

Reference No. HRRT 014/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN ZELINDA DORIA

PLAINTIFF

AND DIAMOND LASER MEDISPA TAUPO LIMITED

FIRST DEFENDANT

AND OLIVIA JANE BLAKENEY-WILLIAMS

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson

Dr SJ Hickey MNZM, Member

Mr RK Musuku, Member

REPRESENTATION:

Ms E Tait for plaintiff

Mr G Brant for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 22 March 2019

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**DECISION OF TRIBUNAL STAYING PROCEEDINGS<sup>1</sup>**

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[1] On 20 November 2018, the Tribunal dismissed an application to strike out Zelinda Doria's proceedings under the Human Rights Act 1993 (HRA). The defendants have filed judicial review proceedings in the High Court in respect of that decision. They have applied for Ms Doria's proceedings in the Tribunal to be stayed or adjourned until the

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<sup>1</sup> [This decision is to be cited as *Doria v Diamond Laser Medispa Taupo Ltd (Stay)* [2019] NZHRRT 20.]

determination of the judicial review proceedings. Ms Doria is opposed to this. She wishes to avoid further delay in respect of her proceedings and suggests that the Tribunal lacks jurisdiction to stay, or indefinitely adjourn, its own proceedings. While she does not contend that her proceedings should be heard prior to the determination of the judicial review proceedings, she would like the usual case management steps such as discovery and the filing of evidence to proceed.

[2] The issue for the Tribunal to determine in this decision is whether it can and should stay or indefinitely adjourn Ms Doria's proceedings pending the resolution of the judicial review application.

## **Background**

[3] In March 2018, Ms Doria filed proceedings against the defendants in the Tribunal under the HRA. She had previously been employed by the defendants. Her claim concerned their alleged discriminatory treatment of her by reason of her pregnancy. One of the matters she complained about was being forced to take parental leave when she was in the early stages of pregnancy and wished to continue working.

[4] The defendants filed a reply under protest of jurisdiction and a strike-out application. The basis of the strike-out application was that the Tribunal lacks jurisdiction to deal with the claim because it constitutes a parental leave complaint under the Parental Leave and Employment Protection Act 1987 (PLEPA). As the Employment Relations Authority has exclusive jurisdiction in respect of PLEPA, the defendants argued that the Tribunal lacks jurisdiction in respect of Ms Doria's complaint of unlawful discrimination, or, in the alternative, that the Tribunal lacks jurisdiction with respect to those parts of the claim that could be characterised as a parental leave complaint.

[5] In dismissing the strike-out application, the Tribunal found that the matters complained of by Ms Doria are matters which are within the jurisdiction of the Tribunal pursuant to the HRA, and that the fact that some of the treatment complained of can be characterised as a parental leave complaint does not preclude the Tribunal from considering the balance of the claim. The Tribunal also considered that, with regards to the claim as a whole, it did not clearly follow that the fact that some parts of it could be characterised as a parental leave complaint precluded the Tribunal from considering the entire claim which is otherwise clearly within its jurisdiction.

[6] Following the dismissal of the strike-out application, the Tribunal directed the Secretary to convene a teleconference so that directions could be given as may be necessary to allow the case to be set down for hearing. Such case management teleconferences are held pursuant to reg 17 of the Human Rights Review Tribunal Regulations 2002, which require a Chairperson of the Tribunal to convene a meeting of the parties before any hearing to, amongst other things, ascertain the issues in dispute between the parties and to determine whether or not it is necessary or desirable to give directions. These directions typically provide timetabling for discovery and the exchange of evidence and the preparation of a common bundle of documents for the hearing.

[7] A procedural teleconference was scheduled to take place on 7 February 2019. Prior to the teleconference, Mr Brant filed a memorandum confirming his instructions to take review proceedings in respect of the strike-out decision and requesting that the teleconference be adjourned for two weeks, by which time the proceedings would have been filed and served. This adjournment application was granted, and the teleconference was rescheduled to 21 February 2019.

[8] On 18 February 2019, the defendants filed judicial review proceedings in the High Court challenging the jurisdiction of the Tribunal to resolve the dispute between them and Ms Doria. On 20 February 2019, they applied for a stay or adjournment of the Tribunal proceedings pending the resolution of those judicial review proceedings.

[9] In a *Minute*, dated 20 February 2019, the Co-Chairperson adjourned the teleconference scheduled for 21 February 2019 until further notice and set a timetable for the filing of submissions in opposition to the stay application and the filing of submissions in reply.

[10] The application for an adjournment or stay is opposed by Ms Doria because of the delay that would be caused in resolving her proceedings in the event that the judicial review proceedings fail. While Ms Doria does not contend that the proceedings should be heard by the Tribunal prior to the determination of the judicial review proceedings in the High Court, she considers a case management timetable should be set requiring discovery and the filing of evidence so that, should the judicial review be resolved in her favour, the Tribunal can hear the proceedings without delay. Ms Doria has also submitted that the Tribunal lacks jurisdiction to stay proceedings before it.

### **Assessment**

[11] There are two issues to resolve. The first is whether the Tribunal has jurisdiction to stay or indefinitely adjourn proceedings before it. The second is, if so, whether it is appropriate to do so.

[12] Turning to the first issue, s 105(2) of the HRA provides that:

#### **105 Substantial merits**

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- (2) In exercising its powers and functions, the Tribunal must act—
- (a) in accordance with the principles of natural justice; and
  - (b) in a manner that is fair and reasonable; and
  - (c) according to equity and good conscience.

[13] Section 104(5) of the HRA provides that the Tribunal can “regulate its procedure as it thinks fit, subject to this Act and any regulations made under it”.

[14] Having regard to the Tribunal’s power to regulate its own procedure (s 104(5)) and the requirement that it act in a manner that is fair and reasonable (s 105(2)(b)), our view is that the Tribunal has jurisdiction to make an order that case management of these proceedings be suspended until the determination of the judicial review proceedings. In other words, that the proceedings be stayed. This is a matter of procedure which the Tribunal is allowed to regulate provided that it does so in a manner that is fair and reasonable.

### **Should the proceedings be stayed?**

[15] The Tribunal, having found that it can stay the proceedings will now consider whether it should.

[16] There are three possible outcomes to the judicial review proceedings. These are:

[16.1] An order quashing *Doria v Diamond Laser Medispa Taupo Ltd (Strike-Out Application)* [2018] NZHRRT 50 and a determination that the Tribunal does not

have jurisdiction in respect of the dispute between Ms Doria and the defendants, in which case these proceedings will be at an end.

**[16.2]** An order dismissing the judicial review proceedings and upholding the decision in *Doria v Diamond Laser Medispa*, in which case the proceedings in the Tribunal will proceed.

**[16.3]** A decision determining that the Tribunal does not have jurisdiction in respect of the parts of Ms Doria's claim that can be characterised as a parental leave complaint and confirming the Tribunal has jurisdiction in respect of those parts of the claim not captured by s 56(1) of PLEPA. In this case, the proceedings in the Tribunal will proceed but the ambit of the case will be narrower than if the judicial review had been dismissed.

**[17]** It would be expected that if the entire claim is heard by the Tribunal, the evidence and discovery required will be more wide-ranging than if only the balance of the claim not captured by PLEPA is heard by the Tribunal. It is impractical to proceed with discovery and the preparation and filing of evidence when the ambit of the case before the Tribunal is not known. Neither party can be sure of what facts are necessary to prove and what documents are relevant. Should the decision in *Doria v Diamond Laser Medispa* be quashed and the Tribunal found to have no jurisdiction, putting the defendants to the cost of preparing evidence and providing discovery would be contrary to the interests of justice.

**[18]** It is our view that it is appropriate to adjourn the teleconference and the setting of a case management timetable until the determination of the judicial review proceedings.

**[19]** The Co-Chairperson has already adjourned the procedural teleconference scheduled for 21 February 2019 until further notice. It is our view that it is fair and reasonable and consistent with justice to maintain this adjournment or, in other words, stay this proceeding, until the determination of the judicial review proceedings.

**[20]** It is understandable that Ms Doria wishes to avoid delay in resolving her proceedings. In the *Minute* of the Co-Chairperson, dated 7 February 2019, Ms Tait's advice that discovery was already substantially complete was recorded. Should Ms Doria wish to progress her proceedings by attending to the preparation of her evidence while awaiting the outcome of the judicial review proceedings, she is free to do so. However, no case management directions concerning the filing of such evidence will be made until the judicial review proceedings are determined and the issue of the Tribunal's jurisdiction in respect of all or part of these proceedings is determined.

## **Orders**

**[21]** For the reasons given, the following orders are made:

**[21.1]** The case management teleconference in respect of this claim is adjourned until the determination of the judicial review proceedings.

**[21.2]** Should the judicial review proceedings be unsuccessful or only partially successful, the Secretary is directed to convene a teleconference so that directions can be given as may be necessary to allow the case to be set for hearing.

**[21.3]** Costs are reserved.

**[21.4]** Leave is reserved to both parties to make further application should the need arise.

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**Ms MA Roche**  
**Co-Chairperson**

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**Dr SJ Hickey MNZM**  
**Member**

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**Mr RK Musuku**  
**Member**