

Reference No. HRRT 023/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN ANTHONY BYRNES

PLAINTIFF

AND CHIEF EXECUTIVE OF THE MINISTRY  
OF SOCIAL DEVELOPMENT

FIRST DEFENDANT

AND CALL CENTRE PEOPLE LIMITED

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Dr SJ Hickey MNZM, Member

REPRESENTATION:

Mr A Byrnes in person

Mr E Child for first defendant

Ms J O'Connell for second defendant

DATE OF DECISION: 22 July 2015

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**DECISION OF TRIBUNAL REFERRING COMPLAINT BACK TO HUMAN RIGHTS  
COMMISSION<sup>1</sup>**

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**Introduction**

[1] By consent memorandum dated 10 July 2015 the parties have applied to have this matter referred back to the Human Rights Commission under s 92D of the Human Rights Act 1993 for mediation.

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<sup>1</sup> [This decision is to be cited as: *Byrnes v MSD & Call Centre People (Referral Back to Human Rights Commission)* [2015] NZHRRT 30]

## Background

[2] On 8 September 2014 the Human Rights Commission received a complaint from Mr Byrnes alleging age discrimination in a pre-employment situation. That complaint was against the Ministry of Social Development (WINZ) and the Electoral Commission. The complaint did not cite Call Centre People Ltd as at the time of making the complaint Mr Byrnes was unaware of that company's involvement in the matters about which he complained.

[3] On 22 April 2015 the Human Rights Commission convened a mediation meeting between Mr Byrnes and the Ministry of Social Development. Unfortunately the complaint was not resolved and the present proceedings were filed with the Tribunal on 14 May 2015 with both the Ministry and Call Centre People Ltd cited as defendants.

[4] Statements of reply have now been filed by the Ministry of Social Development and by Call Centre People Ltd. By letter dated 29 June 2015 Ms O'Connell seeks, in the first instance, an opportunity for Call Centre People Ltd to attend mediation and to discuss the issues and claims with Mr Burns. The statement of reply filed by the Ministry of Social Development states the Ministry is willing to attend further mediation, this time with the participation of not only Mr Byrnes but also Call Centre People Ltd. The Ministry observes the previous mediation was unsatisfactory because it did not involve Call Centre People Ltd.

## The consent memorandum

[5] On 13 July 2015 the parties filed a consent memorandum asking that this matter be referred back to the Human Rights Commission on the basis the complaint may yet be able to be resolved by the parties and the Commission by mediation.

## Discussion

[6] While a complainant under the Human Rights Act is not expressly bound to engage with the mediation process once the complaint has been made, it is clear from the statutory scheme that the mediation process ought to run its course unless good reason can be shown to the contrary. This much is clear from the provisions of Part 3 of the Act. It is also underlined by 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.

[7] It will be seen that 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.

[8] A complainant who wishes to avoid the Commission's dispute resolution process must satisfy the Tribunal that one or other of the three grounds allowed by s 92D(1)(b) apply.

[9] Addressing first s 92D(1)(b)(i), the Tribunal has no reason to doubt that, if given the opportunity, all three parties to these proceedings will engage on a good faith basis to find a constructive solution to Mr Byrnes' concerns. It is therefore not possible to find that a referral back to the Commission will not contribute constructively to resolving the complaint.

[10] As to s 92(1)(b)(ii), proceedings before the Tribunal are plainly intended to be a last resort. Mediation is more efficient, informal and cost-effective. The resources of the Tribunal should not be drawn on unless it can be shown that attempts to resolve the complaint through mediation will be futile. It is to be remembered that the Tribunal sits as a panel of three. Care must be taken to avoid unnecessary hearings. It is difficult, in the circumstances, to find that a referral back to the Commission will not be in the public interest. If mediation fails Mr Byrnes can resume these present proceedings.

[11] As to s 92D(1)(b)(iii), Mr Byrnes does not submit that the proceedings are urgent.

## **Conclusions**

[12] Having regard to the statutory criteria in s 92D(1)(b) of the Human Rights Act we have not been satisfied that attempts at resolution of the complaint by the parties and the Commission will not contribute constructively to resolving the complaint, or will not, in the circumstances, be in the public interest or will undermine the urgent or interim nature of the proceedings.

[13] It follows that as required by s 92D(1) we must refer the complaint back to the Commission. However, we do so on terms to ensure the mediation process is not allowed to drift.

## **Orders**

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

[14.1] Pursuant to s 92D(1) of the Human Rights Act 1993 the complaint by Mr Byrnes is referred back to the Human Rights Commission for mediation.

[14.2] So that the proceedings are not left in suspension indefinitely, in four months time the parties are to provide the Tribunal with a progress report. That report must be filed no later than 5pm on Friday 4 December 2015.

[14.3] The proceedings before the Tribunal are stayed in the interim with leave reserved to all parties to seek further directions if and when the need arises.

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**Mr RPG Haines QC**  
**Chairperson**

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**Ms GJ Goodwin**  
**Member**

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**Dr SJ Hickey MNZM**  
**Member**