

Reference No. HRRT 037/2018

UNDER THE PRIVACY ACT 1993

BETWEEN MARCUS STEELE

PLAINTIFF

AND JETTS NEW ZEALAND LIMITED

DEFENDANT

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Deputy Chairperson  
Dr SJ Hickey MNZM, Member  
Ms DL Hart, Member

REPRESENTATION:

Mr M Steele in person  
Ms M Johnston for defendant

DATE OF HEARING: On the papers

DATE OF DECISION: 18 May 2020

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

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[1] Marcus Steele was a member of Jetts New Zealand Ltd's (Jetts) Napier gym. In March 2018 Mr Steele's membership was cancelled. Mr Steele subsequently made an information privacy request to Jetts. No information was released to Mr Steele. Jetts stated it did not hold any personal information about him other than what was completed when he signed up as a member. Mr Steele disagrees.

[2] Mr Steele seeks damages for an interference with his privacy. Jetts disputes there has been an interference with privacy.

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<sup>1</sup> [This decision is to be cited as *Steele v Jetts New Zealand Ltd (Strike-Out Application)* [2020] NZHRRT 11.]

## THE APPLICATION TO STRIKE OUT

[3] On 30 November 2018 Jetts filed an application to dismiss or strike out the claim. Mr Steele opposes this. Jetts submits:

[3.1] The IPP 6 claim identifies no arguable cause of action; and

[3.2] The issues raised under IPP 8 have not been investigated by the Privacy Commissioner.

[4] The Tribunal's jurisdiction to strike out proceedings is explicitly provided for in s 115A Human Rights Act 1993:

### 115A Tribunal may strike out, determine or adjourn proceedings

- (1) The Tribunal may strike out, in whole or in part, a proceeding if satisfied that it-
  - (a) Discloses no reasonable cause of action; or
  - (b) Is likely to cause prejudice or delay; or
  - (c) Is frivolous or vexatious; or
  - (d) Is otherwise an abuse of process.

[5] The jurisdiction to strike out must be used sparingly and if a defect in a claim can be cured, an amendment of the statement of claim is preferred to striking out the claim. See the Tribunal's previous discussions on this point in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [30] and [31].

## JURISDICTION IN RELATION TO THE ALLEGED BREACH OF IPP 8

[6] Jetts submits that the Privacy Commissioner has not investigated a breach of IPP 8. Accordingly, it says the Tribunal has no jurisdiction over this claim.

[7] Sections 82 and 83 of the Privacy Act 1993 limit proceedings in this Tribunal to matters where there has been an investigation by the Privacy Commissioner into the alleged interference with privacy.

[8] The Tribunal has canvassed in previous decisions what constitutes an investigation by the Privacy Commissioner. In *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* [2014] NZHRRT 1 at para [25], the Tribunal noted at para [25] the statutory requirements for an investigation by the Privacy Commissioner:

[25.1] There must be a complaint alleging that an action is or appears to be an interference with the privacy of an individual (s 67(1)).

[25.2] The Privacy Commissioner must decide whether to investigate the complaint, or to take no action on the complaint (s 70(1)).

[25.3] The Privacy Commissioner must advise both the complainant and the person to whom the complaint relates of the procedure that the Commissioner proposes to adopt (s 70(2)).

[25.4] The Privacy Commissioner must inform the complainant and the person to whom the investigation relates of the Commissioner's intention to make the investigation (s 73(a)).

[25.5] The Privacy Commissioner must inform the person to whom the investigation relates of:

[25.5.1] The details of the complaint (if any) or, as the case may be, the subject-matter of the investigation; and

[25.5.2] The right of that person to submit to the Commissioner, within a reasonable time, a written response in relation to the complaint, or as the case may be, the subject-matter of the investigation.

[9] Mr Steele claims Jetts breached IPP 8, however the Privacy Commissioner did not investigate IPP 8. The Certificate of Investigation issued on 10 October 2018 confirms this as it does not refer to IPP 8.

[10] Furthermore, the letter from the Privacy Commissioner to the Tribunal dated 15 November 2018 states that issues relating to IPP 8 were not investigated.

[11] The Privacy Commissioner has not investigated the IPP 8 claim; accordingly, this Tribunal has no jurisdiction in relation to IPP 8. The reference to IPP 8 in Mr Steele's statement of claim and paragraph 2 of the statement of claim must be struck out.

### **THE APPLICATION TO STRIKE OUT THE IPP 6 CLAIM**

[12] Jetts submits the claim by Mr Steele under IPP 6 does not identify an arguable cause of action.

[13] Mr Steele's statement of claim dated 18 October 2018 is brief, but it does set out the parts of the Privacy Act 1993 which he considers have been breached, and why. Paragraph 1 confirms Mr Steele's request for personal information is at issue in the claim. This paragraph clearly relates to the request made by Mr Steele on 22 March 2018, which is the personal information request investigated by the Privacy Commissioner.

[14] The Privacy Commissioner investigated Mr Steele's claim under IPP 6; accordingly Mr Steele's claim under IPP 6 in relation to the information request made on 22 March 2018 is arguable and within jurisdiction. It is only the information request on 22 March 2018 that can be relied on in this claim.

[15] Mr Steele's claim under IPP 6 is not struck out.

### **COSTS**

[16] The issue of costs is reserved.

### **ORDERS**

[17] The application by Jetts to strike out Mr Steele's claim is partially successful. The claim under IPP 8 is struck out and the claim under IPP 6 can proceed. The following references in the statement of claim dated 18 October 2018 are accordingly struck out:

[17.1] The reference to IPP 8 in Part 3 of the statement of claim; and

[17.2] Paragraph 2 in Part 4.

[18] A case management conference is to be convened by the Secretary at the earliest available opportunity.

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**Ms SJ Eyre**  
**Deputy Chairperson**

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**Dr SJ Hickey MNZM**  
**Member**

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**Ms DL Hart**  
**Member**