

- (1) ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFFS AND OF THEIR CHILDREN
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON
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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2014] NZHRRT 37

Reference No. HRRT 007/2014

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN WXY

PLAINTIFFS

AND ATTORNEY-GENERAL IN RESPECT OF THE MINISTRY OF HEALTH

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson, Member

REPRESENTATION:

Plaintiffs in person

Ms M Coleman and Mr MJ McKillop for defendant

DATE OF DECISION: 25 August 2014

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM

The application

[1] This is an application by the Attorney-General for an order striking out the whole of the statement of claim on the grounds:

[1.1] The statement of claim does not allege the plaintiffs are being treated differently to others based on one of the prohibited grounds of discrimination.

[1.2] The factual material attached to the statement of claim does not give rise to an inference the plaintiffs are being treated differently to others based on a prohibited ground of discrimination.

[1.3] The Tribunal has no jurisdiction to hear the claim by virtue of Part 4A of the New Zealand Public Health and Disability Act 2000 (NZPHDA).

It is submitted that the allegations in the statement of claim do not, and cannot be re-pleaded to give rise to an arguable discrimination claim on the basis of family status.

Jurisdiction to strike out – principles

[2] In *Mackrell v Universal College of Learning* High Court Palmerston North CIV2005-485-802, 17 August 2005 at [48] Wild J held that the Tribunal has a wide discretionary power to strike out or to dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by High Court Rules, r 15.1.

[3] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267:

A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed ...; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material ...; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction ...

[4] For more recent authority see *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [25] (Elias CJ) and [146] (Blanchard, McGrath and William Young JJ).

Background

[5] The plaintiffs are self-represented litigants. They have two disabled children aged 19 and 21 respectively. Both have been classified as having very high needs. The relief sought in the statement of claim is that the son and daughter be allocated specific funding for a set number of hours:

[5.1] The son:

... to be allocated by NASC or MOH 146 hours week for home support and personal care and community outings including parents to be paid for personal care and home management.

[5.2] The daughter:

... to be allocated by NASC or MOH 108 hours weekly for home support and personal care including parents to be paid for personal care and home management.

[6] The supporting narrative and documentation submitted with the case has as its focus complaints about both funding and service delivery. The plaintiffs appear to equate the shortfall of desired funding with “discrimination”. It is possible they misapprehend the nature of the Tribunal’s function. It does not have jurisdiction to arbitrate or determine disputes over funding and service delivery issues.

The discrimination claim

[7] The plaintiffs claim the Ministry of Health policy not to fund 24 hour care for people with disabilities living with family carers in a residential setting is discriminatory. The plaintiffs claim the policy breaches Part 1A of the Human Rights Act 1993 (HRA) by unlawfully discriminating on the basis of family status.

[8] They say their children should be properly assessed as having access to 146 and 108 hours of Home and Community Support Services respectively, so that their care in their family home is equivalent to residential care. The plaintiffs claim that paid 1:1 care should be available for both children at most times, including 40 hours of household management and personal care funding under the Funded Family Care policy and additional support services. The plaintiffs say the Ministry of Health has a policy not to provide to 24 hour 1:1 care while a person with a disability is not living in residential care, and that this discriminates against both children on the basis of their family status.

[9] The plaintiffs also claim that other people with a disability have received greater funding than their son and daughter and this is discrimination as their son and daughter are treated differently.

Family status

[10] For the purpose of the HRA the term “family status” is defined in s 21(1)(l) as follows:

- (l) family status, which means—
 - (i) having the responsibility for part-time care or full-time care of children or other dependants; or
 - (ii) having no responsibility for the care of children or other dependants; or
 - (iii) being married to, or being in a civil union or de facto relationship with, a particular person; or
 - (iv) being a relative of a particular person:

Family care policy and Part 4A of the NZPHDA

[11] In *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 parents of adult disabled children challenged a Ministry of Health policy of excluding family members from payment for various disability support services provided by them to their children. In a decision given on 14 May 2012 the Court of Appeal held that the policy was discriminatory on the ground of family status because parents willing to provide natural disability support for their children were materially disadvantaged because they did not receive payment.

[12] The response by the government of the day was swift. On 20 May 2013 Part 4A of the NZPHDA was enacted. It had the effect of making the policy that was successfully challenged in the *Atkinson* proceeding lawful. Part 4A came into effect on 21 May 2013, well before the present proceedings were filed on 13 March 2014. The purpose of Part 4A is set out in s 70A:

70A Purpose of this Part

- (1) The purpose of this Part is to keep the funding of support services provided by persons to their family members within sustainable limits in order to give effect to the restraint imposed by section 3(2) and to affirm the principle that, in the context of the funding of support services, families generally have primary responsibility for the well-being of their family members.
- (2) To achieve that purpose, this Act, among other things,—
 - (a) prohibits the Crown or a DHB from paying a person for providing support services to a family member unless the payment is permitted by an applicable family care policy or is expressly authorised by or under an enactment:
 - (b) declares that the Crown and DHBs have always been authorised, and continue to be authorised, to adopt or have family care policies that permit persons to be paid, in certain cases, for providing support services to family members:

- (c) stops (subject to certain savings) any complaint to the Human Rights Commission and any proceeding in any court if the complaint or proceeding is, in whole or in part, based on an assertion that a person's right to freedom from discrimination on any of the grounds of marital status, disability, age, or family status (affirmed by section 19 of the New Zealand Bill of Rights Act 1990) has been breached by—
 - (i) a provision of this Part; or
 - (ii) a family care policy; or
 - (iii) anything done or omitted in compliance, or intended compliance, with this Part or a family care policy.

[13] The term “family care policy” is defined in s 70B(1):

family care policy, in relation to the Crown or a DHB,—

- (a) means any statement in writing made by, or on behalf of, the Crown or by, or on behalf of, the DHB that permits, or has the effect of permitting, persons to be paid, in certain cases, for providing support services to their family members; and
- (b) includes any practice, whether or not reduced to writing, that has the same effect as a statement of the kind described in paragraph (a), being a practice that was followed by the Crown or by a DHB before the commencement of this Part

[14] As foreshadowed by s 70A(2)(c), s 70E prohibits both the making of complaints to the Human Rights Commission and the commencement or continuation of proceedings in any court or Tribunal based in whole or in part on a “specified allegation”. A specified allegation is defined as an assertion to the effect that a person’s right to freedom from discrimination on one or more grounds stated in s 21 of the HRA has been breached by Part 4A or a family care policy or anything done or omitted to be done in compliance with Part 4A or a family care policy. Section 70G contains certain savings which are not relevant. We reproduce only those provisions which are relevant to the present case:

70E Claims of unlawful discrimination in respect of this Act or family care policy precluded

- (1) In this section, **specified allegation** means any assertion to the effect that a person's right to freedom from discrimination on 1 or more of the grounds stated in section 21(1)(b), (h), (i), and (l) of the Human Rights Act 1993, being the right affirmed by section 19 of the New Zealand Bill of Rights Act 1990, has been breached—
 - (a) by this Part; or
 - (b) by a family care policy; or
 - (c) by anything done or omitted to be done in compliance, or intended compliance, with this Part or in compliance, or intended compliance, with a family care policy.
- (2) On and after the commencement of this Part, no complaint based in whole or in part on a specified allegation may be made to the Human Rights Commission, and no proceedings based in whole or in part on a specified allegation may be commenced or continued in any court or tribunal.
- (3) On and after the commencement of this Part, the Human Rights Commission must not take any action or any further action in relation to a complaint that—
 - (a) was made after 15 May 2013; and
 - (b) is, in whole or in part, based on a specified allegation.
- (4) On and after the commencement of this Part, neither the Human Rights Review Tribunal nor any court may hear, or continue to hear, or determine any civil proceedings that arise out of a complaint described in subsection (3).
- (5) ...

Claim by plaintiffs cannot succeed

[15] As pointed out by the Crown, the Funded Family Care policy enables payment to eligible family members for up to 40 hours of the household management and personal care allocated as part of Home and Community Support Services funding. It is not clear the plaintiffs are claiming they should be paid in excess of the maximum permitted under the Funded Family Care policy, but it is difficult to understand what else could form the basis of a claim of discrimination against them. They, as parents, are not treated differently because they care for dependents or because of their relationship with their disabled children, other than through the operation of the Funded Family Care policy.

[16] To the extent the plaintiffs claim any limit on the payment they can receive to provide support constitutes discrimination on grounds of family status, the Tribunal has no jurisdiction to hear this matter by virtue of s 70E of the NZPHDA. As is made clear by s 70E(2), (3) and (4) even if the complaint by the plaintiffs is based only “in part” on a claim that the policy is discriminatory on the basis of family status, the Tribunal is barred from hearing the claim.

The representative claim

[17] The Crown submissions address also the possible scenario that the plaintiffs are claiming in a representative capacity on behalf of the children in respect of the allocation of Home and Community Support Services funding to the children.

[18] As those submissions point out, even if that were the case, neither the son’s nor the daughter’s family status is engaged. This is because the only possible applicable limb of the “family status” definition is (iv) ie being the son or daughter of the plaintiffs. The definition of “family status” is exhaustive and does not permit reading-in other forms of family relationship.

[19] Accordingly, when the plaintiffs cite as evidence of discrimination instances in which other children have received funding greater than that which the plaintiffs should be allocated to them and their children, the plaintiffs’ pleading does not indicate any element of their family status as being a factor in the funding decision. That is, it is not alleged the identity of the parents is in any way relevant to the alleged failure to provide additional funding. The Crown submissions continue:

[T]he situation [of the son and daughter] is not comparable to any other comparator groups identified by the plaintiffs ... under sub paras (i) or (ii). There is also no suggestion their family relationships with a particular person under sub paras (iii) or (iv) have affected the funding allocation decisions. The defendant therefore submits there is no basis on which “family status” discrimination against [the son or daughter] could have taken place.

[20] We agree with this submission. The claims made by the plaintiffs are so clearly untenable that they cannot possibly succeed and the proceedings must be struck out.

DECISION

[21] The decision of the Tribunal is that:

[21.1] By virtue of s 70E of the New Zealand Public Health and Disability Act 2000 these proceedings cannot be commenced or continued and the Tribunal has no jurisdiction.

[21.2] The claims made by the plaintiffs are so clearly untenable that they cannot possibly succeed.

[21.3] The statement of claim is struck out.

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Mr RPG Haines QC
Chairperson

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Ms GJ Goodwin
Member

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Mr BK Neeson
Member

