**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV 2006-485-1713**

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| UNDER | the Judicature Amendment Act 1972 |
| IN THE MATTER OF | a decision of the Human Rights Review Tribunal under the Human Rights Act 1993 |
| BETWEEN | ATTORNEY-GENERAL<br>Applicant |
| AND | THE HUMAN RIGHTS REVIEW TRIBUNAL<br>First Respondent |
| AND | CHILD POVERTY ACTION GROUP INCORPORATED<br>Second Respondent |

Hearing: 16 October 2006

Appearances: C Gwyn & J Foster for Applicant
C A Rodgers & J Ryan for Second Respondent

Judgment: 6 November 2006

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**RESERVED JUDGMENT OF MILLER J**

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[1] The Child Poverty Action Group Incorporated (**CPAG**) complains that legislation conferring dependant child tax credits discriminates, on employment and family status grounds, against those on income-tested benefits, who are ineligible for the credits. It has sought a declaration to that effect from the Human Rights Review Tribunal.

[2] The Attorney resists, and says that CPAG lacks standing to bring proceedings before the Tribunal because it is not an alleged victim of discrimination, nor does it sue on behalf of any such person. The Tribunal held in an interlocutory decision that CPAG has standing, and the Attorney now moves for judicial review of that decision.

[3] This is the first case under Part 1A of the Human Rights Act 1993, which provides that a legislative enactment breaches the Act if it is inconsistent with the right to freedom from discrimination affirmed by s.19 of the New Zealand Bill of Rights Act 1990. That section provides that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993, which in turn prohibits discrimination on grounds including employment and family status. Family status includes responsibility for care of children.

**Background**

[4] The tax credit in its present form is called the In Work Payment, and it is provided for in s.KD2AAA of the Income Tax Act 2004. It took effect on 1 April 2006. Its predecessor was known as the Child Tax Credit, and it too is the subject of the proceeding. A brochure provided by counsel explains that the In Work Payment is paid to families in which a single parent normally works 20 hours or more a week, or one or both parents between them normally work 30 hours a week. The amount paid varies with the number of children and the family's pre-tax income. For example, a family income of $35,000 before tax entitles a family with three children to an In Work Payment of $120 per week, reducing to $2 for a family income of $92,000.

[5] The legislation expressly provides that the In Work Payment is not available where the principal caregiver or his or her spouse, civil union partner, or de facto partner receives an income-tested benefit, which term is defined to mean unemployment, sickness, domestic purposes, emergency, independent youth, orphan's, unsupported child's, and widow's benefits, or New Zealand superannuation.

[6] CPAG complained about the Child Tax Credit in 2002. The Human Rights Commission accepted the complaint for investigation and resolution, reasoning that it arguably raised issues of discrimination on the prohibited grounds of employment and family status. Mediation was initiated but, for reasons that were not explained before me, no mediation was held.

[7] CPAG accordingly launched proceedings, filing a statement of claim on 23 November 2004. CPAG was and is represented by the Director of Human Rights Proceedings. The Director's reasons for deciding to provide representation were not the subject of evidence (or challenge), but s.92 of the Human Rights Act requires that the Director must consider, among other things, whether the complaint raises a significant question of law, whether its resolution would affect a large number of people, the level of harm involved, whether the proceedings are likely to succeed, whether representation is an effective use of the Director's resources, and whether representation is in the public interest.

[8] The only plaintiff named in the statement of claim was CPAG. It pleaded that it is a non-profit group formed in 1994 to advocate for more informed social policy to support children in New Zealand, particularly those who live in poverty. Its objects include promoting awareness of the causes and consequences of child poverty and promoting better policies for children and young people, focusing on the right of every child and young person to security, food, shelter, education, health care and opportunities for development. It claimed to sue in the interests of about 250,000 children whose principal caregivers are ineligible, and alleged that the Child Tax Credit and In Work Payment are discriminatory. CPAG pleaded that it had complained to the Commission but its complaints had not been resolved.

[9] The Attorney-General is the appropriate respondent to a proceeding under Part 1A in respect of an enactment. He pleaded in response that as CPAG was neither a complainant nor an aggrieved person, the Tribunal had no jurisdiction to hear the proceeding; alternatively, the Tribunal should dismiss it for want of standing. He also pleaded that insofar as CPAG sought a declaration of inconsistency in respect of the In Work Payment, the doctrine of ripeness applied because the In Work Payment did not come into force until 1 April 2006; accordingly, the claim was premature and should be rejected. He also denied that the Child Tax Credit and In Work Payment are discriminatory.

[10] The Tribunal dismissed the application for an order striking out or dismissing the claim in a decision of 15 September 2005. I will return to the Tribunal's reasoning below.

[11] The Attorney appealed, but the appeal foundered when Ronald Young J pointed out that the only possible jurisdictional basis for it under s.123 of the Human Rights Act was that the Tribunal's decision was a "final determination": *Attorney-General v Child Poverty Action Group Incorporated* (Wellington High Court, CIV 2005-485-2140, 17 May 2006, Ronald Young J). The Tribunal's decision was interlocutory in nature. He declined to "regularise" the proceedings by converting them into an application for judicial review or declaratory judgment, expressing serious concern about bringing review proceedings or declaratory judgment proceedings the effect of which would be to circumvent s.123.

[12] In no way discouraged, the Attorney brought this application for judicial review. In his statement of claim, the Attorney alleged that CPAG is neither a victim of the alleged discrimination nor a representative of any particular victims, and that the In Work Payment provisions were not yet in force when the proceeding was brought. He sought an order quashing the Tribunal's decision that it has jurisdiction to hear CPAG's proceeding, or to hear that part of the proceeding that challenges the In Work Payment provisions.

[13] Through the Director, CPAG responded that those eligible to complain, and thence to bring proceedings before the Tribunal, are not confined to aggrieved

persons or those acting in a 'representational capacity' for aggrieved persons, and further pleaded that the Tribunal did not err in refusing to strike out the claim on grounds of ripeness. CPAG further pleaded that the Attorney's objection on grounds of ripeness is academic, for the relevant provisions are now in force.

**The issue**

[14] The proceeding turns on two provisions of the Human Rights Act 1993, one empowering the Commission "to receive and assess a complaint alleging that there has been a breach of Part 1A or Part 2, or both" (s.76(2)(a)), and the other providing that if a complaint referred to in s.76(2)(a) has been made, "the complainant, the person aggrieved (if not the complainant), or the Commission" may bring civil proceedings before the Tribunal (s.92B(1)).

[15] The Act does not define the terms complaint, complainant, or person aggrieved.

[16] Ms Gwyn contended that aggrieved person means a person allegedly the victim of discrimination, while a complainant is a person acting on behalf of an aggrieved person. In argument, she modified this position somewhat, accepting that an aggrieved person might be someone who had either suffered discrimination personally or was sufficiently connected to a person who had been discriminated against. Ms Rodgers supported the Tribunal's decision, maintaining that any person may complain to the Commission and thereafter bring civil proceedings before the Tribunal.

**The Tribunal's decision**

[17] The Tribunal delivered a closely reasoned and comprehensive decision. It is not easy to summarise, but the conclusions were succinctly stated. It held that the word "complaint" in s.76(2)(a) and the word "complainant" in s.76(2)(a) and s.92B should be given their ordinary meanings; that is, conveying the idea respectively of an expression of dissatisfaction and of someone who has expressed dissatisfaction

about something. It also held that it had jurisdiction to evaluate the In Work Payment provisions because they had been enacted, notwithstanding they had yet to come into force.

[18] The Tribunal carefully analysed the legislation, holding that the legislature had chosen to distinguish between persons aggrieved and complainants, and that there was nothing in the legislation to suggest that a complainant may bring a complaint only with the authority of an aggrieved person. The only qualifying condition for a claim is that there must have been a complaint of the kind referred to in s.76(2)(a), which requires only that the complaint must have been received and assessed by the Commission, as it had been in this case. There was no express requirement that person who had made a complaint should have any connection with its subject matter at all.

[19] The Tribunal recorded that CPAG had not asked it to deal with the claim on the basis that it was a representative action of any kind, nor was CPAG asking the Tribunal to approach the matter on the basis that it had the actual or implied authority of any particular affected individual. CPAG sued solely as a "concerned observer of the issues". It appeared to be a responsible public interest group with a real and sincere concern about the issues it raised, but manifestly it was not a taxpaying primary caregiver and so it was not directly affected in the sense that it might itself enjoy a benefit or suffer disadvantage from the proceeding.

[20] The Tribunal noted that Ms Rodgers argued that, in any event, CPAG had a sufficient connection with the matters at issue to bring the proceedings, focusing on its work and the nature of the issues raised. The Tribunal did not find it necessary to determine that question, but it did hold that it would not have been willing to conclude at that stage of the proceeding that CPAG was insufficiently connected to the substantive issues, and so would have declined to strike the claim out.

[21] Nor did a purposive construction assist the Attorney, in the Tribunal's view. By their very nature, discrimination cases may have consequences that transcend the private interests involved, and Part 1A was intended to open the possibility of anti-discrimination challenges to all manner of public functions. Potential practical

concerns about interfering busybodies and misuse of judicial resources could be overstated; any complainant must begin by articulating a coherent claim, and proceedings in the Tribunal require commitment of time and attention, with the risk of adverse costs awards. And in this case practical complications were few because the only remedy available was a declaration of inconsistency; no question of awarding damages arose.

[22] The Tribunal also pointed out that there could be no challenge to jurisdiction had the proceedings been initiated by (say) a primary caregiver claiming to have been affected by the relevant legislation. If the claim were brought by or on behalf of such a person and the Director was to act, as he was doing, then there would be no cost, or risk of an adverse costs award, for the person concerned. In short, it was far from clear that a decision in favour of the Attorney's proposed interpretation would be an end of the matter.

**The amended statement of claim**

[23] The Director has since filed an amended statement of claim in the Tribunal. The claim names CPAG as the first plaintiff, but adds a second plaintiff, CPAG acting on behalf of Ms AB of Auckland and Ms CD of Christchurch. AB is said to be in receipt of a domestic purposes benefit under the Social Security Act, and CD is said to be in receipt of weekly compensation under the Injury Prevention, Rehabilitation and Compensation Act 2001, as a result of which both are ineligible to receive the In Work Payment to assist with the upbringing of their respective children.

[24] In light of these amendments, one might have expected Ms Rodgers to contend that the application for judicial review is moot. She did not take that course, however. Rather, she explained that CPAG intends to remove AB and CD as a group of persons on whose behalf it sues. They have been included at this stage only to ensure that the proceeding can continue in the Tribunal notwithstanding this judicial review application and any appeals from my judgment. She shared Ms Gwyn's view that CPAG's claim raises an important issue. From her perspective, it is important that groups such as CPAG should be able to bring proceedings without

having to name an individual victim on whose behalf the claim is brought. The Director's representation notwithstanding, AB and CD are likely to suffer stress and will face media interest in their personal circumstances, should they remain as plaintiffs. (For that reason, name suppression has been sought in the Tribunal.)

[25] Notwithstanding her submission that the question of standing is a live and important one, Ms Rodgers contended that I ought to decline judicial review even if satisfied that the Tribunal erred in law, pointing to the right of appeal under s.123. The Attorney will have a right of appeal from the substantive decision should CPAG succeed, and this is in substance an interlocutory appeal of the kind that s.123 does not permit.

[26] Ms Gwyn's stance was that the addition of AB and CD made no difference, for CPAG is still named as a plaintiff in its own right. Further, the question of standing to bring complaints under Part 1A is of great importance, not only to this case but also to future claims. However, she did modify the Attorney's claim to relief in this proceeding, confining herself to a request for a declaration that CPAG lack standing to sue in its own right.

[27] I accept that in the exercise of its discretion the Court might decline judicial review on the ground that it is tantamount to an interlocutory appeal. In the circumstances, however, I think the better course is to address the merits. The issue has been fully argued, both parties agree that it remains live notwithstanding amendment to the pleading, and it is a legal issue of some wider significance for proceedings under the Act. I observe that the Tribunal itself has since held that experience has shown that it sometimes makes significant decisions at an interlocutory stage, citing this case as an example: *Director of Human Rights Proceedings v The Catholic Church for New Zealand* HRRT 43/05 13 June 2006 at [20]. It suggested that there ought to be a way of having such decisions reviewed in the High Court.

**The legislative history**

[28] Counsel both appealed to use of the terms complaint, complainant, and aggrieved person in predecessor legislation.

*The Race Relations Act 1971*

[29] The Race Relations Act was enacted to affirm and promote racial equality in New Zealand. It established the Race Relations Conciliator, with jurisdiction to investigate complaints by "any person". Section 14 provided that the Conciliator might in his discretion decide not to investigate if, in his opinion, "the complainant has not a sufficient interest in the subject-matter of the complaint", so confirming that the complainant need not be a victim of discrimination. The Conciliator might also refuse to investigate if the complaint related to a matter of which "the person alleged to be aggrieved" had known for more than 12 months. Other grounds for refusing to investigate included the trivial or vexatious nature of the complaint or that the person aggrieved did not want the investigation to continue. Another was that the person aggrieved had an adequate remedy available elsewhere.

[30] Addressing the Race Relations Bill on 15 December 1970, the Acting Minister of Justice, the Hon David Thomson, explained why the Bill allowed anyone to complain:

> Clause 14 has been amended to permit a complaint to be made to the conciliator by someone other than the aggrieved person. This question gave the committee a great deal of difficulty. The last thing we want is to encourage the interfering busy-body or the person or organisation that for its own purposes wishes to foment complaints and grievances. On the other hand, as the New Zealand Law Society and other witnesses pointed out, some people who may be subjected to racial intolerance might not themselves lay complaints with the conciliator simply because they may be inarticulate or ignorant of their rights, or suspicious or cynical of authority, or fearful of incurring expenses. The result is that the clause has been amended to permit complaints to be made on behalf of the alleged victim of discrimination, but the conciliator may decide not to proceed with the investigation if he feels that the complainant does not desire it. Under the Bill as introduced, the conciliator also has power to refuse to investigate a trivial, frivolous, or vexatious complaint.

[31] The Act provided for civil remedies at the suit of the Attorney or the aggrieved person. In particular, s.17 provided that where the Crown or its servants or agents committed the breach, the Conciliator might certify to the person alleged to be aggrieved by the breach that it was a proper case for civil proceedings under s.21. That section in turn provided that the person aggrieved might sue in the High Court. Remedies included declaration and damages, the latter reflecting losses and humiliation and injury to feelings.

*The Human Rights Commission Act 1977*

[32] The Human Rights Commission Act was enacted to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights. It established the Human Rights Commission, the functions of which included investigating breaches of the Act, acting as conciliator and taking further action. Section 35 was in similar terms to s.14 of the Race Relations Act, which remained in force to address discrimination on grounds of race, but s.35 did not include any provision specifying that the Commission might decline to investigate if the complainant had not a sufficient interest in the subject matter of the complaint. However, it still used the term complainant, because the Commission was required to tell the complainant if it decided not to investigate. The Act also provided (on amendment in 1981) that the Commission might also refuse to investigate if it appeared to the Commission that, having regard to all the circumstances, any further investigation was unnecessary.

[33] By way of explanation for the omission of a provision allowing the Commission to refuse to investigate where the complainant lacked a sufficient interest, Ms Gwyn referred me to the second reading of the Human Rights Commission Bill on 20 July 1977. Addressing the Bill, the Minister of Justice said that clause 32(1)(c) of the Bill had been deleted because special interest groups might otherwise be debarred from taking up the cause of disadvantaged persons. He stated that it would not now matter that "the actual complainant" did not have a particular interest so long as "the aggrieved person" was content for an investigation to be made.

[34] Section 38 of the 1977 Act allowed the Proceedings Commissioner to bring proceedings before the Equal Opportunities Tribunal for a breach of Part 2 of the Act. Proceedings might be brought on behalf of a class of persons. In any such proceedings, "the aggrieved person (if any)" could not be named as a party unless the Tribunal otherwise ordered. However, the aggrieved person could sue if the Commission declined to do so or believed no breach had occurred.

[35] In *New Zealand Freedom from Discrimination Group v New Zealand Grand Lodge of Freemasons* [1980] 2 NZAR 401, the Equal Opportunities Tribunal considered a complaint that Freemasons discriminated against others in relation to employment, and by espousing the cause of fellow Masons when called upon to do so whether the cause be just or unjust. The respondent contended that there was no jurisdiction to consider such a claim under the Human Rights Commission Act. Specifically, it contended that the plaintiff was not an aggrieved person within the meaning of that term as used in s.38.

[36] The Tribunal held that an aggrieved person must be one against whom a breach of the provisions of Part 2 of the Act had been committed, or alternatively a person identified with or in some way connected with those who suffer from the discriminatory practice. The Tribunal was careful to record that it did not mean to cover every type of case. Ultimately the question was one of fact. Further, the term "the aggrieved person" should not be interpreted in an unduly restrictive manner. Nonetheless, the Tribunal considered that the term should not be so interpreted that it really means no more than "any person". Section 38, whether read by itself or in the context of the other provisions of the Act, required the aggrieved person to be in some way differentiated from the generality of people or the public.

*The Human Rights Act 1993*

[37] The Human Rights Act consolidated and amended the Race Relations Act and the Human Rights Commission Act, and provided better protection of human rights in New Zealand. As Ms Gwyn pointed out, the Commission's functions and powers under ss 5-6 were and are extensive; it might promote awareness of human rights in various ways, inquire into any matter, including any enactment, and report

to the Prime Minister on any matter affecting human rights, including the implications of legislation. It might seek a declaratory judgment if it thought that doing so would facilitate the performance of its primary functions.

[38] The Act provided in s.151 that, except as expressly provided, nothing in the Act limited or affected the provisions of any other Act or regulation in force in New Zealand. Nor did anything in the Act relating to grounds of prohibited discrimination affect anything done by or on behalf of the Government of New Zealand, subject to exceptions the substance of which was that the Government was liable for discrimination on grounds of sex, marital status, religious or ethical belief, colour or race or ethnic origins. Section 152 provided that s.151 would expire with the close of 31 December 1999, at which time it would be deemed to be repealed.

[39] The Commission continued in existence under the 1993 Act, and its Complaints Division existed, inter alia, to investigate any alleged breach of Part 2. As originally enacted, s.76 was in similar terms to s.35 of the Human Rights Commission Act. It provided, inter alia, that the Complaints Division might refuse to investigate if "the complainant or the person alleged to be aggrieved (if not the complainant)" had known of the matter for more than 12 months.

[40] Section 83 provided for civil proceedings before the Complaints Review Tribunal. Where the Commissioner sued, "neither the complainant (if any) nor the aggrieved person (if not the complainant)" was to be named as a party unless the Tribunal ordered otherwise. These persons might sue if the Commissioner declined to do so or believed there was no breach.

[41] In *Amaltal Fishing Company Limited v Nelson Polytechnic* [1996] NZAR 97, the Complaints Review Tribunal considered a complaint that the Nelson Polytechnic had adopted a practice of reserving for Maori or Pacific Islanders a number of the limited places available in a fishing cadet course. The applicant was a fishing company, and its evidence was that it sponsored suitable cadets wishing to take up positions in the fishing industry. The Tribunal held that Amaltal was an aggrieved person within the meaning of that term as used in s.17 of the Race Relations Act, s.38 of the Human Rights Commission Act, and s.83 of the Human Rights Act. The

Tribunal noted that there was no dispute on that point, but it went on to add that under s.83 of the Human Rights Act a "complainant" might also bring such proceedings, and Amaltal certainly came within the term "complainant".

*The 2001 amendments*

[42] Upon the expiry of s.151, Parliament moved to incorporate discrimination by Government into the 1993 Act. The Human Rights Amendment Act 2001 introduced Part 1A, and with it the possibility of complaints to the Commission of an essentially political character. The purpose of Part 1A is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by s.19 of the New Zealand Bill of Rights Act 1990 contravenes Part 1A if it is that of the legislative, executive, or judicial branch of government, or that of any person or body in the performance of any public function, power or duty conferred or imposed on that person by or pursuant to law. An act includes an enactment and an act or omission authorised or required by an enactment. The only remedy available in the case of an enactment is a declaration of inconsistency, although other breaches of Part 1A may attract damages.

[43] Part 3, dealing with dispute resolution, was amended to incorporate disputes about compliance with Part 1A. The former s.76 was repealed, and the functions of the Commission were altered. Its primary functions under Part 3 are to provide information to members of the public who have questions about discrimination, and to facilitate the resolution of disputes about compliance with Part 1A or Part 2, by the parties concerned, in the most efficient, informal, and cost effective manner possible. So that it might perform those primary functions, further functions were conferred on the Commission; those of receiving and assessing a complaint, of gathering information, of offering services designed to facilitate resolution, including mediation, and of taking action under Part 3. Section 80 is in similar terms to the former s.76, except that the section now provides that the Commission may only take action in relation to a complaint if the complainant or person alleged to be aggrieved (if not the complainant) tells the Commission that he or she wishes to proceed with it. The Commission may still decline to take action if, having regard to all the

circumstances of the case, it thinks it unnecessary to do so or considers the complaint is trivial or vexatious or was not made in good faith.

[44] The 2001 amendments extended to Part 1A the existing approach to eligibility to complain or sue. In other words, the legislation continues to envisage that a complaint might be made, without specifying by whom, and expressly contemplates that a complaint might be brought by the person alleged to be aggrieved or, if not that person, a complainant. The same persons may sue. Section 92B provides that where a complaint referred to in s.76(2)(a) has been made, the complainant, the person aggrieved (if not the complainant) or the Commission may bring proceedings before the Tribunal. The right of action expressly includes proceedings for a breach of Part 1A that is an enactment. The Director may choose to represent such a person in the exercise of his or her functions under s.90.

[45] Proceedings before the Human Rights Review Tribunal are governed by Part 4. Section 108(1), which was not amended in 2001, deals with persons entitled to be heard. It provides:

> 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.

*Legislative history: conclusions*

[46] The legislative history reveals that there has never been any constraint on who might lay a complaint.

[47] The legislation has always permitted private enforcement proceedings, while providing also for the Commission (or its predecessors) to take action, but over time private enforcement has assumed greater importance in the legislative scheme. In the Race Relations Act and Human Rights Commission Act the only private plaintiff which might bring proceedings was the person aggrieved. Although not defined, that term envisaged some connection with a dispute that was greater than that of the public at large: *Amaltal Fishing.* The 1993 Act, however, specifically envisaged

that a complaint might be laid, and proceedings brought, by the aggrieved person or by a complainant who was not the aggrieved person. That remained the position following the 2001 amendments, under which the Commission itself can take action only if the complainant or aggrieved person consents.

**The approach to construction**

[48] The Oxford English Dictionary Online defines "complaint" as:

> Outcry against or because of injury; representation of wrong suffered; utterance of grievance. … An utterance or statement of grievance or injustice suffered. … A statement of injury or grievance laid before a court or judicial authority (especially and properly a Court of Equity) for purposes of prosecution or of redress; a formal accusation or charge.

[49] And complainant is defined as:

> One who enters a legal complaint against another. … One who complains, a complainer.

[50] Ms Rodgers appealed to very similar dictionary definitions, arguing that they are consistent with the purposes of the Human Rights Act, which include better protection of human rights in New Zealand. That must mean effective and wide protection from discrimination, which requires generous access to the Tribunal to challenge allegedly discriminatory policy and legislation. She referred also to s.6 of the New Zealand Bill of Rights Act 1990, which provides that whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in that Act, that meaning shall be preferred to any other.

[51] Ms Gwyn agreed that a purposive approach is required, but contended that the terms "complaint" and "complainant" are general expressions that must be read in their statutory context. Interpreting "complaint" to mean a complaint brought by or on behalf of an aggrieved person is consistent with the concept that human rights belong to individuals. Further, an interpretation consistent with the New Zealand Bill of Rights Act 1990 is one that provides an effective remedy for any breach of an individual's rights under s.19 to be free from discrimination: *Attorney-General v Udompun* [2005] 3 NZLR 204 at [169]. Both the New Zealand Bill of Rights Act

1990 and the International Covenant on Civil and Political Rights require that claims be brought by, or at least on behalf of, the victim. She also contended that the United Kingdom Human Rights Act 1998 expressly limits the right to bring proceedings for a breach of that Act to victims, as does the Canadian Charter of Rights and Freedoms.

[52] Developing this point, Ms Gwyn argued that there are cogent policy reasons why a Court should refuse to act in the absence of a *lis* between the parties. A discrimination claim necessarily requires proof of comparative disadvantage, and that is generally incapable of being made out in the abstract. The purpose of the free, informal, and efficient dispute resolution process in the Human Rights Act is to ensure that persons who have suffered discrimination can easily vindicate their rights. Parliament cannot have intended that anyone whatsoever could bring a complaint about discrimination affecting an individual, other than on behalf of that individual. Such claims are not readily justiciable and may waste scarce judicial resources. She referred to the judgment of Fisher J in *Moxon v Casino Control Authority* (High Court Hamilton, M 324/999, M 325/999, 24 May 2000):

> Counting against an over-readiness to grant standing are the public interest in avoiding or reducing unnecessary litigation, particularly that class of litigation which may lie on the fringes of justiciability due to its political or philosophical character. There is also a private interest in freeing the parties from the cost, delay and harassment of unwarranted litigation brought by busybodies.

[53] To similar effect, she invoked the judgment of the Supreme Court of Canada in *Canadian Council of Churches v The Minister of Employment and Immigration* [1992] 1 SCR 336, 252:

> It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organisations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

[54] She emphasised that the presentation of facts is not a mere technicality; rather, it is essential to a proper consideration of the issues. And she pointed out that

the failure of a diffuse challenge could prejudice subsequent claims by people with specific complaints: *Hy & Zel v Ontario (Attorney-General)* [1993] 3 SCR 675.

[55] Ms Rodgers responded that the legislature must be taken to have eschewed in the New Zealand Bill of Rights Act 1990 a provision limiting the right of action to those whose rights and freedoms had been breached. The original draft NZBORA contained such a provision, but it was not carried forward into the legislation. She emphasised that decisions such as *Attorney-General v Udompun* were concerned with the question whether damages are available; the Court was not required to consider whether a third party might bring proceedings. Discrimination is often suffered by a group, and the right may be asserted by groups or on the basis of a victim's membership of such a group.

**Discussion**

[56] I cannot accept the Attorney's contention that a "complainant" for the purposes of s.92B must be an alleged victim of discrimination or someone acting on his or her behalf. On the contrary, both the ordinary and natural meaning of "complaint" and "complainant" and the legislative history suggest that any person may complain of discrimination.

[57] The term 'complainant' has never been defined in the legislation, but a distinction between a complainant and a person aggrieved may be traced to the Race Relations Act 1971. The use of these terms in that Act, and subsequently, confirms that the complainant need not act in a representative capacity for an aggrieved person, for it has always been the case that anyone may lodge a complaint with the Commission or its predecessors. This point thus compels the conclusion that 'complainant' in s92B(1) has its ordinary and natural meaning; in context, it simply means someone who has complained to the Commission under s76(2)(a).

[58] By way of confirmation, the legislation has always permitted private enforcement, and in 1993 Parliament chose to extend that right to a complainant who was not an aggrieved person. That would have been unnecessary had the legislature intended to confine the right of action to victims of discrimination or those acting on

their behalf. As the Tribunal's subsequent decision in *Amaltal Fishing* and its earlier decision in the *Freemasons* case show, the concept of "aggrieved person" is sufficiently flexible to admit claims by those with a connection to victims of discrimination. There is force in Ms Rodgers' submission that the Attorney has sought to restrict the meaning of 'complainant' by redefining in hindsight an 'aggrieved person' as an actual victim.

[59] I acknowledge that it is implicit in s.108(1) that a complainant has an interest greater than that of the public at large. But in circumstances where the meaning of s76(2)(a) and s92B(1) is clear, I prefer the construction that such interest may arise from the complaint and status as plaintiff rather than any prior connection to the discriminatory practice.

[60] Turning to policy considerations, I accept Ms Gwyn's submission that claims advanced in the abstract by enthusiastic busybodies may harm victims of discrimination, because such claims may fail for want of a factual context and so set back the development of the law. Sweeping and apparently unmeritorious claims such as those by the plaintiff in the *Freemasons* case are certainly possible, and the Tribunal and defendant should have some means available to permit summary disposition of such cases. It is also undeniable that third parties may waste public resources by bringing badly framed or abstract claims that demand much of the Tribunal's time.

[61] However, the fear of abstract claims is surely overstated, and standing is an unsatisfactory way of addressing them. Discrimination cannot be proved unless the plaintiff establishes comparative disadvantage on the facts. CPAG does not intend to advance its claim in an abstract manner; rather, it will adduce evidence of the position of particular beneficiaries, including AB and CD. No doubt the Tribunal will manage the litigation to ensure both that the Attorney has notice of the respects in which each such person is affected and that its time is not wasted. Of course the claim has implications for entire classes of beneficiaries, but that would be no less true if a single victim prosecuted the claim. By its nature, discrimination is likely to affect classes of people, especially when it is practised in the form of an enactment.

[62] Nor is it obvious that the Tribunal will be hard pressed to deal with claims by third parties such as CPAG. As the Tribunal itself pointed out, discrimination claims demand much time and energy of the plaintiff. The Commission is not obliged to investigate a complaint that it thinks hopeless, nor is the Director required to provide representation before the Tribunal, and in such a case the plaintiff is reliant on its own resources, with a risk that it may face an award of costs. And all the plaintiff can achieve at the end of the day is a declaration of inconsistency.

[63] The Attorney's underlying grievance, although not framed in this way, is that CPAG's claim is political in nature, for CPAG wants to alter the way in which the community distributes its resources through the tax and social welfare systems. Such a claim has implications for the entire community. The Attorney will defend the claim by highlighting the various ways in which the state provides for those such as AB and CD. He seeks in this proceeding to limit those who may bring such claims.

[64] It is true that CPAG's claim is essentially political in nature and ultimately can be resolved only by political means; it must be balanced against other claims on the public purse, resolution of which is the province of politicians, who are accountable to the electorate for such decisions, and the legislature has provided that the only remedy available before the Tribunal is a declaration of inconsistency. Further, the proposition that the Courts have no business adjudicating upon claims that have serious resource allocation implications for the community has a very respectable pedigree. The proposition was eloquently framed by Professor J A G Griffith in *The Political Constitution* (1979) 42 MLR 1. He contended that such claims reflect social conflict over resources that can only be resolved by political means; to address them in litigation is to disguise them as questions of law, and as unqualified rights that a Court may remedy, when in reality they are merely claims upon the community.

[65] By admitting claims of discrimination in respect of enactments, however, Parliament has made available a cause of action and a forum in which such claims may be publicised and to some degree vindicated, if not actually remedied. Armed with a declaration, the plaintiff may press its case for a remedy in the community and

in the legislature. In other words, the legislation manifestly admits claims having a political purpose. That being so, one might have expected Parliament to restrict standing in 2001 had it meant to confine the right of action under Part 1A to aggrieved persons or the Commission itself. It did not do so, and the only conclusion that can be drawn is that it intended, consistent with the 1993 Act, that any person might first complain and then sue.

[66] I conclude that the Tribunal was correct to find that any person may complain of discrimination, and thereafter bring proceedings before the Tribunal.

**The doctrine of ripeness and the In Work Payment**

[67] Ms Gwyn submitted that s.76(2)(a) requires that a breach of Part 1A or Part 2, or both, has already occurred; the complaint is one alleging that there "has been a breach". She pointed out that until an enactment is in force it is not part of the law of the land and cannot create enforceable rights, citing JF Burrows Statute Law in New Zealand 3rd Ed at p391-1. Thus the proceeding was premature. She acknowledged that the Tribunal's findings no longer affect this case as the In Work Payment provisions are in force, but submitted that the Court's decision will supply guidance for future cases of this sort.

[68] It was common ground that the legislation had been enacted when the proceeding was commenced, but had yet to come into force.

[69] Section 20L provides that an enactment, which is an act of the legislative branch of Government, is in breach of Part 1A if it limits the right to freedom from discrimination affirmed by s.19 of the New Zealand Bill of Rights Act 1990. In other words, the enactment itself may breach Part 1A. The term "enactment" is not defined, and there is no requirement that legislation must be in force before the Tribunal has jurisdiction to consider it. Section 16 of the Constitution Act 1986 provides that a bill passed by the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such asset. The legislation was accordingly law when the proceeding was filed, and it must therefore be an enactment for the purposes of the Human Rights Act. It follows

that a complainant might point to it, alleging that by reason of the enactment there had been a breach of Part 1A. The only question for the Tribunal would be whether its discriminatory effect could be established before the legislation had come into force. It is true that no one could claim to suffer a direct loss until it had taken effect, but the only objection to a declaration of inconsistency at the point of enactment could be that the effect of the legislation was not yet clear. Any such objection would lack force when the legislation conferred quantified financial benefits upon clearly identified people, and it would be moot now that the legislation is in force.

[70] It follows that the Attorney's objection to CPAG's claim on grounds that the litigation is premature fails as a matter of construction. The doctrine of ripeness (see for example *Abbott Laboratories* 387 US 136 (1967)) is seldom relevant in New Zealand, because s.4 of the Judicature Amendment Act 1972 allows this Court to review a proposed exercise of statutory power. The Attorney's point rather was that the Tribunal could not do so in the context of a discrimination claim. I have not found it necessary to examine the doctrine, which was not pressed in argument.

**Result**

[71] The application for judicial review is dismissed. If costs cannot be agreed, counsel may file memoranda.

*"In accordance with r 540(4) I direct the Registrar to endorse this judgment with a delivery time of 10 am on the 6th day of November 2006."*

F Miller J

**Solicitors:**
Crown Law Office, Wellington for Applicant
Office of Human Rights Proceedings, Wellington for Second Respondent