

Reference No. HRRT 040/2017

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN ALEX KAPIARUMALA

PLAINTIFF

AND NEW ZEALAND CATHOLIC BISHOPS CONFERENCE

FIRST DEFENDANT

AND MICHAEL GIELEN

SECOND DEFENDANT

AND SEXUAL ABUSE PROTOCOL COMMITTEE

THIRD DEFENDANT

AND BISHOP STEPHEN LOWE

FOURTH DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms K Anderson, Member

Dr SJ Hickey MNZM, Member

REPRESENTATION:

Mr CG Tuck for plaintiff

Mr S O'Sullivan and Mr M Booth for first defendant

Mr DS McGill for second defendant

Mr I Millard QC and Mr B Cullen for third and fourth defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 11 May 2018

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM¹

¹ [This decision is to be cited as: *Kapiarumala v New Zealand Catholic Bishops Conference (Strike-Out Application)* [2018] NZHRRT 18]

The claim

[1] The plaintiff, Alex Kapiarumala, was in 1981 ordained a priest in the Roman Catholic Diocese of Dibrugarh in Assam, India. After later spending two years in New Zealand in the period August 2002 to December 2004, he returned to this country in approximately November 2008. The present complaint by the plaintiff to the Tribunal has its genesis in complaints against the plaintiff himself. These were that he had sexualised pastoral encounters.

[2] By statement of claim filed in July 2017 the plaintiff alleges that all four defendants discriminated against him in his employment on the grounds of his race or ethnic or national origins contrary to the Human Rights Act 1993 (HRA). He further alleges he was the victim of racial harassment by all defendants. Damages of \$150,000 are sought along with compensation for loss of salary, stipend and associated benefits. The plaintiff has more recently submitted the Tribunal should exercise its power under s 92D of the HRA to refer his "complaint" back to the Human Rights Commission.

[3] All defendants deny the allegations and have filed applications for the proceedings to be struck out.

[4] By application dated 16 November 2017 the plaintiff applied for an order that a fifth defendant (a Catholic priest) be joined to the proceeding. After case management directions had been given by the Chairperson in relation to that application by way of *Minute* dated 23 November 2017 (in which attention was drawn to a potential objection to jurisdiction based on *Simmons v Board of Trustees of Newlands College (Strike-Out Application)* [2014] NZHRRT 60) Mr Tuck by memorandum dated 13 November 2017 gave notice that the application for joinder would not be pursued.

[5] The plaintiff has also filed in the High Court related defamation proceedings. The damages claimed amounted to almost \$1.3 million. Those proceedings were recently discontinued by notice of discontinuance dated 26 February 2018. The present proceedings before the Tribunal have not been discontinued though it will be seen the plaintiff has not by notice of opposition or by evidence in reply formally resisted the various strike out applications filed by the defendants. The Tribunal has received only submissions by Mr Tuck.

The plaintiff's representation

[6] The plaintiff has been represented by Ms Lisa Abrams, solicitor of Tauranga and by Mr Craig Tuck, barrister also of Tauranga.

[7] By memorandum dated 8 December 2017 Mr Tuck reported he had encountered "unforeseen problems in obtaining instructions" and by email dated 11 December 2017 Ms Abrams gave notice that her involvement in the case had ceased.

[8] By application dated 12 December 2017 Ms Abrams sought an order declaring that she had ceased to be the solicitor on the record for the plaintiff. In her supporting affidavit she notified the Tribunal that:

[8.1] Information had recently come forward which had created a serious and significant conflict of interest. She was no longer able to represent the plaintiff as instructing solicitor as the information concerned affected her duties, professional instructions and ethics.

[8.2] The plaintiff had breached the engagement contract authorising Ms Abrams to act and she was for this additional reason no longer able to continue representing him.

[8.3] Both the plaintiff and Mr Tuck had been given notice of Ms Abrams' intention to withdraw.

[9] In an email dated 13 December 2017 a solicitor in the employ of Ms Abrams advised the Tribunal that the plaintiff had known since 2 December 2017 that Ms Abrams could no longer act for him and he had ceased responding to Ms Abrams' emails some two weeks prior to that. The email went on to advise that Ms Abrams had also withdrawn from the defamation proceedings brought by the plaintiff in the High Court in Hamilton.

[10] On 15 December 2017 the Tribunal made an order formally declaring that Ms Abrams had ceased to be the solicitor on the record for the plaintiff.

[11] By memorandum 13 December 2017 Mr Tuck advised the Tribunal that he would continue to appear as counsel.

The strike out applications

[12] Each of the four defendants have filed applications for the proceedings to be struck out. Each application is supported by a detailed affidavit. Because the third and fourth defendants have shared representation, there are only three formal applications. The date of filing of the applications and the identity of the deponent of the supporting affidavit is shown in the following table:

Date	Name of Defendant	Application and Submissions	Supporting affidavit: Name of Deponent
6 November 2017	NZCBC	✓	JA Dew, Cardinal and Archbishop of Wellington
8 December 2017	Father Michael Gielen	✓	M Gielen, (Father)
8 December 2017	SAPC & Bishop Lowe	✓	SM Lowe, Bishop of the Hamilton Diocese

The plaintiff's response

[13] By *Minute* dated 15 November 2017 the plaintiff was directed by the Chairperson to file and serve any notice of opposition (together with his evidence and submissions) in relation to such of the strike out applications he intended opposing. No such notice has been filed. But Mr Tuck has filed various memoranda, notably those dated 10 November 2017 and 27 February 2018. All such memoranda (particularly the two mentioned) have been taken into account in preparing this decision.

[14] By letter dated 22 January 2018 Mr Tuck advised he was acting for the plaintiff in a pro bono capacity and sought an extension of time for filing the notice of opposition:

A number of issues have been identified by the defendants that need to be clarified. Counsel is confirming instructions with the plaintiff and seeks an extension of the time for filing to 5 February 2018 by 5 pm.

[15] No objection having been raised by any of the defendants the application was granted by the Chairperson by *Minute* dated 30 January 2018. The timeline for the plaintiff's filing of any notice of opposition was moved to 5 February 2018.

[16] By memorandum dated 2 February 2018 Mr Tuck reported he had received further instructions from the plaintiff since the withdrawal of Ms Abrams as instructing solicitor. He stated (with reference to the strike out applications) that it was accepted that there is an issue as to the jurisdiction of the Tribunal (as contended by the defendants) and that these proceedings in their current form cannot continue. He suggested that the proceedings be referred back to the Human Rights Commission. The text of the memorandum follows:

1. Further to counsel's memorandum of 22 January 2018. Counsel has received further instructions from the plaintiff since the withdrawal of Ms Abrams as instructing solicitor.
2. Counsel accepts that there is a jurisdiction issue that means these proceedings in their current form cannot continue.
3. Rather than return to the Human Rights Commission and commence fresh proceedings, counsel seeks to have the Tribunal refer the matter back to the Human Rights Commission.
4. In the interim, counsel proposes a mediation with the defendants with a view to resolving the discrimination allegations entirely – this may be beneficial to all concerned to obtain some clarification, closure and healing.
5. Should this be an agreeable pathway – counsel is available to liaise with the defendants' counsel in an effort to arrange a suitable venue, time and facilitator(s).

[17] By *Minute* dated 5 February 2018 the defendants were directed by the Chairperson to file their submissions on the proposal that the complaint be referred back to the Human Rights Commission. All defendants have responded in terms opposing such referral.

[18] The referral issue is addressed later in this decision.

[19] Not only has the plaintiff failed to file a notice of opposition to the strike out applications he has not challenged by way of affidavit the detailed evidence provided by the deponents referred to, being (in the order in which they are named as defendants) the Archbishop of Wellington, John Atcherley Dew, Father Michael Gielen and Bishop Stephen Lowe. Mr Tuck has, however, by memorandum dated 27 February 2018 made brief submissions in opposition to the strike out applications and renewed the application for the case to be referred back to the Human Rights Commission.

THE STRIKE OUT APPLICATIONS

Jurisdiction to strike out

[20] In a number of recent cases the Tribunal has addressed its jurisdiction to strike out the proceedings. Examples are collected in *Apostolakis v Rennie (Strike-Out Application)* [2017] NZHRRT 42 at [8] to [18]. The circumstances in which the Tribunal may strike out all or part of a pleading include where there is no arguable case. While the ordinary rule is that a strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true, where the factual allegations are plainly incorrect it is not appropriate to assume their truth. There must be an objective factual basis for the allegations. A court or tribunal is not required to assume the correctness of factual allegations obviously put forward without any foundation. See *Collier v Panckhurst* CA 136/97, 6 September 1999 at [19].

[21] In the present case the unanswered affidavits by Archbishop Dew, Father Gielen and Bishop Lowe and the absence of any formal notice of opposition or affidavit by the plaintiff

allow the Tribunal to determine the strike out application on the basis of the evidence given by the defendants.

The strike out applications and the employment issue

[22] It is alleged all four defendants discriminated against the plaintiff in the employment context. As each defendant submits this claim is wholly misconceived, it is necessary to refer to the allegations made in the statement of claim and to the unchallenged evidence filed by the defendants which establishes that at the relevant time the plaintiff was not in the employ of any of the defendants.

[23] In his statement of claim the plaintiff variously alleges:

[23.1] He had an open-ended employment position with the Hamilton Diocese “working for Bishop Denis Browne”.

[23.2] In January 2010 he was appointed assistant priest at St Thomas More, Mt Maunganui where he worked with Father Gielen (the second defendant) and suffered unlawful discrimination and racial harassment “throughout his employment relationship with Father Gielen”.

[23.3] He suffered unlawful discrimination in his employment “with the actions” of the third defendant, the Sexual Abuse Protocol Committee (SAPC).

[23.4] He suffered unlawful discrimination and racial harassment “throughout his employment relationship with Bishop Stephen Lowe”, the fourth defendant.

[24] The claim that one or all of the defendants was the employer of the plaintiff is, however, untenable in the face of the detailed affidavits sworn by Archbishop Dew on 2 November 2017 and 8 December 2017 respectively and by Bishop Lowe on 8 December 2017. As it is unnecessary to recite the contents of these affidavits at length we provide only a brief summary of the main points:

[24.1] The Roman Catholic Church is not a registered entity in New Zealand. However, the metropolitan and provincial dioceses and each individual parish are separate registered charities. There is one metropolitan diocese (the Archdiocese in Wellington). There are also five provincial dioceses. These are in Auckland, Hamilton, Palmerston North, Christchurch and Dunedin. [Dew 2 November 2017, paras 8 and 9].

[24.2] The New Zealand Catholic Bishops Conference (NZCBC) is a charity designed to facilitate and support bishops in New Zealand. It is not the governing body of bishops in New Zealand. The purpose of the organisation is simply to provide bishops with guidance. [Dew 2 November 2017, para 14].

[24.3] NZCBC is not, and was not, the plaintiff’s employer. It is also not an agent of the Roman Catholic Church in New Zealand. [Dew 2 November 2017, para 6].

[24.4] NZCBC has no employment relationship with the plaintiff or direct involvement in the circumstances of this matter (with the exception of minor administrative involvement) and so could not cause or commit the discrimination complained of by the plaintiff. [Dew 2 November 2017, para 32 and Dew 8 November 2017, para 45].

[24.5] Each diocese has its own clergy trust fund, which they fund through levies on parishes and special collections within the diocese. The clergy trust fund is used

to pay the stipends of all clergy bishops, priests and deacons within the diocese. [Dew 8 November 2017, para 37].

[24.6] As with all six Catholic dioceses within New Zealand, the Hamilton Diocese is not an incorporated entity. However, under the Roman Catholic Bishops' Empowering Act 1997, a private Act of Parliament, the office of bishop of each diocese is a corporation sole with perpetual succession. In the case of the Hamilton Diocese the corporation sole is "the Roman Catholic Bishop of the Diocese of Hamilton". The property of the Hamilton Diocese is held under that name. [Lowe 8 December 2017, para 2.2].

[24.7] Each diocese is part of a wider Catholic community and reports directly to the Vatican and is accountable to the Pope. There is no national governing body in New Zealand that controls or can legislate for an individual diocese in New Zealand. Each diocese is independent of the other dioceses. [Lowe 8 December 2017, para 2.4].

[24.8] As the Hamilton Diocese, like other dioceses, reports to and is accountable directly to the Vatican, the NZCBC has no control over the Hamilton Diocese. The Hamilton Diocese does not report to the NZCBC. [Lowe 8 December 2017, para 3.1].

[24.9] The NZCBC has no role in the deployment of priests within a diocese or in their discipline. It cannot give any direction in relation to particular priests. [Lowe 8 December 2017, para 3.3].

[24.10] A priest is a person of God who has been called by God to exercise certain special ministries within the Church. [Lowe 8 December 2017, para 4.1].

[24.11] The call is considered a lifelong call and even when a priest retires from active ministry he remains a priest able to minister the sacraments. [Lowe 8 December 2017, para 4.3].

[24.12] Because a priest is only to be ordained if he is considered to be called by God, priesthood is regarded as a vocation and not an employment relationship. A similar situation prevails in New Zealand to that described in a paper prepared by the Catholic Bishops of England and Wales which sets out the role of a priest in the following terms: [Lowe 8 December 2017, para 4.5]

- 5.1 The relationship between the clergy and their bishops and the clergy and the people entrusted to their care is a unique one. It is based on a God-given call to ministry within a diocesan setting, the characteristics of which are incompatible with the employer-employee relationship. Any extension of employment rights to the clergy would not only alter radically and undermine the relationship between a priest or deacon and his Bishop, but would also attack the very basis of Catholic ministry. Priests and deacons are called to serve the people entrusted to them and to spread the message of the Gospel amongst all people as a result of the grace of ordination, not because they have entered into a quasi-contractual agreement to provide a service to a defined group of clients or consumers.

[24.13] Although the bishop of the diocese into whom the priest is incardinated can give instructions on some matters, and the local bishop within the diocese where the priest has faculties that allow him to serve there, can assign the priest to various parishes and the like, neither bishop has daily control of the priest. The priest is required to observe Canon Law and diocesan rules and regulations but otherwise exercises his priestly ministry according to his own spirituality before God. [Lowe 8 December 2017, para 4.6].

[24.14] Consistent with the priest not being an employee the priest does not receive a wage or salary. Rather the Church undertakes to provide accommodation, food, a car and provides a living allowance called a stipend. In the Hamilton Diocese this is provided by the Clergy Trust Fund. The stipend is about 30% of the minimum wage. [Lowe 8 December 2017, para 4.9].

[24.15] Whenever Bishop Lowe appoints a priest to a position, he (Bishop Lowe) has never thought he was exercising anything more than the powers conferred on him by Canon Law. He has not thought that he was entering into some form of civil law contract. That concept is alien to the way the Church operates. [Lowe 8 December 2017, para 4.16].

[24.16] When in December 2004 the plaintiff's appointment to the Auckland Diocese expired, the plaintiff returned to India. He was, for a time, the parish priest of Nilmoni in the Diocese of Dibrugarh. In June 2008 the Bishop of Dibrugarh granted the plaintiff permission to minister in the Archdiocese of Guwahati. The plaintiff did not take up such ministry nor did he remain in his own diocese. Instead, without the knowledge of his Bishop, he came back to the Auckland Diocese. This was in November 2008. Bishop Lowe has been advised by the Bishop of Dibrugarh that he (the Bishop of Dibrugarh) did not know where the plaintiff was until in July 2009 the plaintiff advised that Bishop that he was in New Zealand and sought permission to remain. The Bishop of Dibrugarh advised the plaintiff that he could not give such permission. [Lowe 8 December 2017, para 5.3].

[24.17] At no time since his return to New Zealand in 2008 has the plaintiff had permission from the Bishop of Dibrugarh to be in New Zealand, something he made no attempt to make known to the Bishop of Auckland or to the Bishop of Hamilton. That means that the plaintiff was at no time qualified to serve as a priest in the Hamilton Diocese. [Lowe 8 December 2017, para 5.4].

[24.18] The plaintiff served in the Auckland Diocese until September 2009. The previous Bishop of Hamilton then offered him ministry in the Diocese of Hamilton until the end of 2010 and he ministered in various parishes filling in for priests. On 31 December 2010 the then Bishop of Hamilton appointed the plaintiff Assistant Priest of Cambridge and Matamata and then in December 2011 he was appointed Assistant Priest of Tauranga. At no stage did the plaintiff enter into an employment agreement with the Hamilton Diocese or the Bishop of Hamilton. [Lowe 8 December 2017, para 5.6].

[25] The inevitable conclusion from this evidence is that at the time the alleged discriminatory acts occurred, the plaintiff was not in any form of employment relationship with any of the named defendants in these proceedings.

[26] Before addressing the relevance of this finding to the strike out applications it is necessary to first explain also that ground of the defendants' objection to jurisdiction.

The strike out applications in the context of the investigation by the Human Rights Commission

[27] For the reasons explained in *Simmons v Board of Trustees of Newlands College (Strike-Out Application)* [2014] NZHRRT 60 at [14] to [21] the Tribunal only has jurisdiction over whatever "complaint" has been earlier lodged with the Human Rights Commission. Proceedings before the Tribunal under the HRA 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. If no “complaint” against a particular defendant was lodged with the Commission, the Tribunal has no jurisdiction in relation to that defendant.

[28] In the present case the Human Rights Commission has by letter dated 13 October 2017 notified the Tribunal that the Commission gave notice only to the NZCBC of the plaintiff’s complaint of discrimination. While the complaint referred also to the SAPC, Father Gielen and Bishop Lowe, none were notified of the complaint. The letter goes on to record that the NZCBC responded that it was unsure whether it was the correct respondent to the complaint but later informed the Commission it was prepared to attend mediation. However, a short time later the plaintiff informed the Commission that as the NZCBC had not at that time provided further information in respect of the complaint, he (the plaintiff) considered he had no choice but to take his complaint to the Human Rights Review Tribunal. In an email dated 23 May 2017 the Commission gave notice that it would accordingly close the complaint file. Two days later NZCBC advised it considered it was not a respondent to the complaint and it was therefore inappropriate to engage in mediation. The relevant text of the Human Rights Commission letter dated 13 October 2017 addressed to the Tribunal follows:

1. I refer to the Human Rights Review Tribunal’s letter dated 8 August 2017 to the Human Rights Commission requesting information about any jurisdictional matters the Tribunal needs to be aware of in the above matter.
2. On 14 November 2016 the Commission received a complaint letter dated 11 November 2016 from Craig Tuck, lawyer for [the plaintiff], which enclosed an affidavit of [the plaintiff]. The heading of the letter stated that the complaint was against the Roman Catholic Church in New Zealand (“the Church”) represented by the New Zealand Catholic Bishop’s Conference (NZCBC). The letter alleged that the NZCBC, the Sexual Abuse Protocol Committee of the Hamilton Diocese (SAPC), Father Michael Gielen and Bishop Stephen Lowe unlawfully discriminated against [the plaintiff] on the grounds of race, colour and ethnic or national origin, and racial harassment in employment pursuant to sections 21, 22 and 63 of the Human Rights Act 1993 (“the HR Act”).
3. In a letter dated 15 February 2017, the Commission notified the NZCBC of [the plaintiff’s] complaint against the Church on the grounds of race, colour, ethnic or national origin and racial harassment in employment pursuant to sections 21, 22 and 63 of the HR Act. The Commission’s letter attached the complaint letter dated 11 November 2016, [the plaintiff’s] affidavit and further complaint information from [the plaintiff] received by the Commission on 14 January 2017.
4. NZCBC responded, through their lawyer, in a letter dated 1 March 2017 in which it advised that it was unsure as to whether it was the correct respondent to [the plaintiff’s] complaint.
5. In an email dated 1 May 2017, NZCBC informed the Commission that it was prepared to attend mediation and would provide a response to [the plaintiff’s] complaint by 17 May 2017.
6. On 23 May 2017, [the plaintiff] informed the Commission, through his lawyer, that as the NZCBC had yet to provide further information in respect of his complaint, he considered that he had no choice but to take his complaint to the Human Rights Review Tribunal due to the resulting delay. In an email dated 23 May 2017, the Commission informed [the plaintiff’s] lawyer that it would accordingly close the complaint file.
7. In a letter to the Commission, dated 25 May 2017, NZCBC advised, through its lawyer, that it considered that it was not a respondent to the complaint and it was therefore inappropriate to engage in mediation...

[29] It is clear from this letter that the Human Rights Commission did not give notice of the plaintiff’s complaint to the second, third and fourth defendants. This position is confirmed by the affidavit sworn by Father Gielen on 28 November 2017 and the affidavit sworn by Bishop Browne on 8 December 2017.

[30] In his affidavit Father Gielen described events in the period December 2009 until May 2010 during which the plaintiff and Father Gielen were serving at St Thomas More in Mt Maunganui. Father Gielen rejects the claims made by the plaintiff against him (Father Gielen) and, for the reasons given by Archbishop Dew and Bishop Lowe, points out that there was no employment relationship between the plaintiff and Father Gielen. More relevantly in the present context, Father Gielen has sworn that he was not aware of any complaint to the Human Rights Commission by the plaintiff against him (Father Gielen).

[31] The affidavit sworn by Bishop Lowe is to the same effect. In his affidavit sworn on 8 December 2017, Part 7, he states:

[31.1] The first time he was aware of any complaint to which he was the respondent was in August 2017 when he received the present proceedings issued out of the Tribunal. The same applies in relation to the SAPC. There was no notice of complaint to either the Bishop or the SAPC from the Human Rights Commission.

[31.2] Bishop Lowe was, however, aware that a complaint had been made against the NZCBC but did not see the complaint until after the issue of the present proceedings.

[31.3] At no stage has Bishop Lowe or the SAPC had the opportunity to be heard in relation to the complaint to the Human Rights Commission.

[32] The inevitable conclusion from the evidence given by Father Gielen and Bishop Lowe is that the Tribunal has no jurisdiction in relation to the second, third and fourth defendants.

[33] This conclusion is not affected by the fact that the plaintiff's complaint to the Commission included allegations that Father Gielen, the SAPC and Bishop Lowe also unlawfully discriminated against the plaintiff. The unanswerable point is that no notice of the allegations against the second, third and fourth defendants was given to those defendants and as the affidavit evidence makes clear, the first time these defendants became aware of the complaints made against them, was when the present proceedings were issued out of the Tribunal.

[34] It is now possible to address the grounds advanced by each of the defendants in support of their separate strike out applications.

The strike-out application by the first defendant, the NZCBC

[35] The strike out application filed by the NZCBC dated 6 November 2017 is supported by detailed submissions dated 8 December 2017. It is not intended to address each and every of the grounds advanced.

[36] In the interests of brevity it is intended to focus on the ground that under Canon Law (which is recognised in New Zealand civil law), a bishop is not an employer of priests in a diocese. That is, priests are not employees, but rather ministers of religion who have responded to a religious calling. In *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 (CA) at 526 this position was confirmed (albeit each case will turn on how each priest is appointed). In the present case Archbishop Dew and Bishop Lowe have unambiguously established that Catholic priests in New Zealand are not ordinarily employees, but rather ministers of religion.

[37] Furthermore, the NZCBC was not only not the plaintiff's employer, it was also not an agent of the Roman Catholic Church in New Zealand.

[38] As deposed by Archbishop Dew, because the NZCBC had no employment relationship with the plaintiff or direct involvement in the circumstances of this matter it could not cause or commit the discrimination complained of by the plaintiff. The pleadings are speculative and without any factual foundation and do not articulate how NZCBC discriminated against the plaintiff in circumstances where the NZCBC had no employment relationship with the plaintiff or direct involvement in the events giving rise to this matter.

[39] In these circumstances it is inevitable that the proceedings by the plaintiff against the NZCBC must be struck out.

The strike-out application by the second defendant, Father Michael Gielen

[40] The application to strike out the plaintiff's claim against Father Gielen is based on one or more of the following grounds:

[40.1] The Tribunal does not have jurisdiction because Father Gielen was not given notice by the Human Rights Commission of any complaint against him.

[40.2] The delay between the facts giving rise to the allegations and the plaintiff's proceeding being lodged in the Tribunal warrant that the claim be struck out and not referred back to the Commission.

[40.3] The plaintiff's pleading does not disclose a reasonably arguable cause of action against Father Gielen under either s 22 or s 63 of the Act.

[41] In earlier sections of this decision we have recorded our conclusion that:

[41.1] At the time of the alleged events the plaintiff was not in any form of employment relationship with any of the named defendants, including Father Gielen.

[41.2] Because the Human Rights Commission gave no notice to Father Gielen of the complaints made against him by the plaintiff, the Tribunal does not have jurisdiction to hear these proceedings as against Father Gielen.

[42] It follows that the proceedings by the plaintiff against Father Gielen must be struck out.

The strike-out application by the third and fourth defendants – the SAPC and Bishop Lowe

[43] By application dated 8 December 2017 the third and fourth defendants applied for the proceedings to be struck out as against them on various grounds including:

[43.1] The Tribunal lacks jurisdiction as no notice of the complaint was given by the Human Rights Commission to the third and fourth defendants. Neither the SAPC nor Bishop Lowe were aware of the complaint until served with the present proceedings issued out of the Tribunal.

[43.2] The statement of claim discloses no arguable cause of action against either the third or fourth defendants. In particular, neither were the employer of or in an employment relationship with the plaintiff.

[44] For the reasons earlier given, both grounds are made out and the statement of claim must be struck out as against the third and fourth defendants. It is not necessary to address the balance of the grounds on which the strike out application has been based.

Whether complaint to be referred back to Human Rights Commission

[45] It is now necessary to address the memorandum dated 2 February 2018 in which Mr Tuck gave notice that he accepts there is a jurisdiction issue and that these proceedings in their current form cannot continue. In this memorandum he applied for an order under s 92D of the Act referring the complaint back to the Commission for mediation.

[46] The jurisdiction of the Tribunal to refer a complaint back to the Commission is conferred by the HRA, 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.

[47] As the proceedings were filed on 19 July 2017 and as the parties have since then taken substantial interlocutory steps it would appear too late for subs (1) to apply. However, under subs (2) the Tribunal may “at any time” refer a complaint back to the Commission if it appears to the Tribunal that the complaint may yet be able to be resolved by the parties and the Commission (for example, by mediation).

[48] By *Minute* dated 5 February 2018 the Chairperson directed that the defendants advise whether the application by the plaintiff under s 92D was consented to or opposed.

[49] All defendants have filed memoranda opposing referral of the complaint back to the Commission. The grounds of opposition include:

[49.1] The delay between the alleged facts giving rise to the plaintiff’s allegations, being the period from mid-August 2014 to June 2015, and the filing of the plaintiff’s proceedings on 19 July 2017.

[49.2] All defendants have applied to have the proceedings struck out on the grounds the Tribunal does not have jurisdiction over the plaintiff’s claims.

Discussion

[50] The fundamental difficulty faced by the plaintiff’s application is that none of the defendants to these proceedings was his employer or in some kind of employment relationship with him. In addition the claims made do not disclose an arguable case of discrimination in employment or racial harassment. This leads to the overarching point that consequently none of the defendants are willing to engage in mediation.

[51] It follows that in terms of s 92D(2) it is not possible for the Tribunal to find that, from what is known to it about the complaint, the complaint may yet be able to be resolved by the parties and the Commission (for example, by mediation).

[52] In these circumstances the application for referral must be declined.

CONCLUSION

[53] For the reasons given the proceedings against the first, second, third and fourth defendants are struck out and no order is made referring the plaintiff's complaint back to the Human Rights Commission.

ORDERS

[54] The following orders are made:

[54.1] The statement of claim is struck out as against the first, second, third and fourth defendants.

[54.2] The application for an order referring this matter back to the Human Rights Commission under s 92D of the Human Rights Act 1993 is dismissed.

COSTS

[55] Costs are reserved. Unless the parties come to an arrangement on costs the following timetable is to apply:

[55.1] The defendants are to file their submissions within 14 days after the date of this decision. The submissions for the plaintiff are to be filed within the 14 days which follow. The defendants are to have a right of reply within seven days after that.

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

[55.3] 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
Chairperson

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Ms K Anderson
Member

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Dr SJ Hickey MNZM
Member