IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 210/83

561

NZLR

IN THE MATTER of Part 1 of the Judicature Amendment Act 1972

BETWEEN IAN LESLIE STEWART BLENHEIM BRADLEY of Auckland, Naval Officer

Applicant

AND THE ATTORNEY-GENERAL sued in respect of the Naval Promotion Board

First Respondent

AND KEITH MICHAEL SAULL Chief of Naval Staff

Second Respondent

Hearing: 14th May, 1984

Counsel: Nicholson, Q.C. for Applicant
Fardell for Respondent

Judgment: 29.5.84

JUDGMENT OF SINCLAIR, J.

This Applicant was formerly an officer in the Royal New Zealand Navy and in April 1980 held the post of Commanding Officer of Her Majesty's New Zealand ship 'PHILOMEL' On 29th April, 1980 the Naval Promotion Board decreed that the Applicant's category for promotion to Captain should be changed from Category B to Category C which had the effect of requiring him to relinquish his post of 'PHILOMEL'.

The Applicant subsequently sought, some 2½ years later, to have that decision reviewed by this Court, but in the meantime he had made certain representations to the

authorities in an attempt to have the April 1980 decision reversed or clarified, but suffice it to say the original decision has remained.

In the statement of claim allegations have been made that the Second Respondent, in making the decision to alter the Applicant's category, considered "statements and reports". Later it is alleged that the Second Respondent made "research and investigation".

After being served with the proceedings the Defendants sought particulars as to the research and investigations referred to in the statement of claim, which incidentally are referred to in more than one paragraph, and also sought particulars of the statements and reports referred to which, once again, are referred to in more paragraphs than just paragraph 11.

There then followed a series of letters between counsel for the parties and eventually counsel for the Respondents filed a motion to strike out the application for review upon the grounds that the decision or decisions to change the Applicant's category for promotion to Captain from category B to category C were not decisions which could be the subject of review proceedings under the Judicature Amendment Act, 1972. That particular motion was countered with a motion for discovery against the Respondents and it was this particular motion which came before me on 14th May, 1983.

Mr Nicholson contends that the Applicant really has no knowledge of what material was acted upon by the Second Respondent or by the Naval Promotion Board when its decision

was made, and that the reference to the Second Respondent having considered statements and reports and having made research and investigation merely repeats what was contained in a communication from the Second Respondent to the Applicant following the making of the decision under review. That may well be so, says Mr Fardell, but having chosen the method of pleading which the Applicant has resorted to then, he says, the Respondents are entitled to the particulars they seek. However, there was no motion for particulars before me and I was really concerned with but the motions which are presently before the Court.

As Mr Fardell pointed out, if his motion is successful that will bring the application to an end and there will be no need to consider the implications of the application for discovery at all. He accepted that if the motion to strike out were considered it had to be on the general basis that any decision of the Naval Promotion Board of a nature similar to the one under review could not be the subject of review under the Adjudicature Amendment Act 1972. He accepted that position.

On the other hand Mr Nicholson submitted that until the full circumstances giving rise to the making of the decision were known it would not be possible for the Court to rule on the motion to strike out as it was often the means whereby the decision was made which gave rise to the right to review rather than the decision itself.

Quite frankly I do not accept that submission in this particular set of circumstances. There must be classes of cases where decisions are made which can never be the

subject of review proceedings irrespective of the circumstances which give rise to the way that decision is made or the method employed in arriving at that decision. This present decision, says Mr Fardell, is in that category. If he is correct it will defeat the Applicant's right to review. If he is not then the matter must proceed and the question of discovery and particulars can then be dealt with.

Accordingly I am of the view that it is premature at this stage to deal with the question of discovery and that the motion to strike out on the basis that the decision is not one capable of being reviewed under any circumstances ought to be decided first.

I adjourn the application for discovery sine die to be brought on at three days notice and direct that the motion to strike out be brought on for hearing as soon as possible and that a fixture be granted as soon as the Court is able so to do. To give effect to this direction I direct the Registrar to put the motion to strike out on the ready list so that it can be included in the cases waiting for a fixture immediately, leaving it to the parties to obtain a fixture as soon as possible.

I point out that the original decision is now virtually four years old and any further delay in addition to that which has already occurred and, in particular, in relation to the issue of the proceedings, may well be a factor which may have to be taken into account when the Court is exercising its discretion if it is eventually held that the decision is one

which is capable of being the subject of review proceedings.

In the meantime the costs of this hearing are reserved.

P.D. Casey J.

SOLICITORS:

Thorne, Thorne, White & Clark-Walker, Auckland for Applicant

Crown Law Office, Wellington for Respondents