr Boyce has filed a written statement of evidence for himself only. It was filed on 14 July 2015 rather than on the scheduled date of 10 July 2015 but Westpac have not made anything of the small delay.

[3] The statements of evidence for Westpac are due for filing on Friday 24 July 2015.

Non-party discovery – background

[4] By memorandum dated Tuesday 21 July 2015 counsel for Westpac reported Westpac is in the process of finalising the written statements for its two witnesses. The first witness is Mr B Szpetnar, formerly the Westpac Branch Manager at Taupo and the second is an unidentified witness from Mr Boyce's former employer, Stretton & Co Ltd (Strettons), a firm of Chartered Accountants.

[1] [This decision is to be cited as: *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31]

[5] On the question of discovery, the memorandum advised Westpac no longer holds copies of emails exchanged between it and Strettons in and around the relevant period (September 2013) as the staff member involved has left Westpac and his electronic records have not been retained. However, subsequent to the discovery process being completed, Strettons provided Westpac with copies of documents which had not previously been within the possession or control of Westpac. Those documents will be provided to Mr Boyce by way of further discovery.

[6] Westpac understands Strettons holds further emails of relevance to these proceedings, including emails between Strettons and Westpac, and between Strettons and Mr Boyce. These documents have not yet been provided to Westpac. Strettons have indicated that for privacy reasons it needs the Tribunal to compel production of the documents. Westpac understands the volume of documents is relatively small (approximately two email chains).

[7] Westpac now seeks either non-party discovery or the issue of a witness summons requiring an officer from Strettons to appear before the Tribunal for the purpose of producing the documents in question.

[8] Mr Boyce believes he is aware of the documents in question and suspects they are most likely not material to the case. For that reason he opposes the application but makes the point that should the application be granted, he wishes (as does counsel for Westpac) to see the documents in advance of the hearing to avoid surprises. Mr Boyce has also filed today (21 July 2015) a cross-application of his own seeking the issue of witness summonses in respect of several witnesses. That application is addressed separately later in this *Minute*.

Non-party discovery – the legal position

[9] Neither the Privacy Act 1993 nor Part 4 of the Human Rights Act 1993 (incorporated into the Privacy Act by s 89 of the Privacy Act) employ the term "discovery" when setting out the powers of the Tribunal or its Chairperson. The Tribunal nevertheless has jurisdiction to order parties before it to give discovery either on a formal or informal basis. This power flows from three primary sources:

> **[9.1]** Section 106(1)(a), (b) and (c) of the Human Rights Act which confers power on the Tribunal to call for evidence and information from the parties or any other person and to require the parties or any other person to attend the proceedings to give evidence. The "any other person" phrase is of particular relevance to non-party discovery:
>
> > **106 Evidence in proceedings before Tribunal**
> >
> > (1) The Tribunal may—
> > (a) call for evidence and information from the parties or any other person:
> > (b) request or require the parties or any other person to attend the proceedings to give evidence:
> > (c) fully examine any witness:
>
> **[9.2]** Section 104(5) which confers power on the Tribunal to regulate its own procedure:
>
> > (5) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal may regulate its procedure in such manner as the Tribunal thinks fit and may prescribe or approve forms for the purposes of this Act.

[9.3] Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002 which confers power on the Chairperson to give such directions as may be necessary or desirable for the proceedings to be heard, determined or otherwise dealt with, as fairly, efficiently, simply and speedily as is consistent with justice:

> **16 Conduct of proceedings: power to give directions, etc**
>
> (1) Subject to decisions of the Tribunal, the Chairperson may give any directions and do any other things—
> (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and
> (b) that are not inconsistent with the Act or, as the case requires, the Privacy Act 1993 or the Health and Disability Commissioner Act 1994, or with these regulations.

[10] The Tribunal's power to order discovery of even confidential documents was not questioned in *Alpine Energy Ltd v Human Rights Review Tribunal* [2014] NZHC 2792 (11 November 2014) and see also the discussion of discovery in the Tribunal's subsequent decision in *Hood v American Express International (NZ) Inc (Discovery)* [2015] NZHRRT 1 (23 January 2015) at [5] to [10].

[11] As to the procedure for ordering a non-party to give discovery in proceedings before the Tribunal, s 104(5) gives the Tribunal a wide discretion. In the exercise of that discretion appropriate account must be taken of the procedure prescribed by the High Court Rules. While those Rules do not apply to the Tribunal, they are often drawn on to provide guidance on such matters as discovery subject to the proviso the Rules are to be appropriately modified and adapted to the Tribunal's distinctive jurisdiction. Rule 8.21 has specific application to particular discovery against a non-party after proceedings have been commenced and provides:

> **8.21 Order for particular discovery against non-party after proceeding commenced**
>
> (1) This rule applies if it appears to a Judge that a person who is not a party to a proceeding may be or may have been in the control of 1 or more documents or a group of documents that the person would have had to discover if the person were a party to the proceeding.
> (2) The Judge may, on application, order the person—
> (a) to file an affidavit stating—
> (i) whether the documents are or have been in the person's control; and
> (ii) if the documents have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and
> (b) to serve the affidavit on a party or parties specified in the order; and
> (c) if the documents are in the control of the person, to make those documents available for inspection, in accordance with rule 8.27, to the party or parties specified in the order.
> (3) An application for an order under subclause (2) must be made on notice to the person and to every other party who has filed an address for service.

[12] It is to be noted that under this procedure an application for discovery against a non-party must be made on notice to the non-party as that person or entity has a right to be heard. This requirement can present particular challenges when the application is made (as here) only two weeks before the hearing. This is not mentioned as a criticism of Westpac. It is merely a recognition that a fixture date may be jeopardised by the fact that discovery is an ongoing process and will inevitably give rise to complications where issues of surprise and notice occur on the eve of a hearing.

[13] An order for particular discovery against a non-party is not the only means by which parties to proceedings before the Tribunal can gain access to documents of potential

relevance held by a third party. That party can be compelled to produce the documents by way of a subpoena or in the language of the Human Rights Act, a witness summons.

Subpoena duces tecum

[14] It is to be recalled that s 106(1)(a), (b) and (c) confer power on the Tribunal to call for evidence and information from the parties "or any other person" and to require that other person to attend the proceedings to give evidence. Section 109, in turn, confers power on the Tribunal either of its motion or on the application of any party to the proceedings, to issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence. The witness summons can require the witness to bring and produce to the Tribunal papers, documents, records or things:

> **109 Witness summons**
>
> (1) The Tribunal may, if it considers it necessary, of its own motion, or on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing of the proceedings.
> (2) The witness summons shall state—
> (a) the place where the person is to attend; and
> (b) the date and time when the person is to attend; and
> (c) the papers, documents, records, or things which that person is required to bring and produce to the Tribunal; and
> (d) the entitlement to be tendered or paid a sum in respect of allowances and travelling expenses; and
> (e) the penalty for failing to attend.
> (3) The power to issue a witness summons may be exercised by the Tribunal or a Chairperson, or by any officer of the Tribunal purporting to act by the direction or with the authority of the Tribunal or a Chairperson.

[15] In legal jargon a witness summons requiring a person to bring to the hearing and to produce papers, documents, records or things is a subpoena duces tecum. See the commentary in *McGechan on Procedure* online looseleaf ed, HR9.52.01.

[16] Under r 9.52 of the High Court Rules orders of subpoena are issued on request without the intended witness being heard. Similarly there is no requirement in ss 109 to 111 of the Human Rights Act for the intended witness to be heard before a witness summons is issued by the Tribunal. A witness summons duces tecum therefore has in this respect an advantage over formal non-party discovery under High Court Rules, r 8.21 where time is of the essence.

[17] The downside of gaining access to non-party documents by way of a subpoena duces tecum is that the party calling the witness as well as the opposing party will not see the documents until they are produced by the witness at the hearing itself. This could lead to surprise, prejudice and an application for adjournment.

Discussion

[18] Taking these factors into account the discussion of Westpac's application for access to the discoverable documents held by Strettons focused on the following options:

> **[18.1]** The making of a non-party discovery order analogous to one made under High Court Rules, r 8.21 requiring Strettons to make the documents available for inspection to the parties. This would require a formal application, supporting affidavit and notice to Strettons. Given only two weeks remain prior to the hearing, this option, while not entirely lacking in feasibility, would cause inconvenience, if not disruption to both the parties and Strettons.

[18.2] Treating the Westpac memorandum of 21 July 2015 as an application for the issue of a witness summons duces tecum pursuant to s 109(2)(c) of the Human Rights Act.

[19] As to the witness summons option Ms Verkerk readily acknowledged the potential for complication, if not unfairness, should Strettons withhold the documents from the parties until production at the hearing in answer to the witness summons duces tecum. Her understanding is that Strettons would not wish to bring about such situation and would be happy to release the documents to the parties once legal justification for doing so has been brought about by service of the witness summons. For his part Mr Boyce advised that in the event of a summons being issued he would support release of the documents by Strettons to the parties ahead of the hearing.

Decision on Westpac application

[20] In my view the issue of a witness summons duces tecum under ss 106(1) and 109 of the Human Rights Act is the appropriate course to be taken in the circumstances of the present case, bearing in mind the hearing is to commence at Taupo in two weeks time. In reaching this view I have been influenced by Ms Verkerk's indication that Strettons will assist in ensuring a fair hearing by the release of the documents at the first practical opportunity after service of the summons.

[21] In these circumstances I make a direction under s 109(3) of the Human Rights Act that the Secretary of the Tribunal is to issue a witness summons subject to Westpac providing the information required by s 109(2), particularly the name and address of the person to be summonsed and a description of the documents sought to be produced, the description to be of sufficient particularity to enable the documents to be identified. The terms of the formal order follow at the end of this *Minute*.

The application by Mr Boyce for witness summonses

[22] In his memorandum dated 21 July 2015 Mr Boyce requested the following:

[22.1] A witness summons addressed to Mr B Szpetnar.

[22.2] Emails and documentation:

> … around [Mr Szpetnar's] departure from Westpac Taupo. Including any emails from Ian Blair to any other members at Westpac including all the Human Resources staff members.

[22.3] All emails:

> … between [Mr Szpetnar] and [Mr Blair] between 1 September 2013 and 31 July 2014.

[22.4] The final request was for:

> Four [unidentified] senior Strettons staff members to attend the hearing.

[23] On Mr Boyce learning from Ms Verkerk that Mr Szpetnar will be a witness for Westpac, the application relating to Mr Szpetnar was not pursued.

[24] As to the second, third and fourth matters, these were discussed at some length with Mr Boyce. I have stressed that before a witness summons can be issued under s 109 of the Human Rights Act the Tribunal must be satisfied the proposed witness can give relevant and material evidence. A witness cannot be summonsed to give evidence

on matters outside the issues raised by the particular proceedings. Nor can a summons be issued speculatively.

[25] The discussion concluded with Mr Boyce advising he will give consideration to the issues overnight and will also wait to see what is contained in the information to be released by Strettons in response to the witness summons now authorised by me.

FORMAL ORDERS

[26] The following orders are made:

> **[26.1]** The Secretary to the Tribunal is to issue a witness summons under s 109 of the Human Rights Act 1993 requiring an officer of Stretton & Co Ltd, Chartered Accountants, Taupo to attend the hearing before the Tribunal at Taupo on 11 and 12 August 2015 and to produce documents of relevance to these proceedings.
>
> **[26.2]** The witness summons is not to be issued unless and until Westpac provides:
>
> > **[26.2.1]** The name and address of the witness to be summonsed.
> >
> > **[26.2.3]** A description of the documents to be produced, that description to be sufficiently particularised so that the documents may be identified.
>
> **[26.3]** If on service of the summons Stretton & Co Ltd elects to release the documents in advance of the hearing, the documents are to be released to both parties.
>
> **[26.4]** The application by Mr Boyce for the summonses referred in his memorandum dated 21 July 2015 at para 10 is adjourned but may be brought on for hearing once Mr Boyce is in a position to properly support the application.

"Rodger Haines"

.....

Rodger Haines QC
Chairperson
Human Rights Review Tribunal