

Reference No. HRRT 071/2016

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN DAVID HINES

FIRST PLAINTIFF

TANYA JACOB

SECOND PLAINTIFF

AND THE ATTORNEY-GENERAL OF NEW ZEALAND

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Dr SJ Hickey MNZM, Member

BK Neeson JP, Member

REPRESENTATION:

Mr G Little for plaintiffs

Mr P Rishworth QC and Ms M Conway for defendant

Mr J Hancock for Human Rights Commission as intervener

Mr SE Greening for Churches Education Commission Trust Board

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 29 March 2017

**DECISION OF TRIBUNAL GRANTING APPLICATION BY CEC
UNDER SECTION 108 HUMAN RIGHTS ACT 1993¹**

Background

[1] These proceedings were filed on 13 October 2016. The statement of reply by the Attorney-General was received on 5 December 2016.

¹ [This decision is to be cited as: *Hines v Attorney-General (Application by Non-Party to be Heard)* [2017] NZHRRT 9.]

[2] On 19 December 2016 the Human Rights Commission gave notice of its intention to exercise its right to appear as intervener pursuant to its functions under ss 5(2)(j), 92H(1)(a) and 92H(2) of the Human Rights Act 1993.

[3] On 28 February 2017 the Churches Education Commission Trust Board (CEC) gave notice under s 108(2) of the Act of its intention to appear and to call evidence on any matter that should be taken into account by the Tribunal in determining the proceedings. The application is supported by an affidavit by Ms TJ Kirkley sworn on 20 February 2017.

The application

[4] In these proceedings religious instruction in State schools is challenged. The plaintiffs contend a secular education should respect all views, not merely those that are in a majority among parents at a local school. The relief sought is a declaration under Part 1A of the Human Rights Act 1993 that various sections of the Education Act 1964 and of the Education Act 1989 are inconsistent with the right to freedom from discrimination on the grounds of religious or ethical belief as guaranteed by s 19 of the New Zealand Bill of Rights Act 1990.

[5] The CEC is a non-denominational trust which provides a Christian Religious Education programme to State primary schools upon request by the Boards of Trustees of those schools. It currently provides such programmes to a total of 667 State primary schools throughout New Zealand. It currently has 16 church denominations in New Zealand as members.

[6] The CEC wishes to appear in these proceedings and to call evidence on any matter that should be taken into account in determining the proceedings on the following grounds:

[6.1] CEC has longstanding and extensive lawful interests in the provision of Christian religious instruction to State primary schools in New Zealand.

[6.2] CEC has an interest in the present proceedings greater than the public generally:

[6.2.1] CEC is the largest provider of religious instruction to State primary schools in New Zealand; and

[6.2.2] CEC can provide specialist knowledge to the Tribunal regarding the operation and practice of religious instruction in State primary schools in New Zealand.

[6.3] CEC will be directly and adversely affected by the declaratory relief sought by the plaintiffs, if granted by the Tribunal.

[6.4] It would be unjust and prejudicial to the CEC for the Tribunal to decide the issues in dispute in this proceeding in the absence of CEC.

[6.5] The CEC has been joined as an interested non-party to the proceedings in *McClintock v Attorney-General* [2015] NZHC 1280, proceedings which involved the same legal issues as in the present proceedings before the Tribunal.

The position of the parties and of the Human Rights Commission

[7] By email dated 16 March 2017 counsel for the plaintiffs advised that as the plaintiffs' evidence involves in large part the CEC curricula they do not oppose the intervention and leave it to the Tribunal to determine the range and scope of the intervention.

[8] The Attorney-General has by email dated 20 March 2017 advised he will abide the decision of the Tribunal. The Human Rights Commission similarly abides.

Discussion

[9] Section 108 of the Human Rights Act stipulates that certain non-parties may be allowed to appear before the Tribunal:

108 Persons entitled to be heard

- (1) Any person who is a party to the proceedings before the Tribunal, and any person who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally, may appear and may call evidence on any matter that should be taken into account in determining the proceedings.
- (2) If any person who is not a party to the proceedings before the Tribunal wishes to appear, the person must give notice to the Tribunal and to every party before appearing.
- (3) A person who has a right to appear or is allowed to appear before the Tribunal may appear in person or be represented by his or her counsel or agent.

[10] The most recent decision of the Tribunal addressing s 108 is *Director of Human Rights Proceedings v Sensible Sentencing Group Trust (Application by Victims to be Heard)* [2013] NZHRRT 26. In that decision at [17] to [20] the Tribunal made the following observations:

[10.1] In determining whether it has been "satisfied" that a non-party has an interest in the proceedings greater than the public generally, the Tribunal will be required to balance competing interests. On the one hand there may be a concern to ensure everyone interested in a particular matter is heard but on the other hand proceedings involving a number of parties may become cumbersome and costly.

[10.2] A non-party can apply either to appear to make submissions or to appear and to call evidence on any matter that should be taken into account in determining the proceedings.

[10.3] If the Tribunal is satisfied that the non-party has an interest in the proceedings greater than the public and allows the non-party to appear before the Tribunal it does not follow that the non-party then becomes a "party" to the proceedings. The non-party remains a "non-party" but is either allowed to appear to make submissions or to appear and to call evidence "on any matter that should be taken into account in determining the proceedings".

[11] In the present case the grounds advanced by CEC in support of its application are compelling. There can be little doubt that CEC has an interest in the proceedings greater than the public generally and that the Tribunal and the parties will be assisted by the participation of CEC in the proceedings. It is significant the application is not opposed by the plaintiffs and that the Attorney-General and the Human Rights Commission have adopted the neutral position of abiding the decision of the Tribunal.

[12] In these circumstances the application is granted.

ORDERS

[13] The following formal orders are made:

[13.1] Pursuant to s 108 of the Human Rights Act 1993 the Churches Education Commission Trust Board is given leave to appear before the Tribunal to call evidence and to make submissions on any matter that should be taken into account in determining the present proceedings.

[13.2] The Churches Education Commission Trust Board may appear in person or be represented by counsel.

[13.3] The Churches Education Commission Trust Board is to be served with all documents filed in this proceeding and given notice of all case management teleconferences.

[14] The Secretary is directed to convene a case management teleconference at the first convenient opportunity.

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Mr RPG Haines QC
Chairperson

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Dr SJ Hickey MNZM
Member

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Mr BK Neeson JP
Member