

Reference No. HRRT 046/2011

**UNDER SECTION 50 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT
1994**

BETWEEN THE DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND JIE (GRACE) ZHU

DEFENDANT

AT AUCKLAND

Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Dr S Hickey, Member

Aaron Martin, Director of Proceedings
Defendant in person

DATE OF DECISION: 28 March 2012

DECISION OF TRIBUNAL

[1] These proceedings under s 50 of the Health and Disability Commissioner Act 1994 were filed on 6 December 2011. A telephone conference was held on 3 February 2012 for the purpose of giving directions to ensure that the case would be ready for hearing at Auckland on 16 April 2012.

[2] The plaintiff and defendant have since settled the proceedings and on 2 March 2012 filed with the Tribunal the following documents on a consent basis:

[2.1] Consent Memorandum dated 29 February 2012.

[2.2] Agreed Summary of Facts.

[3] The Consent Memorandum is in the following terms:

MAY IT PLEASE THE TRIBUNAL

1. The plaintiff and defendant have agreed upon a summary of facts, a signed copy of which is filed with this memorandum.
2. The plaintiff requests that the Tribunal exercise its jurisdiction in respect of the following matters:
 - (a) A declaration pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 ("the Act") that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers Rights) Regulations 1996 ("the Code") in respect of Right 1(1) by failing to treat the consumer with respect, Right 2 by failing to provide services which were free from exploitation, Right 3 by failing to provide services to the aggrieved person in a manner that respected the dignity and independence of the aggrieved person, Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill, Right 4(2) by failing to provide service in a manner which complied with legal, professional, and ethical standards, and Right 4(3) by failing to provide services in a manner consistent with the aggrieved person's needs.
3. In relation to the declaration being sought in paragraph 2(a) above, the parties respectfully refer to the Agreed Summary of Facts. The parties are agreed that it is not necessary for the Tribunal to consider any other evidence for the purpose of making the declarations sought.
4. The defendant consents to the Tribunal making the above declarations based on the facts set out in the Agreed Summary of Facts.
5. In the Statement of Claim the plaintiff also sought the following relief:
 - (a) Damages pursuant to s 57(1)(c);
 - (b) Damages pursuant to s 57(1)(d);
 - (c) Such other relief as the Tribunal thinks fit pursuant to s 54(1)(e); and
 - (d) Costs.
6. In order to resolve the remainder of the relief claimed by the plaintiff the parties seek by consent, an order from the Tribunal that the defendant pay the aggrieved person \$5,000 in damages pursuant to s 57(1)(c) only.
7. There is no issue as to costs.
8. The plaintiff seeks a final order prohibiting publication of the name of the aggrieved person in this matter ... The defendant consents to such a final order being granted.
9. The defendant does not seek any order prohibiting publication of the defendant's name.

[4] Having perused the Agreed Summary of Facts the Tribunal is satisfied on the balance of probabilities that an action of the defendant was in breach of the Health and Disability Commissioner (Code of Health and Disability Services Consumers Rights) Regulations 1996 and that a declaration should be made in the terms sought by the parties in paragraphs 2 and 8 of the Consent Memorandum.

DECISION

[5] By consent the decision of the Tribunal is that:

[5.1] A declaration is made pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers Rights) Regulations 1996 in respect of Right 1(1) by failing to treat the consumer with respect, Right 2 by failing to provide services which were free from exploitation, Right 3 by failing to provide services to the

aggrieved person in a manner that respected the dignity and independence of the aggrieved person, Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill, Right 4(2) by failing to provide service in a manner which complied with legal, professional, and ethical standards, and Right 4(3) by failing to provide services in a manner consistent with the aggrieved person's needs.

[5.2] Damages of \$5,000 are awarded against the defendant under s 57(1)(c) of the Act for humiliation, loss of dignity, and injury to the feelings of the aggrieved person.

[5.3] A final order is made prohibiting publication of the name or any details which may lead to the identification of the aggrieved person in these proceedings.

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Mr RPG Haines QC	Mr GJ Cook JP	Dr S Hickey
Chairperson	Member	Member

“A”

This is the Agreed Summary of Facts marked with the letter “A” referred to in the annexed decision of the Tribunal delivered on 28 March 2012.

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

HRRT 046/11

UNDER Section 50 of the Health and Disability Commissioner Act 1994

BETWEEN **THE DIRECTOR OF PROCEEDINGS**
designated under the Health and
Disability Commissioner Act 1994
Plaintiff

AND **JIE (GRACE) ZHU** of 117E Glendhu Road, Albany,
Auckland, (former) community support worker
Defendant

SUMMARY OF FACTS

INTRODUCTION:

1. The plaintiff is the Director of Proceedings exercising statutory functions under ss 15 and 49 of the Health and Disability Commissioner Act 1994 (the Act). The plaintiff is acting for and on behalf of the aggrieved person.
2. At all material times, the defendant Jie (Grace) Zhu was a disability services provider within the meaning of s 3 of the Act, and was providing disability services to the aggrieved person.
3. On 24 November 2009 Constable Nicolas Munn of the New Zealand Police complained to the Health and Disability Commissioner about services provided to the aggrieved person.
4. On 8 November 2011 Deputy Health and Disability Commissioner Tania Thomas finalised her opinion that the defendant had breached the aggrieved person's rights under the Health and Disability Commissioner (Code of Health and Disability Service Consumers' Rights) Regulations 1996 (the Code) and in accordance with s 45(2)(f) of the Act, referred the defendant to the plaintiff.
5. On 2 December 2011 the plaintiff decided to institute proceedings before the Human Rights Review Tribunal.

The Defendant

6. At the time of the events in question the defendant was employed by Spectrum Health Ltd ("Spectrum") as a community support worker.

7. A key purpose of the position of community support worker is to assist people supported by Spectrum to maintain an optimum state of wellness, safety and community inclusion.
8. At all material times the defendant resided at 117E Glendhu Road, Albany, Auckland (“the Glendhu Road address”).

The aggrieved person

9. The aggrieved person has a severe intellectual and physical impairment; and as a result is completely dependent on caregivers for his daily needs and lives in supported accommodation. He is unable to communicate verbally and uses facial expressions and head and arm gestures to express his needs. The aggrieved person requires the use of a wheelchair and someone to push the wheelchair to mobilise. Whenever the aggrieved person leaves his supported accommodation, he is always accompanied by a support worker. When travelling any significant distance the aggrieved person travels in a specially adapted van. Once inside the van, the aggrieved person is unable to move the wheelchair without assistance, as the chair is clamped in place and the aggrieved person strapped into the chair.

Events on 21 August 2009

10. On or about 21 August 2009 a neighbour of the Glendhu Road address (the neighbour), saw a van parked in the driveway of the Glendhu Road address. The neighbour saw a disabled man in the back of the van rocking backwards and forwards. The neighbour was aware that the defendant was a caregiver working with disabled people. The neighbour had on previous occasions seen a van parked at the Glendhu Road address with a disabled person sitting in it unattended.

11. On the morning of 21 August 2009 a disabled person remained unattended in the van for a period of time. At 11.33 am the neighbour telephoned the police to inform them of what she had seen. At some time between 11.45 am and 12 pm the van left the Glendhu Road address.
12. At approximately 12.30 pm the neighbour left her home to attend a doctor's appointment. At approximately 1.45 pm the neighbour returned home and saw the same van parked at the Glendhu Road address.
13. The neighbour observed that there was a disabled person sitting in the van unattended. This appeared to the neighbour to be a different person to the person she had seen in the van that morning. The person in the van on the afternoon of 21 August 2009 was the aggrieved person.
14. At approximately 1.48 pm the neighbour telephoned the police to report that the van had returned and that a disabled person was sitting in it unattended.
15. At 1.55 pm Constables Munn and Burke were directed to the Glendhu Road address to enquire into the welfare of the person sitting in the van. The constables arrived at the Glendhu Road address a short time later. On arrival, the constables spoke with the neighbour.
16. At about 2.37 pm the constables made their way to the van to check on the disabled person inside. Upon opening the van door the constables noted that it was warm and stuffy in the van. The constables found the aggrieved person sitting in the back of the van in a wheelchair secured firmly to the floor. They spoke to the aggrieved person and ascertained that he was unable to communicate verbally. The constables noted that the aggrieved person was squirming around in his wheelchair and looked uncomfortable. They

observed that the aggrieved person's tracksuit pants were wet from his upper right leg down to his ankle.

17. A short time later, the defendant emerged from her house and said the van had only been parked in the driveway ten minutes earlier. The defendant denied that there had been other occasions on which she had left disabled people in her care parked in vans in her driveway.

Service failings

18. The defendant failed to provide disability services of an appropriate standard to the aggrieved person ("service failings") when she:
 - (a) Engaged in a diversion to her place of residence on 21 August 2009 that was unauthorised by her employer (Spectrum) and unrelated to the provision of disability services to the aggrieved person; and/or
 - (b) Failed to have appropriate regard to the aggrieved person's welfare and/or failed to provide the aggrieved person with adequate support when she left him sitting alone in the van for at least 45 minutes on 21 August 2009; and/or
 - (c) Acted in the way alleged above in the knowledge that the aggrieved person was non verbal, could not mobilise without assistance, and as a result was confined to the van.

First breach – Right 1(1) – right to be treated with respect

19. As a result of the service failings identified in paragraph 18 of this summary of facts the defendant breached Right 1(1) of the Code by failing to treat the aggrieved person with respect.

Second breach – Right 2 – right to freedom from discrimination, coercion, harassment, and exploitation

20. As a result of the service failings identified in paragraph 18 of this summary of facts the defendant has breached Right 2 of the Code in that she exploited the aggrieved person.

Third breach –Right 3 – right to dignity and independence

21. As a result of the service failings identified in paragraph 18 of this summary of facts the defendant breached Right 3 of the Code by failing to maintain the aggrieved person’s dignity and independence.

Fourth breach – Right 4 – right to services of an appropriate standard

22. As a result of the service failings identified in paragraph 18 of this summary of facts the defendant breached Right 4 of the Code by failing to provide the aggrieved person with services of an appropriate standard, in particular by failing to provide services with reasonable care and skill (Right 4(1)); and/or comply with legal, profession other relevant standards (Right 4(2)); and/or provide services in a manner consistent with his needs (Right 4(3)).

Aaron Martin

Director of Proceedings

Jie (Grace) Zhu agrees that the facts set out in this Summary of Facts are true and correct.

Jie (Grace) Zhu

Date: