

Reference No. HRRT 011/2014

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN PETER FRANCES SIMMONS

PLAINTIFF

AND BOARD OF TRUSTEES OF NEWLANDS COLLEGE

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mr PF Simmons in person

Ms GJE Stone for defendant

DATE OF DECISION: 23 December 2014

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM

The application

[1] This is an application by the Board of Trustees of Newlands College (the Board) for an order striking out the whole of the amended statement of claim on the grounds:

[1.1] The amended statement of claim discloses no arguable claim against the Board.

[1.2] No complaint against the Board having been made by Mr Simmons to the Human Rights Commission the Tribunal does not have jurisdiction.

[2] Mr Simmons submits the Tribunal should exercise its power under s 92D of the Human Rights Act 1993 to refer his “complaint” back to the Human Rights Commission.

Jurisdiction to strike out – principles

[3] In *Mackrell v Universal College of Learning* High Court Palmerston North CIV2005-485-802, 17 August 2005 at [48] Wild J held that the Tribunal has a wide discretionary power to strike out or to dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by High Court Rules, r 15.1 which provides:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
- (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[4] Section 115 of the Human Rights Act additionally provides:

115 Tribunal may dismiss trivial, etc, proceedings

The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

[5] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267:

A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed ...; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material ...; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction ...

[6] For more recent authority see *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [25] (Elias CJ) and [146] (Blanchard, McGrath and William Young JJ).

Background

[7] When these proceedings were first filed on 23 April 2014 the original defendant was the Ministry of Education. However, insofar as anything intelligible could be discerned from the sparse terms of the statement of claim, it appeared the issues sought to be raised by Mr Simmons related not to the Ministry, but to the Board. That being the case, there was no jurisdiction for the Tribunal to consider a claim against the Ministry of Education.

[8] At the first teleconference convened on 30 July 2014 Mr Simmons accepted that as it was Newlands College which allegedly failed to accommodate his son's disability, it would be necessary for his claim under the Human Rights Act to be pressed against the Board of Trustees of the college, not the Ministry. He asked that the Ministry of Education be dismissed as a party to the proceedings and the Board of Trustees of

Newlands College substituted. That application was granted. See the *Minute* issued by the Chairperson on 30 July 2014. In directing that an amended statement of claim be filed the Chairperson at [9] of the *Minute* emphasised the need for Mr Simmons to give full particulars of his claim against the Board:

[8] There can be little doubt that the Ministry of Education is the wrong defendant and that the proceedings, if they lie at all, lie against the Board of Trustees of Newlands College. To enable the complaint made by Mr Simmons to progress it is necessary that the Board of Trustees be substituted as a defendant.

[9] As the Board of Trustees will have received no notice of these proceedings it will be necessary for Mr Simmons to file an amended statement of claim in which full particulars are given of the grounds of his claim that Newlands College failed to accommodate his son's disability. The matters set out in the amended statement of claim must be focused on the complaint as made to the Human Rights Commission. Proceedings before the Tribunal are not an occasion for any and all other complaints to be ventilated.

[9] In giving directions the Chairperson at [13.2] again emphasised the need for the amended statement of claim to provide full particulars of the claim against the Board:

[13.2] An amended statement of claim is to be filed by Mr Simmons by 5pm on Friday 5 September 2014. The amended statement of claim is to provide full particulars of the claim that the Board of Trustees of Newlands College breached the Human Rights Act 1993.

[10] While Mr Simmons did on 8 August 2014 file an amended statement of claim it was an "amendment" in name only. He simply refiled the original statement of claim with two amendments. First, the Board of Trustees was now shown as the defendant. Second, the narrative was expanded by the addition of a new para 6:

After mediation it was deemed appropriate that the claim be issued to Board of Trustee Newlands College.

Application to dismiss – no cause of action

[11] The Board of Trustees submits that nowhere in the amended statement of claim is it possible to identify an arguable cause of action against the Board. The "Facts of the case" attached to the claim records only that Mr Simmons enrolled his son in 2007. There was an unspecified "incident" in December 2009 and on 2 February 2010 Mr Simmons objected to the school's actions:

In 2007 we enrolled our child in a secondary educational institution for Year 9.

We advised the school at the outset of the child's special needs.

On 10 December 2009, an incident arose that deeply concerned me.

On 2 February 2010 I objected to the school's actions. I am unhappy with the process.

After discussing this matter I accepted Ministry of Education advice to take the problem to the Human Rights Commission. I made an initial complaint to the Human Rights Commission on 26 April 2011.

[12] When in 2011 Mr Simmons contacted the Human Rights Commission he informed the Commission he did not want to engage in mediation with the school with the result that his "complaint" has never been notified to the Board of Trustees. As a consequence the Board has never known the case it has to meet.

[13] In our view Mr Simmons has not complied with the *Minute* of 30 July 2014. No specific allegations under the Human Rights have been made against the Board. In the language of High Court Rules, r 15.1, the amended statement of claim discloses no

reasonably arguable cause of action against the Board. The proceedings brought by Mr Simmons are accordingly struck out.

Absence of jurisdiction

[14] We address now the alternative ground on which the strike out application is based, namely that the Tribunal does not have jurisdiction to hear these proceedings.

[15] Part 3 of the Human Rights Act prescribes the statutory procedure for the resolution of disputes about compliance with Part 1A and Part 2 of the Act. Emphasis is placed on the resolution of disputes by way of mediation. Access to the Tribunal is permitted only after a complaint has been lodged with the Human Rights Commission. For present purposes it is necessary to set out only ss 75 and 76 of the Act:

75 Object of this Part

The object of this Part is to establish procedures that—

- (a) facilitate the provision of information to members of the public who have questions about discrimination; and
- (b) recognise that disputes about compliance with Part 1A or Part 2 are more likely to be successfully resolved if those disputes can be resolved promptly by the parties themselves; and
- (c) recognise that, if disputes about compliance with Part 1A or Part 2 are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available to the parties to those disputes; and
- (d) recognise that the procedures for dispute resolution under this Part need to be flexible; and
- (e) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
- (f) recognise that difficult issues of law may need to be determined by higher courts.

76 Functions of Commission under this Part

- (1) The primary functions of the Commission under this Part are—
 - (a) to provide information to members of the public who have questions about discrimination; and
 - (b) to facilitate the resolution of disputes about compliance with Part 1A or Part 2, by the parties concerned, in the most efficient, informal, and cost-effective manner possible.
- (2) The Commission has, in order to carry out its function under subsection (1)(b), the following functions:
 - (a) to receive and assess a complaint alleging that there has been a breach of Part 1A or Part 2, or both;
 - (b) to gather information in relation to a complaint of that kind (including one referred back to it by the Director under section 90(1)(b), or the Tribunal under section 92D) for the purposes of paragraphs (c) and (d);
 - (c) to offer services designed to facilitate resolution of the complaint, including information, expert problem-solving support, mediation, and other assistance;
 - (d) to take action or further action under this Part in relation to the complaint, if the complainant or aggrieved person wishes to proceed with it, unless section 80(2) or (3) applies;
 - (e) to provide information gathered in relation to a complaint to the parties concerned.

[16] The vehicle which triggers the Commission's statutory functions is "a complaint" alleging that there has been a breach of Part 1A or Part 2, or both. Before gathering information about a complaint the Commission must give notice to the complainant and to the person against whom the complaint is made of the Commission's intention to gather information and must provide them with general information about their rights and obligations under the Act, the processes that apply to complaints under the Act and other services that may help the parties to a complaint secure a settlement of the matter. See s 81. When the Commission gathers information about a complaint that process must be conducted in private and information disclosed at a dispute resolution meeting

must be kept confidential. See ss 82, 85, 86 and 87. If the Commission decides to take no action in relation to a complaint, it must inform the complainant and the person against whom the complaint is made of that decision and of the reasons for that decision. See s 80(4).

[17] The point is that throughout the dispute resolution process the person against whom the complaint is made must have knowledge of the complaint and must be given an opportunity to be heard.

[18] Should the Commission decide to take no action in relation to a complaint the complainant can then bring civil proceedings before the Tribunal. See s 92B(1):

92B Civil proceedings arising from complaints

- (1) If a complaint referred to in section 76(2)(a) has been made, the complainant, the person aggrieved (if not the complainant), or the Commission may bring civil proceedings before the Human Rights Review Tribunal—
- (a) for a breach of Part 1A (other than a breach of Part 1A that is an enactment, or an act or omission authorised or required by an enactment or otherwise by law), against the person or persons alleged to be responsible for the breach:
 - (b) for a breach of Part 1A that is an enactment, or an act or omission authorised or required by an enactment or otherwise by law, against the Attorney-General, or against a person or body referred to in section 3(b) of the New Zealand Bill of Rights Act 1990 alleged to be responsible for the breach:
 - (c) for a breach of Part 2, against the person or persons alleged to be responsible for the breach.

[19] It is to be noted, however, that s 92B(1) only permits proceedings before the Tribunal if:

... a complaint referred to in section 76(2)(a) has been made ...

[20] Put shortly, the effect of these provisions is that the Tribunal only has jurisdiction over whatever “complaint” was lodged with the Commission. Proceedings before the Tribunal 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. A not dissimilar system operates under the Privacy Act 1993 and in particular, ss 82(1) and 83 of that Act. See *L v T* (1998) 5 HRNZ 30 (Morris J, A Knowles, GDS Taylor) at 35.

[21] As no “complaint” against the Board was lodged with the Commission and as no complaint has ever been notified by the Commission to the Board, the Tribunal has no jurisdiction.

The application for referral

[22] On the filing of any proceedings the Tribunal is under a mandatory duty to first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and is required to refer a complaint under s 76(2)(a) to the Commission unless the Tribunal is satisfied that attempts at resolution will not contribute constructively to resolving the complaint, or will not be in the public interest or will undermine the urgent or interim nature of the proceedings. See 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.

[23] In the present case we are satisfied that attempts at resolution of the complaint by the parties and the Commission will not contribute constructively to resolving the complaint or be in the public interest. Our reasons flow primarily from the history of this case as set out by Mr R Hallowell of the Human Rights Commission in his letter dated 29 May 2014 to the Tribunal and to the parties:

[23.1] When on 7 October 2011 Mr Simmons contacted the Human Rights Commission he informed the Commission that he did not want to engage in mediation with the School. The complaint was therefore not notified by the Commission to the Board of Trustees.

[23.2] Mr Simmons did not approach the Commission again until 27 March 2013. At that time he was informed that mediation was not possible given the time delay and further given that under s 80(2) of the Act the Commission may decline to take action if the complaint relates to a matter of which the complainant has had knowledge for more than 12 months before the complaint is received by the Commission.

[23.3] The Board was not involved in the mediation which took place between Mr Simmons and the Ministry of Education.

[24] Our conclusion is that Mr Simmons had opportunity in April 2011 to engage in mediation with the Board of Trustees but declined to avail himself of that opportunity. There then followed a delay of two years until 27 March 2013 before Mr Simmons again approached the Commission. When he eventually did issue proceedings before the Tribunal on 23 April 2014 he elected to join only the Ministry of Education. He was given opportunity to correct that error and was required to file an amended statement of claim which fully particularised his case against the Board. He threw away this opportunity by electing to simply refile the original statement of claim, a document which contained no arguable cause of action against the Board. Consequently the amended statement of claim similarly discloses no arguable cause of action against the Board. In our view it is far too late to refer back to the Commission a “complaint” against the Board which could have been made three and a half years ago but was not. Mr Simmons’ son is no longer at Newlands College. We see no reason why a State school should at the end of 2014 and into early 2015 incur costs in relation to a “complaint” arising out of an unspecified incident which occurred in 2009 which even now has not been intelligibly articulated and which is in any event truly stale.

[25] For these reasons we decline the application by Mr Simmons that the Tribunal exercise its power under s 92D of the Human Rights Act to refer his “complaint” to the Human Rights Commission.

CONCLUSION AND FORMAL ORDERS

[26] On the application of the Board of Trustees of Newlands College the amended statement of claim is struck out.

[27] The question of costs is reserved.

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Mr RPG Haines QC
Chairperson

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Ms GJ Goodwin
Member

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Mr BK Neeson JP
Member