IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 53**

	Reference No. HRRT 078/2016
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 V McCall for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **1 December 2017**

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM[1]

INTRODUCTION

[1] The Attorney-General applies to strike out the plaintiff's claim on the basis that it discloses no reasonably arguable cause of action and is an abuse of process.

[2] Mrs Apostolakis then sought the consolidation of all five of her proceedings (including the present) currently before the Tribunal. That application was declined by the Chairperson in *Apostolakis v Attorney-General No. 2 (Consolidation Refused)* [2017] NZHRRT 47. The strike out application by the Attorney-General must now be determined.

[1] [This decision is to be cited as: *Apostolakis v Attorney-General No. 2 (Strike-Out Application)* [2017] NZHRRT 53.]

Jurisdiction to strike out

[3] For the purpose of deciding the present case we repeat our summary of the Tribunal's jurisdiction to strike out proceedings as set out in *Apostolakis v Rennie (Strike-Out Application)* [2017] NZHRRT 42 at [8] to [17].

[4] We begin by referring to HRA s 115 which provides:

> **115 Tribunal may dismiss trivial, etc, proceedings**
>
> The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

[5] In *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005, Wild J held that this provision confers on the Tribunal a wide discretionary power to strike out or dismiss a proceeding brought before it:

> [45] Subject to observance of natural justice, fairness and reasonableness, and equity, the Tribunal has a wide discretion as to the procedure which follows: ss 104 and 105 of the Human Rights Act. Section 105 requires the Tribunal "to act according to the substantial merits of the case, without regard to technicalities". That section applies, with necessary modifications, to decisions of this Court on appeal against a decision of the Tribunal: s123(5).
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> [46] The Tribunal has an express power to dismiss proceedings, if satisfied that they are frivolous, vexatious or not brought in good faith: s115. As Mr Laurenson points out, the Tribunal deliberately did not exercise this power. It struck out Ms Mackrell's claim.
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> [47] There are also the Human Rights Review Tribunal Regulations 2002 which place, in terms of the Tribunal's procedures, an emphasis on fairness, efficiency, simplicity and speed. I refer particularly to regulation 4.
>
> [48] Thus, the Tribunal has a wide discretionary power to strike out or dismiss a proceeding brought before it. This will be appropriate in situations similar to those contemplated by rr 186 and 477 of the High Court Rules which are the basis for the present application.

[6] The reference by Wild J to rr 186 and 477 of the High Court Rules is now to be read as a reference to High Court Rules, r 15.1 which provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
> (b) is likely to cause prejudice or delay; or
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.
> …

[7] It is clearly established (and confirmed by High Court Rules, r 15.1(1)(a)) that abuse of process extends to proceedings where there is no arguable case and to proceedings which are seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment. See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30]-[32]:

> [30] We accept the submission of Mr Harrison that the power, under the High Court Rules or the inherent powers of a court, to stay a proceeding for abuse of process is not limited to the narrow tort of abuse of process. In any event, Mr Mills accepts the abuse of process ground would also be available in the circumstances set out by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*:
>
> > ... the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal

> application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

> [31] In Australia, a majority of the High Court in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* identified the following categories of conduct that would attract the intervention of the court on abuse of process grounds:
>
> (a) proceedings which involve a deception on the court, or those which are fictitious or constitute a mere sham;
> (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
> (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose; and
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.
>
> [32] The majority also said that, although the categories of abuse of process are not closed, this does not mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party. It does, however, extend to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment".
>
> [Footnote citations omitted]

[8] Striking out on the grounds of prejudice and delay is often the appropriate course where the statement of claim is prolix and unintelligible. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679. At [84] the Court of Appeal set out the requirements of a statement of claim (High Court Rules, rr 5.17, 5.26 and 5.27). Those requirements apply equally in proceedings before the Tribunal. Specifically:

> **[8.1]** The pleading must be accurate, clear and intelligible.
>
> **[8.2]** Sufficient particulars must be given to enable the defendant to be fairly informed of the case to be met.
>
> **[8.3]** While adequate particulars are required, the statement of claim must not stray into setting out the evidence relied upon.

[9] See also *Mackrell v Universal College of Learning* at [57] to [59]:

> [57] Parties seeking redress from Tribunals and Courts must state their claim in a way which enables the Court or Tribunal and parties responding to the claim to understand what the claim is about. Claims should be pleaded in the most succinct and concise way possible.
>
> [58] Tribunals and Courts, and responding parties, should not be left in the position of attempting to make sense of a "morass of information" (to borrow the Tribunal's description of Ms Mackrell's claim). To put Courts and respondents in the position of having to try and make sense of the incomprehensible is what is meant by the rather quaint terms "embarrass" and "prejudice" in relation to pleadings.
>
> [59] Due allowance is to be made for lay litigants such as Ms Mackrell, and it was made by the Tribunal here. But lay litigants, like litigants who are professionally represented, are required to comply with the pleading rules and procedures of Tribunals and Courts. They are not to be permitted to file incomprehensive claims, because that only visits prejudice and injustice upon the respondent, not to mention enormous inconvenience to the Court or Tribunal.

[10] A statement of claim drafted in compliance with these requirements gives both the Tribunal and the defendant notice of what is being alleged and against whom. Pleading should not be permitted to be a means of oppressive conduct against opposing parties. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* at [87]:

> [87] If a statement of claim has been drafted in compliance with the above requirements, then both the court and the defendant parties should have a clear understanding of what is being alleged and against whom. However, verbose, ill-drafted pleadings may defeat the purpose of a statement of claim to such an extent that it is an abuse of process. This principle is intended, as *Odgers* suggests, to "prevent the improper use of [the court's] machinery". Pleading should not be permitted to be a means of oppressive conduct against opposing parties.
> [Footnote citation omitted]

[11] If there has been such abuse, the statement of claim may be struck out. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* at [89]:

> [89] The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes ….
> [Footnote citations omitted]

[12] On the facts the Court of Appeal found the statement of claim filed by Chesterfields Preschools Ltd an abuse of process because it was pleaded in a highly prolix and diffuse way in relation to material facts spread throughout the pleadings in an incomprehensible way.

[13] As noted in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [30] and [31] two important qualifications must be added.

> **[13.1]** First, the jurisdiction to dismiss is to be used sparingly. If the defect in the pleadings can be cured, an amendment of the statement of claim will normally be ordered. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].
>
> **[13.2]** Second, the fundamental constitutional importance of the right of access to courts (and tribunals) must be recognised. Such right of access must, however, be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or an abuse of process. See *Heenan v Attorney-General* [2011] NZCA 9, [2011] NZAR 200 at [22].

[14] The ordinary rule is that a strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. See *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267. However, where the factual allegations are plainly incorrect it is not appropriate to assume their truth. There must be an objective factual basis for the allegations. A court or tribunal is not required to assume the correctness of factual allegations obviously put forward without any foundation. See *Collier v Panckhurst* CA 136/97, 6 September 1999 at [19].

Vexatious

[15] In the context of the present case it is not necessary to engage in a comprehensive survey of the case law interpreting the term "vexatious". It is well-established that a vexatious proceeding is one which contains an element of impropriety. See

Commissioner of Inland Revenue v Chesterfields Preschools Ltd at [89] and *Burchell v Auckland District Court* [2012] NZHC 3413, [2013] NZAR 219 at [16]. To this may be added:

> **[15.1]** A proceeding may be vexatious, notwithstanding that it may contain the germ of a legitimate grievance or may disclose a cause of action or a ground for institution. See *Attorney-General v Hill* (1993) 7 PRNZ (CA) at 23.
>
> **[15.2]** The subjective intention of the party is not determinative of vexatiousness, which is a matter to be objectively assessed. See *Attorney-General v Collier* [2001] NZAR 137 at [35].
>
> **[15.3]** The issue is not whether the proceeding was instituted vexatiously, but whether it is a vexatious proceeding. See *Attorney-General v Brogden* [2001] NZAR 158 at [58] (appeal dismissed in *Brogden v Attorney-General* [2001] NZAR 809).

Or are not brought in good faith

[16] This ground for striking out proceedings captures other circumstances in which the Tribunal's processes are misused and is perhaps best understood as a different way of expressing the grounds for striking out set out in High Court Rules, r 15.1(1) namely circumstances where there is no reasonably arguable cause of action or where the proceedings are otherwise an abuse of the process of the Tribunal.

Abuse of process

[17] The scope of this ground in High Court Rules, r 15.1(1)(d) was set out in *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602 at [30] as follows:

> The ground of abuse of process is said to extend beyond the other grounds set out in r 15.1(1) to catch all other instances of misuse of the Court's process, including where a proceeding has been brought with an improper motive or to seek a collateral advantage beyond that legitimately gained from a Court proceeding. [Citations omitted]

THE STATEMENT OF CLAIM

[18] The claim alleges that five statutes (the Social Security Act 1964, the Policing Act 2008, the Land Transfer Act 1952, the Property Law Act 2007 and the Property (Relationships) Act 1976) are inconsistent with the New Zealand Bill of Rights 1990 (Bill of Rights Act), s 19 and that the class of individuals said to be discriminated against are "relatives of criminals".

[19] In her statement of claim Mrs Apostolakis says the following provisions of the Social Security Act 1964 are inconsistent with the Bill of Rights Act, s 19:

1. Part 10, s 69C and Schedule 19 (Disability allowance).
2. Section 88B (Jobseeker support).
3. Clause 2, Schedule 6 (Rates of supported living payment benefits).
4. Social Security Amendment Act, s 12(2) (Appeals).
5. Section 40J – supported living payment for totally blind (and ss 19(1) and 19(2) of the Social Security (Benefit Categories and Work Focus) Amendment Act which adjusted this section number and title).
6. Social Security (Rates of Benefit and Allowances) Order 2015.
7. Social Security (Supported Living Payment Benefit) Regulations 1998.
8. Social Security (Benefit Category and Work Focus) Amendment Act 2013, s 116(c)(2)(a).

[20] She also says that the following legislative provisions are inconsistent with s 19:

[20.1] Property Law Act 2007, s 24(2)(b) (disposition of land does not include sale);

[20.2] Land Transfer Act 1952, s 145A (early lapse of caveat), s 164 (correctness of instrument to be certified) and s 164A (certification of instrument);

[20.3] Land Transfer Regulations 2002, Part 3, Schedule 2, Form 19 (withdrawal of caveat);

[20.4] Property (Relationships) Act 1976, s 42(3) (notice of interest against title); and

[20.5] Policing Act 2008, Part 2, Principle 8(d) (Policing to respect human rights) and Principle 9(c) (function of law enforcement).

[21] In her notice of opposition to the strike out application, Mrs Apostolakis makes further allegations unrelated to her statement of claim, including that staff of the Crown Law Office have breached the State Services Commissioner's Standards of Integrity and Conduct and that the Ministry of Social Development has further discriminated against her on the grounds of age by denying her assistance to complete a law degree.

[22] Attached to the statement of claim is a copy of the *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Social Security Legislation Rewrite Bill* (8 March 2016) together with a letter dated 26 August 2016 from the Human Rights Commission explaining to Mrs Apostolakis that her complaint about the five pieces of legislation earlier referred to contain no indication of a ground of unlawful discrimination with the result the Human Rights Commission could not address the complaints under the mediation process provided for in the Human Rights Act 1993.

THE STRIKE-OUT APPLICATION

[23] The Attorney-General points out that as the statement of claim does not plead any relevant factual background it is not possible to determine how the alleged inconsistencies are said to have arisen or what harm Mrs Apostolakis may have suffered as a result.

[24] The primary submission advanced by the Attorney-General is that no reasonably arguable cause of action is disclosed in the statement of claim. More particularly, the submission is that:

[24.1] Mrs Apostolakis has not provided any proper foundation in her statement of claim or notice of opposition (to the strike out application) to support the allegation that the Social Security Act 1964, the Policing Act 2008, the Land Transfer Act 1952, the Property Law Act 2007 or the Property (Relationships) Act 1976 discriminate against her on the basis of family status or any other prohibited ground of discrimination in the Human Rights Act.

[24.2] The Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] set out the test for a finding of discrimination under the Bill of Rights Act, s 19. For a measure to be found to be discriminatory, it must first provide for differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination and second, that treatment must have a discriminatory impact.

[24.3] The claim by Mrs Apostolakis does not get over the first hurdle. She does not say in what ways the provisions pleaded in the statement of claim treat the relatives of criminals differently from other people. Other than vague references to an "unlawful trespass" on 22 April 2010 and "discrimination" on 15 July 2010 (allegations apparently levelled against the Police, but not explained), the claim does not plead any facts from which the Tribunal may conclude there has been any discriminatory treatment against Mrs Apostolakis as a result of the operation of the provisions in question.

[24.4] Further, it is not clear that the provisions identified draw any distinction upon which a finding of discrimination could be based in any event. For example, s 8(d) of the Policing Act 2008 provides that "[t]his Act is based on the following principles … policing services are provided in a manner that respects human rights", and s 9(c) of that Act provides that "[t]he functions of the Police include … law enforcement". Mrs Apostolakis does not plead facts to establish how these provisions create a distinction between her and any other person.

[25] The Attorney-General also submits the claim is unintelligible. It gives insufficient particulars to enable the Attorney-General to meet the allegations made. Indeed, the claim is unsupported by any facts that would allow the Tribunal to make the declaration of inconsistency allowed by s 92J of the Act. The Attorney-General's report on the Social Security Legislation Rewrite Bill does not support any of the complaints made by Mrs Apostolakis regarding the Social Security Act, as that report relates to discrimination on a different basis (total blindness).

THE NOTICE OF OPPOSITION FILED BY MRS APOSTOLAKIS

[26] The notice of opposition filed by Mrs Apostolakis, rather than assisting her case, largely supports the application to strike out filed by the Attorney-General. It is not intended to attempt a comprehensive summary of this 16 page document. It is relevant to note only the following excerpts which underline the point made by the Attorney-General that the claim brought by Mrs Apostolakis is unintelligible:

[26.1] Mrs Apostolakis cites the strike out application as an example of "bullying".

[26.2] Mrs Apostolakis attached to her notice of opposition a copy of a document dated 17 November 2003 in which she (Mrs Apostolakis) acknowledges that her mother, Mrs Dorothy Clare Kennelly loaned her (Mrs Apostolakis) $80,000 and that Mrs Apostolakis agreed (when called upon) to provide her mother with a mortgage ("over my property at 12 Colville Street, Newtown, Wellington") securing that debt on which interest of 10% per annum was to be paid. The document is offered as:

> Prima facie evidence in support of claim of tort of vicarious infringement of human right by legislative branch of government. The effect of "discrimination" family status is the causative link to non-satisfaction of settlement of debt and cancellation of purchase of WN 817/71 by plaintiff.

[26.3] The notice of opposition recites excerpts from a blog site which, in the submission of Mrs Apostolakis, prove beyond doubt that "Crown Law Office infallibility is a myth. Crown Law does not always get it right". On this basis Mrs Apostolakis argues she has "met the threshold".

[26.4] Mrs Apostolakis also sets out, from the same blog site, comments attributed to the then Attorney-General, Hon C Finlayson. This is followed by a list of a multitude of complaints Mrs Apostolakis has against the legal profession.

[26.5] Entirely out of context, reference is made to the fact that "some women began to challenge this narrow view of the world like Kate Sheppard". Left unidentified is "this narrow view". In the succeeding paragraph Mrs Apostolakis goes on to say:

> New Premier Richard Seddon and other opponents of women's suffrage again tried to sabotage the Bill, but this time their interference backfired.
>
> This reminds me of a "certain Judge" who criticised me, obviously expecting a sympathetic response, but did not get the expected response when the "Certain Person" defended me. Oh dear! Oh dear! Oh dear!

[26.6] Later in her notice of opposition Mrs Apostolakis articulates her complaint in relation to 12 Colville Street, Newtown, Wellington in the following terms:

> The "gamesmanship" referred to by the Attorney-General Christopher Finlayson is again apparent and having a detrimental effect on the plaintiff's health, safety and well-being. The "bullying" and "covert bullying" must cease.
>
> The title to 12 Colville Street, Newtown, Wellington WN 817/71 is self-explanatory and at a small cost may be made available to Crown Law who will see immediately that 7671920.1 was illogical, abuse of process, fraud on the court.
>
> 8545382.1 was a valid claim and the non-payment or the non-satisfaction of the instrument is illogical, an abuse of process and fraud on the court and "relatives of criminals" are by analogy treated less favourably than others.
>
> Witness testimony to the fact plaintiff was purchaser on 18 July 2010 of title WN 817/71.

[26.7] Any abuse of process is due to the Crown Law Office "attempting to supress the right of plaintiff to be heard".

[26.8] In further response to the strike out application Mrs Apostolakis says that:

> … for the avoidance of doubt this is a tort of "vicarious infringement" of rights as a result of discriminatory legislation which does not protect the property rights of a class of people being "relatives of criminals" (analogy) are treated less favourably because of this "status".

DISCUSSION

[27] In our opinion the strike out application by the Attorney-General must succeed for the following reasons:

[27.1] Mrs Apostolakis has not provided any proper foundation in her statement of claim or notice of opposition to support the allegation that the five statutes in relation to which the declaration of inconsistency is sought discriminate against her on the basis of family status or any other prohibited ground of discrimination recognised by the Human Rights Act.

[27.2] The statement of claim does not establish an arguable case that the test set out in *Minister of Health v Atkinson* for a finding of discrimination can be made. The claim does not plead any facts from which the Tribunal may conclude there has been any discriminatory treatment regarding Mrs Apostolakis as a result of the operation of the identified provisions.

[27.3] The disturbing frequency with which the submissions for Mrs Apostolakis are irrelevant and focused on extraneous matters (sometimes to the point of incomprehension) underlines the force of the submission for the Attorney-General that neither the statement of claim nor the notice of opposition discloses a coherent argument in support of the claim.

CONCLUSION

[28] Because we conclude that the statement of claim discloses no reasonably arguable cause of action against the Attorney-General the statement of claim must be struck out.

Costs

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

[29.1] 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.

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

[29.3] 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	**Ms GJ Goodwin**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**