The Office of Human Rights Proceedings
Te Tari Whakatau Take Tika Tangata

8 March 2019

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Mr Trevor Simpson
PO Box 26
TE KAUWHATA 3710

Private and confidential

Dear Mr Simpson

DECISION ON YOUR APPLICATION FOR LEGAL REPRESENTATION

I confirm your application for legal representation in proceedings you wish to take in the Human Rights Review Tribunal (the Tribunal) against the Waikato Regional Council (the Council).

Thank you for attending our Offices on 28 February 2019 to make submissions in person with Andy Loader and Wendy Clark, after I had provided you with my draft "no" decision.

I have given careful consideration to your thought-provoking submissions and helpful materials.[1] I have however decided not to grant your application for the reasons set out below.

Your application

The Council has proposed a new Regional Plan Change (the Plan). While the bulk of the Plan has not been implemented, the restrictions on land use change provisions of the Plan were voted through in October 2016. In that regard, Policy 6 sets out that:

> Except as provided for in Policy 16, land use change consent applications that demonstrate an increase in the diffuse discharge of nitrogen, phosphorus, sediment or microbial pathogens will generally not be granted.
>
> Land use change consent applications that demonstrate clear and enduring decreases in existing diffuse discharges of nitrogen, phosphorus, sediment or microbial pathogens will generally be granted.

Policy 16 is entitled "Flexibility for development of land returned under Te Tiriti o Waitangi settlements and multiple owned Maori land".

[1] My draft decision indicated my preliminary view that I would not provide representation.

It deals exclusively with land owned by multiple Maori owners and land returned to Iwi through Treaty Settlements (Treaty and Iwi land) and sets out certain additional criteria to be taken into account when making decisions in relation to such land. All other land owners are subject to Policy 6 with no additional criteria taken into account.

The Council states that

> [T]he purpose of PC1 is to reduce the amount of contaminants entering the Waikato and Waipa rivers and to achieve the Vision and Strategy of making the rivers swimmable and viable for food collection... Policy 16 is entitled "Flexibility for development of land returned under Te Tiriti o Waitangi settlements and multiple owned Maori land"...The policy recognises that Maori freehold land under Te Ture Whenua Maori Act 1993 and Treaty settlement land have historical and contemporary legal impediments that have affected the use of the land that resource management planning provisions controlling land use change have the potential to further negatively impact upon the relationship of tangata whenua with their land, and their ability to make decisions on the use of that land, which in turn has affected their ability to exercise kaitiakitanga and provide for the social, cultural or economic wellbeing of tangata whenua.

You allege that the different criteria applicable to Treaty and Iwi land compared with all other land constitute discrimination on grounds of race/ethnicity and cause commercial disadvantage to you/other non-Maori landowners.

My role under the Human Rights Act 1993

The Human Rights Act 1993 (HRA) gives me the function of deciding whether or not to provide free legal representation to people who wish to take unlawful discrimination proceedings in the Tribunal.

In considering your request for legal representation the following have been assessed:

- your application for legal representation and supporting material;
- the Human Rights Commission's file relating to your complaint;
- additional material provided by you;
- the relevant provisions of the HRA; and
- relevant case law.

The HRA provides a list of factors that I must consider when making my decision. I discuss these, along with the reasons for my decision, below.

Factors I must consider when deciding whether to provide legal representation

1. Whether the complaint raises a significant question of law

Your complaint raises important issues of law relating to differential treatment on grounds of race or ethnicity in the context of legislation which provides for differences in approach to certain Maori owned land. As far as I am aware, this issue has not been considered before. Therefore, I consider that your case does raise a significant question of law.

2. Whether resolution of the complaint would affect a large number of people

I accept that there may be many other non-Maori landowners who may be affected by the Plan in a similar way to you. More widely, there may be other legislative measures in New Zealand which result in differential treatment for non-Maori people in certain circumstances. However, for the reasons discussed below I consider that proceedings brought in respect to your complaint do not have strong prospects of success. It is therefore unlikely that the resolution of this complaint would meaningfully affect a large number of people.

3. The level of harm involved in the matters that are the subject of the complaint

I accept that you feel that the land use change restrictions subject you to significant disadvantage. That counts in favour of providing you with representation.

4. Whether the proceedings are likely to be successful

Your claim involves the exercise of a public function, power or duty. It therefore falls to be considered under Part 1A of the HRA.

An act or omission is in breach of Part 1A if:

(a) it limits the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA); and
(b) it is not a justified limitation on the right under s 5 of the NZBORA.

Discrimination – section 19 of the NZBORA

To establish a breach of s 19 in your case, you would need to show that:[2]

(a) Non-Maori landowners (including you) are treated or affected differently to certain Maori landowners in comparable circumstances;

[2] These factors are consistent with the test set out in *Ministry of Health v Atkinson* [2012] 3 NZLR 456 at [55] and [109].

(b) the different treatment/effect is by reason of your race or ethnicity; and
(c) such different treatment/effect has resulted in a "material disadvantage" to non-Maori people when viewed in context.

I discuss how this test applies to your claim below.

(a) Different treatment

This part of the discrimination test requires a comparison between you/other landowners to whom Policy 16 does not apply, and people in a comparable position.

You need to show that in circumstances in which a person makes a planning application for change of land use which would involve an increase in the diffuse discharge of the relevant pollutants, you and other people in your position are treated differently to people to whom Policy 16 applies.

In such circumstances, Policy 6 means that an owner of land that is not Treaty or Iwi land will generally not be granted permission and no additional criteria are taken into account. By contrast, a person who is applying in relation to Treaty or Iwi land may be more likely to be granted permission as the additional criteria will be taken into account. A comparison is required between people to whom only Policy 6 applies, and people who benefit from the additional criteria in Policy 16. In practice, it is likely that only Maori people will be able to apply in relation to Treaty or Iwi land, and non-Maori people are therefore excluded from the benefits of Policy 16.

To successfully argue this part of the discrimination test you would need to provide evidence supporting your position, but assuming you could provide such evidence, I consider that it is likely that you could satisfy this step of the test.

(b) "By reason of" race/ethnicity

This part of the discrimination test requires you to prove that your race or ethnicity was a material reason that you were treated or affected differently to the comparator. I think it is arguable that your different treatment was by reason of your race or ethnicity, as your non-Maori ethnicity means that you are never likely to be able to benefit from Policy 16.

The Council argues in its response that Policy 16 relates to land rather than people and therefore does not give a particular person commercial disadvantage over others. It may be that if the case were to go before a Tribunal, the Council would be likely to argue that the differential treatment is not by reason of your race/ethnicity, but by reason of you not owning a category of land which is protected by Policy 16. It notes that *"any person, Maori or otherwise, can make an application for resource consent to develop that land".*

It could be argued in response to this that the likelihood is that only Maori people will be applying for consent in relation to Treaty and Iwi land. Non-Maori landowners such as yourself are very unlikely to be applying in relation to such land so in practice, your non-Maori race is a material factor in the non-application of Policy 16 to you.

I therefore consider that it is likely that you could prove differential treatment by reason of a prohibited ground because of the fact that in practice, non-Maori landowners are never likely to be able to benefit from Policy 16.

(c) Material disadvantage

Assuming that you could satisfy the Tribunal that the differential treatment was by reason of your race/ethnicity, the next stage is to prove material disadvantage. To meet this part of the discrimination test you would need evidence that you/other non-Maori landowners are subject to disadvantage in your ability to develop your land compared to the relevant Maori landowners.

You explained that where one landowner is granted consent for a land use change which increases their level of diffuse discharge, this means that when the levels are next reviewed, other landowners' permitted levels of diffuse discharge will necessarily be reduced. You provided examples of the way in which the Plan has affected land values in the area for land which is unable to benefit from Policy 16. You also explained how this affected your ability to make long term investments in your land. You will probably need to provide evidence of specific examples of land value decreases and of the way in which investment decisions have been affected.

Assuming you could provide such evidence, then, as we discussed in our meeting, I consider you would be likely to satisfy this part of the test.

Justification – s 5 of the NZBORA

If you could satisfy the s 19 discrimination test (set out above), then the Council would have a defence to your claim if it could establish that the different policy applicable to Treaty and Iwi land is justified under s 5 of the NZBORA. When considering whether any discrimination was justified, the Tribunal would likely consider the following questions:[3]

- Does the limitation on your right to be free from discrimination serve a purpose sufficiently important to justify curtailment of the right?
- Is the limiting measure rationally connected with its purpose?
- Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
- Is the limit in due proportion to the importance of the objective?

[3] See the Supreme Court judgment in *R v Hansen* [2007] 3 NZLR 1.

Thus, the respondents would have to prove that: the special rules applicable to Treaty and Iwi landowners serve an important purpose, the special rules are rationally connected to that purpose, the impairment is no more than is reasonably necessary and the limit is in due proportion to the importance of prioritising funding towards greatest need.

I consider it is likely the respondents would be able to satisfy the justification test.

As noted by the Council in its response dated 22 August 2018, under the Resource Management Act 1991, when the Council is undertaking its planning functions it is required to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, to have particular regard to kaitiatanga and take into account the principles of the Treaty of Waitangi. The Council considers that Policy 16 provides for those matters and notes further that the policy is not a rule but simply sets out a number of matters which would be considered as part of the decision making process.

The "important purpose" here is maintaining respect for Maori ancestral lands as required by the Resource Management Act 1991. Given that this aim is enshrined in primary legislation, I think it is likely that the Tribunal would hold that this satisfies the "important purpose" requirement.

I also think that the Tribunal would consider that there is a rational connection between the purpose and the measure, given that the wording of Policy 16 closely mirrors the wording of the relevant provision of the Resources Management Act.

The third element of the justification test is the most crucial in your case: does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

The wording of Policy 16 does not create a different rule for Treaty and Iwi land but sets out additional matters to be taken into account when making decisions relating to such land. It is not necessarily the case that an application for land use change which would increase diffuse discharge will be granted for an application relating to Treaty and Iwi land. What Policy 16 does is to create an opportunity for Treaty and Iwi landowners to be granted consent for a land use change which would be refused to all other landowners under Policy 6. I consider that it is likely that the Council may argue that this additional opportunity to have Treaty and Iwi specific considerations to be taken into account is no more than is reasonably necessary for the sufficient achievement of the purpose.

You provided an example of an application relating to Iwi land which was refused on the basis that the level of diffuse discharge would be too high. The Council may use such examples to support the argument that in simply providing for extra considerations to be taken into account in relation to Treaty and Iwi land, Policy 16 does no more than is reasonably necessary – it does not mean that Treaty and Iwi landowners will definitely be granted consent to change their land use.

Although Policy 16 itself appears to do no more than is reasonably necessary, it is possible that the *application* of the policy in the form of the actual grant of consent to Treaty or Iwi landowners may go further than what would be reasonably necessary to achieve the purpose of respecting the principles of the Treaty of Waitangi and Maori kaitiakitanga.

You explained that the way in which the Plan operates means that discharge levels have to be kept at a certain level, and that if more consent is granted to Treaty or Iwi landowners to increase their discharge levels, this necessarily means that all other landowners will have to reduce theirs, which puts you at a financial disadvantage. You say that this creates an inequitable situation where non-Treaty and Iwi landowners bear the financial cost of the New Zealand government complying with its Treaty obligations. The Plan does not provide for any mechanism to compensate landowners who are financially disadvantaged in this way.

If in practice Policy 16 was applied in such a way that, in effect, applications from Treaty and Iwi landowners were generally always granted and this resulted in a demonstrable, significant reduction in levels of discharge permitted for all other landowners which caused them to suffer a significant disadvantage, then it is arguable that this application would go further than is reasonably necessary to achieve the purpose.

If you could provide evidence to show that Policy 16 was being applied in this way, then it is possible that you could show that the prima facie discrimination is unjustifiable. Based on the information you have provided to me however, I do not consider that there is currently any evidence that this is the case.

When seeking to fulfil its objective, the Council is permitted to choose from a range of means that limit your rights as little as is reasonably necessary[4] and is not required to choose the least intrusive measure.[5]

In the absence of more evidence relating to the application of Policy 16 to Treaty and Iwi landowner applications in practice, I consider it is likelythat the Council could satisfy the Tribunal that Policy 16 does not limit your rights any more than is reasonably necessary to achieve its goals.

It follows from what I have said above, that in my view, the Council also has good prospects of establishing that its processes were in due proportion to the objective of ensuring appropriate recognition of the relationship between tangata whenua and their ancestral lands.

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[4] *R v Hansen*, above n 9, at [79] per Blanchard J.

[5] *Ministry of Health v Atkinson*, above n 5, at [154].

Conclusion

While I recognise that it is arguable that you have been discriminated against contrary to s 19 of the NZBORA, I think the Council would be able to satisfy the justification test and therefore your claim would be unlikely to succeed.

I add however that on hearing from you, I am conscious of your concern that a minority of New Zealand land owners are made to carry an intolerable burden to meet the nation's obligations to Māori. If the *application* of Policy 16 results in such a burden, the Office's views on justification might well be different.

5. Whether the remedies available through any proceedings are likely to suit the particular case

If you were successful in establishing that the Council's proposed Plan was unlawfully discriminatory, the Tribunal could make a declaration to that effect. This could lead to additional pressure on the Council to amend the policies.

While I consider that this remedy would be suitable to your case, given my conclusion that proceedings are unlikely to be successful, I do not consider that the Tribunal would reach the question of remedies.

6. Whether there is likely to be any conflict of interest in the provision of representation by me

It does not seem likely that any conflict of interest would arise in this case if I agreed to provide legal representation.

7. Whether the provision of representation is an effective use of resources

In my assessment, it would not be appropriate to use my limited resources to provide representation in this case. The major reason for this is that I cannot assess your case as being likely to succeed.

8. Whether or not it would be in the public interest to provide representation

There do not seem to me to be public interest factors, in addition to those touched upon above, which lead to a different conclusion.

9. Any other matters I consider relevant in this case

There are no other matters I consider relevant.

Decision

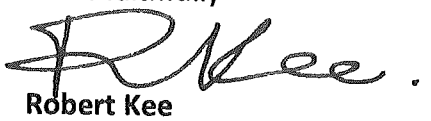
For the reasons discussed above, I have decided not to provide you with representation. You are, however, entitled to take your own proceedings to the Tribunal. You can do this on your own or by using a private lawyer. You may wish to note that if you do take a case in the Tribunal that is unsuccessful, you may be ordered to pay a contribution towards the respondents' legal costs and expenses.

If you would like further information about how the Tribunal operates, please contact the registry on 04 462 6660 or email hrrt@justice.govt.nz. You can also look on the Tribunal's website: http://www.justice.govt.nz/tribunals/human-rights-review-tribunal or write to the Secretary at the following address:

The Secretary
Human Rights Review Tribunal
Private Bag 32001
Featherston Street
WELLINGTON 6011

Finally, you should be aware that this decision is protected by legal professional privilege because it contains legal advice about your case. This means that I may not disclose it to other people, although you may if you wish to do so.

Yours faithfully



Robert Kee
Director of Human Rights Proceedings
Tumuaki Whakatau Take Tika Tangata