IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2023] NZHRRT 42**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 033/2020
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**TAIMING ZHANG**
	PLAINTIFF
AND	**SAMSUNG ELECTRONICS NEW ZEALAND LIMITED**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms MG Coleman, Deputy Chairperson
Ms SB Isaacs, Member
Dr NR Swain, Member

REPRESENTATION:
Mr T Zhang in person
Mr J Edwards and Ms BJ Shone for defendant

DATE OF HEARING: **27 May 2021**

DATE OF DECISION: **20 December 2023**

DECISION OF TRIBUNAL STRIKING OUT THE STATEMENT OF CLAIM[1]

[1] Mr Zhang alleged that Samsung Electronics New Zealand Ltd (Samsung NZ) discriminated against him in breach of s 44(1)(b) of the Human Rights Act 1993 (HRA) (which relates to the supply of goods or services) on the basis of his race, ethnicity or

[1] This decision is to be cited as *Zhang v Samsung Electronics New Zealand Ltd (Strike Out Application)* [2023] NZHRRT 42.

nationality. In the alternative, Mr Zhang alleged that Samsung NZ indirectly discriminated against him, contrary to s 65 of the HRA.

[2] Samsung NZ denies these allegations and has applied to strike out the whole of the discrimination claim brought against it by Mr Zhang.

BACKGROUND: THE CLAIM

[3] Mr Zhang is a Chinese national of Chinese ethnicity who, at the time the events giving rise to his claim occurred, resided in New Zealand.[2]

[4] Samsung NZ is a subsidiary of Samsung Electronics Co., Ltd (Samsung Korea). Mr Peacocke, the Head of Legal, Government Affairs, Regulatory and Compliance at Samsung NZ, by way of an affidavit, advised that Samsung NZ's business is primarily selling products and solutions under the Samsung brand to New Zealand consumers and businesses. Samsung NZ does not design, manufacture or assemble any Samsung products.

[5] Mr Zhang bought a Samsung Galaxy Note 20 Ultra 5G mobile phone (Galaxy Note 20 phone) from Noel Leeming in Wellington. This phone has a dual SIM function, enabling the receipt and transmission of information from two different numbers on the same phone. Samsung Korea designed and manufactured the phone purchased by Mr Zhang from Noel Leeming.

[6] In his statement of claim Mr Zhang said that the phone's dual SIM function does not work if he puts his Chinese Unicom SIM card (Chinese SIM) in as SIM 2 but does work when two New Zealand SIM cards are used in the phone. Mr Zhang said that Noel Leeming provided him with an equivalent replacement phone, but the problem persisted.

[7] Mr Zhang also said that his Samsung Galaxy S10 phone which he purchased in Hong Kong worked with dual New Zealand SIM cards and with one New Zealand SIM and his Chinese SIM. He said this showed the problem was also not related to his Chinese SIM card.

[8] For these reasons, Mr Zhang claimed that the failure of his Galaxy Note 20 phone to work with his Chinese SIM was a consequence of the software used in that phone.

[9] Mr Zhang alleged that the failure of his phone to work when his Chinese SIM is used as in the SIM 2 slot means that he has been treated less favourably by Samsung NZ contrary to s 44(1)(b) of the HRA. More specifically, Mr Zhang alleged that the decision

[2] Mr Zhang was no longer living in New Zealand at the time of the hearing but was offered the opportunity of attending by Audio Visual Link. He declined to do so. He did, however, file submissions in opposition to the application.

by Samsung Korea to install New Zealand software in his Galaxy Note 20 phone, rather than software that allows that phone to function properly with his Chinese SIM, was a deliberate and intentional decision amounting to direct discrimination for which Samsung NZ is liable under s 44(1)(b) of the HRA. He further claimed that Samsung NZ's failure to fix the problem once it had been alerted to it also amounted to direct discrimination.

[10] In the alternative, Mr Zhang claimed that the decision to install New Zealand software on the phone amounted to indirect discrimination as providers of goods must take the possibility of "traits" provided by the HRA into consideration. We understand by his use of the word "traits" that Mr Zhang is referring to the status groups who are protected by the prohibited grounds of discrimination set out in s 21 of the HRA.

[11] Samsung did not deny that the dual sim functionality on Mr Zhang's phone may not have worked properly. However, it disputed that the difficulties Mr Zhang alleged he was experiencing applied to that model of phone generally. In its statement of reply, Samsung said that it tested a Galaxy Note 20 phone with a Chinese SIM and a New Zealand SIM together, as SIM 1 and SIM 2 and vice versa, and the results of that test demonstrated that the device sent and received and calls and SMS messages, although Samsung acknowledged that the messages sent using the Chinese SIM may not have been received by a New Zealand device. It said that the exact reason why this occurred is unclear but that it indicated there was a network issue. Samsung further said that while generally compatible with networks globally, Samsung phones had software installed for a specific market, in this case the New Zealand market.

[12] Samsung denied that it disadvantaged Mr Zhang or treated him unfairly based on his race, ethnicity or national origin. It contended that the difficulties being experienced by Mr Zhang were either technical or functional problems or were related to services provided by network operators and had nothing to do with his race, ethnicity, or national origin. Samsung said that it had not received any other complaints from Chinese customers using Chinese SIM cards, even though it knows through the collection of customer information by consent that thousands of its customers are of Chinese origin. Samsung also criticised the assumption in Mr Zhang's claim that the only people who would be using Chinese network SIMs would be of Chinese ethnicity.

STRIKE OUT APPLICATION

[13] Samsung applied to strike out the claim on the basis that:[3]

[13.1] The claim discloses no reasonable cause of action; and/or

[3] Samsung NZ initially also claimed that it was not the proper defendant, but it later abandoned this ground.

[13.2] The claim is frivolous or vexatious and is not brought in good faith; and/or

[13.3] The case is an abuse of the Tribunal's processes.

[14] The application also relied on the affidavit from Mr Peacocke, which was filed in support of the strike out application. In that affidavit Mr Peacocke said that Mr Zhang had not consented to Samsung testing his phone, but it had tested the same model of phone, which did not demonstrate the same functionality issues Mr Zhang claimed he was having. In opposing the strike out application, Mr Zhang accused Samsung of not taking his complaints seriously until such time as he filed the claim in the Tribunal. He said it was only then that it asked to test his phone.

[15] In terms of the first ground, that the claim disclosed no reasonable cause of action, Samsung NZ submitted that the pleaded facts cannot establish that the reason why the dual functionality of Mr Zhang's Galaxy Note 20 phone to failed to work with his Chinese SIM was his race, ethnicity nor national origin. Samsung further argued that Mr Zhang did not plead that only people of his race, ethnicity or national origin use Chinese SIMs, although it acknowledged that Mr Zhang had pleaded that the only people who would be "victimised" by the failure of Galaxy Note 20 phones to work with a Chinese SIM are foreign citizens. It argued this was not a factually plausible assertion.

[16] The essence of Samsung's contention that the claim was frivolous and vexatious was that by failing to engage in meaningful communications and by refusing to permit his phone to be examined by Samsung NZ, Mr Zhang was not acting in good faith. Both issues it alleged also amounted to an abuse of the Tribunal's processes.

THE LAW

[17] The Tribunal's jurisdiction to strike out proceedings is set out in s 115A of the Human Rights Act:

> **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.
>
> …

[18] It is well established that it is inappropriate to strike out a claim unless the Tribunal can be certain it cannot succeed. Given the fundamental constitutional importance of the right of access to the courts and tribunals, the jurisdiction to strike out a claim is one to be

used sparingly, and particular care is required where the law is confused or developing.[4] Nevertheless, the cautious approach to striking out a claim needs to be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or is an abuse of process.[5]

[19] A strike out application proceeds on the basis that the pleaded facts are assumed to be true, whether or not they have been admitted.[6] This means that while affidavit evidence can be received, the Tribunal will not usually consider evidence that is disputed. Given the factual dispute about the functionality of the kind of phone purchased by Mr Zhang, the Tribunal has determined that it is not appropriate to consider the results of the testing referred to by Mr Peacocke in his affidavit.

No reasonable cause of action

[20] In order to determine whether the facts as pleaded by Mr Zhang disclose a reasonably arguable cause of action, it is necessary to consider those facts in light of the relevant provisions of the HRA.

[21] Section 44 of the HRA prohibits certain conduct in relation to the provision of goods and services:

> **44 Provision of goods and services**
>
> (1) It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public—
>
> (a) to refuse or fail on demand to provide any other person with those goods, facilities, or services; or
>
> (b) to treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case,—
>
> by reason of any of the prohibited grounds of discrimination.
>
> …

[22] The prohibited grounds of discrimination are set out in s 21(1) of the HRA and include race,[7] and ethnic or national origins.[8]

[23] Mr Zhang does not need to establish that Samsung NZ intended to treat him less favourably under s 44(1)(b) on any of these prohibited grounds, or even that one of the prohibited grounds formed the predominant reason for his less favourable treatment.

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[4] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
[5] *Parohinog v Yellow Pages Group Ltd* [2015] NZHRRT 14 at [22]-[28].
[6] *Attorney-General v Prince*, above n 4, at 267.
[7] Human Rights Act 1993, s 21(1)(f).
[8] Section 21(1)(g).

However, he does need to show that one (or more) of these grounds were a material factor in the way that he was treated.[9]

[24] Mr Zhang also relies on the definition of manufacturer under s 2(1)(c) of the Consumer Guarantees Act 1993 to argue that Samsung NZ is liable in this case for the manufacturing decisions of Samsung Korea. That section reads:

> **manufacturer** means a person that carries on the business of assembling, producing, or processing goods, and includes—
>
> (a) any person that holds itself out to the public as the manufacturer of the goods:
>
> (b) any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods:
>
> (c) where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods.

[25] Based on this definition, Mr Zhang claimed that Samsung NZ was the manufacturer of his phone and, through the installation of the phone's software, engaged in treatment of him that was less favourable than its treatment of others by reason of his race, ethnicity or nationality contrary to s 44(1)(b).

[26] As already noted, Mr Zhang further claimed that even if he was not subject to direct discrimination, he has been subjected to indirect discrimination by Samsung NZ.

[27] The prohibition on indirect discrimination is set out in s 65 of the HRA as follows:

> **65 Indirect discrimination**
>
> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

THE ISSUES

[28] Against that background and legal framework, the Tribunal will need to consider the following issues:

[28.1] Is it reasonably arguable in relation to s 44 of the HRA that the person (which includes a legal person) who supplies goods includes the manufacturer of those goods?

[9] *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49].

[28.2] If so, is it reasonably arguable that Samsung NZ is liable under s 44 of the HRA for manufacturing decisions by Samsung Korea, specifically the installation of New Zealand software?

[28.3] If yes, does that manufacturing decision, on the facts as pleaded, give rise to a reasonably arguable claim that Samsung NZ treated Mr Zhang less favourably than others on the ground of his race, ethnicity, or national origin contrary to s 44(1)(b) of the HRA?

[28.4] If not, do the facts as pleaded give rise to a reasonably arguable claim that Mr Zhang has been indirectly discriminated against by Samsung NZ by reason of one of more of those prohibited grounds?

[28.5] Is Mr Zhang's claim frivolous or vexatious?

[28.6] Is Mr Zhang's claim an abuse of the Tribunal's processes?

DOES THE SUPPLY OF GOODS INCLUDE THE MANUFACTURE OF THOSE GOODS?

[29] Samsung NZ acknowledged that it supplied goods, including Galaxy Note 20 phones, to the public or a section of the public. However, Mr Zhang did not purchase his Galaxy Note 20 phone from Samsung NZ and he is not complaining about the way in which the goods were supplied to him by Noel Leeming. As already noted, the crux of Mr Zhang's discrimination claim is about the functionality of his Galaxy Note 20 phone, including the decision to install New Zealand software on it, which he claims breaches his rights under s 44(1)(b).

[30] To succeed in his claim under s 44(1)(b) Mr Zhang needs to establish:

[30.1] First, that Samsung NZ (as an acknowledged supplier of phones such as the Galaxy Note 20 phone) is properly to be regarded as the supplier of Mr Zhang's phone because the supplier of goods includes the manufacturer of those goods.

[30.2] Secondly, that Samsung NZ is responsible under the HRA for the manufacture (specifically in this case is the installation of software) of Mr Zhang's phone.

[30.3] Thirdly, that the action in [30.2] above amounts to treatment of him which is less favourable than would otherwise be the case, by reason of his race, ethnicity or nationality.

[31] The questions for the Tribunal are, therefore, whether (as Mr Zhang claims) the supplier of goods for the purposes of s 44(1)(b) includes the manufacturer of those goods and, if so, whether that manufacture, in this case, amounts to discriminatory treatment for which Samsung NZ is liable. Mr Zhang accepted that unless the treatment referred to in

HRA, s 44(1)(b) extends to capture the conduct of Samsung NZ as the manufacturer and the installer of the software, his claim against Samsung NZ fails.

[32] Mr Zhang argued that the treatment referred to in s 44(1)(b) should be read to capture the conduct of manufacturers, because otherwise there is no remedy under the HRA available to purchasers of goods unless the retailer committed an act of discrimination.

[33] As already noted, Mr Zhang also advanced the argument that Samsung NZ was liable as a manufacturer because of the wide definition of that term in s 2(1)(c) of the Consumer Guarantees Act.

[34] We agree with Mr Zhang that unless the treatment referred to in HRA, s 44(1)(b) extends to capture the conduct of manufacturers, his claim against Samsung NZ fails. However, we are not persuaded that the supply (or provision) of those goods as referred to in s 44 includes their manufacture or design, including in relation to software. Nor are we persuaded that a software installation decision can amount to treating someone less favourably. In short, our view is that s 44(1)(b) does not extend to capture the conduct of manufacturers. Our reasons are these.

[35] First, manufacture and supply are very different concepts. Manufacture in relation to goods is about making a physical product whereas supply or provision is about making that product available to others for their use or benefit.[10] In our view, had the meaning of "supplies" or "provision" in s 44 been intended to extend to the concept of manufacture the legislation would have made this explicit.

[36] We are supported in that view by previous decisions of the High Court in relation to arguments that, if adopted, would have expanded the ordinary meaning of HRA provisions. In *BHP New Zealand Steel Ltd v O'Dea,*[11] the High Court, while noting that one of the purposes of the HRA was to provide better protection of human rights, held:[12]

> …it would be wrong for a Court to stretch or manipulate the clear words of the statute so as to provide protection in a greater or different area than Parliament has determined should apply.

[37] In *Trevethick v Ministry of Health (No 2)*[13] the Tribunal rejected the argument that the definition of "disability" should be read to include the cause of disability as this would involve reading words into the legislation that simply were not there and amounted to a significant de facto amendment to the Act. The Tribunal also said that the incremental

[10] *Oxford English Dictionary* (online ed, Oxford University Press, 2023) defines "manufacture" as "[t]he action or process of making or producing articles, material, or a commodity … by physical labour, machinery, etc.", "supply" as "[t]o make (something needed or wanted) available to someone; to provide, esp. for someone's use or consumption", and "provision" as "the providing or supplying of a commodity".
[11] *BHP New Zealand Steel Ltd v O'Dea* (1997) 4 HRNZ 456, [1997] ERNZ 667 (HC).
[12] At 471.
[13] *Trevethick v Ministry of Health* (2007) 9 HRNZ 1 (HRRT).

way in which the prohibited grounds of discrimination and the areas of activity to which those grounds apply have been added to the HRA compels the conclusion that Parliament has been very deliberate in what will and will not amount to unlawful discrimination.[14] The Tribunal's reasoning on this point was described by the High Court on appeal as "unassailable".[15]

[38] Part 2 of the HRA does not confer a universal right to be free from discrimination. Rather, it only provides protection against discrimination in certain areas of activity such as in employment,[16] in housing and accommodation,[17] and, as in this case, in relation to the provision of goods and services.[18] Under Part 2, if the impugned conduct arises in a sphere of activity not caught by the HRA, it is not discriminatory.[19]

[39] Mr Zhang's argument that the supplier of goods includes the manufacturer of those goods would not only be contrary to the ordinary meaning of the words of that section but would be contrary to the purpose of Part 2 of the HRA which is to prohibit discrimination in express and discrete areas of activity only.

[40] We are not persuaded that it is possible, or appropriate, to import the wide definition of "manufacturer" in s 2(1)(c) of the Consumer Guarantees Act into the HRA definition of a "supplier" of goods. We are equally not persuaded that, even if in this case Samsung NZ was considered to be the manufacturer (and we note from Mr Peacocke's affidavit that Samsung NZ is not a manufacturer), the prohibition on less favourable treatment set out in s 44(1)(b) extends to installing software on a phone which is generally available for the public to purchase.

[41] The consequences of Mr Zhang's interpretation of s 44 would be to require manufacturers to make products of universal utility to all people to avoid claims of discrimination. This cannot have been intended and supports the view that the manufacture of goods falls outside of the ambit of s 44 of the HRA.

[42] We also agree with Samsung NZ that the different treatment in this case relates to a phone, not a person. This distinction is a fundamental one, meaning Mr Zhang's claim is fatally flawed for this reason also.

[43] In summary, Mr Zhang's claim that the functionality problems with his Galaxy Note 20 phone arising out of the manufacture and design of that phone, in particular its software, do not disclose a reasonably arguable discrimination claim under s 44 of the HRA.

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[14] At 7-9.
[15] *Trevethick v Ministry of Health* (2008) 8 HRNZ 485, (2008) NZAR 454 (HC) at [26].
[16] Human Rights Act 1993, ss 22-35.
[17] Sections 53-56.
[18] Sections 44-52.
[19] *Zhang v Victoria University of Wellington* [2023] NZHRRT 36 at [36].

INDIRECT DISCRIMINATION CLAIM SIMILARLY FAILS

[44] Mr Zhang's claim of indirect discrimination also fails, largely for the same reasons.

[45] Section 65 of the HRA (set out above at [27]) does not prohibit all effects-based differential treatment. Rather, s 65 states that effects-based differential treatment will only be unlawful if it arises in situations or spheres of activity in which conduct can amount to discrimination.[20]

[46] This means that unless it is reasonably arguable that a supplier of goods includes the manufacturer of those goods, any claim of indirect discrimination will also fail.

[47] Having found that the design and manufacture of goods is outside of the scope of the prohibition set out in s 44(1)(b), Mr Zhang's indirect discrimination claim also fails.

CONCLUSION ON DISCRIMINATION

[48] In conclusion, we find that Mr Zhang's claim has no reasonable prospect of success and is struck out in its entirety.

[49] It is not necessary to consider the remaining grounds advanced by Samsung NZ.

APPLICATION FOR DIRECTIONS TO STRIKE OUT COUNSEL

[50] It is also unnecessary to deal with Mr Zhang's application for a direction striking out Samsung NZ's counsel which was filed after Samsung's strike out application was heard. For completeness, however, we record our view that the application was entirely without merit. The basis on which it was sought, which in essence was that Mr Zhang disagreed with the case advanced by Samsung NZ, fell very far short of the high threshold required to disqualify counsel.[21]

COSTS

[51] Costs were sought by Samsung NZ. However, we doubt there is any utility in making any order as Mr Zhang is no longer resident in New Zealand, and no order is made.

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[20] *Zhang*, above n 19, at [36].
[21] *Accent Management Ltd v Commissioner of Inland Revenue* [2013] 3 NZLR 374 (CA) at [32].

ORDER

[52] The application to strike out HRRT 33/20 is successful. The claim is struck out in its entirety.

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Ms MG Coleman	**Ms SB Isaacs**	**Dr NR Swain**
Deputy Chairperson	**Member**	**Member**