

Reference No. HRRT 039/2017

UNDER THE PRIVACY ACT 1993

IN THE MATTER OF
INTENDED PROCEEDINGS BY KATHY APOSTOLAKIS

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mrs K Apostolakis in person

The intended first, second and third defendants were not heard

DATE OF DECISION: 7 September 2017

**DECISION OF TRIBUNAL THAT INTENDED STATEMENT OF CLAIM
NOT BE ACCEPTED FOR FILING¹**

Introduction

[1] On 17 July 2017 Mrs Apostolakis presented for filing in the office of the Tribunal a statement of claim dated 13 July 2017. The claim is made under the Privacy Act 1993.

[2] The three intended defendants, as named in the statement of claim, are:

[2.1] “Rodney Knight – Risk and Compliance of Public Trust Corporate Office, PublicTrust.co.nz”

[2.2] “Herman De Groot and Sarah Wilson (Hunter De Groot, counsel)”

[2.3] “The Attorney-General in respect of Mr Charles M Gallagher solicitor, Crown Law Office”.

¹ [This decision is to be cited as: *Re Apostolakis No. 2 (Rejection of Statement of Claim)* [2017] NZHRRT 33.]

[3] The following documents were attached to the statement of claim:

[3.1] A letter dated 10 August 2010 (and attachments) from Mr Ian McCulloch of Ian McCulloch Max Tait Legal, Barristers and Solicitors addressed to Greig, Gallagher & Co, Solicitors.

[3.2] A Certificate of Investigation dated 27 November 2015 issued by the Privacy Commissioner recording that on a complaint by Mrs Apostolakis the Commissioner carried out an investigation regarding the Public Trust in relation to an allegation by Mrs Apostolakis that the Public Trust had breached information privacy principle 6.

The Secretary's letter

[4] By letter dated 3 August 2017 the Secretary rejected the statement of claim on the grounds it was apparent on the face of the documents the Tribunal did not have jurisdiction because it was the Public Trust, not the three intended defendants in respect of whom an investigation had been conducted by the Privacy Commissioner under Part 8 of the Act. The Secretary's letter was in the following terms:

Dear Mrs Apostolakis

On 17 July 2017 you presented for filing a statement of claim under the Privacy Act 1993 in which the proposed defendants are Mr Rodney Knight, Mr Herman De Groot, Ms Sarah Wilson and the Attorney-General "in respect of Mr Charles Gallagher, solicitor".

As you will be aware, the Tribunal's jurisdiction is restricted to defendants in respect of whom an investigation has been conducted under Part 8 of the Act.

As the Certificate of Investigation issued by the Privacy Commissioner on 27 November 2015 and included with your papers refers to none of the proposed defendants, there is no evidence to show each proposed defendant is a person in respect of whom an investigation has been conducted. It follows your papers cannot be accepted for filing.

The statement of claim and associated papers are herewith returned to you.

Yours sincerely

[5] By submissions dated 15 August 2017 Mrs Apostolakis has asked the Tribunal to review the Secretary's decision. It is necessary to note none of the three intended defendants have been served with the proceedings nor have they been heard as to whether the intended proceedings should be accepted for filing. This is because the rejection or acceptance of an intended statement of claim is a decision summary in nature.

The investigation of complaints by the Privacy Commissioner

[6] The Tribunal's jurisdiction is governed by statute.

[7] As explained in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* [2014] NZHRRT 1, (2014) 10 HRNZ 279 at [19], the purpose of Part 8 of the Privacy Act is to ensure that in the first instance a complaint about an interference with the privacy of an individual must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by s 82 only where an investigation has been conducted under Part 8 or where conciliation (under s 74) has not resulted in settlement. For the complaint resolution process to work a person in respect of whom a complaint is made and an investigation conducted must know he or she is under investigation and must also know what is the subject of the

investigation so an effective response can be made. This imperative is explicitly recognised by the Privacy Act. The complaints process mandated by it in ss 67, 70 and 73 is designed to ensure the person under investigation and the matter under investigation by the Privacy Commissioner are clearly identified.

[8] The statutory stipulations governing the investigative process under Part 8 are reflected in the provisions (ss 82 and 83) which govern access to the Tribunal:

82 Proceedings before Human Rights Review Tribunal

- (1) This section applies to any person—
 - (a) in respect of whom an investigation has been conducted under this Part in relation to any action alleged to be an interference with the privacy of an individual; or
 - (b) in respect of whom a complaint has been made in relation to any such action, where conciliation under section 74 has not resulted in a settlement.
- (2) Subject to subsection (3), civil proceedings before the Human Rights Review Tribunal shall lie at the suit of the Director of Human Rights Proceedings against any person to whom this section applies in respect of any action of that person that is an interference with the privacy of an individual.
- (3) ...

83 Aggrieved individual may bring proceedings before Human Rights Review Tribunal

Notwithstanding section 82(2), the aggrieved individual (if any) may himself or herself bring proceedings before the Human Rights Review Tribunal against a person to whom section 82 applies if the aggrieved individual wishes to do so, and—

- (a) the Commissioner or the Director of Human Rights Proceedings is of the opinion that the complaint does not have substance or that the matter ought not to be proceeded with; or
- (b) in a case where the Director of Human Rights Proceedings would be entitled to bring proceedings, the Director of Human Rights Proceedings—
 - (i) agrees to the aggrieved individual bringing proceedings; or
 - (ii) declines to take proceedings.

[9] The effect of s 82 of the Privacy Act is that an aggrieved individual who wishes to bring proceedings before the Tribunal must establish that the defendant is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the privacy of that individual. Similarly, before an aggrieved individual can bring proceedings before the Tribunal under s 83 the “complaint” must first have been considered by the Privacy Commissioner as a complaint.

The investigation by the Privacy Commissioner

[10] The Certificate of Investigation dated 27 November 2015 issued by the Privacy Commissioner unambiguously records that the entity in relation to which his investigation was conducted was the Public Trust:

Certification of Investigation for Human Rights Review Tribunal

Complainant	Kathy Apostolakis (Our Ref: C/27423)
Respondent	Public Trust
Matters investigated	Mrs Apostolakis asked Public Trust for all information they hold about her. Mrs Apostolakis is not a customer of Public Trust, and initially Public Trust could not find any information about her.
Principle(s) applied	IPP 6

Commissioner's opinion:	Public Trust responded in time and took reasonable steps to provide Mrs Apostolakis with her personal information.
<ul style="list-style-type: none"> • application of principle(s) 	29(1)(a); and 29(1)(f)
<ul style="list-style-type: none"> • adverse consequences 	No
<ul style="list-style-type: none"> • interference with privacy 	No

[11] It is plain on the face of this document that none of the three intended defendants named by Mrs Apostolakis in her statement of claim dated 13 July 2017 are persons in respect of whom an investigation has been conducted under Part 8 of the Privacy Act in relation to any action alleged to be an interference with the privacy of Mrs Apostolakis.

The response by Mrs Apostolakis

[12] Subsequent to receipt of the Secretary's jurisdiction letter Mrs Apostolakis has taken two steps. First, she filed a memorandum dated 15 August 2017 and second, on 29 August 2017 she presented for filing a further statement of claim dated 29 August 2017 (HRRT046/2017). The only relevant difference between this statement of claim and that dated 13 July 2017 is that in the new document only one intended defendant is named, namely the Public Trust.

[13] It is not intended to address the submissions as they focus on irrelevant matters and do not address the central issue of jurisdiction.

CONCLUSION

[14] It is plain on the face of the Certificate of Investigation dated 27 November 2015 and on the face of the intended statement of claim dated 13 July 2017 that none of the three proposed defendants are persons in respect of whom an investigation has been conducted under Part 8 of the Privacy Act 1993. It follows the papers cannot be accepted for filing.

[15] By presenting the new statement of claim dated 29 August 2017 in HRRT046/2017 Mrs Apostolakis has tacitly conceded that the first statement of claim dated 13 July 2017 is so defective it is beyond salvage.

[16] We accordingly conclude the Secretary acted correctly in rejecting the intended statement of claim. That decision is upheld.

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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