

**IN THE HIGH COURT OF NEW ZEALAND
AT WELLINGTON**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

CIV-2023-

**Under the Judicial Review Procedure Act 2016, the Declaratory
Judgments Act 1908, and Part 30 of the High Court Rules 2016**

In the Matter of an Application for Judicial Review

BETWEEN New Zealand Loyal, an unincorporated body and
registered political party having its address at 155 Winara
Avenue Waikanae

Applicant

AND Electoral Commission, an independent Crown entity having
its address at 34/42 Manners Street, Wellington

First Respondent

Attorney-General, of Wellington

Second Respondent

STATEMENT OF CLAIM

3 October 2023

FRONTLINE LAW

Filed by Matthew Hague, counsel for the applicant

Address for service:

Level 2, 90 Dixon Street, Te Aro, Wellington 6011

STATEMENT OF CLAIM

The Applicant through counsel says:

PARTIES

1. The Applicant is an unincorporated body and registered political party called New Zealand Loyal (**NZ Loyal**).
2. The First Respondent is the Electoral Commission, which took the actions and made the decisions that are the subject of these proceedings.
3. The Second Respondent is the Attorney-General who is sued in respect of His Majesty's Government in right of New Zealand in general.

SOURCE OF STATUTORY POWER

4. The Electoral Commission is authorised by the Electoral Act 1993 (**the Act**) to carry out certain statutory functions and duties and exercise statutory power.
5. Section 4C of the Act provides that the objective of the Electoral Commission is to administer the electoral system impartially, efficiently, effectively, and in a way that:
 - 5.1 Facilitates participation in parliamentary democracy; and
 - 5.2 Promotes understanding of the electoral system and associated matters; and
 - 5.3 Maintains confidence in the administration of the electoral system.

BACKGROUND

6. In 2023, NZ Loyal was formed and registered with the Electoral Commission.
7. The deadline for submission of certain information, including party list candidates and bulk nomination schedules to the Electoral Commission was noon on 14 September 2023 (**the Information Deadline**).
8. The close for nominations was noon on 15 September 2023 (**the Nomination Deadline**).

Inadequate and Flawed Guidance and Direction from Electoral Commission

9. During the course of the entire election season, the Electoral Commission held a single telephone training call on 29 August 2023 lasting 13 minutes 24 seconds to prepare party secretaries for uploading documents and submitting nominations into its online portal (**the Training Call**).
10. The NZ Loyal party secretary (**the Secretary**) was a party to the Training Call.
11. The Training Call merely dealt with the technical aspects of the Electoral Commission online portal (**the Online Portal**) and made no mention and gave no explanation of the New Zealand electoral system, in particular the important distinction between party list and electoral candidates.
12. The Training Call did not address how the bulk nomination process was to be administered.
13. The Electoral Commission also distributed to party secretaries a nominations manual (**the Manual**).
14. Page 9 of the Manual contains directs:

Details of candidates contesting both an electorate and party list must be entered only once. Make sure that you select the electorate they are contesting and enter their list number.
15. No training was held or offered explaining the Manual.

Issues with Online Portal

16. Significant delays and difficulties were caused because the Electoral Commission failed to properly set up the Online Portal to be used by NZ Loyal.
17. Due to these issues, the Secretary was unable to initially access the Online Portal.
18. Eventually the Electoral Commission had to delete the Online Portal and create it again.

19. When the Online Portal was finally working, the Electoral Commission did not provide the Secretary with log in details which caused further delay.
20. The Secretary was eventually able to access the Online Portal on 9 September 2023.

Submission of Information sought -

21. In the days and weeks prior to the Information Deadline, the Electoral Commission was provided with candidate consent forms.
22. Some candidate consent forms indicated that the candidate was an electorate and list candidate.
23. The Electoral Commission returned forms to candidates who had indicated that they were both an electorate and list candidate, claiming that the form had been completed incorrectly.
24. On the day of the Information Deadline the Leader of New Zealand Loyal (**the Leader**), provided the Secretary with the list of candidates, which included:
 - 24.1 The candidates who were electoral and list candidates, with their electorate and order of preference for the party list, and
 - 24.2 The three candidates who would solely be party list candidates and not electoral list candidates.
25. On the day of the Information Deadline and prior to noon, the Secretary entered candidate information into the Online Portal shortly prior to the Deadline, being the party list schedule and the electoral candidate schedule.
26. Following the direction in the Manual at paragraph 14 above, because all electorate candidates were also list candidates, the Secretary entered their names once.
27. There was no space on the form downloaded to indicate where the order of preference should be inserted, only space for the electoral seat number.
28. There were no notes, reminders or warnings on the form stating that the order of preference on the party list must be indicated for candidates who were also party list candidates within the form.

29. The Secretary was confused by the guidance contained in the Manual and entered only the electoral information of the electoral and list candidates into the Online Portal, but not the number of their order of preference in the party list (**the Party List Information**).

Subsequent Events

30. Upon realising she had omitted the Party List Information, the Secretary immediately called the Electoral Commission on 3 occasions in the afternoon of 14 September 2023.
31. During these calls, the Secretary asked the Electoral Commission to accept the Party List Information.
32. The Secretary made five further calls to the Electoral Commission on 15 September 2023, asking that the Party List Information be accepted.
33. The Electoral Commission refused to accept the Party List Information (**the Decision**).

CAUSE OF ACTION – JUDICIAL REVIEW

34. The Electoral Commission made the Decision in purported exercise of a statutory power and is subject to judicial review.
35. The Electoral Commission is subject to public law obligations, including to make decisions lawfully.

First Ground of Review – Failure to Meet Statutory Obligations

36. The Applicant repeats paragraphs 1 to 35 above.
37. By failing to provide NZ Loyal with access to the Online Portal in a timely manner, the Electoral Commission failed to facilitate participation in parliamentary democracy.
38. By failing to provide adequate training, the Electoral Commission failed to adequately promote understanding of the electoral system and associated matters.
39. By providing the Manual that incorrectly stated the details for a candidate contesting both the electorate and party list only had to be entered once, the

Electoral Commission failed to adequately promote understanding of the electoral system and associated matters.

40. By refusing to allow NZ Loyal to provide the Party List Information after the Information Deadline but before the Nomination Deadline, the Electoral Commission failed to maintain confidence in the administration of the electoral system.
41. These failures were unlawful.

Second Ground of Review – Unlawful Decision

42. The Applicant repeats paragraphs 1 to 35 above.

43. Section 146H(1) of the Act states:

If the secretary of a party lodges a bulk nomination schedule with the Electoral Commission by noon on the day before nomination day [the Information Deadline], the secretary may, at any time before noon on nomination day [the Nomination Deadline], provide to the Electoral Commission any information necessary to remedy any defect or omission in the schedule, or in any document required to be lodged with the schedule.

44. The Secretary attempted to provide the Party List Information to the Electoral Commission prior to the Nomination Deadline, however the Electoral Commission refused to accept it.
45. The Decision was unlawful because it was contrary to s 146H(1) of the Act.
46. Alternatively, the Decision was unlawful because it was contrary to s128C of the Act, which allows a party to withdraw a party list and resubmit it prior to the Nomination Deadline.
47. The Decision was unlawful because it was contrary to its objectives at s 4C of the Act.

Third Ground of Review – Unlawful Limitation on NZBORA Rights

48. The Applicant repeats paragraphs 1 to 35 above.
49. The Decision prevented NZ Loyal electoral candidates from gaining a list vacancy should NZ Loyal gain sufficient party votes.

50. The Decision made it less likely that voters will give NZ Loyal their party vote.
51. The Decision and the resulting implications limited the right in s 12(b) of the New Zealand Bill of Rights Act 1990 (**NZBORA**), that every New Zealand citizen who is of or over the age of 18 years is qualified for membership of the House of Representatives.
52. This limitation on the affected right is not prescribed by law and is therefore unlawful.

REMEDIES

53. The Applicant seeks the following remedies:
 - 53.1 A declaration that the actions and decisions of the Electoral Commission set out in the First Ground of Review were unlawful.
 - 53.2 A declaration that the actions and decisions of the Electoral Commission set out in the Second Ground of Review were unlawful.
 - 53.3 A declaration that the limitation on the right at s 12(b) of the New Zealand Bill of Rights Act 1990 was unlawful.
 - 53.4 An order that the Electoral Commission accept the Party List Information.
 - 53.5 Costs.

Signature: 

(counsel for the applicant)

Date: 3 October 2023

This document is filed by Matthew Hague, counsel for the Applicant, of the firm Frontline Law Limited. The address for service of the applicants is Level 2, 90 Dixon Street, Wellington 6011.

Documents for service on the filing party may be left at that address for service or may be—

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