IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 48**

	Reference No. HRRT 024/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**NEW ZEALAND PRIVATE PROSECUTION SERVICE LIMITED**
	PLAINTIFF
AND	**JOHN PHILIP KEY**
	DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:
Mr RPG Haines QC, Chairperson
Mr MJM Keefe JP, Member
Ms ST Scott, Member

REPRESENTATION:
Mr G McCready in person for plaintiff
Mr PT Kiely for defendant

DATE OF HEARING:	**Heard on the papers**
DATE OF LAST SUBMISSIONS:	**4 September 2015 (plaintiff) and 25 September 2015 (defendant)**
DATE OF DECISION:	**29 October 2015**

DECISION OF TRIBUNAL STRIKING OUT PROCEEDINGS[1]

Introduction

[1] These proceedings filed on 14 May 2015 arise out of events which occurred at a cafe in Parnell, Auckland involving the Prime Minister of New Zealand, the Rt Hon John Key (Mr Key) and a waitress, Ms Amanda Bailey then employed at the cafe. The allegation is that while at the cafe as a customer, Mr Key on several different occasions pulled Ms Bailey's hair which was tied in a ponytail.

[1] [This decision is to be cited as: *New Zealand Private Prosecution Service Limited v Key (Strike-Out Application)* [2015] NZHRRT 48]

[2] The Chief District Court Judge on 13 May 2015 rejected papers filed by New Zealand Private Prosecution Service Limited (NZPPSL) in support of an intended private prosecution against Mr Key alleging male assaults female. The rejection of the charging document was based on a failure by NZPPSL to comply with an earlier direction given on 1 May 2015 that it file formal statements in support of the allegations.

[3] These present proceedings before the Human Rights Review Tribunal followed. It is alleged Mr Key breached s 62(2) of the Human Rights Act 1993. The statement of claim describes the plaintiff as the New Zealand Private Prosecution Service Limited but the document is signed by Mr McCready who has at all times been the spokesperson for NZPPSL. Neither Mr McCready nor NZPPSL claims to be the victim of the alleged sexual harassment nor do they claim to have brought the proceedings with the knowledge and consent of Ms Bailey. Indeed the statement of claim specifically acknowledges Ms Bailey has refused to cooperate in the bringing of the claim. The allegations in the statement of claim appear to have been gleaned from media reports.

[4] By statement of reply filed on 18 June 2015 the defendant has challenged the standing of NZPPSL and sought an order that the proceedings be struck out on three primary grounds:

> **[4.1]** The facts contained in the statement of claim, if proven, do not establish an arguable case.
>
> **[4.2]** The proceedings are vexatious or an abuse of process.
>
> **[4.3]** The proceedings have not been brought in good faith.

[5] In turn, NZPPSL (through Mr McCready) alleges:

> **[5.1]** The Chairperson of the Tribunal is disqualified by reason of bias from participating in the decision on the strike-out application.
>
> **[5.2]** The solicitor on the record for the defendant (Mr PT Kiely) is not authorised to represent the defendant.
>
> **[5.3]** The submissions in support of the strike-out application contain false and misleading statements and Mr Kiely is required to withdraw from the case.

[6] For reasons which follow our conclusion is that the proceedings are to be struck out. It is our further conclusion there is no substance to any of the allegations made against the Chairperson or to those made against Mr Kiely.

[7] In view of the allegations made by NZPPSL it is necessary that aspects of the procedural history of this case be referred to.

Relevant procedural history of case

[8] Under the Human Rights Review Tribunal Regulations 2002, regs 12, 13 and 14, the Secretary of the Tribunal is required to serve certain documents, including the statement of claim. A plaintiff is not involved in this process.

[9] By *Minute* dated 21 May 2015 (reported as *New Zealand Private Prosecution Service Ltd v Key (Service of Statement of Claim)* [2015] NZHRRT 22) the Secretary was given directions by the Chairperson regarding service of the statement of claim on the defendant and she was also instructed to serve the proceedings (and the *Minute*) on Ms Bailey as she appeared to be a person entitled to be heard by the Tribunal under s 108 of the Human Rights Act. Ms Bailey was accordingly served on 28 May 2015 via her

lawyer, Mr M Bott. She was allowed 30 days from that date to advise whether she wished to be heard.

[10] Prior to expiry of the statutory 30 day period for the filing of the defendant's statement of reply and prior to any response by Ms Bailey, NZPPSL by application dated 9 June 2015 sought an order requiring the National Secretary of Unite Union to disclose Ms Bailey's residential address and phone number along with the name and telephone number of her counsel. Two grounds were given in support of the application. First, the information was required to ensure Ms Bailey was served with all relevant papers filed by NZPPSL. Second, the information was required to serve Ms Bailey with a witness summons in the event of the case going to a hearing. In a supporting affidavit sworn on 9 June 2015 Mr McCready deposed that on 29 April 2015, at a time when NZPPSL was endeavouring to persuade the District Court to accept the private prosecution brought by NZPPSL against the defendant, he had contacted Unite Union requesting Ms Bailey's contact details but had been refused. He had subsequently served Ms Bailey with all documents filed in the Tribunal by emailing them to Unite Union. There had been no response with the result Mr McCready was unsure whether Ms Bailey was aware of the proceedings. He concluded his affidavit by stating that as Ms Bailey was a material witness her contact details were required for the purpose of serving her with a witness summons in the event of the case proceeding to a hearing.

[11] By *Minute* dated 11 June 2015 (reported as *New Zealand Private Prosecution Service Ltd v Key (Application for Disclosure Order No. 1)* [2015] NZHRRT 23) the Chairperson ruled the Tribunal did not have jurisdiction or power to compel a third party to provide the information sought. The application was dismissed.

[12] By memorandum dated 12 June 2015 (again prior to the expiry of the 30 day period for the filing of documents by the defendant and by Ms Bailey) Mr McCready sought (inter alia) the address for service for the defendant and that for Ms Bailey. At that point no such addresses had been filed. In dismissing that application by *Minute* dated 15 June 2015 (reported as *New Zealand Private Prosecution Service Ltd v Key (Application for Disclosure Order No. 2)* [2015] NZHRRT 24) the Chairperson observed that neither Mr McCready nor NZPPSL appeared to have read or understood the *Minute* of 11 June 2015 or the Human Rights Review Tribunal Regulations. Having failed to acquaint themselves with the Tribunal's processes they appeared to be wasting the Tribunal's time with applications of no merit. Their attention was drawn to the Tribunal's powers under s 115 of the Human Rights Act.

[13] Mr McCready immediately sent an email to various news organisations and journalists erroneously asserting the Tribunal had dismissed the claim on the grounds it was frivolous and was intended to harass Ms Bailey.

[14] By email dated 17 June 2015 to Mr McCready the Secretary noted that in a report published on the website of the *New Zealand Herald* under the heading "Ponytail pulling case ends in confusion" Mr McCready had been reported as saying "The Pony Tail Gate case is therefore at an end". The Secretary asked whether Mr McCready had been accurately reported and if so, whether he could confirm the proceedings had been discontinued.

[15] By two emails dated 18 June 2015 Mr McCready responded that the proceedings had not been discontinued. Rather the application had been dismissed.

[16] Also on 18 June 2015 an address for service and a statement of reply by the defendant was filed. That reply challenged the standing of NZPPSL and the Tribunal's jurisdiction to hear the proceedings. Application was made to have the proceedings

struck out. For her part Ms Bailey has taken no steps in these proceedings, as is her right.

[17] By email dated 19 June 2015 Mr McCready sent to the Tribunal a document dated 19 June 2015 addressed to the Human Rights Commission complaining that in "dismissing" the claim against the defendant the Chairperson had (inter alia) discriminated against Mr McCready on the basis of a disability (dyslexia) and a chronic eye infection. He claimed $199,999 in damages. This complaint was copied to a number of journalists and news media outlets. It was not clear whether the document had been filed with the Commission.

[18] By *Minute* dated 29 June 2015 the Chairperson gave case management directions for the filing by the parties of their evidence and submissions on the strike-out application. The timetable was amended on several occasions for reasons which are not presently material.

[19] By email dated 30 June 2015 addressed to the Secretary and copied to various journalists and media outlets, Mr McCready announced his intention to file an appeal against what he again erroneously described as a decision of the Tribunal "dismissing the claim" against the defendant. The email further asserted that he had standing to file the appeal in his own right because the Chairperson had "wrongly found that Mr McCready filed the application rather than [NZPPSL]".

[20] On 3 July 2015 the Tribunal received an email sent by Mr McCready to a number of persons, most of them associated with media agencies. Attached was a document purporting to be a notice of appeal dated 2 July 2015 for filing in the High Court at Wellington as well as a "notice of complaint" to the Human Rights Commission. That notice was dated 4 July 2015.

[21] Subsequently, by email dated 10 July 2015 Mr McCready advised the Secretary that he appeared to have the decisions of the Chairperson "completely scrambled" and sought confirmation that his proceedings against the defendant were still alive:

> I appear to have the decisions of the Chairperson Completely Scrambled.
>
> I took his last minute as a dismissal of the ENTIRE Claim and not just a dismissal of the application for disclosure of the service of documents on Amanda Bailey.
>
> That is part and parcel of my dyslexia. The last decision and your comments made reference with the words "Dismissed" with the ability of the Tribunal to dismiss and application under Section 115 of the Human Rights Act. That was how I read that minute.
>
> Please confirm the Application under Section 62 against John Phillip Key is still live before the Tribunal and the next step in that proceeding.

[22] By email dated 10 July 2015 the Secretary advised Mr McCready the proceedings were indeed still alive. He was asked to confirm that in the circumstances now acknowledged by him the appeal to the High Court and the complaint to the Human Rights Commission, if filed, would be withdrawn. On 14 July 2015 Mr McCready replied that the appeal to the High Court had not been accepted but the complaint to the Human Rights Commission would remain.

[23] On 24 July 2015 Mr Kiely filed the defendant's submissions in support of the strike-out application. The submissions for NZPPSL followed on 4 September 2015 and the reply submissions by the defendant on 25 September 2015.

STANDING

[24] A singular feature of the proceedings filed by NZPPSL is that neither Mr McCready nor NZPPSL claims to be the victim of the alleged sexual harassment nor do they claim to have brought the proceedings with the knowledge, consent or cooperation of the alleged victim, Ms Bailey. The statement of claim explicitly acknowledges Ms Bailey has refused to cooperate in the bringing of the claim.

[25] In view of the defendant's challenge to the standing of NZPPSL to bring these proceedings it is intended to address that issue first so that the role of standing in the outcome of the strike-out application can be more clearly seen.

Standing – the general principle

[26] As stated in Wade and Forsyth *Administrative Law* (11th ed, Oxford, 2014) at 584 it has always been an important limitation on the availability of remedies that they are awarded only to litigants who have sufficient locus standi, or standing. The law starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies. No one else will have the necessary standing before the court. In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest.

[27] In Aronson and Groves *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Sydney, 2013) at [11.05] standing is introduced in the following terms:

> People have standing to sue (or *locus standi*) if the court or tribunal treats their connection with the dispute before it as sufficient to allow them to institute and maintain the proceedings before it. The question of standing is logically distinct from and prior to the merits of the proceedings because the particular interest a person may claim to have in a case is usually different from the whole of that case.

[28] The authors point out that no matter how it is framed, a requirement of standing demands a connection between the applicant's interests and the relief sought. Standing rules, therefore, are designed to ensure that applicants litigate only their business. Then at [11.50] the function of standing is articulated in more detailed terms, including improving the calibre of litigation and reducing the chance of repetitive litigation:

> Standing has an instrumental function of improving the calibre of litigation. The idea is that an applicant with a personal stake in the dispute will do a better job in gathering, marshalling and presenting the evidence and in researching and presenting legal submissions. It does not necessarily follow, however, that ideological motivations are weaker than materialistic ones. A standing requirement also ensures that litigants confine themselves to their own injuries or grievances, and refrain as far as possible from interfering with the interests of others. Graham J explained that standing rules:
>
> > "are designed to ensure that applicants only litigate their business. For an applicant to have standing demands a connection between the applicant's interest and the relief sought. As a general rule the Court will not recognise busybodies who interfere in things that do not concern them."
>
> This and many other references to "busybodies" can be traced to Lord Denning, who said that the prerogative remedies would not (albeit as a matter of discretion, in his view) be granted "to a mere busybody who is interfering in things which do not concern him".
>
> …
>
> A standing requirement also reduces the chances of repetitive litigation. If X were allowed to litigate an impugned decision affecting only Y's interests, the outcome could not in fairness be binding on Y unless Y were joined in the case. If Y opposed joinder, then Y's presence in X's case could be only as a co-defendant, which would usually be an unfair imposition. If Y were not a party, and the outcome of X's case was antithetical to Y's interests, then Y would probably have to bring a second case. Once again, that would be unfair to Y, and potentially intolerable for the government side if the two cases had different outcomes. It would be even more unfair if

> Y had declined to become a party to X's case, only to seek to reverse its outcome later by separate judicial review proceedings.
> [Footnote citations omitted]

[29] It can be seen the defendant's concerns regarding the standing by NZPPSL are real. Those concerns will be returned to in the context of our reasons for striking out these proceedings. It would not be surprising were Ms Bailey herself to share these concerns, her right to bring proceedings under the Human Rights Act being seemingly pre-empted or compromised by the actions taken by NZPPSL.

Standing – the principle in New Zealand law

[30] In New Zealand a party must either show a personal interest in the proceedings or if such interest is lacking, establish leave to pursue the proceedings is warranted by the public interest in the administration of justice and the vindication of the rule of law. See the obiter comments of Baragwanath J in *Jeffries v Attorney-General* [2010] NZCA 38 at [70] (leave to appeal refused [2010] NZSC 59):

> [70] Litigation imposes burdens on the parties and public resources alike. Restriction of standing to sue is a means used by the courts to restrain litigation where the plaintiff has no personal interest at stake, and where there is no sufficient public interest to justify the allocation of public resources to a hearing and to trouble the defendant with it. It can serve as a valuable curb on unnecessary or improper claims, stopping the proceeding at the outset. But a party who lacks a personal interest in a proceeding may be permitted to pursue it if able to satisfy the ultimate test of whether such leave is warranted by the public interest in the administration of justice and the vindication of the rule of law. Where there is such public interest the courts, since at least *Sommersett's* case, have exercised discretion to permit a plaintiff with no interest other than the pursuit of justice to bring proceedings. A modern example is the Pergau Dam case. Among the factors relevant to the assessment of the public interest are the apparent merits of the case. [Footnote citations omitted]

[31] However, a statute may prescribe its own rules as to standing or contain no standing requirement at all.

Standing – the Human Rights Act

[32] In the specific context of the Human Rights Act, for the Tribunal to have jurisdiction under Part 3 it is a condition precedent a complaint (alleging a breach of Part 1A or Part 2 or both) first be made to the Human Rights Commission. There is, however, no standing requirement either before the Commission or before the Tribunal. It is not necessary for a person seeking to invoke the Commission's or the Tribunal's jurisdiction to have personally suffered discrimination or to be acting on behalf of a person who has suffered discrimination. Any person may complain of discrimination. See *Attorney-General v Human Rights Review Tribunal [Judicial Review]* (2006) 18 PRNZ 295 at [56], [57], [65] and [66] where Miller J was responding to a challenge to the standing of the Child Poverty Action Group (CPAG) to bring a complaint that legislation conferring dependent child tax credits was discriminatory. Only the first two of the cited paragraphs are reproduced here:

> [56] I cannot accept the Attorney-General's contention that a "complainant" for the purposes of s 92B must be an alleged victim of discrimination or someone acting on his or her behalf. On the contrary, both the ordinary and natural meaning of "complaint" and "complainant" and the legislative history suggest that any person may complain of discrimination.
>
> [57] The term "complainant" has never been defined in the legislation, but a distinction between a complainant and a person aggrieved may be traced to the *Race Relations Act 1971*. The use of these terms in that Act, and subsequently, confirms that the complainant need not act in a representative capacity for an aggrieved person, for it has always been the case that anyone may lodge a complaint with the Commission or its predecessors. This point thus compels the conclusion that "complainant" in s 92B(1) has its ordinary and natural meaning; in context, it simply means someone who has complained to the Commission under s 76(2)(a).

[33] In so holding Miller J nevertheless recognised that on this interpretation:

> **[33.1]** Claims advanced in the abstract by "enthusiastic busybodies" may harm victims of discrimination.
>
> **[33.2]** The Tribunal and the defendant should have some means available to permit summary disposition of such cases.

> [60] Turning to policy considerations, I accept Ms Gwyn's submission that claims advanced in the abstract by enthusiastic busybodies may harm victims of discrimination, because such claims may fail for want of a factual context and so set back the development of the law. Sweeping and apparently unmeritorious claims such as those by the plaintiff in the *Freemasons case* are certainly possible, and the Tribunal and defendant should have some means available to permit summary disposition of such cases. It is also undeniable that third parties may waste public resources by bringing badly-framed or abstract claims that demand much of the Tribunal's time.
>
> [61] However, the fear of abstract claims is surely overstated, and standing is an unsatisfactory way of addressing them.

[34] Although not referred to in the judgment, s 115 of the Act is obviously one means available to the Tribunal to summarily terminate proceedings if it is satisfied they are trivial, vexatious or not brought in good faith.

Conclusion on standing

[35] The Human Rights Act does not prescribe a formal standing requirement. Nevertheless, because "busybodies" may harm victims of discrimination and because it is undeniable that third parties may waste public resources by bringing badly-framed or abstract claims that demand much of the Tribunal's time, vigilance is required and if necessary the Tribunal must exercise its wide discretionary power to strike-out or dismiss a proceeding brought before it.

JURISDICTION TO STRIKE-OUT

[36] The Tribunal's jurisdiction to strike out proceedings was most recently discussed in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 (5 May 2015) at [21] to [33].

[37] For the purposes of the present decision we refer only to s 115 of the Human Rights Act which provides:

> **115 Tribunal may dismiss trivial, etc, proceedings**
>
> The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

[38] It was recognised by Wild J in *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005, that this provision confers on the Tribunal a wide discretionary power to strike out or dismiss a proceeding brought before it:

> [45] Subject to observance of natural justice, fairness and reasonableness, and equity, the Tribunal has a wide discretion as to the procedure which follows: ss 104 and 105 of the Human Rights Act. Section 105 requires the Tribunal "to act according to the substantial merits of the case, without regard to technicalities". That section applies, with necessary modifications, to decisions of this Court on appeal against a decision of the Tribunal: s123(5).

[46] The Tribunal has an express power to dismiss proceedings, if satisfied that they are frivolous, vexatious or not brought in good faith: s115. As Mr Laurenson points out, the Tribunal deliberately did not exercise this power. It struck out Ms Mackrell's claim.

[47] There are also the Human Rights Review Tribunal Regulations 2002 which place, in terms of the Tribunal's procedures, an emphasis on fairness, efficiency, simplicity and speed. I refer particularly to regulation 4.

[48] Thus, the Tribunal has a wide discretionary power to strike out or dismiss a proceeding brought before it. This will be appropriate in situations similar to those contemplated by rr 186 and 477 of the High Court Rules which are the basis for the present application.

[39] The reference by Wild J to rr 186 and 477 of the High Court Rules is now to be read as a reference to High Court Rules, r 15.1 which provides:

15.1 Dismissing or staying all or part of proceeding

(1) The court may strike out all or part of a pleading if it—
  (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
  (b) is likely to cause prejudice or delay; or
  (c) is frivolous or vexatious; or
  (d) is otherwise an abuse of the process of the court.

(2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

[40] It is clearly established (and confirmed by High Court Rules, r 15.1(1)(a)) that abuse of process extends to proceedings where there is no arguable case. See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30]-[32]:

[30] We accept the submission of Mr Harrison that the power, under the High Court Rules or the inherent powers of a court, to stay a proceeding for abuse of process is not limited to the narrow tort of abuse of process. In any event, Mr Mills accepts the abuse of process ground would also be available in the circumstances set out by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*:

> ... the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[31] In Australia, a majority of the High Court in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* identified the following categories of conduct that would attract the intervention of the court on abuse of process grounds:

> (a) proceedings which involve a deception on the court, or those which are fictitious or constitute a mere sham;
> (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
> (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose; and
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[32] The majority also said that, although the categories of abuse of process are not closed, this does not mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party. It does, however, extend to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment".

[Footnote citations omitted]

[41] As noted in *Parohinog* at [30] and [31] two important qualifications must be added.

> **[41.1]** First, the jurisdiction to dismiss is to be used sparingly. If the defect in the pleadings can be cured, an amendment of the statement of claim will normally be ordered. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].
>
> **[41.2]** Second, the fundamental constitutional importance of the right of access to courts (and tribunals) must be recognised. Such right of access must, however, be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or an abuse of process. See *Heenan v Attorney-General* [2011] NZCA 9, [2011] NZAR 200 at [22].

[42] The ordinary rule is that a strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. See *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267. However, where the factual allegations are plainly incorrect it is not appropriate to assume their truth. There must be an objective factual basis for the allegations. A court or tribunal is not required to assume the correctness of factual allegations obviously put forward without any foundation. See *Collier v Panckhurst* CA 136/97, 6 September 1999 at [19].

Vexatious

[43] In the context of the present case it is not necessary to engage in a comprehensive survey of the case law interpreting the term "vexatious". It is well-established that a vexatious proceeding is one which contains an element of impropriety. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* at [89] and *Burchell v Auckland District Court* [2012] NZHC 3413, [2013] NZAR 219 at [16]. To this may be added:

> **[43.1]** A proceeding may be vexatious, notwithstanding that it may contain the germ of a legitimate grievance or may disclose a cause of action or a ground for institution. See *Attorney-General v Hill* (1993) 7 PRNZ (CA) at 23.
>
> **[43.2]** The subjective intention of the party is not determinative of vexatiousness, which is a matter to be objectively assessed. See *Attorney-General v Collier* [2001] NZAR 137 at [35].
>
> **[43.3]** The issue is not whether the proceeding was instituted vexatiously, but whether it is a vexatious proceeding. See *Attorney-General v Brogden* [2001] NZAR 158 at [58] (appeal dismissed in *Brogden v Attorney-General* [2001] NZAR 809).

Or are not brought in good faith

[44] This ground for striking out proceedings captures other circumstances in which the Tribunal's processes are misused and is perhaps best understood as a different way of expressing the grounds for striking out set out in High Court Rules, r 15.1(1) namely circumstances where there is no reasonably arguable cause of action or where the proceedings are otherwise an abuse of the process of the Tribunal.

Abuse of process

[45] The scope of this ground in High Court Rules, r 15.1(1)(d) was set out in *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602 at [30] as follows:

> The ground of abuse of process is said to extend beyond the other grounds set out in r 15.1(1) to catch all other instances of misuse of the Court's process, including where a proceeding has been brought with an improper motive or to seek a collateral advantage beyond that legitimately gained from a Court proceeding. [Citations omitted]

APPLICATION OF THE LAW TO THE FACTS OF THE CASE

Sexual harassment – the allegation

[46] The complaint made by NZPPSL to the Human Rights Commission and to the Tribunal is that the Prime Minister, the Rt Hon John Key, sexually harassed a waitress (Ms Bailey) at a cafe in Auckland over the period from August 2014 to April 2015 by "repeatedly pulling [her] hair". It is alleged the harassment continued despite a complaint by Ms Bailey to the defendant, to her employer, to the defendant's wife and to members of the Diplomatic Protection Squad who accompanied the Prime Minister.

[47] It is plain from the allegations made in the statement of claim that the alleged acts occurred when the defendant was a customer of or visitor to Ms Bailey's place of work. Both before the Commission and the Tribunal NZPPSL alleges that by his actions, the defendant has acted unlawfully by breaching s 62(2) of the Human Rights Act.

Sexual harassment – the legislation

[48] Section 62 of the Human Rights Act provides:

> **62 Sexual harassment**
> (1) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) to make a request of any other person for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.
> (2) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that—
> (a) is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and
> (b) is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3).
> (3) The areas to which subsections (1) and (2) apply are—
> (a) the making of an application for employment:
> (b) employment, which term includes unpaid work:
> (c) participation in, or the making of an application for participation in, a partnership:
> (d) membership, or the making of an application for membership, of an industrial union or professional or trade association:
> (e) access to any approval, authorisation, or qualification:
> (f) vocational training, or the making of an application for vocational training:
> (g) access to places, vehicles, and facilities:
> (h) access to goods and services:
> (i) access to land, housing, or other accommodation:
> (j) education:
> (k) participation in fora for the exchange of ideas and information.
> (4) Where a person complains of sexual harassment, no account shall be taken of any evidence of the person's sexual experience or reputation.

[49] To prove a breach of s 62(2) it must be established (inter alia) the language or physical behaviour of the defendant occurred in the course of that person's involvement in one of the areas stipulated in s 62(3). In the present case NZPPSL specifically alleges the "area" was that stipulated in subs (3)(b), namely "employment".

The defendant's reply

[50] In his statement of reply the defendant admits he has from time to time visited the cafe in question and acknowledges that Ms Bailey has worked there as a waitress. In the course of some of his visits to the cafe the defendant met Ms Bailey and had interchanges with her. The defendant's wife was present from to time when those interchanges occurred and so were members of the Diplomatic Protection Squad. The defendant otherwise denies each and every allegation made in relation to the pulling of Ms Bailey's hair.

A fatal flaw in the plaintiff's case

[51] For the defendant it is submitted that by basing its case on s 62(2) and (3)(b), NZPPSL must establish the defendant committed the alleged acts "in the course of his employment or acting in connection with Ms Bailey's employment". As NZPPSL cannot, on any view of the facts, satisfy this requirement there is no arguable cause of action or case and the claim should not be permitted to proceed. See paras 25 to 29 of the submissions. Only paras 26, 28 and 29 are reproduced here:

> 26. The [defendant] encountered Ms Bailey as a customer in a café. The [defendant] has no ownership, interest or control over the operations of the café or staff. He was not in an employment relationship with Ms Bailey and had no influence over her employment in the café.
>
> …
>
> 28. The [defendant] submits that the [plaintiff] has brought its claim on a misunderstanding of the requirements of section 66(2) of the Act. It is not enough to allege, as the [plaintiff] has done, that Ms Bailey was harassed in the course of *her* employment. Rather, the section requires that the person who is alleged to have acted unlawfully must have done so in the course of *that person's* involvement in employment.
>
> 29. The [defendant] had no such involvement with employment and the [plaintiff's] claim cannot succeed as a matter of law. Accordingly the [plaintiff's] claim should be struck out.

Discussion

[52] In general terms, s 62(2) read with subs (3)(b) makes it unlawful for an employee to be sexually harassed by an employer or by another employee. Section 62(2) does not address sexual harassment by a person who is a customer or client of the victim's employer. This is confirmed by s 69 of the Act which makes provision for the victim of harassment by such person to make a complaint to his or her employer who then has a statutory responsibility to take whatever steps are practicable to prevent any repetition of the behaviour of the customer or client which is complained about. Section 69 provides:

> **69 Further provision in relation to sexual or racial harassment in employment**
>
> (1) Where—
> (a) a request of the kind described in section 62(1) is made to an employee; or
> (b) an employee is subjected to behaviour of the kind described in section 62(2) or section 63—
> by a person who is a customer or a client of the employee's employer, the employee may make a complaint in writing about that request or behaviour to the employee's employer.
> (2) The employer, on receiving a complaint under subsection (1),—
> (a) shall inquire into the facts; and
> (b) if satisfied that such a request was made or that such behaviour took place,—
> shall take whatever steps are practicable to prevent any repetition of such a request or of such behaviour.
> (3) Where any person, being a person in relation to whom an employee has made a complaint under subsection (1),—

(a) either—
  (i) makes to that employee after the complaint a request of the kind described in section 62(1); or
  (ii) subjects that employee after the complaint to behaviour of the kind described in section 62(2) or section 63; and
(b) the employer of that employee has not taken whatever steps are practicable to prevent the repetition of such a request or such behaviour,—

that employer shall be deemed to have committed a breach of this Act and the provisions of this Act shall apply accordingly.

[53] Read together ss 62(2) and 69 make it clear the sexual harassment provisions of the Act do not apply to a customer or a client of the employer in the sense of attaching legal liability to that person. Liability only attaches under s 62(2) if the actions of the person complained against were committed in the course of that person's involvement in employment. In this regard the Tribunal can take judicial notice of the fact that the Rt Hon John Key, as the current Prime Minister of New Zealand, does not have any "involvement" in employment at the cafe in question. The statement of claim filed by NZPPSL does not suggest otherwise. It is premised on Mr Key being present at the cafe as a customer or client. That being so the alleged actions, even if proved, do not in law amount to a breach of the Act.

[54] Responding to the strike-out application, the NZPPSL submissions of 4 September 2015 point out that s 69(1) and (2) acknowledge that an employee can be subjected to sexual harassment by a customer or client of the employer. That may be so, but neither s 62(2) nor 69 make such conduct unlawful for the purposes of the Human Rights Act. Just as not every right enshrined in the International Covenant on Civil and Political Rights 1966 is domesticated by the Human Rights Act or by the New Zealand Bill of Rights Act 1990, not every form of discrimination is made unlawful by the Human Rights Act. The legislation clearly intends the sexual harassment provisions to have limited, not open-ended application. The position in the UK is not dissimilar. See Hepple *Equality: The Legal Framework* (2nd ed, Hart, Oxford, 2014) at 102.

Conclusion as to whether there is a reasonably arguable cause of action or case

[55] In terms of s 62(2) and (3)(b) of the Act, NZPPSL cannot on any view of the facts establish that the defendant's alleged behaviour took place in the course of the defendant's employment at the cafe in question. He was not employed there at the time (and NZPPSL does not suggest to the contrary). As NZPPSL has no arguable case, the proceedings must be dismissed.

[56] This is not one of those circumstances in which the defect can be cured by a simple amendment to the statement of claim.

[57] There are, however, other grounds on which the proceedings must be dismissed. Those grounds are addressed next.

VEXATIOUS AND NOT BROUGHT IN GOOD FAITH

[58] For good reason the Human Rights Act prescribes no formal standing requirement. In some circumstances only a third party has the capacity or resources to bring proceedings which are beyond the ability of the affected individuals. See for example the *IDEA Services* and *CPAG* litigation:

[58.1] *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729. At [8] and [9] CPAG was described in the following terms:

> [8] CPAG is an incorporated society formed in 1994 to advocate for a "better informed social policy to support New Zealand children" particularly those living in poverty.

> CPAG undertakes research, publishes information and is a lobbyist for policy change. Its management committee includes Dr Susan St John, an Associate Professor in the Economics Department at Auckland University and Professor Innes Asher, Head of Paediatrics at Auckland University School of Medicine both of whom gave evidence before the Tribunal as did CPAG's director, Janfrie Wakim.
>
> [9] The present complaint is one of a number of claims pursued by CPAG since 2002 challenging forms of State assistance to families with children that are unavailable to families whose parents are in receipt of benefits on the basis of discrimination.
>
> [Footnote citations omitted]

[58.2] *IDEA Services Ltd v Attorney-General* [2011] NZHRRT 11. At [7] and [8] the following description of IDEA Services was given:

> [1] The plaintiff is Idea Services Limited. Idea Services is a subsidiary of IHC New Zealand Incorporated.
>
> [2] IHC is an organisation that has been committed to advocating for the rights, inclusion and welfare of all people with intellectual disabilities in New Zealand since its establishment in 1949. Amongst other activities, it manages a range of volunteer services to support people with intellectual disabilities to lead satisfying lives in the general community. IHC is the largest provider in New Zealand of services to people who have an intellectual disability.
>
> [Footnote citations omitted]

[59] NZPPSL does not have the stature or credibility of an IDEA Services or of a CPAG. As with the attempted criminal prosecution, it has brought the proceedings for its own purposes, not to vindicate the rights of an otherwise voiceless or disempowered individual or group of individuals. Ms Bailey has given neither her consent nor her cooperation.

[60] In the Tribunal's experience, the assertion of rights by victims of alleged discrimination can be challenging enough without their also having to compete with a third party corporate busybody for control over the decision whether proceedings under the Human Rights Act are to be brought. Potentially, a victim could be forced to stand by as a corporate entity pre-empted what is a very personal decision whether to make a complaint to the Human Rights Commission or to bring proceedings before the Tribunal. Notwithstanding the relaxed provisions relating to standing it was not intended by Part 3 of the Human Rights Act that a victim of human rights abuse be disenfranchised by the very dispute resolution and compliance provisions which provide such victims with a remedy. Human rights protection in New Zealand will not be served by such spectacle. The system for resolving complaints of discrimination must not be put at risk by being undermined, if not brought into disrepute.

[61] As foreshadowed in the earlier discussion of standing, there are further factors requiring these proceedings to receive close scrutiny:

[61.1] An applicant with a personal stake in the proceedings will do a better job in gathering, marshalling and presenting the evidence and in researching and presenting legal submissions.

[61.2] If Ms Bailey does bring her own proceedings, the Tribunal will be faced with repetitive litigation with all the attendant risks earlier referred to by Aronson and Groves in *Judicial Review of Administrative Action* at [11.50].

[61.3] As recognised by Miller J in *Attorney-General v Human Rights Review Tribunal* at [60], claims advanced by enthusiastic busybodies may harm victims of discrimination because such claims may fail for want of factual context and so set

back the development of the law. It is also undeniable that third parties may waste public resources by bringing badly-framed or abstract claims that demand much of the Tribunal's time.

[61.4] The bringing of these proceedings with apparent indifference to Ms Bailey's views and her right to make an autonomous decision as to what to do in response to the defendant's alleged actions is abusive and not to be condoned by the Tribunal.

[62] The Tribunal's processes cannot be allowed to be brought into disrepute. In the present case there is, for the reasons given, a distinct element of impropriety, sufficient for the proceedings to be stigmatised as vexatious, not brought in good faith and an abuse of process.

[63] In the result, quite apart from the fact there is no arguable case, these proceedings must be dismissed on the grounds they are vexatious, not brought in good faith and are an abuse of process.

[64] It is now necessary to address the allegations made by Mr McCready against the Chairperson of the Tribunal and against Mr Kiely, the solicitor for the defendant.

ALLEGATIONS AGAINST THE CHAIRPERSON

The recusal application

[65] Through Mr McCready, NZPPSL make the following assertions in relation to the Chairperson:

[65.1] There is an "obvious" conflict of interest involved in the Chairperson adjudicating these proceedings because NZPPSL and Mr McCready have complained to the Human Rights Commission that he has discriminated against Mr McCready on the basis of Mr McCready's disability (dyslexia and chronic eye infection) and has also violated his right to free speech by making reference to the Tribunal's power under s 115 of the Act to dismiss proceedings as being vexatious.

[65.2] Because two of the Tribunal decisions relied on by the defendant in the strike-out application are decisions in which the Chairperson participated, there is a "conflict" and a "lack of independence". The two decisions in question are *Simmons v Board of Trustees of Newlands College (Strike-Out Application)* [2014] NZHRRT 60 and *WXY v Attorney-General (Strike-Out Application)* [2014] NZHRRT 37.

[66] Mr McCready and NZPPSL seek an order that the Chairperson disqualify himself from any further involvement in this case and an order that adjudication of the strike-out application be referred to the High Court under s 122A(2)(a), (c) and (e) of the Act.

The factual background

[67] It is to be recalled that by *Minute* dated 21 May 2015 the Secretary was given directions by the Chairperson regarding service on the defendant and she was also instructed to serve the proceedings (and the *Minute*) on Ms Bailey as she appeared to be a person entitled to be heard by the Tribunal under s 108 of the Act. Prior to expiry of the statutory 30 day period for the filing of the defendant's statement of reply and prior to any response by Ms Bailey, NZPPSL sought a discovery order against a third party (Unite Union).

[68] As earlier explained, by *Minute* dated 11 June 2015 the Chairperson dismissed for want of jurisdiction the non-party discovery order and by separate *Minute* dated 15 June 2015 also dismissed an application that the Tribunal provide the address for service of the defendant and that of Ms Bailey. It is to be remembered that at the time both applications were made (and decisions given) the 30 day statutory period for the defendant to file a statement of reply as well as the 30 day period for Ms Bailey to file any documents had not expired. It was in that context the Chairperson made the observation that NZPPSL and Mr McCready had failed to read with care the two *Minutes* and had failed to acquaint themselves with the Tribunal's processes as set out in the Act and in the Regulations. It was also in that context their attention was drawn to the Tribunal's powers under s 115 to dismiss proceedings which are trivial, frivolous, or vexatious or are not brought in good faith.

[69] Mr McCready promptly (and incorrectly) announced to various media organisations and journalists the Tribunal had dismissed the proceedings. He apparently also lodged with the Human Rights Commission a discrimination complaint dated 19 June 2015.

[70] Mr McCready subsequently acknowledged by email dated 10 July 2015 he had "completely scrambled" the decisions and accordingly sought confirmation from the Tribunal that the proceedings were still alive. That confirmation was given.

[71] Mr McCready having explicitly accepted he misread the two *Minutes* now maintains the Chairperson discriminated against him by stating that which Mr McCready now admits, namely he failed to read the *Minutes* with care and had failed to acquaint himself with the Tribunal's processes.

Recusal – the law

[72] We reproduce the following statement of the law in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3], [5] and [8] 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.

[73] 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.

[74] In summary a judge or tribunal member is disqualified from hearing a case "if a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question he or she is required to decide". The fair-minded lay observer is presumed to be intelligent and to view matters objectively. Although a non-lawyer, he or she must be assumed to be reasonably informed about the workings of the legal system and to understand that decision-makers are expected to act independently when making decisions.

[75] 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. An allegation of bias cannot be made lightly:

> 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.

Recusal – application to the facts

[76] It is difficult to see how, on any view, an observation by the Chairperson that Mr McCready had failed to read with care the two *Minutes* of 21 May 2015 and 11 June 2015 could lead a fair-minded and informed lay observer to reasonably apprehend there was a real and not a remote possibility that the Chairperson might not bring an impartial mind to the determination of these proceedings. Such observer would take into account:

[76.1] On 10 July 2015, ie subsequent to the complaint dated 19 June 2015 to the Human Rights Commission, Mr McCready himself explicitly acknowledged he had "completely scrambled" the Chairperson's decisions. This is a tacit admission the Chairperson's comments were fully justified.

[76.2] As recognised by s 115 itself, there are occasions when the Tribunal must prevent its processes from abuse. It was not inappropriate for the Chairperson to draw attention to the Tribunal's powers under that section given these proceedings have been brought without the knowledge, consent or cooperation of Ms Bailey and further given the apparent failure to read the various *Minutes* with any care.

[76.3] That a court or tribunal may have in earlier decisions set out its understanding of the law is not evidence of bias, particularly if the decisions in question (as here) were delivered in unrelated cases on different facts.

Conclusion on the recusal application

[77] The recusal application is accordingly dismissed.

The application for removal to the High Court

[78] The related application for removal of these proceedings to the High Court is similarly refused. None of the statutory criteria in s 122A(2) are remotely satisfied. There can be no justification for the complicated provisions of this section to be employed in a case such as the present, particularly given the plaintiff has a right of appeal.

ALLEGATIONS AGAINST SOLICITOR FOR DEFENDANT

[79] Through Mr McCready two challenges are made in respect of Mr Kiely as the solicitor representing the defendant:

[79.1] He is not authorised to represent the defendant.

[79.2] He has made false and misleading statements and has breached the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Each allegation will be addressed in turn.

The authority issue

[80] The statement of claim (signed by Mr McCready) states Mr McCready is the representative of NZPPSL. On 22 May 2015 the Tribunal received an authority to act dated 15 May 2015 by which a director of NZPPSL (Ms SM Gill) appointed Mr McCready agent or representative in these proceedings for a period of 12 months.

[81] It would appear the NZPPSL challenge to Mr Kiely's authority is based on the fact the defendant has not also filed an authority to act.

[82] The submission is misconceived because a lawyer representing a party to proceedings before the Tribunal is not required to file an authority to act whereas a non-lawyer agent or representative is so required. An explanation follows.

[83] The Tribunal has power under s 104(5) of the Human Rights Act to regulate its own procedure:

> (5) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal may regulate its procedure in such manner as the Tribunal thinks fit and may prescribe or approve forms for the purposes of this Act.

[84] There is nothing in the Human Rights Act which requires a party to proceedings before the Tribunal to be represented by a lawyer who holds a current practising certificate. Section 108 (persons entitled to be heard) specifically provides that a person who has a right to appear before the Tribunal may appear in person or be represented by counsel or "agent":

> **108 Persons entitled to be heard**
>
> …

(3) A person who has a right to appear or is allowed to appear before the Tribunal may appear in person or be represented by his or her counsel or agent.

[85] In addition, Part 4 of the Act emphasises the need for the Tribunal to conduct its proceedings in a relatively informal manner, fairly and reasonably (see s 105(2)(b)).

[86] These provisions are reinforced by the Human Rights Review Tribunal Regulations 2002, reg 16 which confers on the Chairperson and the Tribunal the power to give directions necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply and speedily as is consistent with justice.

[87] Based on the foregoing the longstanding practice of the Tribunal is to allow parties to represent themselves or to be represented by a lawyer or by an agent, friend or relative without the need for that person to have legal qualifications or experience. This practice is sanctioned by s 27(1) of the Lawyers and Conveyancers Act which provides:

27 Exceptions to sections 21, 22, 24, and 26

(1) Sections 21, 22, 24, and 26 do not prevent—

(a) any person from representing himself or herself in proceedings before any court or tribunal; or

(b) any person from appearing as an advocate, or representing any other person before any court or tribunal if the appearance or representation is allowed or required—
(i) by any Act or regulations; or
(ii) by the court or tribunal; or

(c) any person who may, in accordance with paragraph (b), appear in any proceedings as an advocate or representative from—
(i) giving advice in relation to those proceedings; or
(ii) giving assistance in drafting, settling, or revising documents for filing in those proceedings.

[88] The three circumstances most commonly encountered by the Tribunal are:

[88.1] Litigants in person. Persons in this category have the right to represent themselves without filing any formal document or authority.

[88.2] Litigants who are represented by a person who holds a current practising certificate as a barrister or as a barrister and solicitor issued under s 39(1) of the Lawyers and Conveyancers Act 2006. In such cases the Tribunal accepts the lawyer's warranty he or she is authorised by the party in question. The Tribunal applies (via s 104(5) of the Human Rights Act) High Court Rules, r 5.37, adapted so as to include both barristers and barristers and solicitors:

5.37 Solicitor's warranty as to authorisation to file documents

A solicitor by whom, or on whose behalf, a document is filed in the court is to be treated as warranting to the court and to all parties to the proceeding that he or she is authorised, by the party on whose behalf the document purports to be filed, to file the document.

[88.3] Litigants represented by a lay agent or representative. Such agent or representative must hold an authority to act signed by the party in question. This is made clear on the Tribunal's website. For example, on the page "How to make a claim" the following advice is given to plaintiffs:

> You don't need to have a lawyer or a representative to bring a claim to the Tribunal. However, it is highly recommended that you are represented by someone with experience in dealing with the type of claim you want to make.
>
> If you choose a representative who is not a lawyer, you will need to fill in the form below.
>
> [There is then a link to the Authority to Act which can be downloaded as a PDF document]

Similar advice is given to defendants.

[89] As Mr Kiely is a barrister and solicitor, no authority to act is required to be filed by the defendant. It follows the challenge to Mr Kiely's authority to represent the defendant is untenable and must be dismissed.

The allegation that false or misleading statements have been made

[90] The first allegation is that a false and misleading statement has been made, namely that NZPPSL filed a complaint in the High Court against the Chairperson of the Tribunal.

[91] The factual background is that on 15 June 2015 the Chairperson issued the decision in *New Zealand Private Prosecution Service Ltd v Key (Application for Disclosure Order No. 2)* [2015] NZHRRT 24. On 3 July 2015 the Tribunal received from Mr McCready an email of that date addressed to various persons (including Mr Kiely) the first of whom was Denia Nunns in the following terms:

> Denia please find attached:
>
> 1. Notice of Appeal
> 2. Notice of Complaint to HRC with a Form 1 cover
> 3. Copy of decision appealed from.
>
> I intended to appear in person today but my bus broke down in Waitomo Caves.
> I am filing electronically today to preserve appeal rights.
> I will appear on Tuesday 6 July am to file a fee waiver application.
> Thank you
> Graham McCready
> Second appellant in person

[92] The first of the two documents attached to this email had an intituling which began "In the High Court of New Zealand Wellington Registry". The cover sheet to the first document read:

> Notice of Appeal from a decision of the Human Rights Review Tribunal ("HRRT") of 19 June 2015 [sic] dismissing a claim against the first respondent.

[93] The second document (also with High Court intituling) has a cover sheet endorsed:

> Notice of complaint to the Human Rights Commission in support of a Notice of Appeal against decision of Human Rights Review Tribunal.

and commenced:

> This document informs you that the second appellant has filed a complaint with the Human Rights Commission (see attached) asserting that the Chairperson of the Human Rights Review Tribunal ("HRRT") affringed the following civil rights of the second appellant …

[94] In the submissions in support of the strike out application all that Mr Kiely said at p 4 para (e) of this second document was:

> The respondent filed a "*[n]otice of complaint to the Human Rights Commission in support of a Notice of Appeal against decision of Human Rights Review Tribunal*" on 4 July 2015 in the Wellington High Court. In that notice, the respondent alleged that the Chairperson of the Tribunal …

[95] It will be seen this submission recites verbatim the description which appears on the face of the document itself, a description presumably drafted by Mr McCready. In these circumstances the only conclusion which can be reached is that the complaint (of a false or misleading statement) has no substance whatsoever.

[96] The second complaint is that in his submissions at p 2 para 7 Mr Kiely stated the Human Rights Commission had dismissed the complaint by NZPPSL [that the defendant had sexually harassed Ms Bailey]. The submission said:

> On 30 April 2015, the Commission dismissed the respondent's complaint on the grounds that the complaint did not appear to have been made with the consent or participation of Ms Bailey and the circumstances under which the respondent made the complaint did not necessitate the Commission taking any further action in respect of the complaint.

[97] It is asserted that because the word "dismissed" does not appear in the Commission's letter dated 30 April 2015, the Tribunal has been misled.

[98] As to this, the text of the 30 April 2015 letter from the Commission is already on record as it was filed by NZPPSL with the statement of claim. It is therefore a document to which both the Tribunal and the defendant have access. The relevant passage states:

> Given that your complaint does not appear to be made with the consent or participation of the aggrieved person, the Commission considers that it is not able to offer dispute resolution services under Part 3 of the Act. Furthermore, we are of the view that, for the purposes of section 80(3)(c) of the Act, the circumstances under which you make your complaint do not necessitate the Commission taking any further action in respect of your complaint.

[99] While it is correct neither s 80 of the Act nor the Commission's letter uses the word "dismissed" the submission made for the defendant, read in context, is nevertheless a fair representation of what happened at the Commission level. It specifically states the Commission decided, in the circumstances, that it would take no further action in respect of the complaint. The point taken by NZPPSL and Mr McCready about the absence of the word "dismissed" is trivial in the extreme.

[100] The third complaint is that the submissions for the defendant were false and misleading in submitting that s 62 of the Act applies only to an employer and not to a customer. Reliance is placed on s 69 of the Act in support of the claim that "sexual harassment can be committed by a customer".

[101] This argument can be disposed of shortly. NZPPSL and Mr McCready fail to understand there is a difference between an alleged act on the one hand and legal liability for that act on the other. For the reasons earlier explained, ss 62 and 69 do not attach to a customer legal liability for engaging in sexual harassment of an employee at the workplace visited by the customer. More fundamentally, it does not follow that because NZPPSL and Mr McCready dislike or disagree with the submissions advanced by the defendant those submissions are false, misleading or otherwise a breach of the rules by which litigation is conducted.

[102] Finally it is alleged the filing of a document with three false and misleading statements breached the duty of honesty owed by a lawyer to a court or tribunal.

Reference is made to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.1.

[103] As we see no foundation whatever for the claim that the allegedly false and misleading statements were made, no breach of the Conduct and Client Care Rules 2008 has been established.

CONCLUSION

[104] NZPPSL, assisted by Mr McCready as its representative, has brought proceedings before the Tribunal which are entirely misconceived and have no prospect of success. While asserting altruistic motives, they have filed these proceedings without the knowledge, consent or cooperation of the alleged victim. Given the publicity they have assiduously sought at every stage they have undoubtedly added to the hurt and embarrassment she has already suffered. Their apparent indifference to the risk of her being re-victimised by their actions cannot be lightly put to one side.

[105] Having regard to the documents filed by NZPPSL we have little doubt these proceedings, ostensibly wrapped in the language of human rights, have in truth been brought to embarrass the Prime Minister and to promote the interests of NZPPSL and Mr McCready. Along the way they have made baseless allegations against both the Chairperson and the lawyer representing the Prime Minister.

[106] It should therefore come as no surprise the proceedings must be struck out not only because no arguable case under the Human Rights Act can be established, but also because the proceedings are vexatious, not brought in good faith and are an abuse of process.

FORMAL ORDER

[107] These proceedings are dismissed on the grounds there is no arguable case and on the further grounds the proceedings are vexatious, not brought in good faith and an abuse of process.

COSTS

[108] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

> **[108.1]** The defendant is to file his submissions within 14 days after the date of this decision. The submissions for NZPPSL are to be filed within a further 14 days with a right of reply by the defendant within 7 days after that.
>
> **[108.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without an oral hearing.
>
> **[108.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Mr MJM Keefe JP**	**Ms ST Scott**
Chairperson	**Member**	**Member**