

Reference No. HRRT 021/2014

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN BRENDON DOUGLAS NEAL FORREST

PLAINTIFF

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr BDN Forrest in person

Ms K Laurenson for defendant

DATE OF DECISION: 2 October 2014

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

Introduction

[1] These proceedings were filed on 13 August 2014. Mr Forrest's complaint relates to access by transgender prisoners to hormone treatment.

[2] In a statement of reply filed on 12 September 2014 the Chief Executive pleads:

[2.1] He was not notified of Mr Forrest's complaint to the Human Rights Commission and accordingly had no opportunity to participate in the response to that complaint. Nor was he notified that no further action was being taken on the complaint. Furthermore, contrary to s 80(4) of the Human Rights Act 1993, he was not notified that no further action was being taken on the complaint.

[2.2] The parties should be given opportunity to resolve this matter informally.

[2.3] Because the matter might well be resolved informally an order under s 92D of the Act is sought for mediation to take place.

[3] By accompanying memorandum dated 12 September 2014 Ms Laurenson adds that it is particularly unfortunate that the Commission's response to Mr Forrest contained incorrect advice about the policy in issue (transgender prisoners' access to hormone treatment). Since 10 February 2014 there has been a new policy to the effect that transgender prisoners are entitled to receive medical treatment that is reasonably necessary (as is provided by s 75 of the Corrections Act 2004). Given that the Chief Executive has only just come to know of the complaint it is considered that some time will be needed to investigate the factual basis for the claim and to enter into discussions with the plaintiff. In particular the Chief Executive has to date been unable to confirm the plaintiff's allegations that he has identified as being transgender and that he has sought medical treatment for his transgender status from the Department of Corrections.

[4] By memorandum dated 9 September 2014 Mr Forrest records his consent to the making of an order under s 92D of the Act.

Discussion

[5] 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 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.

[6] 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. It is also 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.

[7] 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.

[8] 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.

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

[10] 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. Corrections wish to enter into mediation and Mr Forrest will take up the challenge. 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 Forrest can resume these present proceedings.

[11] As to s 92D(1)(b)(iii), Mr Forrest does not submit that the proceedings are urgent.

Conclusions

[12] 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.

[13] 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

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

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

[14.2] So that the proceedings are not left in suspension indefinitely, in four months time the parties are to provide the Tribunal with a progress report. That report must be filed no later than 5pm on Friday 23 January 2015.

[14.3] 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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Mr GJ Cook JP
Member

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Mr BK Neeson
Member

