(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION AND ANY OTHER IDENTIFYING DETAILS OF THE PLAINTIFF

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2021] NZHRRT 52**

I TE TARAIPIUNARA MANA TANGATA

Reference No. HRRT 021/2020

UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**JOHN LAVENDER**
	PLAINTIFF
AND	**ATTORNEY-GENERAL**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Mr IR Nemani, Member
Dr NR Swain, Member

REPRESENTATION:
Mr M Timmins, Director of Human Rights Proceedings and Mr J Suyker for plaintiff
Mr AM Powell and Mr JB Watson for defendant

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

DATE OF DECISION: **26 November 2021**

(REDACTED) DECISION OF TRIBUNAL DISMISSING STRIKE-OUT APPLICATION BY ATTORNEY-GENERAL[1]

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[1] [This decision is to be cited as *Lavender v Attorney-General (Strike-Out Application)* [2021] NZHRRT 52. Note publication restrictions. Those restrictions require this decision to be anonymised by the redaction of the true name of the plaintiff. In substitution he is to be referred to as "John Lavender" (not his true name).]

INTRODUCTION

Brief overview of facts

[1] Mr Lavender was born in Australia in 1981 and was an Australian citizen by birth. In 1988, when seven years of age, he was the victim of sexual abuse in Australia. In 2003, when 22 years of age, Mr Lavender came to New Zealand and subsequently became a New Zealand citizen in 2007. Since then he has remained in New Zealand. In early 2019 (and while living in New Zealand) Mr Lavender began experiencing memories of the offending. In February 2019, for the first time, he sought treatment from a psychologist for his symptoms.

[2] Although the Accident Compensation Corporation initially funded counselling by a psychologist, in April 2019 it declined to fund further sessions on the grounds Mr Lavender had not been ordinarily resident in New Zealand at the time the abuse occurred.

[3] In these proceedings under Part 1A of the Human Rights Act 1993 (HRA) Mr Lavender in his second statement of claim dated 23 October 2020 alleges he has been declined cover for mental injury by reason of his national origins, nationality or citizenship. The claim is one of both direct and indirect discrimination.

The strike-out application

[4] By application dated 6 November 2020 the Attorney-General asks that both causes of action be struck out on the grounds the statement of claim discloses no reasonably arguable cause of action. It is properly conceded the facts pleaded by the plaintiff, whether or not admitted, are assumed to be true.

[5] In his notice of opposition dated 20 November 2020 the plaintiff contends the question whether there is a reasonably arguable cause of action is premature and cannot be answered without discovery and evidence, including evidence of the policy underpinning the relevant provisions of the Accident Compensation Act 2001 (AC Act). Reliance is placed on *Williams v Police* [2021] NZHC 808, (2021) 12 HRNZ 545 at [110], a decision which underlined the importance of a hearing at which relevant evidence is adduced and examined.

[6] The decision in *Williams v Police* is under appeal, leave having been granted by the High Court in *Williams v New Zealand Police* [2021] NZHC 2345 (8 September 2021) but the parties to the present proceedings are in agreement it would not be in the interests of justice for the Tribunal's decision on the present application to be deferred until a decision of the Court of Appeal is released.

JURISDICTION TO STRIKE OUT

[7] As can be seen from cases such as *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [21] the Tribunal has always possessed jurisdiction to strike out proceedings. However, with the enactment in 2018 of HRA, s 115A there is now express power to strike out proceedings where no reasonable cause of action is disclosed by the statement of claim:

> **115A Tribunal may strike out, determine, or adjourn proceedings**
>
> (1) The Tribunal may strike out, in whole or in part, a proceeding if satisfied that it—
> (a) discloses no reasonable cause of action; or

(b) is likely to cause prejudice or delay; or
(c) is frivolous or vexatious; or
(d) is otherwise an abuse of process.

(2) If a party is neither present nor represented at the hearing of a proceeding, the Tribunal may,—
(a) if the party is required to be present, strike out the proceeding; or
(b) determine the proceeding in the absence of the party; or
(c) adjourn the hearing.

[8] On well-established principle it is inappropriate to strike out a claim summarily unless the court or tribunal can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

[9] The plaintiff has also emphasised the following passage from *IHC New Zealand v Attorney-General (Strike-Out Application)* [2020] NZHRRT 47, (2020) 12 HRNZ 341 at [29] where, consistent with established principle, the Tribunal held that a discrimination claim against government, related persons and bodies ought not to be excluded or defeated at an early stage on account of the apparent novelty of the claim:

> **[29]** As the successive amendments to the Human Rights Act show, anti-discrimination law is a dynamic and expanding project. A discrimination claim against government, related persons and bodies ought not to be excluded or defeated at an early stage on account of the apparent novelty of the claim. Experience also shows it is not always possible at the initial Commission stage for complex claims to be articulated with the precision required of formal pleadings. In addition the complaining party will not have access to a formal discovery or disclosure regime. The overarching point is that on a strike-out application it is well-established particular care is required in areas where the law is confused or developing. See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J. To similar effect see *Couch v Attorney-General (No. 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [35] per Elias CJ.

[10] Brief reference must now be made to the relevant provisions of the Accident Compensation Act.

THE ACCIDENT COMPENSATION ACT 2001

Cover for mental injury

[11] Section 21 of the AC Act provides:

> **21 Cover for mental injury caused by certain criminal acts**
>
> (1) A person has cover for a personal injury that is a mental injury if—
> (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and
> (b) the mental injury is caused by an act performed by another person; and
> (c) the act is of a kind described in subsection (2).
>
> (2) Subsection (1)(c) applies to an act that—
> (a) is performed on, with, or in relation to the person; and
> (b) is performed—
> (i) in New Zealand; or
> (ii) outside New Zealand on, with, or in relation to a person who is ordinarily resident in New Zealand when the act is performed; and
> (c) is within the description of an offence listed in Schedule 3.
>
> (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
>
> (4) Section 36 describes how the date referred to in subsection (3) is determined.
>
> (5) For the purposes of this section, it is irrelevant that—
> (a) no person can be, or has been, charged with or convicted of the offence; or
> (b) the alleged offender is incapable of forming criminal intent.

[12] It can be seen a person has cover for a mental injury caused by certain criminal acts if he or she can establish (inter alia) the following:

> **[12.1]** The act (offence) is listed in Schedule 3; and
>
> **[12.2]** The person suffered the mental injury inside or outside New Zealand on or after 1 April 2002; and
>
> **[12.3]** If the act was not performed in New Zealand, it was performed when the person was "ordinarily resident in New Zealand".

[13] The term "ordinarily resident" is defined in AC Act, s 17. It is not necessary for the full text of that provision to be reproduced here. In the present context subs (1) provides that a person is ordinarily resident in New Zealand if:

> **[13.1]** He or she is a New Zealand citizen or the holder of a residence class visa; and
>
> **[13.2]** Has New Zealand as his or her permanent place of residence, whether or not he or she also has a place of residence outside New Zealand.

[14] In this provision ordinary residence is not conflated with citizenship.

[15] It is to be noted HRA, s 21 does not list "ordinary residence" or "ordinarily resident" as a prohibited ground of discrimination. Instead it refers to:

> (g) ethnic or national origins, which includes nationality or citizenship:

THE DIRECT AND INDIRECT DISCRIMINATION CLAIMS MADE BY THE PLAINTIFF

[16] The plaintiff's complaint is that his mental injury is not covered by HRA, s 21 because the act (offending) was not performed:

> **[16.1]** In New Zealand; or
>
> **[16.2]** Outside New Zealand on, with, or in relation to a person who was ordinarily resident in New Zealand when the act was performed.

[17] The direct discrimination claim as articulated in the second statement of claim is that by virtue of AC Act, s 21(2)(b)(ii), the plaintiff receives lower entitlements to ACC-funded support than if he had been ordinarily resident in New Zealand at the time of the abuse. It is contended:

> **[17.1]** A material factor in the plaintiff's lower entitlements is his national origins, nationality or citizenship at the time of the abuse; and
>
> **[17.2]** The AC Act, s 21(2)(b)(ii) treats the plaintiff differently by reason of his national origin, nationality or citizenship.

[18] The indirect discrimination claim is likewise advanced on the basis of national origins:

> **[18.1]** A material factor in the plaintiff's lower entitlements is the fact New Zealand was not his permanent place of residence at the time of the abuse;

[18.2] A person who does not have New Zealand as their permanent place of residence is more likely to not have New Zealand nationality or citizenship;

[18.3] The AC Act, s 21(2)(b)(ii) has the (indirect) effect of treating the plaintiff differently by reason of his national origins, nationality or citizenship.

THE STRIKE-OUT APPLICATION

[19] The strike-out application is based on three propositions:

[19.1] Section 21(2)(b)(ii) does not treat a group differently on the basis of a prohibited ground of discrimination. It treats people differently on the basis of domicile ["ordinarily resident"], which is not a prohibited ground listed in HRA, s 21. Consequently the direct discrimination claim has no reasonable prospect of success.

[19.2] Likewise in the case of the indirect discrimination claim. People who do not qualify for cover under AC Act, s 21 solely because they cannot satisfy the "ordinarily resident" criterion will consist of persons of all nationalities and national origins, including persons of New Zealand nationality and national origin, and the same holds for people ordinarily resident in New Zealand. There is no tenable argument that using "ordinarily resident in New Zealand" as a criterion is a proxy or cloak for a prohibited ground of discrimination. The discrimination claim is flawed in principle and cannot succeed.

[19.3] The Human Rights Act, s 153(3) is a complete answer to the plaintiff's claim to the extent his argument is that AC Act, s 21(2)(b)(ii) is discriminatory because it distinguishes between New Zealand citizens and other persons.

DISCUSSION

[20] The success or failure of the plaintiff's direct and indirect discrimination claims rests on the question whether the status under the AC Act, s 21(2)(b)(ii) of being ordinarily resident in New Zealand is included in the HRA, s 21(1)(g) prohibited ground of discrimination ie "ethnic or national origins, which includes nationality or citizenship".

[21] The submissions for the Attorney-General offer powerful justification for concluding "ordinary residence" is not included in HRA, s 21. There is also the challenge that the ordinary residence requirement is related to when the abuse occurred, not to the date on which the mental injury is suffered. Section 21(3) of the AC Act would therefore not appear to assist the plaintiff.

[22] Nevertheless there is little relevant New Zealand case law on HRA, s 21(1)(g) and the Tribunal has not been persuaded the plaintiff's claim is so devoid of merit, so clearly untenable, that it should be struck out. In these circumstances the decision in *IHC New Zealand v Attorney-General* at [29] has application. The plaintiff may be pushing the boundaries of statutory interpretation beyond permissible limits but the argument should be allowed to be made nevertheless and any evidence relevant to the discrimination claims heard and assessed.

[23] While this decision may appear indulgent, the question whether an expansive interpretation of HRA, s 21(1)(g) should be adopted can only be tested by allowing this seemingly adventurous claim to be heard.

[24] The Tribunal notes both parties will be represented at the hearing by experienced counsel and that in his notice of opposition dated 20 November 2020 the Director has advised a substantive hearing would require only one day of evidence and one to two days of oral submissions. It is to be hoped this is an accurate estimate, that the pretrial processes will be completed with a minimum of formality and that an informal tailored discovery process will reduce the litigation cost to both parties.

DECISION

[25] The strike-out application is dismissed. Costs are reserved.

[26] The Case Manager is directed to convene a teleconference as soon as possible so that case management directions can be given for the future conduct of these proceedings. The parties are to file and exchange memoranda two clear days prior to the teleconference date setting out their proposals for the next steps to be taken.

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Mr RPG Haines ONZM QC	**Mr IR Nemani**	**Dr NR Swain**
Chairperson	**Member**	**Member**