

(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF AGGRIEVED PERSON AND OF HIS MOTHER

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF CHAIRPERSON OR OF THE TRIBUNAL

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2016] NZHRRT 34

Reference No. HRRT 065/2016

UNDER SECTION 50 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994

BETWEEN DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND NIU ISAAKO TALENI

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Dr SJ Hickey MNZM, Member

Mr RK Musuku, Member

REPRESENTATION:

Ms N Wills, Director of Proceedings

Mr NI Taleni in person

DATE OF DECISION: 17 October 2016

DECISION OF TRIBUNAL¹

[1] These proceedings under s 50 of the Health and Disability Commissioner Act 1994 were filed on 30 September 2016.

[2] Prior to the filing of the proceedings the parties resolved all matters in issue and the Tribunal is asked to make a consent declaration. The parties have filed:

¹ [This decision is to be cited as: *Director of Proceedings v Taleni* [2016] NZHRRT 34]

[2.1] A Consent Memorandum dated 28 September 2016.

[2.2] An Agreed Summary of Facts, a copy of which is annexed and marked "A".

[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 exercises its jurisdiction and issues:
 - (a) A declaration pursuant to section 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 4(1) by failing to provide services to the aggrieved person with reasonable care and skill; and
 - (b) A final order prohibiting publication of the names of the aggrieved person in this matter and the complainant, the aggrieved person's mother and welfare guardian.
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 declaration sought. The parties request that the agreed summary of facts be published by the Tribunal as an addendum to the decision.
4. The defendant consents to the Tribunal making the above declaration based on the facts set out in the agreed summary of facts, and the non-publication order sought in paragraph 2(b).
5. There is no issue as to costs.
6. 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 paragraph 2(a) 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 breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in respect of Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill.

[5.2] A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the aggrieved person and of his mother and welfare guardian. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

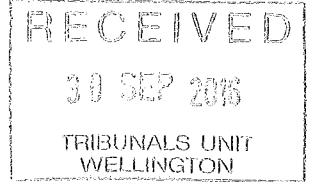
Mr RPG Haines QC
Chairperson

Dr SJ Hickey MNZM
Member

Mr RK Musuku
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 18 October 2016.



BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

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 **NIU ISAAKO TALENI** of Auckland, former Support Worker

Defendant

AGREED SUMMARY OF FACTS



Level 11, 86 Victoria Street, Wellington 6011
PO Box 11934, Wellington 6142
Phone: 04 494 7900 Fax: 04 494 7901

Nicola Wills - Director of Proceedings

AGREED SUMMARY OF FACTS

THE PARTIES

The plaintiff

1. The plaintiff is the Director of Proceedings (“the Director”) exercising statutory functions under sections 15 and 49 of the Health and Disability Commissioner Act 1994 (“the Act”). The plaintiff is acting for and on behalf of the deceased consumer and aggrieved person (“Master R”) through his estate.

The aggrieved person

2. At all material times, Master R was living in Auckland with his mother and welfare guardian (“Mrs R”). He was diagnosed with autism spectrum disorder,¹ intellectual disability, attention deficit hyperactivity disorder, seizure activity, and global developmental delay. He was non-verbal, had complex needs and challenging behaviour, and required constant one-to-one care. Master R was a high flight risk, making constant escape attempts, and he had a fascination with petrol and fire.
3. At the time of his death Master R was 20 years old.

The defendant

4. From June 2009, and at all material times, the defendant, Niu Isaako Taleni (“Mr Taleni”),² was a health care and disability services provider within the meaning of sections 2 and 3 of the Act and provided support worker services to Master R.

¹ Autism spectrum disorder is a complex neuro-behavioural disorder that includes impairments in social interaction, language development, and communication skills, combined with rigid, repetitive behaviours.

² Also known as Isa, Azaako, Izaako, and Esa.

The complainants

5. In July 2013 Mrs R and Mr M³ complained to the Health and Disability Commissioner about services provided to Master R.
6. In June 2015 the Deputy Health and Disability Commissioner (Disability) (appointed under s 9 of the Act) 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.
7. In December 2015 pursuant to s 49 the plaintiff decided to issue proceedings before the Human Rights Review Tribunal.

BACKGROUND

Initial carer support arrangements for Master R

8. From the age of three, Master R received Ministry of Health ("MOH") funded care.
9. Originally this was in the form of respite care, which involved him spending three out of seven days at a residential facility and the rest of the time at home with his mother, Mrs R. During this time, Mr F was Master R's main carer at the respite facility.
10. In 2003 (when Master R was 11) the residential facility withdrew Master R from its respite service because his behaviour became unmanageable.
11. From 2003 the MOH funded Master R's support package through Taikura Trust ("Taikura"), a Needs Assessment and Service Co-ordinator agency ("NASC"). The MOH contracted Taikura to work with

³ Principal of the special school where Master R was a student.

Master R and Mrs R directly so that Mrs R could support her son safely in her home.

12. From 2003 Mrs R chose to use Mr F and his family ("the F family") as Master R's main support workers. This arrangement involved a family network who knew Master R well. Accordingly, Mr F usually provided care to Master R in the F family home. Mrs R had a longstanding professional relationship with Mr F dating back to when Mr F had cared for Master R at the respite facility, prior to Taikura's involvement.
13. For a period of time in 2006 Mr Taleni had assisted Mr F to care for Master R. However, aside from that period, Mr Taleni was not involved in the carer support arrangements for Master R again until September 2012.

Discretionary funding: 2006 – December 2011

14. In 2006 Care Group Ltd, a provider of home-based support services, received a referral from Taikura to provide Master R with back up care, to be funded with discretionary funding ("DF").⁴
15. Care Group Ltd's role was to facilitate and co-ordinate Master R's care arrangements. Mrs R wished to continue the ongoing arrangement with Mr F and his family for the care of Master R. Accordingly, Care Group Ltd independently contracted with Mr F, Mr F's wife, and Mr F's brother in order to provide support to Master R. Care Group administered the carer rosters in consultation with Mrs R and Mr F.

⁴ Discretionary funding is a form of funding used by the MOH where a contracted MOH agency is unable to provide services (usually high needs clients who have complex and unique arrangements to meet the needs of clients and families). In those circumstances, the NASC has discretion to contract a non-MOH contracted agency to provide care. This form of funding later changed to Individualised Funding where clients use total funded hours packages to suit their own individual needs.

16. Normally, the provision of support to clients is done in the client's home. However, in this case the provision of support to Master R was usually provided in the F family home.

Individualised Funding from December 2011

17. In December 2011 Master R's funding package transitioned from DF to individualised funding ("IF"). As the MOH would no longer fund care using DF, Mrs R had the option of moving Master R onto an IF package or having Master R moved to a MOH contracted facility. Master R was a high and complex needs client whose nominated agent, Mrs R, wanted to keep him at home while having a flexible funding arrangement which allowed her to make decisions around the care he received.
18. As Master R's nominated agent for IF, Mrs R wanted to continue to use the F family as Master R's main support workers. Given its historical involvement and detailed knowledge of Master R's condition and incapacity, Mrs R privately engaged Care Group Ltd to assist her to manage Master R's IF package.

Plan while Mr F was away overseas from September 2012

19. Mr F had been and remained Master R's main support worker until September 2012, when he went away. Mr F had arranged for his wife to assume responsibility for looking after Master R during Mr F's absence, but she struggled with looking after him. As a result, Mr Taleni became one of Master R's main support workers while Mr F was away. Mrs R also arranged for her nephew, Mr N (who was also Master R's teacher aid at his special school), to assist with Master R's care during this period.

20. Since 29 June 2009, Care Group Ltd had contracted independently with Mr Taleni for the purposes of providing services to another Care Group client, Master S (another high needs client).
21. Mr Taleni received on-the-job training when he began caring for Master S but had no formal qualifications as a disability support worker.
22. Care Group Ltd paid Mr Taleni \$16.50 an hour (excluding GST) directly as per his independent contract with Care Group Ltd.
23. The care provided to Master R by Mr Taleni between September and November 2012 took place in Mr Taleni's home.

Caring for two clients at one time

24. Care Group Ltd provided support workers on a one-to-one basis; support workers were not rostered on to care for two clients at the same time. Master R was funded for one-to-one care.
25. When Mr Taleni first took over Master R's care while Mr F was away, he was also the main care giver for Master S.
26. Mr Taleni acknowledges that Care Group Ltd told him he was not allowed to look after two clients at the same time.
27. Mr Taleni understood one-to-one meant caring for one client at a time.
28. On 24 October 2012 Care Group Ltd noticed that Mr Taleni was double booked to look after both Master S and Master R on 26 and 27 October 2012. Care Group Ltd advised Master S's father that Mr Taleni was unavailable that weekend but Master S's father understood Mr Taleni had changed his circumstances and was available. On 25 October Care Group Ltd contacted Mr Taleni who advised them that an F family

member who had worked with Master R previously and who was known to Mrs R ("Mr P") would be providing care to Master R while Mr Taleni cared for Master S.

29. In fact, Mr P was someone who had been staying with Mr Taleni for six weeks from September/October. He was not part of the F family and was not qualified to be caring for someone like Master R. He was not known to Mr F or Mrs R.
30. Mr Taleni deliberately misled Care Group Ltd into believing that he was only looking after Master S and that Mr P (an appropriate replacement) was looking after Master R.

EVENTS OF 9 NOVEMBER 2012

31. On Friday 9 November 2012 Mr Taleni was rostered to care for Master S from 2pm to 8pm. Mr Taleni's name was also on the roster to care for Master R from 3pm to 9pm that same day.
32. On Thursday 8 November 2012 Care Group Ltd sent the following text message to Mr Taleni: "Tomorrows shifts – [Master S] 2pm to 8pm. Please confirm thanks." Mr Taleni replied "yes".
33. On Friday 9 November 2012 Care Group Ltd texted Mr Taleni to say: "Wkend shifts – [Master S] 9am to 7pm and [Master R] Sunday 9am to 9pm. Please confirm thanks." Mr Taleni replied: "I got [Master R] today as well aye?" Care Group Ltd replied: "Yes at 3pm" and Mr Taleni then replied: "OK gona go there now".
34. Care Group Ltd assumed Mr P would be caring for Master R on Friday, as Mr Taleni had used this arrangement previously when double rostered, and believed that it was acceptable to Mrs R.

35. On Friday 9 November 2012, Mr P and Mr Taleni's son (who was two years old at the time of the events) were at Mr Taleni's home.
36. At approximately 11am Mr Taleni collected his other client, Master S, from Master S's home.⁵ After shopping at the supermarket, Mr Taleni dropped off Master S at his (Mr Taleni's) home to be looked after by Mr P while Mr Taleni collected Master R at 3pm.
37. Mr Taleni looked after both clients at his home at the same time that afternoon. Neither Master S's nor Master R's family was aware that Mr Taleni was looking after their sons at the same time.
38. Mr Taleni knew that he was not allowed to look after both Master R and Master S at the same time.
39. At approximately 6.30pm, Mr P left Mr Taleni's house with some friends. At approximately 7.30pm, Mr Taleni left Master S and Master R alone and unsupervised in his home watching television so that he could collect food for Master S from Master S's parents. Mr Taleni took his son with him and locked the front door before he left. Mr Taleni locked the house because Master R had a tendency to run off. Mr Taleni acknowledges that he should not have left Masters S and R alone in his house as Master R should always be supervised.
40. While Mr Taleni was out collecting food, a fire broke out at his home. Masters S and R were unable to get out of the house, as they were locked inside. Master S suffered burns and was taken to hospital. Sadly, Master R died in the fire.

⁵ Mr Taleni's shift did not start until 2pm, but he collected Master S early at the request of Mrs S.

EXPERT ADVICE RECEIVED

41. Mr John Taylor, an independent expert with 27 years' experience working within the disability sector, provided advice to HDC in relation to the care provided to Master R.
42. Mr Taylor has the following qualifications: MPhil (Distinction) in Disability Studies, Education and Evaluation; DipPGArts (Distinction) Social Work; BSc in Science and Ethics; and LTh.
43. Mr Taylor's roles have included: being a direct support worker, agency management (over ten years), agency governance, behaviour specialist (over 10 years), national sector roles such as Chair of New Zealand Disability Support Network, National Reference Group for the MOH's New Model, National Leadership Team for Enabling Good Lives, and a range of contracted roles. In addition, Mr Taylor has helped set up four disability support agencies, two provider umbrella groups and two disability related businesses.
44. Mr Taylor advised that Mr Taleni was responsible for the care of very vulnerable clients and failed severely to provide adequate care to Master R on 9 November. In particular, Mr Taleni made some very poor decisions about risk and he knowingly went against the directions of Care Group Ltd by:
 - a. agreeing to continue to support both Masters S and R at the same time with the help of Mr P (who was not a qualified support worker);
 - b. choosing to continue supporting both Masters S and R on his own when Mr P left in the early evening;

- c. continuing with his plan to go and collect Master S's food instead of ringing someone for help;
- d. deciding to leave Masters S and R unsupervised and locked in his house when he went to collect food.

MR TALENI'S BREACH – RIGHT 4(1) OF THE CODE

- 45. Right 4(1) of the Code states: "Every consumer has the right to have services provided with reasonable care and skill."
- 46. Mr Taleni breached Right 4(1) by caring for two vulnerable people (plus his own two-year-old son) at one time against Care Group Ltd's express instructions and when he knew Master R was funded for, and required, one-to-one care. Mr Taleni also breached Right 4(1) by leaving Master R unsupervised and locked in his home with Master S, despite knowing that Master R must always be supervised.
- 47. Mr Taleni deceived the families of Master R and Master S, and Care Group Ltd into believing that there was one-to-one care occurring.
- 48. Mr Taleni accepts that his actions as particularised in the statement of claim and described in this agreed summary of facts amount to a breach of Right 4(1) of the Code.

Nicola Wills
Director of Proceedings

I, Niu Isaako Taleni agree that the facts set out in this Summary of Facts are true and correct.

Date