IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 10**

UNDER	**THE HUMAN RIGHTS ACT 1993**
	Reference No. HRRT 036/2015
BETWEEN	**VANESSA KING**
	Plaintiff
AND	**ATTORNEY-GENERAL**
	Defendant
	Reference No. HRRT 039/2015
BETWEEN	**PETER HAMILTON RAY**
	First Plaintiff
AND	**ROSEMARY MCDONALD**
	Second Plaintiff
AND	**ATTORNEY-GENERAL**
	Defendant

CONT.

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Dr SJ Hickey MNZM, Member
Hon KL Shirley, Member

REPRESENTATION:
Mr SRG Judd for plaintiffs
Mr P Rishworth QC and Mr M McKillop for defendant

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

DATE OF DECISION: **31 March 2017**

DECISION OF TRIBUNAL ON APPLICATION BY PLAINTIFFS FOR ORDER REMOVING PROCEEDINGS TO THE HIGH COURT[1]

[1] [This decision is to be cited as: *King v Attorney-General (Application to Remove Proceedings to High Court)* [2017] NZHRRT 10.]

045/2015

BETWEEN **HINEATA RAMEKA**

Plaintiff

AND **ATTORNEY-GENERAL**

Defendant

046/2015

BETWEEN **SUSHILA BUTT AND ARTHUR ROYD BUTT**

Plaintiffs

AND **ATTORNEY-GENERAL**

Defendant

058/2015

BETWEEN **MORGAINA MATTHIAS**

Plaintiff

AND **ATTORNEY-GENERAL**

Defendant

027/2016

BETWEEN **ANGELA HART**

Plaintiff

AND **ATTORNEY-GENERAL**

Defendant

028/2016

BETWEEN **GILLIAN HART**

Plaintiff

AND **ATTORNEY-GENERAL**

Defendant

004/2017

BETWEEN **PHILIP SIM**

Plaintiff

AND **ATTORNEY-GENERAL**

Defendant

THE APPLICATION

[1] By application dated 17 February 2017 the plaintiffs in all eight of the intituled proceedings apply for an order that the proceedings be removed to the High Court for determination. Such order can only be made with the leave of the High Court. Section 122A of the Human Rights Act 1993 (HRA) provides:

> **122A Removal to High Court of proceedings or issue**
>
> (1) The Tribunal may, with the leave of the High Court, order that proceedings before it under this Act, or a matter at issue in them, be removed to the High Court for determination.
> (2) The Tribunal may make an order under this section, with the leave of the High Court, before or during the hearing, and either on the application of a party to the proceedings or on its own initiative, but only if—
> (a) an important question of law is likely to arise in the proceedings or matter other than incidentally; or
> (b) the validity of any regulation is questioned in proceedings before the Tribunal (whether on the ground that it authorises or requires unjustifiable discrimination in circumstances where the statutory provision purportedly empowering the making of the regulation does not authorise the making of a regulation authorising or requiring unjustified discrimination, or otherwise); or
> (c) the nature and the urgency of the proceedings or matter mean that it is in the public interest that they or it be removed immediately to the High Court; or
> (d) the High Court already has before it other proceedings, or other matters, that are between the same parties and involve issues that are the same as, or similar or related to, those raised by the proceedings or matter; or
> (e) the Tribunal is of the opinion that, in all the circumstances, the High Court should determine the proceedings or matter.
> (3) Despite subsection (2), if the validity of any regulation is questioned in proceedings before the Tribunal and the leave of the High Court is obtained for the making of an order under this section, the Tribunal must make an order under this section.
> (4) If the Tribunal declines to remove proceedings, or a matter at issue in them, to the High Court (whether as a result of the refusal of the High Court to grant leave or otherwise), the party applying for the removal may seek the special leave of the High Court for an order of the High Court that the proceedings or matter be removed to the High Court and, in determining whether to grant an order of that kind, the High Court must apply the criteria stated in subsection (2)(a) to (d).
> (5) An order for removal to the High Court under this section may be made subject to any conditions the Tribunal or the High Court, as the case may be, thinks fit.
> (6) Nothing in this section limits section 122.

[2] The grounds on which the order is sought are those in s 122A(2)(a) and (e), namely:

> **[2.1]** Several important questions of law are likely to arise in the proceedings other than incidentally.
>
> **[2.2]** In all the circumstances the High Court should determine the proceedings.

[3] The Attorney-General (sued in respect of the Ministry of Health) does not oppose the application should the Tribunal reach the view that removal of these proceedings to the High Court is appropriate.

[4] It will be seen the Tribunal has concluded it is appropriate that the application be granted in all eight proceedings. However, because the Tribunal cannot make an order under s 122A without leave of the High Court we intend in this decision to give our reasons for reaching the conclusion we have so that the plaintiffs can then file in the High Court an originating application to remove the proceedings to that Court. In the event of leave being given the Tribunal's decision can then be perfected as an order at a later date.

BRIEF BACKGROUND

[5] In each of the eight proceedings the plaintiffs challenge a policy of the Ministry of Health which excluded family members from payment for the provision of disability support services to their disabled relatives. It is alleged the policy constituted unlawful discrimination on the basis of family status. The policy in question is the same as that considered in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 and in *Spencer v Ministry of Health* [2016] NZHC 1650, [2016] 3 NZLR 513. In *Atkinson* it was found that the policy was discriminatory because parents willing to provide natural disability support for their children were materially disadvantaged as they did not receive paid work; similarly, adult disabled children were materially disadvantaged because they were denied access to the range of paid services providers that other disabled persons could access. The Court of Appeal further upheld the decision of the High Court that the differential treatment was not a reasonable limitation under s 5 of the New Zealand Bill of Rights Act 1990.

[6] On 20 May 2013 the New Zealand Public Health and Disability Act 2000 (PHDA) was amended with effect from the following day. The effect of the amendment is summarised in *Spencer* at [18] and [19]:

> **[18]** Part 4A, which the amendment introduced, governs funded family care. It affirms that family members are not generally entitled to payment for supporting their disabled family members. It validates the Ministry's then home based support services policy or practice, which the *Atkinson* cases had held to be discriminatory, and others analogous. But it also authorises qualifying family caregivers to be paid for their services; the funded family care policy from which Mrs Spencer now benefits.
>
> **[19]** The 2013 PHDA amendment precluded the Tribunal and any Court from hearing, or continuing to hear or to decide, any civil proceeding on any complaint of unjustifiable discrimination made after 15 May 2013. However, it permitted the *Atkinson* claim, then awaiting a remedy hearing, to be resolved by the Tribunal. It also permitted this Court to hear Mrs Spencer's then extant application for judicial review, on the basis of her pleadings as they were before 16 May 2013. [Footnote/endnote citations omitted]

[7] In all eight of the present proceedings the plaintiffs rely on both *Atkinson* and *Spencer*.

THE REMOVAL APPLICATION

Section 122A(2)(a) – important questions of law

[8] For the plaintiffs it is submitted these proceedings will require a critical evaluation of the various *Atkinson* and *Spencer* judgments as well as the impact of Part 4A of the PHDA on the current proceedings. Given the decision-maker will be invited to interpret the findings of the High Court and of the Court of Appeal, it is appropriate that the proceedings are heard in the High Court.

[9] Included among the important questions of law likely to arise in the proceedings are the following:

> **[9.1]** Whether the *Atkinson* policy applies to parents of minor disabled children who qualify for disability support services provided by the Ministry.
>
> **[9.2]** Whether the *Atkinson* policy applies to spouses.
>
> **[9.3]** The relevance, if any, of the Limitation Acts of 1950 and 2010 on claims under the *Atkinson* policy.

[9.4] Whether s 70E of the PHDA applies to disentitle the plaintiffs from an award of damages.

Section 122A(2)(e) – in all the circumstances

[10] The following additional points are advanced by the plaintiffs as part of the submission that in all the circumstances the High Court should determine the proceedings:

[10.1] In six of the eight cases the damages sought are well in excess of the Tribunal's jurisdiction of $350,000. If the Tribunal were to be satisfied that the Ministry breached Part 1A of the Human Rights Act, the proceedings would then have to be transferred to the High Court under s 92R for that court to determine the appropriate remedy or remedies.

[10.2] A number of the issues raised by the Ministry are mixed questions of law and fact and may relate to liability, causation and/or remedies. It is appropriate for the High Court to hear the cases from the outset so that all issues of liability, causation and remedies can be dealt with in one hearing with the witnesses having to give evidence only once.

[10.3] A decision of the Tribunal in these proceedings would almost certainly be subject to an appeal to the High Court. For this additional reason it would be more efficient for the High Court to hear all the proceedings.

[10.4] The matter of *Spencer* is still before the High Court and several issues raised by the Ministry in the present proceedings are similar to or related to those it raised in *Spencer*.

[10.5] The plaintiffs have been waiting a very long time for their claims to be resolved, including awaiting the outcome of the *Atkinson* and *Spencer* litigation.

[10.6] The Tribunal is presently overwhelmed by a wholly unanticipated increase in case load. See *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8. There will be substantial delay before the Tribunal can hear the liability part of the proceedings. Were judgment to be given in favour of the plaintiffs the cases would then need to be referred to the High Court for a second hearing on remedies (and judgment). The inevitable delay inherent in a two-step process will prejudice the plaintiffs.

[10.7] It is therefore in the interests of justice for the proceedings to be removed to the High Court now so that liability and remedies can be heard together and with significantly less delay.

SUBMISSIONS FOR THE ATTORNEY-GENERAL

[11] As mentioned, the Attorney-General has advised the Tribunal that the Ministry of Health offers no opposition to the application. The following specific responses to the plaintiffs' submissions are also made.

Section 122A(2)(a) – important questions of law

[12] The Ministry agrees that the matters in issue in these cases raise important questions of law. The plaintiffs' characterisation of those questions as detailed above is broadly agreed. While the Ministry would express the questions of law differently, that does not detract from its agreement they are important. Essentially, the Ministry says

the question of law is whether the *Atkinson* declaration applies to the plaintiffs' circumstances or not; and, if not, whether the Ministry discriminated against them. If it did, then it is necessary to consider the impact of the Limitation Acts and of the relevant superior court decisions bearing upon the assessment of a remedy, if any.

[13] It is agreed these proceedings do require the reconciliation of the superior court judgments, principally the two *Spencer* decisions (that of the Court of Appeal in [2015] NZCA 143 and of the High Court on the remedies reference in [2016] NZHC 1650).

Section 122A(2)(e) – in all the circumstances

[14] The first of the points made by the plaintiffs under s 122A(2)(e) (that in six of the eight cases the damages sought are in excess of the Tribunal's jurisdiction) is not agreed. Transfer to the High Court is not necessary once the Tribunal has made a liability finding unless the Tribunal is also satisfied the appropriate remedy is beyond its jurisdiction. Whether that is so would depend on the scope of any finding of liability that may be made.

[15] The Ministry agrees, however, that the Tribunal's unanticipated increase in case load would likely significantly delay consideration of the plaintiffs' claims, compared to the relative speed with which these matters could likely be determined in the High Court.

DISCUSSION

[16] There is little doubt these eight proceedings are likely to raise important questions of law. While the precise formulation of those questions may be debated the parties are in agreement as to their broad terms. For present purposes we accept the points of law include those identified in the plaintiffs' submissions. The overarching point is that it will be necessary for the *Atkinson* and various *Spencer* decisions to be reconciled. The protracted history of the litigation in those two cases foreshadows the real challenges facing the present parties in finding an early judicial resolution to their dispute.

[17] As to the "in all the circumstances" limb of the application, the plaintiffs' submissions gravitate to duplication and delay. We agree there is a high risk that even were the liability hearing to be before the Tribunal, the remedies hearing in all but two of the cases will have to take place in the High Court as required by s 92R. While split hearings on liability and remedies is not of itself an unusual circumstance, it is highly unusual for liability to be determined by a tribunal and the remedies by the High Court. While this is what the Act mandates, it will come at a cost in terms of delay and additional expense.

[18] The chequered history of the *Spencer* litigation is illustrative. There were pre-trial rulings which were appealed to the Court of Appeal (see *Attorney-General v Spencer* [2015] NZCA 143), a liability judgment given on 20 July 2016 (see [2016] NZHC 1650) and an application for that judgment to be recalled (see [2017] NZHC 391). All notwithstanding liability was supposedly settled in *Atkinson.* In litigation of this potential magnitude there is good reason to concentrate the hearings in one jurisdiction. This can only be done by removing the proceedings from the Tribunal to the High Court.

[19] Finally, there is the point that grossly under-resourced as it is, the Tribunal presently has no ability to offer a liability hearing until 2018 or 2019.

CONCLUSION

[20] Should the High Court grant leave under s 122A(1) of the HRA for the Tribunal to order that all eight of the present proceedings be removed to the High Court for determination, the Tribunal would so order. Our reasons are:

> **[20.1]** Important questions of law are likely to arise in the proceedings other than incidentally; and that
>
> **[20.2]** In all the circumstances, the High Court should determine the proceedings.

[21] As the Tribunal does not presently have leave of the High Court to make any orders, no order for removal is made in this present decision.

[22] It is anticipated the plaintiffs will now make application to the High Court for leave under s 122A(1) of the Act. Once such leave has been obtained the Tribunal will make the necessary formal orders subject, of course, to whatever might be said by the High Court in that regard.

.....	.....	.....
Mr RPG Haines QC	**Dr SJ Hickey MNZM**	**Hon KL Shirley**
Chairperson	**Member**	**Member**