IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 19**

	Reference No. HRRT 028/2012
UNDER	**THE HUMAN RIGHTS ACT 1993**
IN THE MATTER OF	**AN APPLICATION BY THE DEFENDANT THAT THE PROCEEDINGS BE STRUCK OUT**
BETWEEN	**FRIEDRICH JOACHIM FEHLING**
	PLAINTIFF
AND	**DOUGLAS JOHN APPLEBY**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Dr SJ Hickey, Member

REPRESENTATION:
Mr FJ Fehling in person
Mr MM Bell for defendant

DATE OF DECISION: 8 May 2013

DECISION OF TRIBUNAL
DISMISSING STRIKE-OUT APPLICATION BY DEFENDANT

[1] In response to the *Minute* issued by the Chairperson on 22 January 2013 Mr Appleby has advised that he is pursuing his strike-out application as a preliminary matter rather than in the context of the substantive hearing itself. On 15 February 2013 Mr MM Bell filed submissions in support of the strike out application. In turn, Mr Fehling on 7 March 2013 filed equally detailed submissions in opposition. In submissions dated 15 March 2013 Mr Bell has replied.

[2] Our conclusion is that the strike-out application is premature. As it is possible for the application to be renewed either at the close of Mr Fehling's case or at the close of all the evidence, we do not intend embarking upon a detailed consideration of the at times intricate arguments presented by the parties.

Background circumstances

[3] In their submissions both parties have assumed that the Tribunal is aware of certain "facts" even though the statement of claim and statement of reply respectively are somewhat economic documents. Both do, however, refer explicitly to the decision of the Tribunal in *Fehling v South Westland Area School* [2012] NZHRRT 15 (6 July 2012, RPG Haines QC Chairperson, J Grant & S Scott). Many of the "facts" assumed by the parties are summarised in the first two paragraphs of that decision:

> **[1]** On 5 January 2009 Mr Fehling was lawfully on that part of the school grounds which had been leased by South Westland Area School (SWAS) to one of its senior teachers. Without the knowledge or consent of that teacher and without prior discussion or warning, Mr Fehling was served with a notice under s 4 of the Trespass Act 1980 requiring him to stay off the entire school grounds, including the leased grounds. The notice was signed by the School Caretaker and served by the Police. No reasons were given. Immediately upon service of the notice Mr Fehling was arrested, apparently on an outstanding warrant in relation to some other matter. It being the holiday period, there were no judicial facilities on the West Coast and Mr Fehling was accordingly taken to Christchurch. On his first appearance there before a District Court Judge he was released at large without bail. The charge was dropped. From the time of his arrest to the time of his release Mr Fehling mounted a hunger and water strike, a period of three and a half days.
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> **[2]** When Mr Fehling asked the School for the reasons for the issue of the trespass notice, the School declined to provide them. On seeking the intervention of the Ombudsman Mr Fehling was told that the reason was that complaints had been made to the Caretaker that he (Mr Fehling) had been using the pool, showers and toilets at the School. Mr Fehling strongly denies these allegations. By way of a request for personal information under the Privacy Act 1993, Mr Fehling sought the names of the individuals who had made the complaints. The School declined to provide that information, relying on s 27(1)(d) (disclosure of the information would likely endanger the safety of any individual) and s 29(1)(a) (disclosure of the information would involve the unwarranted disclosure of the affairs of another). The issue in these proceedings is whether the information has been properly withheld.

[4] The Tribunal concluded that it had been satisfied on the balance of probabilities that whether viewed as an interference with privacy as defined in s 66(1) of the Privacy Act 1993 or as an interference with privacy defined in s 66(2), the school had interfered with Mr Fehling's privacy. The Tribunal granted the following remedies:

> **[4.1]** A declaration under s 85(1)(a) of the Privacy Act that South Westland Area School had interfered with the privacy of Mr Fehling by refusing to disclose the personal information which had been requested by him.
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> **[4.2]** Damages of $10,000 for humiliation, loss of dignity and injury to feelings.

[5] On 23 August 2012 the *Hokitika Guardian* published an account of the case. Mr Appleby, Chairman of the Board of Trustees of the School, was reported as saying:

> We fought it so that people could feel safe and maintain their right to privacy. I would do it again.

The case for the defendant

[6] For the defendant Mr Bell says that Mr Fehling advances two complaints. First, that there has been a breach of the Human Rights Act 1993, s 63 (racial harassment) and s 65 (indirect discrimination). As to this it is submitted that there is nothing in the reported

comments by Mr Appleby which identifies Mr Fehling. In addition, no act of discrimination, either express or implied, can be found in the comments. As none of the prohibited grounds of discrimination in s 21 of the Act have been breached any complaint Mr Fehling may have about Mr Appleby's reported comments are not within the Tribunal's jurisdiction.

[7] The second complaint identified in Mr Bell's submissions is that the defendant has breached the provisions of the Human Rights Act by refusing to allow Mr Fehling access to or use of any place to which members of the public are entitled to go to or to access; or has refused him the use of facilities available to members of the public by reason of the prohibited grounds of discrimination. As developed, this argument requires the Tribunal to consider the terms of the trespass notice issued and served on 5 January 2009 and the circumstances in which that notice was issued. In particular it is submitted that the trespass notice did not deny Mr Fehling access to any place to which members of the public are entitled to go to and second, there is no evidence that denial of access via the trespass notice was due to any one of the prohibited grounds of discrimination.

[8] An additional point made by Mr Appleby is that he is the wrong defendant or at least, the Board of Trustees of the South Westland Area School should be added as a second defendant.

The submissions by Mr Fehling

[9] In his written submissions Mr Fehling identifies three "questions of law" which, in turn, provide insight into the evidence he will need to lead at the hearing:

> Does s 4(1) and (2) of the Trespass Act 1980 (warning & notice to stay off a property that otherwise provides public facilities for public access) invalidate ss 44, 134 HRA (definition of offence by preventing a member of the public access to a public – facility place in a discriminatory way)?
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> Does s 65 HRA 1993 (indirect discrimination) require the offender to have directly stated the discriminatory grounds for his acts) in order to become valid?
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> Do proceedings under the Privacy Act's information provisions preclude or disable proceedings under the HRA's anti-discrimination (incl offence definition) provisions that are brought as a consequence of the resulting emerging information?

[10] In developing each of these issues Mr Fehling at times refers extensively to the necessarily factual setting in which these points must be determined.

The defendant's reply

[11] The reply submissions for Mr Appleby engage with Mr Fehling's factual assertions and offer a different account. They also develop three points found also in the original submissions. First, that Mr Appleby did not sign the trespass notice. Rather it was issued by the Police. Second, that the proper defendant should be the Board of Trustees of South Westland Area School and third, that the proceedings are an abuse of process as the claim under the Human Rights Act ought to have been prosecuted at the same time as Mr Fehling's case under the Privacy Act.

The principles to be applied in a strike-out application

[12] 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 …

[13] 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).

Application of the principles

[14] We address first the principle that a strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. Here the statement of claim is somewhat sparse but the essence of Mr Fehling's case is nonetheless clear. The submissions for Mr Appleby properly recognise the two broad grounds on which it is advanced. Mr Fehling, in turn, has amplified the basis of his case in his detailed six page submissions. While it might be argued that those submissions cannot be read with the statement of claim, for the purpose of a strike-out application such view is too narrow and technical. Mr Fehling is self-represented and in fairness to him the two documents should be read together. The Tribunal must act according to the substantial merits of the case without regard to technicalities. See s 105(1) of the Human Rights Act. While Mr Appleby may well deny the allegations made by Mr Fehling, the strike-out application necessarily proceeds on the assumption that the factual allegations made by Mr Fehling are true.

[15] As to the first complaint which has at its centre the reported comments by Mr Appleby in the *Hokitika Guardian*, the question is one of inferences. That is, while Mr Appleby does not identify Mr Fehling in his reported comments, the strike-out application must proceed on the basis that to readers of the *Hokitika Guardian*, it was obvious that Mr Appleby could only have been referring to Mr Fehling. No one else had been awarded $10,000 damages against the school and no one else had been trespassed from the school in January 2009 on the supposed basis of "safety concerns". It can also be inferred that the comments were implicitly in breach of ss 63 and 65 of the Act.

[16] As to the second complaint, Mr Fehling alleges that Mr Appleby authorised the issue of the trespass notice. He also alleges that among the purposes behind the issuing of that notice was the intent to discriminate against Mr Fehling on one or more of the prohibited grounds of discrimination in s 21 of the Human Rights Act. Mr Appleby denies these allegations but, as mentioned, for the purpose of the strike-out application the allegations are treated as true.

[17] Standing back, it can be seen that both complaints share a common feature in that significant components turn on the inferences which can be drawn from the evidence. On this strike out application we must proceed on the basis that the inferences relied on by Mr Fehling are the proper inferences.

[18] We turn now to the requirement that the causes of action must be "so clearly untenable that they cannot possibly succeed". In this regard we are of the view that this stringent test has not been satisfied by Mr Appleby. On the information before the Tribunal in the form of the statement of claim, the statement of reply and the submissions on the strike-out application, we are of the view (contrary to the argument from Mr Appleby) that the causes of action relied on by Mr Fehling are indeed tenable. Whether they will ultimately prevail at trial is another issue. But when considering a strike-out application at the preliminary stages of any proceeding, it is necessary to be

cautious to prevent injustice to claimants who may in fact have a good claim once all the evidence is before the Tribunal, including through cross-examination.

[19] The next requirement is that the jurisdiction is to be exercised sparingly and only in a clear case where the tribunal is satisfied that it has the requisite material. As to this requirement, we have no confidence at all that we have the "requisite material" to determine that on this peremptory application the claim by Mr Fehling is clearly untenable as a matter of law or that there is a complete and incontrovertible answer on the facts. In short, the case is not suitable for summary dismissal ahead of trial.

The delay point

[20] We cannot currently see any substance to the argument that these proceedings under the Human Rights Act should have been brought concurrently with the proceedings initiated by Mr Fehling under the Privacy Act. For all we know Mr Fehling could well reply that until he succeeded in those proceedings he did not have the information he needed to bring the present proceedings under the Human Rights Act. In addition no serious prejudice or harm has been asserted by Mr Appleby. Our present view is that the delay point, if it has any substance, will go to the issue of remedy should Mr Fehling successfully establish his case.

Outcome

[21] The strike-out application by Mr Appleby is dismissed.

Next steps

[22] Ordinarily the Chairperson would give timetable directions for the filing of evidence. However, to avoid unnecessary delay we intend giving those timetable directions in this decision but leave it to the Chairperson to vary or to amend those directions should the need arise.

Timetable directions

[23] The following directions are made:

> **[23.1]** Both Mr Fehling and Mr Appleby are to notify the Tribunal by 5pm on Friday 24 May 2013 whether either (or both) has proper grounds to oppose the joinder of the Board of Trustees of South Westland Area School as a second defendant to these proceedings.
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> **[23.2]** Written statements of the evidence to be called at the hearing by Mr Fehling are to be filed and served by 5pm on Friday 21 June 2013.
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> **[23.3]** Written statements of the evidence to be called at the hearing by Mr Appleby are to be filed and served by 5pm on Friday 26 July 2013.
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> **[23.4]** Any written statements of evidence in reply by Mr Fehling are to be filed and served by 5pm on Friday 16 August 2013.
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> **[23.5]** Any documentary evidence to be relied on by a party must be filed by the relevant stipulated date.
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> **[23.6]** The proceedings are to be heard at Hokitika on a date to be advised by the Secretary.

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

[24] It goes without saying that should the Board of Trustees of South Westland Area School be joined as a defendant in these proceedings the foregoing timetable may require amendment.

[25] The time allowed for each of the timetable steps is generous as account has been taken of the communication challenges presented by the distance of South Westland from both Christchurch and Wellington.

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Mr RPG Haines QC	**Mr GJ Cook JP**	**Dr SJ Hickey**
Chairperson	**Member**	**Member**