

Reference No. HRRT 059/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN KONG HWEE TAN

PLAINTIFF

AND CHIEF EXECUTIVE, MINISTRY OF SOCIAL DEVELOPMENT

DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:

Mr RPG Haines QC, Chairperson

Mr RK Musuku, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mr KH Tan in person

Ms K Laurenson and Ms E Devine for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 23 December 2015

**DECISION OF TRIBUNAL REFERRING COMPLAINT BACK TO
HUMAN RIGHTS COMMISSION AND RELATED ORDERS¹**

Introduction

[1] By statement of claim filed on 14 October 2015 Mr Tan complains of the decision by the Ministry of Social Development (MSD) to the effect that payments made to him under the New Zealand Superannuation and Retirement Income Act 2001 must be reduced by the amount Mr Tan receives from the Central Provident Fund Board of

¹ [This decision is to be cited as: *Tan v Chief Executive, Ministry of Social Development (Referral back to Human Rights Commission)* [2015] NZHRRT 56]

Singapore. He complains he is discriminated against on the basis of being a citizen of Singapore and challenges the application of s 70 of the Social Security 1964.

[2] As filed, the statement of claim names two defendants, being the Chief Executive of the Ministry of Social Development (first defendant) and Rt Hon John Key, Prime Minister of New Zealand (second defendant).

[3] Mr Tan is self-represented.

[4] A statement of reply by the defendants (as originally named) was filed on 18 November 2015.

[5] By memorandum also dated 18 November 2015 the defendants have sought the following directions:

[5.1] The removal of Mr Key as a party to this proceeding.

[5.2] An order under s 92D of the Human Rights Act 1993 referring Mr Tan's complaint back to the Human Rights Commission.

[6] In submissions dated 6 December 2015 Mr Tan objects to both applications.

The proper defendants

[7] It is apparent from the documents filed by Mr Tan that he is aggrieved that while expatriates who leave Singapore are able to withdraw their Central Provident Fund savings, citizens of Singapore cannot. He alleges that when in 1995 Mr Key worked in Singapore Mr Key withdrew his savings before he left for London and that in his subsequent capacity as Prime Minister of New Zealand he failed to rectify the alleged injustice to Mr Tan who has been unable to withdraw his savings.

Conclusion on proper defendants

[8] As a matter of law, the allegations made by Mr Tan against Mr Key do not provide any basis for a cause of action under the Human Rights Act 1993. Specifically the relevant duties and discretions in ss 69G, 69H, 69I and 70 of the Social Security Act rest on the Chief Executive of the MSD, not on the Prime Minister. It follows Mr Key is to be removed as a party to these proceedings leaving the Chief Executive Officer of the Ministry of Social Development as the only defendant.

The application for the complaint to be referred back to the Human Rights Commission

[9] Mr Tan's complaint to the Human Rights Commission was not notified to the MSD or to the Crown Law Office. As explained by the Commission in a letter dated 2 November 2015 to the Tribunal, it declined to provide mediation or to progress the complaint because:

MSD's response to similar complaints over the years have been to deny any unlawful discrimination because in its view the complaints are about the nature of the overseas pension and not the national origins, ethnicity or race or age of the complainant. MSD has taken the same stance towards all pensions earned overseas.

[10] For MSD it is submitted mediation may well contribute constructively to resolving Mr Tan's complaint if only by assisting the parties to better understand each other's respective positions and thereby assist with resolving the matter.

[11] Mr Tan opposes the application, pointing to the delay the referral will cause.

Discussion

[12] Section 92D of the Act relevantly 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.

[13] 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.

[14] Addressing first s 92D(1)(a), it is undisputed no attempt has been made to resolve the complaint at the Commission level.

[15] Addressing next s 92D(1)(b)(i), the Tribunal has no reason to doubt that, if given the opportunity, the MSD will engage with Mr Tan and the Commission on a good faith basis and that, as submitted mediation:

[15.1] May well contribute constructively to resolving the complaint; and

[15.2] Will assist the parties to better understand each other's respective positions and thereby assist with resolving the matter.

Conclusions

[16] We accordingly conclude the statutory criteria in s 92D(1)(a) and (b) of the Human Rights Act are satisfied and that the complaint is to be referred back to the Commission for mediation. We are further satisfied it will not be contrary to the public interest for such mediation to take place. There is a clear interest in Mr Tan and the MSD seeking to resolve their differences informally before engaging the Tribunal's processes. Because Mr Tan has appealed to the Social Security Appeal Authority we see no circumstances of urgency.

ORDERS

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

[17.1] The Chief Executive of the Ministry of Social Development is to be the only defendant in these proceedings. Any other defendant is removed.

[17.2] Pursuant to s 92D(1) of the Human Rights Act 1993 the complaint by Mr Tan is referred back to the Human Rights Commission for resolution by the parties and the Commission (whether through mediation or otherwise).

[17.3] So the proceedings are not left in suspension indefinitely, the parties are to provide the Tribunal with progress reports at four monthly intervals. The first such report must be filed no later than 5pm on Friday 29 April 2016.

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

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Mr RPG Haines QC
Chairperson

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Mr RK Musuku
Member

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Mr BK Neeson JP
Member