

Decision to serve trespass notice in respect of Council's premises

Ombudsman's opinion

Legislation:	Ss 13 and 22 Ombudsmen Act, s 4 Trespass Act (see Appendix 1)
Agency:	Horowhenua District Council
Ombudsman:	David McGee
Reference number:	313104
Date:	4 April 2013

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Summary

The Horowhenua District Council (HDC) issued a trespass notice against the complainant, Mr Philip Taueki, after he made offensive comments during submissions on its annual plan. He had left the premises voluntarily at the time, after the Mayor asked the Chief Executive to take steps to trespass him. The police subsequently served a trespass notice at the request of the HDC, banning him from the HDC premises for two years. Service was not effected until six days after the incident.

I have formed the final view that the HDC acted unreasonably and unjustly by failing to give Mr Taueki an opportunity to comment prior to service of the trespass notice.

Complaint

1. This is a complaint about the HDC's decision to serve the complainant with a trespass notice in respect of the Council's premises at 126 – 148 Oxford Street, Levin.
2. I issued a provisional opinion on the complaint to the complainant and the HDC on 28 January 2013. I have received responses from both parties and have taken them into account in forming this opinion.

Background to this complaint

3. The HDC began hearing the submissions received on the HDC's annual plan at a meeting held on 1 June 2011, commencing at 3.30pm. The HDC had received 144 submissions and the purpose of this meeting was to work through these submissions, noting each one and hearing from those submitters who wished to speak to their submission. The Mayor reminded those in attendance of the protocol for speaking, namely that 5 minutes was allowed to submitters, with a further 5 minutes for questions. The Mayor said he would endeavour to ensure the meeting kept to time in order to accommodate the number of submitters wishing to speak.
4. The complainant made a submission on the annual plan in his capacity as Chief Executive of [a foundation] and was allocated time to address the meeting accordingly. He commenced speaking at or about 5.30pm.
5. As the 10 minute time limit was approaching, the Mayor reminded the complainant that he was closing in on his allocated time and suggested he should start to wind up his submission. The complainant then began to make offensive personal comments aimed at two of the councillors present, which were unrelated to the subject matter under consideration. The Mayor repeatedly advised the complainant that his time was up and that he needed to stop, but the complainant continued speaking. There can be no doubt from the statements of witnesses that I have seen that the complainant's conduct was regarded as unacceptable and, in the view of some present, threatening.

6. The Mayor asked the HDC's Chief Executive for advice on how to resolve the situation. The Chief Executive addressed the meeting and read out clauses 3.16.1 and 3.16.2 of the Council's standing orders which relate to the maintenance of public order at meetings and to the power of the Chair of the meeting to require a member of the public to leave a meeting where he or she is likely to prejudice the orderly conduct of that meeting.
7. The Mayor then requested that the complainant leave the meeting. The complainant did not leave and the Mayor asked the Chief Executive to "take steps to trespass [the complainant]."
8. The Chief Executive left the Council chamber and went to his office where he contacted the Police and sought advice on the process for serving a trespass notice. He then drafted a trespass notice using the template for this from the Police website. This draft notice warned the complainant that he was to stay off the Council's premises at 126 – 148 Oxford Street, Levin for a period of two years.
9. The Chief Executive returned to the Council chamber to serve the complainant with the trespass notice but found that the latter had by then left the chamber.
10. On the following day (2 June 2011) the Chief Executive visited the Levin Police to arrange for service of the notice by a Police officer. He left the meeting with the Police expecting that service would occur immediately. For whatever reason it did not. The notice was served on the complainant at 10.36am on 7 June 2011.

The complainant's concerns

11. The complainant complained that the HDC's decision to issue him with a trespass notice preventing him from accessing the Council's building in Oxford Street, Levin, for two years, was unreasonable.
12. The complainant's lawyer pointed to the positions the complainant held within the local community and the advocacy functions that these entailed, including with the HDC. He also pointed out that the local authority's premises are used for other activities than just Council meetings (he instanced Maori Land Court and Local Domain Board meetings) and that the trespass notice would interfere with the complainant's ability to attend these. The impacts on the complainant were seen as severe and out of proportion to any offence he had caused.
13. In subsequent submissions the complainant's lawyer questioned the HDC's process for reaching its decision to issue a trespass notice, challenging its reasonableness in regard to the complainant's conduct and other alternatives open to the Council. The accuracy of some of the information said to have been relied on by the HDC was also disputed.
14. The complainant's lawyer considered that issue of the trespass notice was unlawful and requested its withdrawal.

HDC's response

15. The HDC in response pointed out that Council premises are not immune from the Trespass Act. It considered that, given the complainant's actions, it was a justified response on its part to serve him with a trespass notice requiring him not to enter the premises for two years. While it acknowledged the inconvenience this would cause the complainant it did not consider that this was a disproportionate response or that it unduly infringed his rights, particularly the right to freedom of expression, given his unreasonable conduct both on this and on previous occasions.
16. In a further response the HDC questioned whether my approach to the issues raised by this complaint was in accordance with the law as expressed in the Trespass Act and the New Zealand Bill of Rights Act. Subsequently the HDC accepted the Ombudsman's broad jurisdiction to depart from legal authority though pointing out that any significant departure from it should be undertaken with care. I accept this latter point, though it is not clear to me that the approach that I have adopted is actually in conflict with legal authority. This is discussed below.

Ombudsman's role

17. Under section 13(1) of the Ombudsmen Act 1975, I have authority to investigate the administrative acts, decisions, omissions and recommendations of the HDC.
18. In the course of this investigation a submission relevant to my role was made by the HDC's solicitors. In this submission the solicitors referred me to judicial authority on the use of the Trespass Act, maintaining that views I had expressed had failed to analyse the questions posed in this complaint within a legal framework and having regard to established legal principle. My views were thus said to be inconsistent with decision-making in this area of the law generally. In particular, it was said that to formulate any "hard and fast" rule on the exercise of trespass powers by public authorities is unreasonable and "is seeking to put a gloss on the law outside of the statutory process, while also being inconsistent with judicial authority". As indicated above, this submission has since been qualified, but it is still important that I discuss it.
19. I will come back to the judicial authority later, but I want to say at the outset that I reject entirely any attempt to confine the Ombudsman's jurisdiction to review of whether there has been a lawful exercise of power by a public authority.
20. The Ombudsmen Act does not prescribe against what criteria the Ombudsman's investigations under section 13(1) are carried out. However, section 22 of the Act sets out a number of factors any one of which would justify the Ombudsman in making a formal recommendation for further consideration or other amelioration. These factors are taken as giving a focus to Ombudsmen investigations.

21. Section 22(1) and (2) refer to the factors that might lead to a formal recommendation.
22. Subsection (1) instances where the Ombudsman considers that the decision, recommendation, act or omission in question –
 - “(a) appears to have been contrary to law; or*
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or*
 - (c) was based wholly or partly on a mistake of law or fact; or*
 - (d) was wrong.”*
23. Subsection (2) instances where the Ombudsman considers that in making the decision, recommendation, act or omission, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that reasons should have been given for a decision.
24. Although section 22(1)(a) permits the Ombudsman to form an opinion that the decision, etc complained of “appears” to have been contrary to law and section 22(1)(c) permits the Ombudsman to conclude that such a decision, etc was based wholly or partly on a mistake of law, the Ombudsman does not determine legal rights. The latter is a matter for the courts. But even apart from section 22(1)(a) and (c) the Ombudsman can make judgments that are quite distinct from the strict legality of a matter. An Ombudsman does put a gloss on the law outside any statutory process. It was for this very reason that the office was created in 1962 separate from the judicial branch of government.
25. Of course, an Ombudsman must act in accordance with the law as expressed in the Ombudsmen Act or as required by wider public law principles. It was for this reason that I provided the parties with an opportunity to comment on my provisional views on this complaint before proceeding further with it. But an Ombudsman is not confined to determining complaints on the basis of the law. The Ombudsman determines complaints on the basis of what administrative justice requires. Increasingly, with the great developments that have occurred in judicial review since 1962 one can expect that law and administrative justice will coincide, but this is not necessarily the case. My role, I emphasise again, is with regard to the latter.

The reasonable exercise of legal power

26. Although the complainant urges me to do so, I do not propose to make any finding on the question of the legality of the trespass notice. While, as recorded above, I am not precluded from forming an opinion on this, only a court could resolve it definitively. But as the complainant's lawyer contends that the notice is unlawful and I have received

submissions from the HDC on the legal context in which trespass decisions are taken, I have discussed this issue in the paragraphs below on “The law”.

27. Nevertheless, the fact that a legal power exists, and indeed, may have been exercised lawfully, does not exhaust an Ombudsman’s jurisdiction. Indeed, it is in just such a situation that that jurisdiction comes peculiarly into its own.
28. Thus, regardless of the legal position, was it reasonable for the HDC to have acted as it did? Indeed, would it be reasonable for any public authority to exercise its power in the way that the HDC has? These are the questions that I consider arise for my consideration. The legal context is always critical to any consideration of them.
29. The Trespass Act 1980 provides for two distinct types of trespass notice (described as a warning). Under section 3 a person who is trespassing may be warned by the occupier to leave. Failure to do so is an offence. But under section 4 a person may be warned by the occupier to stay off a place with the consequence that if this warning is disobeyed within the next two years an offence is committed. Such a warning may be given to a person while he or she is trespassing, after they have trespassed, or where it is anticipated that they will trespass in the future.
30. In this particular case, what is at issue is an ongoing (two year) trespass notice issued under section 4 of the Trespass Act. It seems to me that issuing an ongoing notice six days after the event which precipitated it is quite different from issuing a trespass notice under section 3 requiring the trespasser to leave the premises then and there or even a trespass notice issued under section 4 in the face of a trespasser acting contumaciously. In the latter instances a notice is utilised to deal immediately with a situation confronting the occupier of the premises concerned. While giving an indication that a trespass notice may be issued and listening to what the trespasser has to say first is certainly desirable, it may not always be feasible in these circumstances.
31. But a notice issued days after the event which led to it (while contemplated by section 4(1)), is issued in “cold-blood”. There is an opportunity to give the subject a warning of the action which the occupier of the premises is proposing to take and to give that person an opportunity to make a submission, orally or in writing, about the proposed notice and its extent of operation. If there is felt to be a danger of the person entering the premises and causing disruption while these steps are being taken, the person could be warned that if he or she entered in the interim they would be required to leave the premises and would be trespassing if they did not.
32. Thus, as a matter of principle, it does not seem to me to be a reasonable (even if it were legal) exercise of power by a public authority to exclude someone from a public building for two years, without first (so far as is practicable in the circumstances) giving that person an opportunity to persuade the authority why that power should not be used (or should be confined or limited in its application). Indeed, I see this as part of a much wider principle: that it is desirable that as far as possible any exercise of public power directed at an individual occurs after consulting with that person first.

The notice issued to the complainant

33. Given the Mayor's direction to the Chief Executive, the complainant may have anticipated being served with a trespass notice at the meeting and have voluntarily withdrawn for that reason. Even so, he was not to know that this would be a notice under section 4 banning him for two years as opposed to a section 3 notice requiring him to leave there and then. Furthermore, whether the trespass notice should apply in respect of every part of the Council premises or for all purposes, regardless of the complainant's reason for wishing to enter them, are matters that have arisen in the complaint to me and are matters on which the complainant could have been invited to comment before the notice took effect.
34. It is clear that the Chief Executive did propose at the meeting to issue a trespass notice under section 4 (for two years). Whether this would have been a reasonable response even in the exigency of the situation is a moot point. But issuing a two year ban later without any intervening warning is, in my view, unreasonable.
35. In response to a provisional opinion which I issued the HDC elaborated on how the notice came to be issued. As described above (paragraph 10), the Chief Executive visited the Police the following day with a view to the notice being served on that day or shortly thereafter. In fact, the notice was not served until six days later.
36. It was put to me that in those circumstances the Council did not issue the trespass notice in "cold-blood" and did not have the opportunity to consult with the complainant, even if it had considered such a step feasible or desirable, because it understood that the service process was underway.
37. I do not accept this interpretation of the situation. The trespass notice was not issued at the meeting. The HDC decided to proceed with it after the event which precipitated it. It was open to the HDC to have informed the complainant of its intentions before approaching the Police. It did not do so. The fact that service took place six days later rather than one day later is thus beside the point. The HDC could have, but did not, initiate any consultation before acting. Nor does it even appear to have given consideration to doing so. (I also consider that the HDC, having enlisted the Police as its agent for service, can hardly disclaim any responsibility for the delay of six days. But I do not think that this is relevant in any event.)
38. The HDC did not give the complainant an opportunity to comment before it proceeded to impose the two year trespass ban on him. Nor does it appear that this would have been impracticable or otherwise undesirable. I consider this to be an unreasonable and unjust action within the meaning of section 22(1)(b) of the Ombudsmen Act on the part of a public authority.

The law

39. In its submission to me on behalf of the HDC, the Council's solicitors referred to the case of *Police v Beggs*¹ as giving useful guidance on the exercise of powers by occupiers under the Trespass Act. The solicitors said that *Beggs* confirms that the rights, such as freedom of expression, recognised in the New Zealand Bill of Rights Act are not unfettered and do not supersede the rights of occupiers under the Trespass Act. The test for the exercise of trespass powers is what is reasonable in all the circumstances. The High Court in that case had discussed "reasonableness" in various scenarios, eschewing a precise formula for the definition of what is reasonable in view of the infinite factual situations that might arise.
40. In my view what is significant about *Beggs* is not that the rights affirmed in the Bill of Rights Act, such as freedom of expression, have some limits and do not supersede the rights of occupiers under the Trespass Act. Its real significance is the exact opposite - that the rights of public authority occupiers are limited by the rights affirmed by the Bill of Rights Act. The exercise of a Trespass Act power by a public authority, though not abrogated by the Bill of Rights Act, has to be consistent with those rights and "reasonable in the circumstances". Such a test is not found in the Trespass Act itself.
41. The later case of *Rongonui v Police*² (also concerned, as was *Beggs* with trespass from the parliamentary precincts) adopted a similar position on the use of Trespass Act powers. In *Rongonui* the judge emphasised that use of section 4 (as opposed to section 3) heightened the obligation to exercise the powers reasonably given the length of duration of its effects.
42. It seems to me that if this issue were being determined on the law a similar approach would be taken. The exercise of its occupier rights by the HDC must be consistent with the rights affirmed by the Bill of Rights Act. I agree that each circumstance will be different. But if one was analysing this case in Bill of Rights Act terms it is not only the complainant's freedom of expression right that would be likely to feature (though that is clearly relevant). It is also likely to be the complainant's right to justice which is affirmed by section 27(1) in these terms:

"Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

¹ [1999] 3 NZLR 615

² [2011] NZAR 128

One aspect of natural justice is, of course, the right to be heard before a decision affecting oneself is taken.

43. One could see natural justice as being relevant to the question of whether the HDC had sufficient justification in the circumstances of this case to exercise its power to issue a trespass notice to the complainant. Alternatively, the complainant's right to natural justice could be seen as an independent right that the HDC was obliged to have regard to before exercising any power of its own that adversely affected his interests.
44. Thus in any legal examination of what occurred in this case, one would have to consider whether the complainant's right to justice was observed by serving him a trespass notice banning him from the Council premises on the basis of his conduct six days earlier (whatever the HDC's intentions as to timeliness of service) and, I have been told, a trend in his behaviour going back for some considerable time (the 1 June incident was described to me as "the straw that broke the camel's back"), without putting the intention to do so to him for comment first.
45. The solicitors for the HDC recorded that the complainant had not "appealed" the trespass notice. He has, of course, no right of appeal under the Trespass Act. He could have sought judicial review of it. Alternatively, its legality could have been brought into question in any prosecution for its breach (as in *Beggs and Rongonui*). The complainant chose instead to complaint to the Ombudsman, as is his right.
46. Whether a Court would have reached the same conclusion under the Bill of Rights Act as I have done under the Ombudsmen Act is not for me to say. Nor do I intend to hazard an opinion under section 22(1)(a) of the Ombudsmen Act as to whether the HDC's decision "appears to have been contrary to law". But nothing in *Beggs* persuades me that I should take a different view to the one I expressed in paragraph 38 above. Rather the reverse.

Ombudsman's opinion

47. For the reasons set out above, I am of the view that the HDC acted unreasonably and unjustly in not giving the complainant an opportunity to comment before it decided to proceed with serving a trespass notice under section 4 of the Trespass Act.
48. I acknowledge that the complaint has not been advanced by this Office as expeditiously as it ought to have been. The trespass notice is now over 18 months old and it is regrettable that this matter has not been resolved before now. It has, however, involved consideration of an important principle as to the exercise of power by a public authority and as to this Office's constitutional role.
49. I do not propose to suggest that the trespass notice be withdrawn. I am conscious that the complainant did misconduct himself at the meeting in question, that there was previous history of objectionable conduct towards the Council, and that the HDC genuinely considered that it had good reason to utilise its powers under the Trespass Act. But I do consider that the HDC should reconsider its decision to serve this trespass

notice, and give the complainant an opportunity to make any submissions to it before it decides whether there is any need to continue it in effect.

David McGee
Ombudsman

Appendix 1. Relevant statutory provisions

OMBUDSMEN ACT 1975

13 Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
 - (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that,

in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

TRESPASS ACT 1980

4 Trespass after warning to stay off

- (1) Where any person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time thereafter, warn him to stay off that place.
- (2) Where an occupier of any place has reasonable cause to suspect that any person is likely to trespass on that place, he may warn that person to stay off that place.
- (3) Where any person is convicted of an offence against this Act committed on or in respect of any place, the court may warn that person to stay off that place.
- (4) Subject to subsection (5), every person commits an offence against this Act who, being a person who has been warned under this section to stay off any place, wilfully trespasses on that place within 2 years after the giving of the warning.
- (5) It shall be a defence to a charge under subsection (4) if the defendant proves that—
 - (a) the person by whom or on whose behalf the warning concerned was given is no longer an occupier of the place concerned; or
 - (b) it was necessary for the defendant to commit the trespass for his own protection or for the protection of some other person, or because of some emergency involving his property or the property of some other person.