IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 2**

	Reference No. HRRT 041/2016
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**JANETTE KATHERINE MCKEOGH**
	First Plaintiff
AND	**DONNA ANNE LA FAUCI**
	Second Plaintiff
AND	**MALCOLM LEON LARSEN**
	Third Plaintiff
AND	**ATTORNEY-GENERAL OF NEW ZEALAND IN RESPECT OF THE MINISTRY OF SOCIAL DEVELOPMENT**
	Defendant

AT WELLINGTON – ON THE PAPERS

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Dr SJ Hickey MNZM, Member

REPRESENTATION:
Mr RW Kee, Director of Human Rights Proceedings and Mr G Robins for plaintiffs
Mr PT Rishworth QC and Ms D Harris for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **24 January 2017**

DECISION OF TRIBUNAL DECLINING TO REFER COMPLAINT BACK TO HUMAN RIGHTS COMMISSION[1]

[1] [This decision is to be cited as: *McKeogh v Attorney-General (Referral Back to Human Rights Commission)* [2017] NZHRRT 2.]

Introduction

[1] By statement of claim filed on 21 July 2016 Ms McKeogh, Ms La Fauci and Mr Larsen allege that the spousal deduction from New Zealand Superannuation required by s 70(1) of the Social Security Act 1964 discriminates against them on the basis of family status, thereby breaching their right to freedom from discrimination under s 19 of the New Zealand Bill of Rights Act 1990 and is not able to be justified under s 5 of that Act. The only remedies sought are a declaration of inconsistency under s 92J of the Human Rights Act 1993 and costs.

[2] By statement of reply filed on 24 August 2016 the Attorney-General denies the plaintiffs' claim in its entirety and says:

> **[2.1]** The plaintiffs are not disadvantaged by s 70(1) of the Social Security Act nor is the application of this provision discriminatory on the grounds of family status, either in purpose or effect; and
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> **[2.2]** Even if the treatment of the plaintiffs under s 70 was a prima facie limit on the right to be free from discrimination, it would be a justified limit and as such, not contrary to s 19 of the Bill of Rights.
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> **[2.3]** It is intended a more comprehensive statement of reply will be filed in due course.

The application

[3] The Attorney-General by application dated 19 December 2016 now seeks a direction from the Tribunal that this matter be referred back to the Human Rights Commission under s 92D of the Human Rights Act 1993 for mediation to occur.

[4] In support of the application the Attorney-General submits:

> **[4.1]** Section 92D of the Act imposes a mandatory duty on the Tribunal to consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and it must refer the complaint to the Commission unless satisfied that attempts at resolution of the complaint by the parties and the Commission will not contribute constructively to resolving the complaint or will not, in the circumstances, be in the public interest or will undermine the urgent or interim nature of the proceedings.
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> **[4.2]** These claims did not progress to mediation by the Human Rights Commission.
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> **[4.3]** Mediation will enable the parties and their counsel to clarify, check and understand fully the facts of the case, to discuss constructively the issue of alleged discrimination, the law and its application to the facts of the case and to better assess their respective positions and the prospects of success, and to better prepare for litigation.
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> **[4.4]** The proceeding is not brought on an urgent basis.
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> **[4.5]** There are no interim issues that will be undermined by an interim stay for the purposes of mediation.

Position taken by the plaintiffs

[5] By notice of opposition dated 23 December 2016 the plaintiffs oppose the application on the following grounds:

> **[5.1]** The Ministry of Social Development has never previously offered to attend mediation with a view to resolving the complaint. Mediation has only ever been offered on the basis that the Ministry is prepared to "explain" its position. The current offer is in similar vein and arises some five months after the claim was filed. The plaintiffs do not consider mediation will have any utility.
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> **[5.2]** Further attempts at resolution by the parties and the Commission will not contribute constructively to resolving the complaint:
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> > **[5.2.1]** In correspondence and in his statement of reply the Attorney-General has expressly denied that s 70(1) of the Social Security Act has any discriminatory effect and, even if it is prima facie discriminatory, it is justified under s 5 of the Bill of Rights.
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> > **[5.2.2]** The Attorney-General has never resiled from or softened that position. There is no suggestion he is willing to agree to a declaration of inconsistency with respect to s 70(1). Apart from costs, that is the only remedy the plaintiffs seek.
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> > **[5.2.3]** The factual and legal issues are well understood, both through the pleadings and in correspondence between the parties and the Human Rights Commission stretching back several years.
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> > **[5.2.4]** The purposes for which the Attorney-General seeks mediation are inappropriate. With no prospect of resolution of the complaint, mediation is not (or no longer) the appropriate forum in which the parties and their counsel can explore factual and legal issues and to prepare for litigation. Should the Attorney-General wish to clarify any aspect of the plaintiffs' claim, his counsel are free to contact counsel for the plaintiffs. This they have not done.
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> **[5.3]** The parties are simply too far apart for mediation to be of any utility.

Discussion

[6] The mechanism provided by the Human Rights Act for the resolution of complaints of unlawful discrimination is one of dispute resolution (including mediation). See for example the decision of the Tribunal in *MacGregor v Craig* [2016] NZHRRT 6 at [17] to [27]. As noted at [27] of that decision the centrality of dispute resolution (including mediation) to the Part 3 process is underlined by the fact that when proceedings under s 92B are brought before the Tribunal, the Tribunal is under a mandatory duty to consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and must refer the complaint back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission will not be productive. Section 92D provides:

> **92D Tribunal may refer complaint back to Commission, or adjourn proceedings to seek resolution by settlement**
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> (1) When proceedings under section 92B are brought, the Tribunal—

(a) must (whether through a member or officer) first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise); and
(b) must refer the complaint under section 76(2)(a) to which the proceedings relate back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission—
(i) will not contribute constructively to resolving the complaint; or
(ii) will not, in the circumstances, be in the public interest; or
(iii) will undermine the urgent or interim nature of the proceedings.

(2) The Tribunal may, at any time before, during, or after the hearing of proceedings, refer a complaint under section 76(2)(a) back to the Commission if it appears to the Tribunal, from what is known to it about the complaint, that the complaint may yet be able to be resolved by the parties and the Commission (for example, by mediation).

(3) The Tribunal may, instead of exercising the power conferred by subsection (2), adjourn any proceedings relating to a complaint under section 76(2)(a) for a specified period if it appears to the Tribunal, from what is known about the complaint, that the complaint may yet be able to be resolved by the parties.

[7] The parties are agreed that s 92D(1)(b)(iii) has no application in the present context.

[8] In addressing the criteria in s 92D(1) and (2) it is necessary to take into account the attempts at resolution which preceded the filing of proceedings in the Tribunal.

[9] In that regard the Human Rights Commission, by letter dated 16 August 2016, advises:

> **[9.1]** In the case of Ms McKeogh her complaint was notified to the Ministry on 16 November 2015. On 17 February 2016 the Ministry replied to the effect that in its view the spousal deduction from New Zealand Superannuation was not discriminatory and even if it was a prima facie limit on the right to be free from discrimination, it was a justified limitation. The Ministry did not offer to mediate. The Commission accordingly closed its file on 26 February 2016.
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> **[9.2]** In the case of Ms La Fauci her complaint was notified to the Ministry on 28 November 2015. On 17 March 2016 the Ministry replied in terms identical to its response in respect of the complaint by Ms McKeogh. Again the Ministry did not offer to mediate and the Commission closed its file on 23 March 2016.
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> **[9.3]** In the case of Mr Larsen the complaint was notified to the Ministry on 7 August 2014. On 4 September 2014 the Ministry replied in the same terms it would later use in its response to the complaints by Ms McKeogh and Ms La Fauci. On 18 September 2014 the Ministry did, however, agree to meet in mediation "to explain the policy". Mr Larsen responded he did not wish to attend such a mediation. The Commission therefore closed its file on 10 October 2014.

[10] This history is not propitious of a purposeful mediation.

[11] There is also the fact that the distinguishing feature of the present case is that it has been brought under Part 1A of the Human Rights Act. That is, it does not involve the private enforcement of the right to be free from acts of discrimination by other citizens in the context of the situations addressed by Part 2, such as employment, access to places, vehicles and facilities, the provision of goods and services, and other forms of discrimination such as sexual harassment, racial harassment, indirect discrimination and victimisation. Rather the proceedings are founded on a complaint that the source of the discrimination is an Act of Parliament.

[12] Whereas in the "private" contexts covered by Part 2 compromise and settlement may remedy a complaint of unlawful discrimination, the same cannot be said about complaints made under Part 1A where the claim is that the statutory provision itself

imposes the unlawful limitation on the right to be free from discrimination. So in the context of the present case it is difficult to see how the plaintiffs and the Attorney-General could arrive at a mediated outcome or settlement without the plaintiffs conceding the spousal deduction is lawful or the Attorney-General conceding the deduction is unlawful. The Attorney-General has little or no latitude within which to settle the claim short of conceding the plaintiffs' entire case, a concession which would have to be made in the face of the statutory provision and in knowledge that a potentially significant number of other individuals in the same or similar circumstances will be affected. Equally the plaintiffs have little or no latitude short of abandoning their claim.

[13] There is accordingly considerable force to the submission made by the plaintiffs that the factual and legal issues are well understood by both sides and that the Ministry has never resiled or softened its position that s 70(1) of the Social Security Act does not have any discriminatory effect and even it if is prima facie discriminatory, such discrimination is justified under s 5 of the Bill of Rights. Put more simply, unless one party concedes the position of the other, the plaintiffs and defendant necessarily take positions which are inherently beyond reconciliation or mediation. At the end of the day the Ministry contends the Social Security Act requires the spousal deduction to be made. Unless Parliament amends that provision the plaintiffs will be without effective remedy. Even if a declaration of inconsistency is made by the Tribunal the statutory provision will survive. Such declaration may nevertheless be a useful step along the way to persuading Parliament to amend the Act.

[14] In these circumstances it is difficult to see how the Tribunal can be satisfied that an order referring the complaint back to the Commission will achieve any purpose.

[15] That brings us back to the submission by the Attorney-General that mediation will enable the parties and their counsel to clarify, check and understand fully the facts of the case, to discuss constructively the issue of alleged discrimination, the law and its application to the facts of the case, to better assess their respective positions and the prospects of success, and to better prepare for litigation.

[16] The fundamental objection to this submission is identified in the plaintiffs' reply. That is, the purposes for which the Attorney-General seeks mediation are inappropriate. With no prospect of resolution of the complaint, mediation is not the appropriate forum within which the parties and their counsel prepare for the litigation. Should the Attorney-General wish to clarify any of the matters referred to in his application, there is no reason why discussion with counsel for the plaintiffs should not take place as is customary.

[17] The plaintiffs are now aged 68, 66 and 81 respectively. The spousal deduction affects their superannuation payments every fortnight. The Tribunal is told they are eager to make progress in this matter and proceed to a hearing. The Attorney-General does not assert he or the Ministry will be prejudiced were a case management teleconference to be now convened with a view to the case being set down for hearing.

Conclusion

[18] For the reasons given we are not satisfied that attempts at resolution, or further attempts at resolution of the complaint by the parties and the Commission:

[18.1] Will contribute constructively to resolving the complaint; or

[18.2] Be in the public interest.

[19] Counsel for the Attorney-General request that if the Tribunal is not minded to refer this complaint back to the Human Rights Commission for mediation that the Attorney-General be allowed two months within which to prepare for the case management issues that will need to be timetabled.

[20] Given that the Attorney-General filed his statement of reply on 24 August 2016 but did not apply for a s 92D order until mid-December 2016 it is necessary to observe there has been ample time to prepare for the case management conference. Be that as it may, given the Tribunal's current workload it is unlikely that a teleconference can be arranged inside the next two months. De facto, the Attorney-General is therefore likely (but not guaranteed) to have the two months requested.

ORDERS

[21] The following orders are made:

> **[21.1]** The application by the Attorney-General for an order under s 92D (that the complaint by the plaintiffs be referred back to the Human Rights Commission) is declined.
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> **[21.2]** The Secretary is directed to convene a case management teleconference at the earliest convenient date.

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Mr RPG Haines QC	**Ms GJ Goodwin**	**Dr SJ Hickey MNZM**
Chairperson	**Member**	**Member**