IN THE COURT OF APPEAL OF NEW ZEALAND

CA745/2014
[2015] NZCA 490

BETWEEN	TAME TE RANGI & ORS Appellants
AND	WILLIAM WAKATERE JACKSON Respondent

Hearing:	15 September 2015
Court:	Randerson, Harrison and Wild JJ
Counsel:	P F Majurey and P R H Mason for Appellants T T R Williams and I F F Peters for Respondent
Judgment:	19 October 2015 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are ordered to pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The Independent Māori Statutory Board is a body established by the Local Government (Auckland Council) Act 2009 (the Act). One of the Board's primary purposes is to assist the Auckland Council by promoting issues of cultural,

economic, environmental and social significance for two defined groups.[1] One is mana whenua – those who are affiliated with an Auckland based iwi or hapu. The other is mataawaka – those who do not enjoy such an affiliation, being Maori who live in Auckland and who are not in a mana whenua group.

[2] The Board must consist of seven manawhenua representatives and two mataawaka representatives.[2] They are appointed for a three year local government term by a selection body comprising 19 members who represent separate mana whenua groups.[3] The selection body's sole function is to make these appointments. In discharging this duty it "must be guided only by the Board's purpose, function and powers".[4]

[3] The issue arising on this appeal is whether the selection body followed the correct statutory process when appointing Messrs John Tamihere and Tony Kake as the Board's two mataawaka representatives for the 2013 local government election. An unsuccessful candidate for mataawaka selection, William Jackson, sought judicial review in the High Court of the selection body's appointment of Mr Kake, but not of Mr Tamihere. Duffy J found that the selection body acted unlawfully in appointing Mr Kake and set his appointment aside.[5] The selection body now appeals.

Local Government (Auckland Council) Act 2009

[4] Clause 6 of Schedule 2 prescribes this process which the selection body must follow when appointing mataawaka representatives:

> **6 Selection body chooses mataawaka representatives for board**
>
> (1) The selection body must choose the board's 2 mataawaka representatives.
>
> (2) The selection body must choose the mataawaka representatives *by following a process that*, at a minimum,—

1 Local Government (Auckland Council) Act 2009, s 81.
2 Schedule 2, clause 1.
3 Schedule 2, clause 2, 4 and 9(1).
4 Schedule 2, clause 2(4).
5 *Jackson v Te Rangi* [2014] NZHC 2918.

(a) includes public notification of the process that the body proposes to use for choosing the representatives; and

(b) provides an opportunity for nominations to be received; and

(c) requires the body to take into account the views of mataawaka when choosing the representatives.

(3) The selection body must apply clause 5 when choosing the 2 mataawaka representatives.

(Emphasis added).

Background

[5] The selection body appointed for the 2010 local body election chose Messrs Tamihere and Kake as the Board's two mataawaka representatives. Mr Jackson was an unsuccessful candidate.

[6] The selection body for the 2013 local body election was appointed on 4 May 2013 and was required to complete its function by 31 August 2013. Of the 19 members appointed to the 2013 selection body, 12 had been members of the 2010 body.

[7] The selection body met on 4 July 2013 to approve the process for choosing the board members. Two executive assistants provided a range of material including a legal opinion about the selection requirements and an advice paper setting out the appropriate selection process. In particular the selection body was advised that it was required to take into account the views of mataawaka at two stages when selecting the Board's mataawaka representatives: first, when adopting the selection process and seeking nominations and; second, when making its ultimate selections.

[8] Apart from resolving at the 4 July 2013 meeting to adopt the criteria represented by this advice, the selection body also approved additional criteria for appointment including (a) knowledge and expertise in te reo, tikanga and mātauranga; (b) knowledge of the geographic and socio-political makeup of the Tāmaki Makaurau area; (c) knowledge and expertise in areas relevant to local government; (d) strong networks established with manawhenua in local and central

government spheres; and (e) acknowledgement as a leader within a candidate's community.

[9] On 12 July 2013 the selection body publicly notified its invitation for nominations for the positions of mataawaka representatives including a recital of the criteria, requisite and attributes for selection. Eight nominations were received. But, despite requesting them, the Board did not receive mataawaka views other than in letters from various mataawaka groups tendered in support of candidates. Mr Jackson provided supporting letters from nine different mataawaka groups; Mr Kake was nominated by four persons with mataawaka affiliations but did not provide further supporting material from mataawaka. It also appears that Mr Tamihere spoke directly with Tame Te Rangi, the selection body chair, in support of his candidacy.

[10] On 13 August 2013 one of the selection body's executive assistants circulated an agenda for the meeting scheduled for 15 August. The agenda referred to the eight nominees with a table summarising information provided by each. As some of the information was extensive, the executive assistant declined to supply it to members through email. She did advise, however, that hard copies would be available for review at the meeting.

[11] An advice paper was included with the agenda, proposing these two options for selecting mataawaka representatives:

(a) Setting up a subgroup to meet for an hour and prepare a shortlist of four nominations, followed by a reconvened meeting of the full selection body. After discussing the attributes of each shortlisted nominee, each member would be polled to identify the two candidates which he or she supported; and

(b) Alternatively, avoiding the short listing step, the selection body would generally discuss the merits of each candidate. Then on a show of hands the body would determine which of the candidates had support.

> A more detailed discussion would follow about those candidates who had support and later each member would be polled.

[12] As scheduled, the selection body met on 15 August 2013. The first part of the meeting, from 10.30 am, was devoted to selection of the manawhenua representatives. Consideration of selection of the mataawaka representatives started at about 12.15 pm. Even though 18 members of the selection body were present (one was absent), only seven bundles of each nominees full nomination material were distributed.

[13] The selection body decided for reasons that are not apparent not to adopt either of the selection options outlined in the agenda. Instead of considering as a body the merits of each nominee, the members moved immediately to adoption of a secret ballot process. Mr Te Rangi advised the members to use the lunch break scheduled for 12.30 pm to consider the documents before voting. By 1.15 pm all voting papers had been handed in. The results were announced, Messrs Tamihere and Kake were declared to be the mataawaka appointees and the meeting closed with a karakia.

High Court

[14] Mr Jackson pleaded various causes of action. Duffy J neatly summarised his case as being that:

> [82] … in a number of ways the appointment process led to the selection body failing to take into account the views of mataawaka. The first respondents accept that they were required to take the views of mataawaka into account. The core of their defence is that they have satisfied this obligation. I propose to focus on who is right. This involves addressing part of the illegality grounds and the failure to take account of relevant considerations together.

[15] The Judge comprehensively recited the competing arguments and principles. She also recited at length the narrative of events occurring at the meeting based on affidavits which are not relevant to our approach on appeal. She found that the selection body erred in a number of ways, principally in that: (a) its level of information on mataawaka views about Mr Kake was inadequate to enable it to

discharge its statutory function;[6] (b) it had insufficient time to make an informed decision;[7] and (c) it failed to act as a body when making appointments because its decision was based on a secret poll without any collective discussion beforehand.[8] It is unnecessary for us to recite or address the Judge's decision in more detail because we are in agreement with the result and the last of her three grounds.

[16] The Judge's dismissal of an application to adduce further evidence of the views of other members of the selection body was challenged on appeal, but not emphasised by Mr Majurey. As we agree with the Judge that the selection body acted unlawfully as it failed to act as a body, the fresh evidence question is of academic significance. But for completeness we deal with it below.

Decision

(a) Process argument

[17] Mr Majurey advanced the selection body's appeal on two principal grounds. First, he submitted that as a matter of statutory construction the Judge erred in finding that cl 6(2)(c) obliged the selection body to follow a two staged approach by: (a) adopting a process which required the views of mataawaka to be taken into account; and (b) taking actual account of those views. In Mr Majurey's submission, the clause is exclusively process focussed. Accordingly, on an application for review the Court's enquiry must necessarily be confined to determining whether the selection process adopted was lawful.

[18] We can state our reason for rejecting this submission shortly. Clause 6(2) is prescriptive. It obliges the selection body to choose the mataawaka representatives by following a process that at a minimum incorporates three distinct elements. Only the third is in dispute here.

[19] The process prescribed by Parliament does not exist in a vacuum or for its own ends. The words of cl 6(2)(c) are plain and unequivocal in stipulating that the process adopted must require "the body to take into account the views of mataawaka

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6 At [94]–[99].
7 At [100].
8 At [104] and [105].

when choosing the representatives". The process exists for the substantive purpose of ensuring that the selection body actually takes account of mataawaka views: otherwise, it may rhetorically be asked, what is the rationale for mandating a process requiring mataawaka views to be taken into account if, ultimately, they are not?

[20] The selection body's consideration of mataawaka views was mandatory because they are of general and obvious importance.[9] Mr Majurey advised that mataawaka in Auckland comprise about 100,000 people. The group is diverse and diffuse. It does not have a unified voice. The selection body was constituted by mana whenua representatives who would not necessarily be familiar with mataawaka views (only one member of the selection body, Mr Te Rangi, deposed that he had personal knowledge on the subject). For this reason Parliament recognised that mataawaka must be represented on the Board; and a process was mandated for the selection body to identify and heed mataawaka views, however difficult and imperfect the process may be.

[21] We note that counsel who appeared for the selection body in the High Court, not Mr Majurey, is recorded as conceding an obligation to take actual account of mataawaka views.[10]

(b) Substantive argument

[22] Second, even if he was wrong on the threshold or process argument, Mr Majurey submitted that Duffy J incorrectly found the selection body failed to discharge its obligation to take account of mataawaka views. He relied on (a) the availability of information sheets at the meeting; (b) publication of the names of the nominators of individual candidates; (c) the chair's clear reminder to the other members of their statutory duty to take mataawaka views into account; (d) the chair's invitation to members to discuss each candidate's merits; and (e) the public notice calling for mataawaka views.

[23] However, that submission is beside the point given the selection body's failure to act as a body when making its appointments. As the Judge found:

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9 *CREEDNZ Inc v Governor-General* [1991] 1 NZLR 172 (CA) at 183.

10 *Jackson v Te Rangi*, above n 5, at [82].

> [105] The purpose and policy of Schedule 2 and particularly cl 6 reveals an aim to ensure that the Board has the benefit of mataawaka input, and the intent to achieve this aim through the collective wisdom of the persons appointed to the selection body. This was implicitly recognised in the advice paper and agenda prepared for the 4 July 2013 and 15 August 2013 meetings. The suggested options for choosing the mataawaka representatives and the suggested optional criteria all point to a recognition and expectation on the part of those involved that the decision to appoint mataawaka representatives would be a joint decision with transparent reasoning that was sufficient to show that the views of mataawaka had been taken into account. Instead, the only available inference to draw from what occurred is that each member severally decided who to appoint as a mataawaka representative; and the considerations for doing so cannot be seen. Secret polling, especially without any formal group discussion beforehand, leaves no room for a Court to conclude that the outcome represents a decision of the selection body as a whole that accords with the requirements of cl 6(2). It follows that I reject the first respondents' arguments. I find that Mr Jackson has established this aspect of his ground of review based on illegality.

[24] Mr Majurey submitted that cl 6(2) allowed members of the selection body to act separately in the manner adopted at the 15 August 2013 meeting — that is, by conducting a secret ballot without first participating in a joint or collective discussion. We cannot accept that proposition. The statutory requirement is for "the body", not individual members, to take account of mataawaka views. The legislature plainly expected that "the body" acting in this way would undertake a collective assessment of each candidate's merits, with members exchanging, debating and evaluating individual views guided by the overriding consideration of what appointments would best serve the Board's purpose, function and powers; and that by sharing the information, knowledge and experience possessed by its individual members the selection body would reach a decision on the best candidates.

[25] While the legal opinion provided to the selection body on 4 July 2013 did not address this essential issue, it was properly identified in the advice paper circulated with the agenda for the 15 August 2013 meeting. Both the recommended processes required the selection body acting as a body to consider individual applicants, either by discussing the attributes of shortlisted nominees or generally discussing each nominee. The selection body's adoption of this advice, particularly of the second option would have pre-empted a successful challenge to its decision.

[26] The selection body cannot be criticised for its procedural decision to call for expression of mataawaka views when publicly notifying its invitation for nominations for mataawaka representatives on the Board. That was a reasonably available means of obtaining this information within the tight timeframe allowed. As noted, responses came in the form of eight individual nominations, some supported by letters from different mataawaka groups. Otherwise there was no independent expressions of views from mataawaka organisations.

[27] We understand the difficulties faced by the selection body because of the inadequacies of this response. The availability of information sheets, the names of those who nominated individual candidates, reminders from the chair about statutory duties and an invitation to members to discuss each candidate's merits did not rectify the problem. However, in the absence of formal expressions of mataawaka views members of the selection body were entitled to take into account their own personal knowledge of those views.[11] As the Judge noted, the selection body's failure to act as a body meant that this knowledge was not shared at group discussion.[12] She later observed that:[13]

> The selection body could have enhanced the information that it had received with contributions from those members who had personal knowledge of mataawaka views regarding the candidates, including Mr Kake.

[28] By acting as a collective entity in this way the selection body would have (a) been sufficiently informed about a relevant factor insofar as it was required by the statute;[14] and (b), provided it kept accurate minutes of its deliberations, been able to show that mataawaka views were taken into account.[15] Once it had followed these steps, the selection body's decision would have been beyond challenge. The weight given to mataawaka views within the statutory framework and in conjunction with the selection body's own criteria set out in [8] above was solely within its discretion.

[29] The Act does not mandate that mataawaka views should be related to the merits of a particular candidate. The selection body would be entitled to take into

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11 *Jackson v Te Rangi*, above n 5, at [93].
12 At [87].
13 At [93].
14 *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733 at [31].
15 *Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346, [2010] 3 NZLR 826 at [74].

account mataawaka views more generally as they relate to the Board's purpose, function and powers and then to assess how they might best be enhanced by a particular candidate. In this respect we agree with Mr Majurey that a requirement to take into account mataawaka views does not equate with an obligation on a candidate to prove mataawaka support; and that the Judge erred in appearing to conflate the two concepts.[16]

[30] Also, the selection body's decision cannot be dictated by a numerical contest based on letters of support for various candidates. Those letters are no more than part of the information which is to be taken into account.

[31] As a consequence, the entire selection process was unlawful and the Judge correctly set aside Mr Kake's appointment to the Board. Our conclusion has obvious implications for Mr Tamihere since his appointment suffers from the same defect in that it was the consequence of an unlawful process. However, we cannot set aside his appointment for two reasons. First, he should have been joined to the High Court proceeding as a party whose interests were directly affected by the application but was not joined.[17] Second, no relief was sought against him in the High Court. It will now be a matter on which the Board must take advice on the future steps to be taken in light of this judgment in order to fulfil its statutory mandate.

[32] We add that, if the selection body is reconstituted and undertakes the appointment process for the duration of the existing local government term, it would be inappropriate for members of the selection body to entertain approaches from individual candidates.

(c) Further evidence

[33] We agree with the Judge's reasons for declining the application to adduce further evidence to show that each member of the selection body considered the views of mataawaka.[18] In addition, as the selection body failed to act as a body such evidence cannot affect the result of this appeal.

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16 *Jackson v Te Rangi*, above n5, at [91]–[92].
17 *Ministry of Education v De Luxe Motor Services Ltd* [1990] 1 NZLR 27 (CA) at 34.
18 *Jackson v Te Rangi*, above n5, at [109]–[132].

Result

[34] The appeal is dismissed.

[35] The appellants are to pay the respondent costs as on a band A basis for a standard appeal together with usual disbursements.

Solicitors:
Atkins Holm Joseph Majurey, Auckland for Appellants
Wackrow Williams & Davies Ltd, Auckland for Respondent