

Reference No. HRRT 001/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN AARRON GORDON JACOBSEN

PLAINTIFF

AND TOM ZHOU

DEFENDANT

AT NEW PLYMOUTH

BEFORE:

Mr RPG Haines QC, Chairperson

Mr BK Neeson JP, Member

Hon KL Shirley, Member

REPRESENTATION:

Mr AG Jacobsen in person

Mr T Zhou in person

DATE OF HEARING: 17 August 2015

DATE OF DECISION: 3 September 2015

DECISION OF TRIBUNAL

Introduction

[1] Mr Zhou is a clinical dental technician. On 25 June 2014 he was consulted by Mr Jacobsen who wished to obtain a quote for a full set of dentures. At the start of the consultation Mr Zhou began taking Mr Jacobsen's personal details and asked Mr Jacobsen about his medical history. When told by Mr Jacobsen that he (Mr Jacobsen) was HIV positive, Mr Zhou declined to provide dental services.

[2] Mr Jacobsen immediately lodged a complaint with the Health and Disability Commissioner who, in turn, referred the complaint to the Human Rights Commission.

Mr Jacobsen did not, however, want his complaint to be mediated and these proceedings under s 44 of the Human Rights Act 1993 followed.

[3] The issues for determination are whether Mr Jacobsen has established he was refused services by reason of an actual disability or one which was suspected or believed to exist in terms of s 21(1)(h) and (2)(b) of the Act and if so, whether Mr Zhou has established on the balance of probabilities, that s 21B(1) excepts any conduct which would otherwise be unlawful. Both parties have been given an opportunity to file post-hearing submissions on these issues. See the *Minute* issued by the Chairperson on 26 August 2015. Mr Zhou responded on 31 August 2015 and Mr Jacobsen replied on 1 September 2015. These new submissions have been taken into account.

[4] Both Mr Jacobsen and Mr Zhou gave evidence. Although there were areas of difference, they were in agreement that once Mr Jacobsen disclosed he was HIV positive the consultation was terminated by Mr Zhou and no services were provided.

The evidence given by Mr Jacobsen

[5] In early 2014, probably in April, Mr Jacobsen had all his teeth removed after receiving advice that if his upper and lower teeth were not removed he would lose his lower jaw. On discharge from the hospital where the procedure was carried out he was told to wait between three months and two years before having dentures fitted as it was necessary for most of the swelling to have disappeared. This would allow a better fit.

[6] On researching denture services in New Plymouth Mr Jacobsen was attracted to Mr Zhou's business (Dental Design Studio) because it had an attractive website and because it advertised the titanium type of denture sought by Mr Jacobsen.

[7] When he contacted Mr Zhou by telephone Mr Jacobsen was asked how long ago his teeth had been removed and he replied "three months". He did not at this stage disclose he was HIV positive. The purpose of the visit was to obtain a quote. The appointment was three months and one day after the operation in which the teeth had been removed.

[8] At the consultation on 25 June 2014 only Mr Jacobsen and Mr Zhou were present, the business having no receptionist. After being seated in the consulting chair Mr Jacobsen was asked to smile so that Mr Zhou could see he had no teeth. No examination was carried out at that stage. He was then asked for his contact details, how long his teeth had been out and whether he had any serious health problems. It was at this point Mr Jacobsen disclosed he was HIV positive.

[9] Mr Jacobsen said Mr Zhou's attitude changed instantly. He backed away from the chair, took off his gloves and told Mr Jacobsen "I can't do any work with you with HIV". When Mr Jacobsen asked why, Mr Zhou replied "I can't do any work with serious health problems". Even after Mr Jacobsen explained to Mr Zhou there was no risk to him (Mr Zhou), Mr Zhou said "I can't do any work with serious health problem" and started packing up his things.

[10] Mr Jacobsen left the business premises embarrassed and angry. He told Mr Zhou that he (Mr Jacobsen) would call *Campbell Live* and slammed the door to the premises so hard he thought the door had been damaged. On arriving home he contacted the Health and Disability Commissioner. Mr Jacobsen disputes Mr Zhou's evidence that prior to leaving the premises Mr Zhou suggested he go to TCB Dental Laboratory in New Plymouth and had been shown their address in the Yellow Pages.

The evidence given by Mr Zhou

[11] Mr Zhou is a graduate of Otago University, holding a Bachelor of Dental Technology (BDentTech) (2006) and holds a Postgraduate Diploma in Clinical Dental Technology (PGDipCDTech) (2012). Before setting up his present business (Dental Design Studio) Mr Zhou worked for TCB Dental Laboratory.

[12] Dental technicians create and repair devices for the treatment, replacement and protection of damaged, badly positioned or missing teeth. They work from a mould of a client's mouth made by a dentist or a clinical dental technician. A dental technician does not have clinical contact with the client. A **clinical** dental technician, on the other hand, is qualified to consult with the client directly, to take impressions and to provide advice. A clinical dental technician is not, however, a dentist.

[13] At the time in question Mr Zhou practised as both a dental technician and as a clinical dental technician but had limited direct experience with clients; that is, in practising clinical procedures directly with a client, a process more ordinarily undertaken by a dentist. In June 2014, when visited by Mr Jacobsen, Mr Zhou's practice was mainly preparing a range of appliances requested by dentists. His private patients were a very small proportion of his practice, he having little more than one year post-qualification experience.

[14] Mr Zhou agrees Mr Jacobsen attended the practice on 25 June 2014 and points out the practice had been open for one year only. As he worked through the new patient questionnaire with Mr Jacobsen, Mr Zhou asked whether Mr Jacobsen had any medical conditions. At the point Mr Jacobsen disclosed he was HIV positive Mr Zhou explained that as he (Mr Zhou) had only recently set up practice, he did not have the experience and the skills to take on the case and referred Mr Jacobsen to TCB Dental Laboratory, being a more experienced denture practice. He walked Mr Jacobsen to reception, picked up the Yellow Pages telephone book and showed Mr Jacobsen the location and phone number of TCB Dental Laboratory. He explained the laboratory was known in New Plymouth for treating difficult denture cases. Mr Jacobsen then left. He did not appear angry or embarrassed.

[15] Mr Zhou does not agree his attitude changed on learning Mr Jacobsen was HIV positive. Nor does he agree he backed away from Mr Jacobsen and removed his gloves. He says because he was doing paperwork and making entries on his laptop he was not wearing gloves at the time. His practice is to put on gloves only at the commencement of the examination which follows completion of the paperwork. He denies saying "I can't do any work on you with HIV". What he did say was that he had only recently set up practice and that he was not skilled or experienced enough to take on the case. Mr Zhou added in similar circumstances he had referred other clients to TCB Dental Laboratory.

[16] Explaining why he decided to refer Mr Jacobsen to another clinical dental technician Mr Zhou said he (Mr Zhou) was neither a dentist nor a doctor of medicine and did not feel confident in taking on any patient who had a serious medical condition. He referred to an instance in which he had treated a patient who had a healing problem. In that case Mr Zhou's services had not had a good outcome. While the denture itself had been properly made, the individual had been unable to tolerate it and Mr Zhou had refunded the fee. In the light of this experience he believed he did not have sufficient experience to take on difficult cases and his training at the University of Otago had not sufficiently prepared him for dealing with persons with potentially serious health problems or illnesses such as a heart condition or Type 2 Diabetes. Based on what he

had been told in training he believed that while eventually an experienced clinical dental technician would be able to provide services to patients who had health conditions, initially it was best for the inexperienced technician to accept only patients who did not have health problems.

[17] In the case of Mr Jacobsen, Mr Zhou anticipated there would be difficulty fitting the denture (it could be either too loose or too tight) leading to consequent rubbing of the gums, potential healing issues and difficulty eating. At the time of the consultation with Mr Jacobsen Mr Zhou had experience only in the manufacture of dentures. His clinical experience was very limited and he did not have the confidence or experience to take on every case. He believed it was his responsibility to refer these potentially difficult cases to someone more experienced. As soon as Mr Jacobsen told him he was HIV positive Mr Zhou believed he (Mr Jacobsen) had a major health problem and that any denture manufactured and fitted by Mr Zhou would likely fail or there would be complications during the course of the procedure which Mr Zhou was not equipped to deal with. Mr Zhou asks the Tribunal to note that in evidence Mr Jacobsen said he was unhappy with the dentures which were eventually made by TCB Dental Laboratory. The reason for Mr Jacobsen's dissatisfaction is not, however, known.

Evidence – assessment

[18] The accounts given by Mr Jacobsen and Mr Zhou are largely in accord. There are differences over such matters as whether Mr Zhou backed away from Mr Jacobsen on being told Mr Jacobsen was HIV positive and over the question whether Mr Zhou was wearing gloves during the initial record-taking stage of the consultation. There is also disagreement whether the Yellow Pages were referred to in the context of Mr Zhou recommending Mr Jacobsen go to TCB Dental Laboratory.

[19] As to these differences we are of the view Mr Zhou was the more objective of the two witnesses and we prefer his account wherever there is conflict.

The material facts – findings

[20] On both accounts heard by the Tribunal it is plain Mr Jacobsen's HIV status was a material factor in the decision by Mr Zhou not to provide dental services to Mr Jacobsen. The other material factor was Mr Zhou's belief he was not skilled or experienced enough to take on the case owing to his limited clinical experience.

[21] We address now the legal issues.

THE LEGAL ISSUES

[22] As mentioned, Mr Jacobsen alleges that Mr Zhou breached s 44(1) of the Human Rights Act which provides:

44 Provision of goods and services

- (1) It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public—
 - (a) to refuse or fail on demand to provide any other person with those goods, facilities, or services; or
 - (b) to treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case,—
by reason of any of the prohibited grounds of discrimination.

[23] The prohibited ground of discrimination relied on by Mr Jacobsen is his disability, particularly his physical illness or the presence in his body of organisms capable of causing illness. See s 21(1)(h)(ii) and (vii):

21 Prohibited grounds of discrimination

- (1) For the purposes of this Act, the *prohibited grounds of discrimination* are—
- (h) disability, which means—
 - ...
 - (ii) physical illness:
 - ...
 - (vii) the presence in the body of organisms capable of causing illness:
 - ...
- (2) Each of the grounds specified in subsection (1) is a prohibited ground of discrimination, for the purposes of this Act, if—
- (a) it pertains to a person or to a relative or associate of a person; and
 - (b) it either—
 - (i) currently exists or has in the past existed; or
 - (ii) is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.

[24] The defence to this allegation is:

[24.1] The decision not to offer services to Mr Jacobsen was a clinical judgment by Mr Zhou that he did not have the skills and experience to take on Mr Jacobsen's case.

[24.2] In terms of s 21B(1) of the Human Rights Act the decision to refuse to provide dental services was not unlawful as the decision was authorised or required by an enactment or otherwise by law:

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.

[25] The separate limbs of s 44 will be addressed first and in turn.

Whether a breach of s 44(1)(a) established

[26] For the reasons explained in *CBA v LKJ Ltd* [2014] NZHRRT 13 at [74] to [78], determination whether there has been a breach of s 44(1)(a) of the Human Rights Act does not involve a comparator. All that a complainant need show is that the supplier of the service supplied such service to the public but refused to provide the complainant with the service by reason of a prohibited ground of discrimination. It is then for the alleged discriminator to show that his, her or its actions came within one of the permitted statutory exceptions or within s 21B of the Act.

[27] As to the causation requirement, the refusal or failure to provide goods, facilities or services or the treatment of a person less favourably in connection with the provision of those goods, facilities or services is only unlawful if such refusal, failure or less favourable treatment is "by reason of" any of the prohibited grounds of discrimination. These words indicate that there must be a causative link between the prohibited ground and the refusal, failure or treatment complained of in order for discrimination to occur under s 44(1).

[28] In *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 it was held the question is whether a relevant ground of discrimination was “a material factor” in the decision. See the analysis in *CBA v LKJ Ltd* at [86] to [87].

Section 44(1)(a) – whether causation established

[29] Mr Zhou freely accepted that a material factor in the decision to refuse to provide services to Mr Jacobsen was because he (Mr Jacobsen) disclosed he was HIV positive. It was not the only factor, but that is not required.

[30] This finding does not of itself, however, lead to a conclusion that Mr Zhou acted unlawfully. Section 21B(1) of the Act provides that an act or omission of any person is not unlawful under Part 2 of the Act (being that part of the Act under which Mr Jacobsen’s claim is brought) if that act or omission is authorised or required by an enactment or otherwise by law. We consider this provision shortly. But first we address the second limb of s 44(1) of the Act.

Section 44(1)(b) – whether a comparison exercise – the statutory language

[31] Unlike s 44(1)(a), s 44(1)(b) does require a comparator. The comparison exercise mandated by s 44(1)(b) has as its focus the question whether the complainant has been treated less favourably “than would otherwise be the case”. In this context it is a question whether Mr Jacobsen was treated less favourably compared with other patients seeking dental services from Mr Zhou. The evidence establishes a check is carried out in relation to each potential client to ascertain whether he or she has a serious health condition. If they do Mr Zhou refers them either to a dentist or to a more experienced clinical dental technician.

[32] While Mr Jacobsen was in this respect not treated differently to any other person presenting with a serious health condition, he was treated differently to persons without such condition and who, for these purposes, will be referred to as “healthy persons”. Applying *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [49] to [52], we are of the view the appropriate comparator is the “healthy” group.

[33] There can be little doubt Mr Jacobsen was treated differently to the comparator so understood. However, as in the case of our finding in relation to s 44(1)(a) this finding does not of itself lead to a conclusion Mr Zhou acted unlawfully. It is first necessary to consider whether he has a defence.

[34] We accordingly now consider whether the “defence” under s 21B(1) of the Human Rights Act has been made out in relation to s 44(1)(a) and 44(1)(b).

SECTION 21B HUMAN RIGHTS ACT

[35] The reach of Part 2 of the Human Rights Act is limited by 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.

[36] Mr Zhou says, in effect, he was under a duty to provide services with reasonable care and skill and this, in turn, required him to recognise the limitations to his skill and experience in dealing with patients with potential health problems.

The regulatory framework

[37] As a clinical dental technician Mr Zhou is a health practitioner within the meaning of s 5(1) of the Health Practitioners Competence Assurance Act 2003 (see s161(2) of that Act) and accordingly a healthcare provider for the purposes of the Health and Disability Commissioner Act 1994. See s 3(h) of that Act. Consequently Mr Zhou is bound by the Code of Health and Disability Services Consumers' Rights (the Code of Rights) found in the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

[38] The Code of Rights confers a number of legal rights on all consumers of health and disability services in New Zealand and places corresponding obligations on providers of those services. Right 4 is directly relevant to the present case:

Right 4

Right to services of an appropriate standard

- (1) Every consumer has the right to have services provided with reasonable care and skill.
- (2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.
- (3) Every consumer has the right to have services provided in a manner consistent with his or her needs.
- (4) Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer.
- (5) Every consumer has the right to co-operation among providers to ensure quality and continuity of services.

[39] As observed by Paterson and Skegg in "The Code of Patients' Rights" in Skegg and Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) at [2.6.3], Right 4 of the Code deals with standard of care. But there is no legal duty to provide services:

Right 4 of the Code deals with standard of care. Four of the provisions begin with the statement, "Every consumer has the right to have services provided". There is, however, no legal duty to provide services, since the parameters of the Code are confined to quality of care, and do not support a right to access care in the first place. Thus these provisions are, in effect, premised by the implicit statement, "Where services are provided".

[40] The duty of "reasonable care and skill" in the provision of services is affirmed in Right 4(1) and providers are required under Right 4(2) to comply with "legal, professional, ethical and other relevant standards". The principle of harm minimisation is one aspect of the general duty to exercise reasonable care and skill but is expressly articulated in Right 4(4).

[41] In the present case it would have been preferable were Mr Zhou to have called expert evidence reinforcing his evidence that he believed himself unable to provide services to Mr Jacobsen with reasonable care and skill. However, the absence of such evidence does not in our view weaken his "defence". Although not the most articulate of witnesses (English is not his first language) Mr Zhou has in our view established to the civil standard that he made a decline decision based on his inexperience. In his evidence he referred also to his training which taught that it was best, initially, for a clinical dental technician to treat patients who did not have health problems. We take this to be a reflection of the consumer's right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer. It is not without significance that Mr Zhou, consistent with Right 4(5), recommended Mr Jacobsen contact TCB Dental Laboratory and indeed used the Yellow Pages to provide Mr Jacobsen with both the phone number and location of that business.

[42] On this evidence we conclude that the duty to exercise reasonable care and skill required Mr Zhou, when in doubt as to his experience and skill, to decline to provide dental services to the particular client (here Mr Jacobsen). On the simple and straightforward facts we have concluded Mr Zhou properly recognised there was a real risk that if he took on Mr Jacobsen as a client, he would be acting well beyond his then experience and skill levels, thereby exposing Mr Jacobsen to potential harm.

[43] Expressed another way, by virtue of the Health and Disability Commissioner Act 1994 and the Code of Rights, the provider of dental services is authorised or required by an enactment to take into account the health of a potential patient. It follows that Mr Zhou did not unlawfully discriminate against Mr Jacobsen by taking into account his HIV positive status. Account was taken of that status not for the purpose of refusing to provide dental services to Mr Jacobsen because of his health status but because that status was a factor relevant to the question whether, as a relatively new and inexperienced clinical dental technician, Mr Zhou was able to exercise reasonable care and skill in the provision of dental services to Mr Jacobsen and able to discharge his obligations under the Code of Rights.

CONCLUSION

[44] In view of our conclusions it follows there was no breach of the s 44(1)(a) and the s 44(1)(b) prohibitions on discrimination.

[45] It follows that Mr Jacobsen has failed to establish that Mr Zhou acted unlawfully under Part 2 of the Human Rights Act and his case is dismissed.

COSTS

[46] Because both Mr Jacobsen and Mr Zhou are self-represented the issue of costs is largely academic. At most Mr Zhou would be entitled to disbursements such as photocopying and telephone charges. However as these are likely to be either non-existent or minimal and as it is in the interests of the parties that these proceedings be brought to an end, there is no order for costs.

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Mr RPG Haines QC
Chairperson

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Mr BK Neeson JP
Member

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Hon KL Shirley
Member