

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFF
- (2) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE SECOND DEFENDANT
- (3) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2014] NZHRRT 27

Reference No. HRRT 031/2013

UNDER THE PRIVACY ACT 1993

BETWEEN DEF

PLAINTIFF

AND ACCIDENT COMPENSATION CORPORATION

FIRST DEFENDANT

AND KLM

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Mr BK Neeson, Member

REPRESENTATION:

Ms L Caris for plaintiff

Ms I Reuvecamp for first defendant

Mr AH Waalkens QC and Ms V Knell for second defendant

Ms K Evans for Privacy Commissioner

DATE OF DECISION: 13 June 2014

DECISION OF TRIBUNAL ON JURISDICTION OBJECTION
BY SECOND DEFENDANT

Background – outline of positions

[1] In these proceedings filed on 29 October 2013 the plaintiff alleges that her ACC file containing personal information of a highly sensitive and confidential nature was stolen from the second defendant at a time when the second defendant had possession of the file for the purpose of interviewing the plaintiff in connection with her ACC claim. It is said that both defendants were in breach of the Health Information Privacy Code 1994, Rule 5 which sets out obligations relating to the storage and security of health information. The Privacy Commissioner concluded there had been no such breach.

[2] In a statement of reply filed on 22 November 2013 ACC admits that the file was stolen but denies any breach of legal duty. The affirmative defences pleaded are:

[2.1] ACC took adequate steps to ensure the health information about the plaintiff was protected against loss.

[2.2] ACC is not liable for the actions of the second defendant and denies the existence of an agency relationship between ACC and the second defendant.

[2.3] The plaintiff has not provided any evidence that any third party saw information relating to her. ACC denies that any third party obtained, misused, disclosed or accessed the plaintiff's personal information.

[3] For her part, by notice filed on 29 November 2013, the second defendant asserts that the Tribunal has no jurisdiction as against her because the plaintiff cannot establish that the terms of ss 82 and 83 of the Privacy Act 1993 have been satisfied.

[4] On 14 November 2013 the Privacy Commissioner gave notice pursuant to s 86(5) of the Privacy Act that he intends to appear and to be heard in these proceedings.

The second defendant's challenge to jurisdiction

[5] The second defendant submits that while in the present proceedings the Tribunal has jurisdiction to hear the plaintiff's complaint against the ACC, it has no jurisdiction in relation to the second defendant because:

[5.1] The second defendant is not a person in respect of whom an investigation was conducted by the Privacy Commissioner.

[5.2] The second defendant was not given an opportunity to be heard by the Privacy Commissioner during the investigation into the ACC.

[6] Through her counsel the second defendant has asserted the following facts:

[6.1] While the second defendant was put on notice by ACC that she was the subject of an internal investigation, she was not made aware of the fact that a complaint under the Privacy Act had been made by the plaintiff to the Privacy Commissioner.

[6.2] She had not been aware that the Privacy Commissioner had conducted an investigation under the Privacy Act until she received from the Tribunal notification of the present proceedings.

[7] These assertions have not been contested because:

[7.1] ACC has not taken a position on the objection to jurisdiction. In that respect it abides the decision of the Tribunal on the challenge.

[7.2] After the Chairperson issued a *Minute* on 28 February 2014 drawing attention to the absence of affidavit evidence establishing the facts on which the Tribunal was to decide the protest to jurisdiction, the Privacy Commissioner explicitly conceded the facts as asserted by the second defendant and advised that no evidence would be necessary.

[8] As will be seen, this concession is determinative of the outcome of the objection to jurisdiction.

Jurisdiction

[9] The circumstances in which the Tribunal has jurisdiction to hear matters under the Privacy Act are not unlimited. Indeed they are tightly circumscribed by ss 82 and 83 of the Act. This is fully explained in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike Out Application)* [2014] NZHRRT 1 (30 January 2014) (hereinafter *[NKR]*) at [18] to [42] and no point is served by repeating what is said there. It is sufficient to note that the scheme of the Act is that in the first instance complaints must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by ss 82 and 83 only where an investigation has been conducted by the Commissioner under Part 8 or where conciliation (under s 74) has not resulted in settlement. Before either ss 82 and 83 are engaged the following statutorily prescribed steps must be taken (see *[NKR]* at [25]):

[9.1] 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)).

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

[9.3] 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)).

[9.4] 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)).

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

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

[9.5.2] 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.

[10] While it is correct that satisfaction of the statutory process and in particular, of s 73, can occur by necessary implication (*[NKR]* at [27]) such implication must be "necessary" as compliance with prescribed statutory steps going to jurisdiction must not be easily left to be inferred. In the present case there is no room for implication or inference. The unchallenged evidence is that the second defendant was not aware of the complaint to

the Privacy Commissioner or of the Commissioner's investigation until she was served by the Tribunal with the present proceedings.

[11] As stated in *[NKR]* at [29], the critical and determinative point is whether the Commissioner complied with the mandatory duty in ss 70(2) and 73 to:

[11.1] Notify the person to whom the complaint relates that the Commissioner intends making an investigation into the matter; and

[11.2] Inform that person of the details of the complaint and of the right of that person to submit a written response to the complaint.

[12] On the facts neither step was taken.

[13] For the Privacy Commissioner (and the plaintiff) it is submitted that:

[13.1] Direct contact between the Commissioner and the person complained about is often necessary and the obvious way to proceed. However, sometimes implication will be enough (as recognised by the Tribunal in *[NKR]*). So for instance it should be sufficient to notify an employer (who is, absent any defence such as that in s 126(4), vicariously liable for the activities of the employee); to notify a principal (who is, absent any defence, liable for the actions of an agent); or to notify someone who purports to represent or be a liaison point for the person whose actions are alleged to breach privacy.

[13.2] The fact that indirect advice or information may suffice is particularly obvious in cases where the person receiving the formal notification of investigation must consult with the person whose actions are alleged to have interfered with privacy in order to be able to respond to the Commissioner. Common examples are when the complainant makes allegations about events to which the agency that is notified was not directly a party, such as a conversation between the complainant and an employee (as happened in *Duffy v Drury* [2009] NZHRRT 30). The facts do not necessarily need to be given to the Commissioner both by the individual who was involved in the conversation and by that person's employer. One or the other will suffice.

[13.3] If an employer or a principal raises a positive defence or refuses to be a point of liaison with the Commissioner, then the person concerned will have to be directly contacted. Otherwise that person cannot be assumed to be on notice of the complaint, let alone of any potential liability. At a practical level, the Commissioner also could not get the information needed for the investigation.

[14] However, as the facts of the present case are the other way and do not allow an argument based on implication or inference, we refrain from deciding the issues. As explained in *[NKR]* at [31], whether the statutory pre-requisites in ss 67(1), 70 and 73 have been satisfied is largely a question of fact.

[15] In the present case the facts establish that the second defendant was not aware she was a person in relation to whom a complaint under the Privacy Act had been made, did not know what the complaint (as against her) was and was not given an opportunity to be heard.

Conclusion

[16] It follows that the Tribunal does not, in the present proceedings, have jurisdiction to hear and determine the allegation that the second defendant has interfered with the plaintiff's privacy.

Jurisdiction – ruling of limited effect

[17] Our conclusion on jurisdiction does not mean that the plaintiff is without remedy as against the second defendant. It would be open to the plaintiff to make a complaint to the Privacy Commissioner under ss 67 and 68 of the Privacy Act that the second defendant has interfered with the plaintiff's privacy.

[18] Whether such complaint should be made is not for the Tribunal to say. It is for the plaintiff to decide.

DECISION

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

[19.1] In the present proceedings the Tribunal has no jurisdiction to hear that part of the plaintiff's claim which alleges that the second defendant interfered with the plaintiff's privacy.

[19.2] The second defendant is dismissed as a party to these proceedings.

[19.3] 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.

[19.4] The non-publication orders in relation to the plaintiff and in relation to the second defendant made by the Chairperson in the *Minute* issued on 3 March 2014 are hereby made final orders. Specifically:

[19.4.1] Publication of the name and occupation or of any other details which might lead to the identification of the plaintiff in these proceedings is prohibited.

[19.4.2] Publication of the name and occupation or of any other details which might lead to the identification of the second defendant in these proceedings is prohibited.

[19.4.3] There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

.....
Mr RPG Haines QC
Chairperson

.....
Mr GJ Cook JP
Member

.....
Mr BK Neeson
Member