

- (1) ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFFS AND OF THEIR CHILDREN**
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON**

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2014] NZHRRT 30

Reference No. HRRT 008/2014

UNDER

**SECTION 51 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994**

BETWEEN

ZYX

PLAINTIFFS

AND

NORTHABLE DISABILITY SERVICES

FIRST DEFENDANT

AND

**ATTORNEY-GENERAL IN RESPECT OF
THE MINISTRY OF HEALTH**

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson, Member

REPRESENTATION:

Plaintiffs in person

Mr RJ Harte for first defendant

Ms M Coleman and Mr MJ McKillop for second defendant

DATE OF DECISION: 5 August 2014

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM

The application

[1] This is an application by NorthAble Disability Services (NorthAble) and the Attorney-General for an order striking out the whole of the statement of claim on the grounds that the Tribunal has no jurisdiction by reason of the fact that the Health and Disability Commissioner has not found a breach of the Code of Health and Disability Services Consumers' Rights (Code of Rights).

[2] In *Mackrell v Universal College of Learning* High Court Palmerston North CIV2005-485-802, 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 High Court Rules, r 15.1.

[3] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267:

A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed ...; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material ...; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction ...

[4] For more recent authority see *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [25] (Elias CJ) and [146] (Blanchard, McGrath and William Young JJ).

Background – statement of claim – contents

[5] The plaintiffs are self-represented litigants. They have two disabled children. The statement of claim alleges that NorthAble and the Ministry of Health have failed to carry out appropriate needs assessments and the funds allocated for the support of the two children are inadequate. The particular details of the allegations are not materially relevant.

The jurisdiction question

[6] The jurisdiction of the Tribunal under the Health and Disability Commissioner Act 1994 (HDC Act) is limited. It is not possible for an individual to bring proceedings before the Tribunal for the purpose of complaining about every grievance held in relation to health and disability services. The Tribunal's jurisdiction is strictly circumscribed by ss 50 and 51 of the HDC Act. Unless an individual can satisfy the prerequisites of these two sections the Tribunal cannot entertain the proceedings.

[7] We begin first with s 51 of the HDC Act which provides:

51 Aggrieved person may bring proceedings before Tribunal

Notwithstanding section 50(2) but subject to section 53, the aggrieved person (whether personally or by any person authorised to act on his or her behalf) may bring proceedings before the Tribunal against a person to whom section 50 applies if he or she wishes to do so, and—

(a) the Commissioner, having found a breach of the Code on the part of the person to whom that section applies, has not referred the person to the Director of Proceedings under section 45(2)(f); or

(b) the Director of Proceedings declines or fails to take proceedings.

[8] The persons to whom s 50 of the Act applies are described in s 50(1) in the following terms:

(1) This section applies to any health care provider or disability services provider in respect of whom or of which an investigation has been conducted under this Part in relation to any action alleged to be in breach of the Code.

[9] An aggrieved person who brings proceedings must accordingly show:

[9.1] That the proposed defendant is a person to whom s 50 of the Act applies ie is a provider in respect of whom **an investigation has been conducted** under Part 4 of the Act in relation to any action alleged to be in breach of the Code of Health and Disability Services Consumers' Rights; **and**

[9.2] That the Health and Disability Commissioner has **found a breach of the Code** on the part of the provider; **and**

[9.3] That the Commissioner has not referred the person to the Director of Proceedings under s 45(2)(f) of the Act **or** that the Director has declined or failed to take proceedings.

[10] In all, three distinct jurisdictional pre-requisites must be established. The requirements are cumulative.

The facts relevant to jurisdiction

[11] By letter dated 10 December 2013 the Complaints Assessment Manager of the Health and Disability Commissioner advised the plaintiffs that the complaint they had made to the Commissioner was not one within the jurisdiction of the HDC Act:

Thank you for your letter of 22 November 2013.

You raise several concerns relating to funding entitlements for disability services provided to your children, [names withheld], by NorthAble and the Ministry of Health. Unfortunately the Commissioner is unable to deal with your complaint as it is not covered by the Health and Disability Commissioner Act 1994.

The Commissioner's complaints resolution role under the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights is restricted to matters relating to the quality of health or disability service and delivery. The Commissioner is only able to deal with matters relating to the way in which health and disability services are provided. The Commissioner is unable to examine issues of funding or entitlement to a particular service.

I note that you have made similar complaints to our Office in the past regarding NorthAble and Ministry of Health funding for disability services for your children, and you have been informed that the Commissioner is unable to assist you with such concerns. In future, if you have concerns regarding NorthAble and Ministry of Health funding services, I suggest you bring these to their attention.

I enclose a brochure explaining your rights when receiving a health or disability service. More information about the Health and Disability Commissioner is available on the Office's website at www.hdc.org.nz

Thank you for bringing your concerns to the Commissioner's attention.

[12] In addition to the jurisdiction issue specifically raised by the Commissioner in this letter it is relevant to note also that s 38 of the HDC Act provides:

38 Commissioner may decide to take no action on complaint

- (1) At any time after completing a preliminary assessment of a complaint (whether or not the Commissioner is investigating, or continuing to investigate, the complaint himself or herself), the Commissioner may, at his or her discretion, decide to take no action or, as the case may require, no further action on the complaint if the Commissioner considers that, having regard to all the circumstances of the case, any action or further action is unnecessary or inappropriate.
- (2) The Commissioner's consideration under subsection (1) may, in particular, take into account any of the following matters:
 - (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made:
 - (b) whether the subject matter of the complaint is trivial:
 - (c) whether the complaint is frivolous or vexatious or is not made in good faith:
 - (d) whether the person alleged to be aggrieved does not want any action taken or, as the case may be, continued:
 - (e) whether there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person alleged to be aggrieved to exercise.
- (3) Subsection (2) does not detract from the generality of subsection (1).
- (4) In any case where the Commissioner decides to take no action, or no further action, on a complaint, the Commissioner must inform the following persons and agencies of that decision and the reasons for it:
 - (a) the complainant:
 - (b) the health care provider or the disability services provider to whom the complaint relates:
 - (c) any agency or any person to whom the complaint has, in accordance with section 34 or section 36, been referred:
 - (d) any advocate to whom the complaint has been referred.

Discussion

[13] Given the terms of the Commissioner's letter dated 10 December 2013 and of s 38 of the Act it is clear that the plaintiffs cannot presently satisfy the three distinct pre-requisites prescribed by ss 50 and 51 of the Act. In summary, because the complaint made by the plaintiffs to the Commissioner was not within the Commissioner's jurisdiction no investigation was conducted and therefore no breach of the Code of Rights was found. The Tribunal, in turn, has no jurisdiction.

[14] The claims made by the plaintiffs are so clearly untenable that they cannot possibly succeed and the proceedings must be struck out.

DECISION

[15] For the foregoing reasons the decision of the Tribunal is that:

[15.1] The Tribunal has no jurisdiction to hear these proceedings.

[15.2] The statement of claim is struck out.

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Mr RPG Haines QC
Chairperson

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Ms GJ Goodwin
Member

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Mr BK Neeson
Member