IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 1**

	Reference No. HRRT 002/2012
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS [NKR]**
	PLAINTIFF
AND	**ACCIDENT COMPENSATION CORPORATION**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Mr BK Neeson, Member

REPRESENTATION:
Ms JM Ryan for Plaintiff
Mr J Edwards Defendant
Ms K Evans for Privacy Commissioner

DATE OF DECISION: 30 January 2014

DECISION OF TRIBUNAL STRIKING OUT PARTS OF STATEMENT OF CLAIM

Introduction

[1] In proceedings brought under s 82(2) of the Privacy Act 1993 by the Director of Human Rights Proceedings it is alleged that the Accident Compensation Corporation (ACC) breached Rule 11 of the Health Information Privacy Code 1994 by disclosing personal health information about the aggrieved individual to Nayland Physiotherapy (Nayland) and Richmond Physiotherapy (Richmond) in Nelson. In its statement of reply ACC says that the Tribunal does not have jurisdiction to hear that part of the claim which

relates to Richmond because the Privacy Commissioner did not give notice to ACC under s 73 of the Act of her intention to make an investigation into the Richmond complaint. The Tribunal is asked to strike out paragraphs 10 to 13 of the statement of claim, being those paragraphs which relate to the Richmond complaint. The jurisdiction of the Tribunal to hear the Nayland complaint is not challenged.

[2] The narrow issue for determination by the Tribunal is whether, in terms of s 82(1)(a) of the Act, ACC is a person "in respect of whom an investigation has been conducted under [Part 8 of the Act] in relation to any action alleged" that is, in relation to the alleged disclosure of the aggrieved person's personal health information to Richmond.

[3] The Tribunal having been asked to rule on the jurisdiction challenge by way of a "papers hearing", written submissions have been received from ACC, from the Director and from the Privacy Commissioner.

[4] An apology is offered to the parties for the delay in publishing this decision. All members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously.

THE EVIDENCE

[5] Before addressing the statutory provisions relevant to the jurisdiction challenge it is necessary to provide an overview of the uncontested evidence produced by ACC in the form of an affidavit by Ms M Henderson, Manager Government Services, ACC, Wellington whose responsibilities include signing correspondence to the Privacy Commissioner in relation to complaints under the Privacy Act. To a large degree the issues between the parties will be resolved by our findings of fact.

[6] By letter dated 8 December 2009 the Office of the Privacy Commissioner gave notice to ACC that the Commissioner had received a complaint that ACC, in the course of referring the aggrieved person to Nayland Physiotherapy for treatment, had disclosed to Nayland sensitive information about the aggrieved person. The letter referred exclusively to Nayland. No mention at all was made of Richmond Physiotherapy.

[7] In a letter dated 2 February 2010 Ms Henderson responded to the complaint in some detail. Under the heading "Conclusion" she drew attention to the fact that the aggrieved person had been referred to another provider (Richmond) and Ms Henderson understood that the programme of treatment there was progressing well. She added that a copy of a document known as the Initial Medical Assessment had been provided by ACC to Richmond but it had been returned to ACC unsighted as it contained a reference to the aggrieved person having lodged a sensitive claim. The "Conclusion" (along with the balance of the letter) otherwise addressed the Nayland complaint only.

[8] In a letter dated 16 February 2010 the investigating officer at the Office of the Privacy Commissioner gave notice to ACC that ACC's response dated 8 December 2009 had not satisfied him that ACC had been entitled to disclose sensitive information about the aggrieved person "to a physiotherapist". Under the heading "Background" the officer summarised the allegations made in relation to Nayland Physiotherapy.

[9] The first ever reference by the Office of the Privacy Commissioner to Richmond Physiotherapy was in the following brief paragraph:

> [The aggrieved person] also advised that, on 9 December 2009, ACC again disclosed the information in question, this time to Richmond Physiotherapy. However, [the aggrieved person]

> was able to come to an agreement with Richmond Physiotherapy that this information would be returned to ACC. ACC has since advised that some information was returned and some retained by Richmond Physiotherapy.

[10] Therafter the letter from the investigating officer addressed the submissions made by ACC in Ms Henderson's letter dated 2 February 2010. In particular the officer addressed ACC's position that it had been necessary for the information in question to be disclosed to Nayland and Richmond. However, in the final two paragraphs of his letter the officer spoke only to the Nayland complaint:

> ACC's comments on the affect of this disclosure on [the aggrieved person's] relationship with Nayland Physiotherapy are noted. However, it is my preliminary view that the simple disclosure of this very sensitive information was enough to cause [the aggrieved person] significant emotional harm in terms of section 66(1)(b) of the Privacy Act. Whether or not the disclosure further caused a breakdown in his relations with Nayland Physiotherapy is not therefore relevant to whether or not ACC has interfered with [the aggrieved person's] privacy in this case.
>
> **Conclusion**
>
> In conclusion, therefore, I am not satisfied at this point that the disclosure of the information in question here was necessary for the purpose of facilitating [the aggrieved person's] physical rehabilitation. It is my preliminary view that ACC has interfered with [the aggrieved person's] privacy by doing so. I would be grateful if you could provide your comments on this view …

[11] It will be seen that although the investigating officer's letter refers at times to "Nayland and Richmond Physiotherapy":

> **[11.1]** It is made unambiguously clear that the aggrieved person had come to an agreement with Richmond Physiotherapy that the information would be returned to ACC.
>
> **[11.2]** That the "preliminary view" expressed in the penultimate paragraph of the letter is addressed to Nayland Physiotherapy only. The references on each side of the relevant sentence are to Nayland. There is no mentioned of Richmond.

[12] In these circumstances it is hardly surprising that Ms Henderson stated in her evidence that while the investigating officer's letter of 16 February 2010 made reference to Richmond Physiotherapy, it did not suggest that there was a complaint regarding Richmond or that the Privacy Commissioner was investigating a complaint relating to Richmond.

[13] Accordingly, when Ms Henderson took up the invitation to respond to the investigating officer's preliminary view, her letter dated 24 March 2010 referred exclusively to Nayland Physiotherapy. It made no reference at all to Richmond. In her evidence Ms Henderson deposed that she did not refer to Richmond as that matter seemed to have been resolved and the investigating officer in his letter dated 16 February 2010 did not ask for information about the provision by ACC of information to Richmond.

[14] It is relevant to note that in an almost contemporaneous letter dated 6 April 2010 from the aggrieved person to the investigating officer detailing the harm allegedly caused by ACC's actions, the aggrieved person refers six times to Nayland Physiotherapy. The sole reference to "Richmond" is in the phrase "Nayland Physiotherapy and Richmond Police":

> The personal humiliation, loss of mana/self esteem, and exacerbation of diagnosed PTSD caused by ACC, Nayland Physiotherapy and Richmond Police, has acutely undermined the

> work done by counsellors who assisted me with my Sensitive Claim Issues and caused me intolerable stress and anxiety.

[15] We cannot assume, without more, that the reference to "Richmond Police" can only be read as "Richmond Physiotherapy". But even if the phrase is read as an intended reference to Richmond Physiotherapy, the point nevertheless remains that the aggrieved person himself makes reference to Richmond only in passing. The focus of attention in this letter, as in the correspondence from the investigating officer to ACC, is on Nayland.

Evidence – conclusions

[16] The conclusions we have come to are:

> **[16.1]** The letter dated 8 December 2009 from the Office of the Privacy Commissioner was exclusively about the alleged disclosure of sensitive information by ACC to Nayland Phyiotherapy.
>
> **[16.2]** The ACC response dated 2 February 2010 clearly and unambiguously addressed only that complaint.
>
> **[16.3]** The subsequent letter dated 16 February 2010 from the investigating officer stated that the aggrieved person had come to an agreement with Richmond Physiotherapy. The investigating officer expressed a preliminary view only in relation to Nayland Physiotherapy.
>
> **[16.4]** In relation to this letter Ms Henderson reasonably concluded that there was no suggestion that there was a complaint regarding Richmond Physiotherapy or that the Privacy Commissioner was investigating such complaint.
>
> **[16.5]** Consequently the ACC letter dated 24 March 2010 addressed the Nayland complaint and that complaint alone.
>
> **[16.6]** It was plain from the terms of the correspondence passing between the investigating officer and ACC that ACC was not aware that the Privacy Commissioner was investigating a complaint in relation to Richmond. Had the Privacy Commissioner intended to pursue such investigation, it would have been a simple matter for this to have been made clear to ACC either in the correspondence or by way of separate letter.

[17] We now address the significance of the fact that ACC was not put on notice that the Privacy Commissioner was investigating "any action" by ACC in relation to the referral to Richmond Physiotherapy.

JURISDICTION

The investigation of complaints by the Privacy Commissioner

[18] As the Long Title of the Privacy Act declares, the overall purpose of the Act is to promote and protect individual privacy. More particularly it provides also for the appointment of a Privacy Commissioner "to investigate complaints about interferences with individual privacy".

[19] The complaints process is detailed at length in Part 8 of the Act. The scheme is that in the first instance complaints 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.

[20] As pointed out in the Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at 174-175 an important aim of the Act is to secure voluntary compliance with its principles. In part that is achieved by providing guidance, education and assistance. But voluntary compliance is also an important aim of the complaints system. On receiving a complaint the Privacy Commissioner must attempt to reach a settlement between the parties. If that fails, there is provision for the matter to proceed to an enforcement stage before the Tribunal.

[21] In most cases complaints are either settled or complainants decide not to pursue the matter further after the investigation has been completed. According to the Office of the Privacy Commissioner *Annual Report 2013* (Wellington, November 2013) at 21, 824 complaints were received in the twelve month period to 30 June 2013. The Table which follows shows incoming and closed complaints and work in progress at 30 June 2013:

Table 1: Complaints received and closed 2008-2013

	2008/09	**2009/10**	**2010/11**	**2011/12**	**2012/13**
Complaints received	806	978	968	1,142	824
Complaints closed	822	961	999	1,026	896
Work in progress after year's end	273	290	247	363	291

[22] The *Annual Report 2013* at 23 further records that the aim of the Privacy Commissioner is to settle 30% of all complaints. Settlement outcomes for the year to 30 June 2013 are shown in the second Table which follows below. Of the complaints closed for the year 2012/13, 36% were closed with some level of settlement. This was an increase in the settlement rate from the previous year. The Privacy Commissioner achieved some level of resolution in nearly 63% of the complaints that were notified. Settlements ranged from apologies through to payments of money for harm caused.

Table 2: Settlement outcomes 2012/13

Settlement outcome	**Number**
Information released	104
Apology	68
Money/monies worth	21
Information partly released	31
Information corrected	36
Assurances	105
Change of policy	55
Training	0

[23] It is clear from these figures that the alternative dispute resolution scheme as facilitated by the Privacy Commissioner is an effective one, providing speedy, low-cost, informal and non-adversarial resolution of complaints wherever possible.

[24] However, for the complaint resolution process to work a person in respect of whom an investigation is being conducted must know what is under investigation so he or she can respond effectively. As we now explain, this imperative is recognised by the Privacy

Act. The complaints process mandated by it is designed to ensure that the matter under investigation by the Privacy Commissioner is clearly identified.

Investigations by the Commissioner – the statutory provisions

[25] We do not intend to recite the statutory provisions at length. For present purposes a summary of those provisions is sufficient:

> **[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.

[26] On the evidence presently before the Tribunal it is by no means clear and very much open to doubt whether Richmond was the subject of a complaint by the aggrieved person. First, the terms of the Commissioner's initial letter to ACC dated 8 December 2009 makes no reference whatever to Richmond. Second, the much later letter dated 6 April 2010 from the aggrieved person to the Privacy Commissioner mentions Nayland Physiotherapy six times whereas "Richmond" is referred to only in the phrase "Richmond Police". In any event there is certainly no evidence of advice by the Commissioner to ACC of a decision to investigate a complaint relating to Richmond.

[27] Rather, the argument for the Director is that because the ACC letter dated 2 February 2010 voluntarily reported the return by Richmond of a document and because Richmond was then discussed by the investigating officer in his letter dated 16 February 2010, by inference ACC was put on notice of the Commissioner's intention to make an investigation in relation not only to Nayland, but also to Richmond. As to this we have already held that the facts cannot support such interpretation although we accept that on different facts, satisfaction of the statutory process and in particular, of s 73, could occur by necessary implication. In this context we address briefly the submission that an investigation by the Privacy Commissioner is an ambulatory process.

Investigation an ambulatory process

[28] It is acknowledged that it is not unusual for an investigation by the Privacy Commissioner to raise different points from those originally known and notified to the

person complained against. An investigation is an inquiry into what happened and involves the gathering of facts, the obtaining of responses from the parties and, where necessary, third parties. As new information comes to hand further responses from the parties may be required. It is an ambulatory process. As an investigation progresses and the facts become clearer, it may become apparent that new privacy principles are potentially engaged other than those originally notified. New respondent agencies or new complaints may be identified. Or it may appear that the respondent agency has repeated the action that is alleged to be an interference with privacy. It is submitted that it was only during the investigation that it became apparent that ACC had possibly disclosed information about the aggrieved person to Richmond.

[29] The critical and determinative point, however, is whether the Commissioner then complied with the mandatory statutory duty in ss 70(2) and 73 to:

> **[29.1]** Notify the person to whom the complaint relates that the Commissioner intends making an investigation into the new matter; and
>
> **[29.2]** Inform that person of the details of the new complaint and of the right of that person to submit a written response to the (new) complaint.

[30] This is hardly an onerous requirement and one which in any event is imposed by the common law duty of fairness, now reinforced by s 27 of the New Zealand Bill of Rights Act 1990. Our finding is that these statutory steps were not taken.

[31] We do not see this approach infringing the general principle that it is not the role of the Tribunal to review the way in which the Privacy Commissioner investigates complaints (*Steele v Department of Work and Income* [2002] NZHRRT 12 at [43]-[44]) or to prescribe a process that must be followed in order for there to be an "investigation" (*Lehmann v Radioworks Ltd* [2005] NZHRRT 20 at [105(b)]). Whether the statutory prerequisites in ss 67(1), 70 and 73 have been satisfied is largely a question of fact.

[32] To assist the Tribunal to determine what action was investigated, the Privacy Commissioner, in each case where proceedings are brought before the Tribunal, issues a Certificate of Investigation. We examine next the question whether that certificate is conclusive as to the matter or matters investigated by the Privacy Commissioner.

The certificate by the Privacy Commissioner and the determination of jurisdiction

[33] In proceedings before the Tribunal under the Privacy Act it is not unusual for an issue to arise as to whether the alleged interference with the privacy of an individual is within the Tribunal's jurisdiction and in particular whether the alleged interference was the subject of an investigation by the Privacy Commissioner. Inevitably this category of challenge to the Tribunal's jurisdiction necessitates an enquiry into what matter or matters were in fact investigated by the Privacy Commissioner. For the assistance of the Tribunal and to ensure clarity as to what "action alleged" has been investigated by the Privacy Commissioner, the Commissioner issues a Certificate of Investigation particularising the subject of the investigation. It is this certificate which potentially sets the boundary of the Tribunal's jurisdiction. The certificate does not have any statutory basis and in that respect is informal and is capable of challenge. See in the analogous context of the Human Rights Act 1993 the recent decision in *Peters v Wellington Combined Shuttles Ltd (Application by Defendant that Jurisdiction be Declined)* [2013] NZHRRT 21 (28 May 2013). For a decision under the Privacy Act reference can be

made to *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (20 September 2013) at [58].

[34] In the present case the Certificate of Investigation provided by the Privacy Commissioner stated:

Certification of Investigation for Human Rights Review Tribunal

Complainant	**[name of person aggrieved] (Our Ref: C/21897)**
Respondent	**Accident Compensation Corporation**
Matters investigated	[The person aggrieved] complained that ACC disclosed neuropsychological information and information about the existence of a "sensitive claim" to two physiotherapy practices without his consent or knowledge and in contradiction to express instructions on his ACC file. [The aggrieved person] considered that the information disclosed was sensitive and had no relevance to the injuries that were to be treated.
Principle(s) applied	Rule 11 of the Health Information Privacy Code
Commissioner's opinion: • **application of principle(s)** • **adverse consequences** • **interference with privacy**	 Breach of rule 11 Yes Yes, referred to in DHRP.

[35] If one were to look to this certificate for assistance in determining whether the Privacy Commissioner conducted an investigation in relation to the Richmond matter, it will be seen that the Certificate refers to "two physiotherapy practices". Contextually, this is an unambiguous reference to both Nayland and Richmond.

[36] However, as explained, the Certificate is an informal document and capable of challenge. In the present case and for the reasons given, the evidence establishes that Richmond was not the subject of an investigation, or at least, ACC was not put on notice that Richmond was the subject of an investigation by the Commissioner. It follows that the implicit reference in the Certificate to Richmond was mistaken and of no legal consequence.

The certificate by the Privacy Commissioner – construction

[37] We do not, however, wish to leave the impression that the Part 8 statutory provisions relating to the investigatory process are to be narrowly and rigidly construed. Nor we do intend to suggest that certificates from the Privacy Commissioner are to be given a narrow and technical construction. This would be inconsistent with the purposive interpretation of the Act mandated by s 5 of the Interpretation Act 1999. It would also be inconsistent with s 105 of the Human Rights Act (incorporated into the Privacy Act by s 89 of that Act):

105 Substantial merits

(1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
(2) In exercising its powers and functions, the Tribunal must act—
  (a) in accordance with the principles of natural justice; and
  (b) in a manner that is fair and reasonable; and
  (c) according to equity and good conscience.

[38] These principles were most recently applied in *Geary v Accident Compensation Corporation* at [63] and [64]:

> **[63]** It cannot have been intended that a plaintiff show that each particular document has been the subject of a specific investigation by the Privacy Commissioner. Indeed, at a practical level it would in most cases not be possible for a plaintiff to establish such. There is also the point that an investigation under Part 8 of the Act by the Privacy Commissioner is required by s 90 of the Act to be conducted in private. The proceedings are privileged (s 96). In addition, ss 94 and 95 make provision for the protection of witnesses and their privileges in relation to the giving of information to and the production of documents to the Commissioner. We accordingly reject the submission, implicit in the argument advanced by ACC, that Mr Geary must establish document by document, that each was the subject of an investigation by the Privacy Commissioner. It is sufficient to show that the Privacy Commissioner investigated an alleged breach of Principle 6 following a request by Mr Geary for access to personal information. All personal information requested fell within the ambit of that investigation and accordingly within the jurisdiction of the Tribunal.
>
> **[64]** It should be added that it is not uncommon for the Tribunal to be told by an agency that, subsequent to the institution of proceedings before the Tribunal, the agency has discovered previously overlooked information. Such information has always been treated as being within the ambit of the proceedings then before the Tribunal. See recently *Rafiq v Commissioner of Police* [2012] NZHRRT 13 (23 May 2012) at [16] and [17]. The decision in *Waugh v New Zealand Association of Councillors Inc* [2005] NZHRRT 24 at [93] – [97] makes very much the same point. As that decision observes, any other interpretation would be pedantic. It would raise the prospect of multiple claims in the Tribunal arising out of essentially the same facts. So if in the present case the Tribunal concluded that it did not have power to deal with the correspondence passing between the HDC and Dr Rankin then presumably Mr Geary would simply ask the Privacy Commissioner to investigate the withholding of those two documents and thereafter bring the matter back to the Tribunal. We do not believe that such a result would have been intended, particularly given the terms of s 105 of the Human Rights Act.

Establishing jurisdiction – the Tribunal

[39] The statutory stipulations governing the investigative process under Part 8 are logically 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.

[40] As stated in *Geary* at [58], the effect of s 82 of the Privacy Act is that a plaintiff is required to establish that the defendant in any proceeding 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 the aggrieved 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. See *L v T* (1998) 5 HRNZ 30 (Morris J, A Knowles, GDS Taylor) at 35 and 36; *Steele v Department of Work and Income* [2002] NZHRRT 12; *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45; *Lehmann v Radio Works* [2005] NZHRRT 20 and more recently *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10.

[41] In the present case the applicable provision is s 82(1). For the reasons given our finding of fact is that as far as the Richmond matter is concerned, ACC is not a person in respect of whom an investigation has been conducted under Part 8 of the Act and for that reason the Tribunal does not presently have jurisdiction in relation to the Richmond matter.

[42] The Director invited the Tribunal to take into account a letter written by ACC to the Director in the context of the "opportunity to be heard" process which the Director must conduct under s 82(3) prior to taking proceedings before the Tribunal. As to this the Commissioner and the Director are different statutory officers and their statutory mandated processes are equally different and occur at different stages of the overall Part 8 process. We do not see how a letter submitted by ACC to a different statutory officer at some distance in time from the conclusion of the Commissioner's investigation can shed any meaningful light on the question whether the Commissioner followed the prescribed statutory process. In any event, if ACC in that letter was mistaken as to whether Richmond had been the subject of an investigation by the Commissioner it cannot be bound by such mistake.

Jurisdiction – ruling of limited effect

[43] Our conclusion that the Tribunal does not have jurisdiction in relation to the Richmond matter and that paragraphs 10 to 13 of the statement of claim must accordingly be struck out does not represent a "victory" of any great significance to ACC. As ACC candidly acknowledged in its submissions, our finding is not necessarily prejudicial to the Director or to the aggrieved person as it would be open to the latter to make a complaint to the Privacy Commissioner and for the Privacy Commissioner to undertake a brief investigation into the Richmond matter, thereby satisfying the requirements of the Act and if necessary, the matter can then be brought back before the Tribunal.

[44] Furthermore we do not see our present decision as going beyond well established jurisprudence. A plaintiff cannot bring a case based on different privacy principles to those investigated by the Privacy Commissioner. See *Waugh v New Zealand Association of Councillors* [2003] NZHRRT 9, *Read v Van Rij* [2009] NZHRRT 14, *Bevan-Smith v TVNZ* [2004] NZHRRT 44 and *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10. The duty to afford proper opportunity to be heard is also reflected in the principle that it must be made clear to the agency that the agency is personally at risk in the investigation. See *Duffy v Drury* [2009] NZHRRT 30.

DECISION

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

> **[45.1]** The Tribunal presently has no jurisdiction to hear that part of the Director's claim which relates to alleged disclosures by ACC to Richmond Physiotherapy.
>
> **[45.2]** Paragraphs 10 to 13 of the statement of claim are accordingly struck out.
>
> **[45.3]** The Secretary is directed to convene a further teleconference so that the Chairperson can give such directions as may be necessary to allow the unaffected balance of the case to be set down for hearing.

Costs

[46] ACC seeks an award of costs and cites in support *Read v Van Rij* where in similar circumstances an award of $350 was made.

[47] We decline to award costs against the Director for the following reasons:

> **[47.1]** The "error" which has led to the striking out of the Richmond allegations in the statement of claim is not that of the Director. In good faith he relied on the Certificate of Investigation issued by the Privacy Commissioner. ACC did not take the jurisdiction point at the s 82(3) "hearing".
>
> **[47.2]** While ACC has been vindicated in asserting that the statutory process in the Act must be followed, that vindication is not against the Director, but against a non-party, namely the Privacy Commissioner.
>
> **[47.3]** ACC concedes that the Richmond matter can be made the subject of a complaint by the person aggrieved and that it will be possible for the Privacy Commissioner to undertake a brief investigation satisfying the requirements of the Act, and if necessary to bring the matter back before the Tribunal.
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> **[47.4]** For the reasons explained in *Haupini v SRCC Holdings Ltd (Costs)* [2013] NZHRRT 23 at [46]-[47], the Director performs an important public function under both the Human Rights Act 1993 and the Privacy Act 1993. In the experience of the Tribunal that function is always performed to a high standard. We see no strong or compelling reason for an award of costs at this early stage of the proceedings. Important though the jurisdiction objection may be, some sense of proportion must be kept. It was, in the end, a simple and straightforward point which has provided ACC with (potentially) only temporary relief.

.....	.....	.....
Mr RPG Haines QC	**Mr GJ Cook JP**	**Mr BK Neeson**
Chairperson	**Member**	**Member**