

Reference No. HRRT 028/2012

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN FRIEDRICH JOACHIM FEHLING

PLAINTIFF

AND DOUGLAS JOHN APPLEBY

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Dr SJ Hickey, Member

REPRESENTATION:

Mr FJ Fehling in person

Mr MM Bell for defendant

DATE OF DECISION: 1 May 2014

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**DECISION OF TRIBUNAL ON THE EFFECT OF MR APPLEBY'S BANKRUPTCY**

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**Background**

[1] Mr Fehling's statement of claim was filed on 19 November 2012. The document is not a model of clarity and the pleadings are not entirely clear. It would appear, however, that two claims are advanced:

[1.1] That Mr Appleby breached the Human Rights Act 1993 (HRA) in respect of s 65 (indirect discrimination). The prohibited grounds of discrimination relied on are those in HRA s 21(1)(c), (d), (g), (j) and (k). Mr Fehling seeks a declaration that Mr Appleby breached Part 2 of the HRA. He also seeks damages for humiliation, loss of dignity and injury to feelings.

[1.2] That Mr Appleby committed an offence under HRA s 134(1)(a) and (b). Mr Fehling seeks a "declaration of offence" and a fine of \$3,000.

[2] Following unsuccessful strike out and recusal applications filed by Mr Appleby the case is set down for hearing at Hokitika on 26 and 27 May 2014.

### **Mr Appleby's bankruptcy**

[3] By memorandum dated 17 March 2014 Mr Bell gave notice that on 10 February 2014 at the Greymouth High Court Mr Appleby was declared bankrupt on the application of the ASB Bank. An Insolvency Summary Report (undated but printed on 17 February 2014) attached to Mr Bell's memorandum contains an entry which reads:

Unsecured creditor with POD           \$2,037,703.50.

[4] Mr Bell sought the further directions of the Tribunal in light of this information.

[5] In response Mr Fehling has submitted that s 76 of the Insolvency Act 2006 has no application to the proceedings before the Tribunal.

[6] In further submissions Mr Bell has made three points:

[6.1] Section 76(1) of the Insolvency Act applies.

[6.2] Mr Fehling has not made any application to continue the proceedings under s 76(2).

[6.3] Even if a s 76(2) application were to be made it should be declined in the Tribunal's discretion.

### **Discussion**

[7] The general rule is that on adjudication, all proceedings to recover any debt provable in bankruptcy are halted. However, the High Court has a discretion to allow any proceedings already commenced before adjudication to continue. Section 76 of the Insolvency Act 2006 provides:

#### **76 Effect of adjudication on court proceedings**

- (1) On adjudication, all proceedings to recover any debt provable in the bankruptcy are halted.
- (2) However, on the application by any creditor or other person interested in the bankruptcy, the court may allow proceedings that had already begun before the date of adjudication to continue on the terms and conditions that the court thinks appropriate.

[8] The meaning of "provable debt" is given in s 231:

#### **231 Meaning of provable debt**

- (1) A **provable debt** is a debt or liability that a creditor of the bankrupt may prove in the bankruptcy.
- (2) A **creditor's claim form** is the document that a creditor submits to the Assignee for the purpose of proving the debt.
- (3) A debt is proved when it is admitted by the Assignee.

[9] As to what debts are provable debts, s 232 states:

#### **232 What debts are provable debts**

- (1) A provable debt is a debt or liability that the bankrupt owes—
  - (a) at the time of adjudication; or
  - (b) after adjudication but before discharge, by reason of an obligation incurred by the bankrupt before adjudication.

- (2) A fine, penalty, sentence of reparation, or other order for the payment of money that has been made following any conviction or order made under section 106 of the Sentencing Act 2002—
- (a) is not a provable debt; and
  - (b) is not discharged when the bankrupt is discharged from bankruptcy.

**[10]** In the result, before the proceedings brought by Mr Fehling are “halted” by s 76 it must be shown that his proceedings have been brought to recover a debt provable in the bankruptcy. That is, to recover a debt or liability “that the bankrupt owes” at the time of adjudication or after adjudication (but before discharge) by reason of an obligation incurred by the bankrupt (Mr Appleby) before adjudication.

**[11]** The obstacle to the application of both limbs of s 232 is that at the present time Mr Appleby does not “owe” anything arising out of the proceedings brought by Mr Fehling. This is because:

**[11.1]** No breach of the HRA has yet been proved by Mr Fehling. The liability hearing is in the future (26 and 27 May 2014). Determination of liability will follow at some later date when the Tribunal gives its decision.

**[11.2]** An award of damages under HRA s 92M can be made only if the relevant harm is established by evidence. Even then the making of an award is discretionary.

**[12]** In these circumstances we are not satisfied that the monetary claims made by Mr Fehling are presently “a debt or liability that the bankrupt owes” in terms of the two timelines specified by s 232 of the Insolvency Act. Our decision is supported by *Kaye v Auckland District Law Society* [1998] 1 NZLR 151 at 158.

**[13]** As to the claim for a declaration that an offence has been committed and that a fine be imposed, the Tribunal has no jurisdiction over criminal matters and cannot impose a fine.

### **Alternative ground for decision**

**[14]** Even if we are wrong in holding that the monetary claims made by Mr Fehling are not halted by s 76 of the Insolvency Act, such halting can apply only to the recovery of money. Section 76 does not have the effect of halting Mr Fehling’s proceedings insofar as he seeks declaratory relief.

### **Decision**

**[15]** For these reasons we conclude that the proceedings are not affected by Mr Appleby’s bankruptcy. The hearing is to remain scheduled for hearing on 26 and 27 May 2014 at Hokitika.

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**Mr RPG Haines QC**  
Chairperson

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**Mr GJ Cook JP**  
Member

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**Dr SJ Hickey**  
Member