

Reference No. HRRT 034/2016

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN GABRIELLA POPA

PLAINTIFF

AND CANTERBURY UNIVERSITY

DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson

Ms DL Hart, Member

Dr SJ Hickey MNZM, Member

REPRESENTATION:

Dr Popa in person

Ms P Shaw for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 25 January 2018

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM¹

INTRODUCTION

[1] These proceedings for a breach of Human Rights Act 1993 were brought against the University of Canterbury by Dr Gabriella Popa in June 2016. By amended application dated 3 February 2017 the University has applied for an order that the proceedings be struck out.

¹ [This decision is to be cited as *Popa v Canterbury University (Strike-Out Application)* [2018] NZHRRT 1.]

[2] In 2003, the University admitted Dr Popa to the degree of Doctor of Philosophy in Mathematics. Dr Popa complains that since then, the University has consistently refused to employ her in its School of Mathematics and Statistics notwithstanding her obvious academic achievement.

[3] The central issue to be determined is whether there is any reasonably arguable claim before the Tribunal or whether the claim should be struck out.

Background

[4] In October 2015, Dr Popa complained to the Human Rights Commission against the University of Canterbury alleging unlawful discrimination on the grounds of race, colour and ethnic and national origins, as well as racial harassment, because she was not given employment by the University, teaching mathematics.

[5] The Commission did not offer mediation or formally notify the complaint because there was no indication or evidence that Dr Popa's ethnicity, race or national origins were the reasons for her not being employed as a mathematics tutor at the University. This led to her claim at the Tribunal.

[6] Dr Popa reasons that discrimination has occurred because despite being "one of the best in mathematics on this earth" and graduating with a PhD, she has been unable to obtain employment at the University of Canterbury, even as a tutor.

[7] By statement of reply filed in August 2016, the University says (inter alia) that Dr Popa has not formally applied for any job vacancies with the University. In addition, her lack of teaching abilities and interpersonal skills means she is not suited to working with students and therefore for employment with the University. In short, the University says it has not breached any provision of the Human Rights Act.

[8] At a teleconference convened by the Chairperson on 25 November 2016, Dr Popa was advised that a refusal to offer employment to an employee qualified for the work in question does not breach the Human Rights Act unless the refusal is by reason of any of the prohibited grounds of discrimination. In case Dr Popa was in possession of evidence which could establish either directly or by inference that she was declined employment by reason of one of the prohibited grounds of discrimination, she was given the opportunity to place that evidence before the Tribunal.

[9] Subsequently, in a lengthy statement, Dr Popa made allegations of racism and discrimination against the University of Canterbury claiming that tutors there have English names and English as their first language, and are people born in the wealthy part of the world which contrasts with her own position. She further noted that there were no Romanian employees at the University. She did not provide any evidence establishing or capable of establishing that she had been refused employment by the University on the basis of her race, colour or ethnic and national origins.

The strike out application and affidavits in support

[10] The University of Canterbury applies for an order that the proceedings be struck out on the following grounds:

[10.1] Dr Popa has not formally applied for any job vacancies at the University.

[10.2] The Statement of Claim discloses no reasonably arguable cause of action as there is no indication or evidence that Dr Popa's race, ethnic or national origins were reasons for the University not offering her employment.

[10.3] Her proceedings are (in terms of s 115 of the Human Rights Act) trivial, frivolous or vexatious or are not brought in good faith.

[11] In support of the strike out application, the University filed two affidavits. One from Professor Jennifer Brown, the Head of the School of Mathematics and Statistics at the University of Canterbury (the school) and one by Irene David, Director of Teaching-Tutors at the school.

The opposition to the strike out application

[12] Dr Popa filed a further, lengthy response to the strike-out application and the affidavits of Professor Brown and Ms David. In this response, she described at length her interaction with the Human Rights Commission, her difficulty in affording a lawyer, and her criticisms of New Zealand mathematical education. She disputed her lack of suitability to work as a tutor, and asserted that the failure of the University to employ her is discriminatory. She stated she has phoned, emailed, applied online and gone to the University in person because she knows that people with doctorates have specialised education and should work in a university. She describes the University as a "multi-billion dollars corporate" that did not wish to offer her work. She did not point to any evidence that her Romanian nationality has been a factor in failing to obtain work at the University other than the absence of any Romanian employees there.

Jurisdiction to strike out

[13] The Tribunal has in recent cases addressed its jurisdiction to strike out proceedings. Examples include *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 (5 May 2015) at [21] to [33], *New Zealand Private Prosecution Services Ltd v Key (Strike-Out Application)* [2015] NZHRRT 48 at [36] to [45], *Rossi v Chief Executive, Ministry of Business, Innovation and Employment (Strike-Out Application)* [2016] NZHRRT 18 at [11] to [23] and *Apostolakis v Rennie (Strike-Out Application)* [2017] NZHRRT 42 at [8] to [17].

[14] For the purposes of the present decision we note only the following:

[14.1] The ordinary rule is that a strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. See *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

[14.2] The jurisdiction to dismiss is to be used sparingly. If the defect in the pleadings can be cured, an amendment of the statement of claim will normally be ordered. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

Assessment

[15] Dr Popa claims that the University of Canterbury has discriminated against her in the area of employment.

[16] Section 22 of the Human Rights Act 1993 provides:

22 Employment

- (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
- (a) to refuse or omit to employ the applicant on work of that description which is available; or
 - (b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or
 - (c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
 - (d) to retire the employee, or to require or cause the employee to retire or resign,—
- by reason of any of the prohibited grounds of discrimination.

...

[17] The prohibited grounds of discrimination are listed in s 21 of the Human Rights Act. Dr Popa relies on s 21(1)(g) – ethnic or national origins, which includes nationality or citizenship.

[18] The relevant facts relied on by Dr Popa are:

[18.1] She has not been offered any work by the University of Canterbury.

[18.2] She has a PhD and is well qualified to work as a tutor at the University.

[18.3] The University has employed others who do not have a PhD.

[18.4] She is from Romania.

[19] Two issues are raised. These are:

[19.1] Can Dr Popa be described as an “applicant for employment” in terms of the Human Rights Act, s 22(1)?

[19.2] If so, was there a refusal or omission to employ her by reason of one of the prohibited grounds of discrimination?

[20] As to the first issue, the University has argued that Dr Popa has not made any formal application for a job at the University. In the context of a strike out application it is inappropriate, without the benefit of full evidence and argument, to determine whether s 22 requires such a formal application before a person is an ‘applicant for employment’ for the purposes of the Act. It appears that Dr Popa has approached the University on many occasions over a six-year period in connection with her wish to work as a tutor there and that her overtures have been rebuffed because the University considers her unsuitable for tutoring work. For the purpose of this decision it is accepted that Dr Popa is an applicant for employment.

[21] As to the second issue, the statement of claim dated 20 June 2016 does not plead any facts from which it can be said Dr Popa was discriminated against on the basis she

is from Romania. This omission was specifically discussed at the case management teleconference convened on 25 November 2016 and addressed in the subsequent *Minute* of the same date issued by the Chairperson. At [17] he stated:

[17] In case Dr Popa is in possession of evidence which could establish either directly or by inference she was declined employment by reason of one of the prohibited grounds of discrimination it will be seen she will have an opportunity to place that evidence before the Tribunal within the context of the strike out application. This will more efficiently respond to the strike out application than the more indirect but conventional filing of an amended statement of claim. As a self-represented litigant Dr Popa will probably find it simpler to set out her evidence in affidavit form rather than as a narrative in the statement of claim. The essential point is that provided Dr Popa produces some evidence which, if presumed to be true, establishes a prohibited ground of discrimination is present, the strike out application could well fail in that respect. But if, after Dr Popa's best effort to lay out all the evidence in her possession there is simply no evidence on which a prohibited ground of discrimination can be identified, the case for striking out her proceedings will be strengthened.

[22] Dr Popa subsequently filed a 30 page affidavit sworn on 20 February 2017. In this lengthy document, she again failed to provide any evidential foundation for her claim that she was refused employment by the University (or that the University omitted to employ her) because of her race or ethnic or national origins. What she does repeatedly emphasise in this document is that because she is "one of the best in mathematics on this earth" and because she has not been employed by the University of Canterbury, the explanation must be that she is from Romania. However, the conclusion (that she has been discriminated against on the grounds of her nationality) does not follow from the fact that she holds a PhD in mathematics and that she has not been employed by the University. More is required to establish a causative link between her not being employed by the University and the fact that she is from Romania.

[23] Given the terms in which Dr Popa has framed her complaint, this case is a case of a frustrated expectation of entitlement, not one of discrimination. Because Dr Popa has a PhD, she asserts she is entitled to employment by the University. In her letter dated 27 February 2017 to the Tribunal she distilled the essence of her 30 page affidavit in the following terms:

Any healthy brain human being would think that a person with a Ph.D should work in university superior type education. This is how my family and myself think as well.

[24] The same point is articulated with some clarity in the statement dated 16 January 2017 filed by Aurora Ursu, sister of Dr Popa:

I am a trained Engineer and I know very clearly that in the Romanian educational system all people with a Ph.D. are employed at university. Gabriella said to me that she has been discriminated in New Zealand and she has not obtained a job at the University of Canterbury in Christchurch. It is very clear for me that this discrimination should not take place. From what Gabriella informed me, University of Canterbury has many employees without a Ph.D. and these employees without a Ph.D. would work in administration or in education, giving courses or tutorials.

I consider that it is very unfair to see that my sister is discriminated and she does not get a job at the University of Canterbury because she is the best applicant for a job and in a democratic system, the best applicant for a job should get the job.

[25] While the views expressed by Dr Popa and by her sister are no doubt sincerely held, they do not in any way provide an evidentiary foundation for alleging discrimination on the basis of race or ethnic or national origins.

[26] Dr Popa has been given every opportunity to amend her pleadings to address the submission by the University that there is nothing in them to suggest the University has refused or omitted to employ her because of her Romanian nationality. It remains the case that there is nothing in the statement of claim or in the documents subsequently filed by Dr Popa (including her affidavit sworn on 20 February 2017) to suggest the University of Canterbury has refused or omitted to employ her because of her Romanian origins.

[27] It follows that assuming the facts pleaded in the statement of claim (and the subsequent documents filed by Dr Popa) are true, there are no pleaded facts or circumstances to suggest the University of Canterbury has refused or omitted to employ Dr Popa because of her Romanian origins. It is therefore inevitable that the claim must be struck out.

Conclusion

[28] We conclude that because the statement of claim discloses no reasonably arguable cause of action against the University of Canterbury the claim must be struck out.

Costs

[29] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[29.1] The University is to file its submissions within 14 days after the date of this decision. The submissions by Dr Popa are to be filed within a further 14 days with a right of reply by the University within seven days after that.

[29.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without an oral hearing.

[29.3] In case it should prove necessary, we leave it to the Co-Chairperson of the Tribunal to vary the foregoing timetable.

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Ms MA Roche
Co-Chairperson

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Dr SJ Hickey MNZM
Member

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Ms DL Hart
Member