IN THE HIGH COURT OF NEW ZEALAND
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 1993
BETWEEN	ATTORNEY-GENERAL
	Appellant
AND	CHILD POVERTY ACTION GROUP INCORPORATED
	Respondent

APPELLANT'S SUBMISSIONS

Dated: 23 December 2005

Next Event Date: Unknown

Judicial Officer:

Crown Law Office (V Sim/J Foster)
Telephone: 494 5657, PO Box 2858, DX SP 20208,
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MAY IT PLEASE THE COURT:

Introduction

1. This is an appeal of a decision of the Human Rights Review Tribunal (the "Tribunal") holding that it had jurisdiction to hear this proceeding under s 92B of the Human Rights Act 1993 (the "HRA").

2. The appeal is brought pursuant to s 123 of the HRA. Part 10 of the High Court Rules apply. The appeal is by way of re-hearing.

3. The appellant says the Tribunal was wrong to hold it has jurisdiction to hear this case as it is not being brought by or on behalf of any identifiable person or persons who have suffered from the alleged breach of the HRA.

4. The question of who may bring proceedings to the Tribunal is an important one with consequences going beyond just this case. That matter has general implications as to the operation of the HRA.

5. This question is a matter of statutory interpretation and turns on the meaning of the term "complaint" in ss 76(2) and 92B and the term "complainant" in the latter section.

6. The appellant also says the Tribunal was wrong to hold it has jurisdiction to hear that part of the case that relates to legislation not yet in force, as that cannot yet have any effect. That part of the case is premature and hypothetical.

Background

7. A brief background to this matter is set out below.

8. In November 2004 the respondent Child Poverty Action Group ("CPAG") brought this Part 1A claim before the Tribunal under Part 3 of the HRA. The Director of Human Rights Proceedings ("DHRP") represents CPAG in these proceedings.

9. CPAG is an incorporated society whose objects include the promotion of awareness of the causes and consequences of child poverty.

10. CPAG alleges discrimination on the grounds of employment status arising from the provisions of the Income Tax Act 2004, that govern eligibility for the "Child Tax Credit" (the "CTC") and the provisions of the Taxation (Working for Families) Act 2004 (that will come into force on 1 April 2006) that govern eligibility for the "In-Work Payment" (the "IWP"). The remedy sought is the only one available under the HRA - a declaration of inconsistency.

11. CPAG does not bring this claim on the basis it is affected by the CTC or IWP provisions. Neither does CPAG bring this claim on a representative basis on behalf of any particular person, or persons, affected by those provisions. Rather, CPAG brings this claim "in the interests of approximately 250,000 children whose relatives or associates" are currently ineligible to receive payment of the CTC or will be ineligible for the IWP.

12. In June 2005 the Tribunal heard the preliminary matters as to jurisdiction as the appellant disputed the Tribunal's jurisdiction to hear this claim as a whole or in part because CPAG is not a victim of the alleged discrimination nor does it represent any particular victim or victims and because the IWP provisions are not yet in force. [The appellant does not dispute CPAG could bring this claim on behalf of any of the particular persons affected by the CTC provisions.]

13. In a decision dated 15 September 2005 the Tribunal held it did have jurisdiction to hear the whole claim, see *Child Property Action Group v Attorney-General*, Human Rights Review Tribunal, Decision No. 28/05, 14 October 2005.

Tribunal's decision

14. The Tribunal held that under s 92B anyone can bring a claim for an alleged breach of Part 1A or Part 2 of the HRA if they have addressed a complaint to the Human Rights Commission (the "HRC") and the HRC has received and assessed the complaint. The Tribunal held the complainant needs no particular connection with the people involved in the facts at issue, or the particular grounds of discrimination alleged.

15. The Tribunal found that the word 'complaint' in s 76(2)(a) means "no more than to convey the idea of an expression of dissatisfaction" and that the word

'complainant' in ss 76(2)(a) and 92B means "someone who has expressed dissatisfaction about something". The Tribunal held therefore that it had jurisdiction to consider this claim brought by CPAG.

16. The Tribunal also held that it had jurisdiction to consider whether the IWP provisions were discriminatory notwithstanding these had not yet come into force.

Summary of appellant's submissions

17. The term "complaint" in ss 76(2) and 92B means a complaint of a breach of Part 1A or Part 2 brought in respect of an actual "aggrieved person" or on his or her behalf.

18. The term "complainant" in s 92B accordingly means either the "aggrieved person" who has brought a "complaint" or the third party who has brought the "complaint" on behalf of the aggrieved person.

19. Those terms must be interpreted in light of the legislative scheme and purpose. The purpose of Part 3 of the HRA is to provide for the resolution of complaints about discrimination. This necessarily involves an actual identifiable victim of the discrimination ("aggrieved person"), accordingly:

    19.1 Under s 76(2) the HRC can only receive and assess "complaints" about discrimination made in respect of an actual identifiable victim ("aggrieved person").

    19.2 Under s 92B the Tribunal is limited to determining disputes arising from complaints made by or on behalf of that identifiable victim ("aggrieved person").

20. The HRA provides for general concerns of unaffected persons or bodies about potentially discriminatory policies, practices or laws to be addressed by the HRC through the powers provided to it in Part 1. It would frustrate the purpose of the HRA to interpret the legislation in any other way and allow unaffected persons or bodies to bring claims under Part 3 in respect of general concerns about any Part 1A or Part 2 matter.

21. The Tribunal does not therefore have jurisdiction to hear any of this proceeding as CPAG has not made a "complaint" for the purposes of s 76(2)(a) and accordingly cannot bring proceedings under s 92(B) as a "complainant" [CPAG having accepted it is not an "aggrieved person"].

22. Further, the Tribunal may only consider proceedings that allege breaches of either Part 1A or Part 2 of the HRA that have occurred. Therefore, the Tribunal does not have jurisdiction to consider that part of the proceeding that challenges the IWP provisions that are not yet in force.

THE HUMAN RIGHTS ACT 1993

Overview

23. The broad purpose of the HRA is set out in its long title – to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations covenants or conventions on Human Rights.

24. To achieve this purpose the HRA provides for a HRC, defines various grounds of unlawful discrimination, defines whom the Act applies to and provides mechanisms for ensuring compliance with the Act.

25. The HRA achieves this purpose by:

25.1 Providing for the HRC (see Part 1) whose role is to advocate and promote human rights, encourage harmonious relations between persons (s 5) and facilitate the resolution of disputes about discrimination (s 76);

25.2 Defining various grounds of discrimination (Part 2) and to whom the Act applies (see Part 1A and Part 2). Part 1A, that was inserted by the Human Rights Amendment Act 2001, applies to actions of government and related bodies. Part 2 applies to actions of all other persons in respect of employment and the provision of goods and services and other matters (and also applies to government in relation to employment); and

25.3 Providing ways to ensure compliance with the Act, including providing for dispute resolution mechanisms (Part 3) and the Tribunal who is to determine such disputes (see Part 4) and providing the HRC with powers to deal with general/public concerns about discrimination (Part 1).

26. Particularly relevant in this case are those provisions dealing with how concerns and disputes about discrimination can be brought and how these will be determined:

26.1 In Part 1 that provide the powers of the HRC to enquire into, report on or obtain declaratory relief in respect of any breaches of human rights, including discrimination; and

26.2 In Part 3 that provide mechanisms for resolution of disputes about discrimination.

HRC functions and powers under Part 1

27. The primary functions of the HRC as set out in s 5 are to advocate and promote human rights in our society and encourage harmonious relations between persons in our society, s 5(1).

28. In order to carry out its primary function under s 5 the HRC can do the following:

28.1 Receive and invite representations from the public on any human rights matter, s 5(2)(f); and

28.2 Inquire generally into any enactment or law, or any practice that may infringe human rights, s 5(2)(h). If after such an inquiry the HRC considers that the matter discloses or may disclose unlawful discrimination it can bring proceedings before the Tribunal in accordance with s 92E (s 5(2)(i)) ;

28.3 Apply to a Court or Tribunal to be an intervener or assist in proceedings (s 5(2)(j));

28.4 Report to the Prime Minister on any matter affecting human rights including the desirability of legislative or any other action and on the implications of any proposed legislation or policy that may affect human rights (s 5(2)(k));

28.5 Bring proceedings under the Declaratory Judgments Act 1908 (s 6), or to the Tribunal under ss 92B or 92E, (s 5(2)(i)); and

28.6 Publish reports relating generally to the exercise of its functions or to a particular enquiry (s 5 (3)).

Part 3: Resolution of Disputes about compliance with Part 1A and Part 2

29. The object of Part 3 is set out at s 75 and includes recognition that disputes about discrimination by either Part 1A bodies or persons covered by Part 2 are more likely to be successfully resolved if they can be resolved promptly by the parties themselves.

30. The primary functions of the HRC under Part 3 are set out in s 76. These are to provide information to the public who have questions on discrimination and facilitate the resolving of disputes about discrimination.

31. In order to carry out that latter function the HRC has under s 76(2)(a):

> receive and assess a complaint alleging that there has been a breach of Part 1A or Part 2, or both

32. The HRC must provide dispute resolution services include facilitating mediation for the purposes of resolving disputes about discrimination (s 77). Sections 79–89 set out how complainants are to be treated by the HRC, including whether further action can be taken (s 80), who is to be informed before the HRC gathers information (s 81), and the obligation on the HRC to assist the parties to settle the dispute (s 83).

33. The focus in Part 3 is on complaints about discrimination brought under s 76(2)(a) being settled by parties themselves through mediation.

34. However, if a s 76(2) complaint is not resolved or if a settlement reached in respect of such a complaint needs to be enforced proceedings can be brought to the Tribunal under s 92B.

35. Section 92B provides:

> "If a complaint referred to in section 76(2)(a) has been made, the complainant, the person aggrieved (if not the complainant), or the Commission may bring civil proceedings before the Human Rights Review Tribunal. "

36. The person aggrieved for the purposes of s 92B is a person against whom a breach of the HRA has been committed, or a person identified with or in some way connected with those who suffer from a discriminatory practice, see *New Zealand Freedom from Discrimination Group v New Zealand Grand Lodge of Freemasons* [1980] 2 NZAR 401 and *Amaltal Fishing Co Ltd v Nelson Polytechnic* [1996] NZAR 97.

37. Proceedings can also be brought before the Tribunal under s 92E by the HRC if an alleged breach of Part 1A or Part 2 has arisen from an inquiry under s 5(2)(h).

38. The remedies available in proceedings before the Tribunal are set out in ss 92I - 92Q. If an enactment is found to be in breach of Part 1A the only remedy available is a declaration of inconsistency. If such a declaration is made it does not affect the validity of the enactment or prevent the activity complained about being continued, but a report bringing the declaration to the attention of Parliament must be made (s 92K).

39. The Tribunal's functions are set out at s 94 and its procedure is provided for in ss 104 – 126. The Tribunal is required to consider matters according to its substantial merits (s 105), but strict rules of evidence do not apply in the Tribunal (s 106) and any person who has an interest in the matter greater than the public generally may appear and call evidence (s 108).

INTERPRETATION OF "COMPLAINT" AND "COMPLAINANT"

40. The appellant submits that in the statutory context the term "complaint" in ss 76(2) and 92B means a complaint of a breach of Part 1A or Part 2 brought in respect of an actual "aggrieved person" by that person or on their behalf.

Similarly, the term "complainant" in s 92B must mean either the "aggrieved person" who has brought a "complaint" or the third party who has brought the "complaint" on behalf of the aggrieved person.

41. In s 76(2) there is no reference to an "aggrieved person". It is apparent from the text of s 92B that the "complainant" can also be the "aggrieved person" (and often will be of course). It is also apparent that the "complainant" may be someone other than the "aggrieved person" or the HRC, refer use of the term "the person aggrieved (if not the complainant)" in s 92B and in a number of other provisions in Part 3.

42. However, it is apparent from the wording of s 92B that a complaint under s 76(2) must involve an aggrieved person, whether or not that person is the complainant.

Textual meaning

43. Dictionary definitions of the terms "complaint" and "complainant" are of little assistance. The terms do not have a single ordinary meaning but are susceptible to a number of meanings, refer Shorter Oxford Definitions of these terms. Rather, the meaning of the terms need to be assessed in the statutory context in which they occur.

44. It is clear that a s 76(2)(a) "complaint" must be about a breach of Part 1A or Part 2, or both. In the appellant's view it is apparent from the context that the complaint must necessarily be brought in respect of discrimination suffered by an actual "aggrieved person" and must be brought by that person or on his or her behalf.

45. It follows that in the context the term "complainant" in s 92B necessarily means either the "aggrieved person" who has brought a "complaint" or person who has brought the complaint on the aggrieved person's behalf.

46. It is the nature of Part 3 of the HRA that necessarily requires that s 76(2) complaints be about discrimination suffered by an actual aggrieved person.

Nature of Part 3

47. It must be remembered that Part 3 applies to complaints brought under Part 1A or Part 2, or both. Accordingly, ss 76(2) and 92B must be interpreted in a way that sensibly accommodates all complaints whatever part of the HRA they are brought in respect of and whether the alleged discrimination affects one or many persons.

48. Parliament cannot have intended that anyone, including any "busy body", could bring a complaint about discrimination against an individual other than on behalf of that individual. It would be most surprising if, for example, the Tribunal could consider a claim under Part 2 alleging discrimination in employment other than on the employee's behalf or against the wishes of the employee (s 80(1)).

49. The Part 3 dispute resolution processes are designed for disputes about actual discrimination suffered by an aggrieved person rather than disputes about discrimination in the abstract. The concepts of 'dispute resolution', 'mediation', 'settlement' and 'remedies' only make sense in the context of claims brought by or on behalf of an identifiable individual or individuals that have suffered discrimination. The process of settling disputes is focussed on achieving flexible outcomes tailored to the individual circumstances of an aggrieved person. Further, such process is a private matter between the parties, therefore creating no precedent or guiding principles beyond the individual case as opposed to the public adversarial nature of a court.

50. A third party may institute the complaint, and participate in dispute resolution processes on behalf of the aggrieved person or group. But, as a matter of common sense, it is only the person who is aggrieved by the alleged discrimination who can assess whether solutions arrived at in a disputes resolution process resolve the complaint. Similarly, if the matter proceeds to the Tribunal, and succeeds, it is the aggrieved person rather than an unaffected person or body who is entitled to a remedy, whether that be damages or declaratory relief for example.

51. Nor can Parliament have intended that complaints could be determined other than in an appropriate factual context and in light of the particular circumstances of an aggrieved individual or individuals.

52. The term "complainant" is used in a variety of provisions in Part 3. The use of the term is somewhat inconsistent. However, it is clear from many provisions that aggrieved persons and complainants need not be the same persons. It is also apparent from a number of provisions that while there may not be a "complainant" the HRA does not contemplate that there will be no "aggrieved person" involved in a complaint, see for example ss 81(2)(a) and 89. Overall a practical and sensible interpretation requires the term "complaint" to mean either the person aggrieved or the third party complaining on their behalf.

53. In particular, the absence of provisions in Part 3 that specifically require the Tribunal to obtain an aggrieved person's permission before a proceeding may progress supports the interpretation that proceedings may only be brought by either an aggrieved person or someone acting on their behalf.

Legislative history supports aggrieved person requirement

54. The HRA consolidated and amended the Race Relations Act 1971 and the Human Rights Commission Act 1977. All of these Acts envisage a complaint must involve an actual aggrieved person, but that a complaint can be made on behalf of that person: see ss 13-15 of the Race Relations Act, Part 3 of the Human Rights Commission Act and the original Part 3 of the HRA (all of which use the terms "person alleged to be aggrieved" and "complainant" in various places).

55. The HRA was amended in 2001 to allow discrimination claims to be brought against government. The complaints procedure in Part 3 was amended to allow both Part 1A and Part 2 complaints to be dealt with. The subject matter of the complaints process was therefore expanded, but there was no change in respect of who could bring a complaint. An aggrieved person is still essential.

Policy reasons for Courts limiting who may bring proceedings

56. Courts do not ordinarily act in a purely advisory role in the absence of a *lis* between the parties. Even under the Declaratory Judgments Act where there is

a broad jurisdiction the Courts are reluctant to deal with a case in the absence of a proper contradictor, see *Auckland City Council* v *Attorney-General* [1995] 1 NZLR 219, *Gazely* v *Attorney-General* (1994) 8 PRNZ.

57. Courts rarely grant standing to bring proceedings to persons other than those who have an actual interest in outcome. In rare cases, usually involving judicial review and often brought by public interest groups, courts of inherent jurisdiction may give standing where it is considered necessary to protect the public interest if there is no other realistic prospect of addressing the legal issues of significant public interest: *Moxon* v *Casino Control Authority* unreported, Hamilton High Court, M324/99, M325/99, 24 May 2000, Fisher J, *Environmental Defence Group Inc* v *South Pacific Aluminium Co* [1985] 2 NZLR 159 *Finnigan v New Zealand Rugby Football Union Inc* [1985] NZLR 159, *Canadian Council of Churches v The Minister of Employment and Immigration* [1992] 1 SCR 236 and *Hy and Zel v Ontario (Attorney-General)* [1993] 3 SCR 675.

58. It should not be overlooked that unlike this Court the Tribunal has no inherent jurisdiction. The Tribunal's jurisdiction derives entirely from statute. There are cogent reasons the HRA restricted the right to bring proceedings to the Tribunal under Part 3 to "aggrieved persons" (or those representing them). These include the efficient use of the Tribunal resources and the avoidance of unnecessary litigation.

59. Such policy concerns are amply described by Fisher J in *Moxon*:

> "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." (para 99)

See also similar observations by the Supreme Court of Canada in the *Canadian Council of Churches* case:

> "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 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 (p 252)."

60. It is potentially unfair if those persons who have actually suffered discrimination if were to face unacceptable delays in having their cases in the Tribunal dealt with because it was clogged with claims brought by persons who have general concerns about any Part 1A or Part 2 matter for whatever reason.

61. There are also concerns about the hypothetical and abstract nature of challenges that are brought by parties that have no real interest. The difficulties with such challenges are described by the Supreme Court of Canada in *Hy and Zel,* at p 693, the Court relying on the reasoning in *MacKay v Manitoba* [1989] 2 SCR 357, at pp 361-62:

> "Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel."

62. More recently in *Danson v. Ontario (Attorney-General)* [1990] 2 S.C.R. 1086, at 1093, the Court cautioned that "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints." This mirrors the Court's vigilance in ensuring that it hears the arguments of the parties most directly affected by a matter. In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised.

63. There is no compelling need for the Tribunal's jurisdiction to be interpreted to allow general claims to be brought, as matters of significant public interest can be addressed by the HRC. The HRA provides mechanisms other than proceedings before the Tribunal through which general concerns of unaffected persons or bodies about allegedly discriminatory law, policies or practices can be addressed. The HRA can under ss 5 and 6 receive and invite representations from the public on any matter, inquire generally into any

matter, reporting to the Prime Minister or the public on any matter and seek declaratory judgments from the High Court under the Declaratory Judgments Act 1908.

Aggrieved person requirement supported by BORA and ICCPR

64. Both the New Zealand Bill of Rights Act ("BORA") and the International Covenant on Civil and Political Rights ("ICCPR") support there being an aggrieved person requirement in respect of complaints under Part 3.

65. Section 6 of BORA requires an enactment to be given a meaning consistent with the rights and freedoms in BORA.

66. Section 19 of BORA provides that everyone has the right to be free from discrimination on the grounds of discrimination in the HRA.

67. There is nothing in either s 19 or any other provision of BORA that requires Part 3 of the HRA to be interpreted to allow anyone to bring general complaints about discrimination. What is required is for the HRA to be interpreted so as to provide for an effective remedy for any breach of an individual's rights under s 19 BORA, see *Wilding v Attorney-General* [2003] 3 NZLR 787 and *Attorney-General v Udompun* [2005] 3 NZLR 284.

68. Interpreting Part 3 complaints to require an aggrieved person ensures an effective remedy for victims of alleged breaches of s 19 of BORA. A broader interpretation may result in a less effective remedy for the reasons discussed above.

69. Further, interpreting a requirement for an aggrieved person is consistent with the concept of BORA and ICCPR rights belonging to individuals, in particular, the right to freedom from discrimination being an individual right, see Rishworth, *New Zealand Bill of Rights,* at p 374.

70. Both BORA and ICCPR require allegations of any breach of rights be brought by, or at least on behalf of, the victim of the alleged breach: see *R v Bruhns* (1994) 11 CRNZ 656 and Article 1 of the Optional Protocol to the ICCPR.

71. In this regard it is important to remember the following. One of the HRA purposes is to provide better protection of human rights in general accordance

with *the United Nations Covenants or Conventions on Human Rights.* The purpose of Part 1A of the HRA is to provide that the acts of s 3 BORA bodies in breach of s 19 of BORA are also in breach of the HRA. Furthermore, one of the purposes of BORA is to affirm New Zealand's commitment to the ICCPR.

No jurisdiction to consider IWP provisions

72. Part 3 of the HRA is concerned with complaints about breaches of Part 1A or Part 2 that have actually occurred. Accordingly, the Tribunal does not have jurisdiction to hear that part of the proceedings that challenges the IWP provisions that are not yet in force.

73. The need for an actual victim of discrimination or "aggrieved person" necessarily requires that a breach of Part 1A or Part 2 has already occurred. Further, the words of s76(2)(a) are clear. A complaint under s76(2)(a) is one "alleging that there *has been a breach* of Part 1A or Part 2, or both" (emphasis added).

74. Provisions in the IWP only have practical effect, discriminatory or otherwise, as of 1 April 2006. Accordingly, the IWP cannot yet have been a breach of Part 1A. Therefore no complaint under s76(2)(a) can be bought alleging that provisions of the IWP have breached Part 1A. and therefore s 92B cannot apply.

75. Once the IWP is in force and will have an impact on the rights of a person, then a complaint may be brought pursuant to s 72(2)(a) alleging "there has been a breach of Part 1A", and then the Tribunal may have jurisdiction.

76. Further, as a matter of common sense, consideration of the IWP at this stage would be premature and hypothetical:

    76.1 As a matter of law it is not possible to determine whether the IWP has a discriminatory effect in breach of s 19 BORA until the IWP is in force and can have effect. Courts and tribunals generally do not consider a matter if it will not have an impact on the rights of a person, see *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 and *Milroy v Attorney-General*, unreported, Court of Appeal, 11 June 2003, CA 197/02.

76.2 In any event, to determine whether the IWP is discriminatory consideration needs to be given not only to the relevant taxation legislation, but also to broader aspects of the government's social assistance scheme, s there is always the possibility of change.

Dated 23 December 2005

Val Sim /Jane Foster
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