IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-002337

UNDER	Section 123(2) of the Human Rights Act 1993 and Part 20 of the High Court Rules
IN THE MATTER OF	an appeal against the decision(s) of the Human Rights Review Tribunal
BETWEEN	DIRECTOR OF CIVIL AVIATION Appellant
AND	ABBAS BARADARAN SHAHROODI Respondent
AND	HUMAN RIGHTS REVIEW TRIBUNAL Third Party
AND	DIRECTOR OF HUMAN RIGHTS PROCEEDINGS A Party entitled to appear under s 86(1)(b) of the Privacy Act 1993

Hearing: 27 September 2011

Appearances: J Edwards and S Jennings for the Appellant
Respondent in Person
P Gunn for the Third Party
R Stevens for the Director of Human Rights Proceedings

Judgment: 4 October 2011 at 4:00 PM

[RESERVED] JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on Tuesday 4 October 2011 at 4.00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] The appellant, the Director of Civil Aviation, seeks to challenge a decision given by the Human Rights Review Tribunal on 9 March 2011.[1] That decision was given in the context of proceedings brought by the respondent, Mr Shahroodi, under the Privacy Act 1993.

[2] The Director filed a notice of appeal on 11 April 2011.

[3] On 26 April 2011, the Director of Human Rights Proceedings gave notice under s 86(1)(b)(ii) of the Privacy Act, indicating that he intended to appear and be heard in respect of the appeal.

[4] Mr Shahroodi gave notice on 9 May 2011 recording his interest in the appeal.

[5] On 13 May 2011, counsel for the Tribunal filed a memorandum suggesting that the notice of appeal had been filed out of time, and that no waiver of the statutory time limit had been sought or granted. This suggestion was endorsed by the Director of Human Rights Proceedings in a further memorandum dated 26 May 2011.

[6] On 3 June 2011, the Director filed an application dated 27 May 2010 seeking leave to enlarge time for the filing of the notice of appeal.

[7] The matter came before me by way of a telephone conference on the same day. All parties wished to have this preliminary issue dealt with prior to any substantive hearing. Further, all were agreed that it involved legal matters only, as the facts are not in dispute, and that it was not necessary for two additional members to be appointed by me or another Judge of this Court to assist in considering the same.[2]

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1 *Shahroodi v Director of Civil Aviation* [2011] NZHRRT 6.

2 See s 126, Human Rights Act 1993; *Grupen v Director of Human Rights Proceedings* [2011] NZAR 281.

[8] On 8 June 2011, an affidavit was filed on behalf of the Director. It explained that the solicitor responsible for the matter had erroneously assumed that the notice of appeal was required to be filed by 11 April 2011. It acknowledged that the appeal period had ended on 8 April 2011.

[9] The Director's application is opposed by Mr Shahroodi. It is also opposed by the Director of Human Rights Proceedings. Counsel for the Tribunal filed a memorandum advising that the Tribunal would abide the decision of the Court, but offering to appear if it would assist. I took advantage of that offer and Mr Gunn appeared at my request.

Factual Background

[10] The following is a truncated summary taken from the Tribunal's decision.

[11] Mr Shahroodi was a pilot for many years. As early as 2002, his conduct as a pilot came to the attention of the Director and concerns were expressed about his piloting skills. Matters came to a head in early February 2009 when Mr Shahroodi was piloting an aircraft which left the runway and crashed into a perimeter fence.

[12] On 5 February 2009, the Director suspended Mr Shahroodi's pilot licence.

[13] On 19 March 2009 he sent Mr Shahroodi a draft report into the accident and other related documents. The Director then turned his mind to the possibility of revoking Mr Shahroodi's pilot's licence.

[14] On 20 March 2009, Mr Shahroodi wrote to the Director seeking to access "any personal information or reports" about him held by the Director.

[15] On 26 March 2009, the Director sent Mr Shahroodi notice of a proposed decision revoking his pilot's licence. The proposed revocation was based not only on the February 2009 incident but also on other incidents said to have occurred in 2002, 2003 and 2005. Accompanying the notice were various documents including

Mr Shahroodi's "personnel file". These were provided to comply with s 19 of the Civil Aviation Act 1990.

[16] Mr Shahroodi was required to file any submissions he wished to make in relation to the proposed decision by 17 April 2009.

[17] On 30 March 2009, the Director responded to Mr Shahroodi's request of 20 March 2009. He advised that no "personal information or reports" were held by him and that Mr Shahroodi's "personnel file" had been forwarded to him on 26 March 2009.

[18] In fact, the Director had a great deal more information about Mr Shahroodi than was disclosed in the "personnel file" sent on 26 March 2009. The Director, however, took the view that Mr Shahroodi had only requested his "personnel file" and therefore he did not make this additional information available.

[19] Mr Shahroodi continued to request specific information and he contacted the Office of the Privacy Commissioner. The Director pressed on, and on 3 June 2009, he revoked Mr Shahroodi's pilot's licence. It was only on 14 July 2009 that the Director finally complied with Mr Shahroodi's information access request in a substantial way.

[20] Mr Shahroodi has appealed the revocation of his pilot's licence to the District Court under s 66 of the Civil Aviation Act. That appeal has been heard. The Court reserved its decision and the parties are currently awaiting the same.

[21] Mr Shahroodi also commenced proceedings under s 83 of the Privacy Act asserting that the Director had not complied with his request for access to his personal information and reports in the manner required by s 6, principle 6, and Part 5 of the Privacy Act. Those proceedings came before the Tribunal. Initially, the Director applied to have Mr Shahroodi's claim struck out. The Tribunal declined that application.[3] In a subsequent decision, the Tribunal upheld the Director's decision to

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[3] *Shahroodi v Director of Civil Aviation* [2010] NZHRRT 24.

withhold certain information from Mr Shahroodi, and dismissed Mr Shahroodi's claims in that regard.[4] The Tribunal's third decision is in issue in this proceeding.

The Tribunal's Decision

[22] The Tribunal heard the balance of Mr Shahroodi's complaint on 14 and 22 February 2011, and issued its decision on 9 March 2011.[5]

[23] The Tribunal set out a brief chronology, and noted Mr Shahroodi's allegations. It considered the Director's response to Mr Shahroodi's request for access to his personal information, and it was critical of that response. It considered that the Director's initial decision to treat Mr Shahroodi's request as being limited to his "personnel file" was surprising. It held that the Director erred in treating Mr Shahroodi's request as seeking only a limited set of information. It regarded Mr Shahroodi's request as being a "provide everything" type of request, and considered that it ought to have been obvious to the Director that Mr Shahroodi was looking to muster all of the information he could in order to deal with the allegations that were being made against him in relation to the then prospective revocation of his pilot's licence. The Tribunal further considered that the Director was under an obligation to meet that request without undue delay, and that it could reasonably have been expected to supply the information sought by Mr Shahroodi by the end of April 2009. It noted that the information sought was only supplied on 14 July 2009, some two and a half months later that might reasonably have been expected. It noted that during that two and a half month period, the Director finalised his decision to revoke Mr Shahroodi's pilot's licence. The Tribunal found that there was undue delay by the Director in providing access to the information that Mr Shahroodi requested on 20 March 2009, and that the Director's failure to deal with the information access request as he should have done was an interference with Mr Shahroodi's privacy.

[24] The Tribunal then went on to consider the appropriate remedies. It noted that Mr Shahroodi had claimed damages under three different headings. It dealt with each in turn. It considered that a claim for loss of income must fail, because there

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4 *Shahroodi v Director of Civil Aviation* [2011] NZHRRT 5 (the first substantive decision).
5 *Shahroodi v Director of Civil Aviation* [2011] NZHRRT 6.

was no sufficient evidential basis for the award that Mr Shahroodi sought. It noted a claim by Mr Shahroodi for a contribution toward his legal costs. Mr Shahroodi assessed that he had incurred total costs of $140,000; and he sought reimbursement of a third of those costs. The Tribunal considered that it would be helpful to know the outcome of the District Court appeal against the revocation of the pilot's licence before finalising its decision on this aspect of the case. Finally, it noted that Mr Shahroodi was seeking compensation and damages to compensate him for other harm he claimed to have suffered as a result of the Director's interference with his privacy. The Tribunal concluded that Mr Shahroodi had suffered harm and it awarded damages.

[25] The Tribunal made the following orders:

(a) it declared that the Director's response to Mr Shahroodi's information access request of 20 March 2009 was an interference with Mr Shahroodi's privacy;

(b) that Mr Shahroodi's claim for compensation in respect of loss of income should be dismissed;

(c) that Mr Shahroodi's claim for an award to contribute to the legal costs he had sustained in responding to the Director's decision to revoke his pilot's licence should be reserved, to be dealt with after the decision of the District Court in that matter had been released;

(d) that pursuant to s 85(1)(c) and s 88(1)(b) of the Privacy Act, Mr Shahroodi should be awarded damages in the sum of $5,000;

(e) that pursuant to ss 85(1)(c) and 88(1)(c) of the Privacy Act, Mr Shahroodi should be awarded a further sum by way of damages in the amount of $5,000; and

(f) that costs to that point should lie where they fell.

The Notice of Appeal

[26] As noted, the notice of appeal by the Director was filed with the Court on 11 April 2011. The appeal purports to be against the whole of the Tribunal's decision. It asserts that the Tribunal erred in law and fact in the following ways: that it took into account irrelevant considerations, it misapplied relevant legal tests, its decision is unreasonable, it exceeded its jurisdiction, and the awards made were unwarranted and excessive in the circumstances.

[27] An appeal is brought only when the appellant:

(a) files a notice of appeal in the Court;

(b) files a copy of the notice of appeal in the administrative office; and

(c) serves a copy of the notice of appeal on every other party directly affected by the appeal.[6]

Each of these requirements must be complied with within the period allowed for appealing.[7]

[28] At the hearing Mr Jennings for the Director submitted that a copy of the notice of appeal was forwarded by email to Mr Shahroodi on the same day. In a memorandum filed shortly after the hearing, Mr Shahroodi denied receipt of any email dated 11 April 2011. Mr Jennings has filed a further memorandum. He stated that an email was "sent" on 11 April 2011, but acknowledges that the email could not be delivered. He apologised for inadvertently misleading the Court.

[29] Mr Jennings also submitted that a copy of the notice of appeal was sent to Mr Shahroodi by ordinary post on 11 April 2011. Mr Shahroodi explained that he was overseas at or about that time, and that he did not, in fact, receive the notice of appeal until sometime thereafter.

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6 Rule 20.6.

7 *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404.

[30] Mr Shahroodi has a post office box address and a street address. I do not know what address Mr Shahroodi had given in the tribunal proceedings as his address for service, but that does not affect the position.

[31] Service can be effected in accordance with r 6.1. It may be effected by post only when the person to be served has provided the requisite details in a document already served by him or her. Service may be to a post office box address under r 6.1(d) if the post office box address has been specified as the address for service. Pursuant to r 6.6, if a document is posted to a post office box address, the document is treated as being served on the earlier of the third working day after the day on which it was posted, or the day on which it was received. It may therefore be that the requirements of r 20.6 were not met until expiry of the third working day after the notice of appeal was sent by post – namely, Friday, 15 April 2011. In any event, for the reasons that follow, it makes no difference. Both 11 April and 15 April are outside the 30-day period provided for in the relevant appeal provisions.

The Appeal Provisions

[32] The Tribunal's decision was given pursuant to proceedings brought by Mr Shahroodi under s 83 of the Privacy Act, in which he complained that his privacy rights had been interfered with.

[33] The Tribunal's functions are set out in s 94 of the Human Rights Act 1993. Amongst other things, it is required to consider and adjudicate upon proceedings brought pursuant to ss 92B and 92E of the Human Rights Act 1983, and also to exercise and perform such other functions, powers and duties as are conferred or imposed on it by or under any other enactment.

[34] The Privacy Act confers other functions, powers and duties on the Tribunal in any proceedings brought under, inter alia, s 83 of that Act. Section 85 permits the Tribunal to grant a declaration that the action of a defendant is an interference with the privacy of an individual, and to award damages under s 88 for this interference, in defined circumstances. There is no right of appeal directly conferred by the Privacy Act. Rather, s 89 of the Act provides as follows:

> **89 Certain provisions of Human Rights Act 1993 to apply**
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> Sections 92Q to 92W and Part 4 of the Human Rights Act 1993 shall apply, with such modifications as are necessary, in respect of proceedings under section 82 or section 83 of this Act as if they were proceedings under section 92B, or section 92E, or section 92H of that Act.

[35] Part 4 of the Human Rights Act deals with the Tribunal, its functions, powers, constitution and procedure. It contains s 123 which relevantly provides as follows:

> **123 Appeals to High Court**
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> …
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> (2) A party to a proceeding under section 92B or section 92E may appeal to the High Court against all or any part of a decision of the Tribunal—
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> (a) dismissing the proceeding; or
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> (b) granting 1 or more of the remedies described in section 92I; or
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> (c) granting the remedy described in section 92J; or
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> (d) refusing to grant the remedy described in section 92J; or
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> (e) constituting a final determination of the Tribunal in the proceeding.
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> …
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> (4) Every appeal under this section shall be made by giving notice of appeal within 30 days after the date of the giving by the Tribunal in writing of the decision to which the appeal relates.
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> …
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> (8) Subject to the provisions of this Act, the procedure in respect of any such appeal shall be in accordance with the rules of court.
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> …

Matters in Issue/Submissions

[36] There is no dispute that the 30-day period specified in s 123(4) expired on 8 April 2011 and that the appeal was both filed and served after that date. The primary matters in issue are whether there is a proceeding permitting an appeal, and

if there is, can the time for filing the notice of appeal detailed in s 123(4) be enlarged?

[37] Mr Edwards for the Director submitted as follows:

(a) that the appeal was not filed out of time because the Tribunal has not made a final decision. In this regard, he noted that the Tribunal has deferred finalising the quantum of any damages award against the Director for legal costs incurred by Mr Shahroodi;

(b) that in the alternative, the Director was entitled to bring an appeal against the Tribunal's decision within a period of 20 working days pursuant to the High Court Rules;

(c) that the Court has jurisdiction to extend the time allowed for the filing of the appeal pursuant to r 1.19 or pursuant to its inherent powers, and

(d) that the decision of the Court of Appeal in *Attorney-General v Howard*[8] can be distinguished, and the timeframes for filing and service set out in s 123(4) of the Human Rights Act can be enlarged.

[38] Mr Stevens for the Director of Human Rights Proceedings submitted that the time for filing appeals set out in s 123 of the Human Rights Act applies pursuant to s 89 of the Privacy Act. He argued that the Director was required to appeal those parts of the Tribunal's decision as are final within the specified 30-day period, and that when the Tribunal ultimately finalises damages in respect of legal costs incurred, that it will be open to the Director and to Mr Shahroodi to challenge that decision within the same 30 working-day period. He argued that the Court of Appeal's decision in *Attorney-General v Howard* is directly applicable, and that there is no proper basis for distinguishing the same.

[39] Mr Gunn for the Tribunal endorsed Mr Steven's submissions. He argued that the Tribunal's decision was final in its terms, and that an appeal could and should

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8 *Attorney-General v Howard* [2011] 1 NZLR 58.

have been filed and served in respect of the declaration made and the remedies granted within the specified 30-day period.

[40] Mr Shahroodi was content to leave the legal arguments to Messrs Stevens and Gunn. He made some general submissions by way of background, and asserted that he would be prejudiced if leave were granted to enlarge the time for appealing.

Analysis

[41] I deal first with the question of whether or not the Tribunal's decision was in whole, or in part, a final decision.

[42] In my judgment, it is clear that the Tribunal's decision was, in large part, a final decision. Pursuant to s 85(1)(a) of the Privacy Act the Tribunal made a declaration that the actions of the Director were, in the circumstances, an interference with the privacy of Mr Shahroodi. The Tribunal further considered the appropriate remedies. It dismissed Mr Shahroodi's claim for damages for loss of income. It awarded Mr Shahroodi damages pursuant to ss 85(1)(c), 88(1)(b), and 88(1)(c). It did not make a final decision in regard to Mr Shahroodi's claim for an award to contribute to his legal costs. It reserved that part of its decision, to be dealt with after the decision of the District Court in relation to the revocation of Mr Shahroodi's pilot's licence had been released.

[43] In my view, there can be no serious argument but that the Tribunal has made a final order in a number of respects. It cannot reconsider the orders that it has made, and in those requests, it is functus officio.

[44] Section 123(2) provides that a party to a proceeding under s 92B or 92E may appeal to the High Court "against all or any part of a decision" of the Tribunal doing one or more of the things listed in s 123(2)(a) to (e), inclusive.

[45] Here, pursuant to s 89 of the Privacy Act, Mr Shahroodi's proceedings under s 83 of that Act must be treated as if they were proceeding under s 92B, 92E, or 92H of the Human Rights Act. The proceedings commenced by Mr Shahroodi in s 83 of

the Privacy Act are akin to civil proceedings arising from complaints under s 92B of the Human Rights Act.

[46] Section 123(2)(a), (c) and (d) have no application. In my judgment however, both s 123(b) and (e) apply.

(a) Section 89 provides that Part 4 of the Human Rights Act applies with such modifications as are necessary. Where civil proceedings commence under s 92B of the Human Rights Act, the remedies available to the Tribunal include those detailed in s 92I. Inter alia, the Tribunal can make a declaration of breach, and an order for damages.[9] The reference in s 123(2)(b) to the remedies described in s 92I must, in my view, be treated as being a reference to s 85 of the Privacy Act. It follows that s 123(2)(b) applies. The Tribunal has made orders granting a declaration of breach and orders for damages. Those parts of its decision may be appealed.

(b) In the alternative, s 123(2)(e) applies. Parts of the Tribunal's decision – making a declaration, dismissing one of the claims for damages, and making awards in respect of two other claims for damages – constitute a final determination of those parts of the proceeding. Those parts of the decision can also be appealed.

[47] It follows that the Director could appeal to this Court against those parts of the Tribunal's decision which granted the declaration, and awarded damages.

[48] Every appeal pursuant to s 123(4) is required to be made by giving notice of the appeal within 30 days after the date that the Tribunal releases in writing, the decision to which the appeal relates.

[49] It is common ground that the 30-day period expired on 8 April 2011. The appeal was not filed until 11 April 2011 and it seems that service of the notice of appeal was not given to the affected parties until sometime thereafter. The appeal

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[9] See s 92I(3)(a) & (c).

has been brought outside the 30-day period specified by s 123(4). I deal below with the issues of whether or not the period can be enlarged.

[50] I now turn to the assertion made by the Director that the High Court Rules confer a right of appeal, independent of the Human Rights Act.

[51] A right of appeal is a substantive right, and not a mere matter of procedure. If a right of appeal is to exist, it must appear in the relevant statute.[10] Further, if a person desires to appeal, he can do so only if the statute has given him the right, and only within the limits which the statute giving the right lays down.[11]

[52] Here, Mr Edwards referred to r 20.

[53] That rule simply details when Part 20 of the High Court Rules applies. It provides that it applies to appeals to the Court "under any enactment", except for some defined exceptions. The appeal must be under an enactment. The High Court Rules cannot of themselves confer a right of appeal. The rules govern the procedure applicable to, inter alia, appeals brought under s 123 of the Human Rights Act.[12] The appeal is conferred by s 123 and no right of appeal can be created or conferred independently by the High Court Rules.

[54] Finally, I deal with the question of whether or not the time for appealing specified in s 123(4) can be enlarged.

[55] The obligation to file and serve within the statutory timeframe derives from s 123(4). This Court has consistently held that s 123(4) of the Human Rights Act requires notices of appeal to be given within 30 days after the Tribunal has given its decision in writing, and that there is no provision in the Act for an extension of time.[13] The issue came before the Court of Appeal in *Attorney-General v Howard*.[14]

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10 *Attorney-General v Sillem* (1864) 10 HLC 704 at 724, 11 ER 1200 at 1209; *Scottish Widows Fund Life Assurance Society v Blennerhassett* [1912] AC 281.

11 *Bowman, South Shields (Thames Street) Clearance Order, 1931* [1932] 2 KB 621 at 633; *Marriott v Minister of Health* [1936] 105 LJKB 105 at 108, affirmed on appeal [1937] 1 KB 128.

12 See also s 123(8).

13 *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 at 407 (HC); *Ta'ase v Victoria University of Wellington* (1999) 14 PRNZ 406 at 407.

The Court of Appeal held that the timeframes for filing and service are set out in the Human Rights Act, that they are mandatory, and that they cannot be extended by the Courts as there is nothing in the Human Rights Act authorising such an extension.[15]

[56] *Howard* has been applied in a number of subsequent decisions,[16] and in my judgment, it is clear that extensions of statutory timeframes permitting appeals can only be granted where the statute itself so allows.

[57] Mr Edwards asked me to distinguish *Howard*. First, he argued that the Court of Appeal was not being asked to rule on whether leave could be granted by the Court in the exercise of its inherent jurisdiction. He submitted that the decision therefore cannot be authority in that regard, and that there is no provision for leave in cases where the authority for the appeal is not derived from s 123.

[58] That argument cannot stand under close analysis. Here, the only right of appeal in issue is that conferred by s 123, via s 89 of the Privacy Act. There is no independent right of appeal conferred by the High Court Rules. *Howard* is directly on point. It deals with the timeframes for filing and service set out in s 123 of the Human Rights Act.

[59] Mr Edwards further submitted that *Howard* deals with proceedings under Part 1A of the Human Rights Act, where the Tribunal is required to consider a declaration of inconsistency with the New Zealand Bill of Rights Act 1990. He submitted that in such circumstances, certain duties are imposed on the relevant Minister under s 92K.

[60] Again, this argument cannot stand. *Howard* is not, in my judgment, limited to cases under Part 1A of the Human Rights Act. It is a considered and full decision as to the scope and meaning of s 123. As noted above, it has been applied in a

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14 *Attorney-General v Howard* [2011] 1 NZLR 58.

15 Ibid, see Glazebrook J at [100].

16 See, for example, *Armstrong v Accident Compensation Corp* HC Auckland CIV 2011-485-0860, 5 September 2011; *Child Poverty Action Group Inc (CPAG) v Attorney-General* [2011] NZAR 185; *Grupen v Director of Human Rights Proceedings* [2011] NZAR 281; *Murray v Gisborne District Council* HC Wellington CIV 2010-485-743, 3 June 2010; *Vukomanovic v Residence Review Board & Ors* [2011] NZAR 17 (CA).

number of subsequent decisions, including a further decision of the Court of Appeal. In my judgment, *Howard* is directly in point, and I am, of course, bound by the Court of Appeal's decision.

[61] Finally, Mr Edwards suggested that the words "with such modifications as are necessary" contained in s 89 recognises that different imperatives relate to decisions of the Tribunal made under Part 1A of the Human Rights Act, as compared to those under the Privacy Act.

[62] There is no warrant for that argument. Moreover, in my view, such an interpretation would run counter to the terms of s 89. The words "with such modifications as are necessary" are inserted into the section to ensure that the relevant sections of the Human Rights Act and the Privacy Act can mesh together. They do not permit me to ignore the provisions of s 123(4).

[63] It follows that the Director's application for enlargement of time must fail, and that no appeal has been properly brought against the Tribunal's decision of 9 March 2011.

Costs

[64] The Director of Human Rights Proceedings, and the Tribunal, are each entitled to costs.

[65] It seems to me that costs should be awarded on a 2B basis to the Director of Human Rights Proceedings and to the Tribunal. Mr Shahroodi appeared on his own behalf and he is not entitled to costs. I would invite counsel to agree on quantum. If there is any dispute, the Director of Human Rights Proceedings and the Human Rights Review Tribunal are to file memoranda within 10 working days of the date of

this judgment. Any response by the Director is to be filed within a further 10 working-day period. I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

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Wylie J