

Reference No. HRRT 027/2012

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN FRIEDRICH JOACHIM FEHLING

PLAINTIFF

AND CHIEF EXECUTIVE OF NEW ZEALAND
POST LIMITED

DEFENDANT

BEFORE:

Mr RPG Haines QC, Chairperson

Dr SJ Hickey, Member

Mr RK Musuku, Member

REPRESENTATION:

Mr FJ Fehling in person

Mr AS Butler and Mr TCE Miller for Defendant

DATE OF DECISION: 31 January 2013

**DECISION OF TRIBUNAL REFERRING COMPLAINT
BACK TO HUMAN RIGHTS COMMISSION**

Introduction

[1] The Chief Executive of New Zealand Post Limited (New Zealand Post) requests that this matter be referred back to the Human Rights Commission under s 92D of the Human Rights Act 1993. The application is opposed by Mr Fehling.

Background

[2] No evidence has yet been filed. The background, as understood by New Zealand Post, is helpfully set out in the statement of reply at paragraph 7. A paraphrase follows.

[2.1] Mr Fehling currently lives in a vehicle in Hari Hari, South Westland, but is of no fixed abode.

[2.2] In or around June 2012 he made enquiries with New Zealand Post about obtaining a rural delivery service. He was advised that New Zealand Post could provide him with such service provided he erected a mail box on the existing delivery route in the Hari Hari area.

[2.3] On or about 7 June 2012 Mr Fehling applied for rural delivery at a mailbox he had erected on Cron Road, Hari Hari. At that point New Zealand Post began to provide a rural delivery postal service to him at the Cron Road mailbox.

[2.4] The mailbox was vandalised on a regular basis. As a result of the vandalism, from around late June or early July 2012 there was no longer a mailbox to which New Zealand Post could deliver mail to Mr Fehling. In total, New Zealand Post's rural delivery operator was only able to deliver mail to Mr Fehling's mailbox two or three times.

[2.5] Mr Fehling still receives his mail. Typically, he does this by meeting the New Zealand Post rural delivery operator outside the Hari Hari MailCentre at the completion of the operator's mail route.

[2.6] In or around June or July 2012 Mr Fehling made enquiries with the Hari Hari PostCentre as to whether he could rent a PO Box, but chose not to apply for one as he did not wish to pay the annual fee for a PO Box of \$135 and the additional fee for having his mail redirected to that PO Box of \$25.

[3] On 24 August 2012 Mr Fehling wrote to the Human Rights Commission requesting that it provide legal help to enable him to take a complaint to the Tribunal. By letter dated 30 November 2012 Mr Robert Hallowell of the Human Rights Commission reported to the Tribunal that:

One of the matters Fritz Fehling sought legal help about was a complaint about NZ Post. The complaint was that it was discrimination by NZ Post to make mail delivery/reception available after damage/theft of rural delivery letterboxes only by charging the victim at least \$135 annually plus \$25 for mail redirection for a post office box. Letterbox theft generally is done to discriminate against disliked persons due to their political beliefs or low-income or race, ethnicity, ethical belief or any of the other grounds set out in s 21(1) of the Human Rights Act. New Zealand Post is aware of this when it imposes the fees and knowingly punishes the victims. This amounts to indirect discrimination.

Fritz Fehling said that he did not want to go through the Commission's mediation process but wished to take the matter to the Tribunal himself.

[4] In its statement of reply New Zealand Post says that it was not aware of receiving any correspondence from Mr Fehling or the Human Rights Commission about the complaint and only became aware of the complaint upon receiving notice of these present proceedings from this Tribunal on 22 November 2012. When New Zealand Post's Group Legal Counsel contacted the Commission about the complaint, she was told that no information could be provided because doing so would breach Mr Fehling's rights under the Privacy Act 1993. The statement of reply goes on to plead:

11 New Zealand Post anticipates that, if given the opportunity, it would be able to engage with the plaintiff and the Commission on a good faith basis to find a constructive solution to the plaintiff's concerns.

[5] The statement of reply goes on to state that while New Zealand Post accepts that it is prohibited from discriminating against persons in the provision of postal services on any of the prohibited grounds listed in s 21(1) of the Human Rights Act 1993, it denies that it has discriminated against Mr Fehling, whether directly or indirectly, on any of those grounds.

[6] In his submissions dated 20 December 2012 Mr Fehling disputes the statement that New Zealand Post was not aware of the complaint. He says that a copy of the complaint was delivered by him personally to the Manager of the Hokitika PostCentre. This is not presently a significant point because Mr Fehling made it clear to the Commission that he did not want to go through the Commission's mediation process. See the last paragraph of the letter from Mr Hallowell dated 30 November 2012.

The application for referral back to the Human Rights Commission

[7] The application by New Zealand Post under s 92D of the Human Rights Act is based on the following grounds:

[7.1] Because New Zealand Post does not appear to have received any communication from the Commission or from Mr Fehling about the complaint it has had no opportunity to engage with Mr Fehling or the Commission as to the nature of Mr Fehling's concerns and how those concerns might be addressed.

[7.2] New Zealand Post anticipates that, given the opportunity, it would be able to engage with Mr Fehling and the Commission on a good faith basis to find a constructive solution to Mr Fehling's concerns.

[7.3] Referral back to the Commission would be in the public interest.

[7.4] The proceedings are not urgent or of an interim nature.

Mr Fehling's grounds for opposing the application

[8] In his letter dated 20 December 2012 Mr Fehling sets out the grounds of his opposition to the application. We do not intend setting out those grounds at length. In summary they are:

[8.1] Urgency exists due to what he describes as the unacceptable and extreme time-consuming process of having to wait for the rural delivery operator.

[8.2] A confidential mediation would allow New Zealand Post to continue similar discrimination with other members of the public and the outcome would not set a positive precedent. A public ruling by the Tribunal would be in the general public interest as it will validate the provisions of the Human Rights Act.

[8.3] In the context of unrelated proceedings Mr Fehling has had contact with mediators at the Human Rights Commission and has been dissatisfied.

[8.4] There has been an absence of constructive proposals by New Zealand Post.

Discussion

[9] One of the primary statutory functions of the Human Rights Commission is to facilitate the resolution of disputes about compliance with Part 1A or Part 2 of the Human Rights Act, by the parties concerned, in the most efficient, informal, and cost-effective manner possible. See s 76(1)(b). To this end the Commission is required by s 77 to provide dispute resolution services. Those services centre on mediation. Experience shows that mediation settles most complaints. See, for example, the Commission's *Annual Report 2011* at 28-29 and *Annual Report 2012* at 44-47.

[10] While a complainant is not expressly bound to engage with the mediation process once the complaint has been made, it is clear from the statutory scheme that the mediation process ought to run its course unless good reason can be shown to the contrary. This much is clear from the provisions of Part 3 of the Act and is underlined by s 92D which provides:

92D Tribunal may refer complaint back to Commission, or adjourn proceedings to seek resolution by settlement

- (1) When proceedings under section 92B are brought, the Tribunal—
 - (a) must (whether through a member or officer) first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise); and
 - (b) must refer the complaint under section 76(2)(a) to which the proceedings relate back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission—
 - (i) will not contribute constructively to resolving the complaint; or
 - (ii) will not, in the circumstances, be in the public interest; or
 - (iii) will undermine the urgent or interim nature of the proceedings.
- (2) The Tribunal may, at any time before, during, or after the hearing of proceedings, refer a complaint under section 76(2)(a) back to the Commission if it appears to the Tribunal, from what is known to it about the complaint, that the complaint may yet be able to be resolved by the parties and the Commission (for example, by mediation).
- (3) The Tribunal may, instead of exercising the power conferred by subsection (2), adjourn any proceedings relating to a complaint under section 76(2)(a) for a specified period if it appears to the Tribunal, from what is known about the complaint, that the complaint may yet be able to be resolved by the parties.

[11] It will be seen that on the filing of any proceedings the Tribunal is under a mandatory duty to first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and is required to refer a complaint under s 76(2)(a) to the Commission unless the Tribunal is satisfied that attempts at resolution will not contribute constructively to resolving the complaint, or will not be in the public interest or will undermine the urgent or interim nature of the proceedings.

[12] A complainant who wishes to avoid the Commission's dispute resolution process must satisfy the Tribunal that one or other of the three grounds allowed by s 92D(1)(b) apply.

[13] Addressing first s 92D(1)(b)(i), the Tribunal has no reason to doubt that, if given the opportunity, New Zealand Post will engage with Mr Fehling and the Commission on a good faith basis to find a constructive solution to Mr Fehling's concerns. It is therefore not possible to find that a referral back to the Commission will not contribute constructively to resolving the complaint.

[14] As to s 92(1)(b)(ii), proceedings before the Tribunal are plainly intended to be a last resort. Mediation is more efficient, informal and cost-effective. The resources of the Tribunal should not be drawn on unless it can be shown that attempts to resolve the complaint through mediation will be futile. It is to be remembered that the Tribunal sits as a panel of three. Care must be taken to avoid unnecessary hearings. New Zealand Post wants to enter into mediation. It is difficult, in the circumstances, to find that a referral back to the Commission will not be in the public interest. If mediation fails Mr Fehling can resume these present proceedings.

[15] As to s 92D(1)(b)(iii), Mr Fehling submits that the proceedings are urgent. His desire to regularise his mail delivery is, of course, understandable as is his concern that he will be prejudiced by the absence of a reliable form of communication. Nevertheless he has been without formal postal services for some period of time and has been able to

devise a work-around solution. There is no reason why the Commission should not be asked to undertake its mediation process on an urgent basis, particularly given that New Zealand Post is a willing and cooperative party to the proceedings.

[16] As to the complaint by Mr Fehling that the mediation process occurs “in secret”, a significant factor in any mediation or dispute resolution process is the need to encourage the parties to be non-legalistic and to make compromises without putting in jeopardy the position they may wish to take in later proceedings before the Tribunal should the mediation process fail. This necessarily requires a degree of confidentiality, as recognised by ss 85, 86 and 87 of the Act. What Mr Fehling may have overlooked is that s 89 of the Act stipulates that a settlement between parties to a complaint may be enforced by proceedings before the Tribunal. The confidentiality which necessarily surrounds the mediation process does not prejudice Mr Fehling either during the mediation itself or in later proceedings before the Tribunal. While Mr Fehling has indicated a certain lack of faith in the Commission’s mediation process (and its mediators), we are not aware of any attempt by Mr Fehling to engage with the mediation process in a sustained manner. Where, as here, New Zealand Post is represented by responsible counsel the Tribunal can be confident that New Zealand Post will enter into the mediation process on a good faith basis and will assist in the earliest resolution of the proceedings before the Commission. If resolution is not achieved the present proceedings can be resumed.

Conclusions

[17] Having regard to the statutory criteria in s 92D(1)(b) of the Human Rights Act we have not been satisfied that attempts at resolution of the complaint by the parties and the Commission will not contribute constructively to resolving the complaint, or will not, in the circumstances, be in the public interest or will undermine the urgent or interim nature of the proceedings.

[18] It follows that as required by s 92D(1) we must refer the complaint back to the Commission. However, we do so on terms to ensure that the mediation process is not allowed to drift.

Directions

[19] For the reasons given the following directions are made:

[19.1] Pursuant to s 92D(1) of the Human Rights Act 1993 the complaint by Mr Fehling is referred back to the Human Rights Commission.

[19.2] So that the proceedings are not left in suspension indefinitely, the parties are to provide the Tribunal with an update of the progress being made in four months time and in any event no later than 5pm on Friday 24 May 2013.

[19.3] The proceedings before the Tribunal are stayed in the interim with leave reserved to either party to seek further directions if and when the need arises.

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Mr RPG Haines QC
Chairperson

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Dr SJ Hickey
Member

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Mr RK Musuku
Member

