

Reference No. HRRT 072/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN KATHY APOSTOLAKIS

PLAINTIFF

AND ATTORNEY-GENERAL

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mrs K Apostolakis in person

Ms D Harris for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 1 December 2017

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**DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM<sup>1</sup>**

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**INTRODUCTION**

**The original statement of claim**

[1] Mrs Apostolakis has been involved in a number of proceedings before the Family Court and High Court. In the present proceedings (filed 17 November 2015) brought before the Tribunal under Part 2 of the Human Rights Act 1993 it was originally alleged a court official employed by the Ministry of Justice in the Family Court discriminated against Mrs Apostolakis in the course of his official duties. The remedies sought included (inter alia) a “judicial review” of three Family Court decisions, the restoration of a specific title to land and general, exemplary and punitive damages.

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<sup>1</sup> [This decision is to be cited as: *Apostolakis v Attorney-General No. 1 (Strike-Out Application)* [2017] NZHRRT 52.]

[2] On 23 December 2015 the Attorney-General filed a strike-out application based on various grounds including that no reasonably arguable case of discrimination existed, that the Tribunal is not a forum in which matters decided in the Family Court can be re-litigated and the Tribunal does not have jurisdiction to make the orders sought by Mrs Apostolakis.

[3] When a teleconference was convened by the Chairperson on 12 February 2016 the limitations of the Tribunal's jurisdiction were pointed out to Mrs Apostolakis. As a consequence she advised she would amend the statement of claim. The teleconference was adjourned for this step to be taken.

### **The amended statement of claim dated 19 February 2016**

[4] On 19 February 2016 Mrs Apostolakis filed an amended statement of claim, this time under Part 1A of the Act. The relief sought is a declaration that the Domestic Violence Act 1995 (ss 3, 52 and 53) treats applicants more favourably than respondents. It is alleged the legislation "supports encourages financial or economic abuse". Mrs Apostolakis further alleges that in proceedings under that Act her then partner, Mr Damir De Polo was treated differently to her. In her nine page Facts of the Case she complains about the outcome of proceedings in the Family Court and in particular the grant of an application by Mr De Polo for a protection order against Mrs Apostolakis. That order was made on 15 September 2006. Subsequently, on 13 October 2009 judgment was given in the Family Court in relation to matrimonial property proceedings between the couple. While Mrs Apostolakis may have endeavoured to appeal the 13 October 2009 decision, that appeal was abandoned. See *Apostolakis v Kolich* [2012] NZHC 212 at [45]. That judgment contains a description of certain events which flowed from the 13 October 2009 judgment, events which have no direct relevance to the matters before the Tribunal. It is sufficient to note that in those proceedings the High Court rejected an attempt by Mrs Apostolakis to re-litigate matters already determined by the Family Court. See the judgment at [51]. The complaint made in the amended statement of claim dated 19 February 2016 is, in effect, that because Mrs Apostolakis wanted very different outcomes from the Family Court proceedings and in particular the outcome of the protection order application, she attributes the outcome to "discrimination" on the basis of family status. She articulates the discrimination complaint in the following terms:

**[4.1] At para 15:**

The plaintiff submits that the Crown did not protect the plaintiff because there is no provision in the Domestic Violence 1995 for "respondents" who are victims of financial or economic abuse and victims of extortion to enforce occupation orders under ss 3(2)(c)(iva) and ss 52, 53 Domestic Violence Act 1995.

**[4.2] At para 16 "respondents to protection orders have no protection from abuse under New Zealand law".**

**[4.3] At para 17:**

I was denied the right to occupy the land at 12 Colville Street for refusing to pay \$228,782.44 being an unlawful demand.

**[4.4] At para 26:**

... section 3(2)(c)(iva) DV Act did not protect the plaintiff from false claims of abuse because ex parte orders take no notice of the elements of due process, including the opportunity to refute the allegation. The protection order unjustly enriches the accuser without any safeguard for the respondent.

The safeguard would have been legislation to prevent the demand of \$228,782.44 on 22 April 2010. The safeguard would have been section 3(2)(c)(iva) amended so respondents would not be omitted and thus only have to pay the correct amount of the judgment and not have the deposit of \$54,000 and \$128,049.32 transferred to De Polo Family Trust emphasis on the fact these amounts have not been litigated so they are not being relitigated if they have never been litigated in the first instance.

**[4.5] At para 32:**

This claim is not about statutory interpretation, but it is about omission of the word “respondents” and their legal rights to be free from unlawful discrimination and to be granted protection under NZ law from financial and economic abuse.

## **THE APPLICATION TO STRIKE OUT**

### **The application to strike out**

**[5]** The Attorney-General has applied to have the amended statement of claim struck out in its entirety. The grounds of the application are:

**[5.1]** The amended claim is an abuse of process because:

**[5.1.1]** The jurisdiction of the Tribunal is limited to determining complaints of discrimination.

**[5.1.2]** No reasonably arguable discrimination arises: there is no foundation in the facts pleaded in the amended claim to support the allegation that Mrs Apostolakis (or any other person) has suffered discrimination on the grounds of family status or any other ground through the operation of the Domestic Violence Act or otherwise.

**[5.1.3]** The claim attempts to inappropriately use the Tribunal as a forum to dispute matters which have resulted from Family Court orders under the Domestic Violence Act and in relation to Mrs Apostolakis’ former home.

**[5.2]** The Tribunal has no jurisdiction to consider the claim because:

**[5.2.1]** Mrs Apostolakis has not submitted to the Human Rights Commission a complaint relating to these specific claims of discrimination resulting from the Domestic Violence Act or otherwise on the grounds of her family status.

**[5.2.2]** Any complaint about matters which have resulted from Family Court orders cannot be the subject of action by the Human Rights Commission or the Tribunal because it would concern an act or omission of a court as set out in s 79(3) of the Human Rights Act.

### **The notice of opposition**

**[6]** The submissions by Mrs Apostolakis in opposition run to 37 pages. It is not practical to provide a summary. She argues that the “advantageous treatment” of “protected persons” as defined in s 2 of the Domestic Violence Act is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 and the inconsistency cannot be justified under s 5 of that Act. She also complains that the definition of “domestic violence” in the Act does not include a category of persons related to criminals. The main focus of her submissions, however, is to attack the orders made in the Family Court relating to relationship property. Her complaints in that regard are broad, including a claim that the

Judge believed false evidence given by Mr De Polo and that Mr De Polo's lawyers (Ms Rennie and (subsequently) Mr Meikle) misled the Court by withholding relevant information. The submissions also detail the complaints by Mrs Apostolakis about events which followed the 13 October 2009 judgment, events at an auction and the seizure of a motor vehicle.

[7] That Mrs Apostolakis is using the Tribunal proceedings as a means of attacking the outcome of the Family Court litigation is highlighted in particular by the submissions at pages 24 to 27. The following paragraphs detail "events of unlawful discrimination on grounds of 'family status'":

33. Events such as did the plaintiff have the funds, deposit and mortgage finance, to purchase 12 Colville Street Newtown at the public auction at Leaders Real Estate on 15 July 2010? Did Kosta Apostolakis want to purchase 12 Colville Street? Did Kosta Apostolakis tell the plaintiff that under no circumstances would he purchase 12 Colville Street because he had just sold Anki Road to reduce his debt level? Was the plaintiff blackmailed by Leaders Real Estate who threatened to "expose" details of *R v Apostolakis* (1997) 14 CRNZ 492 CA and sabotage business of Willis Drycleaners in the process?

...

33. Why do Herman De Groot and Sarah Jenny Wilson continue to obstruct plaintiff's claim with allegations that plaintiff was unable to settle purchase 15 July 2010 because it was a mortgagee sale on Trade Me? How did Judge Grace [who made the 13 October 2009 orders in the Family Court] calculate earnings of plaintiff from 13 October 2009 to 15 July 2010? How did Judge Grace review chattels and value between 13 October 2009 and 15 July 2010? Did the Family Court update amounts calculated on the 13 October 2009? Does the Family Court have a right to prohibit the attendance and bidding at the public auction on the 15 July 2010 by the plaintiff and after successful bid and fulfilment cancel it?

...

36. ... The events that followed subsequent to the orders of 13 October 2009 are extremely relevant and form the basis for plaintiff's challenge that the Domestic Violence Act contains omissions and do not protect plaintiff however "unique" her situation may be. The plaintiff became the subject of cruel and inhumane treatment after 13 October 2009 as a result of deficiencies in the Domestic Violence Act 1995 not protecting relatives of criminals under section 3(2)(c)(iva) and ss 52 and 53 occupations orders ...

### **Jurisdiction to strike out**

[8] Because the Tribunal's jurisdiction to strike out proceedings is fully addressed in *Apostolakis v Attorney-General No. 2 (Strike-Out Application)* [2017] NZHRRT 53 which is also being published today, we do not intend repeating that discussion here and it is adopted in full.

### **DISCUSSION**

[9] The submissions for the Crown correctly point out that Mrs Apostolakis has not in her amended statement of claim established proper grounds for alleging she has been discriminated against on the grounds of family status, or any other prohibited ground. The reason her home was sold and other events occurred was because of the operation of family law principles, including equal division of property. If any perceived unfairness has occurred in that process, that is not because of discrimination.

[10] The law and principles in the Domestic Violence Act operate because of principles that Parliament has decided to enact in the form of legislation that is applied to the facts by the courts on the basis of evidence. They do not operate because Mrs Apostolakis is a relative of criminals.

[11] The definition of “domestic violence” in s 3 of the Act provides:

**3 Meaning of domestic violence**

- (1) In this Act, *domestic violence*, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.
- (2) In this section, *violence* means—
  - (a) physical abuse:
  - (b) sexual abuse:
  - (c) psychological abuse, including, but not limited to,—
    - (i) intimidation:
    - (ii) harassment:
    - (iii) damage to property:
    - (iv) threats of physical abuse, sexual abuse, or psychological abuse:
    - (iva) financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education):
  - (v) in relation to a child, abuse of the kind set out in subsection (3).

...

[12] The submission by Mrs Apostolakis that the discrimination lies in this provision “not protecting relatives of criminals” is an untenable claim. Relatives of criminals are protected if they (like everyone else) bring themselves within the definition of “domestic violence”. Mrs Apostolakis, however, “reasons” that because a protection order was made against her and because she is unhappy with this outcome, the explanation for her predicament lies in the fact that she has been discriminated against because she is a “relative of criminals”. It is the same “reasoning” which causes her to complain of discrimination in relation to the property orders made on 13 October 2009.

[13] But as the Attorney-General submits, no reasonably arguable discrimination arises. There is no foundation in the facts pleaded in the amended claim to support the allegation Mrs Apostolakis has suffered discrimination on the grounds of family status or on any other ground through the operation of the Domestic Violence Act or otherwise. Moreover, the claim attempts to inappropriately use the Tribunal as a forum to dispute matters which have been determined by the Family Court when granting the protection under the Domestic Violence Act and when making the subsequent orders on 13 October 2009 in relation to relationship property.

[14] In reality the present proceedings have been brought for the purpose of mounting a collateral attack on the decisions of the Family Court and to re-litigate matters which have already been determined. It is well recognised this is an abuse of process. See *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541 (HL) and *Apostolakis v Kolich* [2012] NZHC 212 at [51]. The claims by Mrs Apostolakis are clearly untenable. She “lost” in the Family Court not because of any shortcoming in the definition in s 3 or in the operation of ss 52 and 53 or because of discrimination, but because of a judicial finding based on evidence. This cannot be sensibly described as discrimination on family status. It is an ill-disguised attempt to collaterally attack the decisions.

[15] Mrs Apostolakis also faces the insuperable hurdle of s 79(3) of the Human Rights Act which provides:

- (3) Despite every other provision of this section, if the complaint or part of it concerns a judgment or other order of a court, or an act or omission of a court affecting the conduct of any proceedings, the Commission must take no further action in relation to the complaint or relevant part of it.

[16] This provision excludes judicial decisions and orders from the jurisdiction of both the Commission and the Tribunal. See also *Orlov v Ministry of Justice* [2009] NZHRRT 9 at [14] to [20] and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2015) at [3.4.28].

[17] In the circumstances we do not need to address the final ground relied on by the Attorney-General, namely that Mrs Apostolakis has not submitted to the Human Rights Commission a complaint relating to the specific claim of discrimination allegedly resulting from the Domestic Violence Act 1995. It is not clear whether the Tribunal currently has all the relevant information to make a decision on this issue. The absence of sufficient information was remarked upon by the Chairperson in his *Minute* issued on 23 June 2016 at [7] and [8].

## CONCLUSION

[18] By way of summary we conclude that the amended statement of claim is an abuse of process because:

[18.1] There is no foundation in the facts pleaded in the claim to support the allegation that Mrs Apostolakis has suffered discrimination on the grounds of family status or on any other ground through the operation of the Domestic Violence Act 1995 or otherwise.

[18.2] The claim is a collateral attack on the decisions of the Family Court and seeks to re-litigate matters already determined by that Court.

[18.3] The matters of which Mrs Apostolakis complains are removed from the Tribunal's jurisdiction by s 79(3) of the Human Rights Act 1993.

[19] The statement of claim is accordingly struck out in its entirety.

## Costs

[20] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[20.1] The Attorney-General is to file his submissions within 14 days after the date of this decision. The submissions by Mrs Apostolakis are to be filed within a further 14 days with a right of reply by the Attorney-General within seven days after that.

[20.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without an oral hearing.

[20.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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**Mr RPG Haines QC**  
Chairperson

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**Ms GJ Goodwin**  
Member

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**Mr BK Neeson JP**  
Member