IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP11/01

BETWEEN: **J. FRANKS**

Plaintiff

A N D: **WAIKATO ETHNIC COUNCIL INCORPORATED**

665

First Defendant

A N D: **N. MANOHORAN and ORS**

Second Defendants

HEARING: 21 June 2001

COUNSEL: Rodney Lewis for plaintiff
Warren Pyke for defendants

JUDGMENT: 22 June 2001

JUDGMENT OF CHAMBERS J

Solicitors: Rodney Lewis, Hamilton
Bogers Scott & Shortland, Hamilton

Rule 477 application

[1] Janet Franks, a retired woman living in Hamilton, is cross that last year she was suspended from the office of vice president of the Waikato Ethnic Council Incorporated, an incorporated society. She has brought a proceeding in the High Court in which she challenges the decision to suspend her. She asks the court to reinstate her as vice president.

[2] In addition, Ms Franks complains that the other members of the executive committee of the Ethnic Council have defamed her. She seeks, by way of redress, damages of $20,000.

[3] The defendants have applied, under r477 of the High Court Rules, for the proceeding to be stayed or dismissed. Mr Pyke, for the defendants, submits that the statement of claim is deficient. He further submits that Ms Franks's delay in commencing this proceeding is "fatal".

[4] Mr Lewis, for Ms Franks, opposed the application under r477.

[5] It is quite clear that the current statement of claim is deficient. Most of Mr Pyke's criticisms were well made and were accepted by Mr Lewis. All these deficiencies are, however, potentially remediable. I shall deal with those deficiencies later in this judgment. The first matter which must be determined is whether Mr Pyke's argument about delay is right. If it is right, then of course the proceeding should not be allowed to continue.

Delay

[6] According to the statement of claim, Ms Franks was first suspended from her position as vice president by resolution of the executive committee

on 21 February last year. The executive committee then sought the endorsement of the members of the Ethnic Council at a general meeting held on 1 April last year. The members apparently did endorse the executive committee's decision. Ms Franks challenges both decisions. Ms Franks commenced her proceeding in this court on 12 February this year.

[7] There is no doubt that delay can be a factor in whether an applicant for judicial review should be granted a remedy. I asked Mr Pyke if he could cite any case in which an application for review had been struck out solely on the grounds of delay, even before any affidavits had been filed. He was not able to cite any case where that had happened.

[8] I do not doubt that in an extreme case the court may be able to conclude that delay has been such that there is simply no realistic chance of a remedy being granted. This case is certainly not in that category. I do not know what explanation Ms Franks may have for the apparent delay in commencing this proceeding. It may be that she will ultimately be denied relief in whole or in part because of her delay in seeking redress. That is a determination, however, to be made by the trial judge after he or she has heard and considered all the evidence.

[9] I reject Mr Pyke's submission that the proceeding should be dismissed on the grounds of delay.

Deficiencies in the pleadings

[10] Mr Pyke identified a number of deficiencies in the statement of claim. Mr Lewis, having heard Mr Pyke's submissions, largely agreed with the criticisms. I am going to allow Ms Franks to file an amended statement of claim. For convenience, I list the improvements which must be made.

[11] First, the heading should record that the claim is brought under the Judicature Amendment Act 1972: see r36(1)(c) and First Schedule, Form 1.

[12] Secondly, the backing sheet must state that it is an application for review: see r628(2).

[13] Thirdly, the statement of claim must separately state the facts on which Ms Franks bases her claim to relief, the grounds on which she seeks relief, and the relief sought: see s9(2) of the Judicature Amendment Act 1972.

[14] Fourthly, the two decisions challenged must be specifically and separately stated. Since the grounds of challenge may differ with respect to each of the decisions, separate grounds should be stated for each impugned decision, and separate relief should be sought with respect to each impugned decision.

[15] The statement of claim as currently drafted is ambiguous as to precisely what relief Ms Franks seeks on her application for review. Mr Lewis confirmed that with respect to the 21 February 2000 decision, Ms Franks seeks an order quashing the decision and an order restoring her to her position as vice president. With respect to the 1 April 2000 decision, Ms Franks seeks an order quashing the decision and an order restoring her to her position as vice president. That those are the orders sought will no doubt be made clear in Mr Lewis's amended pleading.

[16] I turn now to the pleading in defamation. Mr Pyke is correct in his criticisms of the current pleading. Mr Lewis will need to look carefully at the pleading requirements in the Defamation Act 1992. He should also study the useful precedents in Appendix I to *Gatley on Libel and Slander*, 9th ed. A

statement of claim in defamation must state what the allegedly defamatory words were, who said them, when and where they were said, and what meaning the plaintiff says they bear. If it is alleged that the Ethnic Council is in some way vicariously liable for defamatory statements made by one or more of the executive committee members, then the factual basis for such vicarious liability will need to be pleaded.

[17] Mr Pyke did raise the question of whether a claim in defamation could be included in the same statement of claim as an application for judicial review. In that regard he properly referred me to the decision of Master Hansen in *Manson v New Zealand Meat Workers Union* [1990] 3 NZLR 615. In that case, Master Hansen expressed the view that causes of action for breach of contract and tort could not be included in the same statement of claim as an application for review. With respect, I do not share Master Hansen's view. I am certainly aware of other cases where an application for review has been pleaded in the same document as other private law causes of action. An example is *Gregory v Rangitikei District Council* [1995] 2 NZLR 208, a decision of McGechan J, an acknowledged expert on the law of procedure. This issue was also averted to in a case before Salmon J, *The Property People Ltd v Housing New Zealand Ltd* (1999) 14 PRNZ 66. Salmon J did not need to decide the point. He nonetheless observed that "there is certainly an attraction in the view that all matters in issue arising out of the same facts should be determined at the same time": ibid. at para [30].

[18] I can see no reason why two proceedings with the inevitable extra attendant costs are needed when, as here, the matters in issue arise out of the same facts. There is nothing in the Judicature Amendment Act 1972 or in the High Court Rules which compels two statements of claim.

[19] I should point out that Mr Pyke was not insisting on two statements of claim. His point really was that the existing statement of claim did not sufficiently differentiate between on the one hand the application for review and the remedies sought in respect of it and on the other the claim in defamation and the remedies sought in respect of it. Rather, the statement of claim simply contained a list of remedies sought, without making clear which remedy was sought with respect to which claim. That criticism was entirely justified.

[20] If, after consideration, Ms Franks decides to continue with her claim in defamation, then the statement of claim must clearly differentiate between the judicial review cause of action and the defamation cause of action (or defamation causes of action). The remedies sought with respect to each cause of action must be separately stated after that cause of action: see r114.

[21] The amended statement of claim must be a much better effort than the one under scrutiny in this judgment. A court will be less inclined to be indulgent if the amended statement of claim is not in compliance with relevant statutes and the High Court Rules.

Result

[22] The defendants' application is dismissed.

[23] Ms Franks, if she wishes to continue with the proceeding, must, however, file an amended statement of claim. I fix the following timetable:

On or Before	*Action required*
5 July 2001	Plaintiff must file and serve amended statement of claim.

2 August 2001	Defendants must file and serve statement of defence to amended statement of claim.
16 August 2001	Any interlocutory applications and affidavits in support thereof to be filed and served.
23 August 2001	Any notices of opposition and affidavits in opposition to be filed and served.
30 August 2001	Any affidavits in reply on interlocutory applications to be filed and served.

[24] I direct the registrar to allocate a pre-trial conference for September 2001. I record that Mr Pyke asked that that conference be convened before a judge rather than a master. This was on the basis that this was an application for review, at least in part. As well, he predicted that the conference might take longer than a normal conference. He explained that Master Faire normally had extremely full lists whenever he visited Hamilton. I leave it to the registrar to determine before whom the conference should take place. If need be, the Registrar can consult with the resident Hamilton judge, Hammond J.

[25] I record that neither side seeks discovery from the other. Mr Pyke said that it was quite possible there would be no further interlocutory applications. He was also optimistic that he and Mr Lewis would be able to agree all matters generally determined at a pre-trial conference. If there are no further interlocutory applications and if the parties can agree all necessary pre-trial directions, then a consent memorandum can be filed and put before a judicial officer, who may well then decide that the pre-trial conference date can be vacated.

Costs

[26] The parties were agreed that this proceeding should be categorised as category 2 for costs purposes.

[27] The defendant sought costs with respect to this application. I made it clear at the oral hearing what the result was likely to be. Mr Pyke submitted that, while he had not been totally successful, he had nonetheless exposed a number of deficiencies in the statement of claim. He said that the defendants should receive costs on a band B basis.

[28] Mr Lewis submitted that each side had been partly successful. He had successfully resisted an application to dismiss the proceeding. At the same time he acknowledged that his statement of claim was deficient and required amendment. He submitted there should be no order for costs; each side should bear its own costs.

[29] I consider that the defendants should have an award of costs. The award should be reduced in part to reflect the fact that the application was not wholly successful: see rr47(a) and 48D(d) and (f). I award the defendants costs on a band B basis, to be reduced by 25%. The appearance took a quarter day. The net result, therefore, is:

Preparing and filing interlocutory application:	.6	
Preparation for hearing:	.25	
Appearance at hearing:	.25	
Sub-total:	1.1 x $1300 =	$1430
Less 25%		357
TOTAL		$1073

[30] In addition, Ms Franks must pay any disbursements, in the absence of agreement to be fixed by the registrar.

Signed at: 11.55 am/~~pm~~ on 22 June 2001

Robert Chambers