

Reference No. HRRT 010/2014

UNDER THE PRIVACY ACT 1993

BETWEEN ANATOLY KERN

PLAINTIFF

AND CHIEF EXECUTIVE OF THE MINISTRY  
OF SOCIAL DEVELOPMENT

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr Kern in person

Ms J Foster and Ms N Gray for defendant

DATE OF DECISION: 10 October 2014

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**DECISION OF TRIBUNAL DISMISSING STATEMENT OF CLAIM**

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[1] On 14 August 2014 the Chief Executive of the Ministry of Social Development (MSD) applied for an order that these proceedings be struck out or, in the alternative, dismissed. In this decision we explain why these proceedings must be dismissed.

**Background**

[2] When Mr Kern requested a copy of his file from MSD some information was withheld under ss 27(1)(c) and 29(1)(a) of the Privacy Act 1993. On 30 October 2012 and 17 June 2013 he requested that certain personal information be corrected. The MSD declined to correct the information but, at the request of Mr Kern, it attached to the information a statement of the correction sought.

[3] On a complaint by Mr Kern to the Privacy Commissioner, the Commissioner ruled that there had been no breach of Information Privacy Principle 6 but there had been a breach of Principle 7 in that MSD could not identify when the statement of the correction sought had been attached to the personal information in question. By letter dated 21 August 2013 the Commissioner advised Mr Kern that MSD offered to apologise.

### **The statement of claim**

[4] After a delay of eight months Mr Kern filed the present proceedings seeking \$200,000 in damages for humiliation, loss of dignity and injury to feelings.

[5] The statement of claim alleges a breach by MSD of not only Principle 7, but also Principles 2, 3, 4 and 8. It is bereft of meaningful particulars, alleging only:

1. In a breach of Principles 2, 3, 4 defendant during 2011 and 2012 accepted a large number of defamatory and false personal statements from plaintiff vindictive ex-partner, involved in criminal harassment actions, causing humiliation, loss of dignity and injury to the feelings.
2. In 2012 defendant breached Principle 7 by refusing to correct false personal information causing humiliation, loss of dignity and injury to the feelings.
3. Defendant used false personal information in breach of Principle 8 during various investigations during 2011, 2012 years and in preparation of s 132 report for court in July 2012 causing humiliation, loss of dignity and injury to the feelings.

### **The statement of reply**

[6] By statement of reply and supporting memorandum filed on 28 May 2014, MSD submitted the statement of claim provides an insufficient factual basis for the allegations and sought an order that Mr Kern file an amended statement of claim which properly particularised his case. It was said that it was essential that Mr Kern provide sufficient particulars to allow MSD and the Tribunal to understand why he believes he has a claim.

[7] By memorandum dated 28 March 2014 Mr Kern responded that the Privacy Act breaches alleged in the statement of claim were “enormous” and had been fully and sufficiently pleaded in the statement of claim. He added:

[7.1] To provide particulars he would have to comment on every statement obtained from his “vindictive and psychopathic ex-partner”.

[7.2] To provide the particulars he would need a full copy of all personal information about him held by MSD. He sought an order that MSD provide a full copy of the case file held by MSD in relation to Mr Kern’s daughter.

[7.3] A particularised statement of claim would be filed within three months of the release of this information.

### **The teleconference held on 2 July 2014**

[8] On 2 July 2014 the Chairperson convened a teleconference. His *Minute* issued on that date provides a full account of what took place. Little point would be served by attempting a summary. We note only:

[8.1] Mr Kern asserted he wanted the hearing to be ten years in the future. Asked for his reasons he said that it would take him that long to instruct a lawyer, to prepare the case and to make an assessment of damages. Asked whether he had taken steps to obtain legal representative Mr Kern said he could not afford a lawyer and was not eligible for legal aid as his income is too high. He added that

it took lawyers many years to qualify and he would need the same period of time to prepare for the hearing. The Chairperson made it clear to Mr Kern that a delay of ten years was well beyond the realms of possibility and the case would have to be readied for hearing in a matter of months. See *Minute* at [10] and [11].

**[8.2]** When asked how many witnesses he intended calling at the hearing Mr Kern said that he did not know. He also said that he was not obliged to attend the hearing. He believed it would be sufficient for him to file a witness statement only. To this the Chairperson responded:

**[17]** It must be made very clear to Mr Kern that as the plaintiff he carries the responsibility of establishing his claim and that the standard of proof is the balance of probabilities. It is difficult to see how his claim can be established without him attending the hearing in person to give evidence and to face questioning by the lawyer representing the Ministry. Without his attendance before the Tribunal it will not be realistically possible for an assessment of credibility to be made. Put simply, unless Mr Kern attends the hearing to give evidence there is a real chance that his claim will either fail or be struck out for want of prosecution.

**[8.3]** Mr Kern was required to file an amended statement of claim with adequate particulars. The direction was in the following terms:

**[23.1]** By 5pm on Friday 25 July 2014 Mr Kern is to file and serve an amended statement of claim which provides a clear statement of the facts giving rise to the claim under information privacy Principles 6 and 7. The amended statement of claim must also provide sufficiently detailed particulars to inform the Tribunal and the Ministry of Mr Kern's claim and of the facts to be relied on by him.

**[8.4]** Mr Kern was further required to file by Friday 12 September 2014 written statements of the evidence to be called by him at the hearing. See *Minute* at [23.3].

**[8.5]** The Chairperson warned Mr Kern that if he did not comply with these directions, he would be at risk of having his proceedings struck out. See *Minute* at [22]:

**[22]** For the benefit of Mr Kern it must be emphasised once more that the directions which follow must be complied with in full and by the stipulated timetable date. Specifically, if the amended statement of claim is not filed on the due date (25 July 2014) or if it does not contain a full statement of the facts on which Mr Kern bases his case, it will be open to the Ministry to apply to have the proceedings struck out.

**[8.6]** As to the request for the daughter's file, counsel for MSD advised the Chairperson that the Ministry had already released to Mr Kern all the personal information the Ministry believed it was legally obliged to provide. See *Minute* at [8].

**[9]** Mr Kern failed to file the amended statement of claim by the stipulated date of 25 July 2014. By email dated 6 August 2014 the Secretary wrote to him drawing attention to the passing of the deadline and enquiring whether he intended filing an amended statement of claim. That email has not been replied to by Mr Kern.

### **The filing of the strike-out application**

**[10]** On 14 August 2014 MSD applied to have the proceedings struck out or dismissed on the grounds that:

**[10.1]** Mr Kern had failed to comply with the direction that an amended statement of claim be filed.

[10.2] The claim as presently pleaded fails to disclose a tenable cause of action.

[10.3] The proceedings are being used for an improper purpose.

[11] As Mr Kern has a right to be heard on the application the Chairperson by *Minute* dated 18 August 2014 directed that if Mr Kern intended opposing the application, he file and serve his submissions on or before 29 August 2014.

[12] By email dated 18 August 2014 Mr Kern responded to the effect that he would be filing no submissions:

What's the point in providing any submission when they are simply filtered and ignored?

NZ HRRT breaching s 27 of NZBoRA – what a village parody to judicial system, but revealing example of real purpose of this organization.

[13] It is to be noted that the subsequent deadline (12 September 2014) for Mr Kern to file written statements of the evidence he intends calling at the hearing also passed without anything being received from Mr Kern.

## DISCUSSION

[14] There are three reasons why these proceedings must be dismissed:

[14.1] Mr Kern has refused or failed to provide meaningful particulars of his case.

[14.2] Mr Kern has failed to comply with directions made by the Chairperson.

[14.3] The Tribunal does not in any event have jurisdiction over the alleged breach by MSD of Information Privacy Principles 2, 3, 4 and 8.

## Jurisdiction

[15] By virtue of s 115 of the Human Rights 1993 (incorporated into proceedings under the Privacy Act by s 89 of that Act) the Tribunal has power to dismiss proceedings if satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith:

### 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.

## Statement of claim without particulars

[16] In *Mackrell v Universal College of Learning* HC Palmerston North CIV-485-802, 17 August 2005 at [48] this provision was described by Wild J as “a wide discretionary power”:

[48] Thus, the Tribunal has a wide discretionary power to strike out or dismiss a proceedings brought before it. This will be appropriate in situations similar to those contemplated by [r 15.1] of the High Court Rules which [is] the basis for the present application.

[17] Wild J at [57] to [60] emphasised the importance of the statement of claim in properly informing the defendant and the Tribunal of what the claim is about. Although in that case the information provided was “incomprehensible and hopelessly prolix”, the same principle applies where the statement of claim is incomprehensible by being bereft of meaningful information and the plaintiff refuses to provide particulars:

[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 incomprehensible claims, because that only visits prejudice and injustice upon the respondent, not to mention enormous inconvenience to the Court or Tribunal.

[60] The appellant's claim is both incomprehensible and hopelessly prolix. The Tribunal was right to strike it out. A claim which cannot be understood has no prospect of success.

**[18]** Useful reference can also be made to the Tribunal's recent decision in *Pope v Human Rights Commission* [2014] NZHRRT 3 at [31] to [36].

**[19]** In the present case the statement of claim must be struck out as it is not possible for MSD to sensibly ascertain what is alleged against it and therefore cannot respond meaningfully.

#### **Failure to comply with directions**

**[20]** At the teleconference held on 2 July 2014 Mr Kern less than helpfully advised that he was seeking a date of hearing ten years in the future. While it was made clear to Mr Kern that a delay of ten years was well beyond the realms of possibility, the studied failure by Mr Kern to comply with the subsequent directions that he file a particularised statement of claim by 25 July 2014 and his evidence by 12 September 2014 is indicative of his withdrawal from meaningful participation in these, his own proceedings. So too is his assertion that he was not obliged to attend the hearing and that it would be sufficient for him to file a statement. His 18 August 2014 email reference to “a village parody [of a] judicial system” further reinforces our conclusion that he has disengaged from the case.

**[21]** In these circumstances we find that the proceedings are vexatious and have not been brought in good faith and are to be struck out for this reason as well.

#### **Absence of jurisdiction over Information Privacy Principles 2, 3, 4 and 8**

**[22]** The Tribunal has jurisdiction only over those matters investigated by the Privacy Commissioner. See *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [58] to [64] and *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike Out Application)* [2014] NZHRRT 1 at [18] to [42].

**[23]** It follows that the Tribunal has jurisdiction only in relation to the application of Information Privacy Principles 6 and 7. There being no complaint in relation to the former, these proceedings, at best, are in any event confined strictly to the application of Principle 7 (correction of personal information). The issue, however, is academic given that for the reasons earlier expressed, the proceedings are to be dismissed in any event.

### **DECISION**

**[24]** For the foregoing reasons the decision of the Tribunal is that:

**[24.1]** These proceedings are vexatious or not brought in good faith and are dismissed.

**[24.2]** Costs are reserved.

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**Mr RPG Haines QC**  
**Chairperson**

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**Mr GJ Cook JP**  
**Member**

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**Mr BK Neeson**  
**Member**