



## B v. Waitemata District Health Board

[2013] NZHC 1702

**Country:** New Zealand

**Region:** Oceania

**Year:** 2013

**Court:** High Court

**Health Topics:** Health systems and financing, Hospitals, Mental health, Tobacco

**Human Rights:** Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Right to privacy

### Facts

In this case applicants argued that the no-smoking policy of the Waitemata District Health Board (WDHB) and the consequent prohibition of smoking in hospitals and surrounding grounds violated their right not to be subjected to torture or cruel treatment, the right to be treated with humanity, the right to respect private life, and the right to natural justice.

Two of the applicants were psychiatric patients and the other was a former psychiatric nurse at hospitals operated by the WDHB. They challenged the WDHB Smoke-free Environment Policy dated November 2009, which was established to ensure that employees, patients and members of the public were protected from tobacco smoke in the workplace and to encourage and support patients and staff not to smoke.

### Decision and Reasoning

The Court rejected the challenge and upheld the anti-smoking policy. The Court reviewed the case on three grounds: (1) the illegality of the Smoke-free Policy, (2) the irrationality of the Smoke-free Policy, and (3) a breach of natural justice.

The Court held that District Health Boards were statutory entities and corporate bodies capable of doing anything that "a natural person of full age and capacity can do." As a result, they are allowed to set rules for their building operation and requirements for the conduct of persons on that site. The Court found that smoking was a recognized and preventable health hazard and that there was no inherent right to smoke. Therefore, the Court determined that the ban on smoking, and the absence of smoking rooms, was not an illegal action.

The Court also held that the smoke-free policy was not irrational because it was straight forward and part of the WDHB objective of improving patient and community health.

To determine if there was unlawful discrimination, the Court looked to see if there was unlawful discrimination either (1) between detained psychiatric patients and non-detained patients and/or (2) between smokers and non-smokers. The Court found that neither of these distinctions are forms of unlawful discrimination. First, WDHB was able to regulate what occurred on its premises and smoking, like "accessing pornography, having promiscuous sexual relations and drinking alcohol" could also be prohibited. Furthermore, the Court found that differential treatment was not the same as discrimination. The Court also rejected the claim that being addicted to nicotine constitutes a disability.

The Court rejected the claim of torture or cruel treatment, finding that withdrawal symptoms do not meet the threshold established domestically, or based off of international standards such as the International Covenant on Civil and Political Rights.

Likewise, the Court held that a non-smoking policy is for the benefit of the patients, and, therefore, by providing patients with nicotine replacement and other therapies, the WDHB was actually treating the applicants with humanity and respect for the inherent dignity of the person, not denying it.

The Court also held that because the policy was neither arbitrary nor unlawful it did not violate the right to respect private life.

The Court also rejected the right to smoke, and therefore found that there was no right to natural justice under this policy.

The Court also found that in the alternative that there was some right to smoke, the policy was a justified limitation under section 5 of the New Zealand Bill of Rights due to the costs that would be placed on WDHB to provide and monitor supervised smoking areas and the low level of disadvantage suffered by the applicants as compared to the significant advantages of enforcing the no-smoking policy.

### **Decision Excerpts**

“There was no discrimination on the ground of psychiatric illness in breach of the New Zealand Bill of Rights Act 1990. The restraint applied equally to all patients, staff and visitors and was not on the basis of psychiatric illness or acute illness. Rather, the Smoke-free Policy effectively prohibited smoking on the basis of particular features of the applicants’ condition (danger to themselves or others or acuity of condition), or employment situation, that led to their detention or presence on the premises, and consequent inability to leave the hospital property to smoke. There was no discrimination on the ground of a disability, as nicotine dependence from smoking is not a disability. There were no breaches of other human rights such as the right not to be subject to torture and cruel treatment.” Para. 94.

“Even if there had been breaches of the applicants’ rights, the Smoke-free Policy was a justified limitation under s 5 of that Act. The purpose of the policy was important, the ban was rationally connected with the purpose of reducing smoking and protecting persons from smoking, and the ban was proportionate and did no more than was necessary in its context to achieve its purpose of stopping smoking and protecting non-smokers from tobacco smoke.” Para. 95.

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