

Reference No. HRRT 019/2017

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN STEVEN GILBERT BUTCHER

PLAINTIFF

AND NEW ZEALAND TRANSPORT AGENCY

FIRST DEFENDANT

AND ATTORNEY-GENERAL in respect of the
Ministry of Transport

PROPOSED SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms K Anderson, Member

Ms GJ Goodwin, Member

REPRESENTATION:

Mr S Butcher in person

Mr R Wilkin for first defendant

Mr P Rishworth QC and Ms A Todd for Attorney-General

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 23 November 2018

DECISION OF TRIBUNAL ADDING ATTORNEY-GENERAL
AS SECOND DEFENDANT¹

¹ [This decision is to be cited as: *Butcher v New Zealand Transport Agency (Joinder of Attorney-General)* [2018] NZHRRT 52]

Background

[1] By amended statement of claim dated 18 October 2018 Mr Butcher alleges particular provisions of the Land Transport Act 1998 and/or the Land Transport (Driver Licencing) Rule 1999 are inconsistent with the right to freedom from discrimination on the grounds of religion. The single defendant presently named in the proceeding is the New Zealand Transport Agency.

[2] Mr Butcher seeks declarations under s 92J of the Human Rights Act 1993 (HRA) that the Land Transport Act and subordinate legislation relating to driver licensing requirements are inconsistent with s 19 of the Bill of Rights Act 1990 “in relation to religious objection to a combined driver's licence and ID”.

[3] By application dated 23 October 2018 the Attorney-General submits he should be joined as a party to the claim on the grounds that the Attorney-General, in respect of the Ministry of Transport (which administers the Land Transport Act), ought to have been named as a party at the outset. The application acknowledges that the New Zealand Transport Agency is appropriately named as a defendant in light of the claim Mr Butcher seeks to make about driver licences. However, it is anticipated that as the matter proceeds, the Agency too will be represented by counsel for the Attorney-General.

[4] While HRA, s 92G provides that the Attorney-General may appear and be heard in proceedings before the Tribunal in which it is alleged there has been a breach of HRA, Part 1A and although the section confers the right to adduce evidence and the right to cross-examine witnesses, the Attorney-General does not under this provision have the status of a party with the rights and obligations of a party.

[5] The nature of the claim and the declarations sought are such that this case is a civil proceeding in the Tribunal “for a breach of Part 1A that is an enactment, or an act or omission authorised or required by an enactment or otherwise by law”. In short, the allegation is that an act of the legislature is discriminatory. In accordance with HRA, s 92B(1)(b), such claim is properly brought against the Attorney-General, or against the Attorney-General together with the body performing the licensing function conferred or imposed by law (namely the Agency).

[6] As to the role intended to be played by the Attorney-General, counsel has explained:

[6.1] Mr Butcher’s claim is in essence that:

[6.1.1] Section 28(1) of the Land Transport Act can and should be applied consistently with the various rights in the New Zealand Bill of Rights Act that he says are infringed; and

[6.1.2] If that cannot be done, s 28(1) is facially inconsistent with those rights; and

[6.1.3] One such right is s 19 of the Bill of Rights Act, for which an available remedy is a declaration of inconsistency under s 92J of the Human Rights Act.

[6.2] The Attorney-General as defendant will argue that the alleged facts do not establish a breach of any of the rights as claimed and, in particular, that there is no inconsistency with s 19 of the Bill of Rights Act.

[7] By email dated 30 October 2018 Mr Wilkin gave notice the Agency does not oppose the Attorney-General's application.

[8] By notice of opposition dated 2 November 2018 Mr Butcher opposes the application:

[8.1] In his submission the role of the Attorney-General is to be impartial and non-political and he should remain free to appear for either party as it best serves the interests of justice. This would best be done under HRA, s 92G rather than by joinder as a defendant. Mr Butcher opposes a joinder which in his submission runs the risk of bias inherent in an adversarial process.

[8.2] Joinder of the Attorney-General will add unnecessarily to the cost of the proceedings.

[8.3] If the Attorney-General is joined as a defendant Mr Butcher might apply to join another (unspecified) party for balance.

[9] In reply submissions counsel for the Attorney-General has pointed out that the Attorney-General is not insensitive to Mr Butcher's perception that there is an "inequality of arms". But the true position, he submits, is that the Attorney-General, in respect of the Ministry of Transport, ought to have been named as a party when these proceedings were first filed. Further, there need be no increase in legal costs to Mr Butcher as joinder of the Attorney-General as a second defendant is unlikely to have any added impact as the matters in dispute remain the same. In any event, concerns about costs are not a reason against joinder.

Discussion

[10] Joinder of a defendant to proceedings before the Tribunal is to be determined according to the High Court Rules, suitably adapted to the Tribunal's processes. See *Director of Human Rights Proceedings v Wellington Advkit Services Ltd (Joinder of Second and Third Defendants)* [2015] NZHRRT 11 at [18] to [21] and *Director of Human Rights Proceedings [Lightbody] v Corrections (Joinder of Second Defendant)* [2018] NZHRRT 32. Rule 4.56 provides:

4.56 Striking out and adding parties

- (1) A Judge may, at any stage of a proceeding, order that—
 - (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
 - (b) the name of a person be added as a plaintiff or defendant because—
 - (i) the person ought to have been joined; or
 - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.
- (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[11] The test for joinder is a "liberal" one and it imposes a low threshold. See *Newhaven Waldorf Management Ltd v Allen* [2015] NZCA 204, [2015] NZAR 1173 at [44] and [46].

Decision

[12] Given the nature of the claim made by Mr Butcher under HRA, Part 1A and further given the Attorney-General should have been named as a defendant when these proceedings were filed there is no basis for declining the present application.

[13] Neither the Tribunal nor Mr Butcher can restrict the right of the Attorney-General to call such evidence and to make such submissions as the Attorney-General considers appropriate. This applies irrespective whether the Attorney-General appears as a party or appears pursuant to HRA, s 92G.

[14] As to Mr Butcher's fear that there will be an increase in legal costs, the objection is without foundation because, as pointed out by the Attorney-General, the matters in dispute remain the same whether the Attorney-General is joined as a party or not.

[15] Should Mr Butcher wish to join another party as a plaintiff in these proceedings, application can always be made provided there are proper grounds for the application and in particular, it can be demonstrated that the person put forward as an additional plaintiff can be shown to be a person who ought to have been joined from the outset or whose presence before the Tribunal may be necessary for the Tribunal to adjudicate on and settle all questions involved in the proceeding. See High Court Rules, r 4.56 above.

Formal order

[16] An order is made that the Attorney-General (in respect of the Ministry of Transport) be added as second defendant to these proceedings.

[17] The case management timetable set out in the *Minute* dated 5 October 2018 will, as a consequence, require adjustment.

Case management timetable directions

[18] The following amended directions are made:

[18.1] The Attorney-General is to file and serve a statement of reply by 5pm on Friday 14 December 2018.

[18.2] Discovery and inspection are to be provided on an informal basis by the parties by 5pm on Friday 15 March 2019.

[18.3] Written statements of evidence to be called at the hearing by Mr Butcher are to be filed and served by 5pm on Friday 12 April 2019. By the same date Mr Butcher is to provide the defendants with a list of documents he wishes to have included in the common bundle of documents.

[18.4] Written statements of evidence to be called at the hearing by the defendants are to be filed and served by 5pm on Friday 17 May 2019. By the same date the defendants are to provide Mr Butcher with a list of documents the defendants wish to have included in the common bundle of documents.

[18.5] Any statements of reply by Mr Butcher are to be filed and served by 5pm on Friday 31 May 2019.

[18.6] The defendants are to prepare the common bundle of documents and that bundle is to be filed and served two weeks prior to the hearing.

[18.7] These proceedings are to be set down for a two-day hearing in Wellington on a date to be advised by the Secretary.

[18.8] Leave is reserved to all parties to make further application should the need arise.

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Mr RPG Haines ONZM QC
Chairperson

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Ms K Anderson
Member

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Ms GJ Goodwin
Member