**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2014] NZHRRT 22**

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| | **Reference No. HRRT 003/2013** |
| **UNDER** | **THE HUMAN RIGHTS ACT 1993** |
| **BETWEEN** | **MATTHEW RICHARD BROWN** |
| | **PLAINTIFF** |
| **AND** | **OTAGO POLYTECHNIC** |
| | **DEFENDANT** |

**AT DUNEDIN**

**BEFORE:**
**Mr RPG Haines QC, Chairperson**
**Mr RK Musuku, Member**
**Hon KL Shirley, Member**

**REPRESENTATION:**
**Mr MR Brown in person supported by Mr VE Scott as *McKenzie* friend**
**Mr BCS Dorking for Otago Polytechnic**

**DATE OF HEARING: 19 and 20 May 2014**

**DATE OF DECISION: 30 May 2014**

## DECISION OF TRIBUNAL ON STRIKE OUT APPLICATION

**[1]** On 16 August 2013 Otago Polytechnic filed an application for an order that these proceedings be struck out. In this decision we explain why the application succeeds in part and fails in part.

### Background

**[2]** On 11 July 2012 Mr Brown made a complaint to the Human Rights Commission alleging that Otago Polytechnic discriminated against him because of his disability and that it had victimised him because he sought to rely on his rights under the Human Rights Act 1993 (HRA). In a letter dated 8 August 2012 the Commission stated that it could find no indicator that there had been any difference in Mr Brown's treatment by the

Polytechnic because of his disability or because he sought to rely on his rights under the HRA.

**[3]** These proceedings were commenced on 21 February 2013 by the filing of a statement of claim with a "letter" dated 18 February 2013 (three pages) addressed to the Secretariat. This letter expands on the sparse pleading in the statement of claim itself. Also filed was a document dated 25 January 2013 (two pages) with the heading "Statement of Claim" together with:

> **[3.1]** An assortment of correspondence covering the period May 2011 to January 2013 passing between Mr Brown and (inter alia) the Otago Polytechnic, the Independent Police Conduct Authority, the Privacy Commissioner and the Human Rights Commissioner.
>
> **[3.2]** A bound volume of documents (240 pages) comprising a collection of papers submitted by Mr Brown to the Human Rights Commission when making his complaint. The cover sheet describes the bound volume as "a Report Under Sections 8, 9 and 19 of the New Zealand Bill of Rights Act, 1990 and Sections 20J, 21 and 66 of the New Zealand Human Rights Act, 1993 and Section 6 of the Privacy Act, 1993" (hereinafter "the bound volume").

**[4]** In a statement of reply filed on 25 March 2013 the Otago Polytechnic protested the jurisdiction of the Tribunal, pleading that the statement of claim does not explain how the alleged conduct of the Polytechnic relates to those sections of the HRA said to have been contravened. Accordingly further and better particulars of the actual allegations and how they amounted to unlawful discrimination would be needed before the Polytechnic could provide a detailed response. Without prejudice to the need for better particulars, the statement of reply nevertheless responded (to the degree possible) to the allegations made by Mr Brown.

**[5]** By application dated 23 April 2013 the Otago Polytechnic sought better particulars. At the first teleconference convened by the Chairperson on 23 May 2013 Mr Brown agreed to provide the particulars sought. The *Minute* issued on 23 May 2013 relevantly recorded:

> **[3]** The application for further particulars dated 23 April 2013 points to a number of perceived difficulties with the statement of claim and asserts:
>
> > The Statement of Claim also discloses no cause of action within the jurisdiction of the Tribunal. Apart from references to a range of statutory provisions the defendant is left to guess how it has allegedly breached those provisions. For example the plaintiff does not claim to have made a protected disclosure yet he claims to have been discriminated against under section 66(1)(a) of the Human Rights Act 1993. He claims the defendant has breached section 21(b)(i) of that Act but does not disclose his marital status nor how that status relates to the alleged discrimination. He claims the defendant breached section 21(h)(iv) but does not provide details of the disability from which he allegedly suffers or how that was related to the defendant's actions.
> >
> > The plaintiff alleges breaches of various other statutes and Codes which are plainly outside the Tribunal's jurisdiction such as alleged breaches of the Harassment Act, various unspecified Tertiary Education Codes, the Crimes Act 1961, and a Police Complaints Authority issue. Without sufficient detail of how the plaintiff says the defendant supposedly breached its obligations to him under the Human Rights legislation the defendant is not able to determine whether it should file a formal application to strike out the plaintiff's claim as disclosing no arguable cause of action, or to protest to the Tribunal's jurisdiction to hear the plaintiff's claim at all.
>
> **[4]** The application then requires Mr Brown to provide particulars in the form of responses to 21 specific questions.

> **[5]** For the reasons broadly set out in the passages cited above the application has been properly made.
>
> **[6]** In fairness, Mr Brown did not resist the application and agreed to provide the particulars by 5pm on Friday 21 June 2013.

**[6]** Mr Brown was directed to file and serve the further particulars by 5pm on Friday 21 June 2013.

**[7]** Also addressed at the first teleconference was the question of the Tribunal's jurisdiction over some of the complaints made by Mr Brown in the statement of claim. The *Minute* of 23 May 2013, after recording that the Tribunal has jurisdiction only in relation to those matters made the subject of complaint to the Human Rights Commission, noted that some of the breaches alleged in the statement of claim had not been so complained about. To clarify what matters had been the subject of complaint Mr Brown was directed to file and serve a copy of the complaint together with a list of documents submitted in support of that complaint.

**[8]** On 20 June 2013 Mr Brown filed further and better particulars and on the following day notified the Secretary that he, Mr Brown, had already filed with the Tribunal the complaint to the Human Rights Commission and the supporting documents filed with that complaint.

**[9]** By letter dated 25 June 2013 Mr Dorking identified in relation to each of the 21 particulars sought those particulars which had been provided, those in relation to which particulars had not been provided and those where responses needed clarification or further attention. Mr Dorking also submitted that there had been no compliance by Mr Brown with the direction that he (Mr Brown) file with the Tribunal a copy of the complaint lodged with the Human Rights Commission.

**[10]** At the second teleconference convened on 4 July 2013 these issues were addressed. As to the particulars, Mr Brown agreed to provide the requested information. To assist him identify precisely what remained to be provided, Mr Dorking agreed to set out, in simplified format, what Otago Polytechnic still required by way of particulars. As to the content of the complaint filed with the Human Rights Commission, Mr Brown was directed to obtain and file the relevant documents. The following directions were given in the *Minute* issued on 4 July 2013:

> **[17.1]** By 5pm on Friday 12 July 2013 Otago Polytechnic is to file and serve a notice clarifying what it still requires of Mr Brown by way further and better particulars.
>
> **[17.2]** By 5pm on Friday 26 July 2013 Mr Brown is to file and serve a full and particularised response to that notice.
>
> **[17.3]** By 5pm on Friday 26 July 2013 Mr Brown is to file and serve copies of the all the correspondence which passed between him and the Human Rights Commission from the time his complaint was filed with the Commission through to the Commission's final determination of that complaint.

**[11]** On 11 July 2013 Mr Dorking filed and served details of the second application for better particulars and on 26 July 2013 Mr Brown filed an eight page response.

**[12]** On 2 August 2013 Mr Brown filed a bundle of correspondence which had passed between him and the Human Rights Commission.

**[13]** On 16 August 2013 the Otago Polytechnic filed an application to strike out. It was based on three grounds:

**[13.1]** The correspondence between Mr Brown and the Human Rights Commission now filed with the Tribunal showed that a number of assertions made by Mr Brown in his proceedings before the Tribunal had not been made the subject of complaint before the Human Rights Commission. It was submitted that the Tribunal had no jurisdiction over those matters.

**[13.2]** There were claims against Otago Polytechnic outside the jurisdiction of the Tribunal.

**[13.3]** For those claims not outside the jurisdiction of the Tribunal, Mr Brown's claims were so untenable they could not possibly succeed and should be struck out.

**[14]** A third teleconference was convened on 5 September 2013 for the purpose of setting a date for Mr Brown to file a response to the strike out application. After a long discussion Mr Brown recognised he should seek legal assistance. The directions given in the *Minute* issued on 5 September 2013 included the following:

> **[9.1]** As a matter of urgency, Mr Brown is to obtain advice on his eligibility for a grant of civil legal aid. If eligible, he is to lodge an application at the earliest opportunity.
>
> **[9.2]** As soon as Mr Brown learns the outcome of that application he is to notify the Tribunal and Mr Dorking.
>
> **[9.3]** In the event of delay, Mr Brown must provide the Secretary with an update of his situation no later than 5pm on Friday 4 October 2013.
>
> **[9.4]** Within four weeks from the date of Mr Brown being notified of the outcome of his legal aid application he is to file and serve his response to the strike out application filed by Otago Polytechnic.
>
> **[9.5]** Thereafter a teleconference is to be convened by the Secretary at the first practical opportunity.

**[15]** By memorandum dated 23 October 2013 Mr Dorking drew attention to the fact that both the Tribunal and Otago Polytechnic had yet to be advised by Mr Brown of the status of his application for legal aid. Furthermore, Mr Brown had not filed a response to the strike out application. The Polytechnic sought an order that Mr Brown file such response and that the strike out application be determined.

**[16]** Mr Brown's response was to complain by letter dated 8 November 2013 that the Chairperson was biased. By *Minute* dated 22 November 2013 Mr Brown was directed to provide the factual basis on which his allegation was based together with particulars of the allegation. The deadline of 6 December 2013 passed without anything being filed. Mr Brown did, however, by letter dated 20 December 2013 make further unparticularised allegations against the Chairperson.

**[17]** In a decision given on 4 February 2014 the Tribunal dismissed the recusal application and directed that the strike out application be heard.

**[18]** Mr Brown then advised that he intended appealing the recusal decision. As matters transpired no valid appeal was brought but in any event, no stay having been sought or granted, the Chairperson by *Minute* dated 14 March 2014 directed that the strike out application be heard on 19 May 2014 at Dunedin.

**[19]** By email timed at 1:44pm on 9 May 2014 the Secretary sent out a notice confirming the hearing date and venue. At 2:30pm that day Mr Dorking replied that it was his understanding that the hearing was confined solely to the strike out application and that,

by definition, the hearing would not involve witnesses. At 2:50pm the Secretary confirmed that that was the case. At 3:18pm Mr Brown said he had witnesses to give evidence at the strike out hearing. The Chairperson immediately issued a *Minute* pointing out that it would be uncommon for a plaintiff to call evidence on a strike out application as the hearing proceeds on the assumption that the facts pleaded in the statement of claim are true. Nevertheless, so that the Tribunal and Polytechnic had proper notice of the intended evidence, Mr Brown was required to provide a full written statement of evidence for each and every intended witness. That *Minute* dated 9 May 2014 was served on Mr Brown and Mr Dorking by email sent by the Secretary at 16:48pm on 9 May 2014. The statements were directed to be filed and served by 5pm on Thursday 15 May 2014.

**[20]** Mr Brown filed no such statements.

**The ruling whether Mr Brown could call evidence at the strike out application**

**[21]** When the Tribunal convened on the morning of Monday 19 May 2014, Mr Brown attended in the company of Mr VE Scott. Mr Brown said that Mr Scott was the only intended witness. He would give evidence that:

> **[21.1]** Otago Polytechnic had discriminated against Mr Brown and against Mr Scott himself.
>
> **[21.2]** Otago Polytechnic did not follow its own complaints procedure.
>
> **[21.3]** Otago Polytechnic had not discharged its obligation to provide an inclusive education environment for students with impairments.
>
> **[21.4]** Otago Polytechnic did not hold a meeting with Mr Scott, as requested, to discuss Mr Brown's complaints.
>
> **[21.5]** Mr Scott had viewed "the evidence" and had concluded that Mr Brown had undoubtedly been discriminated against by the Polytechnic.

**[22]** It was also requested that Mr Scott be Mr Brown's *McKenzie* friend.

**[23]** The application that Mr Scott be a *McKenzie* friend was granted. As Mr Scott was unaware of what such role entailed, it was explained that he would be permitted to sit beside Mr Brown during the hearing, to take notes, to quietly make suggestions and give advice, and to propose questions and submissions to Mr Brown who could put them to the Court. He (Mr Scott) would not, however, be permitted to address the Court by way of making submissions.

**[24]** The application that Mr Scott also be called as a witness raised the possibility of conflicting roles. The issue did not have to be determined because the Tribunal in an oral decision ruled that as a strike out application proceeds on the assumption that the facts pleaded in the statement of claim are true, the intended evidence was unnecessary and in addition, it was not permissible for Mr Scott to give evidence as to what conclusion he had reached after assessing the evidence. Nor was it permissible for Mr Scott to give evidence that he had allegedly been discriminated against. Such evidence was not relevant to the issues in the strike out application and was, in any event, not probative of any fact in issue in Mr Brown's case.

**[25]** The preliminary matters having been disposed of, Mr Dorking presented the submissions for Otago Polytechnic.

**The submissions for Otago Polytechnic in support of the strike out application**

**[26]** The submissions for Otago Polytechnic were advanced under three separate and distinct headings:

> **[26.1]** First, that the Tribunal had no jurisdiction over complaints which had not earlier been made to the Human Rights Commission.
>
> **[26.2]** Second, the Tribunal had no jurisdiction over claims made under legislation other than the HRA.
>
> **[26.3]** Third, those claims which were within the jurisdiction of the Tribunal were so untenable on the facts they could not possibly succeed.

**[27]** In the interests of brevity we do not intend reciting at length the detailed written submissions advanced in support of the strike out application or Mr Brown's at times unfocussed response.

## STRIKING OUT – THE TEST TO BE APPLIED

**[28]** In *Mackrell v Universal College of Learning* High Court Palmerston North CIV2005-485-802, 17 August 2005 at [48] Wild J held that the Tribunal has a wide discretionary power to strike out or to dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by High Court Rules, r 15.1.

**[29]** The principles to be applied on a strike out application are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267:

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed …; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material …; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction …

**[30]** For more recent authority see *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 where at [25] Elias CJ said:

> [25] It is not necessary to traverse again the approach to exercise of the strike out jurisdiction. It is enough for me to say of the peremptory procedure here adopted that a claim is not suitable for summary dismissal ahead of trial and before discovery unless, even on repleading, it is clearly untenable as a matter of law (in which case the pleadings should be struck out) or unless there is a complete and incontrovertible answer on the facts (in which case summary judgment may also be entered for the defendant). [footnote citations omitted]

**[31]** At [146] Blanchard, McGrath and William Young JJ stressed the desirability of making determinations on the basis of actual facts found at trial, rather than on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.

**[32]** We address first the question of jurisdiction and second, whether in relation to those claims within the jurisdiction of the Tribunal, the assertions are so untenable that they could not possibly succeed.

## THE QUESTION OF JURISDICTION

**[33]** Under this heading we address the two jurisdiction challenges. We begin with the inbuilt limitations of the HRA itself.

### Statutory scheme for making complaints and bringing proceedings

**[34]** 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.

**[35]** 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).

**[36]** 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.

**[37]** 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.

**[38]** It is to be noted, however, that s 92B(1) only permits proceedings before the Tribunal if:

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

**[39]** Put shortly, the effect of these provisions is that the Tribunal only has jurisdiction over whatever "complaint" was lodged with the Commission. 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" 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.

**[40]** On the filing of proceedings in the Tribunal the Commission provides the Tribunal with a letter identifying the complaint lodged with the Commission. This assists the determination of the question whether the Tribunal has jurisdiction over any particular matter. The letter does not have any statutory basis and in that respect is informal. In the present case the text of the Commission letter dated 14 March 2013 is set out below.

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

## The facts

**[42]** The statement of claim at Part 3 sets out the provisions of the HRA on which Mr Brown replies. His pleading is as follows:

> The treatment I have been subjected to by staff members of the Otago Polytechnic are violations under the Human Rights Act 1993, s 21(b)(i), (h)(iv); s 65; s 66(1)(a)(i), (ii), (iii); s 57(1)(a), (c); the New Zealand Bill of Rights Act 1990, s 27(1), (2); s 9 and the Harassment Act 1997.

**[43]** By contrast the "complaint" made by Mr Brown to the Human Rights Commission on 11 July 2012 was in the following terms:

> To whom it may concern,
>
> I would like to lodge a complaint with the Human Rights Commission.
>
> Please find the complaint enclosed.
>
> If you have any questions about this you can contact me by phone … or by email …
>
> Thanking you

**[44]** The enclosure was the 240 page bound volume. This compilation principally comprises a large number of annexures or attachments to a narrative focused on:

> **[44.1]** Mr Brown's general complaints concerning the witness protection programme.
>
> **[44.2]** Mr Brown and his dealings with a certain constable.
>
> **[44.3]** Mr Brown, the certain constable and the Otago Polytechnic.

**[45]** In delimiting the jurisdiction of the Tribunal, the letter from the Human Rights Commission to the Tribunal dated 4 March 2013 relevantly states:

> On 11 July 2012 Matthew Brown made a complaint to the Commission containing a number of allegations that Otago Polytechnic discriminated against him because of his disability and that it victimized him because he sought to rely on his rights under the Human Rights Act.
>
> In a letter dated 8 August 2012 the Commission informed Matthew Brown it could not find any indicator that there had been any difference in treatment by Otago Polytechnic because of his disability or because he sought to rely on his rights under the Human Rights Act.

**[46]** From this it is clear that the Human Rights Commission interpreted the "complaint" made by Mr Brown as being twofold:

> **[46.1]** Discrimination based on disability (s 21(1)(h) read with s 57 (discrimination in access to educational establishments)).
>
> **[46.2]** Victimisation on account of using rights under the HRA (s 66(1)(a)(i)).

**[47]** It is these complaints and these alone that the Tribunal has jurisdiction to hear and determine.

**[48]** It was submitted by Otago Polytechnic that the following allegations in the statement of claim (taken to mean the original statement of claim read together with the two sets of particulars provided by Mr Brown) were outside the jurisdiction of the Tribunal:

> **[48.1]** The alleged breach of HRA s 21(1)(b) – discrimination based on marital status.
>
> **[48.2]** The alleged breach of HRA s 65 (indirect discrimination) except to the extent that the section has application to a determination of the matters investigated by the Human Rights Commission and therefore within the jurisdiction of the Tribunal.
>
> **[48.3]** Any claim under HRA s 66(1)(a) based on an allegation that Mr Brown had made a disclosure under the Protected Disclosures Act 2000.

**[48.4]** The alleged breach of HRA s 57 (discrimination by an educational establishment).

**[49]** As to [48.1] (marital status), following discussion Mr Brown conceded he had not made a complaint to the Human Rights Commission based on marital status. It follows that the Tribunal has no jurisdiction to entertain in these proceedings a complaint based on s 21(1)(b).

**[50]** As to [48.2] (indirect discrimination), we are of the view that when a complaint is made to the Human Rights Commission it is not necessary that the complainant specifically rely on or refer to the provisions of s 65. The distinction between direct and indirect discrimination may not always be easy to make or to articulate. In most cases it will be implicit that if a complaint of "discrimination" is made, it necessarily includes both direct and indirect forms of discrimination. It follows that a breach of s 65 of the HRA was implicitly included in Mr Brown's complaint to the Human Rights Commission and is therefore within the jurisdiction of the Tribunal.

**[51]** As to [48.3], the victimisation provisions of HRA s 66 refer to less favourable treatment of an individual by reason of that person's intention to use his or her rights under the HRA or to make a disclosure under the Protected Disclosures Act 2000. Mr Brown has demonstrated he complained to the Commission that he had been allegedly victimised for making use of his rights under the HRA. The question is whether he also complained of victimisation for making a disclosure under the Protected Disclosures Act. As to this, it was submitted (inter alia) for Otago Polytechnic that this Act could have no application to the facts as Mr Brown was at no time an employee of Otago Polytechnic. Mr Brown then conceded he was not basing any part of his case on the Protected Disclosures Act. It follows that the Tribunal has no jurisdiction under s 66(1)(a) insofar as the Protected Disclosures Act is concerned.

**[52]** As to [48.4] (discrimination in education), the evidence was unclear. The complaint to the Human Rights Commission was accompanied by a 240 page bound volume of documents. Those documents traverse a broad spectrum of matters, primarily Mr Brown's dissatisfaction with the New Zealand Police. Mr Brown nevertheless submits that it is possible to find within the bound volume sentences or paragraphs which can be construed as a complaint of discrimination against Otago Polytechnic on the prohibited ground of disability. Specific reference was made to the documents at pp 21, 22 and 34. It was his submission that it was the duty of the Human Rights Commission to study the bundle carefully and to then identify each and every complaint which might conceivably be constructed from the documents.

**[53]** We do not accept this submission. It is almost impossible to work one's way through this discursive and jumbled collection of documents to ascertain what specific complaints under the HRA are made against Otago Polytechnic. It is implicit under Part 2 of the HRA that it is for the person aggrieved to articulate with reasonable clarity what the "complaint" is and the basis for the complaint that there has been a breach of Part 1A or Part 2 of the Act, or both. It is not for the Human Rights Commission or the person complained against to undertake this task.

**[54]** Nevertheless, on a strike out application we are mindful that it is possible to read pages 21, 22 and 34 of the bundle as amounting to a complaint of discrimination against Otago Polytechnic on the grounds of disability. Making allowance for the fact that Mr Brown is self-represented and possibly affording him more latitude than can properly be justified, we have come to the view that there is just enough on the evidence to allow a claim of discrimination under s 57 to continue. As stated by the majority in *North Shore*

*City Council v Attorney-General* at [146], there will be cases where determinations should be made on the basis of actual facts found at trial rather than on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out. However, as will be seen, fairness requires Otago Polytechnic to be given full particulars of this complaint and our directions follow at the end of this decision.

**[55]** It follows that with the exception of the claims based on HRA, s 57 (discrimination in an educational establishment) and s 65 (indirect discrimination) the challenged parts of the statement of claim must be struck out.

**[56]** We now turn to the second limb of the challenge to jurisdiction.

**Jurisdiction – claims under other statutes**

**[57]** The jurisdiction of the Tribunal is entirely statute-based. The relevant statutes are the Human Rights Act 1993, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994. The Tribunal does not have jurisdiction under any other statute. It follows that the Tribunal has no jurisdiction to enquire into the following allegations:

> **[57.1]** Breach of s 9 of the New Zealand Bill of Rights Act (torture and cruel treatment) and breach of s 27 (natural justice).
>
> **[57.2]** Breach of the Harassment Act 1997.
>
> **[57.3]** Discrimination because Mr Brown is a person involved in the witness protection programme.

**[58]** Following discussion at the hearing Mr Brown conceded each of the foregoing points.

**Conclusion on jurisdiction**

**[59]** It follows that with the exception of the claims under ss 57 (discrimination in an educational establishment) and 65 (indirect discrimination) each and every of the claims challenged by Otago Polytechnic must be struck out on the grounds that the Tribunal has no jurisdiction to hear and determine the allegations.

**[60]** We turn now to address the remaining challenge advanced by Otago Polytechnic, namely that in relation to certain matters there is no arguable cause of action.

## NO ARGUABLE CAUSE OF ACTION

**[61]** In careful submissions Otago Polytechnic advanced reasons why, in relation to those matters within the jurisdiction of the Tribunal, the claims should be struck out as disclosing no arguable cause of action.

**[62]** The difficulty, however, is that the case law is replete with warnings to the effect that summary dismissal ahead of trial is not appropriate unless the claim is clearly untenable as a matter of law. If the facts are not clear or are disputed, it is better that the case proceed to trial rather than on the hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.

**[63]** In at least two significant respects Mr Brown advised that his pleadings had either been misinterpreted or were mistakenly worded. We here refer to:

**[63.1]** The pleading by Mr Brown that employees of Otago Polytechnic behaved in a certain manner towards him "and other students". Taken at face value this is a pleading that Mr Brown was not treated differently to other students and therefore no discrimination took place. Mr Brown's response at the hearing was twofold. First, he said that "other students" did not mean "all students" and, he and the "other students" were a sub-category of "all students" and had as a group been treated differently. Second, only he had been treated differently. These two claims are contradictory but that is a trial issue, not a ground for striking out.

**[63.2]** The allegation in the pleadings that an employee of Otago Polytechnic "falsified" Mr Brown's complaint against other employees. In one of his particulars Mr Brown said that there had been no falsification. At the strike out hearing Mr Brown said that the change should not have been made. He had made a mistake. There had been falsification.

**[64]** These two examples illustrate the fluidity of Mr Brown's case and at the substantive hearing such matters may have a substantial impact on the Tribunal's findings of fact. But the presence of such issues does not justify the striking out of the claims. On an application to strike out a pleading for failure to disclose a cause of action, the court or tribunal will not attempt to resolve genuinely disputed issues of fact. See *CED Distributors (1988) Ltd v Computer Logic Ltd (In Receivership)* (1991) 4 PRNZ 35 (CA) at 41. In the end the course taken must depend on the justice of the particular case, the court or tribunal always being alert not to preclude a party from the opportunity of trial if real prospects of success cannot be excluded: *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 62-63 per Cooke P.

## CONCLUSION AND FORMAL ORDERS

**[65]** On the application of Otago Polytechnic the following allegations made in the statement of claim (read together with the two sets of particulars) are struck out:

**[65.1]** Breach of HRA, s 21(1)(b) – discrimination based on marital status.

**[65.2]** Breach of HRA, s 66(1)(a) – victimisation on the ground of making a disclosure under the Protected Disclosures Act 2000.

**[65.3]** Breach of the New Zealand Bill of Rights Act 1990, s 9 (torture and cruel treatment) and s 27 (natural justice).

**[65.4]** Breach of the Harassment Act 1997.

**[65.5]** Allegation that Otago Polytechnic discriminated against Mr Brown because of his involvement in the witness protection programme.

**[66]** In relation to the claim of discrimination under HRA s 57 we have noted that Otago Polytechnic is entitled to particulars and Mr Brown is ordered to provide such particulars as may be requested by Otago Polytechnic in terms of the timetable directions which follow.

**[67]** The question of costs is reserved.

**[68]** It is now necessary that these proceedings be readied for hearing. This entails the filing by the parties of their witness statements and the settling of the common bundle. Preparation of that bundle is usually the responsibility of the plaintiff but this will probably be beyond Mr Brown's capabilities. Otago Polytechnic is asked to shoulder this task. It

will be a relevant factor when the question of costs comes to be considered. Timetable directions follow.

## TIMETABLE ORDERS

**[69]** The following directions are made:

**[69.1]** Should Otago Polytechnic require further particulars of the claim under HRA, s 57, it is to file and serve by 5pm on Friday 20 June 2014 a notice clarifying what it still requires of Mr Brown by way of further and better particulars.

**[69.2]** By 5pm on 4 July 2014 Mr Brown is to file and serve a full and particularised response to that notice.

**[69.3]** Written statements of the evidence to be called at the hearing by Mr Brown are to be filed and served by 5pm on 18 July 2014. By the same date Mr Brown is to provide Mr Dorking with a list of documents Mr Brown wishes to have included in the common bundle of documents.

**[69.4]** Written statements of the evidence to be called at the hearing by Otago Polytechnic are to be filed and served by 5pm on Friday 15 August 2014. By the same date Mr Dorking is to provide Mr Brown with a list of documents Otago Polytechnic wishes to have included in the common bundle of documents.

**[69.5]** Should Mr Brown wish to file any statements in reply, such statements are to be filed and served by 5pm on Friday 29 August 2014.

**[69.6]** In consultation with Mr Brown, Mr Dorking is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 19 September 2014.

**[69.7]** The proceedings are to be heard at Dunedin on a date to be fixed once a venue has been booked. Ten days are to be set aside. A generous estimate has been made to avoid a part heard hearing. The date and venue are to be advised by the Secretary.

**[69.8]** Leave is generally reserved to both parties to make further application should the need arise.

**[69.9]** In case it should prove necessary we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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| ..... | ..... | ..... |
| **Mr RPG Haines QC** | **Mr RK Musuku** | **Hon KL Shirley** |
| **Chairperson** | **Member** | **Member** |