

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

SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:

Mr S Butcher in person

Mr P Rishworth QC and Ms A Todd for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 15 March 2019

**DECISION OF CHAIRPERSON REFUSING LEAVE FOR THIRD AMENDED
STATEMENT OF CLAIM TO BE FILED¹**

Introduction

[1] Mr Butcher has applied for leave to file a third amended statement of claim dated 20 February 2019. The application is opposed by the defendants. In this decision I explain why leave must be refused.

¹ [This decision is to be cited as: *Butcher v New Zealand Transport Agency (Third Statement of Claim)* [2019] NZHRRT 14]

Background

[2] At the first case management teleconference convened on 5 October 2018 Mr Butcher was required to file an amended claim clarifying his complaint. Specifically he was required to identify the statutory provisions alleged to be inconsistent with his right to freedom from discrimination. See the *Minute* dated 5 October 2018 at [7] and [11.1]. A second statement of claim was duly filed on 18 October 2018. The adequacy of that document was not tested as the filing was overtaken by the joinder of the Attorney-General as second defendant. See *Butcher v New Zealand Transport Agency (Joinder of Attorney-General)* [2018] NZHRRT 52 (23 November 2018).

The third amended statement of claim

[3] On 20 February 2019 Mr Butcher submitted his third revised statement of claim together with an application for leave to file. The new document is long (28 pages) and comprises 98 separately marked paragraphs.

[4] In his application Mr Butcher explains (inter alia):

[4.1] Joinder of the Attorney-General has necessitated changes to the existing statement of claim.

[4.2] He (Mr Butcher) believes it is necessary to add to his claim the “procedural propriety” of both defendants’ actions.

[4.3] Those who have been informally assisting him with his claim have suggested he remedy perceived deficiencies in both the form and content of the existing statement of claim. In his (and their) view the existing claim does not encapsulate all matters Mr Butcher would like the Tribunal to consider.

[4.4] By broadening the claim Mr Butcher will expand the scope of the discovery obligations of the defendants.

[4.5] The expanded statement of claim will assist the Tribunal and counsel for the defendants to process and progress the complaints made by Mr Butcher.

[4.6] Mr Butcher intends approaching counsel for the defendants with a view to persuading them that his religious beliefs are genuine, that those beliefs have given rise to discrimination and that Mr Butcher meets the test for discrimination. If agreement can be reached on these issues, the hearing before the Tribunal will be shortened.

[4.7] Mr Butcher will now prepare his supporting witness statements.

Grounds on which defendants oppose the application

[5] By memorandum dated 7 March 2019 the defendants oppose the filing of the third statement of claim on the grounds it does not meet the requirements of the High Court Rules, it fails to fully and fairly inform the defendants of the nature of the claim, pleads scandalous material, is prolix and pleads matters of evidence.

[6] The primary point made by the defendants is that the third amended statement of claim does not properly plead a claim of religious discrimination:

[6.1] Despite its length the proposed document gives no particulars as to what Mr Butcher’s religious belief actually is, and why the practise of his religion is affected by the prescription of photographic drivers’ licences.

[6.2] The proposed amended claim is essentially a catalogue of objections taken by Mr Butcher (and others) to photographic drivers licences but fails to advance any particularised claim of discrimination against Mr Butcher himself based on religious belief, and therefore fails properly to state a claim.

[6.3] Without a pleaded statement of relevant religious belief much of the content of the proposed claim is of uncertain relevance (for example, the assertions relating to alleged “biometric capability” of drivers licences and their being an “international ID card”).

[6.4] In the result, while many assertions of fact are made there is no link between these and any particularised claim of religious discrimination. The first assertion of any religious claim is at paras 54 to 56 (that the prescribed licence is “against” religious belief or “in opposition to” Mr Butcher’s beliefs) but without stating what the belief is and why the prescribed form of licence works a disadvantage amounting to discrimination in terms of s 19 of the New Zealand Bill of Rights Act 1990. Paragraph 57(xii), (xiii) and (xiv) come closest to advancing a claim of different treatment, but fail to state any factual basis for that claim.

[6.5] A claim of vigorous objection, even an objection founded on religious belief (if it were particularised), is not itself discrimination.

[6.6] While Mr Butcher says he intends to file an affidavit as to his beliefs (see para 14 of his Application for Leave to Amend Statement of Claim dated 20 February 2019), he is required to give particulars in his statement of claim. Those particulars must specify how it is claimed there is discrimination on the ground of that belief.

[7] The defendants further submit:

[7.1] That para 7 of the proposed amended statement of claim contains rhetoric which should be removed from any document that is approved for filing. The allusion to “dastardly fascism” and to Germany in the 1930s and the hint of equivalence to modern New Zealand does not belong in a statement of claim.

[7.2] The claims of impropriety against a former Cabinet Minister (The Hon Maurice Williamson at para 88(iii) and (iv)) relating to the introduction of photographic drivers’ licences are gratuitous and should be removed.

[7.3] The extensive citation of proceedings in Parliament (even if advanced for inquiry into their truth) and the seeking of an inquiry into whether, the Hon M Williamson MP misled Parliament from 1995 to 1999 is inviting the Tribunal to question or impeach proceedings in Parliament and therefore to act in a manner contrary to article 9 of the Bill of Rights 1688 (Eng), affirmed in force in New Zealand by the Imperial Laws Application Act 1988 and the Parliamentary Privilege Act 2014.

[7.4] The statement of claim is prolix and excessively pleads evidence and submissions. See for example paras 23 to 54.

[8] As part of their submission on prolixity and the pleading of evidence the defendants point to:

[8.1] Much of the statement of claim asserts rights under other than s 19 of the New Zealand Bill of Rights Act 1990. These rights cannot form the basis of relief in the Tribunal. Mr Butcher is also seeking remedies that cannot be granted by the Tribunal.

[8.2] The extensive assertions of fact are, on Mr Butcher's admission, designed to raise matters upon which he can seek discovery. But insofar as these assertions are not connected to any specific claim of discrimination (as opposed to a general objection to photographic drivers' licences) they cannot be pleaded in a statement of claim to elicit discovery.

[9] Finally, the defendants submit:

[9.1] The timetable needs to be both suspended and revisited. As the timetable currently stands, there is to be informal discovery completed by 15 March 2019. Quite apart from the implications of the present application by Mr Butcher (if allowed) for expanding the scope of discovery, the number of files in the Ministry of Transport bearing upon the introduction of photographic drivers' licences is such that further particularity as to the claim of religious discrimination is needed to determine relevance.

[9.2] A new timetable is needed for a proper amended statement of claim to be filed stating precisely the issues involved, and allowing for tailored discovery as agreed in light of issues which have been properly pleaded.

Mr Butcher's reply of 8 March 2019

[10] In his reply dated 8 March 2019 Mr Butcher takes the following points:

[10.1] He is concerned the defendants require him to particularise his relevant religious beliefs. He claims this puts him on trial rather than the defendants.

[10.2] The objections made to the third statement of claim were not made in relation to the first and second versions of the document.

[10.3] The defendants have not taken up his offer to meet with counsel "to traverse the issue of my religious belief".

[10.4] He is ready and able to provide more information about his religious belief and why the practise of his religion is affected by the Land Transport Act and how discrimination is apparent.

[10.5] He is opposed to discovery by the defendants being delayed or narrowly confined.

[10.6] He relies on s 5 of the Human Rights Act to justify his request for many of the orders sought in the third statement of claim.

[10.7] He cannot see how including evidence in the statement of claim can disadvantage the defendants.

[10.8] If the defendants are correct in saying that a report to Parliament by the Human Rights Commission is not a remedy available from the Tribunal, he seeks a formal ruling to this effect.

[10.9] While he is prepared to remove the reference to “dastardly fascism” he opposes removal of the allegations made regarding Hon Maurice Williamson.

[10.10] He is not opposed to the extension of the case management timetable.

DISCUSSION

The third statement of claim

[11] The grounds on which the defendants object to the third statement of claim are unassailable. The document is unquestionably prolix and provides no or no meaningful particulars as to what Mr Butcher’s religious belief actually is and why the practise of his religion is affected by the statutory prescription of photographic drivers licences.

[12] As Mr Butcher’s whole case is premised on discrimination based on his religious belief, this is an omission of the first order and potentially fatal to his case. So too is his failure to properly particularise the claim of discrimination. The omissions and flaws in the statement of claim cannot be overcome or filled by the subsequent filing by Mr Butcher of an affidavit or other evidence or by meeting with counsel for the defendants. His case must be properly set out in a statement of claim.

[13] The Tribunal is given power by s 104(5) of the Human Rights Act 1993 to regulate its procedure as it thinks fit. Pursuant to that power it draws, when appropriate, on High Court practice and in particular the High Court Rules suitably modified to recognise the Tribunal’s unique jurisdiction. High Court practice regarding statements of claim reflects principles of universal application and for that reason are frequently referred to by the Tribunal in contexts similar to those in the present case. Mr Butcher must comply with those principles.

[14] As can be seen from High Court Rules, r 5.26 the purpose of a statement of claim is to inform the other party precisely of what is being claimed and to indicate to the court or tribunal, when viewed with the subsequent pleadings, what has to be decided in the case. A plaintiff must therefore ensure he or she sets out all the essential points that, if proved, would entitle him or her to the relief claimed.

[15] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [84] the Court of Appeal set out the requirements of a statement of claim (High Court Rules, rr 5.17, 5.26 and 5.27). Those requirements apply equally in proceedings before the Tribunal. Specifically:

[15.1] The pleading must be accurate, clear and intelligible.

[15.2] Sufficient particulars must be given to enable the defendant to be fairly informed of the case to be met.

[15.3] While adequate particulars are required, the statement of claim must not stray into setting out the evidence relied upon.

[16] Claims must be pleaded in the most succinct and concise way possible. Courts and tribunals and responding parties should not be left in the position of attempting to make sense of a morass of information. While due allowance is made for lay litigants they are not permitted to file incomprehensible claims because that only visits prejudice and injustice on the other party and inconveniences the court or tribunal. See *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005 at [57] to [59]:

[57] Parties seeking redress from Tribunals and Courts must state their claim in a way which enables the Court or Tribunal and parties responding to the claim to understand what the claim is about. Claims should be pleaded in the most succinct and concise way possible.

[58] Tribunals and Courts, and responding parties, should not be left in the position of attempting to make sense of a “morass of information” (to borrow the Tribunal’s description of Ms Mackrell’s claim). To put Courts and respondents in the position of having to try and make sense of the incomprehensible is what is meant by the rather quaint terms “embarrass” and “prejudice” in relation to pleadings.

[59] Due allowance is to be made for lay litigants such as Ms Mackrell, and it was made by the Tribunal here. But lay litigants, like litigants who are professionally represented, are required to comply with the pleading rules and procedures of Tribunals and Courts. They are not to be permitted to file incomprehensible claims, because that only visits prejudice and injustice upon the respondent, not to mention enormous inconvenience to the Court or Tribunal.

[17] The third statement of claim now tendered by Mr Butcher falls well short of these simple requirements and, if filed, would be at real risk of being struck out by reason of its prolixity and oppressiveness.

[18] It must also be said that it is inappropriate for a statement of claim to make allusion to irrelevant matters such as “dastardly fascism” and to Germany in the 1930s. The suggestion that present day New Zealand is somehow equivalent to Germany in the 1930s is not only irrelevant, it is of little help to the parties and to the Tribunal. There is also the point the Tribunal does not have jurisdiction to investigate claims of alleged impropriety against a former Cabinet Minister. The defendants are also correct in taking the point that it is not possible for the Tribunal to inquire whether a Cabinet Minister misled Parliament in the period 1995 to 1999.

[19] Nor is it permissible for a statement of claim to allege breaches of provisions in the New Zealand Bill of Rights Act which are not relevant to the religious discrimination claim.

Discovery

[20] Mr Butcher believes that if he broadens his attack in the manner exemplified by the third statement of claim this will entitle him to a commensurably broader range of documents through the discovery process. In this he is mistaken.

[21] First, the statement of claim cannot be a catalogue of every complaint a plaintiff may have. The claim must comply with the requirements earlier explained in this decision.

[22] Second, the High Court Rules make it clear that to reduce the time and cost involved in discovery, the discovery process must be tailored to the needs of the particular litigation. Mr Butcher is misguided in believing the process requires the defendants to make disclosure of anything and everything relating to drivers licences, particularly photographic licences. The ambit of the discovery obligations of the defendants is limited by the bounds of the discrimination claim by Mr Butcher if and when he properly articulates and particularises that claim.

[23] If necessary the Tribunal will make a formal order that discovery is, in the circumstances of the present case, to be tailored discovery as under High Court Rules, rr 8.8 and 8.9, not standard discovery as under r 8.7.

[24] Litigation discovery is not to be conflated with access to official information under the Official Information Act 1982.

The issue of remedies

[25] The third statement of claim seeks a bewildering array of remedies in the form of declarations (at least 16 are sought) and by way of orders that various inquiries be undertaken and reports compiled. The Tribunal is asked to order an inquiry into 18 separate matters while reports are sought into at least 14 other separate matters.

[26] The difficulty facing Mr Butcher is that he has brought a claim under Part 1A of the Human Rights Act with the result the only form of relief available (assuming he is successful in his discrimination claim) is a declaration of inconsistency under s 92J of the Act.

[27] One explanation for the request for outlandish remedies is that Mr Butcher is of the mistaken belief the Human Rights Review Tribunal and the Human Rights Commission are the same thing. That is why he relies on s 5 of the Human Rights Act to justify his request for investigations and reports. But that section addresses the functions of the Human Rights Commission, not the functions of the Tribunal and the Tribunal has no jurisdiction over the Commission.

CONCLUSION

[28] The third statement of claim singularly fails to meet the minimum standards of pleading required for a document of this kind. It follows it is not possible for leave to be granted for the document to be filed. That would only result in an application by the defendants for Mr Butcher's proceedings to be struck out.

[29] Leave to file the third statement of claim is accordingly declined.

[30] If Mr Butcher intends pursuing his proceedings it will be necessary for him to present to the Tribunal a statement of claim which complies with the requirements earlier set out in this decision and which overcomes each and every of the objections made by the defendants. If he fails to comply with this direction his proceedings will be at real risk of being struck out. He must realise the directions given in this decision comprise his last opportunity to file a statement of claim which meets the Tribunal's requirements. Until this has been done the existing case management timetable must be suspended and notice to this effect was given by the Secretary to the parties by email dated 13 March 2019.

[31] Directions follow. They include the convening of a further teleconference once Mr Butcher has presented for filing a statement of claim in acceptable form.

Directions

[32] The following directions are made:

[32.1] If Mr Butcher intends continuing with his case he is to prepare a fourth statement of claim which complies with the Tribunal's requirements as set out in

this decision and which meets and addresses each and every of the objections raised by the defendants to the third statement of claim. The fourth statement of claim together with an application for leave is to be filed and served by 4pm on Thursday 18 April 2019.

[32.2] By 4pm on Friday 17 May 2019 the defendants are to file and serve a memorandum identifying any issues arising out of the content of the fourth statement of claim and whether the application for leave to amend is opposed.

[32.3] At that point a decision will be made whether to deal with any objections on the papers or to convene a teleconference, or both.

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

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Mr RPG Haines ONZM QC
Chairperson