

Reference No. HRRT 076/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN TE RINGA MANGU NATHAN MIHAKA

PLAINTIFF

AND HOUSING NEW ZEALAND

CORPORATION

DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mr N Bourke for plaintiff

Ms S Shaw for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 4 March 2016

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

Introduction

[1] By statement of claim filed on 30 November 2015 Mr Mihaka complains of the decision by Housing New Zealand Corporation (HNZC) to terminate his tenancy. The 90-day notice issued by HNZC was followed by the grant on 24 April 2015 by the Tenancy Tribunal of a possession order in favour of HNZC. Mr Mihaka has appealed that decision to the District Court. Those proceedings have been stayed pending

¹ [This decision is to be cited as: *Mihaka v Housing New Zealand Corporation (Referral back to Human Rights Commission)* [2016] NZHRRT 8]

resolution of the discrimination complaint. That complaint is that Mr Mihaka has allegedly been discriminated against by HNZC on the basis of his age and race. HNZC denies the allegations.

[2] The initial view taken by the Human Rights Commission was that Mr Mihaka's complaint was in respect of the Tenancy Tribunal decision and therefore outside the Commission's jurisdiction.

[3] Subsequently, by letter dated 20 January 2016, the Commission advised the Tribunal it has since been clarified that the grounds of the complaint under the Human Rights Act 1993 differ from the grounds on which the Tenancy Tribunal reached its decision. The Commission has therefore reopened the complaint and approached HNZC to ascertain whether it is interested in mediating the dispute.

[4] Initially Mr Mihaka and HNZC agreed:

[4.1] To mediate; and

[4.2] To simultaneously prepare for a hearing before the Tribunal on the basis that if mediation turns out to be unsuccessful, the earliest possible hearing date before the Tribunal can be achieved.

[5] At a teleconference convened by the Chairperson on 26 February 2016 it was pointed out to the parties that s 92D of the Act is a formidable obstacle to the proposal that the parties simultaneously mediate before the Commission and litigate before the Tribunal.

[6] Initially Ms Shaw raised the possibility of HNZC withdrawing from mediation in favour of proceeding immediately with a hearing before the Tribunal. However, she has by subsequent memorandum dated 1 March 2016 advised that given the imminence of the mediation process (now confirmed to proceed at Wellington on 14 March 2016) HNZC considers the pragmatic course is to engage in the mediation process prior to seeking timetabling orders in the Tribunal.

Discussion

[7] 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.

[8] It will be seen that on the filing of any proceedings the Tribunal is under a mandatory duty to 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.

Decision

[9] Given both parties have agreed to the mediation offered by the Commission we are satisfied an order under s 92D(1) must be made. There is a clear interest in Mr Mihaka and HNZN seeking to resolve their differences informally before engaging the Tribunal's processes.

[10] Should the mediation not result in resolution of the dispute the parties can return to the Tribunal on an urgent basis.

ORDERS

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

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

[11.2] If the differences between the parties are not resolved with the assistance of the Human Rights Commission the parties are to so notify the Tribunal at the earliest opportunity with a view to a further teleconference being convened at short notice for case management directions to be given.

[11.3] 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. The teleconference scheduled for 11 March 2016 at 9am is vacated.

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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