

Reference No. HRRT 025/2016

UNDER THE PRIVACY ACT 1993

BETWEEN YAN GUO

PLAINTIFF

AND STEPHEN JAMES CULPAN

DEFENDANT

TRIBUNAL: Rodger Haines QC, Chairperson

REPRESENTATION:

Ms Yan Li, agent for plaintiff

Ms HC Stuart for defendant

DATE OF MINUTE: 16 June 2017

**MINUTE OF CHAIRPERSON REGARDING
(1) PLAINTIFF'S REPRESENTATION BY AN AGENT
(2) PLAINTIFF'S SEARCH ORDER APPLICATION¹**

Background

[1] Ms Guo is a former patient of Dr Culpan. On 28 August 2015 she requested a copy of her medical file. It is alleged Dr Culpan did not respond to this request within the timeline permitted by s 40 of the Privacy Act 1993. A second allegation is that when the requested information was released, that release was incomplete. Dr Culpan responds that Ms Guo was provided with a copy of her full medical file on 29 September 2015.

[2] The proceedings against Dr Culpan are linked to associated proceedings brought by Ms Guo before this Tribunal in HRRT 024/2016: *Guo v PricewaterhouseCoopers* and proceedings before the Employment Relations Authority, also against PricewaterhouseCoopers (case 3001443). While in HRRT 024/2016 Ms Guo is represented by counsel, in the proceedings before the Employment Relations Authority she is represented by an agent, being Ms Yan Li.

¹ [This decision is to be cited as *Guo v Culpan (Agent)* [2017] NZHRRT 57]

The question of representation

[3] Ms Li is the mother of Ms Guo. When the present proceedings (HRRT 025/2016) were instituted Ms Guo filed an Authority to Act stating that she appointed Ms Li to act as agent on her behalf. The difficulty which has arisen is that by email dated 29 May 2017 Ms Li asked the Tribunal to provide a Mandarin interpreter for the teleconference. The interpreter was required for her, not Ms Guo who, being a graduate of the University of Auckland and a former exchange scholar at the University of California Berkeley, is fluent in English.

[4] By email dated 2 June 2017 the Case Manager asked Ms Guo and Ms Li to explain why the Tribunal should permit Ms Guo to be represented by a layperson who (apparently) could not participate meaningfully in the proceedings without the proceedings being interpreted into Mandarin.

[5] In reply Ms Guo and Ms Li contended Ms Guo had an unqualified right to be represented by whomsoever she chose and that any nominated agent was entitled to interpreter assistance even though Ms Guo is fluent in English.

[6] In this regard it is correct that s 108(3) of the Human Rights Act 1993 (incorporated into proceedings under the Privacy Act by s 89 of the latter Act) provides that a person who has a right to appear before the Tribunal may appear in person or be represented by his or her counsel or agent. Nevertheless, the Tribunal has the statutory power in s 104(5) of the Privacy Act to regulate its procedure in such manner as the Tribunal thinks fit. Also relevant is s 105 which requires the Tribunal to act according to the substantial merits of the case, without regard to technicalities. In exercising its powers and functions it must also act according to the principles of natural justice, in a manner that is fair and reasonable and according to equity and good conscience. Finally, the Human Rights Review Tribunal Regulations 2002, reg 16(1) gives the Chairperson power to give directions and to do any other things “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”.

[7] Read together these provisions empower the Chairperson to direct that a particular agent not be permitted to represent a party. Without being exhaustive, the grounds for giving such direction would include:

[7.1] Hindering or interfering with the prompt and orderly dispatch of the litigation.

[7.2] Jeopardising one or both parties receiving a fair hearing.

[7.3] The unjustified expenditure of public funds to provide an interpreter for an agent when the party represented by that agent is fluent in English.

[7.4] The agent is to be called as a witness in the case.

[8] It follows a party to proceedings before the Tribunal does not have an unqualified right to the assistance of a particular agent. At all times the Tribunal retains a discretion. But as stated in *R v Leicester City Justices, Ex parte Barrow* [1991] 2 QB 260 (CA) at 291 whether the litigant is said to have a legal right to the assistance of an agent or whether the court or tribunal has a discretion which must be exercised in the litigant's favour unless there are good reasons for not doing so, the result is the same in either case. The right of any court or tribunal to regulate its own procedure is a right to regulate procedure **in the interests of the proper administration of justice**. The real

issue is “fairness or unfairness”. That is whether it is fair or unfair to deny a litigant in person a particular form of assistance.

[9] In the present case the documents filed by or on behalf of Ms Guo are of a high standard and in fluent English. Some of the content is unhelpful, particularly the allegations of improper conduct made against counsel for Dr Culpan (Mr AH Waalkens, QC and Ms HC Stuart). At the teleconference today I questioned Ms Guo and Ms Li about the authorship of the documents. Ms Guo said she is the author of the document headed “My necessary information for my statement of claim” submitted under cover of her email dated 27 June 2016 addressed to the Tribunal. Ms Li said she was the author of the memoranda dated 6 June 2017, 8 June 2017 and 12 June 2017.

[10] When I remarked on the fluency in English evidenced by these memoranda, Ms Li told me that she holds a Masters degree in Education from Auckland University. She graduated in 2002. She explained that her skill in writing in English is far better than her ability to speak English. She had requested the assistance of a Mandarin interpreter just in case she needed help understanding legal terms and concepts.

[11] Because one of the purposes of today’s teleconference was to test the fluency of Ms Guo and Ms Li in both written and spoken English, the teleconference was conducted without an interpreter. My assessment of Ms Guo is that she is fluent in both the written and spoken word. Her mother is a fluent writer of English and speaks English well, if not fluently, as one would expect from a person for whom English is a second language, but who has successfully attained a Masters degree from a New Zealand university.

[12] Against this background, it is possible to return to the question whether Ms Li is to be permitted to represent her daughter in these proceedings. I have decided for the following reasons it would be unfair to deny Ms Guo the assistance of her mother:

[12.1] Ms Guo has suffered from [redacted] illness for some time. [Redacted]. Ms Li is understandably anxious to avoid her daughter experiencing unnecessary stress and for that reason is representing her, not only in the proceedings before the Employment Relations Authority, but also in the present proceedings before the Tribunal.

[12.2] Ms Li has today advised that at the substantive hearing she will be able to manage without a Mandarin interpreter. Consequently, the anticipated expansion of the time required for the hearing will not in fact occur.

[12.3] Ms Stuart says Dr Culpan takes a pragmatic approach to the question of representation. Provided Ms Li’s participation will not prolong the hearing, he raises no objection.

[13] While I am sure Ms Li has a Masters degree in Education, I have asked that she provide (by 23 June 2017) a copy of her diploma or other evidence from Auckland University confirming her graduant status.²

[14] There is one final matter which has been relevant to my decision to permit Ms Li to assist her daughter. The memoranda filed by Ms Li contain a number of allegations against Mr Waalkens and Ms Stuart, alleging improper conduct on their part. I have today explained to Ms Li and to Ms Guo that such allegations are without foundation and

² Such evidence was filed on 16 June 2017.

must end. They have acknowledged this instruction and have agreed to comply with it. This is an issue to which I return shortly.

[Paras [15] to [21] are not relevant and have been redacted]

The request for a search order

[22] Consequent on Ms Guo’s belief Dr Culpan has obstructed the course of justice by allegedly destroying evidence, Ms Li by memorandum dated 15 June 2017 has requested an order authorising computer experts retained by Ms Guo to access and search Dr Culpan’s computer records looking for all communications, emails or documentation about Ms Guo for the period 2009 to 2015.

[23] But in civil litigation a search order can only be made under statutory authority and only after safeguards have been observed such as those found in the search order provisions in Part 33 of the High Court Rules.

[24] The Tribunal has no statutory power to issue an order of the kind sought by Ms Guo and as a creature of statute, has no inherent jurisdiction to fill the gap. It is simply not possible for the Tribunal to lawfully grant the application. In these circumstances the making of the order would be a serious inroad into Dr Culpan’s right under s 21 of the New Zealand Bill of Rights Act 1990 to be secure against unreasonable search or seizure of his person, property or correspondence or otherwise.

[25] In fairness, once this was explained to Ms Li the application was not pursued today. Ms Li said she would take legal advice.

[Balance of *Minute* not relevant and has been redacted]

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Rodger Haines QC
Chairperson
Human Rights Review Tribunal