IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-003303

IN THE MATTER OF	Section 88B of the Judicature Act 1908
BETWEEN	HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND Applicant
AND	CHRISTOPHER JOSEPH O'NEILL Respondent

Hearing: 4 December 2007

Court: Williams J
Venning J

Appearances: D Collins QC/C Inglis for Attorney-General
Respondent in Person
H Waalkens QC as Amicus Curiae

Judgment: 20 December 2007

JUDGMENT OF THE COURT

This judgment was delivered by me on 20 December 2007 at 10.00 am, pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date..............

Solicitors: Crown Law Office, Wellington
Copy to: H Waalkens QC, Auckland
C J O'Neill

HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND V CHRISTOPHER JOSEPH O'NEILL HC AK CIV 2007-404-003303 [20 December 2007]

Introduction

[1] The Human Rights Review Tribunal deals with proceedings involving breaches of human rights (both domestic and international), public administration, employment and social and cultural issues. The Tribunal has jurisdiction under the Privacy Act 1993, the Health and Disability Commissioner Act 1994 and the Human Rights Act 1993. The Tribunal may make declarations and impose compensatory and punitive damages. It may also make restraining orders and award costs.

[2] Between 25 January 2002 and 8 August 2007 Mr O'Neill filed 93 proceedings with the Tribunal. Since 8 August 2007 Mr O'Neill has filed a further 21 proceedings.

[3] The Attorney-General considers Mr O'Neill's proceedings are vexatious. He seeks an order under s 88B of the Judicature Act 1908 against Mr O'Neill.

Preliminary matters

[4] At the outset of the hearing the Court raised with Mr O'Neill whether he had advanced the issue of legal representation. The matter had been raised with him during a teleconference on 27 November 2007. Mr O'Neill told the Court that he had filled out an application for legal aid and sent it off but had not spoken to a lawyer or arranged for a lawyer to represent him. He took the view that he could not afford a lawyer and he would only appoint a lawyer when and if legal aid was granted.

[5] At the pre-hearing conference the Court made it clear to Mr O'Neill that if he wished to be represented it was for him to make the necessary arrangements by approaching a barrister or solicitor who would be prepared to accept instructions on a legal aid basis. At the same conference he was advised the fixture would remain. Mr O'Neill has chosen not to follow the Court's direction. The hearing has been allocated since 2 August 2007. Mr O'Neill has had four months to obtain

representation. Counsel were ready to proceed. The hearing proceeded with Mr O'Neill representing himself.

[6] During the course of the hearing Mr O'Neill referred to what he called his statement of defence. Mr O'Neill had lodged with the Court a document containing pages numbered 1 to 28 and attachments A to P. It had not been filed on the pleadings section of the Court file as it did not comply with the rules for a statement of defence. In determining this case, however, the Court has read and considered that document in full.

[7] Prior to the hearing, the question whether the Court had jurisdiction to make the orders was identified as an issue. Mr Waalkens was appointed amicus to assist on that and other issues in the case. We are grateful to Mr Waalkens for his comprehensive and helpful submissions.

Issues

[8] The proceeding raises three principal issues:

- Is there jurisdiction to make an order under s 88B? and
- If so, has Mr O'Neill persistently and without any reasonable ground instituted vexatious legal proceedings? and
- If so, should the Court exercise its discretion to make an order under s 88B?

Is there jurisdiction to make an order under s 88B?

[9] The first issue is whether there is jurisdiction to make the order the Attorney-General seeks. Section 88B (renumbered on 15 December 2006 from s 88A but otherwise unchanged) reads:

> 88B Restriction on institution of vexatious actions

> (1) If, on an application made by the Attorney-General under this section, the [High Court] is satisfied that any person has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the [High Court] or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, order that no civil proceeding or no civil proceeding against any particular person or persons shall without the leave of the [High Court] or a Judge thereof be instituted by him in any Court and that any civil proceeding instituted by him in any Court before the making of the order shall not be continued by him without such leave.
>
> (2) Leave may be granted subject to such conditions (if any) as the Court or Judge thinks fit and shall not be granted unless the Court or Judge is satisfied that the proceeding is not an abuse of the process of the Court and that there is prima facie ground for the proceeding.
>
> (3) No appeal shall lie from an order granting or refusing such leave.

[10] The section only applies to "legal proceedings" instituted in the High Court or "any inferior Court". The issue of what constitutes legal proceedings for the purposes of s 88B has been considered in a number of cases. In *Attorney-General v Wiseman* SC AK, M672/67 20 February 1968 Woodhouse J was prepared to "take a broad view of the matter" and held that legal proceedings were not limited to the institution of an action by a writ. That approach was approved by the Court of Appeal on appeal: *Re Wiseman* CA10/68 28 May 1969. However, in *Attorney-General v Collier* [2001] NZAR 137 para [32 when considering whether appeals ought to be characterised as legal proceedings for the purposes of the section the Court noted:

> ... some caution is necessary in an expansive approach to the language of a section which impacts upon rights of access to the Courts as recognised by s 27 of the New Zealand Bill of Rights Act 1990

[11] In the present case whether the proceedings taken by Mr O'Neill are legal proceedings for the purposes of s 88B will be determined by the question of whether or not the Tribunal is an inferior Court. As the English Court of Appeal confirmed in *Attorney-General v Jones* [1990] 1 WLR 859:

> [the] reference to the High Court and to inferior courts was intended to make it clear that, although the Act of 1981 was primarily concerned with the powers, duties and procedures of the Supreme Court, this section was to extend to proceedings initiated in other courts, such as the county courts, but was not intended to extend to proceedings initiated in those tribunals which were not properly characterised as courts.

[12] Mr O'Neill's proceedings are initiating proceedings filed with the Tribunal. The relevant provisions of the Human Rights Act refer to proceedings before the Tribunal as "civil proceedings". If the Tribunal is an inferior Court for the purposes of the section then the proceedings taken by Mr O'Neill before the Tribunal are properly characterised as legal proceedings instituted by him.

[13] "Inferior Court" is defined in the Judicature Act to mean:

> Any Court of judicature within New Zealand of inferior jurisdiction to the High Court.

[14] The meaning of s 88B and of a "court of judicature" is to be ascertained from the text and in light of the purpose of the section: s 5(1) Interpretation Act 1999.

[15] The issue of whether a Tribunal can be an inferior Court for the purposes of the section has also been considered before. In *Attorney-General v Hill* (1993) 7 PRNZ 20 the Court accepted that proceedings issued in the Disputes Tribunal were issued in a Court. The decision is of little assistance however as Disputes Tribunals are included within the definition of inferior Courts in the Inferior Courts Procedure Act 1909 and are constituted as a division of the District Court.

[16] Of more assistance is the case of *Attorney-General v Reid* [2000] 2 NZLR 377. In *Reid* the Court directly considered whether the Employment Tribunal was an inferior Court. After referring to the discussion of that issue by members of the Court of Appeal and the House of Lords in *Attorney General v British Broadcasting Corporation* [1981] AC 303 the Court concluded that the Employment Tribunal was a Court of judicature in New Zealand:

> [17] We have no doubt that the Employment Tribunal is a Court of judicature in New Zealand. Along with the Employment Court it determines disputes between parties to employment contracts which would otherwise be dealt with by the ordinary Courts of judicature of the country: s 3 of the ECA. In that respect it is very different from an administrative Court or tribunal. The fact that it is enjoined to deal with disputes by way of mediation does not change its true nature. Other Courts of judicature also promote or use the same techniques. In particular, the functions defined for it, and in respect of which it has jurisdiction under s 76(a) and (c), s 79(1)(b), (c), (d), (e), (g), (h) and (i), make it clear that it adjudicates on issues which would otherwise be determined by Courts of judicature.

> [18] It is clear the tribunal was not established for a purely legislative or regulatory administrative purpose. Proceedings before it are declared to be "judicial proceedings": s 92(2). It has an "equity and good conscience" jurisdiction consistent with a Court of equity: s 79(2). There are numerous aspects relating to its constitution and its procedure which are consistent with a Court of judicature but hardly consistent with an administrative Court or a tribunal: see, for example, ss 88, 89, 94, 95, 96 and 99 and reg 49 of the Employment Tribunal Regulations 1991.
>
> [19] There are three provisions in particular which, while they may not themselves be determinative of the issue, point strongly in the direction that the tribunal is a Court of judicature. It has power to enforce its orders: s 79(1)(f). Not only are its proceedings declared to be judicial proceedings but the tribunal has the same protection in respect of privileges and immunities as Courts of judicature: s 92. It is recognised that there can be contempt of the tribunal and the tribunal has power to order that a person guilty of contempt in the face of the tribunal can be taken into custody and detained until the rising of the tribunal: s 107.
>
> [20] While we appreciate that arguments can be put forward to the effect that the tribunal is not a Court of judicature, we consider that they pale into insignificance compared with those relied upon by us for our determination that the tribunal is a Court of judicature.

[17] The Employment Tribunal had two features that are not present in the case of the Tribunal. First, s 3 of the then Employment Contracts Act 1991 gave the Employment Tribunal and Employment Court exclusive jurisdiction in relation to matters arising out of employment contracts. Although the Tribunal has a specialist jurisdiction, it does not have exclusive jurisdiction. But an exclusive jurisdiction is not required for a Court to be a Court of judicature. The District Court is an obvious example of an inferior Court created by statute that does not have exclusive jurisdiction.

[18] Next, s 92 of the Employment Contracts Act 1991 declared proceedings before the Employment Tribunal to be "judicial proceedings" in providing privileges and immunities to members of the Employment Tribunal, parties, representatives and witnesses. The Human Rights Act does not have a directly equivalent provision but s 112 of the Act gives witnesses and counsel appearing before the Tribunal the same privileges and immunities as those in proceedings before a District Court and s 118 provides that members of the Tribunal shall not be personally liable for any act done or omitted in good faith in pursuance of the functions of the Tribunal. The reference to "judicial proceedings" in the Employment Contracts Act 1991 was not so much

conferring status, but was rather confirming the effect of the immunities granted. Sections 112 and 118 of the Human Rights Act achieve the same end.

[19] The opinion of Their Lordships in *Attorney General v British Broadcasting Corporation* is also of some assistance. The BBC proposed to broadcast a programme critical of a religious sect stating, amongst other things, that they were not entitled to exemption from liability for rates because they were not open to all members of the public and so were not places of public religious worship for the purposes of the General Rate Act. The issue of whether they were exempt from rating was before the local valuation court for determination. The Attorney General applied for an injunction against the BBC restraining it from showing the programme until the Valuation Court had dealt with the matter on the basis the issue was before the Court. The BBC contended that the local valuation court was not an inferior court and therefore the superior court of the Queen's Bench Division had no power to punish a contempt committed in connection with its proceedings. The House of Lords held that the Land Valuation Court was not an inferior court. In the course of doing so Their Lordships made a number of observations about what constitutes an inferior court. Lord Edmund-Davies referred (at 344) to the six factors that Eveleigh LJ had identified in the Court of Appeal (at 316):

> In my opinion, the first is that [the tribunal] should have been created by the state. … Secondly, it must conduct its procedure in accordance with the rules of natural justice. Thirdly, that procedure will involve a public hearing with the power at least to receive evidence orally, to permit the oral examination and cross-examination of witnesses and to hear argument upon the issues before it. Fourthly, it arrives at a decision which is final and binding as long as it stands. Fifthly, there will be two parties at least before it, one of whom may be the Crown, who are interested in the decision. Sixthly, the decision will be concerned with legal rights.'

[20] Lord Edmund-Davies then concluded (at 351):

> At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hall-mark by which a "court" or "inferior court" may unerringly be identified. It is largely a matter of impression.

[21] It seems clear that the labelling of a body as a court or tribunal is not determinative either way. In the same case Lord Scarman noted (at 358):

> The mere application of the "court" label does not determine the question; nor, I would add, does the absence of the label conclude the question the other way.

[22] He concluded (at 359-60):

> I would identify a court in (or "of") law, i.e. a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and executive (i.e. administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. ... Unless a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court in law. I would add that the judicial system is not limited to the courts of the civil power.

[23] Reference can also be made to *Re Ewing* Case no. IHQ/02/0198 20 December 2002 at para [42]:

> There are many bodies or tribunals (so called) which exercise purely administrative functions and which are not properly to be categorised as courts. S.42 does not, as I see it, relate to those. But equally there are bodies bearing the name of, say, a commission or tribunal which (even though they bear the name "commission" or "tribunal") can properly be identified as courts. That a body may be labelled a court does not mean that it is a court; any more than that a body is labelled a tribunal means that it is not a court. ...

[24] It is apparent from the authorities that the function the Court or Tribunal performs (and the way it exercises the function) is of much more importance to the determination of whether it is a Court than its name. Even though the body may be required to act judicially its function may be essentially administrative. If so, it will not be a Court even if called a Court. On the other hand, if a Tribunal performs judicial functions it may be a Court, despite being called a Tribunal.

[25] Under s 94 of the Human Rights Act the Tribunal's functions are:

> (a) To consider and adjudicate upon proceedings brought pursuant to sections 92B, 92E, 95 and 97;
>
> (b) To exercise and perform such other functions, powers, and duties as are conferred or imposed on it by or under this Act or any other enactment.

[26] The proceedings referred to in ss 92B, 92E and 97 include:

- civil proceedings arising from complaints;
- civil proceedings arising from an inquiry by the Commission;
- declarations as to the lawfulness or otherwise of acts associated with occupational qualifications; and
- interim orders,

[27] The Tribunal also has the function of hearing and determining proceedings relating to a breach of a person's privacy rights: Part 8 Privacy Act 1993.

[28] In addition the Tribunal has the power to issue a declaration of inconsistency with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990: s 92J(2) of the Act.

[29] To exercise its functions the Tribunal is vested with the powers that Courts of judicature commonly have. Its procedure is consistent with that of a Court. The Tribunal holds sittings as it (or its chair) approves. The sittings may be adjourned from time to time: s 104. The Tribunal may take evidence on oath: s 106(2). The Tribunal may call for evidence and information from the parties or any other person: s 106(1)(a). It may request or require parties or any other person to attend to give evidence: s 106(1)(b). It may fully examine any witness, receive evidence, any statement, document and information on a matter that may in its opinion assist to deal effectively with the matter before it whether or not it would be permissible in a Court of law: s 106(1)(c). Similarly expansive powers in relation to evidence are available in the Family Court (ss 164 and 165 Family Proceedings Act 1980) which is recognised as an inferior Court. The Tribunal's sittings are held in public except in special circumstances: s 107. The Tribunal can punish those in contempt: s 114. It has the power to issue witness summons: s 109. The Tribunal must give reasons: s 116. It has the power to dismiss frivolous cases: s 115.

[30] Importantly, the Tribunal has the power to direct the payment of damages in certain cases: s92M and to award costs: s 92L. It has the same jurisdictional level

for damages as the District Court: s 92Q. It has the power to enforce the orders it makes: s 121.

[31] The Tribunal may state a case for this Court on a question of law: s 122. It may remove a proceedings to this Court: s 122A and 122B. There is a right of appeal to this Court and to the Court of Appeal on a question of law: ss 123 and 124.

[32] The Tribunal must refer certain issues regarding the granting of certain remedies to this Court (e.g. discrimination by Government) and those involving unlawful discrimination where the appropriate remedy may be outside the District Court's jurisdiction and better dealt with by the High Court: s 92R. We agree with Mr Waalkens' submission that this is a powerful indicator the Tribunal is an inferior Court to this Court and exercises a judicial function.

[33] In summary, the Tribunal has a number of features in common with those of the former Employment Tribunal which the Full Court in *Reid* accepted was an inferior Court. In addition there are additional features of the Tribunal's function and powers which confirm that position. The Tribunal's role of determining civil proceedings arising out of an alleged breach of rights by adjudication, after considering evidence, is quintessentially the role of a Court of judicature.

[34] We conclude that the Tribunal is an inferior Court for the purposes of s 88B of the Judicature Act and that proceedings issued in it, including those proceedings issued by Mr O'Neill, are civil proceedings issued in an inferior Court for the purposes of that section.

[35] Before leaving the matter we should note that in one of its own decisions *Director of Health and Disability Proceedings v CO* [2005] NZHRRT 25 (9 August 2005) the Tribunal concluded that it was not a Court of law, but rather was a statutory Tribunal. We are obliged to Mr Waalkens for drawing the case to our attention but accept the reasons he outlined, and which we now discuss, why the case is not at all persuasive and should not be followed.

[36] In coming to the conclusion the Tribunal was not a Court the Tribunal placed emphasis on the use of the word Tribunal. But it is apparent from the authorities cited above that nomenclature is not determinative. Nor is it significant that none of the members is a Judge. The chair must be legally qualified: s 99A and a District Court Judge has been appointed as a deputy chair. Further, there was no such requirement for the Employment Tribunal but it was still accepted as a Court. The proposition that the reference to equity and good conscience (in s 105(2)) somehow points against the Tribunal being a Court overlooks that in *Reid* this Court said such a provision was consistent with the powers of a Court of equity. Finally the proposition that because the Tribunal has an obligation to deal with interlocutory proceedings fairly, efficiently, simply and speedily that suggests it is not a Court, overlooks that the High Court Rules require the rules to be construed to secure "the just, speedy and inexpensive determination of any proceeding or interlocutory application".

[37] The fact the Tribunal has an inquisitory role is not significant. It must follow proper procedure with rights of cross-examination and comply with the rights to natural justice. As Mr Waalkens observed, r 324 of the High Court Rules provides the High Court with the ability to appoint independent experts to inquire into and report on questions of fact or opinion for the Court not involving questions of law or construction for the Court. The Court of Appeal and Supreme Court can similarly obtain expert evidence if they consider such of assistance.

[38] The Tribunal next considered the wide powers as to the admissibility of evidence pointed against it being a Court. But similar provisions applied to the Employment Tribunal in *Reid*. In that case the Court held (at 381 para [18]) Judicature Act 1908 s 99B that such procedure was:

> consistent with a Court of judicature but hardly consistent with an administrative Court or a tribunal.

Further, as noted, the Family Court has such expansive powers also.

[39] Next, there is nothing in the fact the Tribunal does not have exclusive jurisdiction. As Mr Waalkens observed, the District Court is a creature of statute that does not have exclusive jurisdiction but is still an inferior Court.

[40] Finally the two cases the Tribunal referred to are not persuasive. The first, *Proceedings Commissioner v Stowell* [1997] NZAR 109 relied on the decision of *Proceedings Commissioner v Air New Zealand* (1998) 7 NZAR 462. In that decision, the Tribunal itself said in one passage at p 468:

> The Tribunal may be a Court. It is undoubtedly required to act in a judicial manner and conduct the proceedings before it with fairness and impartiality and in accordance with the rules of natural justice,

before going on to say that it was not a "Court of Law". The decision is not at all persuasive.

[41] The Tribunal's decision in *Director of Health & Disability Proceedings v CO* is wrong. We are satisfied that the Tribunal is an inferior Court for the purposes of s 88B and there is jurisdiction to make the order sought.

[42] In the circumstances it is unnecessary to consider Mr Waalkens' alternative submission made in reliance on the English decisions of *Ebert v Venvil* [2000] ChD 484; and *Bhamjee v Forsdick* [2004] 1 WLR 88 that the Court may have inherent jurisdiction to make comparable orders declaring Mr O'Neill vexatious and preventing him from filing further proceedings.

Has Mr O'Neill persistently and without any reasonable grounds instituted vexatious legal proceedings?

[43] The following principles were identified in *Hill* (at pp 22-23) and cited with approval by the Court in *Collier* at para [35] on this particular issue:

- Whether the defendant has persistently and without any reasonable ground instituted vexatious proceedings is to be determined objectively, not in relation to the defendant's subjective beliefs or motives.

- The totality of the proceedings must be looked at.

- The issue is not whether the proceeding was instituted vexatiously, but whether it is a vexatious proceeding.

- A proceeding may be vexatious, notwithstanding that it may disclose the germ of a legitimate grievance, a cause of action, or a ground for institution.

[44] The amended statement of claim refers to a number of the proceedings that Mr O'Neill has filed and which have been dealt with. The amended statement of claim identifies 39 claims that have been determined. Of those, 37 have been determined against Mr O'Neill. He has succeeded on only two. It is sufficient to refer to a sample of the claims that have been dealt with to determine whether Mr O'Neill has persistently and without reasonable ground instituted vexatious legal proceedings. We do so by reference to a number of the claims summarised in the amended statement of claim.

O'Neill v Donovan (HRRT, Decision No. 3/03, 12 February 2003)

[45] This claim involved a notice of intention to bring proceedings by Mr O'Neill claiming that use of certain Latin phrases ("*res ipsa loquitur*" and "*de novo*") by the proposed defendant in submissions filed in another matter amounted to an unlawful discrimination against him by reasons of race and/or ethnic or national origins.

[46] The HRRT noted that this was one of about 10 separate claims commenced by Mr O'Neill in the HRRT during 2002. The HRRT dismissed the claim stating:

> We are satisfied that this proceeding is trivial and frivolous.

O'Neill v Human Rights Commission & Ors (HRRT, Decision No. 6/03, 18 February 2003).

[47] This claim involved a notice of intention to bring proceedings by Mr O'Neill, claiming that:

- Use of the Maori language by the Associate Minister of Health in a letter to him dated 15 June 2001 was discriminatory; and

- The way in which the Human Rights Commission dealt with the above complaint was in breach of its statutory obligations.

[48] The HRRT dismissed the first part of the claim as trivial and frivolous.

[49] With respect to the second part of the claim, the HRRT allowed Mr O'Neill a further opportunity to provide details of his complaint. In so doing, the HRRT stated:

> This claim is one of ten or so claims that were filed by Mr O'Neill during 2002. The materials received from Mr O'Neill are characterised by an aggressive and abusive style of presentation. It is not a style that is conducive to the identification and disposal of any genuine claims that Mr O'Neill may have. We therefore wish to make it clear that Mr O'Neill is to provide the foregoing details in a straightforward and non-argumentative way.

[50] The HRRT subsequently dismissed Mr O'Neill's claim, in Decision No. 13/03, 23 April 2003.

O'Neill v Poutasi (HRRT, Decision No. 14/03, 29 April 2003)

[51] In this claim, Mr O'Neill alleged that he had been a victim of discrimination on the basis of his political opinion. Mr O'Neill had been advised by the then Northern Regional Health Authority ("NRHA") that he did not qualify for public funding for a certain diagnostic procedure. He sought information from the Ministry of Health under the Official Information Act 1982, and this information was declined.

[52] Mr O'Neill then sought compensation from the Ministry of Health for his time spent writing letters and making telephone calls. This demand was denied, and the Ministry blocked further emails from Mr O'Neill. After the Human Rights Commission found it had no jurisdiction to deal with Mr O'Neill's claim, he brought proceedings in the HRRT.

[53] The HRRT dismissed the proceedings on the grounds that:

- there was no statutory foundation for the claim; and
- even if there was a statutory foundation, the claim disclosed no tenable cause of action; and
- the claim was vexatious and was not brought in good faith.

[54] The HRRT found that Mr O'Neill had pursed the claim for ulterior motives, "to provide Mr O'Neill with a platform from which to harangue the Director General [of Health] rather than pursue any legitimate claim for payment from her, or raise any real complaint of discrimination.".

[55] The HRRT also observed that:

> All of the material put before us leads us to conclude that Mr O'Neill's motives in demanding money and then pursuing the matter in this Tribunal have much more to do with tub-thumping than any real issue about discrimination. We also accept that Mr O'Neill has pursued the matter in a way that is inappropriate to the point of being vexatious.

O'Neill v Ministry of Health (HRRT, Decision No. 07/04, 2 April 2004)

[56] This was a claim by Mr O'Neill under the Health Information Privacy Code 1994 ("the Code"), arising out of the NRHA decision not to grant him funding for a diagnostic procedure.

[57] The HRRT found it difficult to ascertain the exact nature of the claim because:

> ... it is difficult to find a way through the abuse that characterises so much of Mr O'Neill's correspondence to ascertain exactly what facts are relevant.

[58] The HRRT concluded, however, that the claim related again to the Ministry of Health's handling of his request for information under the Official Information Act and the Code. The HRRT declined to strike out the claim and instead made timetabling orders for the filing of further written argument.

[59] Mr O'Neill subsequently advised the HRRT that he would not be filing anything further in the proceeding because he could not "address a case that does not exist and never has" (HRRT, Decision No. 43/04, 30 August 2004).

[60] Mr O'Neill sought to distinguish between the Ministry *of* Health and the Minister/Ministry *for* Health, to which the HRRT found there to be "no doubt that the claim when filed was both in form and substance a claim against the Ministry of Health", (HRRT, Decision No. 43/04, 30 August 2004).

[61] The HRRT struck out the claim against the Ministry of Health on the basis that it had been abandoned by Mr O'Neill. The HRRT made an order under s 85(2) of the Privacy Act awarding costs of $3,000 to be paid by Mr O'Neill to the Ministry of Health (at [15], HRRT, Decision No. 43/04, 30 August 2004), but declined to award indemnity costs against him, observing that Mr O'Neill had a tenable argument that there had been a breach of the Privacy Act.

O'Neill v Various Defendants (HRRT, Decision No. 11/04, 16 April 2004).

[62] This proceedings concerned a complaint by Mr O'Neill of a breach of s 21(j) of the Human Rights Act (political opinion) against various defendants, being the Governor-General, the Prime Minister, the Attorney-General, the Ministry for Justice, the speaker of the House of Representatives, the House of Representatives and the Government Administration Committee (with each of the members of that Committee being sued individually and as a committee).

[63] The complaint arose out of Mr O'Neill's dealings with the Office of the Ombudsmen in relation to his Official Information Act issues with the Ministry of Health. Mr O'Neill named the entities referred to as defendants because he accepted that any complaint about the Ombudsmen was beyond the reach of the HRRT by virtue of s 26(1)(a) of the Ombudsmen Act 1975.

[64] The HRRT found that Mr O'Neill's proposed claim did not disclose any proper cause of action under the Human Rights Act against any of those whom he would name as defendants. The HRRT dismissed the claim.

O'Neill v Police Complaints Authority (HRRT, Decision No. 21/04, 21 May 2004)

[65] This claim involved a notice of intention to bring proceedings by Mr O'Neill against the Police Complaints Authority ("PCA"), alleging that the PCA had unlawfully discriminated against him when it declined to uphold a complaint by Mr O'Neill against the police that the police had failed to investigate conduct by a third party which Mr O'Neill considered to be of a criminal character.

[66] The PCA had informed Mr O'Neill that it would not acknowledge or respond to any correspondence from him that was written in offensive language. Mr O'Neill claimed that this was discrimination on the grounds of race and ethnicity, because the English language is ethnically associated with Mr O'Neill's race.

[67] The HRRT struck out the claim noting:

> There is nothing to suggestion that if anyone else were to write to the Authority in offensive terms they would not be given the same response that Mr O'Neill received, no matter what their ethnicity or what language they used. There is nothing to establish any comparative disadvantage to Mr O'Neill that is in any way related to his ethnicity.

[68] The HRRT further noted that there was nothing in the materials filed by Mr O'Neill that "would begin to justify a claim" that the PCA had acted in bad faith, and that s 33(1)(a) of the Police Complaints Authority Act 1988 (granting immunity to the Authority in the exercise of its functions) represented "another very significant obstacle in the way of this particular claim.". The HRRT also found that the claim was trivial and vexatious. It awarded costs against Mr O'Neill.

O'Neill v The Privacy Commissioner & Ors (HRRT, Decision No. 23/04, 21 May 2004)

[69] This claim involved a notice of intention to bring proceedings by Mr O'Neill against the Privacy Commissioner and Sports and Recreation New Zealand ("SPARC"), alleging unlawful discrimination and interference with privacy. The Privacy Commissioner had discontinued her investigation into a complaint by Mr O'Neill that SPARC had breached principles of the Privacy Act.

[70] The HRRT dismissed the claim against the Privacy Commissioner for lack of jurisdiction, noting previous decisions issued by it in proceedings brought by Mr O'Neill, where it had emphasised the limits of the HRRT's jurisdiction and struck out the claims against SPARC for lack of detail.

O'Neill v HRRT & Ors (HRRT, Decision No. 16/2005, 26 May 2005).

[71] This was a complaint by Mr O'Neill purporting to challenge the appointment of the Deputy Chairperson of the HRRT.

[72] Mr O'Neill identified as defendants the HRRT "per se", various named officers of the HRRT, the Privacy Commissioner, the former Attorney-General and the Chief Justice.

[73] The HRRT struck out the claim as being "clearly untenable".

O'Neill v New Zealand Police (HRRT, Decision No. 019/06, 30 May 2006)

[74] On 22 December 2005 Mr O'Neill filed a claim against the New Zealand Police in relation to a decision not to investigate allegations of perjury he had made.

[75] The HRRT dismissed the claim on the grounds that:

- It did not fall within s 92B of the Human Rights Act;
- The approach complained of "cannot on any stretch of the imagination be argued to constitute unlawful discrimination against Mr O'Neill";
- It was frivolous.

O'Neill v Various Proposed Defendants (HRRT, Decision No. 23/06, 16 June 2006)

[76] This decision related to three claims that Mr O'Neill had filed in February and March 2005. The claims were against the Human Rights Commissioner for breach of the Human Rights Act, in respect of her declining to investigate a complaint made by Mr O'Neill against the Director of Proceedings.

[77] The Chairperson of the HRRT had issued a minute in May 2005 in relation to the three claims, drawing Mr O'Neill's attention to various shortcomings with them.

[78] Mr O'Neill subsequently filed amended statements of claim in the three matters in December 2005. The Chairperson of the HRRT issued a further minute indicating to Mr O'Neill that the amended claims did not deal in any adequate way with the matters raised in the earlier minute.

[79] Mr O'Neill provided further material but declined to file any further amended claims.

[80] The HRRT struck out all three claims on the basis that the papers filed were:

> Prolix, unnecessarily argumentative, and they do not serve to inform the proposed defendants in any fair or appropriate way what the claims against then [sic] are said to be.

O'Neill v The Privacy Commissioner (HRRT, Decision No. 24/06, 16 June 2006

[81] This decision relates to two claims by Mr O'Neill against the Privacy Commissioner (Reference No's. HRRT 3/06; HRRT 5/06). In HRRT 3/06, Mr O'Neill claimed that he had been a victim of unlawful discrimination on the ground of gender, as a result of the Privacy Commissioner's handling of a complaint.

[82] In HRRT 5/06, Mr O'Neill claimed that he had been the victim of unlawful discrimination on the grounds of his political opinion, disability and employment status by the Privacy Commissioner blocking his emails and telephone calls, and making him resort to the post.

[83] The HRRT dismissed the two claims as vexatious. The HRRT stated:

> The number of matters, the nature of the complaints, and the manner in which Mr O'Neill has put this multiplicity of arguments forward demonstrates that he is prone to making excessive and, most often, unmeritorious claims. We also think the time has come to deal with these kinds of claims for what they are, and to recognise that they are part of a campaign of claims against the Privacy Commissioner that has become vexatious.

[84] The HRRT awarded the defendant's costs on a full solicitor/client indemnity basis.

O'Neill v Bell (HRRT, Decision No. 42/06, 1 November 2006)

[85] This complaint was brought against the Board Administrator of the Auckland District Health Board, alleging discrimination in the way the Administrator dealt with some of Mr O'Neill's correspondence. Mr O'Neill claimed he was denied access to the Board because of his disability and his employment status.

[86] The HRRT found that:

> … this claim has no prospect of success. We add that we regard the claim as being both trivial and frivolous, and would have dismissed it under s 115 of the Act on that basis in any event.

[87] The HRRT accordingly dismissed the claim.

[88] The HRRT subsequently awarded costs of $5,000 against Mr O'Neill, in *O'Neill v Bell* (Decision No. 44/06, 7 December 2006), noting that Mr O'Neill had been warned "several times about the potential for adverse costs awards if he persists in bring [sic] unmeritorious claims to the Tribunal".

[89] The HRRT noted that if the defendant had asked it to award full solicitor/client costs, it would have done so and that costs should be fixed "at a level that reflects the fact that the matter was never anything more than a waste of the defendant's time and resources.

O'Neill v Proposed Defendants A, B and C (HRRT, Decision No. 43/06, 7 December 2006)

[90] Mr O'Neill complained that two officers of the Accident Compensation Corporation failed to follow proper procedure and discriminated against him by failing to adhere to his requests for information.

[91] The HRRT struck out the claim as disclosing no "coherent cause of action under the Act.".

[92] Against the above cases, it must be recorded that in two cases Mr O'Neill has had a limited measure of success. In *O'Neill v Dispute Resolution Services Limited* (HRRT, Decision No. 15/06, 10 April 2006) Mr O'Neill complained he did not receive a response to his request for information. The Dispute Resolution Services Limited had blocked his email address. The Tribunal accepted that the Dispute Resolution Services Limited's failure to respond to Mr O'Neill's email amounted to an inference with his privacy. It however found that no harm had been suffered by Mr O'Neill and limited the relief to a declaration.

[93] In *O'Neill v ACC* (HRRT, Decision No. 25/06, 16 June 2006) the Tribunal made a declaration that the ACC's failure to provide Mr O'Neill with access to such health information about him as was on the relevant files was an interference with his privacy, but again made no order for costs.

[94] In relation to the other proceedings referred to in the statement of claim the proceedings have variously been:

- dismissed in their entirety;
- struck out because the Tribunal considered the correct procedure would be for Mr O'Neill to apply for judicial review;
- struck out as not disclosing any tenable claim or for lack of jurisdiction;
- dismissed.

[95] On our review of the proceedings that Mr O'Neill has issued, we are satisfied that the applicant has met the high standard required to satisfy the Court that Mr O'Neill has persistently and without any reasonable ground instituted vexatious legal proceedings. To the extent that Mr O'Neill has succeeded before the Tribunal his success has been very limited. Such success pales into insignificance when compared with the total number of proceedings Mr O'Neill has issued that were without any merit, or were held to be frivolous and vexatious. Mr O'Neill's proceedings are generally characterised by meritless claims, often directed at individuals for no reason other than they have made decisions adverse to Mr O'Neill. There is also the pattern, often apparent in claims by vexatious litigants, of the extension of proceedings to take in an increasing circle of potential defendants including the Chair of the Tribunal, members of the Tribunal, and Ministers of the Crown. Mr O'Neill sought to minimise those proceedings on the basis he had not served them. But in some ways that is worse, and it is more vexatious to file proceedings without an intention of serving or pursuing them.

[96] Mr O'Neill has flooded the Tribunal with civil proceedings. Mr Anderson, the secretary of the Tribunal, deposed that as at 9 August 2007 there were 88 live proceedings before the Tribunal. Fifty of those 88 proceedings had been filed by Mr O'Neill. Mr O'Neill's cases equated to approximately 57 percent of the Tribunal's then live active case load. Since Mr Anderson's affidavit was sworn on 9 August 2007 Mr O'Neill has filed a further 15 proceedings with the Tribunal.

[97] The proceedings or notices of intention to bring proceedings filed after this application were made, are plainly vexatious. They include claims against, among others, Mr Anderson, Ministry of Justice personnel, the Minister of Justice, Judge McElrea and Mr Haynes, the Judicial Complaints Commissioner. In a number of cases the claims are extravagant: e.g. for $1 million in damages. Mr O'Neill's response to the inflated claims was to say that he knew he could not obtain damages in that sum. But nevertheless he sought them.

[98] Standing back and looking at Mr O'Neill's proceedings overall there is a clear pattern of persistence in instituting vexatious proceedings. Mr O'Neill's

response to the current proceedings is itself a clear example of such persistence and his approach to proceedings before the Tribunal.

[99] In the document that he filed in response Mr O'Neill sought to justify the various sets of proceedings he had issued. Mr O'Neill made the point that in a number of the proceedings he was given leave to reformulate his claim so that when the proceedings were considered in that context there was not such a multiplicity of proceedings. But even taking account of those matters and the other matters that Mr O'Neill raised in his document and submissions it is plain that almost all the proceedings issued by Mr O'Neill have been hopeless. Overall his proceedings can not be categorised as anything other than vexatious.

Should the Court exercise its discretion to make the order?

[100] Again, the principles were identified in *Hill's* case and were cited with approval in *Collier* at para [35]:

> (a) The power under s 88A is not to be lightly exercised.
>
> (b) The reasons for restraining a vexatious litigant are:
>
> (i) The entitlement of the defendants to protection.
>
> (ii) The need to use the limited resources of the judicial system for the resolution of genuine proceedings.
>
> (iii) The interests of the vexatious litigant himself.

[101] In addition it is right to record, as the Court did in *Collier*, that because of the impact upon rights of access it is proper for the Court to be reluctant to make an order unless the grounds are clearly made out, citing with approval: *Attorney-General v Jones* (at 863 per Lord Donaldson MR). But as Staughton LJ (at p 865) pointed out in the same case:

> [t]here must come a time when it is right to exercise that power, for at least two reasons. First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly, the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who do have genuine grievances, and should not be squandered on those who do not.

And it is necessary to consider from all the circumstances whether there is such a pattern of persistence in instituting vexatious proceedings as to justify an order.

[102] We consider the order is not only desirable in this case but it is necessary. We are in no doubt that Mr O'Neill will not modify his behaviour without the intervention of the Court.

[103] It is also a matter of concern that apart from pursuing vexatious proceedings Mr O'Neill has engaged in vitriolic personal attacks against those that he considers have not determined matters in the way he considers they should. Mr O'Neill's actions are further confirmation that he cannot be relied upon to exercise restraint. Mr O'Neill's attitude, as noted in his submissions is that "persistence is not a crime, the crime is that such is necessary to receive justice". The defendants are entitled to the protection of an order.

[104] Further the resources of the Tribunal are limited. The sheer volume of Mr O'Neill's proceedings mean that litigants with meritorious claims will have their hearings delayed by the need for the Tribunal to deal with Mr O'Neill's frivolous proceedings.

Result

[105] There is jurisdiction to make the order. There can be no doubt that this is a proper case for the order the Attorney-General seeks.

[106] Mr Collins invited the Court to make an order in general terms to apply to all Courts. To date Mr O'Neill has not sought to file proceedings in Courts other than with the Tribunal. We are conscious of the effect of an order in general terms. Given that Mr O'Neill has restricted his proceedings to date, we consider the order should be restricted to the Tribunal. If, however, Mr O'Neill does not change his behaviour and simply refocuses his attention to other Courts, then the Attorney-General may renew his application for a general order. We will adjourn the application as it relates to litigation other than in the Tribunal.

Orders

[107] The orders of the Court are:

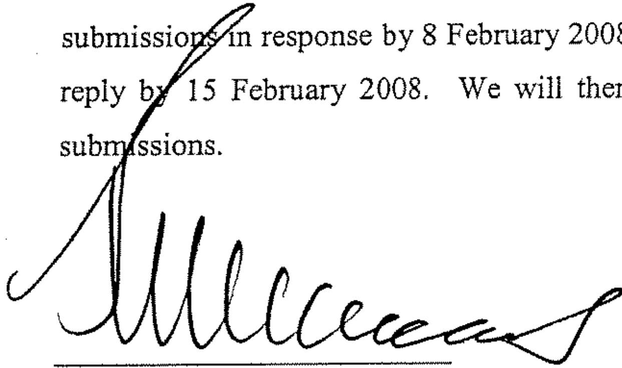
a) No legal proceedings shall without the leave of the High Court be instituted by Mr O'Neill himself or by his agent in the Human Rights Review Tribunal; and

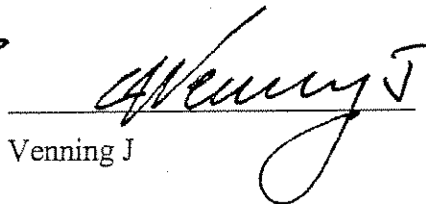
b) All civil proceedings instituted by him and currently before the Tribunal shall not be continued by him without such leave.

c) The Attorney-General's application as it relates to civil proceedings other than in the Tribunal is adjourned with leave reserved to bring it on, on seven days' notice.

Costs

[108] Costs are reserved. If the Attorney wishes to pursue the issue of costs a memorandum is to be filed by 25 January 2008. Mr O'Neill is to file and serve submissions in response by 8 February 2008. The Attorney is to file submissions in reply by 15 February 2008. We will then deal with costs on the basis of those submissions.





Williams J

Venning J