IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-1460
[2018] NZHC 1776

IN THE MATTER	of an application under s 122A of the Human Rights Act 1993
BETWEEN	DAVID HINES First Plaintiff
	TANYA JACOB Second Plaintiff
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Defendant

On the papers:

Counsel:	G Little for Plaintiffs P Rishworth QC for Crown F Joychild QC for Human Rights Commission S E Greening for Churches Education Commission (party given leave to appear before the Human Rights Review Tribunal)
Judgment:	18 July 2018

JUDGMENT OF CHURCHMAN J

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[1] On 13 October 2016, the plaintiffs commenced proceedings in Human Rights Review Tribunal (the Tribunal) seeking declarations that certain sections of the Education Act 1964 and the Education Act 1989 are inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990. The substance of the claim relates to religious education occurring in State schools.

[2] The Human Rights Commission gave notice of its intention to appear as an intervenor pursuant to its functions under ss 5(2)(j), 92H(1)(a) and 92H(2) of the Human Rights Act.

[3] On 28 February 2017, the Churches Education Commission Trust Board (CEC) gave notice of intention to appear and call evidence, and that application was granted in *Hines v Attorney-General (Application by Non-Party to be heard).*[1]

[4] A first amended statement of claim was filed by the plaintiffs on 23 May 2018.

The removal application

[5] The Tribunal has a significant and growing backlog of cases. The Chairperson of the Tribunal is on record saying that, for most of the litigants before it, it has ceased to function.

[6] On 15 June 2018, the plaintiffs applied for an order that their proceedings in the Tribunal be removed to the High Court for determination.

[7] Section 122A of the Human Rights Act 1993 sets out the circumstances in which a removal order may be made. The plaintiffs have relied on three of those grounds:

(a) that important questions of law are likely to arise in the proceedings other than incidentally;

(b) the nature and urgency of the proceedings mean that it was in the public interest that they be removed immediately to the High Court; and

(c) that in all circumstances the High Court should determine the proceedings.

[8] The Tribunal issued a decision on that application on 26 June 2018. It held that the central question at the heart of the proceedings was whether the current

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1 *Hines v Attorney-General (Application by Non-Party to be heard)* [2017] NZHRRT 9.

provisions of the Education Act 1964 which authorise religious instruction in State primary schools are inconsistent with the right to protection from discrimination on the grounds of religious and ethical belief under s 19 the New Zealand Bill of Rights Act. It concluded that the proceedings held considerable public policy implications for the State school system and would directly impact upon the hundreds of schools which currently hold religious instruction programmes under the Education Act 1964.

[9] The Tribunal rejected the plaintiffs' claims that there was any urgency to these proceedings.

[10] The Tribunal accepted the plaintiffs' claim that, as a result of the major delays being experienced in the Tribunal, it could be said that, in all of the circumstances, the Court should hear these proceedings. However, before the proceedings can be transferred from the Tribunal to the High Court, the High Court must grant leave under s 122A(1) of the Human Rights Act 1993. The Tribunal was unable to make an order for removal because it did not presently have the leave of the High Court. The Tribunal confirmed that if such leave was obtained, it would make the necessary formal orders removing proceedings to the High Court.

Discussion

[11] The Court accepts that these proceedings are likely to raise important questions of law. The Court also accepts that there have been major delays in processing cases before the Tribunal and that a substantial and unacceptable backlog has occurred. However, the delays are not particular to this specific case but seem to be systemic.

[12] One of the concerns I have in relation to this application is that if the delays being experienced were held to justify removal to the High Court, then there may well be a flood of applications of a similar nature to the present one.

[13] It would not be appropriate for this Court to become in effect the first instance body considering these applications merely as a result of the inability of the Tribunal to address its work backlog. The Court does not have the specialist expertise found in the Tribunal and it is clearly Parliament's intention that parties alleging a breach of their human rights will have their concerns determined in the first instance (other than

in a limited type of situations covered by s 122A), by the specialist Tribunal set up to hear such matters.

[14] For many of the claimants before the Tribunal, their cases will involve issues that are of profound significance to them, and also issues of novel and, at times difficult, points of law.

[15] In the present case, the Court is effectively in the invidious position of saying that the particular rights or question of law involved are of greater importance or have a greater claim to priority than the many other important matters that the Tribunal has to deal with.

[16] Making an application under s 122A cannot be regarded as a solution to the systemic problems of delay besetting the Tribunal. It must remain the exception rather than the rule that cases are transferred out of this specialist jurisdiction and into the High Court.

[17] However, by a fine margin, I am satisfied that this is such an appropriate case.

[18] I am influenced by the fact that the defendant, the Human Rights Commission and CEC have all filed memoranda abiding the decision of the Court. Had there been active opposition from any of these parties, particularly on the grounds that this case required the application of the specialist expertise found in the Tribunal, then the outcome of this application may well have been different.

[19] Accordingly, I find that the requirement of s 122A(2)(a) of the Human Rights Act 1993 is met on the basis that an important question of law arises in these proceedings, and I grant leave for the removal of these proceedings to the High Court for determination under s 122A(1). Leave is also granted for the proceedings to be commenced by originating application.

Churchman J

Solicitors:
Davenports City Law, Auckland for Plaintiffs
Crown Law, Wellington for Crown