

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF EFG AND JKL**
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL**

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2013] NZHRRT 37

Reference No. HRRT 001/2012

UNDER THE PRIVACY ACT 1993

BETWEEN IAN RUSSELL GEARY

PLAINTIFF

AND ACCIDENT COMPENSATION CORPORATION

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Mr MJM Keefe JP, Member

Dr AD Trlin, Member

REPRESENTATION:

Mr AC Beck for Plaintiff

Mr I Hunt and Ms S Grieve for Defendant

DATE OF DECISION: 18 October 2013

DECISION OF TRIBUNAL ON APPLICATION FOR STAY OF ORDER

[1] The substantive decision of the Tribunal was given on 20 September 2013 as *Geary v Accident Compensation Corporation* [2013] NZHRRT 34. The 30 day period for the filing of a notice of appeal has not yet expired.

[2] By application dated 30 September 2013 the Accident Compensation Corporation (ACC) sought a stay of the order made by the Tribunal at para [220.3] of the decision:

[220.3] An order is made under s 85(1)(d) of the Privacy Act 1993 requiring ACC to provide Mr Geary with access to the personal information hitherto withheld by ACC and listed as documents 1 to 7, 9 to 14, 16-18 and 20 to 21 in the schedule to the ACC letter dated 29 June 2005 addressed to Mr Geary. Such access is to be given as soon as reasonably practical and in any case not later than ten working days from the day after the date of this decision.

[3] ACC wishes to provide a third party (referred to in the Tribunal's decision as EFG) with a copy of the Tribunal's decision as well as a copy of the documents which the Tribunal has ordered be provided by ACC to Mr Geary. No reasons are given. The submission for ACC was:

4. The defendant considers that EFG ought to be entitled to a copy of the Tribunal's decision, and the documents the Tribunal has directed must be disclosed, before they are released to the plaintiff. The defendant is currently locating EFG so as to be able to provide her with the decision of the Tribunal and the documents directed to be disclosed.
5. In those circumstances the defendant seeks a stay of the direction of the Tribunal at [220.3] until the time for appealing against the Tribunal's decision has elapsed (or, if an appeal be lodged, pending determination of the appeal by the High Court), or pending disclosure to EFG of the documents identified in [220.3], whichever is the later.
6. It is noted that the [plaintiff] has most of the documents, in any event, and thus a stay of the direction, in relation to those documents, will have no practical effect.

[4] By memorandum dated 1 October 2013 Mr Beck submitted:

[4.1] The purpose of the stay had not been made clear, but the conventional grounds justifying a stay had not been addressed.

[4.2] To the extent that ACC acknowledged that documents had already been disclosed to Mr Geary, the order sought would be of no practical effect and such orders would not normally be made by a judicial authority.

[5] Noting that it was not clear whether the Tribunal had jurisdiction to grant the stay sought by ACC in the absence of an appeal under s 123 of the Human Rights Act 1993 (HRA), the Chairperson by *Minute* dated 1 October 2013 directed ACC to file submissions addressing the jurisdiction issue. Those submissions were to be filed and served by Friday 4 October 2013 and the submissions by Mr Geary in opposition were to be filed by Thursday 10 October 2013. The submissions for ACC were filed on time but the submissions by Mr Beck were not received until 5pm on Monday 14 October 2013.

[6] In its submissions ACC:

[6.1] Has clarified that it seeks a stay for only the same period as is available for appeal. In practical terms the thirty day appeal period expires on Sunday 20 October 2013. Given that the application by ACC was not filed until 6.26pm on 30 September 2013 and further given the necessity for the subsequent timetabling of submissions it has not been possible for the Tribunal to publish a decision until now.

[6.2] Asserts that the Tribunal "clearly" has jurisdiction to modify the order made by it "if it considers the interests of justice so require". It is said that jurisdictionally, the basis for doing so arises "because the Tribunal has a power to recall its decision" [if the interests of justice so require]. No statutory provision or other authority has been cited in support of this submission.

[7] The short issue for determination is whether the Tribunal has jurisdiction to make the order sought by ACC.

WHETHER JURISDICTION TO RECALL DECISION AND TO STAY ORDER

[8] It might be helpful to begin by contrasting the jurisdiction of the High Court with that of the Tribunal.

[9] The High Court Rules make specific provision for:

[9.1] Stay of enforcement. See High Court Rules, r 17.29. A liable party can apply for a stay of enforcement if a substantial miscarriage of justice would be the likely result of enforcement:

17.29 Stay of enforcement

A liable party may apply to the court for a stay of enforcement or other relief against the judgment upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were enforced, and the court may give relief on just terms.

This rule is concerned with the risk of substantial injustice resulting from enforcement of the judgment, not from the judgment itself: *Palmerston North City Council v Birch* [2012] NZHC 3248 at [17].

[9.2] Stay pending appeal. See High Court Rules, r 20.10. On any civil appeal to the High Court an application to stay the effect of a judgment may be made either to the decision-maker being appealed or to the High Court. The Court of Appeal (Civil) Rules 2005, r 12 makes similar provision in relation to civil appeals from the High Court to the Court of Appeal. We reproduce here only High Court Rules, r 20.10:

20.10 Stay of proceedings

- (1) An appeal does not operate as a stay—
 - (a) of the proceedings appealed against; or
 - (b) of enforcement of any judgment or order appealed against.
- (2) Despite subclause (1), the decision-maker or the court may, on application, do any 1 or more of the following pending determination of an appeal:
 - (a) order a stay of proceedings in relation to the decision appealed against;
 - (b) order a stay of enforcement of any judgment or order appealed against;
 - (c) grant any interim relief.
- (3) An order made or relief granted under subclause (2) may—
 - (a) relate to enforcement of the whole of a judgment or order or to a particular form of enforcement;
 - (b) be subject to any conditions for the giving of security the decision-maker or the court thinks just.

The general rule is that a party is entitled to enjoy the fruits of a judgment in its favour. Unless the statute conferring the appeal right provides otherwise, the bringing of an appeal does not operate to stay the effect of any judgment being appealed. In the absence of an order under the relevant rules, the successful party is entitled to enforce the judgment given.

[10] Turning to the jurisdiction of the Tribunal, it has power to grant a stay pending appeal but no power to stay enforcement. See s 89 of the Privacy Act 1993 which stipulates that certain provisions of the HRA are to apply:

89 Certain provisions of Human Rights Act 1993 to apply

Sections 92Q to 92W and Part 4 of the Human Rights Act 1993 shall apply, with such modifications as are necessary, in respect of proceedings under section 82 or section 83 of this Act as if they were proceedings under section 92B, or section 92E, or section 92H of that Act.

[11] On the present facts, ss 92Q to 92W of the HRA have no application. The only relevant provision in Part 4 of the HRA is s 123(9) which provides that a notice of appeal lodged in the High Court against a decision of the Tribunal does not operate as a stay of proceedings unless the Tribunal or High Court so orders:

(9) Notice of appeal shall not operate as a stay of proceedings in respect of the decision to which the appeal relates unless the Tribunal or the High Court so orders.

[12] Otherwise nothing in the Privacy Act or in the relevant provisions of the HRA permits a stay of proceedings or a stay of enforcement. The Tribunal has no jurisdiction approximating High Court Rules, r 17.29.

[13] There presently being no appeal by ACC the provisions of s 123(9) HRA have no application.

[14] It follows that jurisdiction for the Tribunal to recall its decision and to stay the order in question must be found outside the Privacy Act and the HRA.

[15] In this regard ACC has not referred the Tribunal to any statutory provision or decided case in which the asserted jurisdiction is to be found. At its highest the case for ACC is that the Tribunal can act “if the interests of justice so require”.

[16] In our view the argument is untenable. The Tribunal does not have jurisdiction to recall a decision and to stay an order made in a substantive decision. As explained in *Reid v New Zealand Fire Service Commission (Recall Application)* [2012] NZHRRT 27 (29 November 2012) at paras [28] to [51]:

[16.1] The Tribunal does not have express power to recall a decision. Nor does it have inherent power to do so.

[16.2] The remedies of appeal and judicial review protect against error by the Tribunal.

[17] While s 105 of the HRA has not been cited by ACC in support of its argument, the Tribunal in *Reid* at [35] to [39] explained the reasons why that provision does not confer jurisdiction to recall. The Tribunal’s decision now finds support in *Spencer v Attorney-General* [2013] NZHC 2580 at [44]. There Winkelmann J held that s 105 cannot confer jurisdiction on the Tribunal to stay or suspend the effect of an existing remedy.

[18] The application for stay must accordingly be dismissed.

[19] For completeness we add that even had the Tribunal possessed jurisdiction to stay enforcement in the terms expressed in High Court Rules, r 17.29, we would have found that there is no evidence that a substantial miscarriage of justice would be likely to result if the order were enforced. The factual basis for the ACC application remains unexplained.

FORMAL ORDERS

[20] For the reasons stated we have determined that the Tribunal does not have jurisdiction to make the order sought by ACC. The application is dismissed and the decision given on 20 September 2013 is to stand unaltered.

[21] Costs are reserved.

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Mr RPG Haines QC
Chairperson

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Mr MJM Keefe JP
Member

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Dr AD Trlin
Member