



KEEPING SIGHT

When a school board issued a warrant with a trespass notice, he went all the way to the Supreme Court to find out more about it. While not an employment dispute, similar considerations apply when a person is subject to disciplinary action, says Paul Robertson.

IT STARTED SMALL; A

vagrant was thought to be using the school swimming pool, toilets and showers. A complaint to the Board of Trustees led to a trespass notice being issued. The man's efforts to find out more about the notice went all the way to the Supreme Court. Was he entitled to know the reason why it had been served and the names of the complainants?

Although this dispute did not involve an employment dispute, similar considerations apply when a person subject to disciplinary action asks for the identify of those making complaints.

For some years, Mr Fehling had been living rough around Hari Hari on the West Coast of the South Island. A conscientious objector from Germany, Mr Fehling identifies strongly as an environmentalist and values his individual freedom. He first lived in a tent, but then purchased a van which he often parked on land adjoining the school because of his friendship with a teacher at the school who occupied a school house.

Mr Fehling was marked as an 'outsider' by locals because of his

unusual accent, his strong beliefs and his practice of wearing his nightgown over his clothes during the day. The feelings sometime escalated into violence; windows in his van had been broken.

In January 2009, Mr Fehling was in his caravan lawfully parked on the land by the school house. Without the knowledge of the teacher, he was served by the police with a trespass notice signed by the school caretaker and was arrested in relation to an outstanding warrant.

It being a holiday, he was transported to Christchurch and kept in the cells for three days before being released. All charges against him were dropped. He maintained a hunger strike over the period he was in jail.

On his release he asked the school to provide reasons for the issue of the trespass notice. The school refused. After a complaint to the Ombudsman, he was told that the reason was that he had been using the pool, showers and toilets at the school. Mr Fehling strenuously denied these allegations. He asked for the names of the individuals who had made the complaints. The school

refused. Mr Fehling applied to the Privacy Commissioner and the Human Rights Tribunal.

After some setbacks, including an unsuccessful application to the Tribunal and having lodged appeals with the High Court and Supreme Court, the Tribunal finally made an award in his favour.

The Board relied upon s 27 (1) (d) (disclosure of the information would likely endanger the safety of any individual) and 29(1)(a) of the Privacy Act (disclosure of the information would involve the unwarranted disclosure of the affairs of another person).

The Tribunal concluded that Mr Fehling had not used the school facilities and had not acted unlawfully or improperly. Mr Fehling had been subject to a substantial injustice. The effect of the notice was to 'run him out of town'. He posed no threat; the fears expressed by school staff were unwarranted. Because no individual was 'likely' to be endangered, the first ground relied upon by the Board was not upheld.

For the second ground the Tribunal accepted that

the name of an informant is relevant to the 'affairs of another person'. Whether disclosure is unwarranted involves weighing a range of factors, including whether the informants had a reasonable expectation that their names would not be released; whether Mr Fehling needed to know the identity of the informants to clear his name, and whether disclosing the names would cause harm.

The Tribunal held "... by a clear and decisive margin that the school has not established the disclosure of the identity of the persons who made complaints ... would amount to an unwarranted disclosure of their affairs." The Tribunal concluded that there had been interference with the privacy of Mr Fehling, issued a declaration and awarded damages of \$10,000.

Fehling v South Westland Area School [2012] NZHRRT 15

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