**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2018] NZHRRT 27**

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| | **Reference No. HRRT 017/2016** |
| **UNDER** | **THE HUMAN RIGHTS ACT 1993** |
| **BETWEEN** | **JARVIS-MONTREL HANDY** |
| | **PLAINTIFF** |
| **AND** | **NEW ZEALAND FIRE SERVICE COMMISSION** |
| | **DEFENDANT** |

**AT AUCKLAND**

**BEFORE:**
**Ms MA Roche, Co-Chairperson**
**Dr SJ Hickey MNZM, Member**
**Mr BK Neeson JP, Member**

**REPRESENTATION:**
**Mr J Handy in person**
**Mr GC Davenport defendant**

**DATE OF HEARING:** **Heard on the papers**

**DATE OF DECISION:** **26 June 2018**

**DECISION OF TRIBUNAL STRIKING OUT PART OF STATEMENT OF CLAIM[1]**

## Introduction

**[1]** These proceedings under the Human Rights Act were brought against the New Zealand Fire Service Commission (NZFSC) by Jarvis-Montrel Handy in March 2016. Mr Handy's claim concerns two complaints against NZFSC. The first is of racial harassment and the second is of discrimination based on sexual orientation.

**[2]** By application dated 24 November 2016, NZFSC applied for an order that the racial harassment limb of the proceedings be struck out. The basis of the strike-out application

[1] [This decision is to be cited as *Handy v New Zealand Fire Service Commission (Strike-Out Application)* [2018] NZHRRT 27.]

is that in 2014, Mr Handy made an application to the Employment Relations Authority (ERA) for the resolution of various grievances against NZFSC, one of which was racial harassment. Section 79A of the Human Rights Act provides that in circumstances where an employee is entitled to make a complaint under the Human Rights Act and also to apply to the ERA for the resolution of a grievance, the employee may either make a complaint or apply to the ERA but may not do both.

**[3]** The primary issue to be determined is whether Mr Handy's application to the ERA for resolution of his grievance relating to racial harassment triggered s 79A, so that he is excluded from making a complaint under the Human Rights Act about the same racial harassment. If so, he cannot pursue that complaint before the Tribunal.

## Background

**[4]** Mr Handy was employed by NZFSC between July 2012 to November 2013. In February 2015, Mr Handy complained to the Human Rights Commission against NZFSC alleging unlawful discrimination on the ground of sexual orientation as well as racial harassment. When notified, NZFSC advised that it did not consider the Human Rights Commission had jurisdiction to proceed with the complaint of racial harassment, as Mr Handy had sought to have it included in a personal grievance dealt with by the ERA.

**[5]** The Human Rights Commission subsequently informed Mr Handy that it declined to proceed with his complaint of racial harassment.

**[6]** In August 2015, mediation was held in respect of the sexual orientation discrimination complaint which was unsuccessful. The Human Rights Commission file on the complaint was then closed, leading to Mr Handy's proceedings in the Tribunal. The statement of claim encompassed both the racial harassment and sexual orientation complaints.

**[7]** At a teleconference convened by the Chairperson, the issue of whether proceedings taken by Mr Handy before the ERA had triggered s 79A were discussed. NZFSC advised its intention to seek an order striking out that part of Mr Handy's claim which rests on the assertion that he had been racially harassed. Directions setting out a timetable for the strike-out application were recorded in a *Minute* dated 21 October 2016.

## Choice of procedures

**[8]** Section 79A of the Human Rights Act provides as follows:

> **79A Choice of procedures**
>
> (1) If the circumstances giving rise to a complaint under Part 2 are such that an employee would also be entitled to pursue a personal grievance under the Employment Relations Act 2000, the employee may take one, but not both, of the following steps:
>
> (a) the employee may make in relation to those circumstances a complaint under this Act:
>
> (b) the employee may, if the grievance is not otherwise resolved, apply to the Employment Relations Authority for the resolution of the grievance under the Employment Relations Act 2000.
>
> …

(5) If an employee applies to the Employment Relations Authority for a resolution of the grievance under subsection (1)(b), the employee may not exercise or continue to exercise any rights relating to the subject matter of the grievance that the employee may have under this Act.

## The strike-out application

**[9]** In accordance with the Chairperson's directions, on 24 November 2016, NZFSC filed an application, in reliance on s 79A of the Human Rights Act, for an order that the part of the claim based on assertions of racial harassment be struck out. The application was made on the grounds that:

**[9.1]** On 1 April 2014, prior to filing a claim in the Tribunal alleging racial harassment, Mr Handy applied to the ERA in respect of various grievances against NZFSC, one of which was racial harassment.

**[9.2]** In December 2014, following a hearing conducted on the papers, the ERA determined that Mr Handy was allowed to pursue claims for unjustified dismissal and unjustified action and, although Mr Handy had not raised some of his personal grievances within the requisite 90 days, he was able to refer to these, including the allegations of racial harassment as background to his unjustified dismissal grievance.

**[9.3]** On 1 April 2015, Mr Handy filed an Amended Statement of Problem in the ERA which asserted that he had been subjected to racial harassment while employed by NZFSC.

**[9.4]** On 2 April 2015, the ERA directed the parties to attend mediation.

**[9.5]** The ERA subsequently held a three day hearing in respect of Mr Handy's grievances against NZFSC. At the hearing, Mr Handy referred to and placed reliance on his assertions that he had been racially harassed.

**[10]** The application to strike out was supported by the affidavit of Richard James Dagger dated 23 November 2016. Mr Dagger is employed by NZFSC in the role of Principal Advisor Workplace Relations. In the affidavit, Mr Dagger outlined the proceedings taken by Mr Handy against NZFSC in the ERA and annexed relevant documents including:

**[10.1]** Mr Handy's Application to ERA dated 1 April 2014.

**[10.2]** The index of Mr Handy's bundle of documents and excerpts from the bundle which refer to racial harassment.

**[10.3]** Mr Handy's Amended Application to ERA dated 1 April 2015.

**[10.4]** ERA *Minute* dated 2 April 2015, referring the matter to mediation.

## Mr Handy's response to strike-out application – timetable extensions

**[11]** The timetable set in the Chairperson's *Minute* of 21 October 2016 provided for any opposition to the strike-out application to be filed by 13 January 2017. Mr Handy applied

for an extension for filing his opposition and, in a *Minute* dated 17 January 2017, the Chairperson extended the date for filing opposition to 20 January 2017.

**[12]** In a *Minute* dated 6 October 2017, the Chairperson recorded that Mr Handy had failed to file his opposition to the strike-out application, that two ACC medical certificates had been received dated 29 November 2016 and 20 February 2017 respectively, the second of which stated that Mr Handy had no capacity to work and that capacity should be reviewed from 1 June 2017. The Chairperson extended the date for Mr Handy to file and serve his opposition to the strike-out application to 27 October 2017 and directed that if there are medical reasons why Mr Handy cannot comply with this direction, he is to file a detailed medical report setting out the reasons why he cannot presently participate in his proceedings, and identifying the length of time the disability is expected to last.

**[13]** On 26 October 2017, Mr Handy sought an extension of time to 1 November 2017 "to obtain newly prescribed medication to manage my mental/emotional wellbeing and to find a JP for witnessing the affidavit".

**[14]** In a *Minute* dated 30 October 2017, the extension of time to 1 November 2017 was granted.

**Application to adjourn proceedings sine die**

**[15]** On 1 November 2017, Mr Handy filed an application to adjourn his proceedings sine die (indefinitely). In support of the application, Mr Handy relied on the following:

> **[15.1]** In July 2017, the decision of the ERA concerning Mr Handy's claim against NZFSC was released. Preparation is underway for an appeal against that decision and the December 2014 decision (referred to at [9.2] above). If the appeal is successful, the claims before the Tribunal would almost certainly be abandoned.
>
> **[15.2]** In addition to the proceedings before the Tribunal, Mr Handy is involved in several other proceedings. The priority Mr Handy has given to these cases has given rise to his decision to apply to adjourn the proceedings in the Tribunal *sine die*.
>
> **[15.3]** His health-related "hindrances".
>
> **[15.4]** Under the statute of limitations, several years remain during which Mr Handy's claims could be raised. The passage of time therefore should not be a successful argument in opposing the application to adjourn sine die.

**[16]** In support of the application, Mr Handy provided a Work and Income capacity medical certificate dated 29 August 2017, certifying that his capacity to work was affected by ongoing issues with chronic sinusitis. He also provided a redacted letter from the Endocrinology Outpatients Department at Kenepuru Hospital dated 19 June 2017, and a CCDHB orthopaedics referral for outpatient appointment dated 18 October 2017. This referral recorded painful swelling in Mr Handy's feet that made wearing footwear difficult, walking painful, and restricted his employment. In the application Mr Handy stated that should the redacted letter not meet the necessary threshold, he would be prepared to offer further detailed information to the Tribunal should the Chairperson require.

**[17]** The application to adjourn sine die was opposed by NZFSC on the grounds that:

**[17.1]** If the plaintiff is well enough to be involved in a number of other proceedings, it is disingenuous for him to say he is unable to deal with the strike-out application in the Tribunal.

**[17.2]** Mr Handy agreed to the strike-out being dealt with on the papers and had had almost twelve months to file an affidavit and notice of opposition to it but had failed to do so.

**[17.3]** Having commenced proceedings in the Tribunal, Mr Handy has put NZFSC to the cost of defending them and it is not open to him to flout the Tribunal, to consider he is able to delay matters, or put them on hold.

**[17.4]** The documents filed by Mr Handy do not detail any condition which would prevent writing, or responding in writing to the strike-out application. Although he has stated he is prepared to provide further detailed information, should the Chairperson require, he was directed to file a detailed medical report by 27 October 2017 which was then extended on his application to 1 November 2017. Despite this he has not done so.

**[18]** In submissions in reply Mr Handy submitted:

**[18.1]** It is not disputed that a claim for racial harassment was raised in the ERA. What is in dispute is whether that claim, precludes a claim for racial harassment against NZFSC in the Tribunal. Mr Handy has not yet filed documents to support his position against the strike-out application.

**[18.2]** It does not follow from the fact that Mr Handy is actively engaging in matters in other jurisdictions that he should be compelled to contemporaneously engage in matters before the Tribunal. The documents provided set out the medical conditions which significantly limit the degree to which Mr Handy can participate in his ongoing matters.

**[18.3]** The application to adjourn is not entirely based on Mr Handy's medical conditions. The appeal to go before the Employment Court will be a deciding factor in continuing to pursue one or both of the claims before the Tribunal.

**Assessment of application to adjourn sine die**

**[19]** The strike-out application has been before the Tribunal since November 2016. Despite repeated extensions, no submissions or affidavits in opposition have been filed by Mr Handy. Instead, after repeatedly seeking extensions of time in response to the arrival of deadlines, a year after being served with the strike-out application, he filed an application to adjourn sine die. That application is declined. No proper reasons have been advanced by Mr Handy for further delay in this matter. He has been on notice since October 2017 that a detailed medical report setting out the reasons why he cannot presently participate in his proceedings and identifying the length of time the disability is expected to last has been required. Such a medical report has not been forthcoming and

the medical certificates filed do not explain why Mr Handy cannot participate in these proceedings.

**[20]** We do not overlook the offer of "further detailed information" in paragraph [10] of Mr Handy's adjournment application. However, having had since October 2017 to provide a medical report to the Tribunal, there has been a sufficiency of time for him to provide the requisite detailed information. It is not in the interests of justice for this matter to remain undetermined. It is unfair to NZFSC to remain in this proceeding when they have applied, a long time ago, for it to be struck out.

**[21]** The application to adjourn sine die is declined. The Tribunal will now proceed to determine the strike out application.

## The jurisdiction to strike out – principles

**[22]** In *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 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**
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> (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.

**[23]** Applying r 15.1 to this application, the striking out part of a proceeding by reason of absence of jurisdiction plainly falls within r 15.1(a), (c), and (d).

## Assessment

**[24]** The strike-out application does not give rise to any factual dispute between the parties. It is not in dispute that Mr Handy applied to the ERA for the resolution of grievances concerning claims of racial harassment as well as workplace bullying, unjustified dismissal and unjustified disadvantage. The question is whether this application triggered s 79A. If so, he was not entitled to bring proceedings, for the same complaints, under the Human Rights Act.

**[25]** The ERA determined that Mr Handy was out of time for applying for a resolution of his racial harassment grievance, having failed to raise this grievance with NZFSC in the 90 days required under s 114 of the Employment Relations Act. He was however able to raise the racial harassment claim as background in the context of his unjustified dismissal and unjustified disadvantage claims. In his affidavit, Richard Dagger deposes that at the

hearing of the grievances relating to unjustified dismissal and unjustified disadvantage, Mr Handy maintained his view that he had been racially harassed.

**[26]** NZFSC submits that the ERA decision finding the racial harassment grievance to be raised out of time, and limiting it to supporting the unjustified dismissal claim, is irrelevant as s 79A refers expressly to the making of an application, and not to its determination and submits the racial harassment claim is therefore outside the Tribunal's jurisdiction.

**[27]** Section 158 of the Employment Relations Act provides that proceedings in the ERA are commenced by "the lodging of an application in the prescribed form". The Employment Authority Regulations 2000 provide at reg 5 that the prescribed form is "Form 1". A copy of Mr Handy's completed Form 1 is annexed to Mr Dagger's affidavit. It is date-stamped as having been received by the ERA on 8 April 2014. The form specifies that Mr Handy is seeking resolution of problems including racial harassment

**[28]** The form having been accepted for filing by the ERA, constitutes an application that has been "lodged" in terms of s 158. In *Butler v Shepherd* HC Auckland CIV 2011-404-923, 18 August 2011, the High Court held at [69] - [70] that the plaintiff, having *lodged* a proceeding with the ERA for resolution of a grievance, was prevented by s 79A from exercising any rights relating to that grievance under the Human Rights Act.

**[29]** This is the situation Mr Handy finds himself in with respect to his racial harassment complaint. Having lodged a proceeding with respect to his racial harassment grievance, he has "applied" to the ERA for the resolution of the grievance in terms of s 79A of the Human Rights Act. In *Wang v Hamilton Multicultural Services Trust 920090* [2010] NZEMPC 142, (2011) 9 NZELR 404, applying to the ERA was described by the Employment Court, in the context of the choice of procedures, as a "point of irrevocability".

**[30]** Mr Handy having applied to the ERA for the resolution of his racial harassment grievance, is unable to complain about the same racial harassment under the Human Rights Act. The part of his claim that relates to racial harassment, is therefore struck out.

**Balance of claim – sexual orientation discrimination**

**[31]** We turn now to the complaint concerning sexual orientation discrimination. There are three factual allegations made with respect to this claim. These are:

> **[31.1]** That in January 2013, two of Mr Handy's co-workers had a conversation in which they expressed disgust for transgender people and butch lesbians.
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> **[31.2]** In January 2014, Mr Handy's supervisor, Darren Stafford, told Mr Handy that he had known Mr Handy was gay before he hired him. Mr Handy interpreted this remark as an indirect way of expressing, "if you thought you were successfully hiding your sexual orientation, and blending in with the rest, you are mistaken".

**[31.3]** In November 2012 Mr Handy overheard a co-worker say about him, "he thinks he can play the race card and the gay card".

**[32]** Mr Handy complained to the Human Rights Commission that he was discriminated against in his employment on the ground of his sexual orientation. In his statement of claim he refers to s 21(1)(m) and s 22(2) as the relevant provisions of the Human Rights Act that have been contravened. As noted in the reply filed by NZFSC, s 22(2) relates to employment agents and employment agencies and Mr Handy may have meant to refer to s 22(1) which covers employment. Even so, it is unclear from the claim what Mr Handy alleges occurred that breached s 21(1). In its reply, NZFSC notes that Mr Handy has not referred to any decision, action or omission by the Fire Service in respect of his employment that was taken by reason of his sexual orientation.

**[33]** Having filed proceedings in this Tribunal, Mr Handy has shown little interest in pursuing them. In the event he wishes to continue his proceeding under the Human Rights Act against NZFSC concerning sexual orientation discrimination, he is to file an amended claim clearly setting out his allegations in this regard by 5pm on Friday 27 July 2018. In the event that the amended claim is not filed, the claim of discrimination based on sexual orientation will be struck out for want of prosecution.

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| **Ms MA Roche**<br>**Co-Chairperson** | **Dr SJ Hickey MNZM**<br>**Member** | **Mr BK Neeson JP**<br>**Member** |