

Reference No. HRRT 013/2014

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN VIVIEN MILLAR

PLAINTIFF

AND CHIEF EXECUTIVE OF THE MINISTRY
OF SOCIAL DEVELOPMENT

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Mr BK Neeson, Member

REPRESENTATION:

Ms S Boele for plaintiff

Ms D Harris for defendant

DATE OF DECISION: 12 September 2014

**DECISION OF TRIBUNAL REFERRING COMPLAINT
BACK TO HUMAN RIGHTS COMMISSION**

Introduction

[1] In these proceedings filed on 19 May 2014 Ms Millar alleges that s 71A of the Social Security Act 1964 discriminates against persons whose primary income is derived from a social security benefit and whose secondary employment qualifies them for weekly compensation from ACC.

The application that the complaint be referred back to the Human Rights Commission

[2] A statement of defence was filed on 20 June 2014. By subsequent application dated 8 September 2014 the Chief Executive of the Ministry of Social Development (MSD) has

applied to have this matter referred back to the Human Rights Commission under s 92D of the Human Rights Act 1993 for mediation.

[3] In support of the application the following points are made:

[3.1] Until now proper consideration does not appear to have been given to mediation of this claim. Mediation is a cost effective option for both parties. Litigation for either party will be expensive and uncertain.

[3.2] A mediation meeting of the parties and their lawyers will assist each side 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 explore constructively whether there is any factual or legal aspect of the claim that would justify a settlement or indeed any means by which this claim might be settled and to enable the parties to better assess their respective positions and the prospects of success and to better prepare for the litigation.

[3.3] The proceedings have not been brought on an urgent basis and there are no interim issues that would be undermined by an interim stay.

[4] The following points are advanced in opposition to an order for referral:

[4.1] Section 71A of the Act is mandatory and does not confer any discretion on the MSD. Mediation is not the right process to advance the plaintiff's challenge.

[4.2] Mediation is unlikely to settle the matter and the legal challenge is better addressed before the Tribunal.

[4.3] The proceedings have been brought in good faith and in the interests of a large group of single parents who may find themselves in a position similar to that of the plaintiff.

[4.4] Mediation will cause unnecessary delay.

[4.5] A decision by the Tribunal is needed to clarify the law in the area of welfare law.

Discussion

[5] One of the primary statutory functions of the Human Rights Commission is to facilitate the resolution of disputes about compliance with Part 1A or Part 2 of the Human Rights Act in the most efficient, informal, and cost-effective manner possible. See s 76(1)(b). To this end the Commission is required by s 77 to provide dispute resolution services. Those services centre on mediation. Experience shows that mediation settles most complaints.

[6] While a complainant is not expressly bound to engage with the mediation process once the complaint has been made, it is clear from the statutory scheme that the mediation process ought to run its course unless good reason can be shown to the contrary. This much is clear from the provisions of Part 3 of the Act. It is also underlined by s 92D which provides:

92D Tribunal may refer complaint back to Commission, or adjourn proceedings to seek resolution by settlement

(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] It will be seen that on the filing of any proceedings the Tribunal is under a mandatory duty to first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and is required to refer a complaint under s 76(2)(a) to the Commission unless the Tribunal is satisfied that attempts at resolution will not contribute constructively to resolving the complaint, or will not be in the public interest or will undermine the urgent or interim nature of the proceedings.

[8] A complainant who wishes to avoid the Commission's dispute resolution process must satisfy the Tribunal that one or other of the three grounds allowed by s 92D(1)(b) apply. In the present case the submissions for Ms Millar fall well short of this. The submissions for the MSD, on the other hand, persuade us that an order under s 92D of the Act is the appropriate step to be taken. Specifically, it would appear that no or no real attempt has hitherto been made to engage with the mediation process offered by the Human Rights Commission. Before parties embark on what is likely to be substantial litigation involving the deployment of considerable resources, mediation should be attempted to either settle the case or to facilitate a better understanding of the opposing party's case. This, in turn, will allow more focussed pleadings before the Tribunal and the avoidance of unnecessary evidence and argumentation at the substantive hearing itself.

[9] In fairness to Ms Millar, Ms Boele made it clear that while she (Ms Millar) would prefer an early resolution of the case by the Tribunal, she will participate in any mediation in good faith.

[10] It is understood that the mediation will be held at Christchurch and that the Commission will have the ability to set the process in motion with little delay.

[11] It will be seen from the orders which follow that while referring the complaint back to the Commission we do so on terms which ensure that the mediation process is not allowed to drift. The parties are to report back to the Tribunal in three months time.

Orders

[12] For the reasons given the following orders are made:

[12.1] Pursuant to s 92D(1) of the Human Rights Act 1993 the complaint by Ms Millar is referred back to the Human Rights Commission for mediation.

[12.2] So that the proceedings are not left in suspension indefinitely, in three months time the parties are to provide the Tribunal with a progress report. That report must be filed no later than 5pm on Friday 12 December 2014.

[12.3] The proceedings before the Tribunal are stayed in the interim with leave reserved to either party to seek further directions if and when the need arises.

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Mr RPG Haines QC
Chairperson

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Mr GJ Cook JP
Member

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Mr BK Neeson
Member