

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 92/2022  
[2022] NZSC 141

BETWEEN COLIN SAMUEL HENRY  
Applicant

AND MINISTER OF JUSTICE  
First Respondent

ATTORNEY-GENERAL  
Second Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: Applicant in person  
J B Watson for Respondents

Judgment: 6 December 2022

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**JUDGMENT OF THE COURT**

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- A The application for an extension of time to apply for leave to appeal is granted.**
  - B The application for leave to appeal is dismissed.**
  - C The applicant must pay the respondents costs of \$2,500.**
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**REASONS**

**Introduction**

[1] The applicant, Mr Henry, applies for leave to appeal against a decision of the Court of Appeal<sup>1</sup> dismissing his appeal against a High Court decision which declined his application for judicial review relating to the appointment process for the

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<sup>1</sup> *Henry v Minister of Justice* [2022] NZCA 216 (French, Clifford and Gilbert JJ) [CA judgment].

Race Relations Commissioner.<sup>2</sup> Mr Henry's application for leave to appeal is some four months out of time and so he also applies for an extension of time.

## **Background**

[2] In June 2018, Mr Henry submitted an expression of interest in response to an advertisement for appointment as the Race Relations Commissioner. In September 2018 he was advised that he had not been shortlisted for the position. He commenced judicial review proceedings and unsuccessfully applied for interim relief to stop the appointment process on two occasions.<sup>3</sup> On the substantive judicial review proceedings, the High Court ruled that none of Mr Henry's claims were made out.<sup>4</sup>

## **Court of Appeal decision**

[3] The Court of Appeal noted that Mr Henry advanced the same arguments as he had in the High Court:<sup>5</sup>

- (a) that his legitimate expectations had been frustrated;
- (b) that the appointment process was unfair and irrational; and
- (c) that the respondents had breached their duty to account for diversity in s 29(2)(b) of the Crown Entities Act 2004, and his right to justice under s 27 of the New Zealand Bill of Rights Act 1990.

[4] The Court of Appeal commented that the essence of Mr Henry's argument was a general dissatisfaction with the process and a concern that he had been treated unfairly and essentially discriminated against.<sup>6</sup>

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<sup>2</sup> *Henry v Minister of Justice* [2019] NZHC 1493 (Gault J) [Substantive HC judgment].

<sup>3</sup> *Henry v Minister of Justice* [2018] NZHC 2831, [2018] NZAR 1815 (Fitzgerald J); and *Henry v Minister of Justice* [2019] NZHC 889, [2019] NZAR 711 (Gault J).

<sup>4</sup> Substantive HC judgment, above n 2, at [93].

<sup>5</sup> CA judgment, above n 1, at [37].

<sup>6</sup> At [38].

[5] With regard to the specific grounds, the Court of Appeal did not accept Mr Henry's claim of legitimate expectations in relation to the process.<sup>7</sup> Nor was there substantive unfairness and irrationality in the appointment process.<sup>8</sup> Further, there was no breach of the principle of natural justice.<sup>9</sup> Nor was there a breach of s 29(2)(b) of the Crown Entities Act.<sup>10</sup> The Court held that the evidence demonstrated that the desirability of promoting diversity in the membership of Crown entities was considered.<sup>11</sup> The Court also rejected Mr Henry's application to adduce further evidence.<sup>12</sup>

### **Application for extension of time**

[6] An adequate explanation for the delay in filing the application for leave has been provided and there is no prejudice to the respondents. The application for an extension of time is granted accordingly.

### **Grounds of application**

[7] Mr Henry does not seek to interfere with the outcome of the selection process for the Race Relations Commissioner.<sup>13</sup> He submits that his proposed appeal is of public and general importance as it involves scrutiny of the process for appointment. In his submission, the Court of Appeal mischaracterised his claim as a claim for a wrong done to him, which it was not. By pursuing this appeal, Mr Henry says his aim is to ensure recognition of the unacceptable aspects of the process of selection of New Zealand's Race Relations Commissioner and thereby to help minimise, if not eliminate, those unsatisfactory aspects in the future.

### **Our assessment**

[8] The criteria for leave are not met.<sup>14</sup> Nothing advanced by Mr Henry suggests that the Courts below erred in their assessment of the alleged errors of process

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<sup>7</sup> At [51]–[62].

<sup>8</sup> At [64].

<sup>9</sup> At [65](b).

<sup>10</sup> At [65](a).

<sup>11</sup> At [65](a).

<sup>12</sup> At [44].

<sup>13</sup> The appointment of Mr Meng Foon as Race Relations Commissioner was made on 11 July 2019.

<sup>14</sup> Senior Courts Act 2016, s 74.

identified by Mr Henry. Nor is there a risk of a miscarriage of justice.<sup>15</sup> The matter can also be seen as moot, given that the appointment has been made and Mr Henry does not seek to challenge this.

## **Result**

[9] The application for an extension of time to apply for leave to appeal is granted.

[10] The application for leave to appeal is dismissed.

[11] The applicant must pay the respondents costs of \$2,500.

Solicitors:  
Crown Law Office, Wellington for Respondents

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<sup>15</sup> Section 74(2)(b). For the threshold required for a miscarriage of justice in civil cases, see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].