IN THE HUMAN RIGHTS REVIEW TRIBUNAL	[2016] NZHRRT 37

	Reference No. HRRT 037/2016
UNDER	THE HUMAN RIGHTS ACT 1993
BETWEEN	MATTHEW RICHARD BROWN
	PLAINTIFF
AND	NEW ZEALAND POST LIMITED
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Dr SJ Hickey MNZM, Member

REPRESENTATION:
Mr MR Brown in person
Mr AS Olney and Mr OE Jaques for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **1 December 2016**

DECISION OF TRIBUNAL ON PLAINTIFF'S RECUSAL APPLICATION AND ON DEFENDANT'S REQUEST FOR PARTICULARS[1]

[1] In this decision the Tribunal:

> **[1.1]** Declines Mr Brown's application that the Chairperson be recused from participating in these proceedings.
>
> **[1.2]** Requires Mr Brown to provide full particulars of his case against New Zealand Post Ltd (NZ Post).

[1] [This decision is to be cited as: *Brown v NZ Post Ltd (Recusal Application)* [2016] NZHRRT 37]

BACKGROUND

List of proceedings brought by Mr Brown

[2] Because reference will necessarily be made to other proceedings brought before the Tribunal by Mr Brown a list of his past and present cases follows:

> **[2.1]** HRRT003/2013: Brown v Otago Polytechnic. Filed 21 February 2013. Status: notice of withdrawal signed on 12 June 2014.
>
> **[2.2]** HRRT004/2013: Brown v Progressive Enterprises Ltd. Filed 19 March 2013. Status: notice of withdrawal signed on 20 May 2014.
>
> **[2.3]** HRRT037/2016: Brown v New Zealand Post Ltd. Filed 11 July 2016. Status: first teleconference convened on 11 November 2016.
>
> **[2.4]** HRRT045/2016: Brown v Centre City New World. Filed 2 August 2016. Status: Awaiting first teleconference.
>
> **[2.5]** HRRT048/2016: Brown v Dunedin City Council. Filed 11 August 2016. Status: Awaiting first teleconference.

[3] In both of the 2013 proceedings Mr Brown sought the recusal of the Chairperson. That application was dismissed in *Brown v Otago Polytechnic and Progressive Enterprises (Recusal Application)* [2014] NZHRRT 5 (4 February 2014). Both proceedings were later withdrawn by Mr Brown.

The present proceedings

[4] The present proceedings in HRRT037/2016 have been brought by Mr Brown under the Human Rights Act 1993. It is alleged NZ Post breached Part 2 of the Human Rights Act 1993 by discriminating against Mr Brown in the provision of goods and services (s 44(1)(a)). Indirect discrimination (s 65) is also alleged and in addition Mr Brown claims to have been victimised in terms of s 66(1)(a)(i). The prohibited ground of discrimination said to have been involved in these incidents is not entirely clear from the statement of claim.

[5] In a statement of reply filed on 18 August 2016 NZ Post denies the allegations.

[6] By separate memorandum filed with the statement of reply NZ Post submits the statement of claim does not identify the facts and circumstances relied on by Mr Brown in support of the alleged breaches of ss 44, 65 and 66 of the Act and therefore seeks a direction that Mr Brown file full and proper particulars of his case.

The documents filed by Mr Brown on 26 August 2016

[7] By email dated 26 August 2016 Mr Brown filed the following documents:

> **[7.1]** An affidavit sworn by Mr Brown at the District/High Court Dunedin on 26 August 2016. In this document Mr Brown alleges the Chairperson of the Tribunal misconducted himself in two different respects in the context of the 2013 proceedings brought by Mr Brown.
>
> **[7.2]** A copy of a letter dated 26 August 2016 from Mr Brown to Inspector Amelia Steel of Dunedin Central Police Station. In his letter Mr Brown alleges (inter alia) the Police have "continually suppressed or falsified evidence against me to obtain

unlawful convictions or to derail all the good I achieve in my day to day life, while the Courts continually refuse to accept evidence that clearly demonstrates my innocence". Mr Brown goes on to allege a judge of the District Court behaved improperly during a hearing in which Mr Brown was involved and it is also claimed the Independent Police Conduct Authority has "whitewashed every genuine complaint [Mr Brown has] filed from 1990 to date". To this letter Mr Brown attached a statement he claimed to have made "as a result of the abusive, lawless conduct of the New Zealand Police and the Courts".

[7.3] A letter dated 26 August 2016 from Mr Brown to Mr Dorking, the solicitor who represents Centre City New World in the HRRT045/2016 proceedings. In this letter Mr Brown states that he will be filing "a charge document" against Centre City New World and describes the allegations made by staff of that company as an "utterly feeble falsehood".

[8] As the purpose of the filing of these documents and the identification of the proceedings in which they were intended to be filed was unclear, the Secretary by email dated 29 September 2016 required Mr Brown to provide this information.

[9] By email dated 30 September 2016 Mr Brown replied that the affidavit was filed as a record in case he (Mr Brown) needed "to file criminal proceedings against the Tribunal". The letter to Inspector Steel was for "the Tribunal records" while the letter to Mr Dorking was for "Central City New World". The email read:

> The affidavit against Mr Hanies [sic], is a record for the Tribunal and for myself in case I need to file criminal proceedings against the Tribunal. The correspondence in regard to Inspector Amelia Steel, is for the Tribunal's records. The correspondence that relative to Mr Dorking, is for Central City New World.
>
> I have not had the chance to visit the Tribunal's office, but I will do so before I return to Dunedin.

The *Minute* issued on 12 October 2016

[10] By *Minute* dated 12 October 2016 the Chairperson noted that none of the papers filed by Mr Brown on 26 August 2016 were related to any application currently before the Tribunal in any of his three 2016 proceedings. Indeed, no application at all had been filed by Mr Brown in relation to those proceedings. Mr Brown was accordingly required to file any intended application by 28 October 2016 together with all supporting sworn evidence and submissions. The formal directions recorded in the *Minute* were:

> **Directions**
>
> **[10]** The following directions are made:
>
> > **[10.1]** If in any of the three proceedings in which he is a plaintiff in this Tribunal, Mr Brown intends making an application based either in whole or in part on any of the documents filed by him on 26 August 2016, such application is to be filed and served by 5pm on Friday 28 October 2016 together with all supporting sworn evidence and submissions.
> >
> > **[10.2]** Case management directions are then to be given for the hearing and determination of the application(s).
> >
> > **[10.3]** Leave is reserved to both parties to make further application should the need arise.

[11] No application, evidence or submissions have in fact been filed by Mr Brown in any of the three proceedings filed in 2016.

The teleconference held on 11 November 2016

[12] The account of the teleconference convened by the Chairperson on 11 November 2016 is to be found in the Chairperson's *Minute* of the same date. In it there is a description of Mr Brown's behaviour which was clearly intended to ensure the Chairperson could not make himself heard above what can best be described as a "wall of sound" created by Mr Brown incessantly talking over the Chairperson. The narrative given in the *Minute* is in the following terms:

> **[11]** Immediately all parties had been joined to the teleconference at 2.15pm on Friday 11 November 2016 and without waiting for the Chairperson to make any introduction or to explain the purpose of the teleconference, Mr Brown, speaking in a loud voice and without pause, began repeating the phrase "Mr Haines you are not morally or legally able to be involved in any of my proceedings". Any attempt by me to say anything at all was met by repeated repetition of the same phrase. At times Mr Brown spoke so loudly he was shouting. It became clear the purpose of the wall of sound was to prevent me from saying anything at all. Repeated requests that Mr Brown allow me space in which to speak were drowned out by Mr Brown deliberately talking over me.

[13] These difficulties notwithstanding it was eventually possible for the Chairperson to elicit from Mr Brown his position in relation to the following two matters:

> **[13.1]** The affidavit sworn by Mr Brown on 26 August 2016.
>
> **[13.2]** The application by NZ Post for particulars.

[14] As to the first, Mr Brown acknowledged he had filed no application connected or related to his affidavit because in his opinion he had filed enough documentation and there was no need for anything further to be filed. He continued to repeat the phrase that the Chairperson was not morally or legally permitted to be involved in any of his proceedings.

[15] As to the application by NZ Post for particulars, Mr Brown said this application was "rubbish" and that his claim was clear, lucid and concrete. In response to a question from the Chairperson he said he did not have to make submissions on the NZ Post application and did not have to provide particulars as the statement of claim was "clear enough".

The opportunity to file submissions

[16] The *Minute* issued on 11 November 2016 (inter alia) drew attention to recent decisions of the Tribunal of relevance to the recusal application by Mr Brown and to the NZ Post application for particulars. The parties were given opportunity to file submissions. The submissions for NZ Post were received on 23 November 2016. No submissions were received from Mr Brown. He has, however, twice communicated with the Tribunal's Secretariat. The text of his emails dated 24 and 28 November 2016 respectively follow:

> **[16.1]** Email dated 24 November 2016 addressed to Mr Jaques (solicitor for NZ Post) and copied to the Tribunal's case manager:
>
> > On Friday, 25 November 2016, I will be having a break from my studies for one week.
> >
> > I will concentrate on having Mr Hanies (sic), disqualified from Chairing/presiding over my cases.
> >
> > I will be corresponding to the Governor General and filing a further affidavit against Mr Hanies (sic). If need be, I will file a charging document in regards to Mr Hanies (sic)

> perjury himself, and endeavouring to pervert the course of justice, while presiding over my previous cases.

[16.2] Email dated 28 November 2016 addressed to Ms Wano, Jurisdiction Manager, Tribunals Unit, Ministry of Justice:

> I will forward the Governor General an affidavit on 2 December 2016, in regard to having QC Rodger Hanies (sic), disqualified from presiding over my cases before the Tribunal.
>
> As a consequence of having no choice but to withdraw against Central City Countdown, in 2013-14, I am now forced to refile against two staff members of Countdown for abusive and harassing behaviour.

[17] It is now intended to address first, the application by Mr Brown that the Chairperson be recused and second, the application by NZ Post for an order requiring Mr Brown to provide full particulars of his claim.

The position taken by NZ Post on the recusal application

[18] By memorandum dated 23 November 2016 NZ Post, while making brief submissions on the relevant law, confirmed it would abide the decision of the Tribunal.

RECUSAL – THE LAW

[19] The well-established test for apparent bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question the decision-maker is required to decide. See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35 where there was unanimity in relation to the following passages from the judgment of Blanchard J at paras [3] to [5]:

> [3] There was no disagreement before us concerning the test for apparent bias. After some semantic differences, the test in the United Kingdom and the test in Australia have become essentially the same. In *Muir v Commissioner of Inland Revenue*, the Court of Appeal brought New Zealand law into line. In the Australian case of *Ebner v Official Trustee in Bankruptcy* the leading judgment was given by Gleeson CJ and McHugh, Gummow and Hayne JJ. They stated the governing principle that, subject to qualifications relating to waiver or necessity, a Judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". As that judgment proceeds to observe, that principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal (in the present case, the Court of Appeal) be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.
>
> [4] It was pointed out in *Ebner* that the question is one of possibility ("real and not remote"), not probability. The High Court of Australia also warned against any attempt to predict or inquire into the actual thought processes of the judge. Two steps are required:
>
> (a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
>
> (b) Secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".
>
> [5] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. Lord Hope of Craighead commented in *Helow v Secretary of State for the Home Department* that:

> before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[20] The bias test was more recently succinctly expressed in *Siemer v Heron [Recusal]* [2011] NZSC 116, [2012] 1 NZLR 293 at [11]:

> [11] It is well-established that apparent bias arises only if a fair-minded and informed lay observer might reasonably apprehend that there is a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. The observer will not adopt the perspective of a party seeking recusal unless objectively it is a justified one. It is necessary for those making decisions on whether there is apparent bias in a particular situation first to identify what is said that might lead a judge to decide the case other than on its merits and, secondly, to evaluate the connection between that matter and the feared deviation.

[21] In *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [62] it was said that where an allegation of bias is made the factual inquiry should be rigorous:

> First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the “bias” ball in the air.

[22] In *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, [2015] NZAR 1 at [66] the Court emphasised the statement by Blanchard J in *Saxmere* at [20] that the party alleging apparent bias must also articulate a logical connection between the alleged disqualifying factor and the “feared deviation” from the course of deciding the case on its merits. In the more recent decision of *A (SC 106/2015) v R* [2016] NZSC 31 at [16] the Supreme Court noted that judges should not recuse themselves without sufficient cause.

[23] All these principles apply with equal force to tribunals and to their members.

THE RECUSAL APPLICATION

[24] There is no formal recusal application as such. All Mr Brown has filed is an affidavit sworn by him on 26 August 2016 with the apparent intent that it apply to all three of the proceedings filed in 2016. The affidavit is in the following terms:

> I, Matthew Brown, of Dunedin, swear that:
>
> [1] Rodger Hanies [sic], Chairperson of the Wellington Human Rights Review Tribunal, asserted in early 2013 during a telephone conference that my claim against the Otago Polytechnic could not be successful. He asserted there was no legislation that would permit me to summons witnesses to a Tribunal hearing so that I might cross-examine the defendants of Otago Polytechnic in order to demonstrate the concrete violations of the Human Rights Act 1993 to which I was subjected.
>
> [2] I believe it was Barry Dorking, the lawyer representing Otago Polytechnic, who, during that telephone conference, affirmed that Mr Hanies' [sic] above assertions were correct, and therefore that my claim against Otago Polytechnic was futile.
>
> [3] In the Dunedin Human Rights Review Tribunal, accompanied by one of my McKenzie friends, Vivian Scott, I cited the repugnant violations of the Human Rights Act 1993 to which I had been subjected for over two months. Mr Hanies [sic] responded that I should consider the

employer of the defendants. I was utterly staggered at his comment, especially after airing the treatment to which I had been subjected.

[4] For the record, the organisation cited in this affidavit has made amends with me and continues to do so. Neither the Human Rights Commission nor the Human Rights Tribunal influenced the Otago Polytechnic's moral stance or willingness to agree upon an amiable and professional solution.

[5] This affidavit does not quote individuals verbatim, but reports the relevant facts in the most comprehensive and uncomplicated form.

[25] The concession in the last paragraph of the affidavit that individuals are not quoted verbatim underlines the very general terms in which the two allegations against the Chairperson are framed:

> **[25.1]** That during a teleconference in early 2013 he (wrongly) asserted it was not possible for Mr Brown to summon witnesses to a Tribunal hearing.
>
> **[25.2]** That during a Tribunal hearing in Dunedin he told Mr Brown he should "consider the employer of the defendants".

[26] Each allegation will be addressed in turn.

The first allegation – the summonsing of witnesses

[27] Section 109 of the Human Rights Act makes explicit provision for the Tribunal (or the Chairperson) to issue a witness summons:

109 Witness summons

(1) The Tribunal may, if it considers it necessary, of its own motion, or on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing of the proceedings.

(2) The witness summons shall state—

- (a) the place where the person is to attend; and
- (b) the date and time when the person is to attend; and
- (c) the papers, documents, records, or things which that person is required to bring and produce to the Tribunal; and
- (d) the entitlement to be tendered or paid a sum in respect of allowances and travelling expenses; and
- (e) the penalty for failing to attend.

(3) The power to issue a witness summons may be exercised by the Tribunal or a Chairperson, or by any officer of the Tribunal purporting to act by the direction or with the authority of the Tribunal or a Chairperson.

[28] During the course of the teleconference convened on 2 September 2013 so that case management directions could be given in HRRT004/13: Brown v Progressive Enterprises Ltd, the Chairperson made explicit reference to s 109 and Mr Brown's ability to apply under that provision for summonses addressed to the three employees of Progressive Enterprises Ltd originally named by Mr Brown as defendants in the proceedings but who were being replaced by their employer, Progressive Enterprises Ltd. The Chairperson told Mr Brown that though the three persons were to be removed as parties it would still be open to Mr Brown to require those persons to give evidence at the hearing. All this is recorded in the *Minute* issued on 2 September 2013 immediately after the teleconference:

[10] First, as to the proper defendant, Mr Crotty properly conceded that Progressive is responsible for the acts or omissions of the three individuals cited as defendants in the statement of claim. On this being explained to him, Mr Brown readily consented to the removal

> of those three individuals from the proceedings and their replacement by Progressive as the single defendant. The terms of the consent order follow below.
>
> **[11]** Mr Brown raised the question whether any or all of the three named persons could be summonsed by him to give evidence should the case proceed to a substantive hearing. It is not the role of the Tribunal or Chairperson to advise Mr Brown. He will need to take advice on the issue. It is appropriate, however, to point out that s 109 of the Human Rights Act provides that the Tribunal may, if it considers it necessary, on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing. The effect of s 111 is that it is the responsibility of the party requesting the summons to pay the witnesses' fees, allowances and travelling expenses.

[29] It is therefore plain on the face of the record there is no factual foundation for the claim first made by Mr Brown in 2013 and now repeated in 2016 that the Chairperson "asserted there was no legislation that would permit me to summons witnesses to a tribunal hearing so that I might cross-examine the defendants".

[30] In the context of the present application in HRRT037/2016 the Tribunal again rejects the renewed recusal application based as it is on exactly the same misconceived contention first rejected by the Tribunal in *Brown v Otago Polytechnic and Progressive Enterprises (Recusal Application)* (4 February 2014) at [39] to [41]. In that decision the Tribunal said:

> **[39]** It was for this reason that Mr Brown was required to particularise his allegations and to support them by affidavit. Had there been any factual basis for the allegations it would have been a simple task to provide the requested particulars. Instead, Mr Brown elected to leave the allegations unexplained and unparticularised.
>
> **[40]** The only allegation to which a specific response is possible is the allegation that Mr Brown was told by the Chairperson he (Mr Brown) could not summons a witness "under any circumstances". This allegation is plainly unsustainable as can be seen from the *Minute* issued in HRRT004/2013 (Progressive Enterprises) on 2 September 2013:
>
> > **[11]** Mr Brown raised the question whether any or all of the three named persons could be summonsed by him to give evidence should the case proceed to a substantive hearing. It is not the role of the Tribunal or Chairperson to advise Mr Brown. He will need to take advice on the issue. It is appropriate, however, to point out that s 109 of the Human Rights Act provides that the Tribunal may, if it considers it necessary, on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing. The effect of s 111 is that it is the responsibility of the party requesting the summons to pay the witnesses' fees, allowances and travelling expenses.
>
> **Recusal – conclusion**
>
> **[41]** It is our view that a fair-minded and informed lay observer would not reasonably apprehend that there is a real and not a remote possibility that the Chairperson of the Tribunal might not bring an impartial mind to the determination of HRRT003/2013 (Otago Polytechnic) and HRRT004/2013 (Progressive Enterprises). Such observer would take into account the following:
>
> > **[41.1]** By failing or refusing to provide particulars of his allegations Mr Brown has frustrated the rigorous factual inquiry required by the bias test. Expressed in different terms, the "bias" ball has been lightly thrown into the air.
> >
> > **[41.2]** The complaint by Mr Brown as to his alleged inability to summons witnesses is demonstrably without foundation.
> >
> > **[41.3]** The lawyer representing Otago Polytechnic who participated in all three teleconferences has stated:
> >
> > > **[41.3.1]** At no point has there been any conduct by the Chairperson which could reasonably be described as bias and prevarication, or any statements made about the "fundamental mechanisms of the Tribunal" which could reasonably be described as misleading.

> > **[41.3.2]** At no time during the various telephone conferences could there be any reasonable suggestion that the Chairperson has misled Mr Brown as to his options for proceeding.
> >
> > **[41.3.3]** The Chairperson has proved a model of helpfulness and patience assisting Mr Brown, to the extent Mr Brown would allow, to comply with the reasonable requirements placed on plaintiffs who make claims against others.
>
> **[41.4]** The lawyers representing Progressive Enterprises and who participated in both teleconferences have stated that in their view the Chairperson has been even handed when dealing with the parties and has appropriately assisted Mr Brown, as a layperson, where possible.

[31] As earlier mentioned, Mr Brown subsequently elected to withdraw both of his 2013 proceedings.

[32] We turn now to the second allegation.

The second allegation – "consider the employer of the defendants"

[33] This ground for recusal is said to be that the Chairperson said to Mr Brown that he "should consider the employer of the defendants". However, it is difficult to see how these words, if spoken by the Chairperson, enliven a recusal issue.

[34] Given this circumstance it is necessary to refer to the ruling in *Muir v Commissioner of Inland Revenue* at [62] that where an allegation of bias is made, the factual inquiry should be rigorous. It is necessary to establish the actual circumstances which have a direct bearing on the suggestion the decision-maker is or may be seen to be biased. Complainants cannot lightly put bias in issue.

[35] Mr Brown is well aware of this legal requirement, it having been specifically referred to in the Tribunal's 4 February 2014 decision at [38], but has chosen to ignore it. Mr Brown's failure to particularise his allegation notwithstanding the direction that he do so (see the Chairperson's *Minute* of 12 October 2016) and notwithstanding further opportunity to do so when the Chairperson made enquiry during the teleconference convened on 11 November 2016 is in this context significant. Had there been any factual basis for Mr Brown's complaint it would have been a simple matter for him to have articulated the complaint in clear, unambiguous terms and to provide proper particulars. Instead Mr Brown has elected to leave the allegation incoherent, unexplained and unparticularised.

Recusal – conclusion

[36] Having regard to the fact that the first recusal ground has no factual foundation and further having regard to the fact the second recusal ground is incoherent, unexplained and unparticularised, it is our view that a fair-minded and informed lay observer would not reasonably apprehend that there is a real and not a remote possibility that the Chairperson of the Tribunal might not bring an impartial mind to the determination of HRRT037/2016: Brown v New Zealand Post. Such observer would take into account the following:

> **[36.1]** There is demonstrably no factual foundation to the allegation made by Mr Brown as to what he was told regarding his ability to summons witnesses.
>
> **[36.2]** By failing or refusing to provide particulars of his second allegation ("consider the employer") Mr Brown has frustrated the vigorous factual inquiry

required by the bias test. Impermissibly the "bias" ball has been lightly thrown into the air.

[36.3] This is the second occasion on which Mr Brown has made unsupportable allegations against the Chairperson. On the first occasion his recusal application was dismissed by the Tribunal in *Brown v Otago Polytechnic and Progressive Enterprises (Recusal Application)* [2014] NZHRRT 5 (4 February 2014).

CONCLUSION ON RECUSAL APPLICATION

[37] The recusal application made by Mr Brown is dismissed.

THE APPLICATION BY NZ POST FOR PARTICULARS

The statement of claim

[38] The forms approved by the Tribunal under the Human Rights Act, s 104(5) and the Human Rights Review Tribunal Regulations 2002, reg 5 for the commencement of proceedings, are published on the Tribunal's website. There are three forms in all, reflecting the Tribunal's separate and distinct jurisdictions under the Human Rights Act, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994. To initiate proceedings an intending plaintiff must first satisfy the eligibility requirements separately prescribed by those three statutes and in addition must meet the description of one of the persons listed in reg 6. An intending plaintiff must then use the form appropriate to the particular statute under which the proceedings are brought.

[39] In the present case Mr Brown has filed the form for initiating proceedings under the Human Rights Act. For present purposes reference will be made only to Parts 3 and 4 of that form.

[40] Part 3 requires the intending plaintiff to specify the provisions of the Human Rights Act alleged to have been contravened:

> **Part 3: Relevant provisions of the Human Rights Act 1993**
> Specify the provisions of the Human Rights Act 1993 which you consider to have been contravened.
> Take notice that the plaintiff says that the defendant has (or the defendants have) contravened the following provisions of the Human Rights Act 1993.

In response Mr Brown has written:

> Part 2
>
> Unlawful discrimination 21(a)(i)
>
> 44 Provision of Goods and Services (1)(a)(6)
>
> 65 Indirect discrimination
>
> 66 Victimisation (1)(a)(i)

[41] Part 4 requires particularisation of what the defendant has allegedly done in contravention of the Human Rights Act:

> **Part 4: Facts of the case**
> What do you say the defendant has done or not done (or the defendants have done or not done) that contravened the provisions of the Human Rights Act 1993 in your case?

In response Mr Brown has written:

> I have attached (enclosed) all relative documents and an affirmation, dated 4 May 2015.

[42] It can be seen that while the prescribed form requires a plaintiff to state "briefly and clearly the facts giving rise to [the] claim", Mr Brown has not done this. Instead he has annexed a series of documents, leaving the Tribunal and NZ Post to figure out for themselves what his (Mr Brown's) case is.

[43] In chronological order the attached documents are:

> **[43.1]** New Zealand Driver Licence No. CD566350 issued on 4 April 1991 in the name of Matthew Richard Brown.
>
> **[43.2]** Undated Trespass Notice addressed to Andre Richard Joy in respect of New Zealand Post/Kiwibank 310 Moray Place, Dunedin.
>
> **[43.3]** Undated details of Service of Trespass Notice.
>
> **[43.4]** Letter dated 6 May 2013 from Mr Brown to Police Complaints Authority (two pages) regarding the service on 25 April 2013 of a Trespass Notice.
>
> **[43.5]** Letter dated 8 May 2013 from NZ Post to Mr Brown regarding NZ Post's complaints resolution process and rejecting the allegation by Mr Brown that NZ Post staff had acted inappropriately or that Mr Brown's privacy had been breached by NZ Post.
>
> **[43.6]** Letter dated 14 June 2013 from NZ Post to Mr Brown confirming NZ Post remained of the view that its staff member had acted appropriately.
>
> **[43.7]** 4 May 2015 affirmation of Matthew R Brown. It is not clear whether this document has in fact been affirmed. The document provided to the Tribunal comprises a cover sheet and a single page of narrative without jurat.
>
> **[43.8]** Letter dated 4 May 2015 from Mr Brown to Kiwibank Christchurch referring to an enclosure described as an affirmation of events which occurred between Mr Brown and staff members employed by PostShop/Kiwibank. The letter also submitted a request under Official Information Act 1982.
>
> **[43.9]** Letter dated 25 May 2015 from Mr Brown to Kiwibank, Christchurch regarding matters addressed by Mr Brown in an "affidavit" dated 4 May 2015.
>
> **[43.10]** Letter dated 29 May 2015 from NZ Post to Mr Brown addressing his request under the Official Information Act.
>
> **[43.11]** Letter dated 13 October 2015 from Chief Mediator to Mr Brown confirming action taken by the Human Rights Commission in respect of Mr Brown's complaints against Kiwibank, New World Centre City and Moana Pool and the responses of NZ Post, New World Centre City and the Dunedin City Council to the complaints made by Mr Brown.
>
> **[43.12]** Letter dated 14 June 2016 from Mr Brown to Chief Executive, NZ Post requesting correspondence earlier provided to Mr Brown by letter dated 8 May 2013.

[43.13] Letter dated 20 June 2016 from Mr Brown to Chief Executive, NZ Post regarding the "degrading treatment" to which Mr Brown was allegedly subjected by the former manager of the Moray Place PostShop/Kiwibank and requesting information under the Official Information Act.

[43.14] Letter dated 6 July 2016 from NZ Post to Mr Brown advising NZ Post believes Mr Brown has previously been provided with accurate and clear information concerning the reasons why certain trespass notices were issued and declining the requests for information under s 18(h) of the Official Information Act and s 29(1)(j) of the Privacy Act 1993.

[43.15] Photocopy of page taken from *New Zealand Civil Rights Handbook*

[44] In summary, the statement of claim filed by Mr Brown on 11 July 2016 is best described as a sparse document as far as content is concerned. It does not briefly and clearly state the facts giving rise to Mr Brown's claim. The Tribunal and NZ Post are left to fossick through various documents unaided by meaningful particulars.

[45] For reasons now explained, this is both unacceptable and impermissible.

STATEMENTS OF CLAIM AND PARTICULARS – THE LAW

The importance of pleadings

[46] It may be stating the obvious but articulating a claim with proper particulars is far more effective in promoting an understanding of a case than expecting the Tribunal and the opposing party to rummage through unexplained documentation and correspondence attached to the statement of claim. This is not a mere pleading point. See *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 where, in delivering the judgment of the Court, McGechan J said:

> It has become fashionable in some quarters to regard the pleadings as being of little importance. There was an echo of that approach in the implicit suggestion floated in this case that exchange of briefs of evidence before trial might be seen as curing any lack of particularity in the pleadings. Any such view is misguided. Pleadings which are properly drawn and particularised are, in a case of any complexity, if not in all cases, an essential road map for the Court and the parties. They are the documents against which the briefs of evidence are or should be prepared. They are the documents which establish parameters of the case, not the briefs of evidence.
>
> We are not casting aspersions on the pleadings in this case which, leaving aside issues about necessary particularity, are well drawn on each side. Nor are we advocating a pedantic approach to the topic. Pleadings should be read as conveying what they would reasonably convey, in the context of the case, to a sensible legal mind. Even less are we advocating prolixity of pleadings, or the raising of every conceivable cause of action irrespective of its potential for success; this type of pleading often contains the additional flaw of overlooking R114 which requires each cause of action to be separately pleaded. What we are saying is that both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence, and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.

Pleadings in the Human Rights Review Tribunal

[47] It is plain from the face of the form prescribed for use in claims under the Human Rights Act that a plaintiff must give full particulars of the facts giving rise to the claim.

See particularly the instructions at **Part 4: Facts of the case**. This requirement is a general principle of pleading reflected also in High Court Rules, r 5.26 which provides:

> **5.26 Statement of claim to show nature of claim**
>
> The statement of claim—
> (a) must show the general nature of the plaintiff's claim to the relief sought; and
> (b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action; and
> (c) must state specifically the basis of any claim for interest and the rate at which interest is claimed; and
> (d) in a proceeding against the Crown that is instituted against the Attorney-General, must give particulars of the government department or officer or employee of the Crown concerned.

[48] This rule has been adopted by the Tribunal on numerous occasions, most recently in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 (5 May 2015) at [25] and in *Rossi v Chief Executive of the Ministry of Business, Innovation and Employment (Strike-Out Application)* [2016] NZHRRT 18 at [16].

[49] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [84] the Court of Appeal summarised the requirements of a statement of claim (High Court Rules, rr 5.17, 5.26 and 5.27):

> **[49.1]** The pleading must be accurate, clear and intelligible.
>
> **[49.2]** Sufficient particulars must be given to enable the defendant to be fairly informed of the case to be met.
>
> **[49.3]** While adequate particulars are required, the statement of claim must not stray into setting out the evidence relied upon.

These requirements apply equally in proceedings before the Tribunal.

[50] Reference must also be made to *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2007, Wild J at [57] to [59]:

> [57] Parties seeking redress from Tribunals and Courts must state their claim in a way which enables the Court or Tribunal and parties responding to the claim to understand what the claim is about. Claims should be pleaded in the most succinct and concise way possible.
>
> [58] Tribunals and Courts, and responding parties, should not be left in the position of attempting to make sense of a "morass of information" (to borrow the Tribunal's description of Ms Mackrell's claim). To put Courts and respondents in the position of having to try and make sense of the incomprehensible is what is meant by the rather quaint terms "embarrass" and "prejudice" in relation to pleadings.
>
> [59] Due allowance is to be made for lay litigants such as Ms Mackrell, and it was made by the Tribunal here. But lay litigants, like litigants who are professionally represented, are required to comply with the pleading rules and procedures of Tribunals and Courts. They are not to be permitted to file incomprehensible claims, because that only visits prejudice and injustice upon the respondent, not to mention enormous inconvenience to the Court or Tribunal.

[51] A statement of claim drafted in compliance with these requirements gives both the Tribunal and the defendant notice of what is being alleged and against whom. Pleading should not be permitted to be a means of oppressive conduct against opposing parties. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* at [87]:

> [87] If a statement of claim has been drafted in compliance with the above requirements, then both the court and the defendant parties should have a clear understanding of what is being

> alleged and against whom. However, verbose, ill-drafted pleadings may defeat the purpose of a statement of claim to such an extent that it is an abuse of process. This principle is intended, as *Odgers* suggests, to "prevent the improper use of [the court's] machinery". Pleading should not be permitted to be a means of oppressive conduct against opposing parties.
> [Footnote citation omitted]

[52] If there has been such conduct, the statement of claim may be struck out. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* at [89]:

> [89] The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes ….
> [Footnote citations omitted]

The content of the statement of claim filed by Mr Brown

[53] In the present case the statement of claim is bereft of meaningful content with the result the Tribunal and NZ Post are left to search through the attached documents for clues as to what Mr Brown's case is. This is unacceptable as is Mr Brown's unreasoned refusal to provide particulars or to make submissions on the NZ Post application. It was particularly unhelpful for him to characterise the application as "rubbish". As pointed out in *Mackrell v Universal College of Learning* at [58] and [59], parties should not have to make sense of the incomprehensible. Lay litigants are not to be permitted to file unintelligible claims because that only visits prejudice and injustice upon the opposing party, not to mention the enormous inconvenience to the court or tribunal. In *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30] to [32] it was accepted abuse of process extends to proceedings which are seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment.

Particulars – conclusion

[54] For the foregoing reasons Mr Brown is required to file and serve an amended statement of claim which complies with the requirements discussed above. The key points are:

> **[54.1]** The amended statement of claim must be accurate, clear and intelligible.
>
> **[54.2]** Sufficient particulars must be given to enable to NZ Post to be fairly informed of the case to be met.
>
> **[54.3]** While adequate particulars are required, the amended statement of claim must not stray into setting out the evidence to be relied upon.

[55] As stated by NZ Post in its application dated 18 August 2016 it is necessary for Mr Brown to:

> **[55.1]** Focus the amended statement of claim on what, if any, valid human rights complaint he (Mr Brown) has;
>
> **[55.2]** Set out the relevant facts and circumstances relied on in support of that complaint; and

> **[55.3]** Limit the scope of the amended claim to the facts and circumstances relevant to that complaint.

[56] Unless the amended statement of claim fully complies with these requirements Mr Brown is likely to face an application by NZ Post that these proceedings be struck out.

ORDERS

[57] By 5pm on Friday 16 December 2016 Mr Brown is to file and serve an amended statement of claim which, in accurate, clear and intelligible terms provides sufficient particulars to enable NZ Post to be fairly informed of the case to be met. The amended statement of claim must:

> **[57.1]** Identify the valid complaint(s) Mr Brown has under the Human Rights Act 1993;
>
> **[57.2]** Set out the relevant facts and circumstances relied on in support of each complaint; and
>
> **[57.3]** Limit the scope of the amended statement of claim to the facts and circumstances relevant to each complaint.

[58] Within 30 days of service of the amended statement of claim or by 5pm on Friday 3 February 2017 (whichever is the later) NZ Post is to file an amended statement of reply as well as any other response to the re-pleaded statement of claim which NZ Post believes necessary in the circumstances.

[59] A further teleconference is thereafter to be convened by the Secretary.

[60] Leave is reserved to both parties to make further application should the need arise.

....	....	....
Mr RPG Haines QC **Chairperson**	**Ms GJ Goodwin** **Member**	**Dr SJ Hickey MNZM** **Member**