

Reference No. HRRT 017/2012

UNDER THE HUMAN RIGHTS ACT 1993

IN THE MATTER OF AN APPLICATION BY THE DEFENDANT  
THAT THE TRIBUNAL DECLINE  
JURISDICTION

BETWEEN PRESLEY JOHN PETERS

PLAINTIFF

AND WELLINGTON COMBINED SHUTTLES  
LIMITED

FIRST DEFENDANT

AND WELLINGTON COMBINED TAXIS  
LIMITED

SECOND DEFENDANT

AT AUCKLAND

BEFORE:  
Mr RPG Haines QC, Chairperson  
Mr GJ Cook JP, Member  
Mr RK Musuku, Member

REPRESENTATION:  
Mr Peters in person  
Ms A Pazin for Defendants

DATE OF DECISION: 28 May 2013

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**DECISION OF TRIBUNAL DECLINING JURISDICTION**

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**Introduction**

[1] In these proceedings filed on 9 August 2012 it is alleged that the defendants contravened s 63 (racial harassment) and s 65 (indirect discrimination) of the Human Rights Act 1993. In addition to filing a statement of reply denying these allegations the

defendants submit that the Tribunal has no jurisdiction to hear the case because neither the allegation of racial harassment nor the allegation of indirect discrimination were the subject of a complaint by Mr Peters to the Human Rights Commission in terms of s 76(2)(a) of the Act. The essential point raised by the jurisdiction objection is whether the preconditions to the bringing of proceedings before the Tribunal have been satisfied by Mr Peters.

### **Statutory scheme for making complaints and bringing proceedings**

**[2]** Part 3 of the Human Rights Act prescribes the statutory procedure for the resolution of disputes about compliance with Part 1A and Part 2 of the Act. Emphasis is placed on the resolution of disputes by way of mediation. Access to the Tribunal is permitted only after a complaint has been lodged with the Human Rights Commission. For present purposes it is necessary to set out only ss 75 and 76 of the Act:

#### **75 Object of this Part**

The object of this Part is to establish procedures that—

- (a) facilitate the provision of information to members of the public who have questions about discrimination; and
- (b) recognise that disputes about compliance with Part 1A or Part 2 are more likely to be successfully resolved if those disputes can be resolved promptly by the parties themselves; and
- (c) recognise that, if disputes about compliance with Part 1A or Part 2 are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available to the parties to those disputes; and
- (d) recognise that the procedures for dispute resolution under this Part need to be flexible; and
- (e) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
- (f) recognise that difficult issues of law may need to be determined by higher courts.

#### **76 Functions of Commission under this Part**

- (1) The primary functions of the Commission under this Part are—
  - (a) to provide information to members of the public who have questions about discrimination; and
  - (b) to facilitate the resolution of disputes about compliance with Part 1A or Part 2, by the parties concerned, in the most efficient, informal, and cost-effective manner possible.
- (2) The Commission has, in order to carry out its function under subsection (1)(b), the following functions:
  - (a) to receive and assess a complaint alleging that there has been a breach of Part 1A or Part 2, or both;
  - (b) to gather information in relation to a complaint of that kind (including one referred back to it by the Director under section 90(1)(b), or the Tribunal under section 92D) for the purposes of paragraphs (c) and (d);
  - (c) to offer services designed to facilitate resolution of the complaint, including information, expert problem-solving support, mediation, and other assistance;
  - (d) to take action or further action under this Part in relation to the complaint, if the complainant or aggrieved person wishes to proceed with it, unless section 80(2) or (3) applies;
  - (e) to provide information gathered in relation to a complaint to the parties concerned.

**[3]** The vehicle which triggers the Commission's statutory functions is "a complaint" alleging that there has been a breach of Part 1A or Part 2, or both. Before gathering information about a complaint the Commission must give notice to the complainant and to the person against whom the complaint is made of the Commission's intention to gather information and must provide them with general information about their rights and obligations under the Act, the processes that apply to complaints under the Act and other services that may help the parties to a complaint secure a settlement of the matter.

See s 81. When the Commission gathers information about a complaint that process must be conducted in private and information disclosed at a dispute resolution meeting must be kept confidential. See ss 82, 85, 86 and 87. If the Commission decides to take no action in relation to a complaint, it must inform the complainant and the person against whom the complaint is made of that decision and of the reasons for that decision. See s 80(4).

**[4]** The point is that throughout the dispute resolution process the person against whom the complaint is made must have knowledge of the complaint and must be given an opportunity to be heard.

**[5]** Should the Commission decide to take no action in relation to a complaint the complainant can then bring civil proceedings before the Tribunal. See s 92B(1):

**92B Civil proceedings arising from complaints**

(1) If a complaint referred to in section 76(2)(a) has been made, the complainant, the person aggrieved (if not the complainant), or the Commission may bring civil proceedings before the Human Rights Review Tribunal—

(a) for a breach of Part 1A (other than a breach of Part 1A that is an enactment, or an act or omission authorised or required by an enactment or otherwise by law), against the person or persons alleged to be responsible for the breach:

(b) for a breach of Part 1A that is an enactment, or an act or omission authorised or required by an enactment or otherwise by law, against the Attorney-General, or against a person or body referred to in section 3(b) of the New Zealand Bill of Rights Act 1990 alleged to be responsible for the breach:

(c) for a breach of Part 2, against the person or persons alleged to be responsible for the breach.

**[6]** It is to be noted, however, that s 92B(1) only permits civil proceedings if:

... a complaint referred to in section 76(2)(a) has been made ...

**[7]** The effect of this provision is that the Tribunal only has jurisdiction over whatever “complaint” was lodged with the Commission ie the complaint in relation to which the person complained about has had notice and further, has had an opportunity to be heard. Proceedings before the Tribunal are not of an open-ended nature, permitting a general inquiry into all Part 1A and Part 2 issues about which the complainant may feel aggrieved. Rather, the jurisdiction of the Tribunal is confined to the “complaint” which was lodged with the Commission at first instance. A not dissimilar system operates under the Privacy Act 1993 and in particular, ss 82(1) and 83 of that Act. See *L v T* (1998) 5 HRNZ 30 (Morris J, A Knowles, GDS Taylor) at 35. A recent example of those provisions in action is seen in *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 (8 April 2013) at [5] to [10].

**[8]** On the filing of proceedings in the Tribunal the Commission provides to the Tribunal a letter identifying the nature of the complaint which had been lodged with the Commission. This assists in determining whether the Tribunal has jurisdiction over the particular matter. The letter does not have any statutory basis and in that respect is informal. It is rare for a Commission letter to be challenged. The present case is an exception.

**[9]** We turn now to the facts.

## The facts

[10] The statement of claim alleges that the defendants have contravened s 63 (racial harassment) and s 65 (indirect discrimination) of the Act.

[11] The Act addresses race matters in three separate and distinct provisions:

[11.1] First, race is listed as a prohibited ground of discrimination in s 21(1)(f).

[11.2] Second, racial disharmony is addressed in s 61.

[11.3] Third, racial harassment is addressed in s 63.

Both racial disharmony and racial harassment appear under the heading of “Other forms of discrimination” and just as they are differentiated as between themselves, they are distinct from racial discrimination. The differences do not need to be explored in the present case.

[12] The important point is that where allegations involving race are made, the person complained against is entitled to know whether the complaint is one of discrimination on the grounds of race or whether the complaint is that the person has breached s 61 (racial disharmony) or has breached s 63 (racial harassment).

[13] The present challenge to the Tribunal’s jurisdiction is based on the following evidence:

[13.1] When the Commission wrote to Mr Paul Johannson, Operations Manager of Wellington Combined Taxis Ltd on 14 April 2010 advising that the Commissioner had received a complaint from Mr Peters, it was unambiguously stated that the complaint received was one of race discrimination in the employment situation (s 22 of the Act). The letter relevantly read:

Further to our telephone conversation today, I write to advise that the Commission has received a complaint from Mr John Peters, against you and Wellington Combined Taxis of race discrimination (section 22 of the Human Rights Act 1993) ...

...

I note that Mr Peter’s complaint raises issues of a commercial nature also. I have advised Mr Peters that these issues are not able to be addressed by the Commission as its jurisdiction is to progress complaints of unlawful discrimination only.

[13.2] After the Commission decided that it would take no further action in relation to the complaint made by Mr Peters, Mr Peters approached the Director of Human Rights Proceedings with a request that the Director provide legal representation for Mr Peters’ intended proceedings before the Tribunal. Mr Peters has provided the Tribunal with a copy of the Director’s decision dated 17 August 2010 declining the request. After recording that he had obtained from the Commission its file relating to the complaint lodged by Mr Peters, the Director wrote:

14 The difficulty is that your complaint to the Commission was not notified to [Paul Johannson] and [Wellington Combined Shuttles Ltd] as one of racial harassment; it was notified as one of race (ethnicity) discrimination. Proceedings may only be commenced to the Tribunal for matters that have first been the subject of a complaint to the Commission. It may seem hair-splitting to differentiate race discrimination from racial harassment, when the events relate to the same business relationship –

however racial harassment is a separate category of discrimination under the HRA. If proceedings were issued alleging racial harassment, when that had not been notified to PJ and WCSL, then I imagine that the Tribunal would decline jurisdiction to hear the matter until a complaint had been made to the Commission and notification of that complaint had occurred.

**[14]** On this evidence it is submitted it is clear Mr Peters did not lodge with the Commission complaints of racial harassment and of indirect discrimination.

**[15]** Mr Peters, however, relies on a letter from the Human Rights Commission dated 20 August 2012 which is in the following terms:

Thank you for your letter of 10 August 2012.

On 18 December 2009 John Peters complained to the Commission that he had been discriminated against and racially harassed by Paul Johnansson and Wellington Combined Shuttles Ltd.

In April 2010 the Commission decided that it would take no further action in relation to the complaint. It had not been possible for the parties to agree to attend mediation.

On 29 June 2011 Presley John Peters complained to the Commission that he had been racially harassed by Wellington Combined Shuttles.

In June 2012 the Commission decided that it would take no further action in relation to the complaint. It had not been possible for the parties to agree to attend mediation.

Please do not hesitate to contact me should you require any further information.

**[16]** Based on this document the submission is that on two separate occasions, namely 18 December 2009 and 29 June 2011, Mr Peters made complaints of racial harassment (though it is to be noted the Commission letter makes no mention of a complaint of indirect discrimination).

### **Directions as to the filing of evidence**

**[17]** A teleconference was convened on 27 September 2012 to discuss the procedure by which the jurisdiction objection was to be determined. It was agreed that the hearing would be on the papers. The Chairperson also identified the evidentiary issues which the parties, particularly Mr Peters, would need to address.

**[18]** In the *Minute* issued by the Chairperson at the conclusion of that teleconference it was noted at [7] and [9] that in determining the jurisdiction objection the Tribunal would be required to compare the nature and content of the complaint made to the Commission against the nature and content of the complaint made in the statement of claim filed by Mr Peters. The Chairperson recorded that the Tribunal did not then have the complaints of 18 December 2009 and 29 June 2011 referred to in the Commission's letter. The Chairperson strongly recommended that Mr Peters obtain the documents as a matter of urgency as they were likely to be of critical importance to the jurisdiction objection. Among the directions made were the following:

**[12.1]** The evidence and submissions in support of the jurisdiction objection made by Wellington Combined Shuttles Ltd and Wellington Combined Taxis Ltd are to be filed and served by 5pm on Friday 12 October 2012. Should the defendants so elect they will be entitled to rely entirely on the submissions already filed in the form of the letter from Buddle Findlay dated 5 September 2012.

**[12.2]** The evidence and submissions by Mr Peters in opposition to the jurisdiction objection are to be filed and served by 5pm on Friday 2 November 2012.

[12.3] Any evidence and submissions in reply by Wellington Combined Shuttles Ltd and Wellington Combined Taxis Ltd are to be filed and served by 5pm on Friday 16 November 2012.

[12.4] The jurisdiction objection is thereafter to be determined by the Tribunal following a hearing on the papers.

### **The evidence filed by Mr Peters**

[19] On 1 November 2012 Mr Peters sent to the Tribunal and to the solicitors for the defendants an email in the following terms:

Please find attached the following documents in response to the above case, HRRT017/2012, Presley John Peters v Wellington Combined Shuttles Limited and Wellington Combined Taxis Limited.

1. Response by the plaintiff dated 31<sup>st</sup> of October 2012
2. Annex (1) Lesley Ashworth's Human Rights Commission's email dated the 26<sup>th</sup> of April 2010
3. Annex (2) Complaint made to the Human Rights Commission dated the 18<sup>th</sup> of December 2009
4. Annex (3) Robert Hallowell's Letter dated the 20<sup>th</sup> of August 2012
5. Annex (4) Medical Reports for Presley John Peters.

Please advise via return email ASAP when you receive these documents. If there is a problem opening any of these documents please advise and I shall forward another copy to you. Please bear in mind that 2<sup>nd</sup> of November 5.00pm Friday is the cut off time for submission, if there is anything required please email me.

[20] By email dated 1 November 2012 Ms Pazin for the defendant companies advised Mr Peters that (inter alia) Annex (2), being the complaint to the Human Rights Commission dated 18 December 2009, could not be accessed. Mr Peters was asked to email the document. To this Mr Peters replied on 1 November 2012:

The documents you received are the only ones that you should have ...

[21] On 2 November 2012 the Secretary to the Tribunal also wrote to Mr Peters drawing attention to the fact that Annex 2 had not been attached. The Secretary sought confirmation from Mr Peters that he did not intend submitting the missing document.

[22] Mr Peters does not appear to have replied to this enquiry. He did, however, by email dated 2 November 2012 addressed to Ms Pazin state:

... regarding the complaint, it was requested from the Human Rights Commission, and Robert Hallowell, has sent a letter summarising the complaint dates and the reason for the complaint. Please refer his letter which states dates outcomes and reasons. That letter was sent to you.

### **The submission for the defendants**

[23] The defendant's submit:

[23.1] In the absence of any copy of the complaints dated 18 December 2009 and 29 June 2011, Mr Peters relies on the Commission's letter of 20 August 2012 which describes the complaints as "racial harassment".

[23.2] This description conflicts with that found in the Commission's letter to the Operations Manager of Wellington Combined Taxis Ltd dated 14 April 2010 ("race discrimination (section 22 of the Human Rights Act 1993)").

**[23.3]** The letter from the Director of Human Rights Proceedings dated 17 August 2010 also records that the complaint (as at 2010) was one of “race discrimination”, not of racial harassment.

**[23.4]** The Commission’s letter of 14 April 2010 combined with the Director’s letter of 17 August 2010 establish that the complaint was of unlawful discrimination, not one of racial harassment or of indirect discrimination.

**[23.5]** It follows that the reference in the Commission’s letter dated 20 August 2012 to a complaint of “racial harassment” is inaccurate.

**[23.6]** Mr Peters not having established that he made to the Commission a complaint of racial harassment or a complaint of indirect discrimination, he has failed to establish jurisdiction for the Tribunal to entertain these proceedings.

**[23.7]** It is significant that in his email submissions of 1 November 2012 Mr Peters explicitly accepts that his 18 December 2009 and 29 June 2011 complaints to the Commission were in the same terms:

In June 2011, Presley John Peters again complained to the Human Rights Commission about the continued racial harassment. This was the same complaint as the original one of 2009 nothing had changed in the complaint ...

**[23.8]** As it is clear that the 18 December 2009 complaint was not of racial harassment, the subsequent complaint of 29 June 2011 was equally not one of racial harassment.

## **Discussion**

**[24]** The Commission letter dated 20 August 2012 describes the two complaints received from Mr Peters as complaints that he had been “racially harassed”. The complaint dates are given as 18 December 2009 and 29 June 2011.

**[25]** There is a clear inconsistency between the Commission’s 20 August 2012 categorisation of the 18 December 2009 complaint as “racial harassment” on the one hand and the more contemporaneous letter dated 14 April 2010 sent by the Commission mediator to the Operations Manager of Wellington Combined Taxis Ltd on the other. That letter, in at least four separate paragraphs describes the complaint as one of unlawful discrimination on the grounds of race. There is inconsistency also with the detailed and careful letter dated 17 August 2010 from the Director of Human Rights Proceedings (written after the Director had taken into account the Commission’s file) in which it is recorded that the complaint was one of race discrimination, not racial harassment. Indeed the Director took the point that because the complaint to the Commission had not been notified to the defendants as one of racial harassment, proceedings before the Tribunal in which racial harassment was alleged would be faced with a jurisdiction challenge.

**[26]** Mr Peters has been given every opportunity to produce to the Tribunal his complaint of 18 December 2009 but has failed to take this step. Rather, he has relied on the Commission’s letter of 20 August 2012. That letter does not have statutory recognition and is no more than prima facie evidence of the nature of the complaint received by the Commission. That evidence can be displaced by other evidence. In the present case that other evidence (in the form of the mediator’s letter dated 14 April 2010 and the Director’s opinion of 17 August 2010) more than displaces the Commission’s letter of 20 August 2012 and we are satisfied that the 18 December 2009 complaint was of race

discrimination in terms of s 21 of the Act. It was not one of racial harassment in terms of s 63 of the Act.

**[27]** The Commission letter of 20 August 2012 does make reference to a further complaint made by Mr Peters on 29 June 2011. Here neither the mediator's letter nor the Director's opinion are of direct assistance as they predate 29 June 2011. Nevertheless, the error made by the Commission in relation to the complaint of 18 December 2009 undermines to a substantial degree faith in the description of the 29 June 2011 complaint as being about racial harassment. It would have been an easy matter for Mr Peters to have produced to the Tribunal a copy of his complaint of 29 June 2011. It would have established unambiguously the nature and terms of his complaint. Mr Peters, however, has filed no such evidence. He has instead stated that both complaints were the same. Taking the foregoing into account we are not prepared to accept the Commission letter at face value in relation to the second complaint. We therefore do not accept that the complaint made to the Commission on 29 June 2011 was one of racial harassment.

**[28]** As there is no direct, substantive or reliable evidence that Mr Peters ever made a complaint of racial harassment or indirect discrimination under s 76(2)(a) of the Act, the Tribunal has no jurisdiction under s 92B(1)(c) of the Act to hear this claim.

#### **Order**

**[29]** The order of the Tribunal is that these proceedings are dismissed for want of jurisdiction.

.....  
**Mr RPG Haines QC**  
Chairperson

.....  
**Mr GJ Cook JP**  
Member

.....  
**Mr RK Musuku**  
Member