IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 8**

	Reference No. HRRT 015/2011
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**MARGARET HETA**
	PLAINTIFF
AND	**MINISTRY OF SOCIAL DEVELOPMENT**
	DEFENDANT

AT ROTORUA

BEFORE:
Mr RPG Haines QC, Chairperson
Dr SJ Hickey, Member
Mr MJM Keefe, Member

REPRESENTATION:
Ms M Heta in person
Mrs D Harris and Ms L Hercus for defendant

DATE OF HEARING: 11, 12 and 13 March 2013

DATE OF DECISION: 21 March 2013

DECISION OF TRIBUNAL

Introduction

[1] For various periods since 1985 Ms Heta has been in receipt of a Domestic Purposes Benefit. Relevantly, she was in receipt of such benefit from 1 June 2001 to 1 March 2010.

[2] In November 2009 the Ministry of Social Development (the Ministry) commenced an investigation into an allegation that Ms Heta was living with her partner of many years, Mr Suresh Singh. Mr Singh is the father of Ms Heta's four children who at the end of 2009 were aged 15, 14, 8 and 4 respectively. The Domestic Purposes Benefit is not available to those living in a marriage type relationship.

[3] In these proceedings Ms Heta alleges that in the course of its investigation the Ministry interfered with her privacy by:

> **[3.1]** Failing to comply with cl 3 of the *Code of Conduct for Obtaining Information under Section 11 Social Security Act 1964* (the *Code of Conduct*) which requires (inter alia) that when seeking information or documents about a beneficiary the Ministry's investigating officer must first request the information or documents from the beneficiary; and
>
> **[3.2]** Failing to correct personal information held about Ms Heta.

[4] Ms Heta seeks a declaration that the Ministry interfered with her privacy in the two respects alleged. She also seeks damages for humiliation, loss of dignity and injury to feelings under s 66(1)(b)(iii) of the Privacy Act 1993. She does not advance her case under s 66(1)(b)(i) or (ii). See the *Minute* issued by the Chairperson on 21 February 2012.

[5] The issue in these proceedings is whether Ms Heta has established an interference with her privacy as alleged and emotional harm in the sense described. We intend addressing separately the two complaints as they are distinct from each other, although arising out of the same fraud investigation. There are two preliminary points.

The delay in hearing the case

[6] The statement of claim was filed by Ms Heta on 16 June 2011. Her four children were named as plaintiffs and there were five defendants. The orders sought from the Tribunal were of the widest kind, including the reinstatement of the Domestic Purposes Benefit and the dismissal of the criminal charges Ms Heta then faced in the District Court. By decision dated 9 November 2011 the Tribunal struck out the first to fifth defendants and the Ministry of Social Development was substituted as the sole defendant. The decision also identified certain jurisdictional issues and information was requested from the Privacy Commissioner. See the decision of the Tribunal given on 9 November 2011. In a further decision given on 9 February 2012 the Tribunal struck out Ms Heta's children as second plaintiffs.

[7] On 21 February 2012 the Chairperson convened a teleconference and set a timetable for the filing by the parties of their evidence with a view to the proceedings being heard at Rotorua on 14, 15 and 16 May 2012. See the *Minute* dated 21 February 2012. However, on 14 March 2012 the Secretary received advice that Ms Heta had been sentenced to a term of imprisonment and would not be in a position to meet the timetable dates. Nor would she be able to attend the hearing. A request was made that the matter be adjourned until Ms Heta was released. In a *Minute* issued on 23 March 2012 the Chairperson suspended the timetable for the duration of Ms Heta's term of imprisonment. Following a further teleconference held on 23 October 2012 the timetable was re-set with the intention that the hearing commence on 12 March 2013. See the *Minute* dated 23 October 2012. A further directions hearing was held on 14 February 2013 to ensure that the case would be ready to start on 11 March 2013. See the *Minute* dated 14 February 2013.

[8] It will be seen that the delay in hearing this case has been caused by the procedural issues raised by the statement of claim and by the preparatory stages being interrupted by Ms Heta's imprisonment.

The prosecution and conviction of Ms Heta for benefit fraud

[9] On 2 March 2012 Ms Heta was sentenced to 12 months imprisonment for three offences of benefit fraud. She had elected trial by jury but part way through her trial she pleaded guilty after an amended indictment was presented. The original indictment contained eight counts and alleged that Ms Heta had lived with Mr Singh throughout a period of five years and had received welfare benefits totalling nearly $87,000 for all of that period. The amended indictment contained only three counts and it much reduced the scope of the charges. The first count reduced the period over which benefits were wrongly claimed to five specific periods totalling 19 and a half months in all. The amount of the benefits obtained in those periods was reduced to $51,000. The other two counts alleged Ms Heta fraudulently completed Work and Income review forms on two occasions.

[10] The 12 month sentence of imprisonment was successfully challenged on appeal, the Court of Appeal substituting a sentence of eight months imprisonment. See *Heta v R* [2012] NZCA 267 (22 June 2012).

THE FIRST COMPLAINT – THE COLLECTION OF INFORMATION

[11] It is a general principle, reflected in information privacy Principle 2, that where an agency collects personal information, the agency should collect the information directly from the individual concerned. In the context of enquiries made by the Ministry where benefit fraud is suspected, this principle has been codified. This "code" has specific legislative recognition and a breach of the code can be the subject of complaint to the Privacy Commissioner and to this Tribunal. The explanation of how this has been achieved follows next.

The collection of information under the Social Security Act 1964 – the legislation

[12] Section 11 of the Social Security Act 1964 (the SSA) empowers the chief executive of the Ministry to require any person to provide the Ministry with such information as the chief executive requires, to produce any document in the custody or under the control of that person and to furnish copies or extracts from any document. A requirement under this provision is sometimes described as a "Section 11 Notice".

[13] Recognising that the power conferred by s 11 of the SSA must be balanced with duties governing the way in which such power is to be exercised, s 11B of the SSA imposes on the chief executive a duty to issue a code of conduct governing the obtaining of information by way of a Section 11 Notice. It is a requirement of s 11B that the code of conduct be drawn up by the chief executive in consultation with the Privacy Commissioner. Such code must include the matters specified in s 11C of the Act.

[14] The status of the *Code of Conduct* is addressed by s 11B(6) and (7). A person required to produce any information or document by way of a Section 11 Notice or who is the subject of any such information or document, may make a complaint to the Privacy Commissioner that the particular requirement breaches the *Code of Conduct* and Part 8 of the Privacy Act applies to any such complaint as if the *Code of Conduct* were a code of practice issued under Part 6 of the Privacy Act. Accordingly it is via s 11B of the SSA that this Tribunal has jurisdiction over Ms Heta's complaint that the Ministry breached the *Code of Conduct* in the course of its investigation into her alleged benefit fraud. Section 11B provides

> **11B Code of conduct applying to obtaining information under section 11**

(1) The chief executive, in consultation with the Privacy Commissioner appointed under the Privacy Act 1993, must, within 3 months after the commencement of this section, issue a code of conduct that applies in respect of requirements to supply information or documents under section 11(1), and the chief executive, and every officer of the department acting under the delegation of the chief executive must comply with that code of conduct in relation to making any such requirement.
(2) The code of conduct—
(a) must include the matters specified in section 11C; and
(b) may include restrictions on obtaining—
(i) specified classes of information or documents; and
(ii) information or documents from specified classes of persons or from persons in specified relationships—
pursuant to a requirement under section 11(1); and
(c) must specify procedures applying to the obtaining of information or documents under section 11.
(3) The chief executive may from time to time, in consultation with the Privacy Commissioner, amend the code of conduct, or revoke the code of conduct and issue a new code of conduct.
(4) Nothing in the code of conduct may derogate from any code of practice issued by the Privacy Commissioner under Part 6 of the Privacy Act 1993 that applies to the information required under section 11, and the chief executive, in consultation with the Privacy Commissioner, must amend the code of conduct to conform with any such code of practice. This subsection is affected by subsection (5).
(5) Without limiting the general power to make regulations conferred by section 132, the Governor-General may, on the advice of the Minister given after consultation with the Privacy Commissioner, by Order in Council, make regulations under that section authorising the chief executive to obtain—
(a) any specified class of information or document; or
(b) information or documents from any specified class of persons; or
(c) information or documents in any specified manner—
pursuant to a requirement under section 11(1), despite the fact that the making of that requirement would otherwise be in breach of any code of practice issued by the Privacy Commissioner under Part 6 of the Privacy Act 1993.
(6) Any person who is—
(a) required to produce any information or document pursuant to a requirement under section 11(1); or
(b) the subject of any such information or document—
may make a complaint to the Privacy Commissioner that the requirement breaches the code of conduct issued pursuant to this section.
(7) Part 8 of the Privacy Act 1993 applies to any such complaint as if the code of conduct were a code of practice issued under Part 6 of the Privacy Act 1993.
(8) As soon as practicable after issuing any code of conduct and any amendment to it under this section, the chief executive must cause it to be published in a form accessible to the public.

[15] It is also necessary to take into account the statutory stipulation in s 11C of the SSA that the *Code of Conduct* provide that any information or document required by the chief executive be first sought from the beneficiary. The complaint made by Ms Heta is that this requirement was breached. The Ministry concedes that in two instances there was indeed a breach of the *Code of Conduct* in this respect:

11C Matters to be included in code of conduct

(1) The code of conduct established under section 11B must contain the following matters:
(a) provisions—
(i) requiring any information or document to be first sought from a beneficiary; and
(ii) allowing the beneficiary a reasonable time to provide it—
before a requirement under section 11(1) is issued to a person other than the beneficiary, except where compliance with such provision would prejudice the maintenance of the law:
(b) a provision prohibiting a requirement under section 11(1) being made in respect of a beneficiary to any person (not being the beneficiary, an employer or former employer of the beneficiary, a financial institution, or a law practitioner) unless there is reasonable cause to make a requirement under that section:
(c) a provision prohibiting a requirement under section 11(1) being made to an employer in respect of any information or document that relates solely to the marital or relationship status of an employee or former employee of that employer:

(d) provisions otherwise restricting requirements under section 11(1) made to employers to specified information relating to that employment and the address of the employee or former employee.

(2) In subsection (1)(b), *reasonable cause* includes—

(a) cause to suspect that the beneficiary has committed an offence under this Act or has obtained by fraud any payment or credit or advance under this Act:

(b) the fact that the beneficiary or a spouse or partner of that beneficiary has failed within a reasonable time, or refused, to provide any information or produce any document in accordance with a request or requirement made to that person in accordance with subsection (1)(a).

The *Code of Conduct*

[16] The *Code of Conduct* which applied at the relevant time was the version approved by the chief executive on 18 May 2005. Clause 3 of the *Code of Conduct* reflected s 11C(1)(a) by providing:

> **3 Steps to be taken prior to giving a section 11 notice**
>
> 3.1 When seeking information or documents about a beneficiary and/or any other person, the officer must, -
>
> a) first request the information or documents from the beneficiary and/or that other person, and
>
> b) give the beneficiary and/or that other person a reasonable time to provide the information or documents and inform the beneficiary and/or that other person of that time –
>
> except where the officer has reasonable grounds to believe that compliance would prejudice the maintenance of the law.
>
> 3.2 Notwithstanding clause 3.1, an officer may give a section 11 notice to a beneficiary requiring that beneficiary to produce information or documents about that beneficiary.
>
> 3.3 A request under clause 3.1 must comply with Information Privacy Principle 3 of the Privacy Act.

The terms of the request for information addressed to Ms Heta

[17] On 22 January 2010 Mr Tracy Norman, an investigator with the Ministry's National Fraud Unit visited Ms Heta at her home in Rotorua and explained that he was investigating an allegation that she was living with Mr Singh in a marriage type relationship. After a short discussion it was agreed that Ms Heta would attend an interview with Mr Norman at the Ministry's Rotorua office on 26 January 2010.

[18] On 25 January 2010 Mr Norman sent a letter to Ms Heta under the authority of s 11 of the SSA requesting that she supply specified information by 8 February 2010 and advising her that if she was unable to provide the information he could seek the information from other sources under s 11 of the SSA. The letter was in the following terms. It is to be noted that no information was requested in relation to Immigration New Zealand or Sky Network Television Ltd (Sky):

> I have received information regarding a change in your circumstances that may affect your entitlement to benefit.
>
> The information is that you are living in a relationship in the nature of marriage with Suresh Singh. Because of this it is necessary for us to look into your past and present entitlement to benefit.
>
> Please supply the following information for the period January 2001 to current, in respect of yourself and Suresh Singh to assist me with my enquiries. This information is requested under the authority of Section 11 of the Social Security Act 1964:

Bank Accounts

…

CYFS copies of all records held for your children and yourself.

Hire Purchase Agreements

…

Loans/Mortgage/Credit Cards

…

Insurance

…

Land Transport Office/Police

…

Power

…

Phone

…

Tenancy

…

Hospital

…

Employment

…

Schools

…

Date information required

I would appreciate the above information or documents being supplied to me by 8 February 2010.

If you are unable to provide this information by the above date please contact me on (07) 928-8378 as soon as possible.

If you are unable to provide this information I can seek the information from other sources at no cost to you, under the terms of Section 11 of the Social Security Act 1964.

[19] On the following day, 26 January 2010, Ms Heta was interviewed by Mr Norman. It is not necessary for the purpose of this decision to give a detailed account of what was said at that interview. It is sufficient to note that Ms Heta told Mr Norman that she had assisted Mr Singh to gain New Zealand residence and that he (Mr Singh) paid for the Sky television subscription at Ms Heta's home.

[20] On 8 February 2010 Ms Heta responded to the Section 11 Notice by handing over some information. In the opinion of Mr Norman that information had either not been requested or was irrelevant. Ms Heta did not request an extension of time to submit further information and Mr Norman did not go back to her a second time.

[21] On 9 and 10 February 2010 Mr Norman issued 28 notices under s 11 of the SSA to various agencies, including Immigration New Zealand and Sky. It was not until approximately four to five months later, following a complaint made by Ms Heta to the Privacy Commissioner, that Mr Norman became aware that he had failed to first request from Ms Heta the information he had subsequently sought from Immigration New Zealand and Sky.

[22] Mr Norman said that he had never made a mistake like this before. In this regard his evidence was supported by other witnesses from the Ministry who told the Tribunal that Mr Norman was an experienced and careful investigator who was not known to make mistakes.

[23] The complaint referred to is recorded in a letter from the Office of the Privacy Commissioner dated 22 June 2010 in which the Ministry was, for the first time, given

notice that Ms Heta had made a complaint in very general terms that by obtaining information from other individuals or third parties the Ministry had interfered with her privacy. The Ministry was asked (inter alia) to provide the Privacy Commissioner with information about the Section 11 Notices and in particular:

> If information was obtained from third parties under section 11 of the SSA, was Ms Heta given the opportunity to provide that information first? If so, it would be helpful if you could provide me with details of that process.

[24] It was in addressing this enquiry that the oversight in relation to Immigration New Zealand and Sky was discovered.

[25] In a detailed five page letter dated 19 August 2010 the Ministry responded to the Privacy Commissioner and acknowledged the oversight:

> The Ministry inadvertently overlooked seeking information in the first instance from Ms Heta with respect to two information sources – Immigration NZ and Sky Network. The Ministry should have given Ms Heta an opportunity to supply this information before seeking the information directly from the third party agencies that held it.
>
> The staff member who issued the section 11 requests in these two instances has stated that it was an unintentional oversight. He had concluded that Ms Heta had failed to comply fully with the initial request for information; and subsequently made section 11 requests to the third parties – this included Immigration NZ and Sky Network. The staff member did not intentionally seek to circumvent the code of conduct for section 11 requests and this oversight is regretted.
> …
>
> The Ministry accepts that it did not follow the section 11 Code of Conduct correctly at clause 3.1, in respect of the limited information obtained from the insurance company and the District Health Board. The Ministry sincerely apologises for that breach, which was unintentional and contrary (of course) to the Ministry's own internal policy as well as the Code.
>
> Regardless of the fact that the Ministry has committed an error that resulted in a breach of the Code, it is the Ministry's view that no harm to Ms Heta has occurred as a result of that breach. The limited information obtained from the insurance company and the DHB was a very small and relatively unimportant part of a significant amount of other documentary and interview evidence in an investigation that has resulted in a criminal prosecution for over $85,000 in benefit fraud. Further, Ms Heta provided only a small amount of the information that was requested from her in the preliminary request of the Ministry. The documents that she did provide are documents that might typically be kept at home on a person's own file. Other documents that were not as easily accessible were not provided and thus the Ministry needed to exercise its section 11 powers to obtain the information. In the Ministry's view the insurance and DHB documents are in that category and are highly unlikely to have been supplied by Ms Heta even if she had been advised that the Ministry wanted them. The information she provided on 8 February 2010 was deficient and no request for an extension or offer to supply the information was made. The Ministry wishes to emphasise that it accepts that it has made an inadvertent error that has resulted in a breach of the Code and wishes to apologise for that. The matters referred to in this paragraph are noted only in regard to the consideration of the issue of harm.

[26] In evidence it was explained that the references in this letter dated 19 August 2010 to an insurance company and to the District Health Board are errors and should read "Immigration New Zealand" and "Sky Television" respectively. Contextually this is certainly correct, particularly given that the Ministry's letter to the Privacy Commissioner dated 19 August 2010 is largely based on an internal Ministry report prepared by Ms S Tuiri in which no such errors were made.

[27] After the Privacy Commissioner ruled that there had been no breach of the *Code of Conduct*, Ms Heta brought these present proceedings.

The case for Ms Heta

[28] The Ministry having conceded a breach of cl 3 of the *Code of Conduct* in relation to Immigration New Zealand and Sky, the substantive issue for determination by the Tribunal is whether Ms Heta has established an interference with privacy as defined in s 66 of the Privacy Act. To succeed she must satisfy the Tribunal on the balance of probabilities that the Ministry's actions resulted in significant humiliation, significant loss of dignity or significant injury to feelings. She submits that she has given sufficient evidence to so satisfy the Tribunal.

[29] In the conduct of her case at the hearing Ms Heta broadened the scope of her challenge notwithstanding that the limited scope of the Tribunal's jurisdiction had earlier been explained during the various teleconferences and addressed in the several *Minutes* and *Decisions*. For example, Ms Heta attempted to draw the Tribunal into pronouncing upon the legality of aspects of the investigation and prosecution process, on the validity of the Section 11 Notices, on the actions of Immigration New Zealand in allegedly breaching her privacy and that of Mr Singh. She also complained about the alleged provision by the Ministry of incorrect information to the Lakes District Health Board. As repeatedly explained to Ms Heta during the hearing, these complaints lie outside the Tribunal's jurisdiction and will not be addressed as they were not matters investigated by the Privacy Commissioner. The effect of ss 82(1) and 83 of the Privacy Act is that the Tribunal only has jurisdiction over "any action" alleged to be an interference with the privacy of an individual and in relation to which the Privacy Commissioner has conducted an investigation. The Tribunal is bound by the Certificates of Investigation issued by the Privacy Commissioner on 6 October 2010 and 1 September 2011 respectively.

The case for the Ministry

[30] The submission for the Ministry, in essence, is that while the Ministry admits to a breach of cl 3 of the *Code of Conduct* and has apologised for that breach, no significant humiliation, significant loss of dignity or significant injury to the feelings of Ms Heta had resulted and her claim must fail as no interference with privacy (as defined in s 66(1) of the Privacy Act) has occurred. In the alternative the Tribunal should either exercise its discretion to refuse damages or damages should be at the lower end of the spectrum because of the following mitigating factors:

> **[30.1]** Ms Heta was aware at all times that the Ministry had commenced an investigation into her affairs in relation to her receipt of a benefit.
>
> **[30.2]** Ms Heta was aware, following the interviews with the investigator, that immigration matters were of interest to the Ministry along with domestic affairs and that a broad range of information was sought.
>
> **[30.3]** Ms Heta had provided insufficient information in response to the Ministry's request for documentation. Consequently it was necessary for the Ministry to write directly to all of the agencies nominated by the Ministry to request information about Ms Heta.
>
> **[30.4]** But for an administrative error on the part of the Ministry, the requests to the agencies for information concerning Ms Heta were otherwise a matter of

standard procedure for the Ministry and were carried out in compliance with the *Code of Conduct*.

[30.5] The Ministry had accepted the error from the outset and apologised for that error.

[30.6] If the Tribunal was satisfied that an interference with privacy had occurred, the Ministry would not oppose a declaration under s 85(1)(a) that the actions of the Ministry constituted a breach of the *Code of Conduct* and that a formal apology be issued.

Discussion

[31] The Tribunal does not have jurisdiction to grant a remedy under s 85 of the Privacy Act unless it has been satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of the plaintiff.

[32] The term "interference with privacy" is defined in s 66 of the Privacy Act. A number of elements must be established by a plaintiff. Those elements vary according to whether the particular facts of the case come within the s 66(1) limb of the definition or within the s 66(2) limb. In the present case s 66(2) has no application and it is intended to address only the requirements of s 66(1) which provides:

> **66 Interference with privacy**
>
> (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
>
> (a) in relation to that individual,—
>
> (i) the action breaches an information privacy principle; or
>
> (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
>
> (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
>
> (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
>
> (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
>
> (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
>
> (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
>
> (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
>
> (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

[33] As can be seen, a simple failure by the Ministry to comply with the *Code of Conduct* is not on its own sufficient to establish an interference with privacy. Section 66(1) requires the Tribunal to be satisfied also that the breach has caused or resulted in, one of the forms of harm or detriment listed in s 66(1)(b).

[34] In simple terms, to establish an interference with privacy as defined in s 66(1), Ms Heta is required to satisfy the Tribunal, on the balance of probabilities that:

[34.1] There has been a breach of the *Code of Conduct*.

[34.2] The breach has caused significant humiliation, significant loss of dignity or significant injury to her feelings.

[35] The first point is conceded by the Ministry. As to the second point we are of the view that no significant humiliation, loss of dignity or injury to feelings has been established by Ms Heta. It follows that she has not established an interference with privacy as defined in s 66(1). Our reasons for this finding are:

[35.1] Ms Heta is an intelligent and capable individual. In the conduct of her case before the Tribunal she has demonstrated a robust, practical and down to earth attitude to life. She has shown herself to be well practised in dealing with officialdom, a keen appreciator of her rights and an adept user of processes which permit her to challenge official decisions. The contention that she experienced significant humiliation, significant loss of dignity or significant injury to feelings because the Ministry did not first ask her to provide information and documents relating to Mr Singh's immigration matters and information and documents relating to Sky flies in the face of her character.

[35.2] Ms Heta has not shown that had opportunity been given to her to provide the immigration and Sky information first, she had information to provide. In this regard it is to be recalled that in relation to the other matters requested by Mr Norman in his letter dated 25 January 2010, Ms Heta's response was virtually meaningless in that she provided documents which had either not been requested or which were irrelevant.

[35.3] There was nothing intrinsically embarrassing about the information sought and obtained by the Ministry from Immigration New Zealand and Sky. There are no grounds for Ms Heta to claim that it would have been better for the information to have come from her in the first instance rather than from the two agencies in question.

[35.4] Our assessment is reinforced by the fact that it was clear from the at times emotional evidence given by Ms Heta at the hearing that such humiliation, loss of dignity and injury to feelings she claims to have experienced was caused not by the Ministry's minor, if not insignificant breach of the *Code of Conduct*, but from the fact that she was investigated and prosecuted for benefit fraud. Her evidence included reference to the financial embarrassment which followed upon her benefit being cancelled, the difficulties inherent in trying to provide for her children, the intense publicity in Rotorua about her prosecution and guilty pleas and the initial 12 month sentence of imprisonment (later reduced to 8 months). In addition she told the Tribunal that she had stood by Mr Singh throughout his immigration difficulties only to find that on his return to New Zealand he had become an alcoholic. He accidentally burnt her house down causing her devastating financial loss. When the Ministry later used the Immigration New Zealand file to help establish that she was living in a marriage type relationship with Mr Singh she felt that the Ministry had turned into "something nasty" her efforts at maintaining her relationship with Mr Singh and at keeping the family together. On release from prison she was homeless and felt that she had lost everything. Her humiliation, loss of dignity and injury to feeling is summarised in her written submissions dated 12 October 2011 in these terms:

> The plaintiff contends that MSD has figuratively raped her emotionally, financially, mentally and socially. Details of this case have been printed in the Rotorua Daily Post (Oct 2010 and Oct 2011).

Even so, there is no causative link between the emotional harm described by Ms Heta and the Ministry's admitted failure to comply with cl 3 of the *Code of*

Conduct. Without that link the claim must fail: *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33] and [34].

[35.5] As Mrs Harris submitted for the Ministry, Ms Heta's real complaint is that the Ministry has investigative powers under s 11 of the SSA and uses those powers. Ms Heta virtually conceded the point when she said in her evidence that it was humiliating that the Ministry used against her the information obtained from Immigration New Zealand and Sky.

Conclusion on the first complaint – the collection of information

[36] Our conclusions on the first complaint are:

[36.1] The Ministry breached the *Code of Conduct*, cl 3 by failing to first request from Ms Heta information and documents relating to her support of Mr Singh's immigration application and the installation of Sky television in her home. This much is conceded by the Ministry and an apology has been given to Ms Heta.

[36.2] However, Ms Heta did not as a consequence of that breach experience significant humiliation, significant loss of dignity or significant injury to feelings.

[36.3] It follows that no interference with her privacy as defined in s 66 of the Privacy Act has been established.

[36.4] The Tribunal not having been satisfied on the balance of probabilities that any action of the Ministry was an interference with the privacy of Ms Heta, the first cause of action is dismissed.

THE SECOND COMPLAINT – THE CORRECTION OF INFORMATION

How the error came about

[37] It is to be recalled that Mr Norman first interviewed Ms Heta at her home on 22 January 2010 and an interview took place at the office of the Ministry in Rotorua on 26 January 2010. On 4 March 2010 Ms Heta's domestic purposes benefit was suspended by the Ministry's National Fraud Investigation Unit as it was believed she was in a marriage type relationship with Mr Singh.

[38] On 15 March 2010 Ms Heta met with Ms N Tupe, a case manager with Work and Income at the Rotorua Community Link. The purpose of the appointment was for Ms Heta to apply for her Domestic Purposes Benefit to be reinstated. During the interview Ms Tupe discussed with Ms Heta the guidelines for determining whether a marriage type relationship existed. In this discussion Ms Heta disputed being in such relationship with Mr Singh. Ms Tupe described her as being "adamant" on the point.

[39] Either during the interview or immediately thereafter Ms Tupe compiled a case note which was then entered into the Ministry's database. Unfortunately the case note contained an error in that the last sentence stated:

> client is adamant that her and suresh do live in a marriage type relatioship.

What Ms Tupe intended to record was:

> client is adamant that her and suresh do **not** live in a marriage type relatioship.

[40] The full file note, recorded as being created on 15 March 2010 at 11:04:53, read:

Client:	Margaret Heta
Swn:	310-779-874
Created:	15/03/2010 11:04:53
Author:	Ngawaiata Tupe
Type:	Face to face contact
Subject:	Applications Follow Up
Description:	DPB application

Manual Letter Sent No
Comments discussion held with client and notes taken re: relationship with ex-partner
client advised she is disputing the investigation and debt which has been created for MTR.
guidelines to establish if a relationship exsists discussed and completed by client.
client is adamant that her and suresh do live in a marriage type relatioship.

[41] The omission of the negative "not" was, of course, highly significant. Ms Tupe said it was an oversight and we are satisfied that this was indeed the case. Read as a whole, the file note makes it clear that Ms Heta did not accept that she was living in a marriage type relationship and she was complaining that her Domestic Purposes Benefit had been cancelled.

[42] A short time thereafter, probably on or about 10 June 2010, Ms Heta obtained a copy of the case note under the Privacy Act. The copy given to her records that it was printed on 10 June 2010.

[43] On 8 July 2010 Ms Heta met with Ms DM Brown, an Assistant Service Manager at Rotorua Community Link, to discuss the fraud charges and the debt which had been raised by the Ministry. Ms Brown's account of this meeting is as follows:

> **[43.1]** Ms Heta said she was unhappy with the information contained in the case note on her file dated 15 March 2010 11:04:53 in that the note recorded that she was adamant she and Mr Singh were living in a relationship in the nature of marriage. Ms Heta stressed that she had not said this. Ms Brown informed her that she would note her concerns in her file.
>
> **[43.2]** Ms Brown drafted a case note for Ms Heta's file and specifically included a statement that she (Ms Heta) did not say she was living in a marriage type relationship as recorded in the case note dated 15 March 2010 11:04:53. Ms Brown said that because she met with Ms Heta at 2pm on 8 July 2010 and entered her file note at 2:24pm, she assumes that she entered the note while Ms Heta was still at her desk. Ms Brown believes she would have explained to Ms Heta what she was doing and why.
>
> **[43.3]** Ms Brown linked her note to two earlier case notes dated (respectively) 15 March 2010 11:04:53 and 15 March 2010 14:51:10 to ensure anyone reading the notes would be aware Ms Heta considered the earlier note of 15 March 2010 11:04:53 to be inaccurate. She included Ms Heta's comments that she was not living in a marriage type relationship. In doing so Ms Brown considered that she had made the necessary corrections as requested by Ms Heta.
>
> **[43.4]** Ms Brown met with Ms Heta again on 14 April 2011 to discuss her domestic purposes benefit application. As far as she can recall Ms Heta did not discuss with Ms Brown the concerns relating to the 15 March 2010 11:04:53 case note during this meeting.

[44] The reason why Ms Brown linked her case note to the two made on 15 March 2010 is that it is not possible to correct a case note once it is entered into the Ministry's

computer system. This is to protect the integrity of the system. Any potential difficulty is overcome by linking case notes where necessary.

[45] Ms Heta disputes the evidence of Ms Brown that she (Ms Brown) would have explained to Ms Heta what she was doing and why. We prefer the evidence of Ms Brown because she made the correction at the request of Ms Heta at a meeting scheduled for 2pm. The timing of the electronic note (2:24pm) provides strong support for the inference that the correction was made while Ms Heta was still at Ms Brown's desk. As previously mentioned, Ms Heta is keenly aware of her rights, articulate and on occasion forceful. Given the intensity of Ms Heta's feelings about the inaccuracy in the 15 March 2010 11:04:53 case note, it is inherently improbable that Ms Heta, after requesting that the correction be made, did not insist on receiving a clear assurance by Ms Brown that the correction had been entered into the system. Ms Brown is in all probability correct that Ms Heta was still at her desk when the correction was made and that she (Ms Brown) explained what she was doing and why. It is highly unlikely that Ms Heta did not ask for and did not receive such assurance. In addition, forceful a person as she is, Ms Heta did not in the post-8 July 2010 period ever seek correction of the error by approaching the Ministry again over the matter. Nor did she seek confirmation that the correction had been made. Had she not been satisfied by Ms Brown on 8 July 2010 that the correction had been made, we have no doubt that Ms Heta would have made a complaint to the Ministry.

[46] Instead, at some later point in time which Ms Heta could not identify, she made a complaint to the Privacy Commissioner. It was not until ten months after the meeting with Ms Brown that the Privacy Commissioner on 4 May 2011 wrote to the Ministry reporting that Ms Heta had made a complaint that the correction requested by her had not been made. This was the first the Ministry knew of any post-8 July 2010 complaint.

[47] In responding to this inquiry by the Privacy Commissioner, the Ministry appears to have overlooked the fact that the correction sought by Ms Heta had already been made by Ms Brown on 8 July 2010 for the Ministry took the following steps:

> **[47.1]** The case note dated 15 March 2010 11:04:53 was deleted on 13 May 2011.
>
> **[47.2]** A letter was sent to the Privacy Commissioner on 2 June 2011 acknowledging that the case note should have read:
>
> > Client is adamant that her and suresh do **not** live in a marriage type relationship.
>
> In this letter the Ministry also acknowledged that Ms Heta had drawn attention to the error on 8 July 2010 and apologised for the delay in making the correction. As to this apology it might be observed that the author of the Ministry's letter did not appear to have then appreciated that a Principle 7 correction had in fact been made by Ms Brown on 8 July 2010 when it had been requested on that date.

[48] By letter dated 27 June 2011 the Office of the Privacy Commissioner reported that Ms Heta still wanted the statement of correction added to the note of 15 March 2010 11:04:53. The author of the letter observed that this would mean that the Ministry would have to recreate the deleted case note so that the statement of correction could be added. It was also stated that Ms Heta wanted a direct apology from the Ministry.

[49] On 9 August 2011 the Ministry created a new note in which the correction was recorded. This note was then added to Ms Heta's file. A short time later the phrasing of

the note was reviewed by the Ministry's National Office and a decision taken that it should be improved upon. On 5 September 2011 a further correction was entered.

[50] By letter dated 23 August 2011 the Ministry wrote to Ms Heta apologising for the error and for the "delay" in responding to her request that the case note of 15 March 2010 11:04:53 be corrected.

The case for Ms Heta

[51] Ms Heta submits that information privacy Principle 7 was breached by the Ministry when it failed to make the correction requested by her on 8 July 2010 and in the alternative, by failing to attach to the information a statement of the correction sought but not made. She seeks damages for humiliation, loss of dignity and injury to feelings.

The case for the Ministry

[52] The Ministry submits that the correction was made on the first and only occasion on which the Ministry was asked directly by Ms Heta for the correction to be made, being the occasion when Ms Heta met with Ms Brown on 8 July 2010. The Ministry submits that the correction was made by Ms Brown on that date within minutes of receiving Ms Heta's request. In the alternative the Ministry submits in the first alternative that the error was deleted when the case note was deleted on 13 May 2011. In the further alternative, if the Tribunal considers that the Ministry's initial response does not constitute a correction for the purposes of Principle 7(2), the Ministry addressed Ms Heta's request consistently with Principle 7(3). That principle allows for situations where an agency is not willing to correct information. In such circumstance an agency will not be in breach of Principle 7 where it has taken reasonable steps to ensure the requestor's statement is read in conjunction with the allegedly offending information. When on 8 July 2010 Ms Heta requested the 15 March 2010 11:04:53 case note be corrected the Ministry's electronic record keeping system was not able to amend or delete the text of that note. In the circumstances it took reasonable steps to accommodate Ms Heta's request by ensuring her correcting statement would be read with the offending note. The Tribunal is asked to take into account the fact that the Ministry worked cooperatively with the Office of the Privacy Commissioner, eventually recreating the original file note so that the statement of correction could be added.

Discussion

[53] Principle 7 of the information privacy principles is the necessary and logical extension of the right of an individual to have access to personal information held by an agency. It is through Principle 7 that the individual is able to request correction of the information or to request that there be attached to the information a statement of the correction sought but not made:

> Principle 7
>
> *Correction of personal information*
>
> (1) Where an agency holds personal information, the individual concerned shall be entitled—
>
> (a) to request correction of the information; and
>
> (b) to request that there be attached to the information a statement of the correction sought but not made.
>
> (2) An agency that holds personal information shall, if so requested by the individual concerned or on its own initiative, take such steps (if any) to correct that information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading.

> (3) Where an agency that holds personal information is not willing to correct that information in accordance with a request by the individual concerned, the agency shall, if so requested by the individual concerned, take such steps (if any) as are reasonable in the circumstances to attach to the information, in such a manner that it will always be read with the information, any statement provided by that individual of the correction sought.
>
> (4) Where the agency has taken steps under subclause (2) or subclause (3), the agency shall, if reasonably practicable, inform each person or body or agency to whom the personal information has been disclosed of those steps.
>
> (5) Where an agency receives a request made pursuant to subclause (1), the agency shall inform the individual concerned of the action taken as a result of the request.

[54] The term "correct" is defined in s 2 of the Privacy Act:

> **correct**, in relation to personal information, means to alter that information by way of correction, deletion, or addition; and **correction** has a corresponding meaning

[55] A request made pursuant to subclause (1) of Principle 7 for correction of personal information is an information privacy request (see s 33 of the Privacy Act) and the prescribed statutory period within which a decision on the request must be made is that stipulated by s 40 of the Act, namely 20 working days after the day on which the request is received by the agency. Curiously, the failure by an agency to comply with this time limit does not appear to be covered by the deeming provisions of s 66(3) and (4). The point is of no relevance to the present case given that Ms Brown made a decision on the request on the day it was made (8 July 2010) and an entry was simultaneously made in Ms Heta's file recording that she did not say on 15 March 2010 that she was living in a marriage type relationship. This correction was linked to the case note of 15 March 2010 11:04:53.

[56] Ms Heta did not dispute that Ms Brown's case note was a correction of the error. The concession was properly made.

[57] But even if the case note is to be treated as an attachment of a correction sought but not made, Principle 7(3) was complied with in that the Ministry took reasonable steps to ensure that the correcting statement sought by Ms Heta would be read with the case note in which the error was made.

[58] A refusal to correct personal information is within the definition of the term "interference with privacy". See s 66(2). If the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it has jurisdiction to grant one or more of the remedies set out in s 85(1) of the Privacy Act. In this context a plaintiff does not have to establish that any humiliation, loss of dignity or injury to feelings is "significant".

[59] The difficulties faced by Ms Heta are:

> **[59.1]** When she requested correction of the information on 8 July 2010, Ms Brown immediately made the correction.
>
> **[59.2]** In the alternative, Ms Brown recorded the request for correction and linked that request to the original file note of 15 March 2010 11:04:53. The linking of the two file notes was reasonable in the circumstances given that the integrity imperative did not allow the original file note of 15 March 2010 11:04:53 to be altered, amended or endorsed in any way. We have also accepted Ms Brown's evidence that at the meeting she would have explained to Ms Heta what she was doing and why.

[59.3] Ms Heta did not thereafter make any complaint to the Ministry about the file note of 15 March 2010 11:04:53. Given her strongly held view that the Ministry was acting unfairly, improperly and unlawfully in asserting that she was in a marriage type relationship with Mr Singh, that she was under investigation for benefit fraud and indeed was subsequently prosecuted it is remarkable that Ms Heta made nothing more of the incorrect file note in her dealings with the Ministry and made no direct complaint to it that it was in breach of Principle 7. In these circumstances no humiliation, loss of dignity or injury to feeling has been established, or at least nothing which has a causative connection to a failure to correct the case note of 15 March 2010 11:04:53.

Conclusion on the second complaint – the correction of information

[60] As we can find no breach of Principle 7 it follows that we are not satisfied on the balance of probabilities that any action of the Ministry was an interference with the privacy of Ms Heta. The second cause of action must be dismissed.

FORMAL ORDER

[61] For the foregoing reasons the decision of the Tribunal is that no interference with the privacy of Ms Heta has been established either in relation to the collection of information or in relation to the correction of information. The proceedings are dismissed.

Costs

[62] At the conclusion of the hearing on 13 March 2010 there was a brief discussion of costs but Mrs Harris did not then have instructions. In case an application for costs is intended by the Ministry that application will be dealt with according to the following timetable:

[62.1] Any application by the Ministry is to be filed and served, along with any submissions, by 5pm on Friday 12 April 2013.

[62.2] The submissions by Ms Heta are to be filed and served by 5pm on Friday 19 April 2013.

[63.3] The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served without any further oral hearing.

[63.4] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Dr SJ Hickey**	**Mr MJM Keefe**
Chairperson	**Member**	**Member**