IN THE DISTRICT COURT
AT TAUPO

I TE KŌTI-Ā-ROHE
KI TAUPŌ-NUI-A-TIA

CIV-2022-069-000021
[2023] NZDC 928

BETWEEN	ERIKA WHITTOME Plaintiff
AND	TAUPŌ TENNIS CLUB First Defendant
AND	TENNIS NEW ZEALAND Second Defendant
AND	SPORT NEW ZEALAND Third Defendant

Hearing:	8 December 2022
Appearances:	Plaintiff appears in Person L Foley for the First Defendant B Webster for the Second Defendant O Lund for the Third Defendant
Judgment:	21 February 2023

RESERVED JUDGMENT OF JUDGE G C HOLLISTER-JONES

Introduction

[1] The plaintiff, Ms Whittome, is an experienced tennis player at club level. On 11 November 2021, she joined the Taupō Tennis Club and paid her membership for one year. The Taupō Tennis Club is the only tennis club in the Taupō area. Its clubhouse has two toilets which are located inside the tennis club building. The nearest public toilets are 350 metres away from the Taupō Tennis Club, a 10-minute return walk if the footpath is followed or a five-minute walk across the adjoining

domain. The length of play of the matches Ms Whittome was involved in were generally two hours.

[2] In the latter part of 2021, New Zealand was in the midst of an outbreak of the Delta variant of the COVID-19 virus. The public health response was an emphasis on vaccination, mask wearing and gathering limits.

[3] On 17 November 2021, the Taupō Tennis Club announced a vaccination and mask requirement to enter the clubhouse in which the toilets were located. Ms Whittome was unvaccinated and held a mask exemption, although she never presented it.

[4] On 2 December 2021, the President of the Taupō Tennis Club advised members that a vaccine pass was required for access to the toilets. Ms Whittome failed to follow that requirement and this ultimately resulted in the termination of her membership from the club. This occurred on 25 February 2022 when the committee of the Taupō Tennis Club unanimously resolved to revoke her membership. The club followed this up by issuing her with a trespass notice for two years. This has not been rescinded after the vaccine pass requirements have been removed.

[5] Ms Whittome's response was to issue proceedings against the Taupō Tennis Club, Tennis New Zealand and Sport New Zealand. All three defendants seek to strike out Ms Whittome's claims as disclosing no reasonable cause of action and/or being likely to cause prejudice or delay.

Ms Whittome's claims

[6] Ms Whittome represents herself. She filed her statement of claim on 3 March 2022 and throughout 2022 filed further amended statements of claim, with her fifth amended statement of claim being filed on 6 December 2022. The fifth amended statement of claim is structed as follows:

(a) It commences with a summary of 15 lines.

(b) Paragraphs 1 to 7 set out the background to the causes of action alleged.

(c) Paragraphs 8-28 contain the detail of the plaintiff's allegations.

(d) The statement of claim ends with an application for relief seeking compensation of $30,000.

[7] The plaintiff uses a narrative style and interweaves fact and law. Her causes of action are not clearly framed and it is difficult to discern what they are.

[8] The theme of the summary section is that the plaintiff has been discriminated against by the Taupō Tennis Club and that this was supported by Tennis New Zealand and Sport New Zealand. In the 15 lines of her summary, the plaintiff uses "discriminate" or "discrimination" four times.

[9] In the background section, the plaintiff narrates the background facts. In paragraph 1 she claims that because the Taupō Tennis Club pays a levy to Tennis New Zealand, she became a "participant" of Tennis New Zealand. As a result of funding from Sport New Zealand to Tennis New Zealand, Sport New Zealand was "linked". The plaintiff ends the background section with a statement that, "Any action by the defendant[s] was a private action which constituted a tort against the plaintiff."[1]

[10] In the causes of action section, the plaintiff continues with her narrative approach and makes the following allegations in respect of each defendant:

Taupō Tennis Club

(a) The Taupō Tennis Club committed a tort and/or breached its own constitution by failing to provide safe toilets and failing to update the Incorporated Societies' Register.[2]

(b) Breached s 81(2) of the COVID-19 Public Health Response (Protection Framework) Order 2021 ("COVID-19 Protection Framework") by failing to provide access to toilets.[3]

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1 Paragraph 7 of the statement of claim.
2 Paragraph 13.2 of the statement of claim.
3 Paragraphs 8 and 10.5 of the statement of claim.

(c) That the purposes of the COVID-19 Public Health Response Act 2020 and the COVID-19 Public Health Response (Vaccinations) Order 2021 ("COVID-19 Vaccinations Order") were breached by failing to reduce the transmission and outbreak of COVID-19.[4]

(d) The Taupō Tennis Club as a PCBU under the Health and Safety at Work Act 2015 ("HSWA") breached its obligations under s 36 of that Act by failing to provide toilet facilities for the plaintiff.[5] The plaintiff also alleges that the actions of the Taupo Tennis Club amount to coercion under s 92 of the HSWA.[6]

(e) Breached the Human Rights Act 1993[7] by discriminating against the plaintiff on medical grounds based on a perceived presence of disease and/or disability.[8]

(f) Breached the New Zealand Bill of Rights Act 1990 ("NZBORA"), ss 17 and 18(1).[9]

(g) Breached the Health Act 1956 by requiring the plaintiff to submit to compulsory treatment of the COVID-19 vaccination.[10][11]

Tennis New Zealand

(a) Breached their own constitution.[12]

(b) Its guidelines invited discrimination in breach of NZBORA ss 17 and 18(1) through creating a private vaccine mandate.[13]

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4 Paragraph 13 of the statement of claim.
5 Paragraph 13 of the statement of claim.
6 Paragraph 22 of the statement of claim.
7 Section 21(1)(h)(ii) and (vii).
8 Paragraph 14 of the statement of claim.
9 Paragraph 15 of the statement of claim.
10 Health Act 1956, s 92I(5).
11 Paragraph 28 of the statement of claim.
12 Paragraphs 23 of the statement of claim.
13 Paragraph 25 of the statement of claim.

(c) Its guidelines invited the Taupō Tennis Club to discriminate,[14] resulting in breaches of the Human Rights Act.[15]

(d) Breached the Health Act by requiring the plaintiff to submit to compulsory treatment of the COVID-19 vaccination.[16]

Sport New Zealand

(a) Breached their own constitution.[17]

(b) Invited discrimination in breach of NZBORA ss 17 and 18(1) through creating a private vaccine mandate.[18]

(c) Invited the Taupō Tennis Club to discriminate,[19] resulting in breaches of the Human Rights Act.[20]

(d) Its guidelines were in breach of the COVID-19 Vaccinations Order s 3 as they did not reduce the spread of COVID-19.[21]

(e) Breached the Health Act by requiring the plaintiff to submit to compulsory treatment of the COVID-19 vaccination.[22]

[11] In the application for relief, the plaintiff introduces her claim for compensation of $30,000 by referring only to the actions of the Taupō Tennis Club. She particularises why she is entitled to compensation and claims this is because of the loss of her membership to the Taupō Tennis Club, discrimination from the club and the receipt of an unjustified trespass notice.

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14 Paragraph 17 of the statement of claim.
15 Paragraphs 15, 16, 23 and 24 of the statement of claim.
16 Paragraph 28 of the statement of claim.
17 Paragraphs 10.1, 10.2, 10.3 and 10.4 of the statement of claim.
18 Paragraphs 10.1 and 15 of the statement of claim.
19 Paragraph 17 of the statement of claim.
20 Human Rights Act 1993, s 21(1)(h)(ii) and (vii). Paragraphs 10.1 of the statement of claim.
21 Paragraph 19.2 of the statement of claim,
22 Paragraph 28 of the statement of claim.

[12] In the final paragraph of the application for relief, the plaintiff refers to Tennis New Zealand and states that they have discriminated against her but does not link that back to the claim for compensation for $30,000 which is focussed on the actions of the Taupō Tennis Club. The plaintiff seeks no orders or compensation in respect of Sport New Zealand.

The applications for strike out

[13] All three defendants have applied to strike out the fifth amended statement of claim. The principal ground of their applications is that no reasonable cause of action is disclosed. All three defendants submit that the plaintiff's claim is essentially:

(a) One of unlawful discrimination with breaches of the Human Rights Act and the NZBORA being alleged. They say that the claim of unlawful discrimination should be made to the Human Rights Commission or the Human Rights Review Tribunal and not the civil jurisdiction of the District Court.

(b) There is no provision for damages to be awarded for any breaches of the COVID-19 Protection Framework.

(c) The HSWA does not apply to this situation as the plaintiff was not a worker at the Taupō Tennis Club. The first defendant also says the HSWA does not apply to it as it is a volunteer organisation not employing staff.

(d) Whilst s 95(2)(b) of the HSWA provides for an application to the District Court for compensation relating to adverse conduct, the plaintiff's allegations do not fit within what is required.

(e) The first and second defendants are incorporated societies and allegations that they have breached their rules or constitutions are not justiciable in the District Court. Rather, the appropriate forum for these complaints is a claim of judicial review in the High Court.

(f) The plaintiff, when referring to the commission of a tort, has failed to articulate the elements and the defence should not have to guess.

(g) The second defendant, Tennis New Zealand, emphasises that fundamentally the plaintiff's claim relates to decisions of the first defendant and all it issued was advisory guidelines. Tennis New Zealand left it to individual tennis clubs to reach their own decisions on how the COVID-19 Protection Framework was to be implemented. Tennis New Zealand submits that the plaintiff has not made it clear how Tennis New Zealand has acted unlawfully, what cause of action she relies on and what remedy was sought for that. Tennis New Zealand says it has not been given adequate notice of the case it is required to answer.

(h) The third defendant, Sport New Zealand, says it has had no connection to the decisions made by the Taupō Tennis Club or Tennis New Zealand regarding vaccination requirements.

(i) Sport New Zealand emphasise that there is no claim in the application for relief concerning it, and its name does not appear in the application for relief.

[14] The second defendant also submits the statement of claim should be struck out as an abuse of process because it is likely to cause prejudice or delay. This is because it is unintelligible and it is not clear how Tennis New Zealand has acted unlawfully, what cause of action is relied on and what remedy is sought from this defendant.

The plaintiff's response

[15] The plaintiff accepts that her claims are novel but says that all she is asking for is an examination of the application of laws imposed in unprecedented times. She says she has genuine and meritorious arguments which should be impartially heard and determined.

Taupō Tennis Club

[16] The plaintiff's response to the first defendant's application to strike out was to emphasise that she is in an absurd situation in which she and her 10-year-old daughter are not allowed to play tennis in Taupō at the only tennis club in town. Ms Whittome says that the rule changes implemented by the Taupō Tennis Club vaccination requirements were arbitrary and capricious discrimination against her. They amounted to compulsion to receive medical treatment which is a breach of a central requirement of the Health Act, that in no case may a direction require an individual to submit to compulsory treatment.[23] Ms Whittome emphasises that the Taupō Tennis Club breached the COVID-19 Protection Framework, COVID-19 Public Health Response Act and the COVID-19 Vaccinations Order which has resulted in her being discriminated against.

[17] In respect of her claims under the NZBORA, Ms Whittome submits that the Court is bound by that Act and says that her substantive claim is that the Taupō Tennis Club treated her unfairly in terms of her rights under the NZBORA. She submits that she has the right for the Court to the observe the principles of natural justice.[24]

[18] Regarding her claim under the HSWA, Ms Whittome submits that Act applies to the first defendant because it employed a cleaner. She submits she has standing to bring a claim of coercion because she is a person affected by coercive conduct, that conduct being coercion to take a provisionally approved vaccination so that she could use the toilets of the Taupō Tennis Club.

[19] In respect of her claim in tort, Ms Whittome submits that in failing to make its facilities open to all members, the Taupō Tennis Club breached its constitution and thereby committed a common law tort.[25] Ms Whittome did not detail the elements of the tort.

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23 Health Act 1956, s 92I(5).
24 New Zealand Bill of Rights Act 1990, s 27.
25 Clause 7.1.

Tennis New Zealand

[20] Ms Whittome's response to the strike out application brought by the second defendant's application was in similar terms to the submissions she made in response to the first defendant's application. However, in response to a submission that the District Court does not have jurisdiction to hear claims relating to alleged unlawful discrimination under the Human Rights Act, Ms Whittome stated, "While a ruling and remedy may not be able to be given under the HRA in the District Court, the Courts all have an inherent jurisdiction to hear matters in light of the NZBORA."[26] Ms Whittome emphasised her right to natural justice as provided for by s 27(1) of the NZBORA and submitted that this entitles her to have the Court hear her claims.

[21] In response to a submission made by counsel for the second defendant that the plaintiff does not have standing to bring a claim against Tennis New Zealand for breach of its constitution and ancillary policies, the plaintiff conceded that she did not have standing and was not seeking damages from Tennis New Zealand for breach of its constitution and ancillary policies, "rather she is seeking damages from the advice Tennis New Zealand gave to Taupō Tennis Club which they should not have issued …. The plaintiff seeks declaration from Tennis New Zealand of their wrongdoing in their advice."[27]

[22] In respect of tort, the plaintiff submitted that Tennis New Zealand are implicated "because they procured the agreement of the Taupō Tennis Club to commit a tort against the plaintiff."

Sport New Zealand

[23] The plaintiff's response to the application by Sport New Zealand to strike out her claim was to emphasise that Sport New Zealand is a Crown entity and that it was liable because it is the overarching body for sport in New Zealand.

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[26] Paragraph 7(a) of the plaintiff's response to Tennis New Zealand's submissions to strike out.
[27] Paragraph 7(g) of the plaintiff's response to Tennis New Zealand's submissions to strike out.

[24] Regarding the jurisdictional issue concerning her human rights claims, the plaintiff advised that she had not received a written response from the Human Rights Commission about her discrimination complaint and she had not requested a tribunal hearing with the Human Rights Tribunal. The plaintiff submitted that there was a difficulty with the crossover with different authorities and it was far more expedient and sensible to have all matters heard in the one arena, that being the District Court.

Legal principles – strike out

[25] The jurisdiction to strike out is to be used sparingly. The Court will only strike out proceedings where the causes of action are so clearly untenable that they cannot possibly succeed.[28] It is inappropriate to strike out a claim summarily unless the Court can be certain that it cannot succeed.[29]

[26] The Court can also strike out a pleading if is an abuse of the process of the court.[30]

[27] If the defect in the pleadings can be cured, then the Court would not normally strike the claim out. If the history of the matter shows that the plaintiff is unlikely to be able to improve upon the current statement of claim, the Court may strike the claim out.[31]

Discussion

Human Rights Act 1993

[28] The central theme of the plaintiff's claim against all three defendants is that she has been unlawfully discriminated against resulting in breaches of the Human Rights Act and/or the NZBORA.

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28 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267.
29 *Couch v Attorney-General* [2008] 3 NZLR 725 at [33].
30 District Court Rules 2014, r 15.1.
31 *Burchell v Singh* [2014] NZHC 1353 at [18].

[29] The Human Rights Act provides a scheme for dealing with complaints of unlawful discrimination.[32] The Human Rights Commission must provide dispute resolution services,[33] and a complainant can bring civil proceedings before the Human Rights Tribunal for unlawful discrimination.[34] The remedies available in the Human Rights Tribunal are broad and include an award of monetary compensation up to the maximum that the District Court could award in a civil proceeding.[35] The Court of Appeal in *Winther v Housing New Zealand*[36] found that in respect of a claim of unlawful discrimination against a public body, the Tenancy Tribunal did not have jurisdiction to determine the claims based upon unlawful discrimination. The Court found that such a claim must be determined under the Human Rights Act by the processes established by it.[37]

[30] The civil jurisdiction of the District Court is provided for in s 74 of the District Courts Act 2016 and confers jurisdiction on the District Court to determine a proceeding "under any enactment other than this Act".[38]

[31] There is nothing in the Human Rights Act that provides for the District Court to determine claims for unlawful discrimination. Rather, there is a clear scheme for dispute resolution either to the Commissioner or to the Human Rights Tribunal. Furthermore, the District Court does not have an inherent jurisdiction to hear claims under the Act.

[32] I am satisfied that the plaintiff's claims in the District Court for unlawful discrimination by either the first, second or third defendants cannot succeed because this Court does not have jurisdiction to hear it.

New Zealand Bill of Rights 1990

[33] The NZBORA applies only to acts done:[39]

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32 Section 4.
33 Human Rights Act 1993, s 77(1).
34 Section 92B.
35 Human Rights Act 1993, ss 92I and s 92Q.
36 *Winther v Housing New Zealand* [2011] 1 NZLR 825.
37 At [82].
38 District Courts Act 2016, s 74(1)(b).
39 New Zealand Bill of Rights Act 1990, s 3.

(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[34] The actions of the first and second defendants are not subject to the NZBORA, as they are incorporated societies and were not carrying out public functions imposed on them pursuant to law.

[35] Whilst Sport New Zealand was carrying out a public function, any alleged acts of unlawful discrimination committed by it are only justiciable before the Human Rights Commission or the Human Rights Tribunal as I have found above.

[36] The District Court has no declaratory function in respect of breaches of the NZBORA.

[37] No cause of action against any of these defendants under the NZBORA can succeed in the District Court.

COVID-19 Public Health Response (Protection Framework) Order 2021

[38] The plaintiff alleges that the Taupō Tennis Club breached s 81 of the COVID-19 Protection Framework Order by requiring a vaccine pass for its toilets. The plaintiff also alleges that Sport New Zealand bears some responsibility for this decision as a party and is thereby liable as well.

[39] The COVID-19 Protection Framework was originally enacted on 2 December 2021, it provided:

81 Outdoor sports facilities must close indoor parts

(1) This clause applies to the following outdoor sports facilities:

… tennis courts:

(2) The person in control of the outdoor sports facilities must close indoor parts of the facility to customers and clients.

> (3) A breach of subclause (2) is an infringement offence for the purposes of section 26(3) of the Act.

[40] From 23 December 2021, s 81(2) was amended to read: [40]

> The person in control of the outdoor sports facility must close all indoor parts of the facility to the customers and clients, *except toilets and any indoor part of the facility to which access is required for access to those toilets*

[41] Counsel for the second defendant undertook a thorough review of the orders promulgated under the COVID-19 Public Health Response legislation and I accept the submission that s 81 never came into effect. It does not appear in any list of the provisions which had effect at the Red light setting as set out in pt 2 of sch 7 of the Protection Framework. Furthermore, if s 81 had come into effect, it would not have imposed a positive obligation on the Taupō Tennis Club to permit all persons whether vaccinated or not to use its toilets.

[42] Importantly, there is nothing in the COVID-19 Protection Framework legislation that provides for a civil remedy for any alleged breach of it or the failure of any vaccine requirement to fulfil the act's purposes.

[43] Furthermore, the District Court has no declaratory function regarding the vires of orders promulgated under empowering legislation.

[44] The plaintiff's claim against any defendant for alleged breaches of the COVID-19 legislation or associated orders must fail.

Health Act 1956

[45] The plaintiff claims that s 92I(5) of the Health Act imposes a positive duty on public bodies not to compel an individual to submit to compulsory medical treatment. She submits that whilst the first and second defendants are private bodies, they are affiliated to Sport New Zealand which is a public body, and as a result all defendants are responsible for a breach of the Health Act.

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[40] COVID-19 Public Health Response (Protection Framework) Order 2021, s 81(2) (emphasis added).

[46] Section 92I applies to directions issued by a medial officer for health. No defendant in this case was acting as a medical officer of health, nor were they undertaking any public role. All defendants are connected with tennis, which is a recreational activity, and no defendant required the plaintiff to undergo medical treatment. Ms Whittome always had the option to walk to any nearby public toilet. Furthermore, pt 3A of the Health Act has no provision for monetary compensation for any breach.

[47] The plaintiff's allegation that s 92I(5) has been breached is essentially a Bill of Rights claim which, as I have already found, is not justiciable in the District Court. There is no basis for a cause of action under s 92I of the Health Act and it must fail.

Health and Safety at Work Act 2015

[48] The HSWA casts a broad duty on a person conducting a business or undertaking, a PCBU, to ensure, so far as reasonably practicable, the health and safety of workers who work for the PCBU while they are at work in the business or undertaking.[41] The definition of PCBU in the Act is broad[42] and includes any person conducting a business or undertaking, whether that person conducts the business or undertaking alone or with others, and irrespective of whether the business or undertaking is conducted for profit or gain.[43]

[49] One of the five exceptions to the broad definition of PCBU is a volunteer association which means a group of volunteers working together for a community purpose, where none of the volunteers employs any person to carry out the work for the volunteer association.[44] The Taupō Tennis Club has a cleaner who undertakes regular cleaning at the clubroom. The accounts of the Taupō Tennis Club show regular payments to her of $80. "Employs" is not defined in the HSWA but "employee" has the same meaning as s 6 of the Employment Relationships Act 2000. Section 6(1)(b)(ii) of that Act defines "employee" as a person intending to work. The

41 Section 36.
42 Section 17.
43 Section 17(1)(a).
44 Section 17(2).

cleaner engaged by the Taupō Tennis Club was intending to work for it and as a result, the club is a PCBU in terms of the HSWA. However, the primary duties of PCBUs are to ensure, so far as reasonably practicable, the provision of adequate facilities for the welfare at work of *workers* in carrying out work for the business or undertaking, including ensuring access to those facilities.

[50] Ms Whittome was not a worker at the Taupō Tennis Club.

[51] Section 92 of the HSWA provides:

> **92 Prohibition on coercion or inducement**
>
> (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce or induce the other person, or a third person,—
>
> (a) to perform or not to perform, or to propose to perform or not to perform, a function under this Act or a function under this Act in a particular way; or
>
> (b) to exercise or not to exercise, or propose to exercise or not to exercise, a power under this Act or a power under this Act in a particular way; or
>
> (c) to refrain from seeking, or continuing to undertake, a role under this Act.

[52] Section 95 of the HSWA provides civil remedies for coercive conduct:

> **95 Civil proceedings in relation to engaging in or inducing adverse or coercive conduct**
>
> (1) An eligible person may apply to the District Court for 1 or more orders specified in subsection (2) in relation to a person who has—
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> (a) engaged in adverse conduct for a prohibited health and safety reason; or
>
> (b) requested, instructed, induced, encouraged, authorised, or assisted another person to engage in adverse conduct for a prohibited health and safety reason; or
>
> (c) breached section 92 (which relates to the prohibition on coercion or inducement).
>
> (2) The orders are—

(a) an injunction restraining the person from engaging in conduct described in subsection (1):

(b) for conduct referred to in subsection (1)(a) or (b), an order that the person pay compensation that the court considers appropriate to the person who was the subject of the adverse conduct:

(c) any other order that the court considers appropriate.

[53] As is apparent from s 95(2)(b) it does not provide for compensation for coercive conduct under s 92. Furthermore, the plaintiff's claim that she, as a non-employee, has been coerced into taking a vaccine does not fit within the section's prohibition on coercion which appears to be directed at preventing persons coercing others not to perform a function or power under the Act.

[54] I am satisfied the plaintiff has no cause of action against the Taupō Tennis Club under the HSWA.

Tort/breach of constitution

[55] The plaintiff alleges that the first and second defendants have committed a tort. She refers to paragraph 13.2 of the statement of claim where is alleges:

> …it was a tort on the defendants own constitution for the defendant to exclude the club toilets from the plaintiff.

[56] At no stage has Ms Whittome set out the elements of the tort or explained how the defendants have breached it. In *Reihana v Foran,*[45] Mr Reihana claimed that Mr Foran and Air New Zealand breached a duty of care not to require its customers and clients to undergo a potentially dangerous vaccination. The High Court found that the duty alleged by Mr Reihana fell well short of the standards for a novel duty of care in tort and struck it out. Whilst Ms Whittome refers her claim being novel, she has done nothing to explain why the Court should impose a duty of care in this situation. It is not appropriate for the Court to exercise its imagination and to fill out the blanks for the plaintiff. What the plaintiff seems to be alleging is that the first and second defendants, as incorporated societies, have breached their rules and that this has adversely affected her. Is the plaintiff's claim against these defendants capable of

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45 *Reihana v Foran* [2022] NZHC 2425.

amendment to one of a claim for damages against an incorporated society for breach of its constitution or rules?

[57] The plaintiff was a member of the Taupō Tennis Club but not a member of Tennis New Zealand so would not have a claim against the second defendant as an incorporated society.

[58] Every incorporated society must have a constitution or set of rules.[46] It is established law that the rules of an incorporated society constitute a contract between the society and its members.[47] The society may include any provision in its rules so long as they are not inconsistent with the Incorporated Societies Act 1908 or with the law.[48]

[59] Clause 14.4 of the constitution of the Taupō Tennis Club states:

> The Committee may from time-to-time make, alter or rescind rules or policies for the general management of the Club, so long as these are not repugnant to this constitution or to the provision of the law.[49]

[60] The plaintiff complains that the Taupō Tennis Club has acted contrary to its purposes, which is to maintain facilities for the playing of tennis[50] and that she has suffered harm because either her or her young daughter has not been able to play tennis. Essentially this is a complaint that the club has acted ultra vires its constitution. Such a claim can be determined by an application for judicial review in order to determine whether those operating an incorporated society have acted ultra vires the society's constitution and accordingly have acted unlawfully.[51]

[61] Claims for judicial review cannot be heard in the District Court. The plaintiff's claim that the Taupō Tennis Club and Sport New Zealand have committed a tort is not capable of being amended in this Court to one of judicial review.

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46 Incorporated Societies Act 1908, ss 6 and 7.
47 *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA) at 177.
48 Section 6(2).
49 Section 6(2).
50 Clause 3(b) of the constitution.
51 See *Chand v Chand* [2022] NZHC 303.

[62] A member of an incorporated society can also bring an action in contract against the society, but breach of contract does not appear to be the plaintiff's complaint. This is now the plaintiff's sixth statement of claim. Given this procedural history, it is not appropriate for the Court to speculate on how the plaintiff's claim could be amended to alleged breach of contract. So far, the plaintiff has been unable to articulate either how she has either a claim in tort or contract against the first defendant as an incorporated society and I am not convinced that she would be able to do so should further opportunity be given.

[63] This reasoning equally applies to any claim the plaintiff has against the second defendant as an incorporated society.

[64] I find that the plaintiff has no reasonable cause of action in tort against either the first or second defendants.

Abuse of process

[65] The plaintiff's claims against the second and third defendants are ill defined and it is extremely difficult to discern from the statement of claim how they are liable for the actions of the Taupō Tennis Club in requiring a vaccine pass for entry into its toilets or for terminating Ms Whittome's membership of the club. Furthermore, no relief appears to be sought against the second or third defendant. Sport New Zealand is not even mentioned in the application for relief. To allow Ms Whittome's claim to continue against them would be an abuse of the process of the Court.

Conclusion

[66] The plaintiff has no reasonably arguable cause of action against the first, second or third defendants. Furthermore, it would be an abuse of process to let her claims against the second and third defendants continue.

[67] For this reason, each of Ms Whittome's causes of action as contained in her fifth amended statement of claim are struck out against the first, second and third defendants.

[68] The defendants are entitled to costs. Ms Whittome was warned by Judge Spear on 13 July 2022 that she was significantly exposing herself to an order for costs if she was unsuccessful in respect of any of her claims.[52]

[69] I invite counsel for the defendants to submit memoranda concerning costs. The plaintiff is to file one memorandum in response, addressing the costs claim, if any, of each defendant.

[70] The Court will then issue a decision in respect of costs on the papers.

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Judge GC Hollister-Jones
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/02/2023

[52] Minute of Judge RLB Spear dated 13 July 2022 at para [10].