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Tribunal Case Update

Tribunals often have a statutory power to strike out a proceeding that is vexatious or an abuse of process. We begin this issue with two cases from the New Zealand Court of Appeal in which a proceeding originating in a tribunal was ultimately struck out on these grounds.

In *O'Neill v New Zealand Law Society*, the Court of Appeal formulated the correct question to be addressed when considering whether to strike out a viable proceeding due to abusive behaviour by a party. In deciding whether the proper administration of justice requires such action, a range of interests must be considered including, where relevant, the impact of abusive behaviour on the court's staff.

In *Nottingham v Real Estate Agents Authority*, the Court upheld a cross appeal and reinstated the decision of a tribunal to strike out a proceeding that was, or had become, an abuse of process. The Court found that in the circumstances, the continuation of the tribunal proceeding was part of a long-running campaign of harassment.

In both cases, the Court took a wide view of all the circumstances in reaching its view that the proceedings should be struck out as an abuse of process.

This issue also includes a pair of cases from the New South Wales Court of Appeal, both named *Ghosh v Health Care Complaints Commission.* In the 2022 decision, the Court held that where the tribunal delivers a split decision, the majority is not required in its reasons to address the reasons of a dissenting

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member. In the earlier 2020 decision, the Court was critical of the failure of all four members of a tribunal panel to detect serious errors in its reasons for decision which 'should have been obvious' to them.

The question of what is a 'tribunal' arises in various ways, and always requires an answer tailored to the context. In *Nielsen v Parry Field Lawyers Ltd*, the question was whether a particular body was a 'tribunal' within the meaning of a legislative provision which referred to a 'court or tribunal'. A judge of the District Court (NZ) demonstrates the techniques of statutory interpretation and the multi-factor analysis required to craft a persuasive answer.

Finally, we have a bias by prejudgment case from New Zealand (*Wellington Combined Taxis Ltd v Lalloo*), and an unusual case from Queensland revealing the deliberations of QCAT in an application for consent to the sterilisation of a ten-year-old girl with impairments (*Re CM*).

Striking out a proceeding conducted in an abusive manner

In the following case, the New Zealand Court of Appeal dismissed an appeal against a High Court decision striking out a proceeding by a party as an abuse of process. The party had subjected judges and registry staff to extreme verbal abuse and baseless allegations of wrongdoing, refusing to amend his behaviour when given the opportunity to do so. The High Court had acted on its own volition, in the absence of an application from a party, to strike out the proceeding. The case is of interest for the Court's statements as to the correct approach to be taken and the matters to be considered which, the Court held, include the impact of abusive behaviour on the court's staff.

O'Neill v New Zealand Law Society [2022] NZCA 500

New Zealand Court of Appeal (Miller, Brewer and Moore JJ), 29 Sept 2022

This case arose out of a complaint by O'Neill to the New Zealand Law Society ('the Law Society') that counsel who represented him in a prosecution was corrupt and possibly drug affected. A disciplinary hearing panel of the Law Society found that O'Neill had provided no evidence to support his allegations. Before the Law Society could complete the proceeding, O'Neill applied to the High Court for judicial review of decisions made under Law Society processes ('the proceeding').

In the course of a telephone conference with O'Neill, Cooke J became concerned that the manner in which O'Neill was conducting the proceeding amounted to an abuse of process. His Honour put it to O'Neill that his communications to the judges and registry staff had been 'highly abusive in nature and included apparent threats of violence' (quoted at [7]). He advised O'Neill that he was considering exercising the Court's inherent jurisdiction to strike out the proceeding. His Honour directed the filing of submissions on that question,

following which he would decide whether to strike the proceeding out.

In his submissions, O'Neill argued that his language was appropriate as his allegations were true. He repeated and extended the comments he had previously made, including alleging that judges 'had been bought off or corrupted by government' ([9]).

After considering the submissions, Cooke J struck out the proceeding because of the abusive manner in which it was being conducted by O'Neill. His Honour invoked rules 15.1(c) and (d) of the *High Court Rules 2016* (NZ) for jurisdiction to strike out the proceeding as an abuse of process, adding that the Court also had inherent jurisdiction to strike out proceedings of its own volition irrespective of whether any application was made.[1]

O'Neill appealed to the Court of Appeal against the decision of Cooke J to strike out the proceeding. The appeal notice raised grounds mostly directed to justifying O'Neill's behaviour and made further allegations, including that the minute made by Cooke J of the telephone conference was 'the product of an unsound mind' (cited at [12]).

The correct approach

Miller J, giving the judgment of the Court of Appeal, observed that access to justice is an important human right. Accordingly, a viable proceeding will not lightly be struck out on the ground that it has been conducted in an abusive manner ([14]). Miller J identified the correct approach as follows:

> The correct question is whether the proper administration of justice requires that the court should intervene. Limits are enforced because it is inimical to the administration of justice to permit abusive behaviour in a public forum where speech is protected by absolute privilege. Misuse of the judicial process causes unfairness for others involved, including the opposing party. It also undermines public confidence in the administration of justice. Courts must be seen to be capable of dealing with it ([17], [footnote omitted]).

The Court quoted the statement of the English Court of Appeal in *Terry v Hoyer (UK) Ltd* that a court, in assessing whether the proper administration of justice can tolerate the abusive behaviour, 'must… have regard to the interests of litigants in general, to the proper use of court time, and to the need to ensure respect for courts and tribunals in the community'.[2] To this the Court added:

> [A] court must also consider the impact of abusive behaviour on its staff, who are expected to correspond and speak with parties who may be treated, as in this case, rather worse than the judges ([18]).

Application to the present case

The Court found that O'Neill had engaged in personal abuse of judges and registry staff. While some allowance could be made for his strong feelings and lay litigant status, this tolerance did not extend to 'homophobic or misogynist slurs or characterisation of judges as perverts and cows' ([19]). O'Neill had repeated and doubled down on his attacks at every opportunity and made it clear that he would not change his behaviour ([22]).

O'Neill had submitted that he was expressing his own opinions, which he had an absolute right to do under the *New Zealand Bill of Rights Act 1990*. The Court disagreed, observing that according to s 5 of the Act, all rights are subject to reasonable limits prescribed by law, and 'the jurisdiction to strike out exists to ensure those limits are respected' ([20]).

The Court noted that a litigant has the right to make serious allegations, including against judicial officers, provided that a good faith foundation for the allegations is offered. When asked to provide evidence for his allegations against judges and others, O'Neill had offered little more than speculation that 'because things have not gone his way the staff and judges must be corrupt' ([21]).

Having regard to O'Neill's abuse against the Court of Appeal judges and staff, the Court considered that it had grounds to strike out the appeal for abuse of process but preferred to decide the appeal on its merits ([26]).

The Court held that Cooke J was 'plainly right to strike out the proceeding', calling it a 'flagrant abuse of process' ([25]).

Orders

1. The appeal was dismissed with costs to the Law Society.

1 [10], citing *Siemer v Stiassny* [NZCA] 1, [15]

2 [2001] EWCA Civ 678, [16], cited at [17].

2. The Registrar was directed to refer the judgment to the Solicitor-General for consideration of such further steps as she may deem appropriate having regard to s 166 of the *Senior Courts Act 2016* (NZ). The section empowers a court to make an order restricting the commencement or continuation of a civil proceeding about a matter in circumstances where at least two proceedings about the matter were found to be wholly without merit.

Striking out a proceeding as an abuse of process – harassment

In the following case, the New Zealand Court of Appeal allowed a cross-appeal from a decision of the High Court. The effect was to reinstate the decision of a disciplinary tribunal to strike out a proceeding that was, or had become, an abuse of process.

The tribunal, and the High Court, had focussed on a narrow ground for striking out the proceeding. The ground was whether the proceeding was seeking to relitigate matters that had already been decided in the appellants' unsuccessful private prosecution of the second respondent.

The Court of Appeal took a wider view, taking into account of the whole history of the dispute between the parties. It found that the attempt to continue the proceeding in the tribunal after a years-long delay formed part of a 'ten-year long, unrelenting campaign by the appellants, conducted on many fronts' and was vexations and an abuse of process ([54], [56]).

Nottingham v Real Estate Agents Authority [2022] NZCA 488

New Zealand Court of Appeal (Simon France, Ellis and Dunningham JJ), 18 October 2022

In 2011 the appellants (the Nottingham brothers and McKinley) made complaints to the Real Estate Agents Authority ('the Authority') about the second respondent Mr Honey, a real estate agent. In 2012 the Authority's Complaints Assessment Committee ('CAC') declined to take further action on the appellants' complaints. The appellants appealed to the Real Estate Agents Disciplinary Tribunal ('the tribunal') and subsequently to the High Court and the Court of Appeal, and the matter was remitted back to the tribunal. There was no further progress with the complaint until 2019, when the tribunal granted Honey's application to strike out the appeal on the grounds that it was, or had become, vexatious and an abuse of process.

In July 2020 the High Court (Wylie J) allowed the appellant's appeal from the tribunal's decision, and the appeal was again reinstated. Despite this favourable result, the appellants appealed to the Court of Appeal, seeking a ruling that the tribunal must not take into account certain matters when determining the reinstated appeal. Honey cross-appealed the High Court's decision to reinstate the appeals.

The Court dismissed the appeal because the questions raised were not material to the decision appealed from. The appellants were effectively asking for an advisory opinion which the Court could not provide ([46]-[49]).

Finding on the cross-appeal

In the High Court decision appealed from, Wylie J was not satisfied that the appellants were seeking to use the disciplinary proceeding to relitigate matters already determined in the unsuccessful criminal prosecution that Dermott Nottingham had brought in 2014 against Honey and his associates ([38]-[40]). His Honour held that the tribunal was wrong to strike out the proceeding as an abuse of process and reinstated the appeal.

The Court of Appeal found that Wylie J erred in holding that the continuation of the appeal was not vexatious and an abuse of process ([52], [60]). The Court referred to the following circumstances in support of its conclusion:

- The complaints that are the subject of the appeals alleged harm by Honey to the appellants that was minimal, if any, and was certainly not continuing ([53]).
- For ten years Honey had been subjected to an 'unrelenting campaign by the appellants', including a failed private prosecution, 'vexatious judicial review proceedings and … meritless further appeals', and the appellants had failed to pay the costs awarded against them ([54], 55).

- The appellants had failed to progress their appeals in the tribunal in a timely manner, choosing instead to pursue other proceedings against Honey and his associates ([55]).
- The appellant Dermott Nottingham had been convicted on multiple charges of criminal harassment relating to conduct towards Honey and his associates ([56]).
- In the wider circumstances, the appellants' attempt to reactivate the disciplinary matter after a long delay was simply further harassment, which was an abuse of process ([56]).
- The tribunal had been right to recognise that a further determination was unlikely to bring finality, even if favourable to the appellants ([59]).

Orders

The appeal was dismissed, and the cross-appeal was allowed. The High Court decision reinstating the appellants' appeals in the tribunal was set aside and the tribunal's decision striking out the appellants' appeals was reinstated. The appellants were ordered to pay Honey's costs.

Reasons and split decisions – status of dissenting reasons

In an appeal from a majority decision of NCAT's Occupational Division, the appellant argued that the majority made in error of law in failing in its reasons to address the reasons of the dissenting member. The following case note focuses on why the NSW Court of Appeal rejected the argument. The Court also made it clear that it is not the role of a medical member of an adjudicative tribunal to form a diagnosis of a party based on the member's own observations.

Ghosh v Health Care Complaints Commission [2022] NSWCA 229

New South Wales Court of Appeal (Ward P, Basten AJA, Adamson J), 11 Nov 2022

The Health Care Complaints Commission ('the Commission') applied to the NSW Civil and Administrative Tribunal ('the tribunal') seeking disciplinary findings and orders against the appellant Dr Ghosh, a medical practitioner.

The tribunal was constituted by three members, one of whom ('M') was a psychiatrist. A majority of members made orders that included cancellation of Ghosh's registration as a medical practitioner. M dissented and gave separate reasons for his opinion that Ghosh was not guilty of professional misconduct and should be permitted to practise medicine subject to conditions. The majority's reasons made no reference to M's dissenting reasons. Pursuant to s 57 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the CAT Act') the opinion of the majority is taken to be the decision of the tribunal.

The first of the two issues on appeal was whether the tribunal (that is, the majority) erred in failing to have regard to, and to address in its reasons, the dissenting reasons of M. It was submitted by Ghosh's counsel that the dissenting reasons were a mandatory relevant consideration which the tribunal was bound to take into account and address expressly in its reasons. Counsel further submitted that M was a qualified psychiatrist and had made a diagnosis of Ghosh based on observing her in the course of a three-day hearing. Counsel relied upon the judgment of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-41 in support of the proposition that the requirement to consider M's reasons and diagnosis was to be implied from the subject matter, scope and purpose of the CAT Act and the Health Practitioner Regulation National Law (NSW) ('the National Law').

The Court held that leave to appeal on the first issue was not required as an alleged failure to consider a mandatory relevant consideration is an error of law ([49]).

The court's finding

Adamson J, with whose opinion Ward P and Basten AJA agreed, held that the majority was under no obligation to refer to or address the dissenter's reasons in its own reasons. Her Honour considered that counsel's submission conflated evidence with reasons for decision. She accepted that the tribunal was obliged to have regard to the reasons of M (and inferred it had done so) but held that it was not obliged to address them in its reasons as they were

neither evidence nor submissions by the parties ([53]). Nothing in s 165M of the National Law identified dissenting reasons, expressly or by implication, as material which the tribunal was required to address in its reasons ([53]).

Adamson J added that in purporting to make his own diagnosis of Ghosh, M had stepped outside his role as a tribunal member, which was limited to considering the evidence and submissions before the tribunal for the purpose of determining the matter ([55]). His role was not that of a medical assessor or member of a medical assessment panel. As a member of an adjudicative tribunal, M's role was to evaluate the evidence and arguments, not to give his own opinion on the medical question by forming his own diagnosis. Accordingly, the majority was not required to address his opinion in its reasons ([57]).

Her Honour concluded that the appeal grounds which raised the first issue had not been made out and were based on an incorrect premise ([60]).

Basten AJA

In a separate judgment, Basten AJA expressed his agreement with Adamson J subject to his own further observations ([3]-[4]). It seems that His Honour did not go as far as Adamson J (at [53]) in accepting that the tribunal was obliged to have regard to (but not to address) the dissenting reasons ([8]). His Honour said:

> It is true that the Tribunal would err in law if it failed to take account of a mandatory consideration in reaching its decision. However, the reasons (or part of the reasons) for its decision cannot sensibly be described as a matter to be taken into account in reaching the decision [7]).

He added that the tribunal cannot rely on material other than that presented to it by the parties without disclosing the material and giving the parties an opportunity to be heard ([7]). He discussed the legal and practical difficulties that would arise if one member were obliged to take into account the view of another. As a matter of procedural fairness, the tentative conclusions of another member, which may be adverse to one party, would need to be disclosed before it could be relied on by other members. This could produce 'an endless cycle of procedural fairness obligations' ([8]). Moreover, the internal deliberations of the tribunal are protected from disclosure by Sch 2, cl 4 of the CAT Act ([10]).

Basten AJA agreed with Adamson J that in relying on his own psychiatric diagnosis of Ghosh, M misconceived his role as a member of the tribunal ([1], [11]). His Honour added that, apart from that error, 'it was certainly wrong in principle' for M to do so without giving notice of his intention to the Commission which had presented evidence in support of a contrary conclusion' ([11]).

Orders

The Court refused leave to appeal in respect of specified grounds and otherwise dismissed the appeal with costs.

Multi-member tribunal – common responsibility for correct reasons

Ghosh v Health Care Complaints Commission [2020] NSWCA 353

New South Wales Court of Appeal (Bell P, Payne JA, Stevenson J), 22 December 2020

The preceding decision was not the first time that complaints brought by the Health Care Commission against Ghosh had reached the Court of Appeal. Two years previously, a differently constituted bench of the Court of Appeal allowed Ghosh's appeal on multiple grounds, set aside decisions of the tribunal (NCAT) and remitted the matter to the tribunal for rehearing.

It is worth noting what the Court of Appeal said about errors made by the tribunal in its findings on complaint six made by the Commission against Ghosh. Complaints one to five concerned instances of alleged unsatisfactory professional conduct. Complaint six was that, by reason of the unsatisfactory professional conduct detailed in complaints one to five, Ghosh was also guilty of the more serious charge of professional misconduct. The case is notable for the comment about the responsibility of all members of the tribunal for errors in the tribunal's reasons for decision.

The Court identified the following errors in the tribunal's reasons for decision leading to its consideration of, and its conclusion on, complaint six.

- The tribunal wrongly described each of the complaints one to five as being complaints of professional misconduct.
- In relation to complaint one, the tribunal had wrongly concluded that Ghosh had engaged in 'unprofessional conduct' rather than 'unsatisfactory professional conduct' as was alleged by the Commission.
- The tribunal did not address what the Commission alleged in complaint six (which was professional misconduct) but concluded that Ghosh engaged in unsatisfactory professional conduct.
- The tribunal then drew its ultimate conclusion that Ghosh had engaged in both professional misconduct and unsatisfactory professional conduct ([132]-[141]).'

The Court rejected a submission that the errors were minor, resulted merely from a 'word processing, cut and paste error', and that they did not invalidate the tribunal's decision ([143]-[144]). Complaint six was the only complaint that made the more serious allegation of professional misconduct. The Court concluded that the tribunal did not actually deal with complaint six at all, while purporting to do so ([145]).

The Court said it was regrettable and difficult to understand how all four members of the Tribunal failed to detect the various errors and failed to consider the complaint as formulated by the Commission ([146]). The failure to address the principal and most serious complaint of professional misconduct, the inadequacy of the reasons and the other errors

> should have been obvious to the other members of the Tribunal who should not join in reasons without carefully reading and considering them even if they have not had principal carriage of drafting them [150].

What is a tribunal?

In Australian case law, this question is most often asked because only a body which has the attributes of a court within the meaning of Chapter II of the Australian Constitution can exercise Commonwealth judicial power. In New Zealand law, the question is more likely to be whether a particular tribunal is relevantly similar to a court for the purpose of interpreting a statute expressed to apply to 'a court or tribunal'.

In the following case, the District Court examined the powers and independence of the body in question, and weighed the purpose of the provision and other aids to interpretation. The Court concluded that a Law Society Standards Committee was not a 'tribunal' within the meaning of s 17 of the *Disputes Tribunal Act 1988*. The Committee's functions were investigative or administrative rather than judicial, and it lacked the institutional independence of a court-like tribunal.

Nielsen v Parry Field Lawyers Ltd [2022] NZDC 17315

New Zealand District Court (Judge R Neave), 20 September 2022

The Disputes Tribunal is established by the *Disputes Tribunal Act 1988* (NZ). Under s 17(2) of the Act, a dispute cannot be the subject of proceedings in the Disputes Tribunal if the issues in dispute are the subject of proceedings between the same parties in another court or tribunal, unless the proceedings are transferred to the tribunal from a court, or the claim before the other court or tribunal is withdrawn, abandoned, or struck out. The question was whether a Lawyers' Standards Committee ('the Standards Committee') established under s 126 of the *Lawyers and Conveyancers Act 2006* (NZ) is a 'tribunal' within the meaning of s 17 of the *Disputes Tribunal Act*.

The proceeding

Mrs Neilsen and her son engaged Parry Field Lawyers Limited ('Parry Field') to represent them in respect of High Court litigation and advice regarding properties they owned. Mrs Neilsen ('Neilsen') made a complaint to the Law

Society relating to the charges in the invoices that Parry Field presented for their services. A Standards Committee of the Law Society ('the Standards Committee') issued a decision addressing the issues Neilsen had raised and determined to take no further action on the complaint.

Dissatisfied with this outcome, Neilsen subsequently filed a claim against Parry Field in the Disputes Tribunal asserting that she had been charged incorrectly by Parry Field. Parry Field submitted that s 17(2) of the *Disputes Tribunal Act* precluded the tribunal from considering the claim because the Standards Committee had already determined the issues. The Disputes Referee determined that she had jurisdiction because the Standards Committee was not a 'tribunal' within the terms of s 17(2). The Referee proceeded to hear Nielsen's claim and dismissed it on the ground that it was not proven.

Nielsen appealed to the District Court on the ground that the hearing by the Referee was procedurally unfair. Parry Filed filed a cross-appeal challenging the Referee's jurisdiction to hear the claim. Nielsen subsequently withdrew her appeal, but Parry Field opted to continue the cross-appeal. The Law Society was subsequently granted leave to join the cross-appeal as intervener.

A preliminary issue was whether the cross-appeal was within the limited jurisdiction of the District Court to hear an appeal from a decision of the Disputes Tribunal. Neave J decided that if the Standards Committee is a tribunal for the purposes of s 17(2), the Referee would have acted in a manner that was unfair to Parry Field by determining the proceeding without jurisdiction. On that basis, an appeal would lie ([24]).

Was the Standards Committee a 'tribunal'?

After receiving submissions from Parry Field, Neilsen, the Law Society and a court-appointed amicus, Judge Neave determined the question of whether the Standards Committee was a 'tribunal' within the meaning of s 17(2).

His Honour observed that the predecessor section to s 17(2) was inserted to prevent a party to proceedings in another court or tribunal from initiating concurrent proceedings in a tribunal. He said that the provision must also apply to rehearing a claim that had already been determined in another court or tribunal, unless the matter is transferred from a court or the claim is withdrawn, abandoned, or struck out. It follows that if the matter has been determined in another court or tribunal, the proviso to s 17(2) does not apply, and the tribunal did not have jurisdiction to rehear the matter that has already been determined elsewhere ([70]).

His Honour observed that the submissions, which had largely focussed on whether the Standards Committee is a 'tribunal' generally, had failed to contextualise the issue. The question was whether the Standards Committee was a 'tribunal' within the meaning of s 17(2). It was significant that the word 'tribunal' in s 17 is paired with the word 'court'. Section 17 refers to a particular type of tribunal, being one that is relevantly similar to a court ([72]). The question is which qualities of a tribunal make it similar to a court for the purpose of s 17 ([73]).

Other legislation

The Ministry of Justice, which administers the courts and tribunals in New Zealand, provides a list of tribunals on its website from which the Standards Committee was omitted ([76]). His Honour examined other legislation for the courts and tribunals sector. In schedule 3 of the *Court Security Regulations 2019* he found the same list of tribunals as on the Ministry's website ([77]-[80]).

The *Parliamentary Privilege Act 2014* (NZ) defines 'tribunal' (which in that Act is always used in tandem with 'court') in a manner which requires the power to summons a witness. The Standards Committee was not a tribunal under that definition ([81]-[82]).

His Honour found that the *Legislation Act 2019* (NZ), in its definition of 'proceeding', showed a parliamentary intention across all legislation to distinguish between proceedings before a court or tribunal and proceedings before investigative and administrative bodies. His Honour considered the proceeding before the Standards Committee to fall into the latter category ([84]).

Weighing the indicators

Judge Neave said that the following attributes of the Standards Committee were not conclusive indicators of a 'tribunal', but were procedural features to facilitate investigative functions:

- the power to hear evidence under oath,
- being partly subject to the Evidence Act,

- the fact that witnesses and lawyers before the Standards Committee have the same privileges and immunities as they would have before a court of law, and
- the power to award costs ([91]).

The fact that the Standards Committee's powers are statutory and are subject to judicial review or appeal does not distinguish it from other statutory decision makers which are not necessarily tribunals ([92]).

Judge Neave found that the only feature that could make the Standards Committee a tribunal was its power to make final determinations.

His Honour then considered the indications against it being a tribunal ([94]). To be relevantly similar to a court, a tribunal had to be both 'resoundingly judicial in nature' and be '[an] independent bod[y]s with no other role than to determine an issue that is placed before [it]' ([105]). He found that the Standards Committee lacked these attributes.

His Honour found that the Standards Committee had many ancillary powers that go beyond the role of a tribunal as generally understood. The powers included the ability to lay charges before a tribunal and appeal any decisions made, to apply for search warrants, to investigate on its own motion and to take possession of trust funds held by a legal practitioner ([100]).

Furthermore, the Standards Committee was not independent of the Law Society, but was effectively subject to its control ([99]). Its members were appointed by the Law Society, not by a Minister (*Lawyers and Conveyancers Act* ss 126, 128). Regulations made under that Act provided that the Standards Committee was bound to comply with any practice notes or requirements made by the Law Society regarding the procedures to be followed and the manner in which it was to exercise its functions. His Honour remarked:

> This certainly is not the kind of independent tribunal which should be determining the rights and obligations of parties to a proceeding to the exclusion of a neutral decision-making body such as the Disputes Tribunal ([99]).

For these reasons, Judge Neave concluded that, on a 'plain meaning' interpretation, the term 'tribunal' in s 17 of the *Disputes Tribunal Act* did not include the Standards Committee ([104]). It followed that the Disputes Referee did not act outside her jurisdiction in determining the proceeding, and that there was no unfairness to Parry Field ([107]).

Order

The cross-appeal was dismissed, with no order for costs.

Bias – unfair comments during the hearing

In the following case New Zealand's District Court found that remarks made by the Disputes Referee in the course of a hearing, being remarks about matters in issue, created 'an appearance of prejudgment and partiality, and a real and appreciable risk that the outcome of the hearing was prejudicially affected'.

Wellington Combined Taxis Ltd v Lalloo [2022] NZDC 14442

New Zealand District Court (Judge B Davidson), 3 August 2022

The respondent Mr Lalloo was a taxi driver for and a shareholder in the appellant ('WCT'), a co-operative taxi company. Under an operator's contract he was bound by certain company rules and disciplinary procedures ('the rules'). In May 2021, WCT alleged he breached various rules of conduct and imposed a disciplinary penalty of a fine plus demerit points. He sought review under the rules, and on 22 July 2021 a Review Panel upheld the original penalty. He lodged a claim based in contract with the Disputes Tribunal. WCT's lawyers requested transfer of the proceedings to the District Court and objected to the Tribunal's jurisdiction to deal with it as a contract dispute. The Tribunal refused WCT's request to deal with the transfer application prior to the hearing.

Failure to deal with the transfer application at the outset

At the hearing, the Disputes Tribunal referee determined that there was jurisdiction for the claim in contract. She found that WCT had breached rule 19.3 of the rules (which relates to natural justice and fairness) by not giving Lalloo full details of the allegations against him; by imposing excessive and disproportionate

penalties; and by including a member of the review panel in the hearing. The referee set aside the fine and demerit points.

In response to arguments raised by WCT, the Court found that the Disputes Tribunal did have jurisdiction to hear the matter as a contract dispute. The Tribunal could have dealt with the transfer application prior to the hearing and preferably should have done so. The Referee should at least have dealt with the transfer application at the beginning of the hearing ([27]-[29]). Her failure to do so 'did not pollute the hearing to the extent that it became unfair and the result prejudicially affected' ([34]).

Bias

In dealing with allegations of bias raised by WCT, the Court applied the formulation of Judge Neave in *Marbello International Ltd v Martin Douglas* where His Honour said:[3]

> A hearing in which the judicial officer has created the impression that he is favourably disposed to one side or another is a fundamentally flawed proceeding … Where a hearing has occurred in which there is a real possibility of bias, whether or not the apparent prejudice has affected the outcome, the parties have not had a fair hearing before an apparently impartial tribunal.

From the transcript of the Disputes Tribunal hearing, WCT identified remarks of the Referee which, taken together, showed that the Referee was adversely disposed against the company. Counsel for Mr Lalloo submitted that these were merely passing, off-hand and provisional remarks which did not represent her concluded view.

The Court said that the Referee's comments needed to be looked at in the light of the issues to be determined in the case. Of particular concern were the following remarks, each of which went to issues at the very heart of the dispute she was hearing:

- that she believed that a member of the Review Panel had been 'removed' from WCT,
- that she was appalled with the way the company treated its drivers,
- that the company's employment practices reminded her of a communist country, and
- that to comment further would get her into trouble ([39], [41]).

3 District Court Christchurch, CIV-2008-009-002926, cited at [35].

The comments were made in the course of the hearing before all the evidence had been heard and tested. Since they went directly to matters in issue, they could not be dismissed as off-hand. Taken together, they 'create an impression that the Referee was favourably disposed to Mr Lalloo; or to put it another way, unfavourably disposed to WCT' ([40]). His Honour concluded:

> These were unfair comments during a hearing. They carry an appearance of pre-determination and partiality, and a real and appreciable risk that the outcome of the hearing was prejudicially affected. ([42])

Order

The appeal was granted. The orders of the Referee were quashed and a rehearing in the Tribunal was directed. WCT was directed to serve a memorandum on its costs.

Consent to sterilise a child with impairment

In this case the Guardianship Division of QCAT made an order, on the application of the child's mother, giving consent for the sterilisation of a 10-year-old child with severe autism and intellectual impairments to prevent the anticipated adverse consequences of menstruation. The case note explains how the tribunal applied the criteria and conditions for the giving of consent under the *Guardianship and Administration Act 2000* (Qld) in the unusual circumstances of the case.

In an application about matters concerning CM [2022] QCAT 263

Queensland Civil and Administrative Tribunal (Members Endicott, Royland, Burson, 30 May 2022

[Names were anonymised by the tribunal.]

CM was a 10-year-old girl with severe autism disorder and intellectual impairment who was on the cusp of puberty. Her mother applied to QCAT under s 80C(1) of the *Guardianship and Administration Act 2000* (Qld) ('Guardianship

Act') for the tribunal's consent to the sterilisation of CM by hysterectomy. The consent could only be given if the tribunal was satisfied that sterilisation of CM was in her best interests (Guardianship Act 80C(2)).

CM's parents, her separate representative appointed by the tribunal, and her treating clinicians participated in the proceedings. The treating practitioners included Dr PH, CM's general medical practitioner; Dr P, her paediatrician; Dr A, her gynaecologist; Dr N, her adolescent psychiatrist; FM, her psychologist and SJ, her social worker.

Chapter 5A of the Guardianship Act provides the legal framework for the giving of consent to a procedure that will result in the sterilisation of a child. Section 80D sets out criteria to be met before the tribunal can be satisfied that the sterilisation of a child with an impairment is in the best interests of the child. The tribunal structured its reasons around its conclusions in relation to each of the s 80D criteria.

Identification of a medical reason – s 80D(1)(a)

The reason for the proposed sterilisation must fall within one or more of the medical reasons stated in s 80D(1)(a). The tribunal accepted that all the evidence before the tribunal from CM's mother, CM's treating doctors and an independent gynaecologist established that 'permanent prevention of the onset of menstruation for CM is a necessity' ([32]).

Child with impairment – s 80D(1)(b) and (c)

The second and third criteria relate to the effect of the impairments on CM's capacity to understand and give consent to the proposed sterilisation at the present time or when she turns 18. The evidence before the tribunal enabled it to find that CM had an intellectual impairment and was therefore a child with an impairment for purposes of Chapter 5A of the Guardianship Act. The evidence from Dr P (paediatrician), and from FM (psychologist) supported the tribunal's finding that 'CM's impairment results in a substantial reduction of her capacity for communication, social interaction and learning', and 'placed her in an extremely low range of functioning' ([39]). The tribunal further concluded that the impairment was permanent and that 'when CM turns 18, she will have impaired capacity for giving her consent to sterilisation' ([40]).

Whether sterilisation can be postponed – s 80D(1)(d)

The medical evidence indicated that the onset of CM's puberty had been medically delayed by treating her with Lucrin, a drug which could no longer be administered due to concerns about her excessive weight gain ([42]). Dr PH said that CM would begin to menstruate within six months. The psychologist FM and psychiatrist Dr N assessed a serious risk of danger to CM's psychological and physical health if she were to experience menstruation.

The tribunal concluded that 'if CM were to experience even one menstrual period, her behaviour is likely to escalate and result in self-harm and harm to those persons around her' ([44]). Accordingly, if consent to sterilisation were to be granted, it could not reasonably be postponed.

The tribunal then proceeded to consider the statutory requirements in s 80D(3) for determining whether the proposed sterilisation was in the child's best interests.

Respecting CM's dignity and privacy – s 80D(3)(a)

The purpose of giving consent to the proposed sterilisation by hysterectomy would be to prevent the harmful behaviour and distress to CM that would be triggered by the sight of her menstrual blood, and also to prevent the likely need for her to be sedated during her periods. The tribunal was satisfied that giving its consent to a procedure that would avoid those outcomes would be consistent with maintaining CM's dignity ([52]-[53])

Views and wishes of CM – s 80D(3)(b)(i)

The separate representative for CM presented a report from GT, a social worker, as to CM's views and wishes. After observing her behaviours at home with her carers, and considering her clinical diagnoses, GT decided it would be inappropriate for him to interview CM. He expressed the opinion that CM's profound intellectual impairment and autism disorder precluded her from forming any views or wishes about sterilisation, or from being aware that she had undergone a sterilisation procedure ([61]). She would, however, be aware of menstrual bleeding, and her resulting distress would compound her challenging and potentially self-harming behaviours ([63]). In GT's view,

the expected escalation of CM's maladaptive behaviours would make it even more difficult for her carers to maintain the emotional and physical stability that she needed ([59]-[65]).

The tribunal agreed with GT's conclusion that the proposed sterilisation would promote CM's right to progress safely through her life 'unimpeded by the risk of experiencing an unnecessary and unavoidable level of debilitating psychological and emotional trauma' associated with menstruation ([66]-[67]).

Views of the parents, health providers and child representative – s 80D(3)(b)(ii)

Both of CM's parents, who were her carers, supported the tribunal giving consent to sterilisation. The application for consent was supported by CM's separate representative, and each of CM's treating medical and allied health practitioners who provided evidence ([68]-[71]). The tribunal noted that, in reaching their conclusions, the clinicians had had the benefit of conferring with the Clinical Ethics Consultation Service at the Children's Hospital ([71]-[73]).

Well-being of the child and alternative forms of health care – s 80D(3)(c)

The tribunal accepted the conclusion of Dr A, CM's treating gynaecologist, that none of the alternative forms of health care 'would be adequate to ensure the avoidance of menstrual bleeding in this child with a blood phobia and with a propensity to self-harm and aggressive outbursts over the sight of blood' ([87]). Nor was there any suggestion of further alternative health treatments on the horizon that would completely and permanently prevent menstruation for CM ([90]).

Short-term and long-term risks associated with the proposed sterilisation – s 80D(3)(c)(iv)

Dr A stated that the hysterectomy would be performed via laparoscopy, if possible, otherwise by extraction of the uterus via abdominal incision. Despite her young age for undergoing a hysterectomy, the tribunal considered that 'the risks are manageable and adequately planned for by her clinicians' ([100]).

Orders

Having addressed all the requirements of the statutory framework, the tribunal concluded that it was in the best interests of CM to undergo sterilisation by hysterectomy before menarche and gave consent for that to occur within six months ([102]-[106]. To protect the privacy of CM it made orders restricting access to the documents, while authorising publication of the de-identified reasons.

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