**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2007-485-2449**

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| UNDER | the Human Rights Act 1993 |
| IN THE MATTER OF | a determination by the Human Rights Tribunal to strike out proceedings |
| BETWEEN | MELANIE TREVETHICK<br>Appellant |
| AND | THE MINISTRY OF HEALTH<br>Respondent |

Hearing: 17 March 2008

Counsel: J Miller & W Proffitt for appellant
M Coleman & C J Curran for respondent
M Heron & L Coxon for Human Rights Commission

Judgment: 1 April 2008

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**JUDGMENT OF DOBSON J**

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## Background

[1] This is an appeal pursuant to s 123(2) of the Human Rights Act 1993 ("the Act") from a decision of the Human Rights Review Tribunal ("the Tribunal") striking out the appellant's claim for a declaration that the Ministry of Health ("the Ministry") has discriminated against her in a way that contravenes the Act.

[2] The appellant suffers from multiple sclerosis. She moves about in a wheelchair, and has, at her own expense, converted a motor vehicle to enable her to drive herself. Her complaint is that, if her disability had been caused by accident rather than illness, then she would have received substantially greater financial

support from the government under the accident compensation legislation than she has received via the Ministry from "Vote Health".

[3] The appellant claims that this disparity in treatment constitutes discrimination that is prohibited under Part 1A of the Act.

[4] The Ministry sought to strike out her claim on two grounds – first that the appellant could never make out the requisite circumstances of an accident victim treated under the accident compensation legislation as having the same relevant characteristics as she has ("the comparator issue"). Secondly, that the relevant distinction between accident compensation beneficiaries and those assisted from Vote Health is the cause of the disability they suffer and that the definitions in s 21(1)(h) of the Act do not extend to the causes of various forms of disability ("the cause of disability issue"). If correct, this proposition means that discrimination on grounds of the cause of a disability falls outside the prohibited grounds of discrimination.

**Tribunal decisions**

[5] The Tribunal heard argument on the Ministry's strike out application twice. First, after a hearing on 8 December 2006, the Tribunal delivered a decision on 4 April 2007 which focused on the comparator issue. The Tribunal found that the identity of any sufficient comparator could not be determined in abstract, but would require evidence. Accordingly, the first ground for the Ministry's strike out application failed. The Tribunal considered that the second issue had not received the attention it required, so directed that there be further argument on it.

[6] A further hearing was convened on 3 August 2007, leading to a second decision of the Tribunal on 24 October 2007, confined to the cause of disability issue. The Tribunal held that the definition of "disability" in s 21(1)(h) did not extend to the cause of various forms of disability that are specified in that paragraph. Accordingly, the appellant did not have a tenable case for claiming that discrimination based on the cause of her disability constituted a prohibited form of discrimination and her claim was struck out.

**Scope of this appeal**

[7] The appellant appealed from that second decision. For its part, the Ministry sought to support the strike out decision on the alternative ground that, contrary to the Tribunal's first decision, the appellant could never make out a relevant comparator who had been treated better than she has. Mr Miller for the appellant opposed argument on this second aspect, contending that, if at all, it ought to have been the subject of a separate appeal or cross-appeal, and that it did not come within the appellant's appeal.

[8] I heard the argument on the appellant's appeal (ie the "cause of disability" issue) first. I then heard from the parties on whether the Ministry's alternative argument should proceed, and decided that it should. There is a clear analogy between the Ministry's position in the present situation, and that of a respondent to an appeal from the High Court to the Court of Appeal. In the end, no material prejudice arose for the appellant in having to defend the first decision within its own appeal.

[9] Mr Heron and Ms Coxon appeared on behalf of the Human Rights Commission ("the Commission") to present argument opposing the Ministry on the comparator issue. In the end, the submissions for the Commission constituted the major part of the argument opposing that of the Ministry on the comparator issue. The Commission supported the Tribunal's decision on the issue. Mr Miller made short supporting points, also concluding that the Tribunal's decision on the comparator issue was correct.

[10] It is appropriate to consider the issues as they were argued, recognising that that is the converse of the sequence of the Tribunal's decisions.

[11] The parties were agreed on the approach to strike out. Authorities such as *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262, 267 make it clear that the Court may strike out only where the causes of action are so clearly untenable that they cannot possibly succeed. The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has all the requisite material.

**"Cause of disability"**

[12] This is an issue of statutory interpretation of the terms of s 21 of the Act. It provides:

> 21 **Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the prohibited grounds of discrimination are—
>
> (a) sex, which includes pregnancy and childbirth:
>
> (b) marital status, which means being—
>
> (i) single; or
>
> (ii) married, in a civil union, or in a de facto relationship; or
>
> (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or
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> (iv) separated from a spouse or civil union partner; or
>
> (v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended:]
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> (c) religious belief:
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> (d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:
>
> (e) colour:
>
> (f) race:
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> (g) ethnic or national origins, which includes nationality or citizenship:
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> (h) disability, which means—
>
> (i) physical disability or impairment:
>
> (ii) physical illness:
>
> (iii) psychiatric illness:
>
> (iv) intellectual or psychological disability or impairment:

(v) any other loss or 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:

(i) age, which means,—

(i) for the purposes of sections 22 to 41 and section 70 of this Act and in relation to any different treatment based on age that occurs in the period beginning with the 1st day of February 1994 and ending with the close of the 31st day of January 1999, any age commencing with the age of 16 years and ending with the date on which persons of the age of the person whose age is in issue qualify for national superannuation under section 7 of the [New Zealand Superannuation and Retirement Income Act 2001 (irrespective of whether or not the particular person qualifies for national superannuation at that age or any other age):

(ii) for the purposes of sections 22 to 41 and section 70 of this Act and in relation to any different treatment based on age that occurs on or after the 1st day of February 1999, any age commencing with the age of 16 years:

(iii) for the purposes of any other provision of Part 2 of this Act, any age commencing with the age of 16 years:

(j) political opinion, which includes the lack of a particular political opinion or any political opinion:

(k) employment status, which means—

(i) being unemployed; or

(ii) being a recipient of a benefit under the Social Security Act 1964 or an entitlement under [the Injury Prevention, Rehabilitation, and Compensation Act 2001]:]

(l) family status, which means—

(i) having the responsibility for part-time care or full-time care of children or other dependants; or

(ii) having no responsibility for the care of children or other dependants; or

(iii) being married to, or being in a civil union or de facto relationship with, a particular person; or

(iv) being a relative of a particular person:

(m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

**Appellant's arguments**

[13] Mr Miller spoke briefly to the written submissions. The issues were then canvassed in greater detail by Ms Proffitt. The ground covered may be summarised in the following way.

*(i) Approach to interpretation*

[14] A number of points were made in support of a different approach to interpretation of the section. First, it was noted that the Tribunal's second decision includes, in its preliminary observations, the following:

> 3. …we wish to make it clear that we have considerable sympathy for the plaintiff's argument that there is a substantial social inequity arising out of the fact that similarly circumstanced people are treated differently depending on the cause of their disability. It is far from clear to us how that state of affairs might be justified. Certainly we think that the plaintiff has a legitimate political point to make.
>
> 4. …But we make it clear at the outset that our conclusion is not [to] be taken as having somehow endorsed the present regime as being fair or equitable. It does not.

[15] Those laudable sentiments were relied upon to argue that the Tribunal's reasoning thereafter adopted an unduly narrow interpretation of s 21(1)(h), and that a "generous and purposive" interpretation warranted treating the notion of cause of disability as being included within all forms of disability specified, or at least those relevant to the appellant. "Generous" and "purposive" are an amalgam of earlier references to the approach to interpretation of the Act, first in *Talleys v Lewis & Edwards* CIV-2005-485-1750 14 June 2007 where the Court observed:

> In our view the need to approach the statute in a generous sense and to adopt an approach that facilitates its important purposes cannot be questioned.

And further, from the Court of Appeal's decision in *Quilter v Attorney-General* [1998] 1 NZLR 523, 575, in which Tipping J observed:

> The spirit of the Bill of Rights and the Human Rights Act suggest a broad and purposive approach to these problems. Such an approach leads to the proposition that it is preferable to focus more on the impact than on strict analysis.

[16] Secondly, on the approach to interpretation, it was argued that the interpretation contended for need only be one that was "available" – this is on the basis of s 6 of the New Zealand Bill of Rights Act which provides:

> 6. **Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[17] Thirdly, the appellant argued that conformity with international conventions which New Zealand has ratified requires a broad interpretation of what are prohibited forms of discrimination and that, at least in general terms, such international conventions contemplate prohibition of discrimination on grounds that include the cause of a disability.

*(ii) Absurd, illogical consequences*

[18] It was also argued that exclusion of causes from the specified forms of disability will lead to such absurd and illogical consequences that it is not a constraint that should reasonably be attributed to Parliament. Instances were given of where reliance on a distinguishing cause of a disability could be used to justify discrimination that was argued to be clearly contrary to the scheme and purpose of the Act, such as an employer refusing to hire a person with a physical illness caused by cancer, but claiming they would hire someone with a physical illness caused by heart disease.

*(iii) Definition of disabilities not strictly exhaustive*

[19] To meet the point that s 21(1)(h) contemplates the listed forms of disability as being exhaustive because the paragraph begins "disability means…", it was argued that some of the categories were actually inclusive, such as (vi), which recognises reliance on a guide dog, wheelchair or other remedial means. Arguably it follows that the contemplation of "other remedial means" renders this an inclusive definition of one form of disability, thereby making it easier to interpret it as also extending to the cause of the reliance on some form of remedial means.

[20] An additional point was that the rest of s 21 also contains a range of modes of description: "religious belief" (s 21(1)(c)) is inherently open to interpretation, and has elastic boundaries. "Sex" (which includes pregnancy and childbirth) (s 21(1)(a)) is in inclusive terms. So, it was argued, the interpretation of the disabilities in s 21(1)(h) as exhaustive because they are listed below "means" may require reconsideration in light of the variable format of other parts of the section.

*(iv) "Causes" more naturally an aspect of justification*

[21] It was also argued that the scheme and purpose of the Act meant that causes of disability are more naturally addressed at the second stage of a discrimination claim, where consideration is given to any claimed justification for what is prima facie discriminatory, rather than being excluded from the categories of prohibited discrimination at the first stage. In essence, the point is that the scope of discriminatory conduct should be defined as widely as possible, and that conduct relying on causes of a disability are then more relevantly considered when assessing whether the conduct is justified.

*(v) "Intra-ground" discrimination consistent with inclusion of causes*

[22] A discrete argument for "cause of" being included within disabilities was that commentaries on the Act recognised the prospect of intra-ground discrimination within the prohibited categories of conduct. Reference was made to overseas

expectations in this regard, and to a commentary on the New Zealand legislation (Butler & Butler, *"The New Zealand Bill of Rights Act: A Commentary"*, 2005 at para 17.16). It was suggested that the prospect of prohibited discrimination between persons within any one ground of disability reflects a broad reading of those grounds, and that a similarly broad approach should apply to treat each of the forms of disability as including the causes of such disabilities.

*(vi) Intra-ground discrimination made out*

[23] In relation to intra-ground discrimination, it was separately argued that the appellant has a different type of disability from a person with a disability because of injury, that treating such persons differently is intra-ground discrimination, and therefore her claim should be acknowledged. The appellant contended that the Tribunal did not deal with this argument.

*(vii) Best interpretation requires evidentiary context*

[24] Finally it was argued that the claim should not be held clearly untenable without a substantive hearing because this was such an untested area. It was suggested that the relevant sections might be better interpreted in the context of evidence of the appellant's position, and her concerns.

**Tribunal findings**

[25] The arguments for both parties and the Commission were reviewed in the Tribunal's second decision. Before the Tribunal, the Commission had advanced arguments in support of the appellant, and those were also dealt with by the Tribunal. The Commission did not seek to be heard on the "cause of disability" issue on the appeal.

[26] Many of the arguments for the Ministry were accepted by the Tribunal, without being recast as the Tribunal's own reasoning. With respect, I consider the Tribunal's approach and reasoning are unassailable, and the conclusion reached was

clearly the right one. I address the arguments made on behalf of the appellant again, not because of any significant difference in reasoning, but to acknowledge the thorough way in which the matter was re-argued before me.

**Analysis on "cause of disability"**

[27] It is unnecessary to reject the various components of the appellant's first argument about the approach to interpreting s 21. The issue is whether they can avail the appellant to change the interpretation from that which otherwise accords with the scheme and purpose of the Act viz., the ordinary meaning of the words used in their context.

[28] It would be difficult to deny that a "generous and purposive" approach should apply to interpreting statutes affecting human rights. In this sense, I would treat "generous" as a synonym for "broad" when that word is used in contrast to "narrow" as an approach sometimes recognised in statutory interpretation. However, such an approach cannot transform the section into something that it clearly is not.

[29] Similarly, the desirability of conforming to international covenants is, in general terms, unquestionable. However, in an extreme case, non-compliance with an international covenant in the terms of domestic legislation may give rise to arguments of irregularity in that law, but does not mandate the Court to re-write it. I agree with the Tribunal's comment that propositions on this for the appellant were pitched at such a level of generality that they do not seem to engage in any sufficient way with the words actually used in s 21(1)(h).

[30] So too, on the notion that the interpretation contended for has only to be "available". Here, a basis would have to be made out for inclusion of "cause of…" within the specified forms of disability. If it is not available, then s 6 of the New Zealand Bill of Rights Act cannot influence the outcome.

[31] The Ministry's arguments focused on the structure of New Zealand's anti-discrimination laws, by comparison with two other models used in overseas

jurisdictions. The argument was accurately paraphrased in paragraph 26 of the Tribunal's decision:

> [26] The argument for the Crown began by identifying three different models for anti-discrimination laws:
>
> [a] The first model expresses the required standard in very wide terms. An example is the equal protection clause of the 14th Amendment to the US Constitution (*"No State shall … deny to any person within its jurisdiction the equal protection of the laws"*). This approach deliberately leaves it to the Judges to decide what distinctions are prohibited, and which are not;
>
> [b] The second model opts for a non-exhaustive list of grounds upon which discrimination is prohibited, but leaves open the possibility that judicial decisions may, to some extent, extend the grounds in cases that are thought appropriate. The examples suggested by Mr Curran here were s.15(1) of the Canadian Charter of Rights and Freedoms, and Article 14 of the European Convention on Human Rights (*"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground* ***such as*** *sex, race, colour, …etc"* (emphasis added);
>
> [c] Finally, the third model is that in which the legislation contains an exhaustive list of grounds upon which discrimination is prohibited. The application of elements of the list is for the Courts, of course, but in this model any decision to add to the list can only be made by Parliament. The New Zealand legislation is suggested to be an example of the third model. Section 21(1) HRA sets out a comprehensive but closed list of grounds upon which discrimination is rendered unlawful: see, e.g., Butler and Butler (supra, para [23][b]).

[32] The Ministry therefore argued that there could not be any judicial interpretation that de facto extended the categories of prohibited discrimination, and that the addition of causes of disability would inarguably achieve that. Ms Proffitt, who dealt with the detail of this argument, was inclined to be equivocal on whether inclusion of "cause of" made a material change to the scope of prohibited activity – the proposition that it would make no change is entirely unsustainable. The enormous consequences illustrated by the present claim make it inevitable that any reading in of "cause of" would expand the prohibited forms of discrimination to a very significant extent. The Ministry is entitled to characterise such a reading in as a significant de facto amendment to the section.

[33] The obvious consequences of the extent of that change also justify the inference that Parliament must be taken to have considered the prospect, and rejected it. Reflecting on the incremental way in which Parliament has added to the prohibited grounds over time, the Tribunal was justified in finding that Parliament has been very deliberate in deciding what will, and will not, amount to unlawful discrimination in New Zealand.

[34] The Ministry's position was that "means" in s 21(1)(h) is to be interpreted conventionally, so that what follows is exhaustive of what "disability" means. I do not consider that the arguments in (iii) of those for the appellant paraphrased in paragraphs [19] and [20] above can overcome the exhaustive nature of the forms of disability on which discrimination might occur, that are outlawed. Within one such group, namely reliance on remedial means of a type such as wheelchairs or guide dogs, other remedial means are contemplated. However, that cannot expand into the cause for needing such remedial aids. Similarly, the fact that Parliament saw fit to describe other forms of discrimination in different ways cannot, on a reading of the whole of s 21, affect the correct interpretation of s 21(1)(h) as constituting an exhaustive list of the relevant forms of disability.

[35] The Ministry also identified a difference of kind between forms of disability themselves, and the causes of such disabilities. "Disabilities" describes an existing state of affairs. It is reflected in existing facts about a person's present status. In contrast, the cause of any disability is not actually a type of disability at all, but rather an explanation as to how it came about. If the definition in s 21(1)(h) is treated as status based, then including descriptions as to how such status arose grafts on something that is different in kind and, arguably, inconsistent. Further, it would include a different form of concern from the one arising out of an existing state, namely the widely variable and potentially overlapping causes of the identified forms of disability. The addition of cause would require those administering the Act to look for an explanation for a state of affairs, rather than looking at appearances.

[36] The Ministry was inclined to argue that "cause" should not be imported into s 21(1)(h) disabilities because there was no rationale for not treating disabilities any differently from the other prohibited grounds in s 21. In essence, there would be no

utility in adding "cause of" to sex or religious belief. Whilst some expectation of consistency can be raised, I do not see this as the strongest point for the Ministry. If other influences warranted the implication of "the cause of" into the defined forms of disability, then it might reasonably be an addition just to that head of discrimination. However, that point is not reached.

[37] Further, any rationale there might be for treating disabilities differently from other forms of prohibited discrimination breaks down entirely when, as Ms Proffitt suggested, the "cause of" might be incorporated to some, but not all, of the forms of disability specified in s 21(1)(h).

[38] The Tribunal went beyond s 21 in testing the context in which prohibited forms of discrimination become relevant. The point was made that the linking words between the forms of unlawful discrimination, and the consequences of it occurring, for example in the employment context, is where dissimilar treatment occurs "*by reason of*" any of the prohibited grounds of discrimination (eg s 22(1)). Those whose conduct is regulated by these provisions, such as employers, are entitled to know that the categories of prohibited discrimination are closed. Also, the link "by reason of" connects most naturally with an existing state of affairs. This analysis supports the conclusion reached.

[39] As to the absurd and illogical consequences raised in argument (ii) for including "cause of" as an element of discrimination in respect of disabilities, such hypothetical outcomes are not sufficient to work backwards to a substantial amendment to the statutory wording. It may be that the practical answer to many of the appellant's examples lies in the lack of logic for any genuine basis for the suggested discrimination solely on "cause". For instance, in the example described in paragraph [18] above, why would someone refuse to employ a cancer sufferer, but employ someone who had had a heart attack? Presuming the nature and extent of impairment which were relevant to the work duties for the proposed job were directly comparable, there would be many such situations where the explanation patently lacked credibility and was a mis-statement of the real ground for refusal, namely the existence of the physical illness.

[40] That leads on to argument (iv), in which the appellant argued that the scheme of the Act would better accommodate arguments on cause as matters going to justification at the second stage, than being an element of discrimination which is excluded from the forms that are specifically prohibited. However, any such greater cohesion in how the Act is perceived to work, if "cause of" was added to the forms of disability, cannot influence whether it is to be read in in the first place.

[41] As to argument (v) (para [22] above), the prospect of intra-ground discrimination complaints cannot necessitate the expansion of the forms of disability that may lead to prohibited discrimination. The prospect can arise, whether it is merely in respect of the states of disability (as the wording suggests), or in relation to discrimination reflecting the cause of disabilities as well. The argument cannot add to a proper analysis of the section.

[42] As to argument (vi) (para [23] above), the point argued does appear a contrary one. The written submission was:

> 50. …The appellant submits that there is an argument that she has a different *type* of disability to a person whose disability is caused by injury. Ms Trevethick has been discriminated against because she has a different type of disability, being illness. The cumulative and concurrent elements of Ms Trevethick's disability mean that she has a different *type* of disability than a person who has a physical disability (only) caused by accident. In composite it is open to her to argue that she has a different *type* of disability, physical illness with physical disability or impairment.

[43] The first rejoinder to such an argument is likely to be that if the disability of the two persons being compared is not the same, then there can be no statutory expectation of the same treatment. If "cause of" a form of disability is excluded, then different causes of similar forms of disability suffered by two people does not constitute a prohibited form of discrimination. This argument cannot add anything to the interpretation issues on s 21 – rather it assumed that the cause of disability issue had been won.

[44] As to argument (vii), (paragraph [24] above) Ms Proffitt urged that, as with the comparator issue, at least parts of the argument on intra-ground discrimination would be aided by evidence. More generally, it was argued that the cause of disability issue would be aided by the context afforded by evidence.

[45] Statutory interpretation is simply a question of law. Argument may allude to circumstances alleged to be in the minds of legislators, or the consequences that hypothetically follow from particular interpretations. The scheme and purpose of legislation is not something aided by evidence.

[46] This is no more than a question of law. It appears to have been argued, and was certainly re-argued, as fully as it possibly could be. That makes it an appropriate issue to resolve on a strike-out. I am satisfied that it was appropriately dealt with, in accordance with the usual test.

**Does this interpretation cause the unfairness complained of?**

[47] Although not necessary, a brief "standing back" from the interpretative analysis may be appropriate. Where a cause is pursued out of such palpable sense of unfairness as motivates these proceedings, a rationalisation as to the causes of that unfairness is unlikely to support the legal analysis on statutory interpretation, but may put the outcome into a more rounded context. In particular, the cause may not in the end result from any unfair statutory interpretation.

[48] Here, the real source of the complaint is the inadequacies of the accident compensation scheme. The original scheme was borne out of a commitment to legislate against common law rights to sue for workers' compensation, and for negligence causing personal injury in other contexts. The boundaries of the scheme as originally introduced, and on subsequent revisions, have been acknowledged as illogical and giving rise to anomalies. One explanation for these seemingly irrational boundaries is that the accident compensation scheme has evolved as a form of insurance scheme, where levies are compulsorily imposed at levels which are intended to be calculated to recover, more or less, the costs of the benefits required to be paid out. Employers and motorists are two groups who bear targeted responsibility for what is, in the general sense, a form of insurance premium for the cost of personal injury resulting from such activities. Crown Counsel advised that the intention is for the present scheme under the Injury Prevention Rehabilitation and Compensation Act 2001 ("IPRCA") to be entirely self-funding in due course.

[49] The core of those entitled to make claims under the scheme remain those who would, in the absence of such accident compensation legislation, have at least theoretical entitlements to claim damages from others. Incremental extensions have reflected the consequences of injury (such as in sport), but not illness. I infer that thus far, one or more of the actuarial skills in accurately projecting the costs of extending such a scheme to any forms of illness, or the ability of the economy to service such costs, or the political will to impose them, has been lacking. All injuries have some relevant nexus. In contrast, illness strikes in notoriously random circumstances.

[50] Hence the acknowledged discrimination between those suffering disability respectively as a result of injury (better treated under IPRCA) and illness (treated to lesser benefits funded out of "Vote Health"). The Tribunal was inclined to acknowledge that the appellant may have a political point to make. However, any such point is not one that the Court can assist with by transforming that disparity in treatment into a prohibited form of discrimination where that would involve a very significant and unjustified reading into the terms of s 21 of the Act.

**The comparator issue**

[51] Given that the strike out is upheld on the cause of disability issue, the Ministry's residual concern on the comparator issue is largely one of precedent for other claims. I was informed that the absence of an appropriate comparator is a point being taken in two different claims due to be heard this year and that the Crown considers it important to establish that there are circumstances in which the Tribunal would be able to strike out a claim at the initial stage, because it could be satisfied, without evidence, that the claimant could never establish a relevant comparator who was treated better than the claimant.

[52] The Ministry was inclined to accept that the circumstances in which it could argue for the impossibility of a claimant establishing a valid comparator, without testing the evidence, would be rare. Nonetheless, the present was cast as one such situation.

[53] The Ministry also acknowledged that there are very limited circumstances in which a comparator may not be needed at all. Pregnancy is one such possible situation. Again, it did not arise here.

[54] The argument in essence was that the only suggested comparator here was a recipient of benefits under the accident compensation regime, and that such a person will always have a valid difference excluding him or her from being a comparator for the purposes of a complaint of discrimination advanced by someone in the position of the appellant. That difference was described as the respective entitlements arising under a different "social contract". Under the accident compensation regime, that contract reflects the statutory exclusion of common law rights, including all the "lottery" elements seen as inherent in that, in return for predictable levels of state-backed benefits, funded in large measure by those responsible for the activities perceived as giving rise to the risks.

[55] In contrast, those suffering illness have resort to whatever level of health benefits that governments determine, and prioritise from time to time, for disbursement from "Vote Health". The Ministry argued that there is no way that the claimant here could eliminate that fundamental difference, so as to identify a recipient of accident compensation benefits as a comparator of hers, when she is dealt with by the different scheme, administered in a different part of the government.

[56] Put another way, it was noted for the Ministry that the appellant pursued a claim only against the Ministry of Health, but could not allege that this Ministry has treated anyone better in a way that discriminates against her. It is illogical to claim that the Ministry of Health has failed her by not giving her the benefits that another government agency would, if her circumstances were different.

[57] Allied to that is the point that anti-discrimination rights are negative, to prevent discrimination but cannot, for example, afford rights to require the government to re-write a scheme so as to correct an imbalance.

[58] The Ministry agrees with the Commission that discrimination is a comparative concept. The Commission says that means this is inherently a factual issue, and therefore cannot be determined in the absence of evidence. The Commission is concerned that substantial justice will not be achieved, if any pattern develops of cutting off ground-breaking cases at the outset, on an abstracted analysis of the apparent absence of a relevant comparator. In answer to the Ministry's argument about the accident compensation scheme being different because those receiving benefits have forgone rights to sue, Mr Heron instanced that it might overlook recipients such as own-fault motor vehicle drivers who are injured, and do qualify for accident compensation, without realistically giving up rights to sue anyone.

[59] Mr Heron pointed out the complexity of the factual analyses in identifying the comparator by reference to cases in other jurisdictions. In *MEC for Education (Kwazulu-Natal) v Pillay* (CCT51/06, 5 October 2007), a decision of the South African Constitutional Court, and also in *Baird & Ors v Queensland* (2006) 236 ALR 272, a decision of the Federal Court of Appeal, thorough analyses about the comparator led to variations on findings that indeed a comparator or direct comparator may not have been necessary.

[60] In relation to a House of Lords decision cited for the Ministry, *Schamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, Mr Heron made the point that the final attributes of the appropriate comparator had only appeared in the House of Lords, and that the factual analyses in the various courts depended on evidence.

[61] Mr Heron also took issue with the relevance of the criticism that the wrong Crown agency was being sued, to the question of whether absence of appropriate comparators could be established on a strike out. His point was that the government could not be insulated from challenge merely by the way in which it elected to compartmentalise the delivery of benefits.

[62] The Tribunal's approach is reflected in the following extracts from its decision:

> [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.
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> …
>
> [47] …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 discrimination arises…

[63] Again, with respect, I agree with the approach adopted and the outcome reached. I too can see sense in the Ministry's protest about an inevitably relevant point of distinction. However, to rely on that to rule the whole claim out, without any factual context, is a bold step when the context of the argument is inherently fact-specific.

[64] A strike out on this ground is not needed here. The Commission's concern to avoid a precedent is warranted, and on appeal it would be inappropriate to upset the balance struck cautiously in favour of requiring evidence on such points.

[65] Accordingly, the Ministry's challenge to the first decision is dismissed.

**Costs**

[66] There is good justification for letting all costs lie where they fall, and I accordingly direct that there be no orders as to costs.

**Dobson J**

Solicitors:
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