



Human Rights
Commission
Te Kāhui Tika Tangata



10 Human Rights Cases – 2007

Tekau Kēhi Tika Tangata – 2007

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Please note names and other details have been changed to protect the
privacy of the parties involved.

Complaints to the Human Rights Commission in 2007

The 10 cases included in this publication demonstrate just some of the ways human rights issues impact many aspects of the lives of New Zealanders. In the workplace, where family responsibilities, or sex may be taken into account – appropriately or inappropriately. In the provision of goods and services, where assumptions and stereotypes may come into play. In education, where support and compromise are essential to allow children with different needs and beliefs to equally participate in school life.

The cases reflect the diverse range of issues brought to the Human Rights Commission in 2007 for resolution through its Disputes Resolution Service or through the range of approaches available to the Commission through its broader mandate. They demonstrate that many New Zealanders will be affected by a human rights issue in the course of their lifetime.

In the 12 months ending 30 June 2007, the Commission received a total of 5,796 human rights complaints and enquiries. Of these, 1,665 were complaints with an element of unlawful discrimination.

Consistent with the trend of the last five years, race-related and disability discrimination complaints made up over 60% of all unlawful discrimination complaints received.

The Commission receives an increasing number of complaints that raise human rights issues other than unlawful discrimination. They cannot currently be progressed through the Commission's

statutory dispute resolution process. However, the Commission uses other powers to assist their resolution through the provision of information, by referral, by intervening to aid communication between the parties and by encouraging more inclusive policy and practice that better reflects human rights standards.

Only a very small number of complainants fail to settle and seek legal representation at the Human Rights Review Tribunal from the Office of Human Rights Proceedings.

One example was the landmark gender discrimination case about occupational segregation at Talley's processing plant in Motueka. The complainants, Caitlin Lewis and Brett Edwards, demonstrated immense courage and commitment in pursuing the case to its conclusion on appeal to the High Court this year.

Family Status Discrimination

On average around four to five percent of complaints made to the Commission annually are on the ground of family status discrimination.

Family status refers to having or not having dependents, being married to (or in a civil union or de facto relationship with) a particular person or being a relative of a particular person.

This form of unlawful discrimination has traditionally affected sole parents, women, and parents with young children.

A recent case dealt with by the Commission resulted in the acceptance of an applicant as a Justice of the Peace after being initially turned down because his wife was a JP. This case and the two that follow demonstrate some of the range of issues covered by family status discrimination.

1

Unsuitable by association

WHAT HAPPENED

Mary applied for a position with a large national organisation, had an interview and was given the impression she had been successful. She was shown around the workplace including where she would be sitting. Mary was excited at the prospect of beginning a new job.

Shortly thereafter she was advised that she had not secured the job because of her ex-partner's criminal record. Mary queried how this information had become known to the interview panel, how the recruitment process had proceeded to the point where she was congratulated on her success then advised of the opposite, and

critically, the relevance of her ex-partner's record to her ability to do the job.

Mary was trying to move on with her life and was shocked to learn she was being denied employment not because of her ability but because of who her ex-partner was.

THE DISPUTES RESOLUTION PROCESS

In mediation Mary was given the opportunity to tell representatives of the organisation about her distress at finding out she did not have the job. They acknowledged that the recruitment process was flawed and apologised to Mary.

Mary's complaint made the organisation aware of the need to review its recruitment procedures and re-train those involved in recruitment. It undertook to provide training and acknowledged the learning that resulted.

OUTCOME

In addition to the apology, Mary received \$18,000 compensation in recognition of the stress she experienced.

MARY'S STORY

"When the job offer was withdrawn I felt shattered...as if...no one would ever be able to respect me, because of who I was married to. It took me several months to recover enough to get angry instead of just being sad.

From the moment [I received the] personal apology, I felt as if I was back in control of my life again. Somebody had treated me unfairly, and I was addressing it. I

felt really proud of myself, and I stopped feeling ashamed and unworthy.

[The mediator] supported me all the way through, always checking...that I had said everything that I wanted to say. I'm really pleased with what I've got from dealing with the Human Rights Commission, which is mainly my self esteem back. I had a problem, but there was a process where I could seek redress, and now I feel I'm able to move on."

2

Solo-dad left out

WHAT HAPPENED

Roger is a young man who worked at a convenience store for several years. His wife developed a serious illness and died early in 2006, leaving him to care for their baby son.

The store allowed Roger to take unpaid leave for a number of months during his wife's illness and he understood they would keep in contact with him about his return to work.

Soon after his wife died Roger wanted to return to work but he had not heard from the company. He contacted them three weeks after his wife's death. By that time the business had relocated and had employed new staff.

Roger was upset about this, but was relieved when the company created a position for him doing afternoon shifts. This worked well for his childcare arrangements.

After a time he was told this no longer suited the store's needs and he would have

to work an evening shift, or resign. Roger felt he had no option but to resign.

THE DISPUTES RESOLUTION PROCESS

Roger made a complaint of discrimination on the ground of family status. The store was notified of the complaint and agreed to attend mediation.

The day before the mediation the mediator travelled to meet with Roger, to discuss how mediation works and how he might present his case. Roger was planning to attend on his own, but the mediator encouraged him to bring his son and new partner along for support if he wanted.

The company was represented by three managers, one a lawyer from their human resources department. Roger attended with his new partner and son.

OUTCOME

Roger's complaint was resolved at mediation. He received a verbal apology, and a signed agreement which included the offer of a reference and employment in the future should he wish to take it up.

Sex Discrimination

Complaints on the ground of sex discrimination have increased from 7.6% in 2005 to 13.8% in 2007. While some of the complaints of the past year relate to different treatment of men and women, there has been an increase of transgender complaints and complaints relating to pregnant and/or breastfeeding women. The increase in transgender complaints and enquiries can be attributed to the impact of the Commission's Transgender Inquiry.

3

Sex discrimination at seafood company

WHAT HAPPENED

Caitlin Lewis and her partner Brett Edwards started seasonal work in fish processing during the hoki season at Talley's processing plant in Motueka.

Caitlin Lewis was allocated work as a fish trimmer, and Brett Edwards was allocated work as a fish filleter. Historically Talley's had allocated jobs on the basis of gender, but it meant that Caitlin Lewis was paid less than Brett Edwards because filleting was paid more than trimming. Talley's believed that filleting was harder work, more pressured, required regular heavy lifting and provided fewer opportunities for workers to socialise.

THE HUMAN RIGHTS COMMISSION AND OFFICE OF HUMAN RIGHTS PROCEEDINGS

The allocation of men and women into the two different knife work roles and the difference in pay prompted Caitlin Lewis to complain to the Human Rights Commission on the ground of sex discrimination.

The complaint was received in 2000 prior to amendments to the Human Rights Act that established the current disputes resolution process. At this time the Commission investigated her complaint and the then Complaints Division formed the opinion that it had substance.

When Talley's refused to settle she approached the Office of Human Rights Proceedings and her case was accepted for representation by the Director in 2002. The Human Rights Review Tribunal partially upheld the complaint in 2005 and the decision was then appealed by both parties to the High Court.

In June 2007 a Wellington High Court Judge and two members of the Human Rights Review Tribunal ruled in favour of Caitlin Lewis and against Talley's. The High Court judgment found the filleting and trimming jobs were "substantially similar" and that Talley's had discriminated against Caitlin Lewis by paying her less money than filleters for her work.

"The reason she received less money was because she was made a trimmer and the reason she was made a trimmer was because she was a woman," the judgment said.

The landmark decision means employers should not be segregating women into work that is substantially similar to work being undertaken by men but with less money. The court said what is "substantially similar" needs to be assessed by looking at the core aspects of jobs rather than difference in detail.

4

OUTCOME

Talley's agreed to implement an EEO programme, to train managers about the Human Rights Act and pay compensation to Caitlin Lewis.

Insurance a-gender?**WHAT HAPPENED**

Lucy is a transsexual woman (mtf). She applied for life insurance with her partner when they got a mortgage. Her partner's application was approved almost immediately but Lucy had no response after six weeks. She suspected that her application was taking longer to process because she disclosed that she had gender reassignment surgery. Lucy had experienced discrimination in the past because of her gender identity and was concerned that it could be affecting such an important part of her life.

THE HUMAN RIGHTS COMMISSION

Lucy approached the Commission for information about her human rights in relation to her life insurance application.

She then received a letter from the insurance company stating that her application had been deferred for one year because it fell outside the level of risk which could be covered under the company's usual underwriting guidelines. Lucy was very upset about this.

She discussed the matter with her doctor who was also distressed about the decision because there did not seem to be any good reason for deferring the application. Her insurance agent and her doctor requested that the insurance company reconsider its decision.

OUTCOME

The company has now approved Lucy's insurance application.

Lucy was happy with the outcome and said that being able to discuss the situation with a Commission mediator had helped support her through the process.

The Commission has published guidelines on the relationship between the Human Rights Act and the provision of insurance — Guidelines: Insurance and the Human Rights Act 1993 are available from the Commission.

Disability Discrimination

Unlawful disability discrimination is consistently the second largest source of complaints to the Commission. The most frequent areas of complaint for disability discrimination are employment followed by goods and services.

The nature and number of complaints to the Commission and other agencies are indicative of the extensive barriers that remain to disabled people's full participation in New Zealand society.

5

Jenny misses out on school camp

WHAT HAPPENED

Jenny has an intellectual disability. Her school decided she could not attend a school camp because they felt her behaviour posed a potential health and safety risk. The school had insufficient resources to reduce the risk, by, for example, providing a teacher's aide. In their view Jenny would have needed one on one attention. Jenny's parents were not happy, believing that the school should have discussed their concerns about her attendance with them.

Jenny's parents complained to the Commission when they were told she was not allowed to attend the camp.

THE DISPUTES RESOLUTION PROCESS

At mediation it became clear there had been a breakdown of communication between Jenny's school and home. It was evident that good communication was vital to ensuring that Jenny's needs are met at school. During the process the school and Jenny's parents were able to

sort out their differences, acknowledging where things had gone wrong, and where individual communication styles might not have been helpful. Jenny's parents were frustrated when their views were not taken into account, and when responses from the school were slow. This frustration was felt by the school to be unhelpful.

However, they agreed that together they could have come up with possible solutions to any concerns – for example, one of the parents attending camp with Jenny.

OUTCOME

Although Jenny did not attend that particular school camp, processes were established to deal with the lack of notice, consultation, and communication by the school in its decision that Jenny couldn't attend.

They worked together to change the situation. The school agreed to review its policy on its risk analysis for students attending EOTC (education outside the classroom) in consultation with Jenny's parents and the student support person from the Ministry of Education. They agreed that the starting point is that all students participate in EOTC. Where the school identifies risk, the policy requires consultation with parents and with other useful sources to ensure that all reasonable steps are taken to remove barriers and meet the needs of the student.

6

Trying to make an accessible journey

WHAT HAPPENED

The Taieri Gorge Railway is New Zealand's longest tourist train. Based in Dunedin, the train has one of the few accessible carriages in New Zealand with a wheelchair hoist and accessible toilets.

Labour Weekend 2006 was the centenary celebration of the Railway and the train was fully booked months in advance.

Francis is a local and a railway enthusiast. She has a spinal injury and uses a wheelchair. She and a friend were booked on the train for Labour Weekend. A few days out from the event Francis learned there had been a mistake in the booking and the accessible carriage was not available for the trip she had planned.

Francis was extremely disappointed and annoyed because she had requested the carriage when making the booking. She rang the Railway but they were unable to change carriages at that late date.

THE DISPUTES RESOLUTION PROCESS

Francis made a complaint to the Commission of disability discrimination. She explained the complaint was not just about her but for all disabled people who want to use the accessible carriage.

Representatives of the Railway were very willing to attend mediation, so a mediator traveled to Dunedin that week to facilitate a meeting.

OUTCOME

The meeting was a success and had a number of positive outcomes. The Railway apologised for the mistake and offered Francis a free train trip with a group of friends on the accessible carriage at a convenient time. She was refunded for the Labour Weekend event.

In addition, at Francis' suggestion the accessible carriage was to have the International Symbol of Access affixed to it.

MEDIATION HIGHLIGHT

Both Francis and the Railway were positive about the mediation process.

Francis said the meeting had provided a forum to work together and was the starting point for dialogue which continues, a year after the meeting took pace.

The Railway commented that they "were delighted with the mediation; the outcome was a win, win for all. Our advice to other parties who find themselves in this situation is to accept mediation given the expertise and professionalism of the staff at the Human Rights Commission."

No drugs allowed

7

WHAT HAPPENED

Lisa had a contract for services as a counsellor at a residential facility for drug and alcohol addiction.

The facility had a code of conduct, which prohibited staff and residents taking psychotropic (mind-altering) drugs. Lisa had been taking anti-depressant

medication for some time and was unaware that the employer would have a problem with this.

A staff member found that Lisa was taking the medication and reported her to their employer. Lisa was advised she was required to attend a disciplinary meeting as she had breached the facility's code of conduct.

Lisa's lawyer was communicating with the employer, and through a series of events the parties never got to meet. Lisa was subsequently advised her contract was terminated.

THE DISPUTES RESOLUTION PROCESS

At this time Lisa lodged a complaint with the Commission, alleging discrimination on the ground of disability. The facility declined to take part in mediation. Lisa took her case to the Director of Human Rights Proceedings. When the outcome of a similar fact case was known¹, the Director sent the complaint back to the Commission for mediation.

OUTCOME

The complaint was settled in mediation with Lisa receiving an apology and a confidential financial sum.

1 Another employee was also dismissed and chose to take a personal grievance. The Employment Relations Authority found in favour of the employer in that case. In July 2007, the employee lodged an appeal. The case was settled out of court.

Sexual Harassment

Sexual harassment complaints make up seven percent of all complaints annually to the Commission on average. Sexual harassment is unwelcome or offensive and harmful behaviour of a sexual nature in public life; or unwanted requests for sex, for example by a colleague, combined with an implication that not meeting those requests will be disadvantageous.

Most sexual harassment occurs in the workplace and the vast majority of complainants are women. Sexual harassment in the workplace can lead to a hostile workplace, absenteeism, low staff morale, lost productivity, loss of trained and experienced staff, recruiting and training costs and sometimes legal costs.

Employers can protect their workplace against sexual harassment by implementing an effective sexual harassment prevention programme which includes a clear policy statement, a process for dealing with complaints, and training.

Joan grew stressed to the point that she was missing work. She felt unable to talk directly to the manager for fear of disciplinary reprisal.

THE DISPUTE RESOLUTION PROCESS

Joan's complaint to the Human Rights Commission resulted in a mediation meeting with the manager and Chief Executive of the organisation present.

The manager was from a culture where demonstrative touching to acknowledge and show appreciation is the norm. He was shocked to learn that it was perceived differently by Joan. He acknowledged her discomfort and apologised. It was agreed Joan would report to a different manager and timetables were re-arranged to separate the two as much as possible.

OUTCOME

The organisation is working on a Code of Conduct which will cover respectful ways of working together and will be introduced with training for supervisors. The complaint was an eye-opener for the organisation and it valued the reminder to tighten up its procedures and training.

8

Everyone sees things differently

WHAT HAPPENED

Joan worked hard in her role at a factory. Although she appreciated recognition for the quality of her work, she was uncomfortable that her manager expressed his approval by physical touch and caress. She found this inappropriate.

Joan mentioned to her supervisor that she didn't like the manager's ways. However, the supervisor did not pick up that this was a serious and disturbing aspect of being at work for Joan.

Racial Harassment

Racial harassment is behaviour that is racist, hurtful or offensive and is either repeated or serious enough to have a detrimental effect on a person. Racial harassment may include making offensive remarks or jokes about a person's race, mimicking the way a person speaks, calling a person racist names or deliberately mispronouncing a person's name.

A consolidation of race based complaints (including racial harassment – this year making up 5.8% of complaints) consistently makes up the largest number of complaints to the Commission. These complaints are dominated by allegations of unlawful discrimination in employment and provision of goods and services.

circumstances of his leaving still bothered him. He resented having to leave a job he enjoyed because of other's behaviour. He made a complaint to the Commission.

THE DISPUTES RESOLUTION PROCESS

The supervisor attended a mediation where he apologised for the comments and explained he did not mean to be derogatory or racist in any way. He admitted to having a gruff manner, particularly when under pressure. He said he would try to be more aware of his language and he would talk to the other workers about this as well.

OUTCOME

Ron was offered his job back, but he declined as he had moved on to new employment.

MEDIATION HIGHLIGHT

Racial harassment can be unintentional, but is always unacceptable. Although a person may be unaware of the effect of their actions, they can still be held responsible. What is important is how the behaviour affects the person it is directed at.

In this case, the mediator said the mediation was a success because both parties listened to what the other had to say.

9

Minding your language

WHAT HAPPENED

Ron is a Maori man in his late 40s who was working as a labourer in the building industry, work he enjoyed.

The language in the workplace was typically informal, which Ron was not too bothered about. However some comments his supervisor made did bother him – Ron felt they crossed a line from being informal to offensive.

In his hearing, the supervisor referred to Ron as black, black arse, or that black c...t. After a time other workers picked up on this language and began referring to Ron in the same way. Ron tried to brush off the remarks but as the behaviour went on he felt increasingly uncomfortable at work and resigned.

Ron found other work but the

Ethical Belief Discrimination

Complaints on the ground of ethical belief (not having a religious belief) generally come in at under one percent of all complaints to the Commission. This may reflect New Zealand's generally secular public life. However, the conflict between secularism, and selective recognition of some spiritual or religious traditions but not others within state institutions, has prompted a number of complaints. As evidenced by the 2006 Census, the diversity of belief has increased significantly, with more people (over 30%) professing no religion, and belonging to non-Christian faiths such as Islam, Hinduism and Buddhism.

10

A matter of faith

WHAT HAPPENED

Six year-old Richard brought home a consent form from school inviting parents to approve their child's participation in a regular 30 minute religious instruction programme. Richard's parents chose not to have him participate.

Because the school would not provide supervision for Richard during the time of religious instruction, he had to be kept at home each Friday morning until the programme was over and usual classroom activities resumed.

Richard's parents felt this was unfair. They complained to the Commission that because of their ethical belief, Richard was being discriminated against in his education.

THE DISPUTES RESOLUTION PROCESS

Following a mediation meeting, the school

agreed to supervise Richard in the library while his classmates attended religious instruction in the classroom. It was also agreed that the school board would review and likely amend the consent form.

While Richard's parents were pleased with that outcome, the question of whether the practice itself was discriminatory remained for them and their complaint was taken to the Crown for its response. The Crown's position was that the Education Act 1964 does allow a school committee to close a school for not more than 20 hours in a school year for the purposes of religious instruction.

OUTCOME

The mediation process enabled Richard's particular situation to be changed so that he was able to be supervised at school. The school also undertook to consider changes to its religious instruction programme. However, mediation was not able to progress the part of the complaint relating to the legislative provision which provides for religious instruction programmes.

Over recent years, a number of complaints have been received by the Commission about this practice as it is applied within different schools. In most cases, parents claim that it is their religious or ethical belief that is behind their decision not to permit their child to attend religious instruction and as a result of that, their child is being treated unfairly in their education. These complaints have raised a number of issues including the content of the religious instruction programme itself;

that the child is excluded from their peer group; that no education is available to them during the time of the programme; that the school does not take responsibility for supervision of the child during the programme and about the process by which a school chooses whether or not to close for religious instruction.

Recognising that the issue is one that is frequently brought to the Commission, and that it clearly has broader human rights implications, the Commission has developed a 'frequently asked questions' document. This resource is intended to provide guidance to School Boards of Trustees on the legal and human rights considerations involved and to encourage discussion on religious instruction in schools.



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