IN THE HIGH COURT OF NEW ZEALAND **CIV 2005 485 2140**
WELLINGTON REGISTRY

UNDER	the Human Rights Act 1993
IN THE MATTER	of an appeal against a decision of the Human Rights Review Tribunal pursuant to s 123 of the Human Rights Act 1992
BETWEEN	ATTORNEY-GENERAL
	Appellant
AND	CHILD POVERTY ACTION GROUP INCORPORATED
	Respondent

Hearing: 1 and 3 May 2006

Counsel: V Sim and J Foster for Crown
C Rodgers and S R Collins for Respondent

Judgment: In accordance with r 540(4) I direct the Registrar to endorse this judgment with the delivery time of 10.00 a.m. on Wednesday the 17th day of May 2006.

RESERVED JUDGMENT OF RONALD YOUNG J

---

[1] This is an appeal from a decision of the Human Rights Review Tribunal ruling on a preliminary point who concluded that the respondent could bring proceedings alleging the child tax credit provisions of the Income Tax Act improperly discriminates and therefore is inconsistent with s 19 of the New Zealand Bill of Rights Act.

[2] The appellant says that the Review Tribunal wrongly interpreted the words "complaint" and "complainant" in s 76(2) and s 92(b) of the Human Rights Act and

as a result wrongly concluded that it had jurisdiction to hear the respondent's complaint. Secondly, the appellants say that the Tribunal did not have, at the time of the hearing and judgment on the complaint any jurisdiction to consider the "in work payment" section of the proceeding because the relevant statutory provisions had not then come into force. The respondent supports the Tribunal's decision. This appeal was brought pursuant to s 123 of the Human Rights Act.

[3] After hearing submissions from counsel and in the course of preparing a judgment I considered the provisions of s 123 of the Human Rights Act. On the face of the section, it did not appear to allow for an appeal from a ruling on a preliminary point by the Human Rights Review Tribunal. I reconvened the Court and advised counsel of the difficulty.

[4] Counsel have now filed submissions relating to the question of jurisdiction to consider in this appeal. Both the appellant and respondent agree that there is no right of appeal from the Human Rights Review Tribunal's ruling on their preliminary point of jurisdiction. I agree. Section 123 as relevant provides as follows:

> **123 Appeals to High Court**
>
> (1) Where any party is dissatisfied with any interim order made by the Chairperson under section 95 of this Act, that party may appeal to the High Court against the whole or part of that order.
>
> (2) A party to a proceeding under section 92B or section 92E may appeal to the High Court against all or any part of a decision of the Tribunal—
>
> (a) dismissing the proceeding; or
>
> (b) granting one or more of the remedies described in section 92I; or
>
> (c) granting the remedy described in section 92J; or
>
> (d) refusing to grant the remedy described in section 92J; or
>
> (e) constituting a final determination of the Tribunal in the proceeding.

[5] The only possible jurisdictional basis for this appeal is that the decision appealed from constitutes a "final determination of the Tribunal" for the purposes of

s 123(2). The decision of the Tribunal not to strike out or dismiss the claim for want of jurisdiction must be characterised as an interlocutory determination and not a final one. See *Talyancich v Index Developments Limited & Ors* [1992] 3 NZLR 28 and *Matthews Corporation Limited v Edward Lumley & Sons (NZ) Limited* [1994] 7 PRNZ 591.

[6] In those circumstances therefore I am satisfied there is no right of appeal from the Human Rights Review Tribunal's ruling in this case.

[7] The appellants however, seek an order under r 5 of the High Court Rules to "regularise these proceedings" and to allow the proceedings to be brought as an application to review the Tribunal's decision under either:

a) The Judicature Amendment Act 1972; or

b) Rule 626 of the High Court Rules (certiorari); or

c) For a declaration under the Declaratory Judgments Act to determine the proper meaning of "complaint" and "complainant" as used in the Human Rights Act.

[8] The appellants say they rely upon rr 4, 5 and 11 of the High Court Rules. They submit that the Court has wide powers under r 5 to prevent injustices caused by "adherence to technicalities". They say that such non-compliance here should be treated as an irregularity and not a nullity. The appellants submit that the Court has been prepared in the past to regularise proceedings in a multitude of circumstances so that matters such as this (pure questions of statutory interpretation) can be considered on their merits. See for example cases quoted at *McGechan on Procedure* HR5.01-5.08.

[9] The appellants submit of particular relevance is *Peach v Medical Council of New Zealand* HC WN AP87/94 15 April 1994 McGechan J. There the Court, pursuant to s 5, reconstituted an appeal brought under the Medical Practitioners Act as judicial review.

[10] The appellants submit that r 11 can be used in conjunction with r 5 to amend any defects to pleadings and procedures.

[11] They say the factors which are relevant to granting such an application here are as follows:

a) It is in the interests of justice, expediency and common sense that this Court, having now heard argument and given it is a question of law as to the extent of the Tribunal's jurisdiction, gives a decision on this matter.

b) Secondly, there is no prejudice to either party.

c) Thirdly, it is in the public interest that this important question be resolved.

d) Fourthly, further delay would be unfair to both parties if further formal proceedings were required.

e) Fifthly, while the same question might be able to be appealed after the substantive hearing this would cause significant unnecessary costs to the parties.

[12] The appellants offered to file amended pleadings to recognise the changes they have sought.

[13] The respondents oppose any amendment of the proceedings and say that this appeal should now be dismissed and the parties proceed to pursue the substantive hearing.

[14] In particular they say that r 5 has no application in these circumstances. This is not a case they say where there has been a failure to comply with the requirements of the rules. They submit it is simply a question of a lack of jurisdiction to bring an appeal. They say that this is not a question of failure to comply with Part 10 of the High Court Rules (to which appeals from the Human Rights Act apply). They

submit that r 11 is intended to amend defects in errors in pleadings or procedure but cannot be used to cure a want of jurisdiction.

[15] The respondents say that whether r 5 may be used is a question of fact in each case, but must take into account how serious the irregularity is (see *Invercargill City Council v Hamlin* 1994 7 PRNZ 674, 676. The respondents say in this case the error is very serious and should not be cured by a r 5 amendment. They say that what is sought to be cured here is the entire basis for the proceeding. In their submission as a minimum, fresh pleadings would be required and the parties may well wish to make further submissions given the change in focus of the proceedings.

[16] The respondents acknowledge the decision of *Peach v Medical Council of New Zealand* (supra) but say that case can be contrasted with the present case. In *Peach* the conversion of an appeal to a judicial review related to a simple procedural matter of an adjournment of a hearing. This can be contrasted with the current situation where the decision of the Tribunal related to its own jurisdiction. In addition the respondents say that granting amendments using the r 5/r 11 procedure at a very late stage in the proceedings is properly considered as an unusual exception.

[17] They say that as a matter of principle such an amendment should not be allowed because this will reconstitute the proceedings and thus effectively avoid the statutory appeal scheme under the Human Rights Act. They submit that r 5/r 11 cannot be used to overcome the statutory provisions, see *Kristensen & Ors v Global Flags Limited (In Liquidation)* 2001 15 PRNZ 581. They submit that s 123(2)(e) of the Human Rights Act was designed to ensure that the proceedings before the Human Rights Review Tribunal are completed before appellant Courts consider their decision.

[18] The respondents say that the effect of reconstituting the present appeal will be:

a) As previously submitted to undermine the appeal procedure set out in the Act.

b) Prejudice and delay for the respondent. There is likely to be additional expense and delay which may throw up unanticipated difficulties.

c) Thirdly, if the amendment is refused the appellant's right to appeal on the jurisdictional ground will still be preserved, but at the end of the hearing.

d) The respondent's rights will be skewed if such a reconstituting of the current case is allowed. For example leave to appeal pursuant to s 123 of the Human Rights Act is required from a decision of the High Court whereas no such leave is required from a decision of the High Court under either the Judicature Act or the High Court Rules or under the Declaratory Judgments Act.

Discussion and decision

[19] I am not prepared to amend the current proceedings under r 5. I acknowledge in refusing to do so that this may cause some inconvenience and additional cost depending on the appellants' decision as to what is now appropriate. However, it seems to me for two main reasons this step, to allow an amendment under r 5, is now inappropriate.

[20] Rule 5 provides:

> **5 Non-compliance with rules**
>
> (1) Where, in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form, or content or in any other respect, the failure—
>
> (a) Shall be treated as an irregularity; and
>
> (b) Shall not nullify—
>
> (i) The proceeding; or
>
> (ii) Any step taken in the proceeding; or

(iii) Any document, judgment, or order in the proceeding.

(2) Subject to subclauses (3) and (4), the Court may, on the ground that there has been such a failure as is mentioned in subclause (1), and on such terms as to costs or otherwise as it thinks just,—

(a) Set aside, either wholly or in part,—

(i) The proceeding in which the failure occurred; or

(ii) Any step taken in the proceeding in which the failure occurred; or

(iii) Any document, judgment, or order in the proceeding in which the failure occurred; or

(b) Exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceeding generally as it thinks fit.

(3) The Court shall not wholly set aside any proceeding or the originating process by which the proceeding was begun on the ground that the proceeding was required by these rules to be begun by an originating process other than the one employed.

(4) The Court shall not set aside any proceeding or any step taken in a proceeding or any document, judgment, or order in any proceeding on the ground of a failure to which subclause (1) applies on the application of any party unless the application is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

And r 11 provides:

11 Power to amend defects and errors

(1) The Court may, either before, at, or after the trial of any proceeding, amend any defects and errors in the pleadings or procedure in the proceeding, whether or not there is anything in writing to amend, and whether or not the defect or error is that of the party (if any) applying to amend.

(2) The Court may, at any stage of a proceeding, make, either of its own motion or on the application of any party to the proceedings, such amendments to any pleading or the procedure in the proceeding as are necessary for determining the real controversy between the parties.]

> (3) All amendments made under subclause (1) [or subclause 2] shall be made with or without costs and on such terms as the Court thinks fit.

[21] My tentative view, and I acknowledge it can only be a tentative view, is to express serious concern about bringing review proceedings or indeed declaratory judgment proceedings, the effect of which would be to circumvent s 123 of the Human Rights Act. Parliament has decided that the only decisions of the Tribunal that can be appealed are final determinations of the Tribunal in one form or another. They could if they had chosen, have allowed appeals from rulings on preliminary points. They choose not to do so. The Courts have traditionally been reluctant to allow review or declaratory judgment proceedings to circumvent parliamentary direction as to appropriate appeal rights. Also of importance is that the fact that the appellants will be able, ultimately, to challenge this jurisdictional question at the end of the proceedings when a final determination is given.

[22] I acknowledge, as I have said, that this may not be the most efficient way of resolving the jurisdictional question, but it is in my view more consistent with legal principle (see *Whale Watch Kaikoura Limited v Transport Act Investigation Commission* (1997) 3 NZLR 55 at 60 and 61 (HC); *Wellington International Airport Limited v Commerce Commission* (2002) 7 NZBLC 1003,763; (2002) 10 TCLR 460 (HC) and *R v Panel on Takeovers and Mergers ex parte Datafin Plc* [1987] 1 QB 815 at 842, C-D (CA)).

[23] The second broad ground of concern is the applicability and use of r 5 in such circumstances. I acknowledge that there can be circumstances where a misconstrued appeal could be converted to a judicial review. However, as *Peach* (supra) illustrates, such circumstances are typically where simple procedural errors have occurred or are alleged to have occurred and there is an urgent need for Court intervention. Here the issue goes to the fundamental question of jurisdiction to bring an appeal. The appellant's failure I accept is a serious irregularity and not appropriately cured, particularly given the hearing has been completed, by the power to "regularise" the proceedings.

[24] I agree with the submissions of the respondent that if the application under r 5 was granted it would require re-pleading, it would certainly require the opportunity for further submissions from both parties relating both to the merits of the application and also the appropriateness of bringing such proceedings given s 123 of the Human Rights Act. This would add therefore considerably to the cost and complexity of this litigation. This must be balanced against the fact as I have said that it demonstrably would be more efficient to resolve the jurisdictional question now for certainty. However, in my view the balance favours the preservation of the integrity of the statutory appeal process.

[25] For these two reasons therefore I am not prepared to amend the proceedings under r 5. The appropriate course therefore is to strike out the appeal for want of jurisdiction. I therefore do so.

[26] One final observation. This decision is simply a ruling on whether or not I should make an order under r 5 of the High Court Rules reconstituting this appeal as judicial review or declaratory judgment proceedings. I have not been prepared to do so.

Costs

[27] I invite memoranda from the respondents within 14 days and from the appellants a further 14 days in reply.

"Ronald Young J"

Solicitors:
Crown Law Office for Appellant
Office of the Human Rights Proceedings for Respondent