Decision No. 7 /07

Reference No. **HRRT 13/06**

BETWEEN	**MELANIE ANNE TREVETHICK**
	Plaintiff
AND	**MINISTRY OF HEALTH**
	Defendant
AND	**HUMAN RIGHTS COMMISSION**
	Intervenor

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle Chairperson
Ms J Binns Member
Mr S R Solomon Member

HEARING: 8 December 2006 (Wellington)

APPEARANCES:

Mr J Miller for plaintiff
Ms M Coleman & Mr T M A Luey for defendant
Ms C A Rodgers & Ms J Ryan for Intervenor

DATE OF DECISION: 4 April 2007

DECISION

(APPLICATION TO STRIKE OUT)

Introduction

[1] The plaintiff suffers from multiple sclerosis. Her condition is such that she requires a specially modified car so as to be able to drive while in her wheelchair. The cost of the modifications has been in the order of $90,000. But because she does not meet relevant criteria she has not had any significant financial support from the Ministry of Health ('the Ministry') towards those costs.

[2] The plainitff says that if the cause of her disability had been the result of an injury caused by accident rather than a degenerative process, or the manifestation of a disease, then she would have been entitled to considerable financial support under New Zealand's accident compensation legislation. The details as to how much funding the plaintiff might have had in that case do not matter for present purposes. At least in the context of the present application to strike out, it is common ground that if the cause of the plaintiff's disability had been an accident rather than a disease or degenerative process, then she would have been able to access a greater level of financial support from the Government.

[3] The plaintiff's sense of injustice is understandable. From her point of view, the fact that two people with substantially the same physical disability can be treated so differently depending on the cause of their disability is discriminatory. She says that the discrimination involved cannot be justified, and that it contravenes Part 1A of the Human Rights Act 1993 ('the HRA'). She has asked us to make a declaration to that effect, and to restrain the Ministry from continuing to discriminate in that way. She has also asked us to award her damages for the costs of modifying her car, and to compensate her for the loss of dignity that she says she has suffered as a result of the way she has been treated.

[4] The Ministry's response is that there is no discrimination of a kind that is unlawful under Part 1A of the Act. It submits that the plaintiff's circumstances are not really comparable to the circumstances of those who are covered by the accident compensation legislation. It argues that there is in any event no unlawful discrimination, since differentiation between people on the basis of the cause of a disability (as opposed to the disability itself) does not fall within the definitions in s.21 of the HRA. The Ministry submits that when the relevant legislation is properly understood, it is clear that the plaintiff's claim is untenable. On that basis the Ministry has asked us to strike the claim out at this early stage of the proceedings without a substantive hearing.

[5] The Human Rights Commission ('the Commission') exercised its right under s.92H(1)(a) HRA to appear as an intervenor in the proceedings. Ms Rodgers explained that the Commission was not advocating for any particular outcome in respect of the strike out application. Instead it saw its role as putting its perspective on the relevant issues before the Tribunal. It is fair to say, however, that by far the greater part of the debate at the hearing took place between Ms Coleman on behalf of the Crown and Ms Rodgers for the Commission.

Some preliminary matters

[6] In very broad terms, people in New Zealand who suffer disability because of disease or a degenerative process of the body are supported by benefits that are available under 'Vote Health' – i.e., the allocation of funding for which the Ministry is responsible. The term 'Vote Health' is therefore a convenient way of encompassing all the various programmes that are ultimately administered by the Ministry to support people who have disabilities, but who are not entitled to financial support in respect of their disabilities under the accident compensation legislation.

[7] The legislation that governs compensation for personal injuries caused by accident has had a number of different titles since the scheme was first introduced in 1975. The current statute is the Injury Prevention, Rehabilitation and Compensation Act 2001. But, although the broad social and policy objectives that lie behind the legislation are relevant, none of the issues that we have to decide depend upon any differences between the various statutes that have been in force since 1975. Nor does anything that we have to decide depend on any particular provision of the Injury Prevention, Rehabilitation and Compensation Act 2001. As a result we will refer to that Act, and all the preceeding statutes, as 'the accident compensation legislation'.

[8] The defendant named in the statement of claim is the Ministry of Health. We can see why that Ministry may have seemed to be the appropriate defendant at the outset, but as the argument has unfolded we are left wondering whether the real defendant ought not be the Attorney-General in his capacity as representative of the Crown. There is, after all, no suggestion that any conduct by the Ministry has been directed to the plaintiff personally, or that the Ministry has done something that is not within the legislation under which it operates. To the contrary, at various points in the argument

there were references to the accident compensation legislation as being 'under-inclusive' – which, if anything, suggests that perhaps the Department of Labour (which is the government agency responsible for administering the accident compensation legislation) might have been named as a defendant as well as, or in place of, the Ministry. Another party whom we imagine would likely have an interest in the matter is the Minister for Disability Issues.

[9] In essence, however, the plaintiff's complaint is that the Government of New Zealand has enacted legislation which results in different outcomes for people with disabilities dependant on the cause of their disability, and/ or that it has omitted to legislate or take any other steps to remove the anomaly. During argument all counsel referred to the role of 'the Crown' and to what has or has not been done by 'the Government' or Parliament. The focus was not really on any particularised act or omission by the Ministry at all. As a result, and unless it is necessary to identify the Ministry in particular, we prefer to describe the defendant as 'the Government' or 'the Crown' in this decision.

Approach to the application to strike out

[10] It is common ground that the Tribunal has the power to strike out the plaintiff's claim at this stage of the proceedings if satisfied that it does not disclose a tenable cause of action: see, eg., *Bissett v Peters* (HRRT Decision 33/04; 10 August 2004 at paragraph [24]), and *Mackrell v Universal College of Learning* (Unreported, High Court, Palmerston North, CIV 2005-485-802, 17 August 2005 per Wild, J at paragraphs [45] to 48]).

[11] It was also agreed that the Tribunal should approach the application to strike out in the way that is articulated by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at p. 267. The Court of Appeal's comments in the first paragraph under the heading *'Striking out'* on page 267 of the decision are well known, and we do not repeat them here. We do note, however, that the Court of Appeal added this:

> *"Mr Chambers QC for the respondents submitted that the Courts should be very slow to rule on novel categories of duty at the striking out stage. Where the hypothetical facts cover a range of factual possibilities, deciding wide public policy questions may lead to an unfocussed approach because the inquiry is then set against too broad a factual canvass. And empirical evidence and other expert evidence properly tested may help the Court in making right public policy choices.*
>
> *"There is force in these submissions … it is only where, on the facts alleged in the statement of claim, and however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage. And in that assessment the public policy considerations must be solidly founded in the relevant legislation, other relevant material, or the experience of the Courts. In some cases aspects of policy may require the kind of testing of expert evidence, including evidence of ecomonic and social analysis, that is available only at trial. In other cases, policy considerations are patent. They may be explicit or implicit in the relevant legislation. They may be reflected in other areas of law. Or the Courts may feel the considerations are readily identifiable and capable of evaluation and need not be the subject of evidence to be tested at trial."*

[12] The *Attorney-General v Prince and Gardner* case concerned questions raised in respect of the law of negligence, whereas we are concerned in this case with an action brought under Part 1A HRA. Even so we regard the cautionary note that is sounded by

the foregoing passage to be relevant to the exercise of our discretion as to whether to strike out this case, or to allow it to proceed to a substantive hearing. Where it is suggested that broad questions of social policy are at work, or that such considerations justify or explain why certain legislative measures are as they are, then we think the Tribunal ought to be reluctant to strike out a claim without having relevant evidence. Striking out is appropriate only if the relevant policy considerations are explicit or implicit in the legislation, or are otherwise readily identifiable and capable of evaluation, so that there is little to be gained by having evidence and allowing examination of that evidence at a hearing. As the Court of Appeal said in *Attorney-General v Prince and Gardner*, the power to strike out is one that ought to be exercised sparingly, and only in clear cases where the Tribunal is satisfied that it has the requisite material before it.

[13] Moreover, we agree with Ms Rodgers' observation that Part 1A HRA is relatively new and is almost altogether untested by litigation in New Zealand. The issues raised by the present case are novel. The consequences of a decision one way or the other are potentially significant. It is not irrelevant that, of all the many authorities that we were referred to in argument, there does not seem to have been any decision that has dealt with issues of the kind raised in this case in the context of an application to strike out (rather than after a substantive hearing).

[14] Another aspect of the need for caution relates to the way in which the claim has been prepared. Ms Coleman made the point more than once that what the Crown submits should have been pleaded has not been set out in the statement of claim. Of course we accept that a defendant to a claim brought in this Tribunal is entitled to have sufficient information about the claim against him, her or it before being expected to respond. But ultimately the assessment of what is or is not adequate has to be made in the context of our obligation to act according to the substantial merits of each case, and without regard to technicalities (s.105 HRA). It is important to bear in mind that Part 1A is largely untested by litigation.

[15] In our assessment, the thrust of the claim by the plaintiff has emerged clearly enough both from her statement of claim and from the arguments that have been put forward on her behalf. Even if the claim in its present form might not survive scrutiny for compliance with the more precise requirements of court pleadings, we do not think that it would be satisfactory to deal with this matter on the basis that the pleadings are deficient. Certainly we do not think that any shortcomings in the statement of claim that are capable of correction by amendment to that document should be relied upon as a sufficient reason to strike the case out.

[16] However, if we find ourselves persuaded that the claim has no realistic prospect of success, then – notwithstanding all these words of caution - the proper course is to strike the proceedings out at this point. We also agree with Ms Coleman that the fact that a case may involve new or complex legal issues does not exclude the jurisdiction to strike out. It is obvious that litigation under Part 1A HRA which challenges acts and omissions of the Government of New Zealand has the capacity to be complex and, therefore, costly – particularly if it becomes necessary for the Crown to assemble and present evidence of justification that might involve social, economic or other policy considerations. If it is clear that the plaintiff cannot succeed, then we think it would be wrong to allow the matter to proceed for the sake of form, or on a point of principle. To the contrary, in that situation all parties (the plaintiff included) ought to be spared from incurring further costs in the matter.

Relevant legislative provisions, and the Tribunal's role

[17] Part 1A was introduced into the HRA with effect from 1 January 2002, on the expiry of s.151 of the Act (as it stood before the 2001 Amendment Act). In broad terms, Part 1A subjects acts or omissions of the Government of New Zealand to the anti-discrimination standard set out in s.19 of the New Zealand Bill of Rights Act 1990 ('NZBORA'). In doing so it gives effect - at least in part - to New Zealand's commitment to the International Covenant on Civil and Political Rights. The operative provision of Part 1A is s.20L which provides:

> *"**Acts or omissions in breach of this Part***
>
> *(1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.*
>
> *(2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission—*
>
> *(a) limits the right to freedom from discrimination affirmed by that section; and*
>
> *(b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.*
>
> (3) *To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment."*

[18] The conduct (whether acts or omissions) that is covered by s.20L is that of the legislative, executive or judicial branches of the Government of New Zealand, and of any person or body in the performance of a public function, power, or a duty imposed or conferred by or pursuant to law: s.20J HRA. As a result Part 1A has constitutional significance. Even the legislative function of Government is made subject to scrutiny for compliance with s.19 of NZBORA, and the Tribunal has been given an explicit statutory jurisdiction to consider cases where contravening conduct is alleged.

[19] Section 19(1) of NZBORA provides that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the HRA. But like all other rights in NZBORA, that right is subject to s.5 of NZBORA, which provides:

> *"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

[20] For present purposes the relevant ground of discrimination is disability which, by virtue of s.21(1)(h) HRA, means:

> *"(i) Physical disability or impairment:*
> *(ii) Physical illness:*
> *(iii) Psychiatric illness:*
> *(iv) Intellectual or psychological disability or impairment:*
>
> *(v) Any other loss of abnormality of psychological, physiological, or anatomical structure or function:*
> *(vi) Reliance on a guide dog, wheelchair, or other remedial means:*

(vii) The presence in the body of organisms capable of causing illness:"

[21] Taken together, the provisions of the HRA (including but not limited to Part 1A) and NZBORA are clearly intended to open the way for claims against the Government even if of a public interest/ political nature notwithstanding that a Tribunal decision has a potential to lead, albeit indirectly in the case of a declaration of inconsistency, to wide ranging and significant consequences. But clearly it is not an answer to such a claim to say that the outcome might involve significant implications for the way in which resources are allocated between different groups within New Zealand society. The extent of the jurisdiction has already been recognised in *Attorney-General v Human Rights Review Tribunal & Child Poverty Action Group Inc* (unreported, High Court, Wellington, CIV 2006-485-1713, 16 October 2006 per Miller, J). That case was concerned with a question as to who is entitled to bring proceedings under the HRA, but in dealing with that Miller J observed:

> *"It is true that CPAG's claim is essentially political in nature and ultimately can be resolved only by political means; it must be balanced against other claims on the public purse, resolution of which is the province of politicians, who are accountable to the electorate for such decisions, and the legislature has provided that the only remedy available before the Tribunal is a declaration of inconsistency. Further, the proposition that the Courts have no business adjudicating upon claims that have serious resource allocation implications has a very respectable pedigree. The proposition was eloquently framed by Professor J A G Griffith in The Political Constitution (1979) 42 MLR 1. He contended that such claims reflect social conflict over resources that can only be resolved by political means; to address them in litigation is to disguise them as questions of law, and as unqualified rights that a Court may remedy, when in reality they are merely claims upon the community.*
>
> *"By admitting claims of discrimination in respect of enactments, however, Parliament has made available a cause of action and a forum in which such claims may be publicised and to some degree vindicated, if not actually remedied. Armed with a declaration, the plaintiff may press its case for a remedy in the community and in the legislature. In other words, the legislation manifestly admits claims having a political purpose. …"* (para's [64] and [65]).

The plaintiff's claim

[22] Against that background we think it appropriate to make the following observations about the plaintiff's claim.

[23] The statement of claim asserts that the Ministry's equipment funding policy breaches Part 1A HRA by making a distinction between the plaintiff who suffers from multiple sclerosis, and others with similar disabilities but arising out of personal injury (who therefore have entitlements under the accident compensation legislation). The distinction, it is said, arises out of a prohibited ground of discrimination i.e., disability. It is also pleaded that the distinction causes the plaintiff disadvantage, since the Ministry's 'policy' prevents the plaintiff from accessing benefits available to others who have a disability similar to hers. Some particulars as to the way in which the distinction is adverse to the plaintiff are given. As we have noted, relief is sought in the form of a declaration that the Ministry has committed a breach of Part 1A, an order restraining any repetition of the breach, and damages.

[24] During the hearing Ms Coleman expressed considerable concern as to what the effect any decision that ultimately upheld the plaintiff's claim might be. If the Tribunal were to award the damages claimed, for example, then at least potentially that might involve the Tribunal in making resource allocation decisions which, Ms Coleman submitted, are properly in the domain of Parliament, not the Tribunal.

[25] The argument for the plaintiff did not produce or refer to anything that might have qualified as an explicit or deliberate 'policy' of the Ministry of Health to the effect that someone in the plaintiff's position ought not be entitled to access benefits at the level provided for under the accident compensation scheme. Instead Mr Miller referred to what he described as *Government* 'targeting' in the area of disability support, and to the *Government's* 'scheme' for dealing with the issue. This observation is certainly not intended to be critical; to the contrary (and at the risk of belabouring the point) it serves to reinforce our impression that the real defendant in these proceedings is, to use the language of Part 1A HRA, the legislative branch of the Government of New Zealand.

[26] We make the point because potentially significant consequences follow. If one approaches the case on the basis that it is about the state of legislation governing disability support, then it must at least arguably be the kind of case that should be dealt with by the Tribunal under s.92J HRA (particularly if one bears in mind that the word 'enactment' has the wide meaning attributed to it by s.29 Interpretation Act 1999). If so, then the only remedy that the Tribunal would be able to grant is a declaration of inconsistency under s.92J(2) HRA. In that situation the Tribunal would not, for example, be able to award the damages that have been claimed, or to purport to restrain the Ministry or any other governmental agency in any relevant way.

[27] The effect of a declaration under s.92J(2) HRA is set out in s.92K. Such a declaration would not affect the validity, application or enforcement of any enactment. It would not prevent the continuation of the act, omission, policy, or activity that is the subject of the declaration. Instead (and assuming that the declaration survived the inevitable appeal(s)) the relevant Minister of the Crown would be required to bring the matter to the attention of Parliament, and to advise Parliament as to the Government's response to the declaration. Those duties have to be carried out within 120 days of the last date on which any appeal against the declaration could have been brought: see s.92K(3) HRA.

[28] That kind of outcome would not involve the Tribunal in making significant resource allocation decisions. What it would do is identify an issue for Parliament to deal with, and ensure that the issue is put high on the Parliamentary agenda. This sort of interaction between the Tribunal and Parliament can be thought of as a kind of 'dialogue' – one in which the result of the Tribunal's deliberations have to be considered and taken into account by, but are certainly not binding on, the Legislature. In this respect there are similaritites between the Tribunal's jurisdiction and the 'declaration of incompatibility' processes available in the United Kingdom under s.4 of the Human Rights Act 1998, in Ireland under the s.5(1) of the European Convention on Human Rights Act 2003, and in the Australian Capital Territory under s. 32(2) of the Human Rights Act 2004 (ACT). There is a good deal of literature on the topic, but for present purposes we think the essential idea is encapsulated in the following observation in Miles, *Standing in the Human Rights Act 1998* [2000] CLJ 133:

> *"The declaration of incompatibility should be taken into account in attempting to characterise the nature of the Judge's function under the Human Rights Act. The declaration procedure essentially involves the Courts in a dialogue or 'partnership' with Parliament and the Executive about the compatibility of UK legislation with (their understanding of) the true scope and meaning of the abstract rights*

enshrined in the convention. . . (p 164; also noted at para [81] of the Tribunal's decision in *CPAG v Attorney-General* (supra)).

[29] The argument that we heard did not focus on this question as to whether the claim is or ought be treated as being a claim for a declaration of inconsistency under s.92J(2). As a result it would be wrong to do anything more than to note these points and leave the issues open. What is clear, however, is that if the case were to proceed then careful attention will need to be given to these questions about what 'policy' is really under attack, who the defendant ought to be, and what relief the Tribunal can realistically be asked to consider as a result.

[30] We turn to consider the arguments that were presented.

The submissions as to striking out

[31] We begin this section of our decision by acknowledging the skill and care that went into preparation of the submissions for the Crown. Ms Rodgers' submissions for the Commission were also full, well-reasoned and very helpful indeed (as noted, the written submissions for the Commission were adopted by Mr Miller in their totality, and no other written submissions were filed on behalf of the plaintiff). Both Ms Coleman and Ms Rodgers drew attention to relevant jurisprudence in New Zealand and overseas, and discussed various aspects of Part 1A in detail. We are very grateful to them for their scholarship. We regret that this decision will not do justice to the breadth of the materials that they directed us to. However, when almost every proposition is a potential minefield for controversy, it becomes all the more important to approach the application to strike out with careful focus on the central issues that need to be decided.

[32] Ms Coleman gave three fundamental reasons for her submission that the plaintiff's claim does not disclose any unlawful discrimination under the HRA, namely:

[a] The plaintiff has not alleged that anyone else covered by Vote Health is treated more favourably than she is (this is essentially the point we have already noted, namely that this is not a case in which it is being said that the Ministry treats the people for whom it has responsibility in the allocation of funding available to it under Vote Health differently from one another by reason of any prohibited ground of discrimination);

[b] Those who are covered by the ACC legislation are not a valid comparator group against which to measure the way in which the plaintiff is treated;

[c] In any event, the definition of 'disability' in s.21(1)(h) HRA does not make differentiation based on the cause of a disability unlawful.

[33] Ms Coleman characterised the plaintiff's claim as a plea for the Tribunal to remedy an inequality between two separate social assistance/ health schemes that are operated by the Crown. She argued that New Zealand's current anti-discrimination legislation does not require, and therefore does not permit, the Tribunal to do such a thing. She did make it clear, however, that if a *prima facie* case of discrimination were to be found, then the Crown does not expect the Tribunal to strike the claim out on the basis that such discrimination is unarguably justified under s.5 of NZBORA (the term *'prima facie discrimination'* is as used by Tipping, J in *Quilter v Attorney-General* [1998] 1 NZLR 523 at pp 575 & 576). That is a pragmatic approach. It is too soon to say what materials might be relevant in any debate about justification under s.5 NZBORA, but it does seem clear that consideration of the issue will need to be informed by some evidence. As a result the question is not appropriate for determination on a strike out application.

[34] There was some discussion at the hearing as to whether the issue of justification can also be raised at an earlier stage of the analysis, on the basis that differentiation which is justified does not amount to 'discrimination' even if the differentiation is on one of the prohibited grounds. That gave rise to a detailed exchange of views particularly between the Crown and the Commission. But these are not issues that we need to deal with in this decision. The essence of the Crown's case in this part of the argument was that it is not appropriate to treat people who suffer from a disability as a result of an accident as a logical or appropriate 'comparator group' for those who have the same or very similar disabilities, but which have been brought about by disease or the onset of a degenerative process. We deal with that in the next section of this decision.

[35] There is a good deal that might be said about each of the different elements identified by Ms Coleman (see para [32] above). Broadly speaking, however, the Commission accepted that in view of the way which the HRA and NZBORA are structured there are at least two stages to the analysis of a claim of alleged discrimination under Part 1A:

[a] At the first stage it is necessary to consider whether the facts establish that there has been prima facie discrimination that engages the HRA – i.e., has the plaintiff (who carries the evidential burden at this stage) shown that there has been a *distinction* made on one or more of the *prohibited grounds* identified in s.21 HRA, and which has given rise to a *disadvantage*? (the italicised words identify the three separate elements of this approach);

[b] The second stage of the analysis asks whether the prima facie discrimination is justified in terms of s.5 NZBORA. In this exercise it is the defendant who carries the burden of proof: see s.92F(1) HRA.

[36] The essence of Mr Miller's oral argument for the plaintiff was that:

[a] We should be slow to strike the claim out in circumstances where there are novel issues and untested legislation (we have covered the points made by Mr Miller in this respect under the heading *'Approach to the application to strike out'*);

[b] In the context of the striking-out application in this case it would be wrong for the Tribunal to reach any final conclusion as to what the background to the accident compensation legislation was. Mr Miller challenged the idea that the legislation should be seen as a 'social contract' under which citizens have exchanged rights to sue for personal injury at common law in favour of the 'no fault' compensation scheme represented by ACC;

[c] The argument that those who have disabilities and are entitled to benefits under Vote Health cannot be compared with those who have similar disabilities but who are entitled to benefits under the accident compensation legislation is illogical, and should not be accepted;

[d] We ought not accept that there is any legal significance in a difference between selecting between a group of people on the basis of disability, and selecting between the same group of people on the basis of the cause of the disability in question.

[37] We do not regard it as appropriate to try to resolve all of the competing views that were expressed in argument in this decision, or to purport to lay down any hard and fast

rules about how the Tribunal should approach the assessment of discrimination in these kinds of cases in future. As Ms Rodgers submitted, it is neither necessary nor appropriate to attempt such a comprehensive determination when all that is needed is an answer to the question: should this claim be struck out at this preliminary stage?

[38] In our assessment the strike out application cannot succeed unless we accept either or both of two separate propositions put forward by the Crown. The first is that someone in the plaintiff's position cannot properly be compared with someone who receives ACC. The second is that, in any event, the definition of disability in s.21(1)(h) HRA does not include differentiation on the basis of the cause of a disability. Those are the two arguments that we need to deal with. We take them in turn.

The issue of comparison

[39] Ms Coleman submitted that in a case such as this it is essential to show that there has been differential treatment (or a differential impact) *" … between the plaintiff and another comparably circumstanced group …"* by reason of a prohibited ground of discrimination as defined in s.21 of the HRA. The submission gave rise to a debate between the Crown and the Commission as to what that really means, and whether it is *always* necessary to be able to identify a group of similarly circumstanced people who are being treated differently, in order to establish discrimination. Ms Coleman referred us to cases such as *Auton v British Columbia* [2004] 3 SCR 657, *R v Secretary for State for Work and Pensions ex parte Carson* and *R v Secretary for state for Work and Income ex parte Reynolds* [2006] 1 AC 173 (HL), and *Hodge v Canada* [2004] 3 SCR 357. In the latter case the Supreme Court of Canada observed:

> *"The outcome of a s.15(1) claim cannot be skewed by a claimant attempting to associate himself with a group whose relevant characteristics do not reflect the claimant's actual circumstances, or by targeting the benefits of a group whose relevant characteristics are simply not comparable."* (para 20; s.15 (1) of the Canadian Charter of Rights and Freedoms is the provision that corresponds most closely to s.19 NZBORA, although there are significant differences in the wording of each).

[40] The Commission accepts that the assessment of discrimination is a comparative exercise. It also agrees that it will often be appropriate for the Tribunal to carry out that exercise by comparing the circumstances of the plaintiff with another person or group of persons who are in similar circumstances but who do not have the characteristic(s) said to give rise to unlawful discrimination. As Tipping J explained in *Quilter*:

> *"The essence of discrimination lies in difference of treatment in comparable circumstances. For discrimination to occur one person or group of persons must be treated differently from another person or group of persons. Of course difference in treatment will not necessarily of itself amount to discrimination; and not all discrimination will be illegal. In considering whether there is discrimination, it is necessary to define two things: first, the subject matter of and, second, the basis for the alleged discrimination. What does the difference of treatment relate to and upon what factors is the difference based? The approach to both these matters can affect the outcome"* (p 573)

[41] The identification of the 'comparator group' can therefore be all-important to the outcome of a discrimination case: see (e.g.) *Hodge v Canada* (supra) and, for other examples and further discussion, A & P Butler, *The New Zealand Bill of Rights Act – A Commentary* (LexisNexis, 2005, at para 17.12). The topic is thus of considerable

importance to the Commission. The Commission was anxious to explain that, in its view, the Crown's suggestion that it is necessary to identify a comparator group in *every* discrimination case may go too far. The Commission prefers us to leave open a possibility that there might be a proper discrimination case in which there is no real 'comparator'. In that kind of case, the Commission suggests that the ideal of human dignity might be an acceptable yardstick against which to assess the conduct at issue. Reference was made to what was said by Thomas, J in *Quilter* at p. 532, and to jurisprudence surrounding the Canadian Charter of Rights and Freedoms. Ms Rodgers also referred to the discussion in *Anderson v Claymore Management* [2003] 2 NZLR 537 about the possibility of hypothetical comparators. She invited us to give careful attention to both the dignity and hypothetical comparator concepts before deciding what test the Tribunal should adopt for discrimination.

[42] This is a problematic subject: compare, for example P Rishworth et al, *The New Zealand Bill of Rights* (Melbourne, OUP, 2003, pp 385 –386) and Huscroft, *Discrimination, Dignity, and the Limits of Equality* (2000) 9 Otago L Rev 697, at 710 –711, with A & P Butler *The New Zealand Bill of Rights Act – A Commentary* (LexisNexis, 2005, at para 17.9). But for the purposes of this decision we can and will assume that the Crown's approach to the process of comparison is correct. In doing so we make it clear that we have not decided any of the questions raised by the Commission about the extent to which 'comparator groups' need to be identified as an element of the analysis of discrimination.

[43] In essence, the argument for the Crown on the comparator group issue is that those who suffer disability from disease or degenerative process do not have, and have never had, any right to claim compensation from any other member of the community. In contrast, at least before the establishment of the 'no fault' ACC scheme in New Zealand, individuals who suffered personal injury by accident could sue those responsible for causing their injuries. A purpose of the accident compensation legislation was to replace those former rights with a right to be compensated by the Government for injuries suffered by accident. The accident compensation legislation is therefore sometimes referred to as a 'social contract' in which citizens have given up certain common law rights in exchange for the new set of rights provided by the accident compensation legislation: see, e.g., s.3 of the Injury Prevention Rehabilitation and Compensation Act 2001. But in broad terms, the proposition is that people in one group (those who are disabled by injury) have historically had, and still have, a legal right to expect compensation; whereas people in the other group (those who are disabled by disease or degenerative process) have never had, and do not now have, any such rights.

[44] In the Crown's submission, this difference is of vital importance. The argument is that as a result those who are entitled to benefits under the accident compensation legislation are not a logical group with which to compare those who have the same physical disabilities, but who are not entitled to claim for personal injury.

[45] We can see the sense in the Crown's argument. The difference between the groups may be intangible, but it is a real difference nonetheless. Even so, we have not been persuaded that it would be right to hold that that single difference between the two groups is a sufficient reason to dismiss the plaintiff's claim at this stage of these proceedings. One concern is that we may not have a sufficient basis of information on which to reach secure conclusions as to exactly what the purposes of the accident compensation legislation were, and whether or to what extent the reasons for enacting that legislation support the conclusion that the Crown asks us to draw. And, putting the suggested difference relating to the history of the relevant legal rights aside, we are unable to articulate any other compelling reasons why ACC recipients should be treated as an illogical or inappropriate comparator group for others who have the very same

kinds of disabilities (albeit not caused by accident), and so justify a conclusion that this claim should be struck out on that basis.

[46] Furthermore, we do have some significant reservations as to whether historical legal reasons for any given state of affairs can ever be a sufficient basis on which to conclude (certainly at the stage of a strike out application) that the way in which different groups in society are treated by law cannot possibly give rise to unlawful discrimination. After all, even if one accepts (as Ms Coleman submitted) that the HRA is not a general measure to ensure equality, nonetheless the idea of equality is not far removed from the legislation. As Tipping, J said in *Quilter*:

> *"In deciding what is the subject matter of the alleged discrimination and upon what factor or factors the difference of treatment is based, it is appropriate to adopt an approach which accords with the broad purpose of anti-discrimination laws. That purpose is to give substance to the principle of equality under the law and the law's unwillingness to allow discrimination on any of the prohibited grounds unless the reason for the discrimination serves a higher goal than the goal which anti-discrimination laws are designed to achieve …"* (p.573)
>
> And, later (at p575):
>
> *"The spirit of the Bill of Rights and the Human Rights Act suggest a broad and purposive approach to these problems* [i.e., including the problem of comparison]*. Such an approach leads to the proposition that it is preferable to focus more on impact than on strict analysis. If something (here legislation) has an impact on a person or group of persons which differs from its impact on another person or group of persons because of sexual orientation, that difference amounts to prima facie difference in treatment and thus to discrimination. That is so even though analytically it is possible to say that the circumstance applies equally to all. In reality this can be said only if one ignores the difference in impact. In real and practical terms the difference of treatment in its impact does not apply equally to all."*

[47] We give examples to illustrate our concern about the logical consequences of the Crown's argument. If it were accepted that an historical allocation of legal rights is a sufficient basis on which to conclude that one group ought not be compared with another (and that as a consequence there is no relevant differentiation, and thus no unlawful discrimination) then what is the result? On that reasoning, it would have been an answer to the move for universal franchise to say, men have previously had a legal right to vote but women have not. Similarly, laws enshrining racial segregation could be defended on the basis that the advantaged group has previously had legal rights that are not enjoyed by the disadvantaged group. For these reasons we are not attracted to the proposition that an historical allocation of legal rights between those who receive ACC, and those who receive funding under Vote Health, is a sufficient basis to conclude that the two groups are so dissimilar that no question of unlawful discriminaton arises. Surely, at least as important as any historical reasons behind that circumstance, are the answers to questions such as these: If two people have the same or very similar disabilities, then what is it about the practicalities of their circumstances that indicates a conclusion that their cases are not really comparable? How is the fact that two people who have the same needs are treated differently by the Government to be justified in contemporary New Zealand society? (A sense of the scope for debate on those issues can be gained by referring to the proceedings of a Symposium held in 2004 under the title *'The Future of Accident Compensation: New Directions and Visions'* as contained in

[2004] VUWLRev 32 and following; in particular, Mr Miller referred us to remarks by Sir Geoffrey Palmer *'The Future of Community Responsibility'* [2004] VUWLRev 41).

[48] These questions are raised by the claim in this case, but they are not matters that can properly be decided on the basis of the information available in this strike out application. They are questions for determination after hearing.

[49] We do not overlook the submission for the Crown to the effect that, ultimately, it is the function of Government rather than adjudicators to target social welfare programmes of the kind at issue in this case. Ms Coleman urged us to accept that Part 1A HRA does not impose any requirement on Government to provide a particular benefit, or level of benefits, to any given person or class of people. But she did accept that the role of anti-discrimination law is to ensure that such schemes as are established are not discriminatory, or that their boundaries are not drawn so as to exclude someone who ought properly to fall within the scheme and whose omission gives rise to unlawful discrimination. Of course we acknowledge that it is the function of Government to establish social programmes, and to allocate public expenditure as it sees fit. The fact, however, is that since Part 1A HRA came into force on 1 January 2002, if it is alleged that the Crown's actions or omissions result in discrimination that is inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA, then this Tribunal is entitled to consider the matter.

[50] We have also considered the decision of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v Martin* [2003] 2 SCR 504, as Ms Coleman asked us to do. In that case the relevant workers' compensation statute provided benefits for workers who were incapacitated as a result of workplace injuries, but not where the injuries caused chronic pain. The plaintiffs both suffered chronic pain as a result of work related injuries. As a result they were not entitled to permanent disability benefits, which they would have been if their chronic pain had not been caused by work related injury. The decision of the Supreme Court was given by Gonthier, J, who noted:

> *"… the appellants argue that another relevant comparator group is the group of persons suffering from chronic pain who are not subject to the Act and can obtain damages for their condition through the application of normal tort principles. I do not believe that this comparison is appropriate. What distinguishes this group from the appellants is not mental or physical disability – both suffer from chronic pain. Rather, the only difference between them is that persons in the comparator group are not subject to the Act and thus have access to the tort system, while the appellants have to rely on the workers compensation system. In my view, the Court of Appeal correctly held that a s.15(1)* [of the Charter of Rights and Freedoms] *analysis based on this distinction would amount to a challenge to the entire workers' compensation scheme, a challenge which this court unanimously rejected in Reference re Workers' Compensation Act, 1983 (Newfoundland) [1989] 1 SCR 922 (SCC). Moreover, such a comparison would be inappropriate since compensation under the tort system normally requires the injured party to establish that his or her injury was caused by the negligence of another. Thus, even if the workers' compensation system did not exist, not all injured workers with chronic pain would have access to tort damages."* (para 72)

[51] There are, of course, significant differences between the workers' compensation scheme at issue in that case, and the accident compensation legislation in New Zealand - not the least of these being that no-one in New Zealand has had any tort-based right to seek compensatory damages for personal injury since 1975. It is also important to note that this part of the decision was a comment. In the result the Supreme

Court considered that it was appropiate to compare the plaintiffs with those workers who did not have chronic pain and who were therefore entitled to benefits. The Supreme Court found that there was differential treatment between the two groups at issue, and that the differentiation violated the essential human dignity of the individuals affected. The result was held to be discriminatory. An argument that the legislation was nonetheless justified in a free and democratic society was rejected. It was the plaintiffs who were ultimately successful.

[52] Our overall sense of the logic (and certainly the outcome) in the *Nova Scotia (Workers' Compensation Board) v Martin* case is that it is rather more helpful to the plaintiff in the present case than it is to the Crown.

[53] For these reasons we do not accept that it is so obviously illogical and/or inappropriate to compare the plaintiff's circumstances with the circumstances of a similarly disabled person who is entitled to benefits under ACC as to justify the conclusion that this claim should be struck out at this point.

The cause of disability

[54] We have set the definition of 'disability' out at paragraph [19] above. It is to be noted that all of the elements of the definition describe the *manifestation* of disabilities of various kinds. Of particular relevance here are the references in s.21(1)(i) to physical disability or impairment, and in 21(1)(h)(vi) to reliance on a wheelchair.

[55] The Crown takes the point that there is nothing in the wording of these definitions that includes the *cause* of a disability. It is submitted that the HRA (and, therefore, NZBORA) do not prohibit differentiation between people who have the same or similar disabilities on the basis that the causes of those disabilities are different. The Crown contends that there is as a result no basis for the plaintiff's claim: differences between what might be available to her under the accident compensation legislation and what is available to her under Vote Health exist by reason of the causes of her disability, not the disability itself.

[56] This aspect of the argument received little attention in the submissions. We were not referred to any authorities, other than in a very general way to cases which emphasise the need for human rights legislation to be given a fair and liberal interpretation. Evidently there has not yet been any helpful New Zealand jurisprudence on the meaning of any of the elements of the definition of 'disability' in the HRA (see A & P Butler *The New Zealand Bill of Rights – A Commentary* (LexisNexis 2005, at para 17.8.13)). And, although the observations made by Ms Rodgers on behalf of the Commission aligned rather more with the plaintiff's argument than that of the Crown, the Commission did not argue for any particular outcome on this issue.

[57] It is obvious that the definition of disability as a prohibited ground of discrimination does not include any reference to the cause of disability in so many words. The question, then, is whether the definition should be treated as having been intended to encompass differentiation on basis of the cause of a disability, or whether the definition should be read as having deliberately excluded differentiation on the basis of the cause of a disability. Although both Ms Rodgers and Mr Miller would prefer us to leave determination of that question until after a substantive hearing, we agree with Ms Coleman that this is a question of law, and it is therefore the sort of issue that can and should be determined on a strike out application. After all, if the Crown's submission is correct, then this case has no foundation in the legislation and it ought not to proceed.

[58] We have given the matter consideration but, in the end, we were left with a sense that all the attention that was given to the argument about comparator groups has somewhat diverted attention from this issue. We have decided that the proper course is to ask counsel to file futher submissions. Specifically, we ask counsel to consider and address the factors that we ought to take into account in deciding whether the definition of disability in the HRA ought to be read as encompassing the cause or causes of disability (which is the position for which the plaintiff contends), or that the definition of disability was not intended by Parliament to do anything more than refer to the manifestation of disabilities. Such factors might include more detailed reference to the words as they appear in the context of the HRA, consideration of international treaties or other obligations relevant to a proper understanding of the HRA, reference to Hansard, dictionary definitions, and comparison with other statutes in New Zealand that deal with or bear upon disability issues: see, for example, the statutes noted in Brooker's *Human Rights Law* (Adzoxornu Ed.) at para E.1.01 (2). No doubt there are other possibilities as well. Even if research of this kind does not provide anything that might be relevant to our decision, it would at least be useful to know that these avenues have been considered.

[59] Rather than set a timetable for filing of further argument, we will leave it to the Chairperson of the Tribunal to make appropriate arrangements after discussing the matter with counsel by way of a telephone conference. We ask the Secretary of the Tribunal to make the necessary arrangements.

Conclusion

[60] We have concluded that:

[a] Insofar as the application to strike out is based on the argument that the plaintiff's claim is untenable, because those who have disabilities and are entitled to funding under accident compensation are not an appropriate or available comparator group for those who have the same disabilities but can only access funding under Vote Health, the application is dismissed;

[b] Insofar as the application to strike out is based on the argument that the plaintiff's claim is untenable because the definition of disability in s.21(1)(h) HRA does not include the cause or causes of a disability (with a result that differentiation on the basis of the cause or causes of a disabilty is not a prohibited ground of discrimination), we reserve our decision pending further argument.

Mr R D C Hindle	Ms J Binns	Mr S R Solomon
Chairperson	Member	Member