

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

**CIV 2013-485-657
[2013] NZHC 1853**

UNDER the Judicature Amendment Act 1972

IN THE MATTER of a decision under s 16 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

BETWEEN V R
Plaintiff

AND JUDICIAL CONDUCT
COMMISSIONER
First Defendant

M PETERS
Second Defendant

Hearing: 24 July 2013

Counsel: L Theron for First Defendant
No appearance for Plaintiff
No appearance for Second Defendant (abiding outcome)

Judgment: 24 July 2013

JUDGMENT OF THE HON JUSTICE KÓS

[1] The plaintiff issues proceedings against several defendants. Winkelmann J strikes the proceeding out. The plaintiff complains about the conduct of the Judge to the Judicial Conduct Commissioner. He dismisses the complaint for want of jurisdiction. The plaintiff applies for judicial review of the dismissal decision. The Commissioner seeks strike out of the review proceeding. Peters J strikes it out. The plaintiff complains about the conduct of Peters J to the Commissioner. The Commissioner dismisses that complaint too for want of jurisdiction. The plaintiff applies for judicial review of the second dismissal decision. The Commissioner

seeks strike out of the second review proceeding. Alternatively, summary judgment. Any reader paying attention will by now have discerned a pattern.

[2] At the conclusion of this morning's hearing I struck the proceeding out. These are my reasons for that decision. I can, and should, be brief.

Background

[3] In 2009 the plaintiff issued proceedings against a number of people, including the Attorney-General, Solicitor-General, Commissioner and Chief Justice. The claim alleged conspiracy to pervert the course of justice, misfeasance in a public office, violation of human rights, conspiracy to injure by unlawful means and malicious prosecution. The proceedings were struck out by Winkelmann J in November 2009.¹ Winkelmann J said:²

Much of the pleadings simply takes the form of rambling invective ... I am satisfied that all of the causes of action in the present proceeding should be struck out on the grounds that the claim cannot succeed. Moreover the proceedings are an abuse of process because they attempt to relitigate existing proceedings.

An appeal to the Court of Appeal failed.³

[4] The plaintiff complained about Winkelmann J to the Commissioner. The complaint was directed at the substance of the judgment. It also alleged conflict of interest and bias. The Commissioner rejected the complaint. He found no conflict or bias on the Judge's part. And he considered that the complaint was seeking to call in question the legality or correctness of the judgment. Such questions are beyond the jurisdiction of the Commissioner under s 8(2) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act):

It is not a function of the Commissioner to challenge or call into question the legality or correctness of any instruction, direction, order, judgment, or other decision given or made by a Judge in relation to any legal proceedings.

[5] The plaintiff then sought judicial review of the Commissioner's decision. The application for review alleged error of law, breach of natural justice, failure to take into account relevant considerations, consideration of irrelevancies and procedural impropriety. In a judgment delivered 16 October 2012⁴ Peters J found none of the causes of action reasonably arguable and struck the proceeding out.

[6] An appeal against that judgment has been lodged. And on the same day the plaintiff lodged a complaint against Peters J with the Commissioner. To the extent it can be discerned, the complaint makes three charges. First, that the Judge had assumed the Commissioner's "statutory power to make merit determinations on judicial misconduct". That is a curious allegation to make. The Commissioner does not make merit determinations on judicial misconduct.⁵ And Peters J was seized of the question only because of a judicial review application brought by the plaintiff himself.⁶ Secondly, that the Commissioner had unlawfully relinquished that power to the Judge. Not, on its face, a complaint about the Judge. Thirdly, that the Commissioner faced a conflict of interest in determining the present complaint. Ditto. The plaintiff said that he was "open to suggestions" as to how the Commissioner might deal with that conflict.

[7] On 26 February 2013 the Commissioner issued a decision dismissing the complaint under s 16(1)(a) of the Act. First, the Commissioner determined that he did not have a conflict of interest requiring the Deputy Commissioner to assume responsibility.⁷ Secondly, the substance of the plaintiff's complaint concerned the legality or correctness of Peters J's decision, fell squarely within s 8(2) of the Act, and was therefore outside the Commissioner's jurisdiction.

Present proceeding

[8] The plaintiff's amended statement of claim is something of a stream of consciousness. In essence it advances two grounds of review. First, that the Commissioner breached natural justice because he had a "personally vested interest in dismissing the complaint". Secondly, that the Commissioner erred in law "in

determining he did not have a conflict of interest sufficient to compel his disqualification". Relief sought by the plaintiff includes declarations ("rulings") that the Commissioner is conflicted from determining the complaint against Peters J, is "bound by the same laws governing judicial officers in the cases of conflict of interest and apparent bias" and "has no legal authority to seek intervention of the Courts to prevent an inquiry by way of judicial review and to an alleged conflict of interest by him".

Two preliminary issues

[9] Two preliminary issues arise.

[10] First, the plaintiff did not attend Court. Following a decision of the Supreme Court⁸ two weeks ago, he was the subject of a warrant for arrest. I understand it was enforced on Monday. He is currently a prison inmate. He did however file two sets of short written submissions. They are confused, pejorative and hyperbolic. Their tenor may be gleaned from the conclusion to the first submission:

The Plaintiff does not consider there is anything to be gained by any hearing. The First Defendant's application for summary judgment can be dealt with on the papers. Charitably, the Plaintiff is providing these submissions in advance of the knighted-senior-law-partner-in-one-of-New-Zealand's-largets-firms-first-defendant's submissions in order to assist him in making his best case as to why he is above the law.

I take that invitation (repeated in the second submission) at face value.

[11] Secondly, the Commissioner's statutory jurisdiction is a limited one. The Commissioner does not make "merit determinations on judicial misconduct", as the plaintiff was wont to suggest. Rather, as Ms Theron put it, he operates as a clearing house for complaints. Section 15(1) of the Act provides the Commissioner must conduct a preliminary examination. If he forms the opinion that the complaint calls in question the legality or correctness of the judgment, he must dismiss it.⁹ If the complaint is about a judicial decision that is subject to a right of appeal, again he must dismiss it.¹⁰ If the complaint is frivolous, vexatious, not in good faith or about

a matter that is trivial, he may dismiss it.¹¹ On the other hand he may form the opinion that there are grounds to warrant referral of the complaint to the Head of Bench or to recommend that a Judicial Conduct Panel be appointed by the Attorney-General to inquire into any matter concerning the conduct of a Judge.¹² That is as far as the Commissioner's substantive statutory jurisdiction goes. It follows that any "merit determinations on judicial misconduct" are ones for the Panel to make. The Commissioner's role is simply to determine whether there is sufficient basis for the matter to be dealt with by a Panel (although the decision then rests with the Attorney-General) or whether the complaint is better dealt with in another way.

Reasons for striking out this proceeding

[12] Against the background just given, my reasons for striking out this proceeding are as follows.

Striking out principles

[13] First, it is unnecessary to set out in any detail the relevant principles. They are familiar to even the youngest litigation practitioner. The jurisdiction is exercised sparingly. Causes of action may be struck out only if so untenable that they cannot succeed. Facts pleaded are treated as true unless self-evidently speculative or false. These principles apply to judicial review as much as to general proceedings.¹³

Commissioner's decision inevitable

[14] Secondly, s 8(2) of the Act constrains the functions of the Commissioner. The Commissioner may not consider complaints challenging or calling into question the legality or correctness of judicial decisions and orders. Section 16(1)(a) requires the Commissioner to dismiss a complaint if he is of the opinion that the complaint falls outside his jurisdiction. Section 16(1)(f) requires the Commissioner to dismiss a complaint about a judicial decision that "is or was subject to a right of appeal".

¹¹ Section 16(1)(d) and (e).

¹² Section 18.

¹³ *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; *Southern Ocean Trawlers Ltd v Director-General of Agriculture & Fisheries* [1993] 2 NZLR 53 (CA).

[15] The thrust and substance of the complaint against Peters J concerned her alleged assumption of the statutory authority of the Commissioner to make “merit determinations on judicial misconduct”. That of course misconceives the Commissioner’s powers, as I have already explained. But it is an allegation of error of law by Peters J in reaching judgment. On any view it related to the legality or correctness of her judgment. It was also a complaint about a judicial decision subject to a right of appeal. That right has been exercised. An appeal has been lodged, simultaneously with the complaint made to the Commissioner.

[16] It follows that, regardless of the circumstances the Commissioner found himself in, and regardless of whether a conflict of interest existed or not, as a matter of substance the plaintiff’s complaint inevitably would have been dismissed. Any Commissioner would have been bound to dismiss it.

[17] It follows, also, that even there had been a conflict or a breach of natural justice by the Commissioner in dismissing the plaintiff’s complaint, this is one of those rare cases where the Court would not grant relief.¹⁴

No conflict of interest

[18] Thirdly, the allegations that the Commissioner breached natural justice and erred in law in determining he did not have a conflict of interest are wholly unsustainable. They cannot succeed.

[19] Apparent bias, according to the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*,¹⁵ arises only where a fair-minded lay observer might reasonably apprehend that the Commissioner might not bring an impartial mind to resolution of the question the Commissioner is required to decide.¹⁶ That observer is deemed to be informed of the relevant circumstances. He or she here would recognise the Commissioner’s duty to dismiss the complaint. He or she would conclude that even if the Commissioner had a predisposition, it could not influence his decision-making when only one decision at law could be made.

¹⁴ *Brannigan v Davison* [1997] 1 NZLR 140 (PC) at 148.

¹⁵ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 (SC).

¹⁶ At [3].

[20] Fourthly, even if the preceding reason is not correct, there was no conflict between private interest and public duty in this case. The relevant conflict must be such.¹⁷ The Commissioner's alleged interest in this case arose purely by reason of the exercise of his duty. The application by the Commissioner to Peters J to dismiss the judicial review application against his handling of the earlier complaint against Winkelmann J does not connote the sort of interest that conflicts with duty. Rather, it was part of his duty as a responsible statutory officer against whom review is sought. The plaintiff has previously asserted that the Commissioner should not take an active role in defending review proceedings against him. That argument was rejected by Toogood J in June 2012.¹⁸

[21] Is the Commissioner, when the subject of a judicial review proceeding, to take no part in it whatever? To take a wholly quiescent attitude to that proceeding, regardless of its merits? Or is he permitted to take up arms and seek from the Court an early summary determination of those proceedings on the basis that they are devoid of merit because the jurisdictional constraints in his statute gave him no leeway anyway? On the plaintiff's theory, the Commissioner is hoist whichever way he moves. He must "avoid conflict" and do nothing when the subject of a review application, no matter how unmeritorious. If instead he takes up arms, he is conflicted in the event of further related complaints. A fair-minded lay observer would be astonished at this theory.

[22] The Commissioner was bound to respond reasonably to review proceedings brought against him, which he regarded as devoid of merit. That opinion was then confirmed by the decision of Peters J striking out all causes of action in the review application. The Commissioner had a duty to respond, in a reasonable manner, when his office was alleged to have acted unlawfully. Likewise he had a duty to process complaints according to his governing statute. Both are matters of duty. A tension between public duties does not constitute apparent bias for present purposes.¹⁹

¹⁷ *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832 (HC) at [122].

¹⁸ *Siemer v Judicial Conduct Commissioner* [2012] NZHC 1481 at [64] and [65].

¹⁹ *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA) at 179, 194 and 214; *Minister of Immigration v Jia* (2001) 205 CLR 507 (HCA); *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC) at [102]; *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 (HC) at 47; *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC at [131] to [138]; *Wade & Forsyth Administrative Law*

[23] A reasonable lay observer looking at these circumstances would inevitably say that no question of public confidence or trust could be affected by the Commissioner taking the course he did take in this case. The only conflict in this case is one contrived by the plaintiff's own actions. It is not a conflict affecting public trust and confidence in the office of the Commissioner.

Result

[24] The plaintiff's claim is not tenable, and cannot succeed. It is struck out.

[25] The Commissioner applies for costs on an indemnity basis. If the plaintiff opposes costs on that basis, he is to file brief written submissions within 14 days.



Stephen Kós J

Solicitors:
Gault Mitchell Law, Wellington for First Defendant
Crown Law, Wellington for Second Defendant

And to:
Plaintiff in person