IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA329/2020
[2022] NZCA 216

BETWEEN	COLIN SAMUEL HENRY Appellant
AND	MINISTER OF JUSTICE First Respondent
	ATTORNEY-GENERAL Second Respondent

Hearing:	18 November 2021 (further submissions received on 6 April 2022)
Court:	French, Clifford and Gilbert JJ
Counsel:	Appellant in person V McCall for Respondents
Judgment:	31 May 2022 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] In June 2018 Mr Henry, in response to an advertisement in the name of the Minister of Justice (the Minister), submitted an expression of interest for appointment as the Race Relations Commissioner (the RRC) of the Human Rights Commission (the Commission). Mr Henry was not appointed to that position, which was ultimately filled by the 11 July 2019 appointment of Mr Meng Foon.

[2] In September 2018, having been advised by the Ministry of Justice (the Ministry) he had not been shortlisted for the position, Mr Henry commenced judicial review proceedings and, at the same time, applied for interim orders to stop the process for the appointment of a new RRC. Mr Henry's application for interim relief was declined by the High Court on 1 November 2018.[1] A further application for interim relief was made by Mr Henry at the close of the substantive hearing of his application for judicial review on 27 March 2019. That application was declined by Gault J on 18 April 2019.[2]

[3] Finally, Gault J also declined Mr Henry's application for judicial review in a judgment of 28 June 2019.[3]

[4] In his application for judicial review Mr Henry said the appointment process was being carried out on the Minister's behalf by his officials, and the independent panel involved, unfairly, in breach of statutory duties and the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), and so as to frustrate legitimate expectations he had of that process.

[5] Whilst the High Court recognised aspects of that process may not have been ideal, it concluded Mr Henry had not established any reviewable breach of law or duty and dismissed Mr Henry's review application accordingly. Mr Henry now appeals.

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1 *Henry v Minister of Justice* [2018] NZHC 2831.
2 *Henry v Minister of Justice* [2019] NZHC 889.
3 *Henry v Minister of Justice* [2019] NZHC 1493 [Substantive judgment].

Background

Statutory context

[6] The Commission is an independent Crown entity under the Human Rights Act 1993.[4] The Commission consists of a Chief Commissioner, and not less than three and not more than four other commissioners, one of whom (the RRC) must be appointed to lead the work of the Commission in the priority area of race relations.[5]

[7] Pursuant to s 28(1)(b) of the Crown Entities Act 2004 the members of the Commission are appointed by the Governor-General on the recommendation of the Minister. Section 27(1) sets out the responsible Minister's role as regards the governance of Crown entities. It provides:

> (1) The role of the responsible Minister is to oversee and manage the Crown's interests in, and relationship with, a statutory entity and to exercise any statutory responsibilities given to the Minister, including functions and powers—
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> (a) in relation to the appointment and removal of members under this subpart:
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> (b) to determine the remuneration of some members under this Part:
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> (c) in relation to the giving of directions to the entity under subpart 1 of Part 3:
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> (d) to review the operations and performance of the entity under subpart 3 of Part 3:
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> (e) to request information from the entity under subpart 3 of Part 3, whether for a review or otherwise:
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> (f) to participate in the process of setting the entity's strategic direction and performance expectations and monitoring the entity's performance under Part 4:
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> (g) in relation to other matters in this Act or another Act.

[8] Criteria for recommendations by the Minister are set out in s 29, which provides:

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4 Crown Entities Act 2004, sch 1, pt 3.
5 Human Rights Act 1993, s 8(1) and (1A)(c).

> (1) A responsible Minister of a statutory entity must appoint, or recommend the appointment of, members under section 28 in accordance with any criteria for members and any process for appointment under this or another Act.
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> (2) A responsible Minister—
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> (a) may only appoint or recommend a person who, in the responsible Minister's opinion, has the appropriate knowledge, skills, and experience to assist the statutory entity to achieve its objectives and perform its functions; and
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> (b) subject to subsection (1), in appointing or recommending an appointment, must take into account the desirability of promoting diversity in the membership of Crown entities.

[9] Further criteria are found in s 11 of the Human Rights Act, as regards commissioners generally, and in s 13 of that Act, as regards commissioners to lead work in a priority area such as race relations. In general terms, those criteria direct the Minister to consider a candidate's knowledge and experience with respect to the law, human rights, the Treaty of Waitangi, and various economic, employment, social, and cultural issues. The Minister is also directed to consider a candidate's skills or experience in advocacy, public education, business, commercial affairs, community affairs and public administration. Section 13 directs the Minister to consider those factors in the context of the relevant priority area.

[10] Neither the Crown Entities Act nor the Human Rights Act contain any further specification, whether substantial or procedural, of the appointment process.

The appointment process

[11] On 24 May 2018 the Minister agreed to a process to find replacements for the RRC and other commissioners[6] whose positions had expired or were about to expire. Public advertisements would seek expressions of interest (EOIs) and, in line with applicable UN guidelines (the Paris Principles), an independent panel (the Panel) would be appointed to assist. The Panel would assess EOIs, conduct interviews with selected candidates and prepare a shortlist of candidates for the Minister's consideration.

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6 The Chief Commissioner and the Equal Employment Opportunities Commissioner.

[12] The advertisement seeking EOIs for the vacant commissioner roles was published on 26 May 2018. It referred potential applicants to a position description and an application form to be found online. EOIs were to be submitted by 20 June 2018. Neither that advertisement, nor the position description, nor the application form, described the appointment process.

[13] Mr Henry submitted his EOI on 12 June 2018. A responsible official in the Ministry acknowledged receipt on 19 June 2018.

[14] The Minister appointed the three Panel members on 27 June 2018 and announced those appointments on 16 July 2018. The Minister's press release identified the three Panel members, summarised their experience and explained the Panel would run an independent process and make recommendations directly to him. The press release also stated:

> New Zealand is a strong supporter of the United Nations' Principles Relating to the Status of National Institutions (The Paris Principles). They set standards of independence, integrity and effectiveness for institutions such as the Human Rights Commission. The Paris Principles require a transparent selection and appointment process.

[15] The Panel met on 11 July 2018, when it considered Mr Henry's EOI, and again on 16 and 17 July 2018. By that point the Panel had identified two potentially appointable applicants for the RRC position, which did not include Mr Henry.

[16] On 20 July 2018 the Panel notified the Minister by telephone that it intended to re-advertise the role of RRC. The Panel considered the pool of potential appointees for that position was insufficient given the importance of receiving EOIs from a diverse range of applicants.

[17] On 24 July 2018 the Ministry emailed all candidates, including Mr Henry, to advise that there would be a brief delay in finalising the shortlist for the RRC. The email said that at the request of the Panel, and with the agreement of the Minister, there would be a second public advertisement placed on 25 July 2018. The closing date for EOIs would be 3 August 2018. The email also said:

> This is in no way a reflection on the candidates who have expressed interest but the panel felt that the pool of candidates for this particular position was not as large as expected.
>
> You remain under consideration. I expect to have an update on a shortlist around the second week of August.

[18] Candidates who had also expressed interest in the Chief Human Rights Commissioner or Equal Employment Opportunities Commissioner positions were advised they could expect to be notified whether they had been shortlisted within the next week.

[19] The Panel reviewed the EOIs submitted in response to that second advertisement of the RRC position in the week of 6 August 2018 and decided not to add any of those applicants to the shortlist. On 30 August 2018 Mr Henry was notified that he had not been shortlisted to proceed to the interview stage for the RRC position. Mr Henry filed his judicial review proceedings on 4 September 2018.

Mr Henry's judicial review claims

[20] Mr Henry's judicial review claims were based on the following aspects of the appointment process, as it involved him personally.

[21] On 13 July 2018, that is three days before the announcement of the membership and role of the Panel, Mr Henry had emailed the Ministry enquiring as to progress in the appointment process. The email reply from the Ministry that same day advised no decisions on shortlisting had been made and explained the need for the selection process to comply "with UN conventions (called the Paris Principles) which require the responsible Minister to be advised by an independent panel". The Panel had been established but had not completed shortlisting.

[22] On 21 August 2018, that is after the 25 July 2018 readvertising of the RRC position, Mr Henry again enquired of the Ministry as to progress. Mr Henry noted the Ministry had not yet provided the update on the shortlist which, in their email to all applicants of 24 June 2018, they had said they expected around the second week of August. Mr Henry commented:

> It is now the end of the [third] week in August. Should I therefore conclude that once again the reason I have heard nothing is because I have not been put on the shortlist? I should really appreciate knowing so that I can plan appropriately.

[23] The Ministry's email reply on 22 August 2018 said that work on the RRC appointment was temporarily paused because one of the Panel members was out of the country for the next few weeks. The Ministry would be back in touch with Mr Henry when they had an update.

[24] At a case management conference on 6 September 2018, two days after Mr Henry had filed his judicial review proceedings, the hearing of his application for interim relief was set down for 11.45 am on 10 October 2018. Fitzgerald J declined to make specific orders for the production of information, reminding the respondents of the need for "open and transparent … affidavit material".[7] She also declined Mr Henry's request for any "comments or observations made by the review panel" in relation to his application.[8] She did so because she could not see the relevance of that material, given Mr Henry's confirmation that his challenge was not to his application not being accepted per se, but as regards process issues only.

[25] Following discussions with Crown Law, and at their invitation, on 13 September 2018 Mr Henry met with two members of the Panel. That same day those Panel members interviewed the two shortlisted candidates.

[26] On 19 September 2018 Mr Henry applied under the Official Information Act 1982 and the Privacy Act 1993 for a range of information relating to the appointment process. As a result Mr Henry was advised of the reason for the Panel, the criteria for membership of the Panel and its terms of reference, that nine further EOIs were received following the second advertisement of the RRC position and that those EOIs had been discussed by telephone on 7 August 2018 when the Panel had agreed no further suitable candidates had come forward.

[27] Mr Henry had also asked when it was expected the Panel would make its recommendation for the appointment of the RRC, and for copies of all records,

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7 *Henry v Minister of Justice* HC Auckland CIV-2018-404-1898, 6 September 2018 at [9].
8 At [10].

including all comments of the Panel, in relation to his EOI. In response the Ministry advised Mr Henry the Panel had not yet made its recommendation on the RRC position and did not intend to do so until after the resolution of his application for interim relief. As to copies of comments on Mr Henry personally, the Panel had "not made any record of its discussions about candidates for the [RRC] position".

[28] On that basis, Mr Henry's amended statement of claim contained four causes of action:

(a) frustration of legitimate expectations;

(b) failure to act reasonably, rationally, and/or fairly;

(c) breach of statutory duty; and

(d) breach of the Bill of Rights Act.

[29] More particularly, Mr Henry said:

(a) He had a legitimate expectation he would be advised in a timely manner of the success or otherwise of his application. Given his expression of interest was considered on 11 July 2018, and he did not make the shortlist, that expectation was frustrated when on 13 July 2018 he was advised no decisions on the shortlisting had been made.

(b) When he submitted his EOI on 12 June 2018 he did not know who the Panel members were and understood all expressions of interest were to be submitted by 20 June 2018. The Panel's subsequent decision to re-advertise the role of RRC breached his legitimate expectation that all expressions of interest were to have been provided by 20 June 2018, before the identities of the three Panel members were announced, and hence no applicant would know of the identities of the Panel members when providing their expression of interest.

(c) The Minister's announcement of an extended process expressly stated existing candidates remained under consideration. His legitimate expectation that was the case was frustrated because, after he failed to make the shortlist on 11 July 2018, no further consideration was given to his application.

(d) The Ministry's email of 22 August 2018 advising the appointment process was temporarily paused because one of the Panel members was out of the country raised a legitimate expectation that was the case. The fact the two Panel members in New Zealand that very day interviewed two candidates from the first round of advertising breached that expectation, as did the Ministry's inaccurate advice the process had "paused".

(e) Finally, that the Panel had kept no records breached his legitimate expectation as to a proper process being followed by the Panel in the preparation of its advice for the Minister.

[30] Those same elements of the process Mr Henry argued established the Minister's failure to act reasonably, rationally and fairly. The failure of the Minister to provide any contemporaneous records, and the acknowledgement that the Panel had not kept any written records, was a failure of the general duty under the Public Records Act 2005 to create and maintain records. It meant there was no basis upon which the Court could conclude the Minister had fulfilled his statutory duty to encourage diversity.[9]

High Court judgment

[31] In a decision of 27 March 2019, Gault J declined Mr Henry's judicial review application.[10]

[32] First, he rejected Mr Henry's legitimate expectations arguments. The Ministry did not, by its statement in the first advertisement that EOIs were sought by

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9 Crown Entities Act, s 29(2)(b).
10 Substantive judgment, above n 3.

a particular date, create a legitimate expectation that EOIs submitted later would not be considered. Even still, the Ministry's view that the pool of appointees was insufficient was a "satisfactory reason" to depart from that process.[11]

[33] Nor had the Minister, in announcing the establishment of the Panel, created a legitimate expectation that EOIs would be considered by the full Panel. In any event, Mr Henry's application was considered by the full Panel on 11 July 2018.[12] There was also no legitimate expectation the Panel would record its discussions about candidates, based on the Paris Principles, the Public Records Act or otherwise.[13]

[34] The Judge did have some sympathy with Mr Henry's arguments that he and the other non-shortlisted applicants did not really "remain under consideration" as the Ministry had told them on 24 July 2018.[14] However, as the Panel had already considered those EOIs, full reconsideration was not required. It was sufficient, as the evidence indicated, for the Panel to have reflected on whether applicants in the first round of advertising who had not been shortlisted ought to be added at that time.[15]

[35] In the Judge's assessment, there was no unreasonableness in the process. In particular, the respondents to the second advertisement were not advantaged because they knew of the identities of the Panel members. That knowledge made no difference to whether Mr Henry or other applicants were suitably qualified for the position and, indeed, none of those respondents to the second advertisement were shortlisted.[16]

[36] Finally, the Minister had not breached his duty to take account of the desirability of promoting diversity in the membership of Crown entities, found in s 29(2)(b) of the Crown Entities Act. Irrespective of that desirability, the Judge noted Mr Henry would not have been recommended for appointment as he did not satisfy

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11 At [60], referring to *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525.
12 At [62].
13 At [75] and [91].
14 At [70].
15 At [73].
16 At [78]–[80].

the qualification requirements found in s 29(2)(a) of that Act.[17] The Minister had also not breached Mr Henry's right to justice in s 27 of the Bill of Rights Act.[18]

This appeal

[37] On appeal, Mr Henry essentially advanced the same arguments as he had in the High Court. He again argues (i) his legitimate expectations have been frustrated; (ii) the appointment process was unfair and irrational; and (iii) the respondents breached their duty to account for diversity in s 29(2)(b) of the Crown Entities Act, and his right to justice in s 27 of the Bill of Rights Act.

[38] In his oral submissions Mr Henry expressed more general dissatisfaction, not only with the process of consideration of his EOI for the RRC position but also his concerns — based on previous and more recent experience of unsuccessful application for public appointment — that he simply was not being treated fairly and was, in essence, being discriminated against.

[39] That more general sense of grievance had earlier been reflected in the covering letter Mr Henry had sent with his EOI. Having referred to his lack of success in the past, and to approaches he had made to the Ministry in an effort to find out why that had been the case, Mr Henry expressed his concern in the following way:

> One could be forgiven for thinking that something else must be at work to eliminate me from selection for statutory appointment. Is it because, for example, New Zealand citizenship comprises two castes, the upper consisting of native-born New Zealanders, and the lower, of naturalised citizens like myself? Is it for that reason that, while the conviction of the District Court judge mentioned above raised no barrier to his statutory appointment, he being native born, whatever mark there may be against me, even if much more venial, is sufficient to debar me from such appointment? I recall that the outgoing Race Relations Commissioner, Dame Susan Devoy, considered it necessary to remind the leader of the Act Party publicly that both native and naturalised citizens have the same rights under our system. …
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> … Is the Ministry suffering, perhaps unconsciously, from a comparable xenophobically influenced preference? I propose that that question is not one to be ignored. The Chief Justice herself, Dame Sian Elias, considered it necessary to remind the judiciary, at the 2005 swearing in ceremony for High Court Justice, Asher J, of the need for judges to "be on their guard against unconscious prejudice".

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17 At [87]–[90].
18 At [92].

[40] Mr Henry went on to note that, having carefully studied the published key competencies sought in the ideal candidate for the RRC position, he believed his CV established he possessed those competencies in abundance. He supported that contention with a summary of his experience. He concluded:

> Against all of the above, I hope that the Ministry will examine itself carefully and honestly, and at the very least afford me the opportunity on this occasion to demonstrate, in an interview, the distinction with which I will acquit myself if appointed Race Relations Commissioner, transforming that post into a vibrant, proactive agency, from the moribund sinecure that it is seen to be by many.

[41] Mr Henry's oral submissions canvassed many of those matters and confirmed the continuing role of those concerns as motivation for his judicial review proceeding.

Application to adduce further evidence

[42] Before turning to our analysis, we note Mr Henry made an application to adduce further evidence on 10 September 2021, before the hearing of this appeal.[19] That evidence, Mr Henry said, was relevant to whether the Ministry had a "satisfactory reason" to make a second advertisement seeking EOIs. In the affidavit he sought to be adduced, Mr Henry sets out "several experiences that I have had, since delivery of the judgment under appeal, in submitting expressions of interest or applications to [the Ministry], seeking appointment to statutory bodies".

[43] The respondents abided the Court's decision on the application. On 24 September 2021, Brown J directed Mr Henry's application was to be determined at the hearing.

[44] Further evidence to be adduced on appeal must be fresh, credible and cogent.[20] Whilst we appreciate that evidence may support Mr Henry's general dissatisfaction, as he expressed on appeal, with his experiences in seeking appointment, we do not consider that evidence is fresh or cogent. It simply lacks relevance to the errors alleged to have been made in the context of the RRC appointment process.

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19 Court of Appeal (Civil) Rules 2005, r 45(1)(b).

20 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192, affirmed in *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

Analysis

[45] Judicial review is fairness and legality writ large. To that extent, the legal principles Mr Henry relies on require no particular explanation, save in one case: that is, Mr Henry's claim of frustration of legitimate expectations.

[46] A person may have a legitimate expectation that a certain procedure will be followed in the making of a decision regarding the exercise of a statutory power where a decision-maker has made a clear, unambiguous and unqualified representation they will follow that procedure. That expectation must be reasonable.[21] The representation may arise from an express promise given or from the existence of a regular practice which the claimant can reasonably expect to continue.[22]

[47] A common, if not invariable, feature of a breach of a legitimate expectation is detrimental reliance.[23] As Ronald Young J observed in *Talleys Fisheries Ltd v Cullen*:[24]

> Detrimental reliance upon representation is not essential but it is relevant. Absence of detrimental reliance will be rare. The principles of good administration prima facie require adherence by public authorities to their promises.

And similarly, Peter Gibson LJ stated, in giving the leading judgment in *R v Secretary of State for Education and Employment, ex parte Begbie*:[25]

> Mr Beloff submits … (v) it is not necessary for a person to have changed his position as a result of such representations for an obligation to fulfil a legitimate expectation to subsist; the principle of good administration prima facie requires adherence by public authorities to their promises. He cites authority in support of all these submissions and for my part I am prepared to accept them as correct, so far as they go. I would however add a few words by way of comment on his fifth proposition, as in my judgment it would be wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation.

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21 *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [143]; and *Okahu Haulage Inc v Auckland City Council* [2010] NZAR 82 (HC) at [28].

22 *Talleys Fisheries Ltd v Cullen* HC Wellington CP287/00, 31 January 2002 at 48.

23 *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [65].

24 *Talleys Fisheries Ltd*, above n 22, at 48.

25 *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 (CA) at 1123–1124.

[48] In the special context of public sector employment decisions, a "legitimate" expectation argument has operated to ensure that an applicant for employment has their application treated fairly and according to any stated processes.

[49] In *Mansell v Commissioner of Police*, the applicant unsuccessfully applied for a senior post in the police.[26] He then, also unsuccessfully, challenged the selection panel's decision, pursuant to internal police review procedures, to recommend to the Commissioner of Police the appointment of the successful applicant. The High Court found the internal review process wanting and ordered it to be redone. Relevantly for our purposes, the Court observed in responding to the argument administrative unfairness had arisen because the criteria for selection had changed:[27]

> I accept that, when the commissioner publishes a detailed job description and personal specification, applicants have a legitimate expectation that their job applications will be considered in terms of that publication. At the very least, if there is to be some departure, notice will be given sufficient to allow additional or changed material and further preparation for interview. It is a matter of simple fairness.

[50] In this case, therefore, Mr Henry was entitled to have had his EOI assessed fairly by the Panel and according to the terms of the procedure stated — here, primarily those set out in the first advertisement. His claim of breach of legitimate expectation — that is, a complaint of unfair treatment — is to be considered in that light.

[51] As regards that claim, Mr Henry focuses particularly on the decision to readvertise the RRC position and the advice he received from the Ministry in connection therewith. But, prior to Mr Henry submitting his EOI, there was no basis for him to have any particular expectation as to the process that would be followed by the Minister and his officials, other than that expressions of interest were invited from "suitably qualified persons who would like to be considered for [appointment]" as the Race Relations Commissioner "under s 8 of the Human Rights Act 1993". Section 8 describes the membership of the Commission and the roles of the various commissioners. Reference to that Act reflects the statutory framework, including the Minister's role under the Crown Entities Act in recommending to the

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26 *Mansell v Commissioner of Police* [1993] 2 ERNZ 646 (HC).
27 At 650.

Governor-General persons for appointment as commissioners, and the various statutory criteria upon which such recommendations are to be made.

[52] But that framework does not provide a foundation for the very particular expectations of process Mr Henry seeks to rely on. When Mr Henry submitted his EOI on 12 June 2018, the process remained undefined.

[53] Mr Henry's first enquiry as to progress, on 13 July 2018, preceded the public announcement of the membership and role of the Panel. Replying that same day, the Ministry advised (as indeed was the case) that no decisions on shortlisting had been made. Mr Henry was also told, as was publicly confirmed three days later, of the role of the Panel. Whilst Mr Henry's EOI had been considered by that point, the Ministry's advice the Panel had been established but had not completed shortlisting was accurate. Exactly when the Panel determined Mr Henry would not be shortlisted, and communicated that decision to the Ministry, is not clear. In any event, given Mr Henry was advised accurately the Panel had not completed shortlisting on 13 July 2018 we fail to see the basis for any expectation — using that term in its general sense and without any particular legal meaning — as to the nature or timing of advice to him as to the outcome of the process in his case.

[54] Mr Henry also complained of the Panel's decision to readvertise the RRC position. That, he said, breached his legitimate expectation because when he submitted his EOI on 12 June 2018 he did not know who the Panel members were and he had a legitimate expectation that no applicant would know of the identities of the Panel's members when providing their expressions of interest. That expectation was breached by the combination of the 16 July 2018 public announcement of the role and membership of the Panel, and the 25 July 2018 readvertising.

[55] The announcement of the role and membership of the Panel was not made until after 20 June 2018, the closing date for EOIs. Mr Henry could have no legitimate expectations as to the involvement of the Panel at all at that point. Nor did Mr Henry suggest he had any knowledge prior to the Ministry's advice on 13 July 2018 that the Panel had been established and had not completed shortlisting. Again, we find no

basis for the "expectation" Mr Henry asserts. Put another way, Mr Henry cannot complain of unfair treatment by reference to those matters.

[56] Nor, as a matter of logic, can either of (i) the Minister's announcement on 24 July 2018 of an extended process or (ii) the Ministry's email of 22 August 2018 advising Mr Henry of the temporary pause "in the process", give rise to any "expectation" that Mr Henry could possibly rely on. Essentially, the process of finalising the shortlist was ongoing. Mr Henry would be advised as to the outcome when that process was completed. That some detail of where the Panel had got to in that process, whether as regards Mr Henry personally or more generally, may not have been communicated by the Ministry (whether they knew about such matters or not) is not a breach of any expectation. The Ministry was doing its best, by our assessment, to answer Mr Henry's queries notwithstanding the undoubted, and probably unexpected, complication caused by the need to readvertise.

[57] The final expectation Mr Henry claimed had been frustrated was that of a transparent selection process whereby Panel members would record their comments, critiques and observations on assessed candidates. That expectation, he said, was based on the Minister's 16 July 2018 press release referring to the kind of process required by the Paris Principles. Mr Henry referred to s 17(1) of the Public Records Act and to s 23 of the Official Information Act in support of that expectation. Section 17(1) requires every public office to create and maintain full and accurate records of its affairs in accordance with normal prudent business practice, including matters contracted out. Section 23 provides for a person to access reasons for decisions affecting them, subject to prescribed limitations. Mr Henry understood the Ministry's reply to his official information request, that the Panel had "not made any records of its discussions about candidates" for the RRC position, to be an assertion no written records at all had been kept. The case on appeal appeared to support that understanding as none of the materials comprised any written communications by the Panel to the Minister of any substantive official advice.

[58] As we pointed out to counsel for the Attorney-General, there were references in the record to reports prepared by the Panel and advice given by officials. In response, counsel for the Attorney-General was able to confirm that, in fact, reports

and advice in writing had been prepared and provided to the Minister. That material was provided to the Court and to Mr Henry after the hearing.

[59] The material presented included three reports to the Minister from the Panel, each compiled — we infer — after consideration of the EOIs submitted in response to the three rounds of advertisements. Those reports set out brief biographical summaries of each shortlisted and interviewed candidate, together with comments on the Panel's assessment of them. Redactions of those reports were made to protect the privacy of unsuccessful candidates. Notwithstanding that, the reports showed some of the details before the Minister during the appointment process, including up to the time when he decided to recommend the appointment of Mr Foon. They included details as to Mr Foon's attributes and qualifications, as well as those of some unidentified, shortlisted, interviewed but, ultimately, unsuccessful candidates. Those reports did not however canvass why certain candidates who were not shortlisted.

[60] In his subsequent written submissions Mr Henry asserted that the documents provided constituted further support for his concerns.

[61] We disagree. The Minister's press release did not convey a promise about the Panel's recordkeeping practices throughout the appointment process, nor do the Paris Principles refer to such practices. Even if s 17(1) of the Public Records Act and s 23(1) of the Official Information Act require those records to be made and provided to Mr Henry, a matter which was not pleaded[28] and on which we did not receive submissions from the respondents, alleged breaches of those provisions cannot be advanced under the guise of a legitimate expectation argument. They would, if substantiated, support a claim of review for illegality. However, we are satisfied the Panel's reports to the Minister were adequate in terms of the record required for this decision-making process.

[62] For the reasons we have given, we do not accept Mr Henry's ground of appeal as regards legitimate expectations.

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[28] See Substantive judgment, above n 3, at [91].

[63] The remaining grounds of appeal Mr Henry advanced can be addressed more succinctly.

[64] Mr Henry, as he had in the High Court, argued there was substantive unfairness and irrationality in the appointment process. He again claimed that respondents to the second advertisement were advantaged by their knowledge of the Panel membership and that they had more time to submit their applications. In doing so, Mr Henry refers to principles of equal treatment by public authorities. Despite those principled arguments, and as we have said, we do not accept there was unfair and unequal treatment of the kind he says existed. We agree with Gault J that knowledge of the Panel's membership would not have made any difference to whether Mr Henry or other applicants were qualified for the position.[29] Nor, in the event, did that knowledge or having more time to submit EOIs make such a difference: none of the respondents to the second advertisement were shortlisted.

[65] We also do not accept Mr Henry's arguments that the respondents breached s 29(2)(b) of the Crown Entities Act or s 27 of the Bill of Rights Act:

(a) Section 29(2)(b), set out above at [8], requires the responsible Minister to take account of the desirability of promoting diversity in the membership of Crown entities. We agree with the Crown, despite Mr Henry's submission no record of that factor being accounted for, the evidence demonstrates it was considered. It is evident in the backgrounds of the Panel members and the successful appointees to the commissioner roles,[30] and as the Panel's chairperson Ms Pauline Winter explained in her affidavit:

> 32. … The members of the Panel brought a number of perspectives and a variety of experience to the consideration of candidates for the role. I am a former Chief Executive of the Ministry of Pacific Island Affairs and Director of the Office of Pasifika Advancement at the AUT. Sir John Clarke has spent

[29] Substantive judgment, above n 3, at [80].

[30] The Panel's report to the Minister of 29 May 2019, provided to us after the hearing of the appeal, set out the various diversity attributes both of Mr Foon and of two unsuccessful applicants. An earlier report, which recommended an applicant as being "highly appointable", also set out that person's Māori descent, iwi connections, skills in te reo Māori and tikanga expertise.

> decades working in the area of Māori culture and heritage and is himself a former Race Relations Conciliator. Al Morrison is an experienced public servant, currently in a senior role at the State Services Commission, which leads the New Zealand public service.
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> 33. In the course of our discussions, consideration was given to the need for the Human Rights Commissioners to reflect the diversity of New Zealand society. It is not the case that we were unaware of the need to take diversity into account, nor is it correct to say that we didn't take diversity into account in our deliberations. In fact, a concern for increasing the diversity among the people who express interest in the position of Race Relations Commissioner has led the Panel to ask the Ministry to place future advertisements for the position in a wider range of publications than it did previously and to do so in te reo Māorias well as in English.

(b) Finally, the right to justice affirmed in s 27 of the Bill of Rights Act, including to the observance of the principles of natural justice by public authorities, also has not been breached. For the reasons we have given, we do not consider there was procedural unfairness in the appointment process. Issues of compensation do not therefore need to be addressed.

Result

[66] The application for leave to adduce further evidence is declined.

[67] The appeal is dismissed.

[68] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondents