IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

CIV 2014-418-000021
[2015] NZHC 75

BETWEEN		FRIEDRICH JOACHIM FEHLING Appellant
AND		DOUGLAS JOHN APPLEBY Respondent

Hearing: 3 November 2014

Appearances: Appellant in Person
D M Lester - Amicus
Respondent in Person

Judgment: 5 February 2015

JUDGMENT OF WHATA J

Introduction

[1] Mr Appleby is the former chairman of South Westland Area School (SWAS). The School Board issued a trespass notice against Mr Fehling in relation to the school's grounds and facilities. Mr Fehling sought information about the reasons for the trespass notice. Mr Appleby refused to release the details of the persons who had sought the trespass notice. Mr Fehling successfully obtained a ruling from the Human Rights Review Tribunal (the Tribunal) under the Privacy Act 1993 (Privacy Act) that this information was improperly withheld and received an award of $10,000.[1] The *Hokitika Guardian* later attributed the following comments among others to Mr Appleby concerning the Privacy Act award:

> "A man was trespassed from the school due to safety concerns. The safety of the staff and the children is paramount and comes first."

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[1] *Fehling v South Westland Area School* [2012] NZHRRT 15 [*The Privacy Decision*].

> "It's sad. The money has been taken from our kids, it's about $150 per pupil at our school all up."

[2] Mr Fehling is very unhappy about the trespass notice and Mr Appleby's reported comments, and believes that he was unlawfully subject to prohibited discrimination based on his German ancestry. Mr Fehling also believes that Mr Appleby treated him less favourably than others because he made use of his rights under the Privacy Act.

[3] He filed a second claim with the Tribunal under the Human Rights Act 1993 (HRA) alleging that the trespass notice and the comments to the *Hokitika Guardian* breached his right to be free from unlawful discrimination and/or from discriminatory victimisation.

[4] The Tribunal did not uphold Mr Fehling's claims.[2] In short, the Tribunal was not satisfied that there was sufficient evidence to show that the trespass notice or the comments were based on a prohibited ground or that he was subject to actionable victimisation under the HRA.

[5] Mr Fehling appeals to this Court on questions of law only. He adopts various findings of fact made by the Tribunal, but claims that the Tribunal has not applied the correct legal threshold tests or principles for the purpose of assessing whether he was subject to prohibited discrimination or victimised. He identifies two primary and 11 supplementary questions of law. The full list is noted at [31] . He was not represented by Counsel and as I will elaborate, some of the questions are not appropriate to address in this forum at this time.

The issues

[6] Nevertheless, with the benefit of Mr Fehling's helpful oral submissions and with the assistance of Mr Lester (amicus), I consider that there are five key issues for me to resolve, namely:

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2 *Fehling v Appleby* [2014] NZHRRT 24 at [50].

(a) Whether (alleged) Privacy Act victimisation is actionable per se under s 66 of the HRA;

(b) Whether there must be evidence of a specific intention to discriminate on a prohibited ground in order to establish an actionable claim under s 42 and/or s 65 the HRA; and if so

(c) Whether the Tribunal required evidence of specific intent to discriminate on a prohibited ground;

(d) Whether the Tribunal erred by requiring evidence of a link between a prohibited ground and Mr Appleby's conduct; and

(e) Whether the Tribunal's conclusions were reasonable given the findings of fact.

[7] As these issues do not exactly align with the issues stated in Mr Fehling's appeal and supporting submissions, I propose to frame my judgment in the following way:

(a) Set out the background to Mr Fehling's complaint;

(b) Identify the grounds of appeal, and briefly address those grounds which have no prospect of success or do not require resolution; and

(c) Address the five primary issues.

Background

[8] On 5 January 2009 the SWAS issued a trespass notice on Mr Fehling and maintained that trespass notice for a period of two years. Mr Fehling did not consider there were good grounds for the trespass notice and sought the names of the individuals who had complained about him. The school declined to provide that information and, on 6 July 2012, Mr Fehling was successful before the Tribunal in obtaining a ruling that there were no proper grounds for withholding information and

that the refusal was an interference with Mr Fehling's privacy (the privacy decision).[3] Damages of $10,000 were awarded to him.

[9] The present proceedings are, as the Tribunal has noted, a sequel to that decision. In his submissions Mr Fehling alleged before that Tribunal that:

> [2.1] The trespass notice denied him access to the grounds of SWAS, particularly those parts to which the community have access outside school hours. One or more of the prohibited grounds of discrimination were among the reasons for the issuing of the trespass notice.
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> [2.2] When Mr Appleby, then Chairperson of the SWAS Board of Trustees, was interviewed by the *Hokitika Guardian* about the Tribunal's decision under the Privacy Act, he made comments which had the effect of treating Mr Fehling differently on one or more of the prohibited grounds of discrimination or which amounted to victimisation.

[10] The full background to Mr Fehling's central grievance is aptly summarised in the Tribunal's privacy decision and was also adopted by the Tribunal in the present proceedings. The summary is adopted here, there being no challenge to it:

> **[13]** It is not practicable to recite at length the findings of fact made by the Tribunal in the decision delivered on 6 July 2012 and which in the present proceedings is Exhibit 4. The following is a summary only of the key findings:
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> > **[13.1]** Mr Fehling, born in Germany, is an electric engineer by training but has chosen to live a simple life in Nature. He has a particular attachment to Hari Hari where he has lived for approximately twenty years. He speaks English fluently, though with a marked accent. He is also at times intensely intellectual. These factors aid an understanding of why he is regarded as an "outsider" by some in Hari Hari. [Decision [18]]
> >
> > **[13.2]** Mr Fehling is an environmentalist. He includes in his environment "everything", that is not just the "green" environment but also the human environment which includes philosophy, rights, the Bill of Rights and the respect of rights by both government and citizens. [Decision [19]]
> >
> > **[13.3]** From an early point following his arrival in Hari Hari Mr Fehling has known Mr Jim Costello, a senior teacher at the School. At the relevant time he (Mr Costello) lived on the School grounds with his wife in a house provided by the School. Mr Fehling and Mr Costello have become long term friends, Mr Fehling visiting Mr Costello and his wife often. Over the years Mr Fehling has been given permission by Mr Costello to stay on the grounds of the house. Since about 2005

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3 *The Privacy Decision*, above n 1.

Mr Fehling has travelled about and lived in a van which while in Mr Costello's ownership, was apparently purchased by Mr Fehling. [Decision [20]]

[13.4] It is common knowledge in Hari Hari that Mr Fehling is a friend of Mr Costello and that, from time to time, Mr Fehling stays on the Costello property in his van. [Decision [21]]

[13.5] It would seem that not all in Hari Hari have been as appreciative or welcoming of Mr Fehling as Mr Costello. The Tribunal was told of various incidents in which Mr Fehling says he was subjected to harassment by reason only of the fact that he is seen as "different". These incidents include the nighttime smashing of the windows of his van; minor assaults and an occasion when his campsite was invaded by a motor vehicle doing "doughnuts" and other loss of traction manoeuvres to frighten him. Mr Fehling talked about encountering general hostility in the community which he explained in the following terms:

> I come from a different culture and background, have a different sense of freedom and there are a few people who cannot accept this.

[Decision [22]]

[13.6] In the two years immediately prior to January 2009 Mr Fehling had been living in Reefton but in December 2008 he returned to Hari Hari. On his return, and with the permission of Mr Costello, Mr Fehling parked his van on the Costello property adjacent to the two metre high corrugated steel fence. It is not possible from this position to see into the School swimming pool given the two metre high fence and the fact that the pool itself is enclosed. [Decision [25]]

[13.7] On the evening of 4 January 2009, when Mr Fehling was alone in his van, a woman and her two adult sons entered the Costello property. All three persons were known to Mr Fehling from previous incidents. He says that they arrived with the apparent intention of provoking a reaction from him, most likely a violent reaction. However, Mr Fehling did not retaliate. He described himself as against violence and as a person who resolves disputes with brains not brawn. He said that he was a conscientious objector when living in the Federal Republic of Germany and has proved on several occasions that he is not violent. He asked the three persons to leave but they refused to do so. They demanded to know if he had permission to be on the Costello property. When the three uninvited persons eventually realised that they would not be able to provoke Mr Fehling they left, but their parting comment was to the effect that something else would be happening. [Decision [27]]

[13.8] The next day, 5 January 2009, two police officers arrived on the Costello property and served Mr Fehling with a trespass notice in the following terms:

To: Fritz Fehling

Of: No fixed abode

Dear Mr Fehling

NOTICE UNDER SECTION 4(1)(2) & (4) TRESPASS ACT

In accordance with the above Act and Section you are hereby warned to stay off the place known as: Hari Hari Area School + James Costello's house

and occupied by Jenny Adamson + staff + James Costello.

You are advised that in accordance with the provisions of the Trespass Act 1980 it is an offence punishable by a fine not exceeding $1,000 or imprisonment not exceeding 3 months to enter onto the above mentioned place within the space of two years after you have received this warning.

Yours faithfully

"J Adamson"

Date: 5/1/09

Served by: Paul Gurney QID PGW193

Place: Hari Hari Date: 5/1/09

[Decision [28]]

[13.9] Mr Fehling says that moments after being served with the notice he was arrested. He was given no opportunity to leave. Later he was shown an arrest warrant. As no District Court was sitting on the West Coast he was taken to Christchurch. After being held in custody for three and a half days (during which he refused food and water) he was released at large without bail. The charge on which he had been arrested was not pursued. [Decision [29]]

[13.10] At the time he was served with the trespass notice Mr Fehling was lawfully on that part of the school grounds leased to Mr Costello. [Decision [1]]

[13.11] When Mr Fehling subsequently asked the School for the reasons for the issue of the trespass notice, the School declined to provide them. On seeking the intervention of the Ombudsman Mr Fehling was told that the reason was that complaints had been made to the Caretaker that he (Mr Fehling) had been using the pool, showers and toilets at the School. Mr Fehling strongly denies these allegations. By way of a request for personal information under the Privacy Act 1993, Mr Fehling sought the names of the individuals who had made the complaints. The School declined to provide that information, relying on s 27(1)(d) (disclosure of the information would likely endanger the safety of any individual) and s 29(1)(a) (disclosure of the information would involve the unwarranted disclosure of the affairs of another). [Decision [2]]

[13.12] The then Principal of the School (Ms Sloane) gave evidence that Mr Fehling had often called at the School office, sometimes as often as two or three times a fortnight, sometimes to ask what day it was, sometimes to ask for Mr Costello and sometimes to request access to the photocopying facilities. There had been no animosity in Ms Sloan's dealings with Mr Fehling and she had never had any difficulties with him and Ms Sloane fairly conceded that she had never experienced any threatening behaviour or verbal harassment. [Decision [39]]

[13.13] Asked the basis on which she believed that local people felt intimidated by Mr Fehling Ms Sloane said that students felt uncomfortable with him coming onto the School grounds because he would, on occasion, wear a dressing gown. In response to questions from the Tribunal she stressed that he would always have other clothes on and there was never any suggestion that, apart from wearing a dressing gown in public, he acted inappropriately. Ms Sloane mentioned ill-feeling arising from the fact that for some substantial period of time Mr Fehling had lived in the roof of a local church and someone had received a fright on discovering him there. [Decision [41]]

[13.14] Asked further about what she had observed of the behaviour of Mr Fehling, Ms Sloane said that she had never seen Mr Fehling using the swimming pool, changing rooms, toilets or showers. She said that the concern was not so much in relation to adults, but in relation to children. Pressed by the Tribunal to explain this point Ms Sloane said that her concerns arose from the way Mr Fehling looks (he has long hair and a beard) and dresses. She emphasised that she has never had cause to be concerned about his behaviour at the School either in relation to the schoolchildren or to the staff. [Decision [42]]

[13.15] The trespass notice was issued by the school Caretaker, Ms Adamson. She had been on holiday at the time, her duties (which included checking the water in the pool) being performed by her eldest (adult) daughter. That daughter had reported to Ms Adamson that she (the daughter) had seen Mr Fehling's van parked on the Costello property and felt unable to enter the school grounds unless accompanied by her husband. It was alleged (incorrectly) that Mr Fehling was using the toilet and shower facilities adjacent to the swimming pool. Ms Adamson immediately returned to Hari Hari and after discussing the matter with Mr Appleby, contacted the Police who advised her to issue a trespass notice. [Decision 43].

[13.16] The fears held by Ms Adamson and her daughter in relation to Mr Fehling were said to have been based on events which had occurred seventeen years earlier. These fears were entirely irrational. [Decision paras [61] to [63] and [70].

[13.17] The School could not justify the withholding of the information requested by Mr Fehling and there had been an interference with his privacy. The Tribunal made the following orders at [106]:

> **[106]** For the foregoing reasons the decision of the Tribunal is that:

> **[106.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that South Westland Area School interfered with the privacy of Mr Fehling by refusing to disclose the personal information requested by Mr Fehling. The School did not have proper grounds to withhold the information.
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> **[106.2]** Damages of $10,000 are awarded to Mr Fehling against South Westland Area School under ss 85(1)(c) and 88(1)(c) of the Act for humiliation, loss of dignity and injury to feelings.

The decision on appeal

The trespass notice

[11] After summarising the evidence relating to discrimination, the Tribunal stated it was satisfied that:[4]

> … in Hari Hari Mr Fehling regularly encounters discrimination because he is German and because his ethical beliefs are different to the mainstream. These factors combine with his accented speech, long hair and at times unconventional dress mark him out as different and hence a "problem". To some in Hari Hari he is the Other, on the outside, undeserving to be recognised as a human being and undeserving of full human rights.

[12] The Tribunal nevertheless observed that the issue before them was whether either of Mr Fehling's discrimination cases can be established against Mr Appleby.[5] The Tribunal then provides a narrative of events. It refers to the payment out to Mr Fehling as a consequence of his privacy award. It notes that Mr Fehling decided that $1,000 of the damages awarded by the Tribunal was to be donated to a SWAS fund for poor or disadvantaged students and $4,000 was to be paid to Mr Costello with the balance of $5,000 to be retained by Mr Fehling. It is noted that the Board of Trustees met and approved Mr Fehling's request in terms of the allocation of the damages.

[13] The Tribunal then refers to an interview of Mr Appleby by the *Hokitika Guardian*. Given its significance, the relevant article following from that interview is set out in full here:

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4 *Fehling v Appleby*, above n 2, at [15].
5 At [16].

Human Rights Complaints Costs School $16,000

By Rebekah Fraser

South Westland Area School has been ordered by the Human Rights Commission to pay $10,000 compensation to a man trespassed from the Hari Hari school grounds due to alleged safety concerns.

A three year legal battle between the school and a local resident ended earlier this month with a ruling in favour of the man.

Board of Trustees' Chairman, Doug Appleby, said that the saga was a "long, complicated story" that began in January 2009. "A man was trespassed from the school due to safety concerns. The safety of the staff and the children is paramount and comes first."

Mr Appleby said police had issued the trespass notice to protect individuals involved with the school.

However, the man responded by complaining to the Human Rights Commission alleging that the school had damaged his reputation.

Eventually, the Commission found in favour of the man and ordered the school to pay him compensation, Mr Appleby said.

"It's sad. The money has been taken from our kids, it's about $150 per pupil at our school all up."

As well as the $10,000 compensation the school has also been left with a $6,000 legal bill. The school would cover its costs from the annual operations grant, he said. "We fought it so that people could feel safe and maintain their right to privacy. I would do it again."

Human Rights Commission media spokeswoman, Vicky Hall, said she was unable to comment on the case. "Each complain received by the Commission is assessed to see if it fits within the criteria set out in the Human Rights Act. If a complaint is assessed to be an allegation of unlawful discrimination, the Commission offers a dispute resolution service to assist the parties, involved in the complaint, to resolve the matter."

She said the service was offered on an impartial basis requiring the consent of both parties at all times.

"The complaints process is both private and confidential. If the mediation is successful and a resolution is reached, the terms and conditions of the settlement or potential settlement remain confidential to the parties involved."

[14] The Tribunal then noted that Mr Appleby denied that he said:

> "It's sad. That money has been taken from our kids, it's about $150 per pupil at our school, all up."

[15] But the Tribunal also records that he accepts he could have said:

> "We fought it so that people could feel safe and maintain their right to privacy."

[16] The Tribunal also records that he accepted that he said "I would do it again."[6]

[17] The Tribunal then notes that Mr Appleby said that his comments about privacy reflected his opinion that he would favour doing it again if a similar situation arose in the future no matter who the complainant was.

[18] As to the claim based on the trespass notice, the Tribunal made the following observations:

> [24] Mr Appleby does not accept the trespass notice was of itself discriminatory against Mr Fehling. It was to protect those who felt unsafe using the school facilities, particularly the swimming pool as it was alleged Mr Fehling was using those facilities at the same time as Keyholders ie parents and students of the school. This was not allowed. The Board would likely have taken the same action against any person who was on or was using school property without permission in similar circumstances.
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> [25] Mr Appleby explained that parts of the school are also community facilities. The library is one such facility. However, users must sign in at the school if they wish to use this facility. The sports hall or gym is owned in shares (58% school and 42% local community). However, the gym is only used by the community outside of school hours. The swimming pool belongs to the school and is used by Keyholders or students only.
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> [26] Mr Appleby went on to add that:
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> > [26.1] He did not consider Mr Fehling a danger. Only Ms Adamson held that view.
> >
> > [26.2] He was not aware of Ms Adamson's reasons for being afraid of Mr Fehling and he (Mr Appleby) did not ask.
> >
> > [26.3] He was not aware of community hostility against Mr Fehling until the Tribunal decision and "the taking of money from the school".
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> > [26.4] The Costello property should never have been included in the trespass notice.

[19] The Tribunal then turned to its credibility assessment. It was plainly impressed by Mr Fehling as a conscientious, honest and credible witness. They did

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6 *Fehling v Appleby*, above n 2, at [20].

not reach a similar conclusion about Mr Appleby. They noted, for example, that Mr Appleby showed no sign of recognising the injustice done to Mr Fehling by being served (in the name of the school and with the approval of Mr Appleby) a trespass notice which no rational reason could justify. The Tribunal went on to observe:[7]

> It was disingenuous of Mr Appleby to claim (as he did in his evidence) that Mr Fehling could have requested access to community facilities had he wished.

[20] In the same paragraph it also noted:

> It was equally disingenuous for Mr Appleby to assert that the trespass notice had been relaxed "fairly quickly to allow Mr Fehling to visit Mr Costello".

[21] The Tribunal went on to observe that any relaxation was secured by Mr Costello, not the Board.

[22] The Tribunal then observes:

> [30] The uncompromising and hostile attitude of Mr Appleby to Mr Fehling was reflected in the fact that neither he nor the Board took any steps to correct the misreported comments of Mr Appleby in the *Hokitika Guardian* article or to acknowledge to the community the baseless nature of the allegations made against Mr Fehling by Ms Adamson. The fact that Mr Fehling's donation of $1,000 to a school fund went unacknowledged even the Board's letter dated 21 August 2012 to Mr Fehling shows the depth of animosity towards Mr Fehling. This compounded the misattributed allegation in the Press article that Mr Fehling had "taken" money from "our kids".

[23] The Tribunal then frames the first case relating to the trespass notice in this way:

> [33] Mr Fehling alleges that the trespass notice denied him access to those parts of the grounds of SWAS to which the local community had access outside school hours. His case is that, in terms of HRA s 42(1) he was required to leave or cease to use a place or facilities available to members of the public and that this by reason of a prohibited ground of discrimination.

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7 *Fehling v Appleby*, above n 2, at [29].

[24] The Tribunal observed:

> [35] The critical issue was whether the trespass notice was issued **by reason of** one or more of the prohibited grounds of discrimination.
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> [36] We are in no doubt that Mr Fehling is regularly the victim of discrimination on prohibited grounds by some within the Hari Hari community. It cannot be reasoned, however, from this finding that the reason for Mr Appleby's authorisation of the issue of the trespass notice and its subsequent signing by the caretaker, Ms Adamson, was by reason of a prohibited ground of discrimination.
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> [37] First, as to Ms Adamson, who desired to evict Mr Fehling from the Costello grounds (and the school in general) was motivated by a hypersensitive, if not irrational fear of Mr Fehling based on incidents which had occurred 12 or 17 years earlier, a fear apparently inherited by the adult daughter who was the temporary caretaker over the Christmas holiday in question. See for example the privacy decision at [61] and [70]. We have no evidential basis on which to make a finding that the issue of the trespass notice by Ms Adamson was by reason of any prohibited grounds of discrimination.
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> [38] Second, as to Mr Appleby, he said that at the time he authorised Ms Adamson to sign the trespass notice he was not aware of her reasons for being afraid of Mr Fehling. He personally did not consider Mr Fehling a danger. Nor was he aware of the hostility towards Mr Fehling in the Hari Hari community until the Tribunal's decision under the Privacy Act was published.
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> [39] In view of all of Mr Appleby's ill disguised dislike of Mr Fehling as visibly demonstrated at the hearing we have difficulty accepting that at the time the trespass was issued Mr Appleby was not aware of community hostility towards Mr Fehling. Nevertheless, after full consideration we believe there is insufficient evidence to justify a finding that one of the prohibited grounds of discrimination was behind Mr Appleby's authorisation of the trespass notice. It may be that he was too ready in acquiescence in Ms Adamson's irrational fears of Mr Fehling but this does not engage HRA s 42.
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> (emphasis included)

[25] The Tribunal then turns to Mr Fehling's claim to indirect discrimination based on s 65 HRA. The Tribunal observed:

> [41] Mr Fehling submits that this provision requires one to focus on the effect of treating a person differently. That is so. But it must still be shown that it is "the effect of treating a person … differently on **one of the prohibited grounds of discrimination**."

> [42] As we have concluded that the evidence before us does not establish the presence of a prohibited ground of discrimination, the case under s 65 must fail for the same reason as the case under s 42.
>
> (emphasis included)

[26] The Tribunal also noted (in the context of Mr Fehling's complaints concerning comments in the *Hokitika Guardian*):

> [46] As to the indirect discrimination provisions of the HRA s 65, we do not see this provision as having application on the facts. It is directed at ensuring substantive (as opposed to formal) equality. That is, indirect discrimination is said to occur when an apparently neutral practice or policy disproportionately disadvantages one of the groups against whom it is unlawful to discriminate. Although everyone is treated the same, the condition or requirement affects members of a prohibited group differently. See further Selene Mize "Indirect Discrimination Reconsidered" [2007] NZ Law Review 27 at 28.

The privacy claim

[27] As to the privacy claim, the Tribunal observed:

> [45] The fundamental difficulty with Mr Fehling's case is that Mr Appleby's comments are directed to issues under the Privacy Act, not the HRA. Given that the Protected Disclosures Act 2000 has no application on the facts and that Mr Fehling is not in any event an employee of SWAD, the case under s 66 is misconceived and must fail as there was no victimisation **on the ground** that Mr Fehling had (for example) made use of his rights under the HRA.
>
> (emphasis included)

[28] It also stated:

> [47] There is no doubt that the comments were unwise, as Mr Appleby tacitly acknowledged in his written closing submissions. Contextually they were clearly a reference to the proceedings brought by Mr Fehling under the Privacy Act and would hardly endear Mr Fehling to those already hostile to him. The report itself is substantially lacking in balance and accuracy. In particular, no reference is made to the finding of the Tribunal (incorrectly referred to as the Human Rights Commission). None of this is Mr Appleby's responsibility but his failure (and that of the Board) to correct the misattribution to Mr Appleby of the Statement that "money has been taken from our kids" and the failure to draw attention by way of a letter to the editor or otherwise to Mr Fehling's donation to the school fund is regrettable. But none of these factors amount to direct or indirect discrimination. In addition, the victimisation provisions of the HRA are tightly drawn and circumscribed. Not every act of unkindness, unfairness or hostility is a

> breach of the HRA. Nor can every such act be articulated as or framed in terms of discrimination as understood under the HRA.

Jurisdiction

[29] Only questions of law were raised by Mr Fehling in argument. But as will become clear, a limited merits assessment is needed in order to properly resolve the appeal. In this regard, s 123 HRA confers broad appellate jurisdiction on the High Court and the appeal is governed by Part 20 of the High Court Rules. The applicable principles are well settled. The weight the High Court gives to the decision of the Tribunal is a matter of judgment. As noted by Elias CJ in *Austin Nichols & Co Inc v Stichting Lodestar*: [8]

> The appeal Court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal Court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal Court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal Court makes no error in approach simply because it pays little explicit attention to the reasons of the Court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal Court has the responsibility of arriving at its own assessment of the merits of the case.

[30] In this case, if I find a material error of law or fact, I may make a final decision or refer the matter back to the Tribunal for reconsideration.[9]

Mr Fehling's questions – some preliminary points

[31] Mr Fehling posed the following questions:

> Main Questions of Law on Appeal to High Court
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> [1] Does S.66(1)(v) Human Rights Act HRA (victimisation threat under reference to HRA) allow the courts (incl. the Tribunal) to invalidate it for Privacy-Act-S.89-proceedings-related (and thus with HRA part-4 reference) prima-facie-proven victimisation?

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8 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141] at [5].

9 Human Rights Act 1993, s 123(6) and (7).

[2] Does S.65 (indirect discritnination) mention the unlawfully discriminating effect through a not apparently unlawful conduct lacking "good reason", instead of any specific intent?

Fundamental Questions of Law raised in the Tribunal hearing

[3] Does S.4(1,2) Trespass Act 1980 invalidate discriminatory offences & unlawful acts (refusal to public-places access) per SS.42,134 HRA ?

[4] Does S.65 HRA (indirect discritnination) require the offender/ discriminator to have stated directly the discritninatory grounds for his act(s) in order to become statutorily valid?

[5] Do proceedings under the Privacy Act's information provisions preclude or disable proceedings under the HRA's anti-discrimination provisions that are brought as a consequence of the resulting emerging information?

[6] Should proceedings of offences per SS.42,134 HRA aim to maximise the Bill of Rights' Natural-Justice provision S.27(1) and minimise punishment of innocent persons associated with an organisation, by preferably naming specific executive(s)/official(s) of such organisations as direct defendant(s) to alleged personal wrongdoings, instead of using Companies-Act practice as screen?

[7] Should SS.76,232 Insolvency Act limit or otherwise influence the jurisdiction of the Tibunal per SS.92I (remedies), 95 (interim order), 121 (enforcement), 134/42 (offence, unlawful act) HRA, [added: SS.89,92B(4),92T (enforcement of decision-substituting settlement)] ?

[8] Does Schedule 6, S.4(a) Education Act (defendant not liable if he acted in "good faith" in school-board function) overrule the "good reason" and offence/unlawful-act provisions per SS.65,42,134 HRA?(This question of law has been answered in favour of the HRA, but is included as a case example, also for answering questions [3,6,7,9].)

The following questions of law were inherent in the written argumentation, but have been ignored by the tribunal:

[9] Does the continued issuing of a 2-year trespass notice preventing access to public facilities for 2 years without "good reason" per S.65 fulftll offence/unlawful-act provisions per SS.65,42,134 ?

[10] Has the Tribunal concurrently with S.42 (unlawful act) jurisdiction about the non-convictable offence per S.134 HRA, instead of invalidating this statutory section by requiring a double-jeopardy repetition of the hearing in the District Court?

[11] Should the Tribunal via its decision have notified Parlament that the requirement of the Attorney-General's agreement before any judicial hearing per S.135 HRA for an offence prosecution per S.134 contravenes the general law practice and undermines this democracy protecting HRA per S.20L (by enabling protection of fascistic mates against lawful prosecutions for criminal discrimination offences; This political interference in judicial matters per S.135 contravenes SS.4,5,19 Bill of Rights by not being demonstrably justifiable in a free & democratic society, and should have led

> the grossly incompetent Attorney-General to inform Parlament per S.7 Bill of Rights) ?
>
> [12] Should the Tribunal have referred above questions of law to the High Court per S.122 (l),(lA)(referral of questions of law to High Court), because the Tribunal's previous unlawful case examples obviously disabled it to judge lawfully the above questions of law) ?
>
> [13] Should the Tribunal have started precedence case law under the HRA by defining/interpreting principles of "Natural Justice" per SS.6,27(1) Bill of Rights and S.105(1,2(a)) HRA according to article 2.1. of the Universal Democracy Constitution, in order to reduce the monarch's courts' totalitarian at-will discriminatory discretion (article 2.1.
>
> Natural: Following the logical causal chain, arranging real causes/events and their real results/consequences in the time-correct sequence; It does not mean first-past-the post, virtual or mad!
>
> Justice: Balance of the adherence to reasonable agreements, including democratically originated laws under the safeguarding frame of this Constitution (Bill of Rights); It includes correction of breaches with compensation of victims as one part, with the aim to prevent repetition of breaches.) ?

[32] I address the main questions within the frame of the issues I think arise from the appeal in light of argument.

[33] Questions [3], [7], [8] do not give rise to an appealable error because the subject matter of the questions was resolved by the Tribunal in favour of Mr Fehling. In short, they concern prehearing challenges to the jurisdiction of the Tribunal to hear or grant relief which were rejected by the Tribunal.

[34] I also refuse to provide a response on questions [10], [11] and [12] as their resolution will not advance the substantive claims made by Mr Fehling. Questions [10] and [11] concern the jurisdiction of the Tribunal to make a ruling on whether a criminal offence has been committed, and question [12] deals with whether those questions should have been referred to the High Court.

[35] I also refuse to answer question [13]. Mr Fehling's self-proclaimed Universal Democracy Constitution, while thought provoking, has no legal or constitutional status and cannot provide a formal reference point for interpretation of the HRA.

[36] In saying all of this I do not wish to appear to be critical of Mr Fehling's submissions. I accept that several of the posited questions and related submissions helpfully provide a conceptual frame for the central contentions made by Mr Fehling. I will endeavour to reflect their pith and substance, where relevant, in the body of my judgment.

Submissions of Amicus

[37] Mr Lester assisted the Court with submissions about Mr Fehling's two key claims. He submitted (in short) that Mr Fehling's discrimination claim based on the trespass notice essentially involves a factual inquiry, namely whether there was evidence of prohibited reasons for the trespass notice. Contrary to Mr Fehling's submission, he said that the Tribunal did not fail to identify a non-discriminatory basis for the trespass notice. Rather, the Tribunal found that the notice was based on Ms Adamson's irrational fears of Mr Fehling and that there was otherwise insufficient evidence to establish that the trespass notice was issued by reason of a prohibited ground.

[38] Mr Lester usefully referred to [83] of the *Laws of New Zealand* "Discrimination" on the definition of discrimination for the purpose of indirect discrimination under s 65. Referring to [46] of the Tribunal's decision under appeal, Mr Lester submitted that the Tribunal's approach is consistent with the summary of the law included in this text.

[39] Mr Lester also doubted that the Privacy Act victimisation claim was not actionable prohibited discrimination under the HRA.

Mr Appleby's submissions

[40] Mr Appleby's son appeared on his behalf. He registered support for the Tribunal's decision. He submitted however that contrary to the finding of the Tribunal, cl 4, sch 6 of the Education Act 1989 provides immunity from liability for any act done or omitted by Mr Appleby in his role as Chairperson of the Board of

Trustees. Mr Appleby did not cross appeal on this issue so it is not properly before this Court.

The legislative frame

[41] Before exploring the key issues it is necessary to understand the scheme of the HRA.

Purpose

[42] The Human Rights Act is an act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1997 and to provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants and Conventions on human rights.

Unlawful discrimination: Part 2 HRA

[43] Parts 2, 3 and 4 are particularly relevant to the present proceedings. Part 2 defines unlawful discrimination, including the prohibited grounds of discrimination and the contexts within which discrimination must be avoided. Relevant to this proceeding s 21(1) provides:

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the prohibited grounds of discrimination are—
>
> (a) …
>
> (f) race:
>
> (g) ethnic or national origins, which includes nationality or citizenship:

[44] The Act then describes in some detail the contexts within which discrimination on the basis of a prohibited ground is unlawful subject to specified exceptions. Those contexts include employment,[10] partnerships,[11] by industrial and professional associations, qualifying bodies and vocational training bodies.[12]

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[10] Section 22.

[45] Section 42 then prohibits discrimination and access to places, vehicles and facilities is unlawful. More particularly it states:

> **42 Access by the public to places, vehicles, and facilities**
>
> (1) It shall be unlawful for any person—
>
> (a) to refuse to allow any other person access to or use of any place or vehicle which members of the public are entitled or allowed to enter or use; or
>
> (b) to refuse any other person the use of any facilities in that place or vehicle which are available to members of the public; or
>
> (c) to require any other person to leave or cease to use that place or vehicle or those facilities,—
>
> by reason of any of the prohibited grounds of discrimination.
>
> (2) In this section the term vehicle includes a vessel, an aircraft, or a hovercraft.

[46] Section 43 deals with specific exceptions which are not directly relevant.

[47] There are then provisions making it unlawful to discriminate in the provision of goods and services,[13] land housing and other accommodation,[14] access to educational establishments.[15] Other forms of discrimination are also to be avoided, including (in short) actions that promote racial disharmony,[16] sexual harassment, racial harassment.

[48] The Act also addresses indirect discrimination in the following terms:

> **65 Indirect discrimination**
>
> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act 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 of this Act 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.

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11 Section 36.
12 Sections 37, 38, 40.
13 Section 44.
14 Section 53.
15 Section 57.
16 Section 61.

[49] The Act also makes victimisation unlawful:

> **66 Victimisation**
>
> (1) It shall be unlawful for any person to treat or to threaten to treat any other person less favourably than he or she would treat other persons in the same or substantially similar circumstances—
>
> (a) on the ground that that person, or any relative or associate of that person,—
>
> (i) intends to make use of his or her rights under this Act or to make a disclosure under the Protected Disclosures Act 2000; or
>
> (ii) has made use of his or her rights, or promoted the rights of some other person, under this Act, or has made a disclosure, or has encouraged disclosure by some other person, under the Protected Disclosures Act 2000; or
>
> (iii) has given information or evidence in relation to any complaint, investigation, or proceeding under this Act or arising out of a disclosure under the Protected Disclosures Act 2000; or
>
> (iv) has declined to do an act that would contravene this Act; or
>
> (v) has otherwise done anything under or by reference to this Act; or
>
> (b) On the ground that he or she knows that that person, or any relative or associate of that person, intends to do any of the things mentioned in subparagraphs (i) to (v) of paragraph (a) or that he or she suspects that that person, or any relative or associate of that person, has done, or intends to do, any of those things.
>
> …

Process and remedies: Part 3 HRA

[50] Part 3 sets out the mechanisms for the resolution of disputes about compliance with Part 1A and Part 2. The procedures for making a complaint and for the handling of a complaint under this Act are set out in detail. Section 92B deals with civil proceedings arising from complaints. It confers a right on a complainant to bring civil proceedings before the Human Rights Review Tribunal for any breach of Part 2, against the person or persons alleged to be responsible for the breach.

[51] Section 92 sets out the remedies that are available, including in particular:

> **92I Remedies**
>
> …
>
> (2) In proceedings before the Human Rights Review Tribunal brought under section 92B(1) or (4) or section 92E, the plaintiff may seek any of the remedies described in subsection (3) that the plaintiff thinks fit.
>
> (3) If, in proceedings referred to in subsection (2), the Tribunal is satisfied on the balance of probabilities that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint, the Tribunal may grant 1 or more of the following remedies:
>
> (a) a declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint:
>
> (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order:
>
> (c) damages in accordance with sections 92M to 92O:
>
> (d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach:
>
> …

[52] Section 92I (4) also states:

> It is no defence to proceedings referred to in subsection (2) or subsection (5) that the breach was unintentional or without negligence on the part of the party against whom the complaint was made, but, subject to section 92P, the Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant.

[53] Section 92 also provides the jurisdiction of the Tribunal to award damages and in particular s 92M states:

> **92M Damages**
>
> (1) In any proceedings under section 92B(1) or (4) or section 92E, the Tribunal may award damages against the defendant for a breach of Part 1A or Part 2 or the terms of a settlement of a complaint in respect of any 1 or more of the following:
>
> (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the

aggrieved person for the purpose of, the transaction or activity out of which the breach arose:

(b) loss of any benefit, whether or not of a monetary kind, that the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach:

(c) humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.

(2) This section applies subject to sections 92J, 92N, and 92O and to subpart 1 of Part 2 of the Prisoners' and Victims' Claims Act 2005.

[54] There is then broad discretion conferred on the Tribunal pursuant to s 92O to defer or modify remedies for breach of Part 1A or Part 2 or terms of a settlement. A range of matters may be taken into account in exercising powers given by s 92O.[17] Section 92Q then specifies monetary limits on remedies a Tribunal may grant[18] and a Tribunal may refer granting of remedies to the High Court.[19]

Jurisdiction: Part 4 HRA

[55] Part 4 defines the jurisdiction of the Human Rights Review Tribunal, including the functions of the Tribunal and the power of the Tribunal to make interim and/or final orders. The procedure of the Tribunal is detailed at s 104. Section 105(1) directs the Tribunal that it must:

> …act according to the substantial merits of the case, without regard to technicalities.

[56] Section 105(2) further states:

> (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.

[57] Section 106 then provides that the Tribunal may, in short, adopt an inquisitorial approach to the calling of evidence, including from the parties and other

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17 Refer s 92P.
18 Refer s 92Q(2).
19 Refer s 92R-92W as to process of referral and incorporation of High Court decision into Tribunal decisions.

persons. Broad powers are thus conferred to enable the Tribunal to carry out its functions. Reasons must be given for any decision,[20] and the orders of the Tribunal may be enforced in the District Court. The Tribunal also has the power to state a case to the High Court and to remove a proceeding or issue to the High Court.

[58] As foreshadowed above, s 123 confers a broad power of appeal on the High Court.

[59] I will address specific aspects of this frame in terms of the relevant issues. It will be seen that the HRA provides a detailed scheme for the control of prohibited grounds of discrimination, including specified exceptions, the jurisdiction of the Tribunal to assess a complaint of prohibited discrimination and any remedy for it.

First issue: Victimisation

[60] The central issue under this heading is simply:

> Whether (alleged) Privacy Act victimisation is actionable per se under s 66 of the HRA?

[61] Mr Fehling claims that he was victimised by the comments attributed to Mr Appleby in the *Hokitika Guardian* article (noted at [1]). Mr Fehling considers that the published comments show that he was treated less favourably than others because of his German lineage and/or as a result of the stance he took in relation to his Privacy Act request. The Tribunal's reasons for rejecting this claim are noted at [26] above.

[62] Mr Fehling's primary argument in this Court is that s 89 of the Privacy Act incorporates Privacy Act claims into the HRA. I also understand Mr Fehling to be saying that:[21]

(a) Protection from Privacy Act victimisation is an aspect of the right to natural justice, the right to substantive fairness (including practical access to a remedy) as well as procedural fairness; and

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[20] Refer s 116.

[21] This is a summary of my interpretation of Mr Fehling's key submissions, including when dealing with his subsidiary questions.

(b) Privacy Act victimisation should be actionable pursuant to s 66(1)(a)(v) to prevent discriminatory conduct that impairs or seeks to impair the substantive protections afforded by the HRA.

Resolution

[63] One of the key purposes of the HRA is "to provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants and Conventions on human rights". The right to privacy is an aspect of the right to personal autonomy affirmed by various international human rights instruments.[22] Legislation seeking to protect human rights is ordinarily given such large and liberal interpretation as is necessary to achieve its purpose.[23] But I am unable to agree that Privacy Act victimisation is actionable pursuant to s 66 of the HRA for the following reasons. First, I concur with the Tribunal that the Protected Disclosure Act 2000 is not relevant to these proceedings and that there was no victimisation "on the ground that Mr Fehling had (for example) made use of his rights under the HRA."[24]

[64] Second, I am prepared to accept (for argument sake) that Mr Fehling may have been treated less favourably by Mr Appleby because of his Privacy Act complaint,[25] but I do not accept that Privacy Act victimisation per se engages s 66(1)(a)(v). That section stipulates that it shall be unlawful to treat any person less favourably than he or she would treat other persons on the ground that he or she has "done anything under or by reference to this Act." Plainly the reference to "this Act" means the HRA. While "by reference to" means something broader than "under",[26] there must be a logical connection to the prohibited grounds of discrimination, being the focal point of Part 2. Conversely, there is no obvious reason to expand the reference to "this Act" to include anything done by reference to the Privacy Act which is not concerned with prohibited grounds of discrimination and which

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22 Refer various instruments cited in *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [67].

23 See discussion in *North Health v Human rights Commission* [1998] NZLR 218 at 234

24 *Fehling v Appleby*, above n 2, at [45].

25 Mr Appleby's comments to the local press implied that the Board considered that the affected persons needed to be protected from Mr Fehling. There was no proper basis for this statement as the Tribunal's privacy decision demonstrated. Had I concluded that privacy related conduct was actionable under s 66, I would have referred this aspect back to the Tribunal to assess whether in making the statement, Mr Appleby thereby victimised Mr Fehling.

26 See discussion in *Brookers Human Rights Law* (online looseleaf ed. Brookers) at [H66.03].

provides its own broad scheme of relief in relation to privacy rights infringements. For example, s 85 of the Privacy Act provides that the Tribunal may provide "such other relief as it thinks fit" in relation to an interference with the privacy of the individual.

[65] Third, s 89 of the Privacy Act does not purport to incorporate substantive privacy rights infringements or Privacy Act claims into Part 2 of the HRA regime. It states:

> **89 Certain provisions of Human Rights Act 1993 to apply**
>
> Sections 92Q to 92W and Part 4 of the Human Rights Act 1993 shall apply, with such modifications as are necessary, in respect of proceedings under section 82 or section 83 of this Act as if they were proceedings under section 92B, or section 92E, or section 92H of that Act.

[66] As noted, sections 92Q to 92W deal with the extent of the jurisdiction of the Tribunal to grant a monetary remedy and Part 4 deals with the functions, constitution and procedures of the Tribunal. By contrast, the substantive provisions defining actionable prohibited discrimination are separately addressed by Part 2 of the HRA.

[67] Fourth, the entire scheme of Part 2 of the HRA is directed to securing freedom from clearly defined prohibited grounds of discrimination in specified contexts, including employment, partnerships, industrial and professional associations, access to places, vehicles and facilities, provision of goods and services, provision of land, and access to educational establishments. Exceptions are also carefully defined. An expansive interpretation, incorporating Privacy Act victimisation into s 66, would be anomalous given this clear and careful qualifying context and the precision in fact employed by s 89 of the Privacy Act and Part 2 of the HRA generally.

[68] Finally, it would have been a simple enough matter for s 66 to expressly refer to the Privacy Act as it does in relation to the Protected Disclosures Act. It does not do this.

[69] Accordingly the first primary ground of appeal is dismissed.

Second to fifth issues: the evidential threshold requirements

[70] The Tribunal found that there was insufficient evidence to justify a finding that one of the prohibited grounds of discrimination was behind Mr Appleby's authorisation of the trespass notice or his comments to the *Hokitika Guardian* for the purpose of s 42 and/or s 65 of the HRA.

[71] Mr Fehling contends that the HRT erred by effectively requiring evidence of specific intent to discriminate on a prohibited ground. Mr Fehling says that the Tribunal found that he had been subject to prohibited discrimination by some in the community; that Mr Appleby was aware of community hostility toward Mr Fehling and that Ms Adamson was motivated by an irrational fear of Mr Fehling. In the absence of any evidence of a good reason for his discriminatory treatment, Mr Fehling says that this provided a sufficient basis to draw an inference of prohibited discrimination and that there was no need to prove a specific intention either for the purpose of s 42 or s 65. He submits that the requirement to show intent to discriminate on a prohibited ground would defeat the object of s 42 and s 65 to secure freedom from prohibited discrimination.

[72] As foreshadowed above, Mr Fehling's contentions raise the following issues:

(a) Whether there must be evidence of a specific intention to discriminate on a prohibited ground in order to establish an actionable claim under s 42 and/or s 65 the HRA; and if so

(b) Whether the Tribunal required evidence of specific intent to discriminate on a prohibited ground; and

(c) Whether the Tribunal erred by requiring evidence of a link between a prohibited ground and Mr Appleby's conduct; and

(d) Whether the Tribunal's conclusions were reasonable given the findings of community hostility based on prohibited grounds and the absence of a good reason for the trespass notice.

[73] I will deal with each issue in turn.

Is evidence of specific intent required?

[74] The salient threshold test expressed at s 42 is discrimination "by reason of any of the prohibited grounds." Unfortunately I did not have the benefit of a full canvas of authority in argument. In any event, I think the following appears to be settled law in New Zealand:[27]

(a) There must be some material connection between a prohibited ground and the discrimination to qualify;[28] and

(b) The presence or absence of a subjective intention may be relevant to this assessment;[29] but

(c) Proof of a subjective intention to discriminate on a prohibited ground is not a prerequisite.[30]

[75] I accept that this approach connotes the potential for strict liability, an outcome forcibly rejected by Lord Scott in *Lewisham London Borough Council v Malcolm* concerning similar anti-discrimination legislation.[31] Without the benefit of full argument on this point however I am not prepared to depart from what appears to be the orthodoxy. I also think that the requirement for a material connection militates against the prospect of strict liability in the true sense. An essentially fact based approach was also approved by the majority in the Supreme Court concerning prohibited discrimination under the Employment Relations Act 2000, though in a

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27 For an erudite discussion on this issue see *Equal Opportunity Commission v Mount Isa Mines Limited* [1993] 46 FCR 301, 118 ALR 80 at 98 – 100 and 102 – 103.

28 See *Brookers Human Rights Law* (online looseleaf ed. Brookers) at HR 21.02 and cases cited therein. As to materiality, see by analogy, *Air New Zealand Ltd v McAlister* [2010] 1 NZLR 153 at [40].

29 See *Brookers Human Rights Law* (online looseleaf ed. Brookers) at [HR 21.05] and cases cited therein.

30 Ibid, and see *James v East Borough Council* [1990] 2 AC 751(HL) at 779 – 80.

31 *Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening)* [2008] 1 AC 1399 (HL) at [28] per Lord Scott. Lord Bingham by contrast was not apparently concerned about this, resolving that the requisite test for establishing whether the conduct "relates to" a ground of discrimination was whether there was "some connection, not necessarily close", between the reason for the conduct and the discrimination at [10].

cursory way.[32] I also think that it gives vent to the words used in light of legislative object of Part 2 of the HRA, namely to promote the right to be free from prohibited grounds of discrimination also affirmed by s 19 of the New Zealand Bill of Rights Act. Conversely, a requirement to prove intention, in the sense of motive or purpose to engage in prohibited discrimination could undermine the attainment of the Act's anti discrimination policy.

[76] Section 65 states that where any conduct that is not in apparent contravention of any provision "has the effect of treating a person differently … on one of the prohibited grounds" it shall be unlawful unless the contravener "establishes good reason for it." Cartwright J described the requisite threshold test in *Northern Regional Health Authority v Human Rights Commission*:[33]

> Those acts and requirements (conduct, practice, requirement, or condition) must be assessed in the light of the prohibited grounds of discrimination for their impact, and the analysis that is to be made is whether the effect of such acts or requirements results in a person or persons being treated 'differently' on one of the prohibited grounds of discrimination. Regardless of the intention behind the act or of the body imposing a requirement or condition on a person or group of persons, if the effect is discriminatory in terms of the definition of the Human Rights Act, then the conduct, practice, condition or requirement will be unlawful.

[77] This approach also appears to be settled law and I respectfully adopt it for the same reasons expressed at [75].

[78] Accordingly, I accept Mr Fehling's basic contention that evidence of specific intention to discriminate is not a prerequisite to a finding of prohibited discrimination for the purposes of s 42 or s 65.

Did the Tribunal require evidence of specific intent?

[79] I have come to the view that the Tribunal did not require evidence of specific intent to discriminate. Rather, the Tribunal isolated the evidence concerning the allegation of prohibited discrimination. It found that there was community hostility toward Mr Fehling, some of it based on prohibited grounds. But it was unable to find

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32 *Air New Zealand Ltd v McAlister* [2010] 1 NZLR 153 at [40] and see Tipping J at [49]-[50]

33 *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37 (HC) at 62 – 63 (emphasis added).

that there was sufficient evidence of any linkage between this hostility, Ms Adamson's irrational fear and Mr Appleby's decision (as part of the SWAS Board) to issue a trespass notice. In reaching this conclusion there is nothing to suggest on the face of the decision that the Tribunal required evidence of specific intent on Mr Appleby's or Ms Adamson's part to discriminate on a prohibited basis. Rather, I discern that the Tribunal, in using the language it did, examined the factual matrix to discern whether prohibited discrimination was "behind" Mr Appleby's conduct in the sense of causally connected to the decision to issue a trespass notice.

[80] I have also considered the evidence on this issue. If anything, the record is unhelpful to Mr Fehling, because taken at face value, Mr Appleby relied on Ms Adamson's assessment of the perceived danger to her and was not aware of the community hostility to Mr Fehling until after the privacy decision.[34] The Tribunal doubted Mr Appleby's credibility insofar as concerns community hostility, but stopped short of attributing to him, or finding that he acted on, knowledge of prohibited discriminatory hostility for the purpose of the trespass notice or his comments to the *Hokitika Guardian*. The Tribunal is plainly better placed then I am to make a judgment about the credibility of Mr Appleby's evidence overall. It also has the benefit of specialist expertise in drawing the various threads of evidence that might demonstrate discriminatory reasoning. In this context, I am prepared to accept the Tribunal's judgment on the specific assessment of the causal or material significance of community hostility, Ms Adamson's irrational fear and any decision made by Mr Appleby to issue the notice, especially as the record does not overtly support a different conclusion.[35]

[81] I also consider that the Tribunal did not require evidence of specific intent for the purpose of its s 65 evaluation. The Tribunal specifically acknowledged at [41] that s 65 is concerned with the effect of the conduct, rather than the reasons for it. The difference is further emphasised at [46] of the decision, quoted above at [26]. I am not inclined to find that a specialist tribunal comprised of experts in the field of

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[34] *Fehling v Appleby* Notes of Evidence Taken before Tribunal, NZHRRT 24 CIV-2014-418-000021, 26 May 2014, [*Transcript, 26 May 2014*] at 174 and 187.

[35] For completeness, at various points of the transcript Mr Fehling details examples of discriminatory behaviour (for example, [*Transcript, 26 May 2014*] at 76-78, 106, 108, 114, 120, 124, 126, 130-131) but there was little, if any, basis to draw the inference that Mr Appleby was aware of, or participated in, the alleged discrimination.

human rights would inadvertently require evidence of intent to discriminate, having made those clear statements of principle.

A problem of a slightly different kind – the requirement for some linkage

[82] Problematically, however, the Tribunal tied its s 65 reasoning to its findings dealing with s 42 when it stated:

> [42] As we have concluded that the evidence before us does not establish the presence of a prohibited ground of discrimination, the case under s 65 must fail for the same reason as the case under s 42.

[83] This suggests that the Tribunal may have conflated the relevant evidential requirements and required that the impugned conduct had to be causally connected to prohibited discrimination. My review of the transcript of the proceedings also suggests that causative nexus, rather than discriminatory effect, was a focal point of the inquiry.[36] I nevertheless apprehend that the Tribunal was simply searching for some probative evidence of a link between prohibited grounds and Mr Appleby's conduct in order to be able to make a finding of prohibited discriminatory treatment per se. The following passage from the transcript best captures the Tribunal's reasoning in my view:[37]

> ….There has to be an evidentiary basis on which the inference is drawn, so what my questions are really saying to you is apart from saying it's indirect discrimination what are the facts, what is the evidence, on which you say we should draw the inference that connecting the apparently neutral mistaken statement to the various grounds of discrimination that you rely on. There's got to be a bridge between the two.

[84] I see no obvious error in this approach. The Tribunal was required to find that there was discrimination of some kind "on one of the prohibited grounds," that is: [38]

(a) Differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and

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36 *Transcript, 26 May 2014*, above n 34, at 37, 39, 103, 105 – 106.

37 *Transcript, 26 May 2014*, at 112. I would not normally rely on utterances during a hearing to ascertain the legal thresholds adopted by a tribunal, but Mr Fehling requested that I do so.

38 *Ministry of Health v Atkinson (on behalf of the estate of Atkinson) and others* [2012] NZCA 184, [2012] 3 NZLR 456, at [55] and [109]; *Attorney-General v Idea Services Ltd (in Stat Man)* [2012] NZHC 3229; [2013] 2 NZLR 512 at 124 – 125.

(b) Discriminatory impact – the differential treatment must impose a material disadvantage on the person or group differentiated against.

[85] Normally a person alleging discriminatory treatment must show how the relevant conduct, practice or condition impacts on a group by reference to an appropriate comparator group.[39] A text book example of indirect discrimination of the kind caught by s 65 is a height requirement under which men and women are treated the same, but which has a disproportionate effect on women.[40] If there is no good reason for the height restriction, it will infringe s 65. In this case however, there was no overt differential treatment or discriminatory impact of this type. As the Tribunal found, the trespass notice and the comments were ostensibly neutral as between classes of persons. Indeed, there is nothing to suggest that the trespass notice or the comments per se treated Mr Fehling differently or would have a discriminatory impact based on his German heritage. The Tribunal was therefore required to find some other basis for supporting an inference of differential treatment and discriminatory impact based on a prohibited ground. I am satisfied that the Tribunal was concerned to find a link or "a bridge between" the impugned conduct and prohibited grounds in this broader sense, rather than proof of a causal or material nexus between prohibited grounds of discrimination and Mr Appleby's conduct.

Reasonableness

[86] This however does not dispose of Mr Fehling's remaining and I think underlying concern, namely that the Tribunal's ultimate conclusion that there was no link was unreasonable given the findings of fact. The presence of community hostility based on prohibited grounds, the absence of a rational basis for Ms Adamson's fears and Mr Appleby's apparent indifference to the reasons for those fears, arguably supports an inference of at least an indirect link between prohibited discrimination and the trespass notice and that there was no good reason for the discrimination. I also accept that it will be difficult for any complainant to show an intention to discriminate or knowledge of a prohibited ground of discrimination. But

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39 *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537, and see Brookers, above n 29 at [HR1 – 490].

40 See Grant Huscroft and Paul Rishworth *Rights and Freedoms* (Brookers, 1995) at 278. See also Brookers, above n 29 at [HR1 – 489].

the Tribunal's findings essentially drive from a credibility assessment and the extent to which Mr Appleby's conduct was directly or indirectly discriminatory on a prohibited ground. As I have explained at [80], I am not prepared to contradict this assessment based on the transcript of the proceedings.

[87] I am fortified in this view because the claim is personal to Mr Appleby. A proper basis for inferring that Mr Appleby's actions were directly or indirectly discriminatory was required. The position might well be different in circumstances where the claim is made against the Board as a whole. The Tribunal might more easily infer that a Board comprising a representative cross section of the local community may have been affected by the community hostility based on prohibited grounds. The absence of a good reason for the trespass notice might then support the conclusion that the conduct was unlawfully discriminatory. But where the claim is personal to a particular individual, the Tribunal had to be cautious about drawing inferences from the behaviour of others to impute unlawful discriminatory conduct.

[88] Accordingly, I find that Mr Fehling has not made out his second primary ground of appeal.

Result

[89] I find that:

(a) Privacy Act victimisation per se is not actionable pursuant to s 66 of the HRA;

(b) There is no requirement for evidence of a specific intention to discriminate on a prohibited ground in order to establish an actionable claim under s 42 and/or s 65 the HRA;

(c) The Tribunal did not require evidence of specific intent to discriminate on a prohibited ground;

(d) The Tribunal did not err by requiring evidence of a link between a prohibited ground and Mr Appleby's conduct; and

(e) The Tribunal's conclusions were reasonable notwithstanding the finding of prohibited community hostility and or the absence of a good reason for the trespass notice and the comments.

[90] The appeal is therefore dismissed.

[91] I make no order as to costs or disbursements. Both Mr Fehling and Mr Appleby were self represented (though Mr Appleby's son appeared on his behalf). I also consider that the appeal was properly brought in order to clarify whether the Tribunal applied the correct threshold tests.

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