IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 24**

	Reference No. HRRT 028/2012
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**FRIEDRICH JOACHIM FEHLING**
	PLAINTIFF
AND	**DOUGLAS JOHN APPLEBY**
	DEFENDANT

AT HOKITIKA

BEFORE:
Mr RPG Haines QC, Chairperson
Ms WV Gilchrist, Member
Mr MJM Keefe JP, Member

REPRESENTATION:
Mr FJ Fehling in person
Mr DJ Appleby in person

DATE OF HEARING: 26 and 27 May 2014

DATE OF DECISION: 9 June 2014

DECISION OF TRIBUNAL

Introduction

[1] On 5 January 2009 Mr Fehling was served with a trespass notice requiring him to stay off the grounds of South Westland Area School (SWAS). Believing (correctly) that there were no grounds for the issue of the notice, Mr Fehling sought the names of the individuals who had provided the "information" which had caused the notice to be issued. The School declined to provide that information. In proceedings brought by Mr Fehling under the Privacy Act 1993 the Tribunal (differently constituted) found that SWAS had no proper grounds for withholding the information and the refusal was an interference with Mr Fehling's privacy. Damages of $10,000 were awarded to Mr Fehling.

[2] These proceedings under the Human Rights Act 1993 (HRA) are the sequel to that decision. Mr Fehling alleges:

[2.1] The trespass notice denied him access to the grounds of SWAS, particularly those parts to which the community have access outside school hours. One or more of the prohibited grounds of discrimination were among the reasons for the issuing of the trespass notice.

[2.2] When Mr Appleby, then Chairperson of the SWAS Board of Trustees, was interviewed by the *Hokitika Guardian* about the Tribunal's decision under the Privacy Act, he made comments which had the effect of treating Mr Fehling differently on one or more of the prohibited grounds of discrimination or which amounted to victimisation.

[3] The issue in these proceedings is whether these claims are established on the evidence.

Representation

[4] Mr Fehling has throughout these proceedings represented himself.

[5] Mr Appleby was initially represented by Mr MM Bell of Corcoran French, solicitors of Christchurch. However, by memorandum dated 17 March 2014 Mr Bell gave notice that on 10 February 2014 at the Greymouth High Court Mr Appleby was declared bankrupt on the application of the ASB Bank. It was submitted that as a consequence of s 76 of the Insolvency Act 2006 the proceedings were halted. The Tribunal rejected that submission in *Fehling v Appleby (Bankruptcy)* [2014] NZHRRT 17 (1 May 2014). Mr Bell then, by memorandum dated 16 May 2014, advised that because Mr Appleby could not afford further legal representation, he (Mr Appleby) would represent himself at the hearing.

Preliminary issues

[6] Mr Appleby has made two unsuccessful interlocutory applications. The first was a strike out application. That application was dismissed by the Tribunal in *Fehling v Appleby (Strike-Out Application)* [2013] NZHRRT 19 (8 May 2013). The second was a recusal application relating to the three members of the panel which heard and determined the proceedings in which the decision of 6 July 2012 was given under the Privacy Act. Those members were the Chairperson, RPG Haines QC, Ms J Grant, Member and Ms S Scott, Member. The application was dismissed in *Fehling v Appleby (Recusal Application)* [2014] NZHRRT 11 (17 March 2014). Neither decision was challenged on appeal.

[7] At the commencement of the hearing Mr Fehling made two applications:

[7.1] First, that the Tribunal address certain further issues under the Insolvency Act, particularly in relation to the remedies the Tribunal can award against a bankrupt defendant. In this regard the Tribunal ruled that the issue was premature and should await the outcome of the case.

[7.2] Second, that the Tribunal, in considering HRA s 42 (discrimination in access to places and facilities) should also make a ruling whether a criminal offence has been committed under the "mirror" provisions of HRA s 134 as the stipulation in HRA s 135 that a prosecution under s 134 only proceed with the consent of the Attorney-General was inconsistent with the protection of human rights. As to this the Tribunal ruled that it had no jurisdiction in relation to criminal matters and would not make any determination in relation to HRA s 134 and 135.

[8] For his part Mr Appleby submitted that as the actions complained of by Mr Fehling were done by Mr Appleby as Chairperson of the SWAS Board of Trustees, he was not personally liable. Reliance was placed on the Education Act 1989, Schedule 6, cl 4 which provides:

> **4 Trustees not personally liable**
>
> No trustee is personally liable for—
> (a) any act done or omitted by the board; or
> (b) any loss to the board arising out of any act done or omitted by the trustee,—
> if the act or omission was (so far as the trustee's involvement is concerned) in good faith in pursuance or intended pursuance of the functions of the board.

[9] We do not see this provision as having application. As is made clear by cls 1A and 1B, a board may do an act only for the purpose of performing its functions and cannot perform an act contrary to any statute. Quite simply, neither a board nor its chairperson can discriminate against a person in breach of HRA, Part 2. Such discrimination cannot be an "act … in good faith in pursuance or intended pursuance of the functions of the board".

The findings made in the proceedings under the Privacy Act

[10] As recorded in the Tribunal's decision given on 6 July 2012 in the Privacy Act proceedings, those proceedings were against the School. Mr Appleby, as Chairperson of the Board, attended the entire hearing to support the (then) School Principal and the school's other witness, being the Caretaker, Mrs Adamson. Mr Appleby did not himself give evidence. As plaintiff, Mr Fehling attended the entire hearing.

[11] It was in these circumstances understandable that in the present proceedings both Mr Fehling and Mr Appleby made extensive reference to the evidence given in the Privacy Act proceedings and in particular, to the findings made by the Tribunal in the decision given on 6 July 2012.

[12] Those findings are inherently part of the background to this case and reference to them will be made as necessary.

The Privacy Act decision – central findings

[13] It is not practicable to recite at length the findings of fact made by the Tribunal in the decision delivered on 6 July 2012 and which in the present proceedings is Exhibit 4. The following is a summary only of the key findings:

> **[13.1]** Mr Fehling, born in Germany, is an electric engineer by training but has chosen to live a simple life in Nature. He has a particular attachment to Hari Hari where he has lived for approximately twenty years. He speaks English fluently, though with a marked accent. He is also at times intensely intellectual. These factors aid an understanding of why he is regarded as an "outsider" by some in Hari Hari. [Decision [18]]
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> **[13.2]** Mr Fehling is an environmentalist. He includes in his environment "everything", that is not just the "green" environment but also the human environment which includes philosophy, rights, the Bill of Rights and the respect of rights by both government and citizens. [Decision [19]]
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> **[13.3]** From an early point following his arrival in Hari Hari Mr Fehling has known Mr Jim Costello, a senior teacher at the School. At the relevant time he (Mr

Costello) lived on the School grounds with his wife in a house provided by the School. Mr Fehling and Mr Costello have become long term friends, Mr Fehling visiting Mr Costello and his wife often. Over the years Mr Fehling has been given permission by Mr Costello to stay on the grounds of the house. Since about 2005 Mr Fehling has travelled about and lived in a van which while in Mr Costello's ownership, was apparently purchased by Mr Fehling. [Decision [20]]

[13.4] It is common knowledge in Hari Hari that Mr Fehling is a friend of Mr Costello and that, from time to time, Mr Fehling stays on the Costello property in his van. [Decision [21]]

[13.5] It would seem that not all in Hari Hari have been as appreciative or welcoming of Mr Fehling as Mr Costello. The Tribunal was told of various incidents in which Mr Fehling says he was subjected to harassment by reason only of the fact that he is seen as "different". These incidents include the night-time smashing of the windows of his van; minor assaults and an occasion when his campsite was invaded by a motor vehicle doing "doughnuts" and other loss of traction manoeuvres to frighten him. Mr Fehling talked about encountering general hostility in the community which he explained in the following terms:

> I come from a different culture and background, have a different sense of freedom and there are a few people who cannot accept this.

[Decision [22]]

[13.6] In the two years immediately prior to January 2009 Mr Fehling had been living in Reefton but in December 2008 he returned to Hari Hari. On his return, and with the permission of Mr Costello, Mr Fehling parked his van on the Costello property adjacent to the two metre high corrugated steel fence. It is not possible from this position to see into the School swimming pool given the two metre high fence and the fact that the pool itself is enclosed. [Decision [25]]

[13.7] On the evening of 4 January 2009, when Mr Fehling was alone in his van, a woman and her two adult sons entered the Costello property. All three persons were known to Mr Fehling from previous incidents. He says that they arrived with the apparent intention of provoking a reaction from him, most likely a violent reaction. However, Mr Fehling did not retaliate. He described himself as against violence and as a person who resolves disputes with brains not brawn. He said that he was a conscientious objector when living in the Federal Republic of Germany and has proved on several occasions that he is not violent. He asked the three persons to leave but they refused to do so. They demanded to know if he had permission to be on the Costello property. When the three uninvited persons eventually realised that they would not be able to provoke Mr Fehling they left, but their parting comment was to the effect that something else would be happening. [Decision [27]]

[13.8] The next day, 5 January 2009, two police officers arrived on the Costello property and served Mr Fehling with a trespass notice in the following terms:

> To: Fritz Fehling
>
> Of: No fixed abode
>
> Dear Mr Fehling
>
> NOTICE UNDER SECTION 4(1)(2) & (4) TRESPASS ACT 1980

In accordance with the above Act and Section you are hereby warned to stay off the place known as: Hari Hari Area School + James Costello's house

and occupied by Jenny Adamson + staff + James Costello.

You are advised that in accordance with the provisions of the Trespass Act 1980 it is an offence punishable by a fine not exceeding $1,000 or imprisonment not exceeding 3 months to enter onto the above mentioned place within the space of two years after you have received this warning.

Yours faithfully

"J Adamson"

Date: 5/1/09

Served by: Paul Gurney QID PGW193

Place: Hari Hari Date: 5/1/09

[Decision [28]]

[13.9] Mr Fehling says that moments after being served with the notice he was arrested. He was given no opportunity to leave. Later he was shown an arrest warrant. As no District Court was sitting on the West Coast he was taken to Christchurch. After being held in custody for three and a half days (during which he refused food and water) he was released at large without bail. The charge on which he had been arrested was not pursued. [Decision [29]]

[13.10] At the time he was served with the trespass notice Mr Fehling was lawfully on that part of the school grounds leased to Mr Costello. [Decision [1]]

[13.11] When Mr Fehling subsequently 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). [Decision [2]]

[13.12] The then Principal of the School (Ms Sloane) gave evidence that Mr Fehling had often called at the School office, sometimes as often as two or three times a fortnight, sometimes to ask what day it was, sometimes to ask for Mr Costello and sometimes to request access to the photocopying facilities. There had been no animosity in Ms Sloan's dealings with Mr Fehling and she had never had any difficulties with him and Ms Sloane fairly conceded that she had never experienced any threatening behaviour or verbal harassment. [Decision [39]]

[13.13] Asked the basis on which she believed that local people felt intimidated by Mr Fehling Ms Sloane said that students felt uncomfortable with him coming onto the School grounds because he would, on occasion, wear a dressing gown. In response to questions from the Tribunal she stressed that he would always have other clothes on and there was never any suggestion that, apart from wearing a dressing gown in public, he acted inappropriately. Ms Sloane

mentioned ill-feeling arising from the fact that for some substantial period of time Mr Fehling had lived in the roof of a local church and someone had received a fright on discovering him there. [Decision [41]]

[13.14] Asked further about what she had observed of the behaviour of Mr Fehling, Ms Sloane said that she had never seen Mr Fehling using the swimming pool, changing rooms, toilets or showers. She said that the concern was not so much in relation to adults, but in relation to children. Pressed by the Tribunal to explain this point Ms Sloane said that her concerns arose from the way Mr Fehling looks (he has long hair and a beard) and dresses. She emphasised that she has never had cause to be concerned about his behaviour at the School either in relation to the schoolchildren or to the staff. [Decision [42]]

[13.15] The trespass notice was issued by the school Caretaker, Ms Adamson. She had been on holiday at the time, her duties (which included checking the water in the pool) being performed by her eldest (adult) daughter. That daughter had reported to Ms Adamson that she (the daughter) had seen Mr Fehling's van parked on the Costello property and felt unable to enter the school grounds unless accompanied by her husband. It was alleged (incorrectly) that Mr Fehling was using the toilet and shower facilities adjacent to the swimming pool. Ms Adamson immediately returned to Hari Hari and after discussing the matter with Mr Appleby, contacted the Police who advised her to issue a trespass notice. [Decision 43].

[13.16] The fears held by Ms Adamson and her daughter in relation to Mr Fehling were said to have been based on events which had occurred seventeen years earlier. These fears were entirely irrational. [Decision paras [61] to [63] and [70].

[13.17] The School could not justify the withholding of the information requested by Mr Fehling and there had been an interference with his privacy. The Tribunal made the following orders at [106]:

> **[106]** For the foregoing reasons the decision of the Tribunal is that:
>
> > **[106.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that South Westland Area School interfered with the privacy of Mr Fehling by refusing to disclose the personal information requested by Mr Fehling. The School did not have proper grounds to withhold the information.
> >
> > **[106.2]** Damages of $10,000 are awarded to Mr Fehling against South Westland Area School under ss 85(1)(c) and 88(1)(c) of the Act for humiliation, loss of dignity and injury to feelings.

Mr Fehling's evidence relating to discrimination

[14] Mr Fehling's evidence at the hearing on 26 and 27 May 2014 largely duplicated that which he had given at the Privacy Act proceedings in May 2012. To it was added (inter alia) the following:

[14.1] His German nationality has led to serious discrimination over two decades. He said that in Hari Hari present-day Germans are conceived of as "Nazis-in-drag".

[14.2] His ethical beliefs include fighting for his and everyone's human rights.

[14.3] His nationality and beliefs are inseparable. Only his German nationality "with its constitutional-democracy human-rights culture derived from Nazi history"

could explain his self-drafted "Universal Democracy Constitution" which he produced in evidence and of which he is proud.

[14.4] In his view his "German-originated freedom" with its "public defiance against the monarchy's unconstitutional power-exertion" lies at the heart of his indirect discrimination cases.

[14.5] After the Tribunal decision was given on 6 July 2012 he came under considerable pressure from people in Hari Hari. One teacher at SWAS told him he would be "fired on" if he (Mr Fehling) took more than a couple of hundred dollars as a token. The Acting Principal advised him not to borrow or return books during school hours because of the hostility. Another teacher told Mr Fehling that he (the teacher) had been asked why he occasionally shared a cup of coffee with Mr Fehling, implying that no-one should associate with Mr Fehling. In another incident at the school an attempt had been made to provoke Mr Fehling to anger in the hope of justifying a further trespass notice.

[14.6] Mr Fehling has experienced verbal abuse and shouting within Hari Hari. He said that "the anger in the voices as well as the nastiness didn't need wording".

[14.7] Mr Fehling's letterbox is repeatedly vandalised resulting in missing correspondence, failure of delivery and substantial inconvenience in trying to make alternative arrangements.

[15] We are satisfied that in Hari Hari Mr Fehling regularly encounters discrimination because he is German and because his ethical beliefs are different to the mainstream. These factors combined with his accented speech, long hair and at times unconventional dress mark him out as different and hence a "problem". To some in Hari Hari he is the Other, on the outside, undeserving to be recognised as a human being and undeserving of full human rights.

[16] The issue before us, however, is whether either of Mr Fehling's discrimination cases can be established as against Mr Appleby.

[17] We therefore return to the narrative of events.

A payment of damages

[18] Mr Fehling decided that $1,000 of the damages awarded by the Tribunal was to be donated to a SWAS fund for poor or disadvantaged students, $4,000 was to be paid to Mr Costello with the balance of $5,000 to be retained by Mr Fehling. On Monday 20 August 2012 the Board of Trustees met and approved the request. By letter dated Tuesday 21 August 2012 the Board wrote to Mr Fehling advising that the Board agreed to the damages being paid out in the manner requested. Neither in this letter nor elsewhere was Mr Fehling thanked for his donation to the school fund.

Mr Appleby and the *Hokitika Guardian* – the interview

[19] On either Tuesday 21 August 2012 or Wednesday 22 August 2012 Mr Appleby was telephoned while at work on his farm and interviewed by the *Hokitika Guardian*. The next day, Thursday 23 August 2012, the following article was published by the *Hokitika Guardian*. It is on this article that Mr Fehling bases the second part of his case against Mr Appleby and it is therefore necessary that it be set out in full:

Human rights complaint costs school $16,000

By Rebekah Fraser

South Westland Area School has been ordered by the Human Rights Commission to pay $10,000 compensation to a man trespassed from the Hari Hari school grounds due to alleged safety concerns.

A three-year legal battle between the school and a local resident ended earlier this month with a ruling in favour of the man.

Board of trustees chairman Doug Appleby said the saga was a "long, complicated story" that began in January 2009. "A man was trespassed from the school due to safety concerns. The safety of the staff and children is paramount and comes first."

Mr Appleby said police had issued the trespass notice to protect individuals involved with the school.

However, the man responded by complaining to the Human Rights Commission, alleging that the school had damaged his reputation.

Eventually, the commission found in favour of the man and ordered the school to pay him compensation, Mr Appleby said.

"It's sad. That money has been taken from our kids, it's about $150 per pupil at our school all up."

As well as the $10,000 compensation the school has also been left with a $6,000 legal bill. The school would cover its costs from the annual operations grant, he said.

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

Human Rights Commission media spokeswoman Vicki Hall said she was unable to comment on the case.

"Each complaint received by the commission is assessed to see if it fits within the criteria set out in the Human Rights Act. If the complaint is assessed to be an allegation of unlawful discrimination, the commission offers a dispute resolution service to assist the parties, involved in the complaint, to resolve the matter."

She said the service was offered on an impartial basis requiring the consent of both parties at all times.

"The complaints process is both private and confidential. If the mediation is successful and a resolution is reached, the terms and conditions of the settlement or potential settlement remain confidential to the parties involved."

[20] As to his reported comments, Mr Appleby:

[20.1] Denies that he said "It's sad. That money has been taken from our kids, it's about $150 per pupil at our school, all up".

[20.2] Accepts he could have said "We fought it so that people could feel safe and maintain their right to privacy."

[20.3] Accepts he definitely said "I would do it again".

[21] Mr Appleby says that the comment in [20.2] was to explain why the Board defended the Privacy Act proceedings and that [20.3] was his opinion of what he would favour doing if a similar situation arose in the future, no matter who was the complainant ie defending a complainant's right to privacy if safety concerns were held for them. He says he did not intend to express or imply any personal or discriminatory comment against Mr Fehling.

Mr Appleby and the trespass notice

[22] As to the issue of the trespass notice by Ms Adamson, Mr Appleby said that during the school holidays he was contacted by Ms Adamson and told that Mr Fehling had allegedly been using the School swimming pool. Mr Appleby told her to refer the matter to the Police. At the time Mr Appleby had general authority from the Board of Trustees to make decisions on their behalf during the holiday period.

[23] Ms Adamson had telephoned back a short time later in the presence of the Police. She told Mr Appleby that the Police recommended the issue of a trespass notice against Mr Fehling to keep him off the School property. She had been requested by the Police to sign the trespass notice and asked Mr Appleby if that was in order. Mr Appleby advised her that if that was the Police recommendation, then he and the Board would support it. The trespass notice was then signed by Ms Adamson on behalf of SWAS and then served on Mr Fehling.

[24] Mr Appleby does not accept the trespass notice was of itself discriminatory against Mr Fehling. It was to protect those who felt unsafe using the School facilities, particularly the swimming pool as it was alleged Mr Fehling was using those facilities at the same time as Keyholders ie parents and students of the School. This was not allowed. The Board would likely have taken the same action against any person who was on or using School property without permission in similar circumstances.

[25] Mr Appleby explained that parts of the School were also community facilities. The Library is one such facility. However, users must sign in at the School if they wish to use this facility. The Sports Hall or Gym is owned in shares (58% School and 42% local community). However the Gym is only used by the community outside of school hours. The swimming pool belongs to the School and is used by Keyholders or students only.

[26] Mr Appleby went on to add that:

> **[26.1]** He did not consider Mr Fehling a danger. Only Ms Adamson held that view.
>
> **[26.2]** He was not aware of Ms Adamson's reasons for being afraid of Mr Fehling and he (Mr Appleby) did not ask.
>
> **[26.3]** He was not aware of community hostility against Mr Fehling until the Tribunal decision and "the taking of money from the School".
>
> **[26.4]** The Costello property should never have been included in the trespass notice.

Credibility assessment

[27] Mr Fehling impressed as a conscientious, honest and credible witness. He was at pains to give an accurate account of the events on which his case is based and to make concessions where appropriate. He also demonstrated a capacity to be objective about his case.

[28] We were less able to come to a similar conclusion in relation to Mr Appleby. In his own mind he has given a true account of events but to the outside observer it is clear that he is both hostile towards and contemptuous of Mr Fehling. No objectivity could be detected. Mr Appleby's body language and tone of voice throughout the two day hearing spoke volumes of his disdain of Mr Fehling. As did the manner in which, at the

conclusion of the hearing, he threw back at Mr Fehling a letter which Mr Fehling had handed to Mr Appleby at some earlier point in the hearing. All of these factors have unfortunately clouded Mr Appleby's perception of events and his evidence to the Tribunal.

[29] Mr Appleby showed no sign of recognising the injustice done to Mr Fehling by being served (in the name of the School and with the approval of Mr Appleby) a trespass notice which no rational reason could justify. Mr Appleby and the Board allowed the notice to run for two full years, excluding Mr Fehling from the public facilities at the School. It was disingenuous of Mr Appleby to claim (as he did in his evidence) that Mr Fehling could have requested access to the community facilities had he wished. There was never any suggestion by Mr Appleby or by the Board to Mr Fehling that the trespass notice could be varied. It was equally disingenuous for Mr Appleby to assert that the trespass notice had been relaxed "fairly quickly to allow Mr Fehling to visit Mr Costello". Such "relaxation" was not at the instigation of the Board notwithstanding that Mr Appleby gave evidence that the Costello property should never have been included in the notice. Rather, as conceded by Mr Appleby in his closing submissions, it was Mr Costello who secured the "relaxation" for the area occupied by his home.

[30] The uncompromising and hostile attitude of Mr Appleby to Mr Fehling was reflected also in the fact that neither he nor the Board took any steps to correct the misreported comments of Mr Appleby in the *Hokitika Guardian* article or to acknowledge to the community the baseless nature of the allegations made against Mr Fehling by Ms Adamson. The fact that Mr Fehling's donation of $1,000 to a school fund went unacknowledged even in the Board's letter dated 21 August 2012 to Mr Fehling shows the depth of the animosity towards Mr Fehling. This compounded the misattributed allegation in the press article that Mr Fehling had "taken" money from "our kids".

[31] In his evidence to the Tribunal Mr Appleby even resorted to repeating to the Tribunal, as evidence demonstrating Mr Fehling's lack of credibility, evidence at the Privacy Act hearing that he (Mr Fehling) had sometimes been seen wearing a dressing gown and had also lived in the church loft and thereby given someone a fright. Mr Appleby seemed unconcerned by the fact that both allegations had been dealt with in the Privacy Act decision and neither matter could, on any view, have justified the way in which Mr Fehling has been treated by the Board or by the local community.

[32] Against this background we turn to Mr Fehling's two cases. The first has as its focus the circumstances in which the trespass notice was issued. The second is centred on Mr Appleby's reported comments in the *Hokitika Guardian*.

Case 1 – the trespass notice

[33] Mr Fehling alleges that the trespass notice denied him access to those parts of the grounds of SWAS to which the local community has access outside school hours. His case is that, in terms of HRA s 42(1) he was required to leave or cease to use a place or facilities available to members of the public and that this was by reason of a prohibited ground of discrimination. Section 42 provides:

> **42 Access by the public to places, vehicles, and facilities**
>
> (1) It shall be unlawful for any person—
> (a) to refuse to allow any other person access to or use of any place or vehicle which members of the public are entitled or allowed to enter or use; or
> (b) to refuse any other person the use of any facilities in that place or vehicle which are available to members of the public; or

(c) to require any other person to leave or cease to use that place or vehicle or those facilities,—

by reason of any of the prohibited grounds of discrimination.

(2) In this section the term *vehicle* includes a vessel, an aircraft, or a hovercraft.

[34] There is no doubt that the trespass notice required Mr Fehling to leave the grounds of SWAS and to cease to use the community facilities on the grounds of SWAS for two years.

[35] The critical issue is whether the trespass notice was issued **by reason of** one or more of the prohibited grounds of discrimination.

[36] We are in no doubt that Mr Fehling is regularly the victim of discrimination on prohibited grounds by some within the Hari Hari community. It cannot be reasoned, however, from this finding that the reason for Mr Appleby's authorisation of the issue of the trespass notice and its subsequent signing by the Caretaker, Ms Adamson, was by reason of a prohibited ground of discrimination.

[37] First, as to Ms Adamson, her desire to evict Mr Fehling from the Costello grounds (and the school in general) was motivated by a hypersensitive, if not irrational fear of Mr Fehling based on incidents which had occurred twelve to seventeen years earlier, a fear apparently inherited by the adult daughter who was the temporary caretaker over the Christmas holiday period in question. See for example the Privacy Act decision at [61] and [70]. We have no evidential basis on which to make a finding that the issue of the trespass notice by Ms Adamson was by reason of any of the prohibited grounds of discrimination.

[38] Second, as to Mr Appleby, he said that at the time he authorised Ms Adamson to sign the trespass notice he was not aware of her reasons for being afraid of Mr Fehling. He personally did not consider Mr Fehling a danger. Nor was he aware of hostility towards Mr Fehling in the Hari Hari community until the Tribunal's decision under the Privacy Act was published.

[39] In view of Mr Appleby's ill-disguised dislike of Mr Fehling as visibly demonstrated at the hearing we have difficulty accepting that at the time the trespass notice was issued Mr Appleby was not aware of community hostility towards Mr Fehling. Nevertheless, after full consideration we believe there is insufficient evidence to justify a finding that one of the prohibited grounds of discrimination was behind Mr Appleby's authorisation of the trespass notice. It may be that there was too ready an acquiescence in Ms Adamson's irrational fears of Mr Fehling but this does not engage HRA s 42.

[40] Mr Fehling relied also on the indirect discrimination provisions of HRA s 65 which provides:

65 Indirect discrimination

Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

[41] Mr Fehling submits that this provision requires one to focus on the effect of treating a person differently. That is so. But it must still be shown that it is "the effect of treating a person … differently **on 1 of the prohibited grounds of discrimination**".

[42] As we have concluded that the evidence before us does not establish the presence of a prohibited ground of discrimination, the case under s 65 must fail for the same reason as the case under s 42.

Case 2 – Mr Appleby's reported comments in the *Hokitika Guardian*

[43] Mr Fehling alleges that the two admitted statements made by Mr Appleby to the *Hokitika Guardian* were victimisation or indirect discrimination. Those comments were:

> **[43.1]** "We fought it so that people could feel safe and maintain their right to privacy."
>
> **[43.2]** "I would do it again".

[44] Section 66 of the HRA provides:

> **66 Victimisation**
>
> (1) It shall be unlawful for any person to treat or to threaten to treat any other person less favourably than he or she would treat other persons in the same or substantially similar circumstances—
> (a) on the ground that that person, or any relative or associate of that person,—
> (i) intends to make use of his or her rights under this Act or to make a disclosure under the Protected Disclosures Act 2000; or
> (ii) has made use of his or her rights, or promoted the rights of some other person, under this Act, or has made a disclosure, or has encouraged disclosure by some other person, under the Protected Disclosures Act 2000; or
> (iii) has given information or evidence in relation to any complaint, investigation, or proceeding under this Act or arising out of a disclosure under the Protected Disclosures Act 2000; or
> (iv) has declined to do an act that would contravene this Act; or
> (v) has otherwise done anything under or by reference to this Act; or
> (b) on the ground that he or she knows that that person, or any relative or associate of that person, intends to do any of the things mentioned in subparagraphs (i) to (v) of paragraph (a) or that he or she suspects that that person, or any relative or associate of that person, has done, or intends to do, any of those things.
> (2) Subsection (1) shall not apply where a person is treated less favourably because he or she has knowingly made a false allegation or otherwise acted in bad faith.

[45] The fundamental difficulty with Mr Fehling's case is that Mr Appleby's comments are directed to issues under the Privacy Act, not under the HRA. Given that the Protected Disclosures Act 2000 has no application on the facts and that Mr Fehling is not in any event an employee of SWAS, the case under s 66 is misconceived and must fail as there was no victimisation **on the ground** that Mr Fehling had (for example) made use of his rights under the HRA.

[46] As to the indirect discrimination provisions of HRA s 65, we do not see this provision as having application on the facts. It is directed at ensuring substantive (as opposed to formal) equality. That is, indirect discrimination is said to occur when an apparently neutral practice or policy disproportionately disadvantages one of the groups against whom it is unlawful to discriminate. Although everyone is treated the same, the condition or requirement affects members of a prohibited group differently. See further Selene Mize "Indirect Discrimination Reconsidered" [2007] NZ Law Review 27 at 28.

[47] There is no doubt that the comments were unwise, as Mr Appleby tacitly acknowledged in his written closing submissions. Contextually they were clearly a reference to the proceedings brought by Mr Fehling under the Privacy Act and would hardly endear Mr Fehling to those already hostile to him. The report itself is substantially lacking in balance and accuracy. In particular, no reference is made to the

findings of the Tribunal (incorrectly referred to as the Human Rights Commission). None of this is Mr Appleby's responsibility but his failure (and that of the Board) to correct the misattribution to Mr Appleby of the statement that "money has been taken from our kids" and the failure to draw attention by way of a letter to the editor or otherwise to Mr Fehling's donation to the school fund is regrettable. But none of these factors amount to direct or indirect discrimination. In addition, the victimisation provisions of the HRA are tightly drawn and circumscribed. Not every act of unkindness, unfairness or hostility is a breach of the HRA. Nor can every such act be articulated as or framed in terms of discrimination as understood under the HRA.

[48] It follows that Mr Fehling's second case based on the reported comments by Mr Appleby in the *Hokitika Guardian* is not established.

Section 21B of the HRA

[49] Given our findings it is unnecessary for us to consider whether the circumstances in which the trespass notice was issued are affected by HRA s 21B which provides:

> **21B Relationship between this Part and other law**
>
> (1) To avoid doubt, an act or omission of any person or body is not unlawful under this Part if that act or omission is authorised or required by an enactment or otherwise by law.
> (2) Nothing in this Part affects the New Zealand Bill of Rights Act 1990.

CONCLUSION

[50] For the reasons given these proceedings are dismissed.

COSTS

[51] In his closing submissions Mr Appleby said that in the event of Mr Fehling not being successful in making out his claims, Mr Appleby sought a contribution towards his legal costs. We accordingly reserve costs but in doing so must not be taken to encourage Mr Appleby to apply for costs. Each and every interlocutory application made by him has been unsuccessful. We refer here to the three decisions of the Tribunal given in respect of the strike out application, the recusal application and the bankruptcy issue. Nevertheless, should Mr Appleby wish to apply for costs he is entitled to do so. The following timetable is to apply:

[51.1] Mr Appleby is to file his submissions within fourteen days after the date of this decision.

[51.2] Mr Fehling is to file his submissions within a further fourteen days.

[51.3] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[51.4] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Ms WV Gilchrist**	**Mr MJM Keefe JP**
Chairperson	**Member**	**Member**