

Reference No. HRRT 033/2005

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN PETER ATKINSON (ON BEHALF OF THE ESTATE OF SUSAN ATKINSON) AND OTHERS

PLAINTIFFS

AND MINISTRY OF HEALTH

DEFENDANT

BEFORE:

Mr RPG Haines QC, Chairperson
Ms CJ Goodwin, Member
Mr BK Neeson, Member

REPRESENTATION:

Ms F Joychild QC for plaintiffs
Mr JA Farmer QC, Ms SL Robertson and Ms MA Sissons for Mrs Spencer
Ms M Coleman and Ms L Inverarity for defendant
Dr A Butler and Ms SA Bell for Human Rights Commission

DATE OF DECISION: 13 December 2013

**DECISION OF TRIBUNAL JOINING MRS SPENCER AS A PLAINTIFF AND
REFERRING HER COMPLAINT TO THE HUMAN RIGHTS COMMISSION
FOR MEDIATION**

Background

[1] Consequent upon the delivery of judgment in *Spencer v Attorney-General* [2013] NZHC 2580 (3 October 2013, Winkelmann J) Mrs Margaret Spencer on 29 October 2013 filed with the Tribunal an interlocutory application to be joined as a plaintiff in these proceedings.

[2] By *Minute* dated 5 November 2013 the Chairperson made timetable orders regarding the filing of a response by the original plaintiffs and by the Ministry of Health.

[3] By memorandum dated 5 November 2013 Ms Joychild QC advised that the original plaintiffs in these proceedings would abide the decision of the Tribunal and did not wish to be heard.

Ministry opposition to joinder

[4] By memorandum dated 11 November 2013 Ms Coleman for the Ministry gave advance notice of the Ministry's position on two matters:

[4.1] First, it was the Ministry's view that the application was not sufficiently particularised to assess whether Mrs Spencer's proposed claim fell within the scope of these proceedings; and

[4.2] Second, that these proceedings, including any joinder application, should be adjourned pending determination of the appeal now filed by the Crown in the Court of Appeal (*Attorney-General v Spencer* CA736/2013) against the decision in *Spencer v Attorney-General* [2013] NZHC 2580 (3 October 2013, Winkelmann J).

[5] At a telephone conference convened on 12 November 2013 Ms Coleman for the Ministry gave an undertaking that if the Crown was to apply for a stay of the judgment given in the High Court on 3 October 2013, such application would be filed on or before Wednesday 20 November 2013. In circumstances more fully detailed in the *Minute* issued on 12 November 2013 the teleconference was adjourned to enable the Ministry of Health to file a notice of opposition to the joinder application and for the position in relation to any possible stay application in the High Court to be clarified.

[6] In compliance with timetable directions given in that *Minute* the Ministry on 20 November 2013 filed a notice of opposition together with a memorandum addressing two matters. First, the grounds for the Ministry's opposition to Mrs Spencer's joinder application and second, the reasons why a stay order would not be sought in the High Court.

[7] At a further teleconference convened on 22 November 2013 it became clear that the parties held irreconcilable views as to whether the issues raised by the Ministry fell to be addressed as part of the application to join or as part of the post-joinder pre-trial preparation process. A hearing being necessary, an order was made that the joinder application be heard at Auckland in the week commencing Monday 16 December 2013 on a date to be notified by the Secretary once a venue had been secured. Timetable orders were made for the filing of submissions by the parties.

Ministry consent to joinder

[8] However, by memorandum dated 29 November 2013 the Tribunal was advised that counsel for Mrs Spencer and counsel for the Ministry had conferred and had reached agreement on what, in their view, was a constructive means of progressing this proceeding. The Tribunal was asked to order, by consent, that Mrs Spencer be joined to the proceeding as a plaintiff and that her complaint be referred to the Human Rights Commission for mediation pursuant to s 92D(1) of the Human Rights Act 1993. The consent memorandum was in the following terms:

1. This memorandum is filed in relation to Margaret Spencer's application for joinder to this proceeding as a plaintiff. Counsel for Mrs Spencer and counsel for the defendant have conferred and have reached agreement on what is in their view a constructive means of progressing this proceeding.

2. Counsel for Mrs Spencer and counsel for the defendant accordingly seek the following orders by consent:
 - 2.1 Margaret Spencer is joined to the proceeding as a plaintiff;
 - 2.2 Margaret Spencer's complaint is referred to the Human Rights Commission for mediation pursuant to s 92D(1) of the Human Rights Act 1993, on the basis that the complaint may yet be able to be resolved by the parties. Mrs Spencer and the Ministry have not previously engaged in mediation; and
 - 2.3 Leave is reserved to the parties to seek further directions from the Tribunal should that be necessary.
3. Counsel intend to confer with counsel for the existing plaintiffs to ensure that pleadings and any other documents are made available to Mrs Spencer in a way that manages privacy concerns (if any).
4. Counsel further agree that no further steps should be take on the timetable set by the Minute of the Tribunal dated 22 November 2013 pending the Tribunal's consideration of this memorandum.

Consent orders

[9] Given the terms of the joint memorandum the following orders are made:

[9.1] Margaret Spencer is joined to these proceedings as a plaintiff.

[9.2] Pursuant to s 92D(1)(b) of the Human Rights Act 1993 the complaint by Margaret Spencer is referred to the Human Rights Commission on the basis that the complaint may yet be able to be resolved by the parties.

[9.3] So that the proceedings are not left in abeyance indefinitely, the parties are in four months time to provide the Tribunal with an update of the progress being made. That update is to be provided no later than 5pm on Friday 2 May 2014.

[9.4] The proceedings before the Tribunal are stayed in the interim with leave reserved to Mrs Spencer, the Ministry of Health and to the Human Rights Commission to seek further directions if and when the need arises.

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Mr RPG Haines QC
Chairperson

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Ms CJ Goodwin
Member

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Mr BK Neeson
Member