IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 3**

	Reference No. HRRT 015/2013
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**DARRYL WARD POPE**
	PLAINTIFF
AND	**HUMAN RIGHTS COMMISSION**
	FIRST DEFENDANT
AND	**HEALTH AND DISABILITY COMMISSIONER**
	SECOND DEFENDANT
AND	**OMBUDSMAN**
	THIRD DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr BK Neeson, Member

REPRESENTATION:
Mr M Ward, agent for plaintiff
Ms S Bell for first defendant
Ms K Elkin for second defendant
Dame Beverley Wakem DNZM, CBE for third defendant

DATE OF DECISION: 4 February 2014

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM

The application

[1] This is an application by the defendants that these proceedings be summarily dismissed ahead of trial on the grounds that the proceedings are clearly untenable as a matter of law.

[2] 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.

[3] The principles to be applied 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 …

[4] For more recent authority see *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [25] (Elias CJ) and [146] (Blanchard, McGrath and William Young JJ).

Background

[5] On 3 June 2013 a statement of claim in the name of Mr Pope was filed by Mr Mike Ward of Mt Maunganui. Also filed on that date was an Authority to Act apparently signed by Mr Pope on 4 March 2013 appointing Mr Ward "agent/representative" in these proceedings for the period 15 February 2013 to 15 February 2015. However, there is real doubt whether Mr Pope has given his informed consent to the bringing of these proceedings in his name. It is a subject to which we return shortly. For all practical purposes these proceedings are Mr Ward's proceedings.

[6] The defendants cited are:

[6.1] First defendant: "Human Rights Commission".

[6.2] Second defendant: "Health and Disability Commission".

[6.3] Third defendant: "Ombudsman".

[7] The statement of claim is 133 pages in length and is divided into 12 "chapters". It is a rambling document lacking in coherence, is in parts unintelligible and unhelpfully contains large tracts of irrelevant "evidence". The document is almost impossible to follow. The three defendants are alleged to have failed Mr Pope in various ways in the course of providing him with disability services.

[8] The primary grounds on which the strike out applications are based are:

[8.1] The proceedings are fundamentally misconceived in that they rest on the untenable contention that the Human Rights Commission, the Health and Disability Commissioner and the Ombudsmen are disability services providers under the Health and Disability Commissioner Act 1994 (HDC Act).

[8.2] Mr Ward has not established that he has the informed consent of Mr Pope to bring these proceedings.

[8.3] The pleadings are prolix and unintelligible to the degree that it is impossible for the defendants to respond sensibly.

[9] We address each ground separately. Thereafter we address a further and separate ground applicable to the Ombudsmen only.

Proceedings fundamentally misconceived – the disability services provider point

[10] Throughout the 133 page statement of claim the liability of the three defendants is alleged (repetitively) to be based on the discriminatory delivery by the defendants of a "disability service" to Mr Pope. We cite only two examples.

[11] First, at p 11 of the statement of claim Mr Ward articulates the contravention of the Human Rights Act 1993 (HR Act), s 21 in the following terms:

> Section 21(1)(h)(i), (iv), (v), (vi) – discrimination on the basis of disability in the delivery of disability service as demonstrated by denial of reasonable accommodation by the HDC, the HRC, the Ombudsman. These actions amount to consent and acquiescence of public officials in limiting the freedom of an individual. Also breaches of sections 9, 19, 22, 23(5), 27(1) of the NZBORA. Also breaches of several national Acts. The actions of the HDC, HRC, and the Ombudsman resulted in the complete social exclusion of this elderly, disabled man, Darryl Pope. These same actions amount to CIDT in light of the permanent negative effects of the complete social exclusion which Darryl has been forced to endure for several years. See chapters 10, 11, 12 in the enclosed document for details. See Appendix X.

[12] Second, at p 19 of the statement of claim Mr Ward articulates his case in the following terms:

> **A**
>
> **OMB, HDC** and **HRC** failed to follow the relevant Acts which determine the functions of each organisation.
>
> For Darryl, the **OMB, HRC** and **HDC** are <u>disability service</u> providers as defined in the **HDC** Act and are subject to the **HDC** Code.
>
> All three organizations denied *fundamental* and *compulsory* due process to Darryl.
>
> All three organizations denied Darryl the *enhanced, multiple special* efforts required to meet Darryl's *multiple special* needs.
>
> Reasonable accommodation is the *enhanced, multiple special* efforts required to meet Darryl's *multiple special* needs.
>
> All three organizations denied Darryl reasonable accommodation.
>
> The **CRPD** says "**Discrimination on the basis of disability …** includes all forms of discrimination, including denial of reasonable accommodation.
>
> **B**
>
> This comprehensive denial of due process by all three resulted in discrimination against Darryl on the basis of disability.
>
> For Darryl, the **OMB, HRC** and **HDC** are <u>disability service</u> providers as defined in the **HDC** Act and are subject to the **HDC** Code.
>
> The result of this discrimination was, and still is, the complete social exclusion of Darryl.
>
> The discrimination and the social exclusion are the results of **TCIDT**.
>
> The discrimination and the social exclusion add up to **TCIDT**.
>
> The discrimination and the **TCIDT** add up to social exclusion.
>
> The **TCIDT** and the social exclusion add up to discrimination.
>
> What's not cruel, inhuman and derogatory about the way Darryl's been treated?

[13] It is to be noted that the Tribunal does not have jurisdiction to determine issues under the New Zealand Bill of Rights Act 1990 s 9 (right not to be subjected to torture or cruel treatment), s 22 (liberty of the person), s 23(5) (right of person detained to be treated with humanity) and s 27(1) (right to justice).

[14] We turn now to the substantive point, namely whether it is possible for Mr Ward to sustain his allegation that the three defendants are disability services providers.

[15] The term "disability services provider" is defined in s 2(1) of the HDC Act as follows:

> *disability services provider* means any person who provides, or holds himself or herself or itself out as providing, disability services

[16] The definition of "disability services" is:

> *disability services* includes goods, services, and facilities—
> (a) provided to people with disabilities for their care or support or to promote their independence; or
> (b) provided for purposes related or incidental to the care or support of people with disabilities or to the promotion of the independence of such people

[17] As to these definitions, each defendant has a statutory oversight function, such jurisdiction being conferred by separate statutes, being the HDC Act, the Human Rights Act and the Ombudsmen Act 1975. In none of these statutes is a function conferred on any of the three defendants that can sensibly be described as a disability service. In short, none of the three defendants is a disability services provider.

[18] The proceedings must be struck out on the grounds that they are based on a fundamentally misconceived premise.

[19] We address next the question of Mr Ward's authority to bring these proceedings.

Authority to bring proceedings not established

[20] From an early stage of these proceedings both the Human Rights Commission and the Health and Disability Commissioner expressed concern whether Mr Pope was fully aware of and consented to the bringing of these proceedings by Mr Ward in Mr Pope's name. Indeed at different points in the statement of claim Mr Ward makes reference to having been banned from Mr Pope's house in late October 2008, that ban still being in place "as of mid-March 2013". See for example pp 80 and 95.

[21] In these circumstances the *Minute* issued on 19 August 2013 by the Chairperson required that by 13 September 2013 Mr Ward respond to those concerns. In particular he was required to:

> **[12.3]** File a detailed account of the circumstances in which Mr Pope on 4 March 2013 signed the Authority to Act. This account is to include the explanation, if any, given by Mr Ward to Mr Pope regarding the purpose of the Authority to Act and as to the nature of the proceedings which Mr Ward intended filing with the Tribunal in Mr Pope's name. Mr Ward is also to provide full details of what, to the best of his belief, is known of these proceedings by members of Mr Pope's family or by the holder of any Enduring Power of Attorney executed by Mr Pope or by any person who otherwise has responsibility for Mr Pope's care and welfare.

[22] In a response dated 27 August 2013 Mr Ward stated (inter alia) that:

> I've been Darryl's only genuine friend for all that time, almost two decades. Nobody else has taken the time and made the efforts I've made on Darryl's behalf for justice for Darryl. I've demonstrated for almost two decades that I'm the only person who can be consistently relied on to meet Darryl's multiple special needs.

[23] He then said that to obtain Mr Pope's signature to the Authority to Act he told Mr Pope that "if he signed we might be able to have enough time to go get fish and chips or go do what he wanted" and "Other times I told Darryl if he signed the authority we might be able to go over to the Mt. for lunch":

> Darryl was only allowed out by SILC [Supported Independent Living Choices] one half hour a week. During the half hour period once a week I offered Darryl the opportunity to sign the authority to act on about 8 or 10 different occasions. Each time I explained as best I could what it was for. So the specimen from March 4 is only one product of all those opportunities. I went through the process with him 8 or 10 times, not just once, to give Darryl plenty of opportunities to make a decision. Each time he signed the authority to act.
>
> I bent over backwards to obtain genuine authority to act from Darryl. A fool would say that my efforts in that regard were a good example of reasonable accommodation.
>
> Most times I told Darryl that if he signed we might be able to have enough time to get fish and chips or go do what we wanted. (A half hour between 11:30 and noon isn't enough time for anything). Sounds stupid, right? Well if you had the level of experience I've had with disabled people in general, and Darryl in particular, you'd know that what seems stupid to the inexperienced and unknowledgeable person outside a relationship is in fact genuine communication between the two people that make up the relationship. This point is covered in the "protracted and … irrelevant material". In the "protracted and … irrelevant material" I pointed out I made some cards with words that Darryl and me used to communicate with so there was no misunderstanding. This method of communication and the contents of this communication were not accepted or allowed by anybody but Darryl and me.
>
> Other times I told Darryl if he signed the authority we might be able to go over to the Mt. for lunch.

[24] In his response of 27 August 2013 Mr Ward also stated that he had not told any member of Mr Pope's family or holder of a power of attorney "about the HRRT filing".

[25] In a subsequent email dated 17 October 2013 Mr Ward quoted the text of an email (undated) in which the CEO of the relevant Supported Independent Living Choices (SILC) had said to Mr Ward:

> It is about this time of year (late October) that you arrive to see Darryl Pope and others here in Tauranga. I am writing to you to inform you that we have met with Darryl and his family regarding your relationship with Darryl and your complaint to the Human Rights Commission. I need to inform you that we at SILC Ltd and Darryl's family all hold significant concerns about this relationship. The family have requested we discontinue supporting this relationship and we respect this decision. Therefore we will NOT be supporting Darryl to meet with you this summer. If you have any concerns or comments to make please address them to me.

[26] Believing that Mr Ward's emails of 27 August 2013 and 17 October 2013 had only increased concern in relation to Mr Ward's authority to bring these proceedings, the Chairperson by *Minute* dated 6 November 2013 afforded Mr Ward a last opportunity to demonstrate that he held genuine authority to bring and prosecute these proceedings. A direction was given to Mr Ward that:

> **[6]** By 5pm on Friday 22 November 2013 Mr Ward is to file an affidavit by a person independent of Mr Pope's family and independent of Mr Ward who can depose that he or she has spoken to Mr Pope and that Mr Pope has verified to that person that Mr Pope has given his informed and genuine consent to the bringing of these proceedings.
>
> **[7]** Thereafter the Tribunal will, following a hearing on the papers, determine whether these proceedings are to be struck out.

[27] Mr Ward has not to date filed the required affidavit. Instead he has filed a 15 page response dated 2 January 2014 which is characteristically repetitive, jumbled and unfocussed. Most importantly it does not grapple with the concern held by the Tribunal that Mr Ward does not have Mr Pope's informed consent to the bringing of these

proceedings. Mr Ward complains (inter alia) that the Chairperson had not provided him with the "approved form". See p 13 of the email:

> The Chairman wants an affidavit but failed to provide the required hrrt approved form. The unethical and unlawful reason the chairman wants the affidavit is based solely on the multiple disabilities Darryl is handicapped with. The impossibility of getting the affidavit due solely to the multiple disabilities that Darryl is handicapped with.

[28] In our view Mr Ward has been given every opportunity to demonstrate that he has brought these proceedings with Mr Pope's informed consent. His responses have only increased the concerns which from the outset have been expressed by the Human Rights Commission and the Health and Disability Commissioner.

[29] In these circumstances we have decided that these proceedings cannot be allowed to continue and are to be struck out on the grounds that Mr Ward has not demonstrated authority to bring and conduct the proceedings.

[30] We turn now to the claim that the pleadings are prolix and unintelligible to the degree that it is impossible for the defendants to respond sensibly.

Statement of claim – the pleading point

[31] As recently stated in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [84] and [87] one of the key principles of pleading is that the statement of claim be accurate, clear and intelligible. Verbose, ill-drafted pleadings may defeat the purpose of a statement of claim to such an extent that it is an abuse of process. This principle is intended to prevent the improper use of the machinery of a court or tribunal. Pleading should not be permitted to be a means of oppressive conduct against opposing parties.

[32] Under the High Court Rules, r 15.1 a statement of claim may be struck out if there has been such an abuse:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
> (b) is likely to cause prejudice or delay; or
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
> (4) This rule does not affect the court's inherent jurisdiction.

[33] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* at [89] the Court of Appeal conveniently explained these different grounds:

> [89] The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceedings that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must

> be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[34] In the present case we have already emphasised the prolixity of the statement of claim filed by Mr Ward. It also contains purely evidential matters and in many parts the document is virtually unintelligible.

[35] The description of the faults in the pleadings in *Commissioner of Inland Revenue v Chesterfield Preschools Ltd* at [90] and [91] could apply equally to Mr Ward's statement of claim.

> [90] The major issue with the statement of claim is that it is overwhelmingly prolix. It comprises 419 paragraphs. The narrative of facts presented by the statement is not straightforward but diffuse: there are large tracts of factual material and much of the material facts relating to an individual claim are dispersed throughout different parts of the document. This makes it difficult, if not impossible, to understand. It would be impossible for the defendants to give a targeted response to the claims …
>
> [91] Much of the factual material pleaded is irrelevant, provides excessive detail or is evidence rather than pleading. The large tracts of factual information pleaded do not identify the main issues but obfuscate them by adding to the prolix nature of the document and making it burdensome to read. A major concern is the excessive pleading of matters of evidence. …

[36] We consider that the statement of claim in its present form is prolix and unintelligible to the degree that it is impossible for the defendants to respond sensibly. It is an abuse of process and warrants an order striking it out. It is prejudicial to the defendants and likely to cause prejudice and delay. Nothing will be achieved by giving Mr Ward a chance to amend the statement of claim. His correspondence with the Tribunal shows that he is unable or unwilling to conduct his case in a sensible and rational manner and he is incapable of expressing himself in clear, logical and succinct terms.

[37] Finally, we turn to the claim against the third defendant "Ombudsman".

The statement of claim and the "Ombudsman"

[38] At paragraph 2 of the statement of claim the case against the Ombudsman is articulated in the following terms:

> OMB I filed a complaint with the Ombudsman in late 2008 and early Jan, 09 about the way the HDC handled the complaints I made on Darryl's behalf. On Jan 6, 09 Andrew McCaw said he would email the results of the investigation. I have got nothing so far. Darryl was denied due process and reasonable accommodation by the Omb. The result of the discrimination by the Omb was the complete social exclusion of Darryl. See Ch 11 in the enclosed doc.

[39] Chapter 11 does endeavour, with limited success, to particularise the complaint against the Ombudsman. The central premise pleaded is that the Ombudsman is a disability service provider under the Health and Disability Commissioner Act 1994. The following quote is taken from p 73 of the document:

> For Darryl, the **OMB** is a <u>disability service</u> provider as defined in the **HDC** Act and is subject to the **HDC** Code Act. [emphasis in original]

[40] This allegation is repeated numerous times in the 15 pages of Chapter 11, albeit not always in exactly the same language. It is also alleged that the plaintiff was subjected by the Ombudsman to torture or to cruel, inhuman, degrading forms of treatment:

> Darryl is completely socially excluded now because of the unprofessional conduct, **TCIDT** and discrimination to which he was subjected by the ombudsman.

[41] This barely articulate and confused pleading conflates the jurisdiction of the Ombudsman to enquire into matters of administration with the function of the body inquired into. The alleged failure of investigation by the Ombudsman is erroneously argued to be a failure by the Ombudsman to provide a disability service:

> The ombudsman denied *fundamental, compulsory* due process to Darryl. For Darryl due process is a disability service due to Darryl's multiple disabilities and multiple special needs. These *multiple special* needs require *augmented multiple special* efforts, reasonable accommodation, in order to be met. The ombudsman neglected to make the required *enhanced multiple special* efforts, reasonable accommodation, while delivering disability services, to meet these multiple special needs. The ombudsman denied reasonable accommodation to Darryl and so discriminated against Darryl on the basis of his disability. The end result of the actions of the **OMB** being complete social exclusion for Darryl. [emphasis in original]

[42] By letter to the Tribunal dated 19 July 2013 the Chief Ombudsman, Dame Beverley Wakem DMZM, CBE expressed concern at the institution of the proceedings and drew attention to ss 25 and 26(1)(a) of the Ombudsmen Act 1975.

Letter from the Secretary to Mr Ward

[43] By letter dated 31 July 2013 the Secretary wrote to Mr Ward drawing his attention to two potential impediments to the Tribunal having jurisdiction in relation to the intended complaints against the Ombudsman. The first impediment was identified as s 26(1)(a) of the Ombudsmen Act 1975. The second that the Ombudsman is not a "disability service provider". The letter to Mr Ward was in the following terms:

> I am writing to you as the agent for the plaintiff, Mr DW Pope.
>
> On the filing of the statement of claim on 3 June 2013 a copy was sent to the intended third defendant described as "Ombudsman".
>
> Subsequently Dame Beverley Wakem, the Chief Ombudsman, has written to the Tribunal and a copy of her letter dated 19 July 2013 is enclosed for your information.
>
> You are now requested to make submissions on the question whether the Tribunal has jurisdiction to hear the intended complaints against "Ombudsman".
>
> The jurisdiction impediments appear to be:
>
> 1. First, s 26(1)(a) of the Ombudsmen Act 1975 states that no proceedings, civil or criminal, shall lie against any Ombudsman:
>
> > (1) Subject to subsection (2),—
> >
> > > (a) no proceedings, civil or criminal, shall lie against any Ombudsman, or against any person holding any office or appointment under the Chief Ombudsman, for anything he may do or report or say in the course of the exercise or intended exercise of his functions under this Act or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 or the Protected Disclosures Act 2000, unless it is shown that he acted in bad faith:
> >
> > > (b) no Ombudsman, and no such person as aforesaid, shall be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to his knowledge in the exercise of his functions under this Act or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 or the Protected Disclosures Act 2000.
>
> 2. Second, it is asserted (repeatedly) in Chapter 11 of the document attached to the statement of claim (it is the chapter containing the allegations against "Ombudsman") that "the

Ombudsman" is a "disability services provider". That term is defined in s 2(1) of the Health and Disability Commissioner Act 1994 and provides:

> *disability services provider* means any person who provides, or holds himself or herself or itself out as providing, disability services

Given that the Ombudsmen operate under the Ombudsmen Act 1975 and have no function or power under the Health and Disability Commissioner Act it is difficult, if not impossible, to see how any one of the Ombudsmen can be a disability services provider under the HDC Act.

The further difficulty faced is the one outlined by Dame Beverley Wakem namely, that "Ombudsman" is not a legal entity capable of being made a party to proceedings, but the title of an office to which individuals may be appointed. The present proceedings fail to name a person who could be a third defendant.

Before I refer these issues to the Chairperson I would be grateful for your submissions on the three points I have raised. Your submissions are to be received on or before 5pm on Friday 16 August 2013.

The response from Mr Ward

[44] By email dated 3 August 2013 Mr Ward responded to the Secretary's letter. His email is not a model of clarity and is characteristically discursive and unfocussed. It is not practicable to either reproduce the text here or to provide a succinct summary. Only the main points are noted:

[44.1] Mr Ward continued to maintain that the alleged failure by the Ombudsman to investigate the complaints made on behalf of the plaintiff compels the conclusion that the plaintiff was denied a "disability service".

[44.2] He alleged that the employee in the Office of the Ombudsman acted "in the absolutely worst bad faith possible":

> … he discriminated against Darryl on the basis of disability when he delivered a disability service that failed to meet Ombudsman criteria, failed to meet the multiple special needs of this disabled man and failed to satisfy reasonable accommodation as defined in the UN crpd. with the acquiescence of this persons supervisor.

[44.3] He asserted that it was the "job of the hrrt to get to the bottom of the whole mess and see that justice is achieved for Darryl".

[44.4] He was at times discourteous, criticising the Case Manager:

> youre the case manager and you didnt see through the above attempts by the head of the ombudsman to duck responsibility obstruct justice?

[44.5] Mr Ward concluded his email by stating, in effect, that he would not engage further with the issues raised by the Secretary in the letter dated 31 July 2013:

> theres not much sense writing more. if the filing i made to the hrrt doesnt prove darryl has been discriminated against on the basis of disability – well too bad for darryl. hell never know.

Discussion

[45] Section 25 of the Ombudsman Act 1975 states that no proceeding of an Ombudsman shall be held bad for want of form and, except on the ground of lack of jurisdiction, no proceeding or decision of an Ombudsman is liable to be challenged, reviewed, quashed, or called in question in any court:

25 Proceedings not to be questioned or to be subject to review

No proceeding of an Ombudsman shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of an Ombudsman shall be liable to be challenged, reviewed, quashed, or called in question in any court.

[46] Although the Tribunal is described in the Human Rights Act 1993 as a "tribunal", it is, for certain purposes, an inferior court. See *Attorney-General v O'Neill* [2008] NZAR 93 (Williams and Venning JJ) at [33], [34] and [36]:

> [33] In summary, the Tribunal has a number of features in common with those of the former Employment Tribunal which the Full Court in Reid accepted was an inferior court. In addition there are additional features of the Tribunal's function and powers which confirm that position. The Tribunal's role of determining civil proceedings arising out of an alleged breach of rights by adjudication, after considering evidence, is quintessentially the role of a court of judicature.
>
> [34] We conclude that the Tribunal is an inferior court for the purposes of s 88B of the Judicature Act and that proceedings issued in it, including those proceedings issued by Mr O'Neill, are civil proceedings issued in an inferior court for the purposes of that section.
>
> [35] …
>
> [36] In coming to the conclusion the Tribunal was not a court the Tribunal placed emphasis on the use of the word "tribunal". But it is apparent from the authorities cited above that nomenclature is not determinative. Nor is it significant that none of the members is a judge. The chair must be legally qualified (s 99A) and a District Court Judge has been appointed as a deputy chair. Further, there was no such requirement for the Employment Tribunal but it was still accepted as a court. The proposition that the reference to equity and good conscience (in s 105(2)) somehow points against the Tribunal being a court overlooks that in *Reid* this Court said such a provision was consistent with the powers of a court of equity. Finally the proposition that because the Tribunal has an obligation to deal with interlocutory proceedings fairly, efficiently, simply and speedily that suggests it is not a court, overlooks that the High Court Rules require the rules to be construed to secure "the just, speedy and inexpensive determination of any proceeding or interlocutory application".

[47] While *O'Neill* was decided in the context of the "vexatious litigant" provisions of the Judicature Act 1908 we are of the view that the Tribunal is an inferior "court" for the purposes of s 25 of the Ombudsmen Act. Our reasons follow:

> **[47.1]** Ombudsmen are appointed as officers of Parliament and Commissioners for Investigations (see s 3(1)). Every investigation by an Ombudsman must be conducted in private (s 18(2)) and an Ombudsman is under a mandatory statutory duty to maintain secrecy in respect of all matters that come to his or her knowledge in the exercise of his or her functions (s 21). Section 26(1)(a) of the Act further provides that no proceedings, civil or criminal, shall lie against any Ombudsman for anything he or she may do or report or say in the course of the exercise or intended exercise of his or her functions under the Act (unless it is shown that he or she acted in bad faith).
>
> **[47.2]** In the face of these provisions it would be absurd were the protection conferred by s 25 of the Act to apply to proceedings in any court, but not in a tribunal.
>
> **[47.3]** The more so in the case of the Human Rights Review Tribunal given its characteristics as discussed in *O'Neill*.

[48] It follows that the Tribunal has no jurisdiction to adjudicate upon the complaints made against the Ombudsman by Mr Ward (on behalf of Mr Pope).

[49] There is a separate and further reason why the Tribunal does not have such jurisdiction. As we have held above, no Ombudsman is a "disability services provider". The convoluted and mistaken reasoning offered by Mr Ward cannot sensibly lead to the conclusion that any Ombudsman is such a provider. The Ombudsmen do not provide, or hold themselves out as providing, disability services.

CONCLUSION

[50] It is clear to us that in terms of *Mackrell v Universal College of Learning* High Court Palmerston North CIV-485-802, 17 August 2005 at [48] there is no realistic prospect of Mr Ward ever being able to persuade the Tribunal that there is a viable cause of action against any of the defendants. We are also of the view that he has not established that he has authority to bring and conduct these proceedings. In any event, the statement of claim in its present form is an abuse of process and is to be struck out.

FORMAL ORDERS

[51] The following orders are made:

> **[51.1]** The statement of claim is struck out.
>
> **[51.2]** Costs are reserved. If any of the defendants wish to apply for costs they must file a memorandum within fourteen days of this decision. The submissions by Mr Ward are to be filed within a further fourteen days with a right of reply to the defendants within seven days after that. In case it should prove necessary we leave it to the Chairperson of the Tribunal to vary any of the foregoing timetable steps.

.....	.....	.....
Mr RPG Haines QC	**Ms GJ Goodwin**	**Mr BK Neeson**
Chairperson	**Member**	**Member**