IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 44**

	Reference No. HRRT 072/2016
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**IGOR GRIGOROVICH**
	PLAINTIFF
AND	**MALCOLM STAPLETON**
	FIRST DEFENDANT
AND	**BABBAGE CONSULTANTS LIMITED**
	SECOND DEFENDANT

AT AUCKLAND

BEFORE:
Ms MA Roche, Co-Chairperson
Dr SJ Hickey MNZM, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr I Grigorovich in person
Mr S Blackwell for second defendant

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

DATE OF DECISION: **28 September 2018**

DECISION OF TRIBUNAL STRIKING OUT CLAIM[1]

[1] These proceedings under the Human Rights Act 1993 (HRA) were brought against Malcolm Stapleton and Babbage Consultants Limited (Babbage) by Igor Grigorovich in October 2016. Mr Grigorovich's claim concerns a complaint that he was discriminated against by reason of his ethnic and national origin in the course of his employment by Babbage.

[1] [This decision is to be cited as *Grigorovich v Stapleton (Strike-Out Application)* [2018] NZHRRT 44.]

[2] By application dated 11 November 2016, Mr Stapleton and Babbage applied for an order that the proceedings be struck out. The basis of the strike-out application is that in November 2015, Mr Grigorovich lodged an application with the Employment Relations Authority (ERA) in respect of a personal grievance against Babbage. The statement of problem describing the grievance alleged that Babbage had discriminated against him as a Ukrainian in deciding to dismiss him.

[3] Section 79A of the HRA provides that in circumstances where an employee is entitled to make a complaint under the HRA and also to pursue a personal grievance under the Employment Relations Act 2000, the employee may either make a complaint or apply to the ERA, but may not do both. The primary issue to be determined is whether Mr Grigorovich's application to the ERA triggered s 79A so that he is excluded from making a complaint under the HRA about the issues between him and Babbage (and Mr Stapleton) which led to the termination of his employment. Another issue is whether the Tribunal has jurisdiction in respect of a number of additional complaints Mr Grigorovich wishes to bring against Babbage.

Background

[4] Mr Grigorovich was employed by Babbage as a Senior Environmental Scientist from 10 June 2014 to 30 August 2014. In November 2015, Mr Grigorovich filed an application for leave to raise a personal grievance out of time with the ERA. This was necessary as it was after the expiry of the 90 day period specified in s 114(1) of the Employment Relations Act. In the draft statement of problem filed with the application, Mr Grigorovich stated that "the employer also discriminated against me as a Ukrainian in deciding to dismiss me". The facts relied on in the statement of problem included the fact that a Mr McCabe at Babbage "on several occasions … said that as I was Ukrainian I would have a hard time fitting into the team".

[5] Mr Grigorovich's application to the ERA was opposed by Babbage.

[6] A determination of the ERA, dated 23 June 2016, records that Mr Grigorovich filed a personal grievance application that was subsequently withdrawn days before the start of an investigation meeting on 2 May 2016. It also records that the respondent had been put to the expense of filing its evidence. The determination dismissed the application for personal grievance and recorded that an order for costs would have been made against Mr Grigorovich of $2,333.33 if s 45(4) of the Legal Services Act 2011 had not affected his liability.

[7] In June 2016, Mr Grigorovich filed a complaint with the Human Rights Commission against Malcolm Stapleton and Babbage. Malcolm Stapleton is a director of Babbage. Mr Grigorovich complained that he had been discriminated against because of his ethnic or national origins in his employment. The complaint was not resolved at the Human Rights Commission, leading to Mr Grigorovich's proceedings in the Tribunal. In his statement of claim, Mr Grigorovich alleged that "the defendant contravened ss 21 and 22 of the Human Rights Act 1993 by refusing to continue to employ me because of my ethnic/national origins".

[8] As noted earlier, by application dated 11 November 2016, Mr Stapleton and Babbage applied for an order that the proceedings be struck out. Unfortunately, the limited resources of the Tribunal have affected the ability of the Tribunal to hear and determine claims in a timely and efficient manner. There was considerable delay after the filing of the strike-out application before a procedural teleconference was able to be convened.

[9] The strike-out application was discussed at a teleconference on 16 July 2018. The *Minute* of the Co-Chairperson, dated 16 July 2018, recorded directions setting out a timetable for the strike-out application. The *Minute* also recorded Mr Grigorovich's assertion that his claim had not been disposed of in the ERA and his assertion that he had merely been seeking leave to raise a grievance out of time, and subsequently withdrew that application.

Choice of procedures

[10] Section 79A of the HRA provides as follows:

> **79A Choice of procedures**
>
> (1) If the circumstances giving rise to a complaint under Part 2 are such that an employee would also be entitled to pursue a personal grievance under the Employment Relations Act 2000, the employee may take one, but not both, of the following steps:
>
> (a) the employee may make in relation to those circumstances a complaint under this Act:
>
> (b) the employee may, if the grievance is not otherwise resolved, apply to the Employment Relations Authority for the resolution of the grievance under the Employment Relations Act 2000.
>
> …
>
> (5) If an employee applies to the Employment Relations Authority for a resolution of the grievance under subsection (1)(b), the employee may not exercise or continue to exercise any rights relating to the subject matter of the grievance that the employee may have under this Act.

The strike-out application

[11] The strike-out application was made on the grounds that the complaint raised in the Tribunal has been disposed of by the ERA. The provisions of s 79A of the HRA therefore preclude Mr Grigorovich from exercising any rights under the HRA in relation to his grievance as a result of his having chosen to have the matter resolved by the ERA.

The opposition to the strike-out application

[12] Mr Grigorovich opposed the strike-out application on the ground that his complaint concerned several grievances against the defendants which were not the subject of his application to the ERA. These were:

> **[12.1]** Racial harassment (s 63 of the HRA).
>
> **[12.2]** Misleading or deceitful conduct by the defendant (s 4(1) of the Employment Relations Act).
>
> **[12.3]** The contravention of the duty of good faith by the defendant (s 4(1A)(c) of the Employment Relations Act).

[13] In addition, Mr Grigorovich has an unsettled complaint to the Privacy Commissioner concerning Babbage's refusal to provide access to his employment records. In his submissions, Mr Grigorovich says he is applying to the Tribunal for the resolution of this unsettled privacy matter.

[14] Mr Grigorovich's position is that he is entitled to seek resolution in the Tribunal in respect of his outstanding complaints under the Employment Relations Act and the

Privacy Act 1993. He also takes the position that his grievance relating to racial harassment was not the subject of his application to the ERA and did not therefore trigger s 79A of the HRA, leaving him entitled to make a complaint for its resolution in the Tribunal. In submissions in support of his opposition to the strike-out, he contended that adverse comments regarding his communication and writing skills due to English not being his first language constitute racial harassment, as did comments that his ethnic/national background affected the standard of his work.

Reply to opposition

[15] In reply to Mr Grigorovich's opposition, Babbage submitted that:

> **[15.1]** As national origin discrimination has already been raised as a ground for complaint in relation to his loss of employment in his application to the ERA, Mr Grigorovich is precluded from proceeding in the Human Rights Review Tribunal relying on this allegation.
>
> **[15.2]** Although Mr Grigorovich did not mention "racial harassment" in his claim to the ERA, he relied on the same set of circumstances as in his current claim. The fact he did not mention "racial harassment" is of little relevance.
>
> **[15.3]** In any case, no claim of racial harassment was made under the application originally to the Human Rights Commission or in the claim filed in the Human Rights Review Tribunal. No evidence of racial harassment, being a behaviour that is either repeated or of such a significant nature that it has a detrimental effect on the plaintiff, has been produced or even touched on by the plaintiff until his notice of opposition to the strike-out application was filed.
>
> **[15.4]** The Tribunal does not have jurisdiction under the Employment Relations Act. In addition, there is no proof of lodging a complaint to the Privacy Commissioner nor has there been a claim by Mr Grigorovich that his privacy has been interfered with, as required by s 82 of the Privacy Act, nor has an opinion been given under s 83A, nor do the circumstances set out in s 83B exist.

The jurisdiction to strike out – principles

[16] In *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005 at [48], Wild J held that the Tribunal has a wide discretionary power to strike out or to dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by the High Court Rules, r 15.1, which provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
> (b) is likely to cause prejudice or delay; or
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
> (4) This rule does not affect the court's inherent jurisdiction.

[17] Applying r 15.1 to this application, the striking out part of a proceeding by reason of absence of jurisdiction plainly falls within r 15.1(a), (c) and (d).

Assessment

Was s 79A triggered by Mr Grigorovich's application to the ERA?

[18] At the teleconference on 16 July 2018, Mr Grigorovich contended that his application to the ERA was merely an application to raise a personal grievance out of time which was subsequently withdrawn. The implication is that s 79A was not triggered.

[19] The ERA file is not before the Tribunal. However, a number of the ERA documents are annexed to an affidavit by Mr Stapleton sworn in support of the strike-out application. These include Mr Grigorovich's application to the ERA, the statement in reply/notice of opposition filed by Babbage and the ERA determination dated 23 June 2016.

[20] If Mr Grigorovich, by commencing proceedings in the ERA, applied to the ERA for the resolution of his grievance, then s 79A was triggered and there is no jurisdiction for the Tribunal to consider a complaint in relation to the same circumstances. The documents filed in the ERA, in particular the draft statement of problem, fully canvass Mr Grigorovich's grievance. The documents show that, following his application, a defended process proceeded, including the filing of evidence. This process continued until the application was withdrawn leading to the determination of the ERA, dated 23 June 2016, in which Mr Grigorovich's application for personal grievance was dismissed.

[21] The Tribunal finds that Mr Grigorovich did make an application to the ERA for the resolution of his grievance against Babbage. Having lodged a proceeding with the ERA concerning the circumstances of the termination of his employment with Babbage, Mr Grigorovich "applied" to the ERA for the resolution of the grievance in terms of s 79A of the HRA. In *Wang v Hamilton Multicultural Services Trust 920090* [2010] NZEmpC 142, (2011) 9 NZELR 404, applying to the ERA was described by the Employment Court, in the context of the choice of procedures, as a "point of irrevocability".

[22] The withdrawal by Mr Grigorovich of his application to the ERA has no bearing on the jurisdiction of the Tribunal under s 79A which, like its equivalent provision in the Employment Relations Act, s 112, operates to preclude "an unsuccessful applicant in one jurisdiction then having an opportunity to try again": *Wang* at [15]. Having made a choice to begin in the ERA with his complaints against Babbage concerning his treatment as a Ukrainian, s 79A prevents Mr Grigorovich making a "U turn" and coming back to try again in the Tribunal. There is no jurisdiction for the Tribunal to consider this complaint.

Mr Grigorovich's other complaints

[23] Mr Grigorovich asserts that his application to the ERA did not encompass his complaint about racial harassment and therefore s 79A of the HRA was not triggered with respect to that complaint. He also asserts that a number of other issues between him and Babbage were not included in his application to the ERA and therefore can remain on foot in the Tribunal. These are complaints under the Employment Relations Act and a complaint under the Privacy Act.

[24] The Tribunal turns first to the assertion that the racial harassment complaint was not included in the application to the ERA. It is noted that while the words "racial harassment" are not used in the statement of problem lodged with the ERA, the matters

that Mr Grigorovich now characterises as racial harassment, for example, comments about English not being his first language, were included in the statement of problem under the general claim that Mr Grigorovich had been discriminated against as a Ukrainian.

[25] The problems arising between Babbage and Mr Grigorovich connected to his status as a Ukrainian, and the alleged actions of Babbage by reason of that status, were clearly raised in the application to the ERA. While the specific words "racial harassment" were not used, s 79A of the HRA was triggered in respect of complaints arising from Mr Grigorovich's treatment as a Ukrainian. It is not now possible to bring the same or similar complaints to the Tribunal, albeit now characterised as "racial harassment".

[26] The Tribunal now turns to the balance of matters Mr Grigorovich says he wishes to have considered by the Tribunal. The Tribunal has no jurisdiction under the Employment Relations Act and cannot consider Mr Grigorovich's complaints of misleading or deceitful conduct or the contravention of the duty of good faith under that Act. As to the complaint under the Privacy Act, this has been raised for the first time in Mr Grigorovich's notice of opposition to the strike-out application. The claim currently filed with the Tribunal was made under the HRA and concerned a complaint made by Mr Grigorovich to the Human Rights Commission under s 76(2)(a) of that Act. There has been no Privacy Act claim filed with the Tribunal and it is unclear whether the Tribunal would have jurisdiction to consider such a claim. This would depend on whether an investigation by the Privacy Commissioner into Mr Grigorovich's complaint was completed: *Gray v Ministry for Children (Strike-Out Application)* [2018] NZHRRT 13. What is clear is that no Privacy Act claim has been filed. There is no jurisdiction to consider Privacy Act breaches now alleged by Mr Grigorovich in the context of a claim brought under the HRA.

Conclusion

[27] We conclude the Tribunal has no jurisdiction in respect of the proceedings brought by Mr Grigorovich. His claim against Babbage and Mr Stapleton must be struck out.

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Ms MA Roche	**Dr SJ Hickey MNZM**	**Mr BK Neeson JP**
Co-Chairperson	**Member**	**Member**