IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2005-485-1750

	UNDER	The Human Rights Act 1993
	BETWEEN	TALLEYS FISHERIES LIMITED Appellant
	AND	CAITLIN LEWIS First Respondent
	AND	BRETT DAVID EDWARDS Second Respondent

Hearing: 28 February 2007

Coram: Simon France J
Ms S Ineson
Dr A Trlin

Appearances: G P Malone for Appellant
C A Rodgers and J Ryan for Respondents

Judgment: 14 June 2007

JUDGMENT OF THE COURT

Introduction

[1] The plaintiff Caitlin Lewis at times worked for Talleys as a seasonal worker at Talleys' fish processing plant in Motueka. In 1999 and 2000 she was employed to trim fish during the hoki season. Ms Lewis complains that during that period she was appointed to be a fish trimmer as opposed to a better paying position because she was a woman. She therefore alleges she is the victim of gender discrimination. Talleys denies the allegation.

[2] The genesis of Ms Lewis' case was:

1. She was available to do any work at Talleys;

2. She was employed to be a fish trimmer, which involves using a knife to tidy up fillets that have been cut from the whole hoki;

3. An equivalent job at the factory is fish filleter, which is the prior step whereby fillets are cut with a knife from the whole hoki;

4. Talleys pay filleters more than trimmers;

5. Talleys appoint men to be filleters and women to be trimmers;

6. Ms Lewis was made a trimmer because she was a woman. Her partner Mr Edwards started work shortly before her. He had identical skills and background to her, but was appointed to be a trainee filleter, thereby immediately getting more money than her;

7. Ms Lewis is accordingly a victim of gender discrimination.

[3] Ms Lewis complained to the Human Rights Commission. As provided in the Act, the Director of Human Rights Proceedings decided to take a case on her behalf, and thereafter provided the representation and effectively ran the case.

[4] The Human Rights Tribunal found that:

- contrary to the plaintiff's assertion, filleters and trimmers were not doing substantially the same work within the meaning of the term used in s22 of the Human Rights Act 1993;

- contrary to Talleys assertion, Ms Lewis was allocated to be a trimmer on a gender basis;

- on a separate allegation, that her partner Mr Edwards was not re-employed by Talleys for the 2001 season because Ms Lewis had complained to the Human Rights Commission. This finding of victimisation is also the subject of an appeal by Talleys, and will be dealt with at the end of the judgment.

[5] Ms Lewis appeals the Tribunal's finding that the two jobs of trimmer and filleter were not substantially similar. Talleys appeals the finding that Ms Lewis was allocated to be a trimmer because she was a woman. Talleys also complains of the delay between hearing and judgment (16 months) and says that the Tribunal should have stayed the proceedings rather than issue judgment after that period of time had elapsed. This issue of delay will also be addressed at the end of the judgment.

The claim and the Tribunal's decision

[6] It is necessary to set out in some detail what was alleged.

[7] The plaintiff sought:

> **"A DECLARATION** pursuant to section 92I(3)(a) of the Act, that the Defendant Talleys Fisheries Limited, has breached section 22(1)(b) and/or section 65 and/or section 68 of the Act, in that it and/or its agents and/or its employees, afforded the Plaintiff Ms Caitlin Lewis less favourable terms of employment and/or conditions of work and/or opportunities for training and/or opportunities for promotion, than were made available to male applicants and/or male employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances; and/or operated systems in the workplace which conduct or practice had the effect of treating women workers differently from men workers."

[8] We are advised that at the hearing the plaintiff limited her claim to one brought under s22(1)(b) of the Act. She decided not to pursue the allegation that Talleys operated systems which had the effect of treating women workers differently. This was in effect to abandon any allegation of indirect discrimination. Section 22 of the Human Rights Act 1993 provides:

> Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer …

> (a) To refuse or omit to employ the applicant on work of that description which is available; or
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> (b) To offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or
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> (c) …

[9] Ms Rodgers for the plaintiff identified the case she had to prove as being:

1. that Ms Lewis was qualified for work of any description;

2. that Talleys offered her less favourable terms of employment and/or conditions of work than were made available to men of substantially the same capacities employed in substantially similar work;

3. that this differentiation occurred by reason of her sex.

[10] There was no suggestion that men and women employed as trimmers received any different treatment from each other. All employees were treated equally within the group that was trimmers. Rather the plaintiff chose to present the case on the basis that filleters and trimmers were doing substantially the same work. Talleys disputed this and the Tribunal agreed. The plaintiff appeals that finding.

[11] The conclusion of the Tribunal that the work of filleting and trimming were not substantially similar should have been determinative of the proceedings as the case was pleaded. If the work was not substantially similar, the differences in pay rates was explicable by the differences in the jobs rather than gender discrimination. At the hearing before the Tribunal Mr Malone submitted that a finding that the two jobs were not similar was determinative of the whole case as pleaded. However, the Tribunal disagreed and went on to consider job allocation as a separate claim. On this aspect it found in favour of the plaintiff.

[12] It is accepted by both parties that there was only one claim, structured in the way Ms Rodgers sets out (paragraph [9] above). The Tribunal's finding of separate liability for job allocation cannot stand as it was not pleaded as a stand-alone breach under s22(1)(a). The correct approach on appeal, therefore, is to look first at the issue of substantial similarity. If the plaintiff succeeds in that aspect of the appeal then the issue of how Ms Lewis came to be a trimmer will require consideration, since Talleys disputes the Tribunal's finding on this aspect. It can be noted that the first element to be proved – whether Ms Lewis was available for work of any description is not in dispute. She was just as qualified to be appointed to be a trainee filleter as she was to be appointed a trimmer.

[13] Before commencing our consideration of the appeal, we make some further preliminary observations. There is much about the case that is, at least to us, puzzling. First, the Tribunal was never given any hard evidence about Talleys' employment practices over the years generally, or the two years in particular. Rather the Tribunal was presented with an agreed statement of facts which said:

> "That, in respect of the defendant's factory at issue, in the 1999 and 2000 hoki season men (with few exceptions) worked as filleters, general hands (GH1's) and used the band saw (this is in fact a GH1 task); and women (with few exceptions) worked as trimmers, packers and removed roes from fish prior to filleting (these are GH2 tasks). We do not assert that this is a historic anomaly and acknowledge that historically more men have worked as filleters and GH1's than women and that more women have worked as GH2's than men."

[14] The Tribunal expressed its disquiet at this procedure, and we agree. This is reinforced by the observation that in evidence Talleys' management appear to contradict the agreed statement. For example, witnesses testify that, at least at the time of the hearing, women filleters numbered 15-20 percent. That figure may have been due to a change in employment practice subsequent to 2000 but there is no evidence to that effect. Nor is it exactly clear whether the parties view this evidence of 15-20% as being consistent with the agreed statement's description of "few exceptions" to the gender split. The lack of precision or raw material is, we consider, very unhelpful in a case such as this.

[15] Second, the case seems a hybrid of a specific allegation by Ms Lewis that she individually was the victim of discrimination, and the reality that it is a general allegation that women were always appointed as trimmers, and she was a specific victim of a general practice.

[16] Third, if the allegation is that Ms Lewis was not appointed to a position of trainee filleter because she was a woman, it is not clear why the case was not brought under s22(1)(a) which is specifically directed at that. As it was presented the Tribunal had to first determine whether filleting and trimming were the same or different, and then in effect undertake anyway a s22(1)(a) inquiry. It is not surprising the Tribunal made a separate finding of breach in relation to the last aspect.

[17] Finally, by way of preliminary observation, we note the appeal is a general appeal. Because it involves, at least in part, an appeal from questions of fact, s123 of the Act provides that a judge of this Court is to sit with two members of the Human Rights Tribunal panel. Hence the make-up of the Court hearing the appeal.

Issue one : is the work of trimming and filleting substantially similar?

[18] The requirements of s22(1)(b) of the Act, adapted for this case, are that:

1) Ms Lewis be available for work of any description, which the plaintiff says is knife work at Talleys;

2) Ms Lewis be receiving less favourable terms and conditions (or opportunities) than similarly capable employees employed in substantially the same circumstances on knife work at Talleys;

3) The reason she is receiving less favourable terms is because she is a woman.

[19] This part of the judgment deals with the second of those requirements.

[20] The knife work at Talleys falls into two categories, filleting and trimming. Filleters receive more money because Talleys believe it is a more demanding and important job than trimming. The plaintiff says in terms of s22, the work is substantially the same. When a claim such as this is brought, the inquiry is an objective one. In other words, although the employer may consider them different, and although the employer may assess one of the tasks as more valuable to it, that is not determinative of the issue.

[21] Each phase of this case seems to require explanations and qualifications which, with respect, reflect difficulties in how it was presented to the Tribunal. The task to be now undertaken is comparing the jobs of "filleting" and "trimming" but it is to be noted by way of preliminary observation:

> .1 There is no job description for a position known as "trimming". That is because trimming is in fact part of a wider position known as General Hand 2 (GH2). The job description for a GH2 is "an employee who works either trimming, grading, packing fish or associated duties". It seems, however, that in reality a person assigned within a GH2 appointment to trim would do that almost exclusively throughout the season, while other people with GH2 assignments would almost exclusively do the other tasks mentioned in the job description. For example, in her first season Ms Lewis exclusively trimmed. However, in her second season Ms Lewis spent 80% of her time removing roe from the whole fish before it was filleted (removing roe being one of the other GH2 duties).
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> .2 By contrast to trimming, "filleting" has no less than three job descriptions – a filleter 12 months, a filleter six months and a General Hand 1 (GH1). The job description for GH1 is:
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> > "an employee who may be required to perform a number of jobs about the company. This includes but is not limited to general labouring, forklift driving, learning to fillet and operating machinery."

This situation is further complicated by Talleys' evidence that in reality learning to fillet was a stand-alone position that was paid at GH1 rates. Mr Edwards, for example, was appointed to learn to fillet and that was all he did for three days until he decided that he did not like working with knives. He was at that point transferred to doing all the other tasks described in the GH1 job description. Parts of the evidence refer to a position of "rousie" which seems to be what Mr Edwards became. It is a GH1 labourer, to be distinguished from a trainee filleter who happens to be paid at the GH1 pay rate.

.3 We are not clear from the evidence whether the exact scope of the two tasks to be compared was ever clarified. As one would expect, the pay rate (the source of disadvantage) increases for filleters as a worker gets more experienced. A trainee filleter receives the same pay as a General Hand 1, but thereafter six month filleters and 12 month filleters receive higher hourly rates. Which level filleter was the comparator does not seem to have been clarified. Likewise, Ms Lewis and Mr Edwards were only ever employed in a hoki season. The unchallenged evidence of the Talleys' witnesses is that filleters deal with many different species during the year, and that the different species require different knife skills. A person could not be appointed as a filleter 12 months unless experienced in several species. Again, it does not seem to be clear whether the "filleter" being compared is a skilled general filleter, or only a hoki filleter. We suspect the latter but then query the legitimacy of that as a comparator. Further, there is no evidence about whether the different species dealt with in a year require trimmers to have the same varying width of experience, or whether trimming is the same regardless of species.

.4 Finally, it has to be noted that there are apparently two filleting lines, the old filleting line (also known as the incentive line) and the new line. The lines are different in that the new line involves less strenuous lifting. Previously the filleter on the incentive line would put the fillets in a bin and then, when full, manually lift the 28-30kg

> bin onto a conveyor. The existence of individual bins allowed an incentive scheme to work because individual totals could be recorded. Individual bins are not now used on the new line so there is no incentive scheme, and also less of that type of heavy lifting. The evidence was that at the relevant times the filleter might work on either line; the knife skills for each line were the same, but the accompanying tasks, particularly lifting, were different. For reasons that are not apparent the case proceeded on the basis that the comparator was a filleter on the old line.

[22] Against this background of uncertainty we proceed for the moment to address the issue on the basis the case seems to have been proceeded on: namely that the two tasks being compared are trimming hoki, and filleting hoki on the old (incentive) line, both persons having equivalent years of experience. We do so whilst reserving consideration of whether it is a legitimate inquiry.

[23] A filleter takes the whole fish (meaning a fish from which the roe has been removed) and fillets first on one side. The knife is inserted below the head near the pin bone and a cut made to just before the tail. The task is to maximise the amount of fish fillet recovered. The whole fish is then turned over and the exercise repeated. A filleter is given two or more knives which he or she is expected to maintain with stone and steel. The filleter is expected to remove the fillet in a way that avoids the pin bone below the head, but maximises recovery by cutting as deep as possible while avoiding going too far into the belly, and whilst avoiding collecting any fin bones.

[24] The job description manual, in relation to filleting, describes the ancillary tasks involved in the job as being to ensure knives are clean and sharp, to know safety rules, to ensure cutting boards and surrounding areas are clean, to check bins are clean, to maximise recovery, and to put an average of 30kg of fish (skin side down) in bin. As noted, the full bin is then lifted to shoulder height at least, onto the belt. Conditions on the incentive line involve exposure to cold running water. The speed of the filleter dictates the speed of the process, with up to two trimmers required to deal with one filleter's output.

[25] A trimmer's task is to "perfect" the fillet by removing imperfections. The primary task for hoki fillets is to remove the main central fat line, as well as all skin, black belly flap, unacceptable blood, nape, and fin bones. The amount of cuts required of a trimmer depends upon the quality of the fillet, which in turn depends at least in part on the skill of the filleter. The perfected fillets are put in bins of about 7.5kg. The work environment is cold, but reflects the general environment for all of the fish shed. The job has less exposure to cold running water than filleting and does not involve handling the whole fish.

[26] The Tribunal accepted that the differences between the tasks were such that it could not be said they were substantially similar. The factors identified by the Tribunal, which reflected the Talleys' evidence and Mr Malone's submissions, were:

1. the differences in the additional roles of GH1 and GH2 outside the tasks of learning to fillet, and of trimming;

2. the need for a filleter to handle whole fish as opposed to just fillets, and the need to hoist the bins. This difference in lifting was not offset by the other lifting tasks involved in the non-trimming functions of the GH2 job;

3. filleters set the speed of the factory, and filleting is of primary importance in maximising value;

4. filleters are more closely supervised, and their output can be individually assessed;

5. the working conditions are harder in that they deal with cold whole fish, the offal that comes from the first cut, and the running cold water. Of less significance the layout of the work bench made their task less sociable.

[27] The Tribunal concluded it was "hardly surprising" that the factory valued the work of filleters more.

[28] Before considering Ms Rodgers' submissions, the lack of clarity as to the exact comparators is reflected in the Tribunal's reasoning. The first two points of difference identified by the Tribunal involve factors not attributable to filleting and trimming per se, but to the other tasks that someone in a GH2 and GH1 position might do. In our view if these tasks were to be included in the analysis, then the comparator cannot be filleting and trimming. It must be either GH2 (General Hand) and GH1, or alternatively trainee filleter and GH2. Under either of those analyses, the disparate range of tasks involved would, in our view, make comparison much more difficult. This is reinforced when it is considered one of the GH2 tasks is to handle whole fish, roe included, seemingly in wet conditions like filleters' face. The validity of a filleter/trimmer comparison is found in the common use of knives, the proximity in the shed of the people doing each job, and the manner in which the fillets are dealt with by the filleter or trimmer respectively after the knife work is done. Once one moves outside these core tasks to include all these other functions, there is little legitimate basis for comparison.

[29] Mr Malone supported the conclusion reached by the Tribunal essentially for the reasons given by the Tribunal. He was critical of one aspect of the Tribunal's findings, namely the Tribunal's observation that the GH1 position was the "gateway" to the trainee filleting position. In his submission the evidence was unchallenged that trainee filleting was in practice a stand-alone position in that one could be appointed to it directly, or from a GH2 General Hand position (which includes trimmers), or from a GH1 General Hand position. We accept that on the evidence this is so. The trainee filleter role, though made part of the GH1 position in the contract, was in practice a stand-alone position paid at the GH1 rate. However, despite the theoretical possibility of transfer from any other position, the evidence gives little support to the idea that such transfers ever happened. The initial contract Mr Edwards signed had "learner filleter" hand written in as the position to which he was appointed. A person seemingly became a filleter only by being appointed directly and initially to be a trainee filleter.

[30] The Tribunal is in no way to be criticised for its error on the "gateway" observation. It is consistent with the contract, and indeed with some of the evidence of the Talleys' witnesses, albeit that this evidence was clarified in the re-examination

of Mr Cox. The Tribunal's oversight again reflects the unsatisfactory state of much of the evidence.

[31] We turn then to Ms Rodgers' appeal points. They are twofold in focus. First, it is said that the differences are not particularly significant and do not cast doubt on the basic similarity of the knife work. Second, it was submitted that to hold that these types of difference take the jobs outside the statutory test of "sufficiently similar" is to set the bar far too low, and to jeopardise the value of the provision.

[32] To take the latter point first, we consider that the correct approach to statutes such as the Human Rights Act 1993 is sufficiently well established to make extensive reference to authority unnecessary. In *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* [2002] 3 NZLR 333, the Court of Appeal described the Human Rights Act 1993 as no ordinary statute, noting that Parliament intended it to have a special status. It gives effect to New Zealand's international obligations. In our view the need to approach the statute in a generous sense and to adopt an approach that facilitates its important purposes cannot be questioned.

[33] Turning to the specific case, Ms Rodgers grouped the differences identified by the Tribunal into two categories – capabilities, and circumstances. The capabilities were that filleters needed to do more cuts, needed to maintain their own knives using steel and stone, and needed to maximise value recovery. The circumstances were the pressures on a filleter in setting the speed, the need for a filleter to deal with cold fish and cold flowing water and the less sociable environment. The other difference to be addressed is the greater amount of heavy lifting involved in the filleting task. The plaintiff disputes the relevance of this factor.

[34] Although naturally hesitant to differ from the Tribunal on a mixed question of fact and law, all three members of this Court are of the clear view that the tasks are to be seen as "substantially similar" as the term is used in s22 of the Human Rights Act 1993. In many ways the difference between the Tribunal and this Court is explicable by the amount of emphasis given to the details of the tasks.

[35] Both tasks are stages in converting a whole fish into usable fillets by means of a knife. The two fillet strokes on the hoki may indeed be the most skilled individual cut that is required in the process. But it is also the same cut to be made each time, whereas the trimmer must assess the fillet and make different cuts depending on the state of the fillet. Likewise, it is true the filleter controls the speed; however, the fact that one filleter keeps two trimmers going can be viewed both ways. It may equally reflect that a trimmer's task requires more consideration and thought since two trimmers are required to perfect the one filleter's output. Certainly the fact that two are needed to deal with one's output does not necessarily mean that the filleter's task is more important.

[36] It is instructive that Talleys did not move skilled trimmers onto filleting when vacancies arose. Rather they took totally untrained people like Mr Edwards and, by his evidence, gave him ten minutes instruction. If the filleting task was so much more skilled and important, it is difficult to understand why those who had already shown knife dexterity were not transferred. The experienced trimmers who might have been shifted were of course women, and the inference can only be either that experienced trimmers are of more value to the company in that role than in becoming filleters, or (as was alleged by the plaintiff) Talleys did not view women as filleters and did not move them for that reason.

[37] It is difficult to give too much weight to a claim of there being a significant skill difference when both tasks involved using a knife and both required an extraordinarily minimal amount of training. Essentially for both roles there was a brief explanation of "this is how you do it", and then people got better by performing the task with any assistance they could get from others on the line. Mr Edwards testified that within the three days he was filleting there were already concerns about the speed of his work and the quality he produced. Obviously one was expected to be able to learn to do filleting rather quickly.

[38] The heavy lifting aspect on the old incentive line is a possible point of distinction but not necessarily one which made the tasks dissimilar. Both tasks involved repetitive lifting but the amount lifted on a particular occasion and probably overall on the old fillet line was undoubtedly greater for filleting. This variation in

lifting tasks provides an appropriate moment to refer to one of the most contentious aspects of the hearing, namely the evidence given by the plaintiff's expert, Ms Burns. Her expertise is in job evaluations, with a focus on equity issues. Her conclusion was that the tasks were substantially similar. Ms Burns in her report focussed on the key variables of dexterity, sensory skills, lifting, speed/pressure, stamina, working conditions, prior experience, gaining competence and job knowledge.

[39] Ms Burns came under strong attack for three related reasons – she had not visited the Talleys factory and seen the work being done; she had belatedly after her brief of evidence visited a Wellington fish processing operation which the Talleys' witnesses emphatically described as being a totally different operation requiring different preparation of the hoki fillet for a different market; and she relied on a NSW inquiry into fish processing plants which again was criticised by the defendant as being a totally different enterprise.

[40] The Tribunal was critical of Ms Burns' evidence and did not place much weight on it. It considered she lacked understanding of the two tasks being compared. An example was that she was unclear how many knives filleters and trimmers are expected to use. (We pause to observe that having read the evidence we share Ms Burns' lack of certainty.) She was unclear who had to remove the fin bone, and there were similar errors in her understanding of the detail. The Tribunal was also concerned at Ms Burns' lack of objectivity under cross-examination.

[41] Having read the evidence, we understand the Tribunal's concerns and would not seek to supplant the advantage it had from seeing and hearing the witness. The transcript suggests an unduly defensive witness for someone who is there as an independent expert. That said, we consider some of the difficulties arise from a failure of the witness to explain better the role and nature of an expert job evaluator. Whilst it is hard to dispute that it would have been an advantage for her to have seen the site, of itself that should not be seen as rendering the evidence irrelevant. The Tribunal notes the value to be gained from being exposed to Ms Burns' underlying methodology and we agree. The approach in her report was to unpackage the detail of the task and assess whether the core capabilities were different. Ms Burns'

emphasis, for example, is on the use of the knife in a similar way without needing to engage in the finer points of where one inserts the blade. Whilst in a given case perhaps that point of insertion may be important to judging required competencies, it need not be so. A message to take from Ms Burns' evidence, and one which in part reflects the differences between this Court and the Tribunal, is that the core aspects of the task are more important in evaluating comparabilities than are the detail. That said every such exercise is inevitably a matter of fact and degree.

[42] Returning to the issue of the amount of lifting required, Ms Burns testified that it was not a matter that would normally be factored into pay rates for example. If there was a genuine requirement for a particular level of strength it would normally be detailed into the job description and assessed at the appointment process. None of this is to say that lifting cannot be a point of difference; the issue is whether the differences in that aspect make the tasks not substantially similar in terms of s22.

[43] Our conclusion is that the core task of the filleter and the trimmer is to turn whole fish into saleable fillets. Each plays a role using a knife; both tasks require minimal initial training, and are performed more expertly with experience. The evidence leaves little doubt that at busy times both work under pressure. The variations identified in the roles do not in our view alter the essential similarity. We accordingly would take a different view from the Tribunal on this aspect of the case, and hold that in terms of s22 the tasks are essentially similar.

Issue two : less favourable terms and conditions by reason of gender

[44] The Tribunal concluded that at least for 1999 and 2000 the evidence showed a propensity to discriminate against women in the allocation of new applicants to the GH1 role. Attitudes such as "women don't like filleting", "women are not as good at filleting" and "the work of filleting is too demanding for women" influenced decision making. In the Tribunal's view the evidence was clear there was no real prospect of Ms Lewis being appointed to a GH1 job when she applied.

[45] Talleys challenges the conclusion that Ms Lewis was appointed as a trimmer, and not appointed as a filleter, because she was a woman. It submits that the Tribunal was wrong to ignore Talleys' evidence that at the time Ms Lewis was appointed, the position of trimmer was the only vacancy. It is noted that Ms Lewis herself could not recall anyone being taken on as a learner filleter after she was taken on as a trimmer. Nor is it known what positions were offered, and to whom, in the week or so between when Mr Edwards was employed, and when she was taken on. The evidence from Talleys was that Talleys left a message for either of them to ring; Mr Edwards responded and so got the filleter job. Had Ms Lewis responded Talleys say she would have been appointed a filleter. Mr Edwards testified, however, that his impression when he rang was that the job was specifically for him.

[46] Mr Malone submits that the chief witness for Talleys, its personnel manager (Mr Cox), was not challenged on his evidence on these essential points but we do not accept that is so. It is true he was not accused of lying, but the plaintiff's case of allocation based on gender was plainly put to him. This proposition inherently involved the rejection of Mr Cox's evidence. Mr Cox had, unconvincingly, testified that he had a drawer of applicants and when vacancies arose he just took the top one. The Tribunal itself put to him the inherent unbelievability of that given the consistency of gender allocation of the two jobs and the agreed statement of facts. To be fair to the witness he added that other factors such as where the person lived (i.e. local or itinerant) were taken into account once the application was taken from the drawer, but in our view it was fully open to the Tribunal to not accept Talleys' evidence in this regard.

[47] The plaintiff had potentially discharged its onus by illustrating the different treatment of Mr Edwards and Ms Lewis barely a week apart, by establishing that Mr Edwards within three days of appointment left the trainee filleter role thereby freeing it up, and by the general admission of Talleys that trimmers were almost exclusively women, and filleters were almost exclusively men. Talleys is the body that holds any other information that might point to a different inference about the basis on which jobs were allocated. It put none of that data in, but instead chose to rely on a single witness who, on that aspect, did not satisfy the Tribunal that the obvious inference should not be drawn. It was open to Talleys to establish by

evidence what other positions were filled around the time Ms Lewis and Mr Edwards were taken on but it chose not to.

[48] We do not consider that the plaintiff was required to prove the existence of other positions at the time Ms Lewis was appointed. Without such evidence the plaintiff's claim was harder to prove, but for the reasons given we are satisfied that the evidence discharged that onus. It was open to the Tribunal to conclude that Ms Lewis was allocated to a trimmer job because she was a woman.

Conclusion on s22(1)(b) claim

[49] We take the view that the jobs of hoki filleter and hoki trimmer, objectively assessed, are substantially the same.

[50] Talleys may be of a different view but that is not the point. It should not be thought that Talleys are being told what to pay, or how to value jobs. It can pay a filleter more than a trimmer if it wants to. What it cannot do is allocate those jobs on a prohibited basis such as the sex of the applicant.

[51] On balance, despite the doubts earlier identified, we are also satisfied that it was legitimate to compare the positions of hoki filleter and hoki trimmer. The hoki season is substantial, and there was a recognised core of people who did either just trimming or just filleting exclusively through the season. Ms Lewis in 1999 is an example; she spent the whole season trimming. The difficulties with speaking of "filleters" and "trimmers" were likewise recognised we note by the Tribunal but it ultimately accepted them as stand-alone positions available to be compared. We agree.

[52] Ms Lewis has proved her claim. The jobs are substantially similar, and the reason she was receiving less money is because she was allocated to the lesser paying one because she was a woman. Talleys did not directly pay her less because she was a woman, but discrimination need not be deliberate. Ms Lewis has suffered disadvantage, namely, she received less money for similar work to that undertaken

by filleters. The reason she received less money was because she was made a trimmer, and the reason she was made a trimmer was because she was a woman.

Victimisation claim by Mr Edwards

[53] The Tribunal upheld Mr Edwards' claim that he was not re-employed in the 2001 hoki season because Ms Lewis' (his partner) had complained to the Human Rights Commission. Such conduct, if proved, amounts to a breach of s66 of the Act.

[54] There were three relevant witnesses : Mr Edwards, Mr Cox and a Mr Millan who had been night shift foreman in the two seasons in which Mr Edwards was employed, and who still held that role in 2001. Mr Millan's evidence was tendered by Talleys in affidavit form; he was not available to testify orally. The plaintiff objected to the evidence coming in this way, but the Tribunal exercised its discretion to admit it.

[55] Between Mr Edwards and Mr Cox there were several factual conflicts concerning chance meetings, and concerning statements it was said Mr Millan had made during those meetings as to what he had done to support Mr Edwards' 2001 application. These conversations had allegedly occurred during the period Mr Edwards was seeking but not getting work from Talleys. Mr Millan denied giving assurances or agreeing to put Mr Edwards' name forward. He said his invariable rule was to refer the person to Mr Cox. Mr Millan did not recall telling Mr Edwards that he had put his name forward, but accepted he may have done so essentially to free himself from the conversation with Mr Edwards.

[56] The Tribunal resolved these conflicts in Mr Edwards' favour. It took the view that it did not reject Mr Edwards' oral evidence, and without the benefit of hearing from Mr Millan, it therefore preferred what Mr Edwards said. Mr Malone submits that whatever contact there was between the two men and whatever was said cannot have been relevant to why Talleys did not employ Mr Edwards. We agree and do not need to consider this aspect further.

[57] Between Messrs Cox and Mr Edwards there were likewise conflicts which the Tribunal resolved in favour of Mr Edwards. There was a contemporaneous file note it considered supported this assessment, and aspects of Mr Cox's explanation seemed not credible to the Tribunal. For example, Mr Edwards had put on his application that he was picking apples and would need to give a week's notice. The Tribunal rejected Mr Cox's evidence that he did not want to upset the orchardist by taking Mr Edwards away. The Tribunal noted Mr Cox's acceptance that he was frustrated by Ms Lewis' complaint to the Human Rights Commission. In general it preferred Mr Edwards' account of events, and considered the obvious reason why Mr Edwards was not re-employed was the antipathy generated by the Human Rights Commission complaint.

[58] Mr Malone challenged these findings, essentially by reference to Mr Cox's evidence. Mr Malone submits that Mr Cox's evidence –

> "was not so intrinsically unlikely as to justify being disbelieved".

[59] There were conflicts that the Tribunal as trier of fact had to resolve. This is a situation where the advantage of seeing and hearing the witnesses is not to be underestimated. We see no basis for this Court on appeal to take a different view.

[60] The general evidence was that over the period work was available Mr Edwards had worked the previous two seasons and there was no criticism of his efforts. A change in 2001 to being unable to be re-employed is very difficult to understand, and the Tribunal's conclusions, with respect, were almost inevitable. From an appeal viewpoint Talleys has not persuaded us that different inferences should be drawn from the evidence.

Delay

[61] The process has been too protracted:

- 1 November 2002 – commencement of proceedings
- 15-19 September 2003 – first part of hearing before Tribunal

- 1 – 3 March 2004 – second part of hearing before Tribunal
- 18 July 2005 – judgment of Tribunal
- 15 August 2005 – appeal by Talleys
- 28 February 2007 – hearing of appeal

[62] The specific ground of appeal by Talleys is that in July 2005 the Tribunal should not have issued its decision but rather should have stayed the proceedings. It is submitted that the period of delay meant a denial of natural justice and made it inappropriate for the Tribunal to render judgment. The primary concern that Mr Malone advanced was the gap between the hearing and the ruling and its impact on assessment of witnesses and counsel's arguments. Talleys also refers to the delays between alleged discrimination and the filing of a complaint, and the filing of the notice and the hearing as being relevant to the overall assessment. It is said that these periods can be taken into account when deciding if natural justice has been observed.

[63] Ms Ryan, who argued this aspect for the plaintiff, referred the Court to *Nais v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171 (High Court of Australia). In that immigration case there had been a total delay of four and a half years between the initial oral hearing and the decision, and with a lesser period of two years between a supplementary oral hearing and the decision. There were during this time of delay periods of activity and communication with the parties as the Tribunal obtained "country information" and otherwise considered the matters.

[64] The following passage from Gleeson CJ is helpful for setting the framework for consideration of these issues (paragraph [5]):

> Undue delay in decision-making, whether by Courts or administrative bodies, is always to be deplored. However, that comfortable generalisation does little to advance the task of analysis when it becomes necessary to examine the consequences of delay. The circumstances in which delay, of itself, will vitiate proceedings, or a decision, are rare.

[65] Gleeson CJ emphasised that the issue is one of fairness, and noted (paragraph [103]):

> " … The appellants in this case do not have to demonstrate that the tribunal's assessment of them probably would have been more favourable if made reasonably promptly. What they have to demonstrate is that the procedure was flawed; and flawed in a manner that was likely to affect the tribunal's capacity to make a proper assessment of their sincerity and reliability… If the tribunal, by its unreasonable delay, created a real and substantial risk that its own capacity for competent evaluation was diminished, it is not fair that the appellants should bear the risk."

[66] We are in no doubt that no such risk was created here by the delay. The Tribunal had a full record of the evidence. The evidence, while extensive, was not complex. There is no reason to consider that any initial assessments of witnesses and issues made at the time evidence was given would not be properly remembered and evaluated. The delay is not in itself a period that would give rise to concerns over the safety of the decision. From an appearances viewpoint, and from a parties' viewpoint, it is too long. The Tribunal itself acknowledges this in its Ruling, but there is a significant gap to be bridged between a decision being too long delayed and being unsafe because of that delay.

[67] We do not consider it is necessary to address this point further, but out of fairness to the Tribunal we set out its own acknowledgement of the delay and the reasons for it:

> "[9] Both claims were filed in the Tribunal in November 2002. The usual pre-hearing preparation was undertaken and in due course the matters were set down for hearing in Nelson on 15 September 2003. Five days were allocated.
>
> [10] Regrettably, a significant part of the first day was lost to travel delays and further time was lost on the last day because counsel who had expected to deal with the evidence then being given could not be available. By the end of the allocated time the case was far from completed. As a result arrangements were made for the hearing to resume in early October 2003, but for reasons beyond the Tribunal's control the hearing did not resume then. Arrangements to have the hearing resume in January 2004 also had to be postponed. Ultimately the hearing resumed on 1 March 2004 and lasted for a further two and a half days.
>
> [11] The Tribunal members then returned to their respective homes. With the benefit of hindsight, it was unfortunate that we did not allow ourselves another complete day after the hearing, while we were gathered in Nelson, to deliberate on the matter. The failure to do that is at least a part of the reason

> why it has taken us so long since the hearing to deliver this decision. Other delaying factors have been the large number of other hearings that were conducted by the Tribunal in 2004, and the fact that prior to May 2005 the Chairperson's role was a part-time one only.
>
> [12] It is to be hoped and expected that delays of the sort suffered in this matter will not occur in the future, particularly given that the Chairperson now has a full-time commitment to the work of the Tribunal. In the meantime we express our regret to the parties in this matter that it has taken us so long to deliver this decision."

Conclusion

[68] The appeal by the plaintiff succeeds. We find that the defendant discriminated against Ms Lewis. We also uphold the Tribunal's finding that Talleys victimised Mr Edwards. Technically Talleys' appeal also succeeds in that there should not have been a separate finding on job allocation, but it is pyrrhic given the other conclusions.

[69] The plaintiffs are entitled to scale costs in this Court and reasonable disbursements to be fixed by the Registrar if necessary. The minor extent to which Talleys' succeeded does not justify an adjustment to the costs payable. Costs in the Tribunal can be resolved by the Tribunal which already has the issue of compensation reserved for separate decision.

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Simon France J

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