

Reference No. HRRT 027/2012

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN FRIEDRICH JOACHIM FEHLING

PLAINTIFF

AND NEW ZEALAND POST LIMITED

DEFENDANT

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr FJ Fehling in person

Dr AS Butler and Mr TCE Miller for Defendant

DATE OF DECISION: 19 December 2013

**DECISION OF TRIBUNAL LIFTING STAY AND
GIVING DIRECTIONS FOR CONDUCT OF CASE**

The mediation – outcome

[1] By decision dated 31 January 2013 the Tribunal ordered that Mr Fehling's complaint be referred back to the Human Rights Commission. While his proceedings before the Tribunal were stayed in the meantime the parties were directed to provide the Tribunal with an update of the mediation process by 24 May 2013, a deadline subsequently extended to 1 November 2013. See the *Minute* dated 3 September 2013 issued by the Chairperson.

[2] By memorandum dated 1 November 2013 Mr Fehling expressed the view that the mediation efforts had failed and sought continuation of these proceedings. By memorandum also dated 1 November 2013 Dr Butler similarly reported that the parties had not been able to reach a negotiated or mediated settlement and it appeared to New Zealand Post Ltd (NZ Post) that it was unlikely that they would be able to do so. Both

parties are therefore in agreement that the stay should be lifted and that the proceedings before the Tribunal now be progressed to a hearing.

[3] Dr Butler has raised the following additional issues:

[3.1] At present the named defendant is the Chief Executive of NZ Post. Mr Fehling has by letter dated 12 January 2013 requested that New Zealand Post be added as a second defendant. NZ Post does not object to joinder but submits that it should be the only proper defendant. Specifically the Chief Executive of NZ Post should be removed as a defendant because the acts of officers of NZ Post are to be treated as the acts of NZ Post, a limited liability company.

[3.2] NZ Post requests that the venue of the hearing be Wellington in favour of Hokitika.

[3.3] NZ Post agrees with the submission by Mr Fehling that these proceedings not be determined on the papers but following a face to face hearing at which the parties and their witnesses attend to give evidence.

[4] By way of memorandum dated 11 December 2013 Mr Fehling has responded that:

[4.1] The hearing should be held at Hokitika.

[4.2] An interim order should be made against the rural delivery contractor currently involved in the delivery of mail to Mr Fehling, such order prohibiting him from terminating the arrangement. It is said that the contractor has threatened such termination although in a footnote Mr Fehling records that the contractor has since indicated that he will continue the mail delivery arrangement. Mr Fehling nevertheless asks the Tribunal to make the interim order out of "safety".

The interim order application

[5] Jurisdiction to make an interim order is conferred by s 95(1) of the Human Rights Act 1993 which provides:

95 Power to make interim order

(1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[6] Before such jurisdiction can be exercised the applicant must produce sufficient factual evidence to show that the making of the order sought is necessary in the interests of justice to preserve the position of the parties pending a final determination of the proceedings. The most recent discussion of these requirements is to be found in *IDEA Services Ltd v Attorney-General (No. 4 – Interim Order Application)* [2013] NZHRRT 24 (10 June 2013) at [49] to [52].

[7] Presently there is no factual foundation for the making of an interim order. If Mr Fehling believes that he can satisfy the requirements of s 95(1) he is free to file an application and supporting affidavit.

The proper defendant

[8] Given that Mr Fehling has applied to have "New Zealand Post Limited" added as a party to the proceedings and further given that the company does not object to such

order we direct that New Zealand Post Limited be formally added as a defendant to the proceedings.

[9] The substantive question is whether NZ Post is to be the only proper defendant and the Chief Executive removed as a party.

[10] As it is not alleged that the Chief Executive himself committed any of the alleged discriminatory acts and as it is clear that the claim is against NZ Post as a legal entity responsible for the acts of its officers, we see no need for the Chief Executive to remain a party to the proceedings, particularly given that the acts of NZ Post's officers are, in law, to be treated as the acts of NZ Post. The effect is that NZ Post is from this point on to be the only proper defendant to the proceedings and the intituling for all future documents is to be that which appears on this decision.

Whether hearing to be face to face or on the papers

[11] In a letter dated 30 June 2013 Mr Fehling expressed the opinion that "a low-cost hearing process on-paper-only appears to be sufficient". By letter dated 12 July 2013 the Secretary advised Mr Fehling (correctly) that the Tribunal usually prefers to hear the parties in person. The reasons for this should be obvious. First, it is essential for the determination of credibility. Second, by being able to engage directly with the parties the Tribunal is better placed to understand their respective arguments. This is particularly important where, as here, one of the parties is self-represented.

[12] In his memorandum dated 1 November 2013 Dr Butler advises that New Zealand Post agrees that a face to face hearing is to be preferred to a "papers" hearing.

[13] In these circumstances we direct that a face to face hearing take place.

Venue

[14] Mr Fehling submits that the venue should be Hokitika or Greymouth. Dr Butler submits that the matter should be heard in Wellington.

[15] We are of the view that it is premature to determine the point. We leave it to the Chairperson to determine the appropriate venue once all the evidence has been filed in compliance with the timetable which follows below.

The common bundle of documents

[16] Ordinarily, as plaintiff, Mr Fehling would be required to file the common bundle of documents. However, as a litigant in person preparation of such a bundle could well prove a challenge. In these circumstances the only practical alternative is for the common bundle to be prepared by NZ Post. We presume this will not inconvenience NZ Post given that most, if not all of the relevant documents will be NZ Post documents. There should be little difficulty in Mr Fehling providing to NZ Post copies of any additional documents to be included in the bundle.

Timetable directions

[17] To progress the case to a hearing timetable directions follow below. We are aware that Mr Fehling has filed a "statement of evidence" dated 22 August 2013 (4 pages) and a statement of evidence dated 1 November 2013 containing pages 5 and 6. However, these two statements of evidence are part of documents filed for other purposes. We, on the other hand, require of Mr Fehling a single brief of evidence setting out chronologically and in as much detail as possible the factual narrative of events and circumstances on which the claim is based. The Tribunal can only act on evidence and it

is the responsibility of each party to place before the Tribunal their account of the facts as seen and understood by them. Where any document is to be referred to or relied on, a copy of that document is to be filed also. If Mr Fehling intends calling any witness apart from himself, a full brief of evidence must be filed for each witness.

Orders

[18] For the reasons given the following orders are made:

[18.1] The order made by the Tribunal on 31 January 2013 staying these proceedings is set aside.

[18.2] The Chief Executive of New Zealand Post Limited is removed as a party to these proceedings. In his place New Zealand Post Limited is to be substituted as the only defendant.

[18.3] When these proceedings are ready for hearing that hearing will be conducted on a face to face basis at a venue to be determined by the Chairperson.

[18.4] Discovery and inspection of documents is to be attended to on an informal basis in the first instance. This is to be achieved by 5pm on Friday 31 January 2014.

[18.5] Written statements of the evidence to be called at the hearing by Mr Fehling are to be filed and served by 5pm on Friday 14 February 2014. By the same date Mr Fehling is to provide NZ Post with a list of documents Mr Fehling wishes to have included in the common bundle of documents.

[18.6] Written statements of the evidence to be called at the hearing by NZ Post are to be filed and served by 5pm on Friday 7 March 2014. By the same date NZ Post is to provide Mr Fehling with a list of documents NZ Post wishes to have included in the common bundle of documents.

[18.7] Written statements of evidence by Mr Fehling in reply are to be filed and served by 5pm on Friday 21 March 2014.

[18.8] In consultation with Mr Fehling, NZ Post is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 4 April 2014.

[18.9] The proceedings are to be heard on a date to be notified by the Secretary at a venue to be determined by the Chairperson.

[18.10] Leave is reserved to both parties to make further application should the need arise.

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Mr RPG Haines QC
Chairperson

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Ms GJ Goodwin
Member

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Mr BK Neeson
Member