

Decision No. 21/09

Reference No. HRRT 12/08

BETWEEN

KENT MILO KAISER

Plaintiff

AND

**CHIEF EXECUTIVE,
DEPARTMENT OF LABOUR**

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle Chairperson
Dr A D Trlin Member
Mr S Solomon Member

SUBMISSIONS RECEIVED FROM

Mr A Gane for defendant
Ms E Pond for the Privacy Commissioner

DATE OF DECISION: 31 July 2009

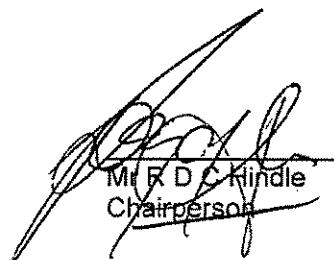
SUPPLEMENTARY DECISION
(Application of s.29(1)(f) of the Privacy Act)

- [1] In our decision dated 26 May 2009 we reserved the issue as to whether s.29(1)(f) of the Privacy Act 1993 provides the defendant (the Department) with grounds to withhold two particular documents from Mr Kaiser. Further submissions have now been received.
- [2] The first document is an email sent by a legal adviser to an investigator on 15 May 2007. Both of the Privacy Commissioner and counsel for the Department agree that the document is different from those at issue in *Reid v Crown Law Office & Privacy Commissioner* (Wellington, High Court, CIV 2008-485-1203, 21 April 2009 per Dobson J) in that the document in this case does not consist of or include communications between opposing parties. We accept that. We agree that the document is a subject of legal professional privilege, and that as a result the defendant had good grounds to withhold it from Mr Kaiser.
- [3] The second document consists of a few scribbled notes taken by counsel for the Department at a hearing on 11 May 2007. The Privacy Commissioner has altered her assessment of this document, and now submits that insofar as it is a verbatim record of what occurred at the court hearing, it is not privileged even though it was a record by one of the lawyers representing the Department in the proceedings. We have been referred to *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 505, *Lambert v Home* [1914] 3 KB 86 and *Robson v Worwick* (1888) 38 ChD 370. We do not, however, see any of those cases as being directly on point. Unlike the documents at issue in *Snorkel*, there can be no doubt that the notes in this case were made for the dominant purpose of the litigation. Nor are the notes in this case anything like the transcripts that were



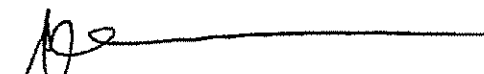
under consideration in *Lambert* or *Robson*. The notes in this case fall well short of being a verbatim record, much less a transcript, of what was said.

- [4] We prefer the submission for the Department, namely that the document at issue is a document created by a lawyer for a party in court proceedings in the course of and for the purpose of dealing with the litigation, and that it is privileged. It follows that, once again, we have come to the conclusion that the Department had good grounds to withhold the document from Mr Kaiser.
- [5] The plaintiff's claims in this proceeding are now dismissed in their entirety.
- [6] If the Department wishes to apply for costs arising out of this litigation then any such application is to be filed and served (together with any supporting materials) within 21 days of the date of this decision. In the unlikely event that there is any issue of costs involving the Privacy Commissioner, again memoranda are to be filed within 21 days of the date of this decision.
- [7] Mr Kaiser (and, if necessary, the Privacy Commissioner) must file and serve any response within a further 21 days:
- [8] The issue of costs in these proceedings under HRRT 12/08 will be dealt with on the basis of those submissions, and without any further hearing.
- [9] In case it is necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable as he considers appropriate.


Mr F D C Hindle
Chairperson


Dr A D Trlin
Member




Mr S R Solomon
Member