IN THE HUMAN RIGHTS REVIEW TRIBUNAL [2018] NZHRRT 37

Reference No. HRRT 008/2018

UNDER THE PRIVACY ACT 1993

BETWEEN MALCOLM EDWARD RABSON

PLAINTIFF

AND SOLICITOR-GENERAL

DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Dr JAG Fountain, Member
Hon KL Shirley, Member

REPRESENTATION:
Mr ME Rabson in person
Ms V McCall for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 29 August 2018

## DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM[1]

### Introduction

**[1]** On 3 September 2014 a Crown Counsel employed at Crown Law sent an email to a third party about Mr Rabson. Mr Rabson says the contents of the email are defamatory. The Solicitor-General asserts the email is the subject of legal professional privilege. Nevertheless, Mr Rabson is in possession of a version of the email from which the identity of the sender has been redacted.

**[2]** By statement of claim dated 20 February 2018 (filed 23 February 2018) Mr Rabson instituted proceedings under the Privacy Act 1993 (PA) seeking an order that the author of the email be named and that the Solicitor-General disclose the basis for the comments made in that email. Mr Rabson also seeks a written apology.

[1] [This decision is to be cited as: *Rabson v Solicitor-General (Strike-Out Application)* [2018] NZHRRT 37]

**[3]** The Solicitor-General has, in turn, applied to strike out Mr Rabson's claim on the grounds that it discloses no reasonably arguable cause of action and is an abuse of process.

**[4]** Following case management directions given by the Chairperson in a *Minute* dated 8 June 2018 for the filing of submissions in relation to the strike-out application Mr Rabson asked for a face to face hearing of the application believing it would be an opportunity for the substantive merits of his claims to be heard by the Tribunal. By *Minute* dated 13 August 2018 the Chairperson denied the application on the grounds that it was misconceived. Mr Rabson responded by email dated 14 August 2018 expressing dissatisfaction with the ruling and complaining that Crown Law was "consistently breaking laws and completely ignoring any rule of law or legislation". His email concluded with a statement that no further taxpayers' money was to be "wasted" in relation to his complaint:

> As a consequence of all of this, please do not waste anymore of the taxpayers money in relation to my complaint I do not consent to the matter proceeding on the papers and I will inform members of the public of the lack of transparency that goes on between all of the organisations involved.

**[5]** By email dated 14 August 2018 the Secretary of the Tribunal asked Mr Rabson to advise whether by this communication he intended to withdraw his proceedings. Mr Rabson has not responded to that email.

**[6]** It is now intended to address the strike-out application. To do so it is first necessary to make brief reference to the nature of the complaint made by Mr Rabson to the Privacy Commissioner.

**The complaint to the Privacy Commissioner**

**[7]** By email dated 8 June 2016 Mr Rabson made an information privacy request to Crown Law for the identity of the person who sent the email and "the reason behind it". He also requested information in relation to himself, the Malcolm Rabson Family Trust, The Gallagher Rabson Family Trust and Casino Properties Limited.

**[8]** On completion of his investigation the Privacy Commissioner by letter dated 19 May 2017 gave notice to Mr Rabson that he (the Commissioner) had reached the final view that Crown Law had not interfered with Mr Rabson's privacy and that PA, s 29(1)(f) (legal professional privilege) had been properly relied on to justify withholding the information requested by Mr Rabson. There had been no interference with Mr Rabson's privacy. As required by the Act, the Commissioner advised Mr Rabson that he was free to initiate proceedings in the Tribunal.

**[9]** By letter dated 14 March 2018 addressed to the Tribunal and to the parties the Privacy Commissioner has confirmed that an investigation was conducted by him in relation to Mr Rabson's 8 June 2016 request. The complaint investigated was a possible breach of information privacy principle 6 (IPP 6). The Privacy Commissioner did not investigate Crown Law for sending allegedly damaging, misleading or defamatory comments.

**The jurisdiction of the Tribunal under the Privacy Act**

**[10]** In proceedings under the Privacy Act the Tribunal has jurisdiction to grant a remedy only where there has been "an interference with the privacy of an individual".

That term is defined in PA, s 66. The definition requires (inter alia) a plaintiff to establish either an action which has breached an information privacy principle or a refusal to make personal information available in response to an information privacy request under IPP 6 or IPP 7.

**[11]** The jurisdiction of the Tribunal is limited also by PA, ss 82 and 83 to the matter investigated by the Privacy Commissioner, here an alleged breach of IPP 6. That principle provides:

> Principle 6
>
> *Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
>
> (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
>
> (b) to have access to that information.
>
> (2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
>
> (3) The application of this principle is subject to the provisions of Parts 4 and 5.

**[12]** It is readily apparent from IPP 6 that the purpose of the principle is to ensure access by an individual to any personal information held by an agency.

**[13]** However, the complaint made by Mr Rabson in the statement of claim is not about the denial of access to personal information held by Crown Law. It is about the contents of the email, particularly the identity of the author and the reasons why "incorrect assertions" were made by that author.

**[14]** As the contents of the statement of claim are of central importance to the strike-out application it is necessary that the relevant parts be set out in this decision.

## The statement of claim

**[15]** The statement of claim prescribed for use in Tribunal proceedings requires a plaintiff to set out the facts of the case:

> **Part 4: Facts of the case**
>
> What do you say the defendant has done or not done (or the defendants have done or not done) that contravened the requirements of the Privacy Act 1993?
>
> State briefly and clearly the facts giving rise to your claim such as:
>
> - When (date and time) did this happen?
> - Where did this happen?
> - Who was involved?
> - What have the consequences been for you as a result of the alleged infringement?
>
> Please state each allegation in a separate numbered paragraph.

**[16]** In answer to this question Mr Rabson has provided the following:

> Wednesday 3rd September 2014 – communicated to a third party false and damaging statements.
>
> Making misleading and defamatory comments to David Corry.
>
> The communication was by email occurring in Wellington.

> The consequences of these actions have lead to incorrect assertions being made about me that have resulted in unfair and false allegations.

**[17]** The statement of claim has otherwise been left blank by Mr Rabson until the following heading:

> **Part 5: What order(s) do you want the Tribunal to make?**

To this question Mr Rabson has replied:

> The name of the individual (lawyer) responsible for the email and statements made.
>
> The basis for making these comments.
>
> A written apology.

**[18]** It is readily apparent from the statement of claim that no arguable case under IPP 6 is disclosed. The complaint is about the content of the email. Mr Rabson does not complain of a denial of access to personal information. Nor does he assert any reason why in the circumstances of his particular case the identity of the author is personal information about him (Mr Rabson). Absent particularisation of such kind the author of a document is not personal information about the person referred to in that document. See *Taylor v Corrections* [2018] NZHRRT 35 at [124].

**The strike-out application**

**[19]** The strike-out application dated 6 June 2018 is based (inter alia) on the following grounds:

> **[19.1]** The statement of claim pleads no facts tending to establish a breach of any of the information privacy principles contained in PA, s 6. Accordingly, the statement of claim discloses no reasonably arguable cause of action.
>
> **[19.2]** The Tribunal lacks jurisdiction to hear claims based on allegations of misleading or defamatory statements.
>
> **[19.3]** The proceeding is an abuse of the process of the Tribunal.

**[20]** In his submissions dated 13 July 2018 in opposition to the application Mr Rabson confirms:

> **[20.1]** The factual allegations which support his claim are those contained in the statement of claim, being the allegations set out in Part 4 of the statement of claim.
>
> **[20.2]** He is seeking the names of the individuals contained in the email dated 3 September 2014 and the basis for the comments made by the author of that email. He is not asking the Tribunal to inquire into a claim of defamation or a claim that misleading comments were made.
>
> **[20.3]** His case is that there is no evidential basis for the assertions in the email. He wants a face to face hearing before the Tribunal to enable the parties "to present their evidence to substantiate their respective positions".

**[21]** It is plain from the statement of claim and from Mr Rabson's submissions of 13 July 2018 that he conceives these proceedings as an opportunity to vindicate his claim that the contents of the email are false, damaging, misleading and defamatory.

**[22]** That Mr Rabson conceives the proceedings in these terms is confirmed by his submissions dated 3 August 2018 when addressing the question whether the strike-out application should be heard and determined on the papers or following a face to face hearing. In his first paragraph he reiterated his request for a hearing at which he could contest the truth of the statements made in the email:

> The Defendant has provided false and misleading statements about me to a third party where there is no evidential basis for the defendant to have made such a claim, as a consequence I should be able to have the Defendant substantiate their position at a Face to Face hearing. I intend presenting evidence that will show that Crown Law had no basis for the statements that they made.

**[23]** In his submissions Mr Rabson went on to assert that the Solicitor-General had misled both the Privacy Commissioner and the Tribunal in relation to the information withheld and "their reasons behind this".

**[24]** Mr Rabson's wish to ventilate these allegations and to dispute the contents of the email are the inevitable consequence of his conception of these proceedings as an opportunity for him to clear his name and to hold responsible those who have put his claimed good character in issue.

**[25]** The difficulty facing Mr Rabson is that the Tribunal does not have jurisdiction to hear and determine issues of such kind. This is the essential point made by the strike-out application.

**[26]** We address now the Tribunal's jurisdiction to strike out proceedings in such circumstances.

## Jurisdiction to strike out

**[27]** In a number of decisions the Tribunal has explained in some detail its jurisdiction to strike out proceedings. The relatively recent decision in *Apostolakis v Attorney-General No. 2 (Strike-Out Application)* [2017] NZHRRT 53 at [3] to [17] is but one example. We do not in the present decision intend repeating what was said in these decisions. The principal points relevant to an application which (as here) is based on the grounds that the statement of claim discloses no reasonably arguable cause of action follow.

**[28]** Section 115 of the Human Rights Act 1993 (incorporated into proceedings under the Privacy Act by virtue of s 89 of the latter Act) 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.

**[29]** 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).
>
> [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.
>
> [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.

**[30]** 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.
> ...

**[31]** 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].

## Discussion

**[32]** The Solicitor-General is correct in submitting the statement of claim fails to allege facts tending to establish even the basic elements of a cause of action under IPP 6 read with PA, s 66. That is, the statement of claim does not allege an interference with privacy as defined in s 66 or explain in what way IPP 6 is alleged to have been breached. The "facts" alleged in Part 4 of the statement of claim do not relate to a refusal to make personal information available to Mr Rabson.

**[33]** Mr Rabson has been unwavering in asserting that his complaint is about the content of the email. His submissions dated 13 July 2018 emphasise that the factual allegations that support his claim are those set out in the statement of claim and that it is his belief that the hearing before the Tribunal will be a hearing at which the Solicitor-General will have to establish the evidential basis for the claims made in the email. He (Mr Rabson) will also have opportunity to present his evidence in opposition.

**[34]** Mr Rabson is fundamentally mistaken as to the jurisdiction of the Tribunal and it is not possible to rescue his statement of claim by reference to the Certificate of Investigation issued by the Privacy Commissioner on 21 September 2017 which establishes the Privacy Commissioner investigated Mr Rabson's complaint under IPP 6. Mr Rabson has chosen not to plead a breach of IPP 6 in the statement of claim and the

strike-out application must be determined on what has been pleaded, not on what might have been pleaded.

## CONCLUSION

**[35]** On any reading of the statement of claim no facts are pleaded which tend to establish a breach of IPP 6 and a consequential interference with Mr Rabson's privacy. No reasonably arguable cause of action is disclosed. It follows the Tribunal lacks jurisdiction to hear the claim and the statement of claim must be struck out.

### Costs

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

> **[36.1]** The submissions for the Solicitor-General must be filed within 14 days after the date of this decision. The submissions by Mr Rabson are to be filed within a further 14 days with a right of reply by the Solicitor-General within seven days after that.
>
> **[36.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without an oral hearing.
>
> **[36.3]** 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 ONZM QC** | **Dr JAG Fountain** | **Hon KL Shirley** |
| **Chairperson** | **Member** | **Member** |