

- (1) ORDER PROHIBITING PUBLICATION OF PLAINTIFF'S NAME
(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON
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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2021] NZHRRT 56

I TE TARAIPUNARA MANA TANGATA

UNDER Reference No. HRRT 045/2021
BETWEEN THE HUMAN RIGHTS ACT 1993
SUSAN BAKER
Plaintiff
AND HIGH COURT OF AUCKLAND
First Defendant
AND NEW ZEALAND COURT OF APPEAL
Second Defendant
AND COMMISSIONER OF INLAND REVENUE
Third Defendant
AND ATTORNEY-GENERAL
Fourth Defendant

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Dr SJ Hickey MNZM, Member

Ms WV Gilchrist, Member

REPRESENTATION:

Ms S Baker in person

Ms B McKenna and Ms RM McMenamin for first and second defendants

Mr MJ McKillop and Ms CPC Wrightson for third and fourth defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 14 December 2021

DECISION OF TRIBUNAL GRANTING STRIKE-OUT APPLICATION FILED BY
THIRD AND FOURTH DEFENDANTS¹

¹ [This decision is to be cited as *Baker v High Court (Strike-Out Application)* [2021] NZHRRT 56. Note publication restrictions. Those restrictions require this decision to be anonymised by the redaction of the true name of the plaintiff. In substitution she is to be referred to as Susan Baker (not her true name).]

INTRODUCTION

[1] In these proceedings filed on 25 June 2021 the plaintiff alleges in her statement of claim she has been discriminated against by all four defendants on the grounds of her family status (having the responsibility for the care of a child) and also victimised contrary to the Human Rights Act 1993 (HRA), s 66.

[2] On 30 July 2021 the first and second defendants (the High Court and Court of Appeal) filed an appearance advising they will abide the decision of the Tribunal while at the same time reserving their rights.

[3] Also on 30 July 2021 the third and fourth defendants (the Commissioner of Inland Revenue and the Attorney-General) filed an on notice application for the statement of claim to be struck out on the grounds (inter alia) the Tribunal does not have jurisdiction to consider complaints concerning judgments or other orders of the senior courts and further, there is no foundation in the facts pleaded to support the allegation that the plaintiff has suffered discrimination as alleged.

[4] As recorded in the *Minute* dated 18 August 2021, the parties have agreed the strike-out application is to be determined on the papers, that is without an oral hearing.

BACKGROUND

[5] For a period of around six months in 2018, the plaintiff's child was not in her custody. The Commissioner of Inland Revenue assessed her as ineligible for child support for this period. The plaintiff disputed this assessment and has repeatedly challenged the Commissioner's decision in the senior courts without success. Whenever the plaintiff has failed she has appealed. When the appeal has failed she has applied to have recalled the judgment to which the unsuccessful appeal related. Attached to this decision is a Chronology submitted by the third and fourth defendants which illustrates the repetitive and persistent challenges mounted by the plaintiff over the past three years in the High Court, Court of Appeal and Supreme Court. None of those challenges have been successful.

[6] In the most recent decision issued by the Supreme Court in *P (SC 46/2021) v Commissioner of Inland Revenue* [2021] NZSC 51 (28 May 2021) at [5] that Court dismissed as an abuse of process an application by the plaintiff for leave to appeal against a judgment of the Court of Appeal of 29 March 2021 which dismissed the plaintiff's application for recall of an earlier judgment of that Court delivered on 4 November 2019:

[5] An application for leave to appeal against the 4 November 2019 judgment was dismissed by this Court on 18 March 2020. A further application for leave to appeal, treated as an application to recall the 18 March 2020 judgment, was dismissed on 20 May 2020. The current application is therefore the third in this Court, and fourth counting the recall application to the Court of Appeal, which the applicant has filed by way of challenge (direct or indirect) to the 4 November 2019 judgment. The point has now been reached where her repeated challenges to this judgment have become an abuse of process. [Footnote citations omitted]

[7] Undeterred by the abuse of process finding the plaintiff filed the present proceedings in the Tribunal less than a month after delivery of judgment by the Supreme Court.

THE STATEMENT OF CLAIM

[8] The statement of claim largely, if not entirely, repeats arguments which the plaintiff has unsuccessfully advanced in all three senior courts.

[9] The case as set out in the statement of claim includes the following key assertions:

[9.1] The Commissioner of Inland Revenue “departed from her responsibilities” under the Tax Administration Act 1994 and the Child Support Act 1991.

[9.2] The High Court judgment given on 7 February 2019 and the Court of Appeal judgments dated 11 September 2019 and 29 March 2021 “perpetuate this discrimination and set up an infrastructure which enables the Commissioner to discriminate against people”.

[9.3] The judgments of the High Court and Court of Appeal have been written “in a manner devoid of reasoning with legislative grounding ..., completely withdrawn from basic mathematic principles and ignorant of our governing statutory laws”.

[9.4] The judgment of the Court of Appeal given on 29 March 2021 ([2021] NZCA 97) dismissing the recall application “creates a false parallel and is a form of trickery which could confuse a reader”.

[10] The declarations sought by the plaintiff are as follows:

1. That the Commissioner’s actions of March 2018 are an unlawful breach of human rights, Victimisation.
2. That the High Court’s ruling [2019] NZHC 98 is an unlawful breach of human rights, Victimisation.
3. That the Court of Appeal ruling [2019] NZCA 531 is an unlawful breach of human rights, Victimisation; and the Court of Appeal Judgment [2021] NZCA 97 is a breach of Natural Justice under the New Zealand Bill of Rights Act 1990.

[11] In fairness to the plaintiff, in her written submissions dated 2 November 2021 she appears to acknowledge the victimisation claim is not applicable to her circumstances as set out in the statement of claim. She also now accepts the Tribunal has no jurisdiction to determine her allegations of breach of natural justice.

[12] The submissions do, however, reinforce the point that the plaintiff seeks to reopen issues already determined by the three senior courts.

[13] The discrimination claim as set out in the submissions dated 2 November 2021 is in the following terms:

Discrimination Claim

- 1) The Commissioner of Inland Revenue has converted a care ratio to disproportionately reflect the care I provided to my daughter in the 2018 child support year.
- 2) She has discriminated against the cumulative effect of ‘no responsibility’; which was a consequence of bringing the ‘days of care’ together for a part-time contact arrangement.
- 3) The Commissioner has considered that because of the significant duration of this arrangement, effectively that I did not have custody of my child.

- 4) The Courts have failed to recognise the effect of legislative provisions working in unison to create a 'fixed' standard of measurement.
- 5) A proportion of 74 percent of ongoing daily care has been manipulated, and applied, as if were "100 percent of care _ for 74 percent of the time" and "zero percent of care _ for 26 percent of the time".
- 6) The discriminatory action of the Commissioner's office; and following this, the Courts, has stemmed from an irrational and emotive response to ensure (for my circumstances) that, "no responsibility" meant "no money".

[14] Among the difficulties faced by the plaintiff is that in neither the statement of claim nor in the submissions is a reasonable cause of action for discrimination disclosed.

THE STRIKE-OUT APPLICATION

[15] The grounds on which a strike-out order is sought by the third and fourth defendants are:

[15.1] The statement of claim discloses no reasonably arguable cause of action:

[15.1.1] The Tribunal does not have jurisdiction to consider complaints concerning judgments or other orders of the senior courts, or an act or omission of a court affecting the conduct of any proceedings.

[15.1.2] There is no foundation in the facts pleaded to support the allegation that the plaintiff has suffered discrimination on the grounds of family status, or any other prohibited ground of discrimination.

[15.1.3] There is no foundation in the facts pleaded to support the allegation of a breach of HRA, s 66.

[15.1.4] There is no foundation in the facts pleaded to support the other allegations made in the statement of claim, such as a breach of natural justice and bias, and in any event the Tribunal does not have jurisdiction to consider those allegations.

[15.2] The claim is frivolous or vexatious and is otherwise an abuse of process:

[15.2.1] There is no foundation in the facts pleaded to support the allegations made.

[15.2.2] The claim is a collateral attack on the decisions of the High Court and Court of Appeal and seeks to relitigate matters already determined in those Courts.

The notice of opposition

[16] The notice of opposition dated 8 September 2021 filed by the plaintiff has in many respects been overtaken by the plaintiff's later submissions dated 2 November 2021. As noted earlier, the victimisation claim under HRA, s 66 as well as the allegation of breach of natural justice are no longer pursued.

[17] Being the more recent and more detailed document, the submissions of 2 November 2021 will be taken as supplementing the plaintiff's discrimination claim. The

submissions open with a heading “Discrimination Claim” followed by six numbered paragraphs. Those paragraphs have been quoted earlier at [13] and as already observed, it can be readily seen the claim is a re-run of arguments rejected by the senior courts. The fact that the Commissioner made a decision adverse to the plaintiff is the only relevant “fact” on which the discrimination claim has been based. This falls well short of disclosing a reasonable cause of action.

JURISDICTION TO STRIKE OUT

[18] As can be seen from cases such as *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [21] and *Apostolakis v Attorney-General No. 2 (Strike-Out Application)* [2017] NZHRRT 53 at [4] to [17] 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.

[19] 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.

DISCUSSION

The statutory bar

[20] The plaintiff faces the insuperable hurdle of HRA, ss 79(3) and 92B(7) which read together stipulate that no proceedings may be brought before the Tribunal where a complaint (or part of the complaint) concerns a judgment or other order of a court:

79 How complaints received to be treated

- (1) ...
- (3) Despite every other provision of this section, if the complaint or part of it concerns a judgment or other order of a court, or an act or omission of a court affecting the conduct of any proceedings, the Commission must take no further action in relation to the complaint or relevant part of it.
- (4) ...

92B Civil proceedings arising from complaints

- (1) ...
- (7) Despite subsections (1) to (6), no proceedings may be brought under this section in respect of a complaint or relevant part of a complaint to which section 79(3) applies.

[21] The allegations in the statement of claim are explicit in articulating a discrimination claim based on the various court judgments listed in the attached Chronology. The provisions of ss 79(3) and 92B(7) are clearly engaged with the consequence the plaintiff's proceedings are untenable in respect of all four defendants.

[22] This is sufficient to strike out the proceedings in their entirety but out of an abundance of caution the remaining grounds in the strike-out application will be dealt with.

Discrimination – the failure to disclose a reasonable cause of action

[23] The plaintiff must establish the Commissioner of Inland Revenue treated her differently to other people on the basis of her family status. In that regard there is no foundation for such allegation in the facts asserted in the statement of claim or the submissions dated 2 November 2021. As no reasonable cause of action is disclosed the claim must be struck out.

[24] A claim of indirect discrimination is not to be found in the statement of claim. It was first advanced by the plaintiff in her notice of opposition but not thereafter addressed in her submissions. In these circumstances it cannot be said a reasonable cause of action based on indirect discrimination has been disclosed. The claim must be struck out.

Victimisation and breach of natural justice

[25] The claims of victimisation and breach of natural justice have not been pursued by the plaintiff. Nevertheless, it is necessary for the Tribunal to emphasise there is no factual foundation in the statement of claim or submissions for either of these allegations.

[26] Furthermore, as the Tribunal has no jurisdiction to sit as a court of judicial review (particularly in relation to the senior courts), the claim of breach of natural justice is untenable and must be struck out.

Abuse of process

[27] In reality the present proceedings have been brought for the purpose of mounting a collateral attack on the decisions of the High Court, Court of Appeal and Supreme Court and to re-litigate matters which have already been finally determined. It is well-recognised this is an abuse of process. See *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 541. The Supreme Court has already classified the plaintiff's repeated challenges to the Court of Appeal judgment of 4 November 2019 as an abuse of process.

[28] In *Craig v Stringer* [2020] NZCA 260, (2020) 25 PRNZ 367 at [16] the Court of Appeal recently emphasised the public interest in finality in litigation:

[16] Access to the courts will be denied where a litigant seeks to reopen a dispute that has already been determined. This is precluded by the doctrine of *res judicata* which serves the public interest in finality in litigation and upholds the principle that a party should not be vexed twice in the same matter. [Footnote citation omitted]

[29] The plaintiff could have advanced her discrimination argument in the High Court, but did not. To raise the argument now offends the rule that a litigant must bring his or her whole case and will generally be prevented from later attempting to re-open the same subject on a different basis. See *Craig v Stringer* at [17] citing *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch) at 115.

[30] The claim must be struck out for being an abuse of process or otherwise vexatious.

CONCLUSION

[31] In summary the proceedings brought by the plaintiff before the Tribunal must be struck out for the following reasons:

[31.1] The claim against all defendants is statute barred by HRA, ss 79(3) and 92B(7).

[31.2] No reasonable cause of action based on discrimination (direct or indirect) is disclosed by the statement of claim or submissions filed by the plaintiff.

[31.3] No reasonable cause of action based on victimisation is disclosed by the statement of claim or submissions.

[31.4] The Tribunal has no jurisdiction to determine allegations that the senior courts have breached natural justice.

[31.5] The claim is an abuse of process.

ORDER

[32] These proceedings are dismissed in their entirety in relation to each of the four defendants.

COSTS

[33] Costs are reserved.

NON-PUBLICATION ORDERS

[34] As the senior courts have uniformly suppressed the name of the plaintiff it is appropriate the following final orders are made by the Tribunal:

[34.1] Publication of the name, address, occupation and of any other details which could lead to the identification of the plaintiff in these proceedings is prohibited.

[34.2] There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and the defendants are to be notified of any request to search the file and given opportunity to be heard on that application.

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

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Mr RPG Haines ONZM QC
Chairperson

.....
Dr SJ Hickey MNZM
Member

.....
Ms WV Gilchrist
Member

CHRONOLOGY

Date	Event	Document Reference
24 December 2017	Plaintiff's child goes to Australia to stay with their father.	
15 March 2018	The Commissioner of Inland Revenue determines plaintiff is no longer eligible for child support.	
1 June 2018	Plaintiff appeals the decision to the Family Court under s 102 of the Child Support Act.	
22 June 2018	Plaintiff applies for judicial review in the High Court.	
28 June 2018	Plaintiff serves the Family Court proceedings on the Commissioner. In due course, as the judicial review proceedings engaging the same issues are already on foot, the Family Court proceedings are put on hold pending the outcome of the judicial review.	
22 July 2018	Plaintiff's child returns to her custody. She in turn applies for a fresh assessment and is assessed as being eligible for child support.	
7 February 2019	The High Court dismisses plaintiff's application for judicial review.	<i>P v Commissioner of Inland Revenue</i> [2019] NZHC 98, [2018] NZFLR 956.
20 June 2019	The Family Court proceedings are struck out as an abuse of process given the High Court decision and impending appeal to the Court of Appeal.	<i>P v Commissioner of Inland Revenue</i> [2019] NZFC 4545.
4 November 2019	The Court of Appeal dismisses plaintiff's appeal against the High Court judgment.	<i>P (CA85/2019) v Commissioner of Inland Revenue</i> [2019] NZCA 531, [2019] NZFLR 322.

Date	Event	Document Reference
3 December 2019	The Court of Appeal reissues its 4 November 2019 judgment with minor amendments sought by both parties.	
18 March 2020	The Supreme Court declines plaintiff's application for leave to appeal the Court of Appeal judgment.	<i>P (SC120/2019) v Commissioner of Inland Revenue</i> [2020] NZSC 22, [2020] NZFLR 84.
20 May 2020	The Supreme Court dismisses plaintiff's application to review the decision of the Deputy Registrar not to accept her further application for leave to appeal for filing. The Court also dismisses her application for recall of the 18 March 2020 judgment.	<i>P (SC 120/2019) v Commissioner of Inland Revenue</i> [2020] NZSC 50
14 July 2020	The High Court dismisses plaintiff's application for recall of its 7 February 2019 judgment.	<i>P v Commissioner of Inland Revenue</i> [2020] NZHC 1676
29 March 2021	The Court of Appeal dismisses plaintiff's application for recall of its 4 November 2019 judgment.	<i>P (CA85/2019) v Commissioner of Inland Revenue</i> [2021] NZCA 97
28 May 2021	The Supreme Court dismisses plaintiff's application for leave to appeal the Court of Appeal's 29 March 2021 judgment.	<i>P (SC46/2021) v Commissioner of Inland Revenue</i> [2021] NZSC 51, (2021) 30 NZTC 25-005
21 June 2021	Plaintiff files this discrimination claim in the Human Rights Review Tribunal.	