

Reference No. HRRT 019/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN GRAEME GEDDES BULLING

PLAINTIFF

AND NEW ZEALAND TRANSPORT AGENCY

DEFENDANT

AT WELLINGTON

BEFORE:

Rodger Haines QC, Chairperson

Ms WV Gilchrist, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mr GG Bulling in person

Mr R Wilkin for defendant

DATE OF DECISION: 15 September 2015

**DECISION OF TRIBUNAL REFERRING COMPLAINT
BACK TO HUMAN RIGHTS COMMISSION¹**

Introduction

[1] By consent memorandum dated 15 September 2015 the parties apply to have this matter referred back to the Human Rights Commission under s 92D of the Human Rights Act 1993 for mediation.

Background

[2] In these proceedings Mr Bulling complains of unlawful discrimination in relation to the renewal of his driver's licence and the requirement for him to undergo a further eyesight test from a doctor or optometrist.

¹ [This decision is to be cited as: *Bulling v New Zealand Transport Agency (Referral Back to Human Rights Commission)* [2015] NZHRRT 44]

Discussion

[3] One of the primary statutory functions of the Human Rights Commission is to facilitate the resolution of disputes about compliance with Part 1A or Part 2 of the Human Rights Act in the most efficient, informal, and cost-effective manner possible. See s 76(1)(b). To this end the Commission is required by s 77 to provide dispute resolution services. Those services centre on mediation. Experience shows that mediation settles most complaints.

[4] While the parties are 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.

[5] 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.

[6] A party 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.

[7] Addressing first s 92D(1)(b)(i), the Tribunal has no reason to doubt that, if given the opportunity, the New Zealand Transport Agency will engage with Mr Bulling and the Commission on a good faith basis to find a constructive solution to Mr Bulling's complaint. Mr Bulling too is willing to engage with the New Zealand Transport Agency on the same basis. It is therefore not possible to find that a referral back to the Commission will not contribute constructively to resolving the complaint.

[8] 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. The New

Zealand Transport Agency wishes to enter into mediation and Mr Bulling will take up the challenge. 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 Bulling can resume these present proceedings.

[9] As to s 92D(1)(b)(iii), neither party submits that the proceedings are urgent.

Conclusions

[10] 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.

[11] 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 that the mediation process is not allowed to drift.

Directions

[12] For the reasons given the following directions are made:

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

[12.2] So that the proceedings are not left in suspension indefinitely, in six months time the parties are to provide the Tribunal with a progress report. That report must be filed no later than 5pm on Friday 18 March 2016.

[12.3] The proceedings before the Tribunal are stayed in the interim with leave reserved to either party to seek further directions if and when the need arises. The fixture for 17 and 18 March 2016 is vacated.

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Mr RPG Haines QC
Chairperson

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Ms WV Gilchrist
Member

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Mr BK Neeson JP
Member