

Background

[2] On the morning of 14 March 2011 Ms Sionepulu was the driver of a vehicle travelling in a southerly direction over the Auckland Harbour Bridge towards the city. On her account, she was in a middle lane when she observed that in the lane on her right hand side a vehicle travelling in the same direction had broken down and was stationary. A truck travelling in that lane parallel to Ms Sionepulu attempted to avoid the obstruction by moving into the lane occupied by Ms Sionepulu. This manoeuvre resulted in her vehicle being “side swiped” by the truck, causing denting and scratching along the right hand door panels of Ms Sionepulu’s vehicle. Although she tried to get the attention of the driver she was unsuccessful. After noting the registration number of the truck she reported the incident to the Police. She says she was frightened and upset by the incident, particularly because she was then pregnant with her daughter. Her Police complaint subsequently led to investigations by both the Police and by the owner of the truck, Downer NZ Ltd.

[3] By letter dated 9 June 2011 the investigating officer, Senior Constable Johnston, notified Ms Sionepulu that having spoken to her and to the driver of the truck involved he (Senior Constable Johnston) had concluded that in view of the conflicting accounts of the incident no further inquiries would be made and the file closed. He provided Ms Sionepulu with the names and contact details of the fleet managers for Downer.

[4] On 19 June 2011 Mr Butler, representing himself as “a Human Rights” advocate, sent a text message to Downer claiming \$7,000 and disclosing to Downer, for the first time, that the driver of the other vehicle was Ms Sionepulu who he described as a “6 month pregnant Pacific Island female”. His second message of the same date foreshadowed a complaint under the Human Rights Act based on discrimination on the grounds of “sex-gender and ethnicity – nationality citizenship as a Pacific Islander”.

[5] The case for Ms Sionepulu is that in the course of the investigations by Downer and Senior Constable Johnston she was the victim of indirect discrimination on account of her sex and ethnicity (that she is a Pacific Islander). Damages of \$100,000 are sought.

The discrimination claim

[6] The claim advanced by Ms Sionepulu has been articulated in different ways. In the statement of claim the essence of the case is captured in the first paragraph which states:

Downer EDI Works Ltd and [Senior Constable] Douglas Johnston treated the plaintiff differently by omitting to conduct a visual check on the Downer owned truck and trailer vehicle that collided with the plaintiffs vehicle on the Auckland Harbour Bridge on 4 March 2011 [sic].

[7] The balance of the allegations in the statement of claim assert (inter alia) that Downer provided to Senior Constable Johnston false information which caused the Police inquiry to be closed. In addition, by falsely denying that any collision had occurred, Downer had impliedly alleged that Ms Sionepulu had caused the damage to her own vehicle and had ignored the “emotional terror of a near death experience for both the plaintiff and unborn baby” as well as the humiliation of the insinuation that Ms Sionepulu was attempting an insurance fraud. The statement of claim goes on to allege “personal injury as a NZ citizen” caused by Senior Constable Johnston not performing his duty “with reasonable care and in bad faith”. The final allegation is that:

... The confusion of why the plaintiff was not treated the same as other drivers in regards to the indicators of NZ transport law and the investigation of vehicle accidents by the Police.

[8] In her brief of evidence (affirmed at the hearing) Ms Sionepulu described herself as “deeply offended, injured and humiliated” that Downer have denied any collision occurred and have “stated that I and my husband done the damage to my vehicle ourselves”. She goes on to say that the “impression” conveyed was that she was a woman and Downer a “man’s company – to get over it”. She then poses a number of rhetorical questions:

Or is this how DOWNER treats everyone that has an alleged collision with one of their vehicles? Is this process a denial part of the procedures that DOWNER has in regards to any type of vehicle accident? Does DOWNER apply this type of conduct with other female drivers as well? Does the NZ Police routinely take the word of big companies from the same suburb (Mt Wellington) without doing a visual check with every collision that occurs involving their vehicles?

The whole process reeks of indirect discrimination and I find it very difficult to understand why they have chosen to treat me in this particular manner unless this is how they treat everyone else. If so, then they have acted unlawfully as I believe the Transport/Road rules apply to everyone equally and are designed to keep pregnant females safe from reckless truck and trailer drivers who think they own the road, and again, have no sense of fear of the NZ Police or consequences.

These questions cannot and do not amount to evidence.

[9] In his opening statement Mr Butler repeated the assertion that between 14 March 2011 and 19 June 2011 his wife had been subjected to indirect discrimination by virtue of her sex (which includes pregnancy) and ethnicity (she being a Pacific Islander). He submitted that the investigations carried out by Downer and by the Police covered up the fact that an accident had occurred as alleged by his wife and he itemised a number of matters which he submitted showed that the investigation carried out by the Police had been inadequate or negligent. This enabled Downer to assert that no collision had occurred. He said that the entire investigatory process had been controlled by Downer and the Police, they were both from Mt Wellington and it was to be assumed that they knew each other. In the result they had produced an outcome which looked legitimate on paper but which actually amounted to indirect discrimination. His wife had been denied an impartial and thorough investigation because the Police had taken the Downer witnesses at their word. He spoke of the trauma suffered by his wife “nearly being killed” with her unborn child and the “cultural humiliation of being treated as a fraudster”. He asked the Tribunal to send a clear message to companies which drove on the road and who believed they owned them. He also asked that the Tribunal send a message to the Police “to pull their socks up”.

[10] Asked to specify the grounds on which it was alleged that his wife was the victim of indirect discrimination, Mr Butler said that it was the investigatory process and the conclusion that no collision had occurred and that the damage had been done by his wife. He said that he and his wife did not know why Downer and the Police carried out their investigations as they did. All they knew was that Ms Sionepulu had been treated differently. No visual check of the Downer vehicle had been carried out. He added:

All we know is she was pregnant at the time and a Pacific Islander.

Mr Kenny [an employee of Downer] thought he could get away with it because she was a Pacific Islander.

[11] In response to a question from the Tribunal Mr Butler said that it was not his wife’s case that because she was not a high profile person such as the Prime Minister, she was treated differently.

Discrimination – the evidence given by Ms Sionepulu

[12] In her oral evidence Ms Sionepulu:

- Accepted that until her husband sent the text message to Downer on 19 June 2011, neither Downer nor any employee of that company were aware of the sex and ethnicity of the driver of the motor vehicle involved in the alleged collision.
- Acknowledged that the statement in her brief of evidence that Downer was a “man’s company” was not meant to imply that that was the reason why her complaint against the truck driver had not been accepted. She had referred to Downer as a man’s company because the phrase had just come to her head.
- Agreed that while her case before the Tribunal was based on a claim of discrimination, no complaint of discrimination is to be found in her brief of evidence. That brief is focused on the accident and the effect it has had on her.
- Agreed that she had not filed a claim in the Disputes Tribunal for the damage to her vehicle even though her husband had taken (in her name) other proceedings in the Manukau Disputes Tribunal in relation to a matter involving her motor vehicle.
- Accepted that she had no evidence that Downer had discriminated against her on the basis of her sex or her ethnicity.
- Acknowledged that she was unhappy with the decision made by Senior Constable Johnston that no criminal proceedings would be brought against Downer or any of its employees.
- Agreed that she had no evidence to show that she had been treated by Senior Constable Johnston differently from other crash complainants and that there was no evidence that the decision that there be no prosecution was because of her sex and ethnicity. She further accepted that she had produced no evidence to show how other drivers were treated by the Police in the course of crash investigations. She further accepted that the statement of claim pleads no date, time or place for the alleged discrimination by the Police.
- Was asked directly whether she agreed that she had produced no evidence as to how, when or where Senior Constable Johnston had discriminated against her. Ms Sionepulu agreed with the proposition.
- Had her attention drawn to the fact that her husband had, in opening submissions, said that she (Ms Sionepulu) had no idea and was at a loss to understand why the investigation had been handled by the Police in the way that it had. She said that that was correct.

The strike out application

[13] At the conclusion of Ms Sionepulu’s evidence counsel for Downer as well as counsel for the Commissioner applied to have the proceedings struck out on the basis that there was no evidence that discrimination of any kind had occurred and that Ms Sionepulu had conceded the point in her evidence.

[14] In opposing the application Mr Butler focused his submissions on the issue whether the incident on the Auckland Harbour Bridge had occurred in the way described by his wife. Asked by the Tribunal to focus directly on the claim that indirect discrimination had occurred, he said that the discrimination lay in the fact that no one had checked the Downer vehicle for damage and that no one had checked the CCTV footage which, he submitted, would demonstrate very clearly that the accident had occurred as alleged by his wife. He said that he did not know why the Police had not checked the CCTV nor did he know why a visual check of the Downer vehicle had not taken place.

Discussion

[15] The Human Rights Act 1993 does not define discrimination. However, as pointed out by Tipping J in *Quilter v Attorney-General* [1998] 1 NZLR 523 at 573, some guidance as to its meaning can be found in s 65, which deals with the subject of indirect discrimination. It provides:

65 Indirect discrimination

Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

[16] Addressing s 65 Tipping J at 573 stated:

That section speaks of conduct and other things having the “effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination”. The section does not expressly identify the person or group with whom the necessary comparison is to be made, but that must be either persons generally or another person or group whose treatment is logically relevant to the person or group alleging discrimination.

The essence of discrimination lies in difference of treatment in comparable circumstances. For discrimination to occur one person or group of persons must be treated differently from another person or group of persons. Of course difference of treatment will not necessarily in itself amount to discrimination; and not all discrimination will be unlawful. In considering whether there is discrimination, it is necessary to define two things: first, the subject matter of and second, the basis for the alleged discrimination. What does the difference of treatment relate to and upon what factor or factors is the difference based? The approach adopted to both these matters can affect the outcome.

[17] The difficulty facing Ms Sionepulu is that there is a complete absence of evidence that there was conduct having the effect of treating her differently on the grounds of her sex and ethnicity.

[18] The letter dated 9 June 2011 from Senior Constable Johnston to Ms Sionepulu confirming the result of his enquiries into the alleged incident simply notes that conflicting accounts having been given of the incident, he had decided no further enquiries would be made. Ms Sionepulu was nevertheless given details of the fleet managers for Downer and it was suggested that Ms Sionepulu contact them regarding her vehicle damage.

[19] As far as the investigation conducted by Senior Constable Johnston is concerned, there is nothing to suggest that there was either direct or indirect discrimination. That is, there is no evidence at all to suggest that while the inquiry conducted by him had the appearance of not being in contravention of the non-discrimination provisions of the Act,

his inquiry nevertheless had the effect of treating Ms Sionepulu differently on the grounds of her sex or ethnicity.

[20] Similarly, there is no evidence at all that in the internal inquiries made by Downer (after being alerted by Senior Constable Johnston to the allegation that there had been an accident) there was either direct or indirect discrimination. That is, there is no evidence at all to suggest that while the inquiry was conducted in an apparently non-discriminatory manner, nonetheless it had the effect of treating Ms Sionepulu differently on one of the prohibited grounds alleged. The evidence is all one way. Downer was not even aware of the sex or ethnicity of the driver making the allegation. That knowledge was acquired only after the Police inquiry had been closed, as had the internal Downer inquiry.

[21] Given the complete absence of evidence that Ms Sionepulu was treated differently by the Police and Downer on one of the prohibited grounds of discrimination we were of the view that the strike out applications made by the Police and Downer at the conclusion of the plaintiff's case were fully justified. On any view of the plaintiff's evidence her case was bound to fail.

[22] We cannot help but observe in passing that these proceedings were entirely misconceived. They were in reality civil proceedings seeking compensation for the alleged damage to the vehicle driven by Ms Sionepulu. As repeatedly stressed to Mr Butler during the course of the hearing, this Tribunal does not have jurisdiction to determine civil or criminal liability for traffic accidents. Our jurisdiction is confined to the Human Rights Act and to an enquiry whether unlawful discrimination has occurred.

[23] The burden was on Ms Sionepulu to establish that in the course of the investigations conducted by both the Police and Downer their conduct, while not apparently in contravention of the Act, had the effect of treating her differently on the grounds of her sex or ethnicity. This she singularly failed to do and in fairness to Downer and the New Zealand Police the Tribunal was obliged to recognise that the case had fundamentally failed and that the proceedings should be terminated summarily at the close of Ms Sionepulu's case.

Formal orders

[24] For the foregoing reasons the Tribunal determined that the proceedings by Ms Sionepulu must be struck out.

Costs

[25] Both Downer and the Police have foreshadowed that they will be applying for costs. Those applications will be dealt with according to the following timetable:

[25.1] Any application by Downer is to be filed and served, along with any submissions, by 5pm on Friday 13 July 2012.

[25.2] Any application by the Police is to be filed and served, along with any submissions, by 5pm on Friday 3 August 2012.

[25.3] Should Ms Sionepulu wish to resist the application for costs her submissions are to be filed and served by Friday 17 August 2012.

[25.4] The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served without any further oral hearing.

[25.5] 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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Mr R Musuku
Member

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Mr B Neeson
Member