

Reference No. HRRT 043/2017

UNDER THE PRIVACY ACT 1993

IN THE MATTER OF
INTENDED PROCEEDINGS BY MICHAEL TAI RAKENA

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Mr RK Musuku, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mr M Tai Rakena in person

Ms V McCall for intended defendant (Chief Executive, Department of Corrections)

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 23 February 2018

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

Introduction

[1] The issue for determination is whether these intended proceedings are to be accepted for filing. Our decision is that as the Tribunal lacks jurisdiction to hear the intended claim the answer is “No”. For additional background material reference can be made to *Re Tai Rakena (Rejection of Statement of Claim)* [2017] NZHRRT 27, a decision in which another set of intended proceedings were likewise rejected for filing.

[2] In October 2015 Mr Tai Rakena was serving a sentence of imprisonment at Rimutaka Prison. On or about 29 October 2015 he made a request to the Health Centre for access to his medical notes for the period 20 July 2015 to 1 August 2015. In compliance with that request the Centre printed two sheets of A4 paper containing the requested information.

¹ [This decision is to be cited as *Re Tai Rakena No. 2 (Rejection of Statement of Claim)* [2018] NZHRRT 5]

[3] At approximately 9:00 am on 29 October 2015 a nurse checked the location of Mr Tai Rakena's cell so that the notes could be delivered to him in the course of the afternoon medication round. Unfortunately, in the period of time between that check and the afternoon round, Mr Tai Rakena was moved to a different cell. Consequently, when the notes were given to the prisoner then occupying the cell in question, they were handed to the wrong person. During the morning medication round the next day that prisoner returned the two sheets of paper.

[4] Mr Tai Rakena complained to the Privacy Commissioner that release of these two pages amounted to an interference with his (Mr Tai Rakena's) privacy. Being dissatisfied with the Commissioner's finding that no interference had been established, Mr Tai Rakena commenced proceedings before the Tribunal in HRRT058/2016. To satisfy the jurisdictional requirement that a plaintiff demonstrate that a prior investigation has been carried out by the Privacy Commissioner, Mr Tai Rakena submitted a certificate of investigation having the reference number C/28243 issued by the Privacy Commissioner on 15 December 2016. This certificate identified that the matter of the investigation was:

In October 2015 the Department of Corrections gave information relating to Mr Tai Rakena's medical treatment to another prisoner in error.

The Commissioner's opinion was stated in the following terms:

Breach of rule 5. No interference [with privacy] as Mr Tai Rakena did not demonstrate he had suffered harm as a result of the disclosure which met the threshold in section 66 of the Privacy Act.

[5] Following an oral hearing at Whanganui on 22 June 2017 the Tribunal by decision in *Tai Rakena v Corrections* [2017] NZHRRT 24 (11 July 2017) found that while there had been a breach of Health Information Privacy Code, r 5, there had been no interference with the privacy of Mr Tai Rakena as that term is defined in the Privacy Act, s 66.

The allegations in the intended proceedings

[6] In the present intended proceedings filed on 11 August 2017 (i.e. one month after the Tribunal's decision) Mr Tai Rakena complains that when he applied to Corrections for a copy of his October 2015 request for his medical notes, that document was not provided to him. For this he seeks \$10,000 in damages.

[7] Filed with the intended statement of claim were:

[7.1] A prisoner complaint form (PC.01) #421148 showing both the "request" and the decision on that request given by Corrections:

[7.1.1] A copy of the request (for the medical notes) was asked for by Mr Tai Rakena on 9 December 2016.

[7.1.2] On 20 December 2016 he was told the prison Health Centre no longer had the form. A Corrections officer recorded:

This request/complaint has been forwarded onto the Health centre manager at Rimutaka Prison.

I have received a response from the Health centre Manager from Rimutaka and she has told me that they no longer have that form that Tairakena is requesting. So there was nothing more I can do about this issue.

[7.2] The first page of a partly redacted (by Mr Tai Rakena) letter dated 23 February 2017 from the Privacy Commissioner to Mr Tai Rakena. On this page the Privacy Commissioner recorded a degree of frustration at having received from Mr Tai Rakena 13 “pieces of correspondence” in the period 1 February 2017 to 23 February 2017 and further recorded that those items would simply be added to file C/28243 and that no further action would be taken:

We have identified those [of the 13 pieces of correspondence] referring to the incident at Rimutaka Prison in October 2015, and added them to file C/28243. As you now have a certificate of investigation on that file, and have provided evidence you are in negotiations with the Department of Corrections over settlement, we will not take any further action on this matter and will not respond to any further correspondence on it.

[8] The supporting documents filed by Mr Tai Rakena accordingly establish:

[8.1] On 9 December 2016 Mr Tai Rakena asked for a copy of the October 2015 document containing his request for his medical notes.

[8.2] On 20 December 2016 he was told the Health Centre no longer had the document.

[8.3] On a date between 20 December 2016 and 23 February 2017 Mr Tai Rakena made a complaint to the Privacy Commissioner.

[8.4] That complaint was not investigated by the Privacy Commissioner.

[8.5] The complaint was placed on the earlier file C/28243 relating to the original complaint that there had been a breach of privacy by disclosure of the two pages of medical notes.

[8.6] The certificate of investigation issued in respect of C/28243 is dated 15 December 2016 which is earlier than the date shown on PC.01 #421148 as the date on which Mr Tai Rakena was told by Corrections the request form was no longer available. Put shortly, the certificate of investigation cannot on any reading contradict the statement made by the Privacy Commissioner in his letter dated 23 February 2017 that Mr Tai Rakena’s complaint based on PC.01 #421148 would not be investigated.

[9] Because these circumstances brought into doubt the Tribunal’s jurisdiction to receive Mr Tai Rakena’s intended proceedings, the submissions of Mr Tai Rakena and of Corrections was sought.

The submissions by the parties

[10] By letter dated 22 August 2017 the Secretary gave notice to Mr Tai Rakena and to Ms McCall of the issues on which their submissions were sought:

Dear Mr Tai Rakena

On 11 August 2017 the Tribunal received your intended statement of claim in HRRT043/17 under the Privacy Act 1993.

The proceedings will not be sent out for service until I am first satisfied that the Tribunal has jurisdiction over the claim.

There are two concerns:

(a) Your intended proceedings are based on a request for personal information set out in PC.01 No. 421148 signed by you on 9 December 2016 and signed by a Corrections officer on 20 December 2016. Yet the Certificate of Investigation (C/28243) upon which you rely to establish jurisdiction was issued by the Privacy Commissioner on 15 December 2016. The difficulty lies in the fact that the certificate predates the PC.01 form on which you rely.

(b) With your papers you have filed the first page of a letter dated 23 February 2017 from the Privacy Commissioner addressed to you. Paragraphs 2 and 3 of that letter make it clear the Privacy Commissioner declined to investigate 13 new complaints made by you and which presumably included the complaint based on PC.01 No. 421148. Where no investigation is made by the Privacy Commissioner the Tribunal has no jurisdiction.

In these circumstances the Chairperson has directed that you provide submissions setting out why you believe the Tribunal has jurisdiction notwithstanding the two points listed above. Your submissions are to be filed (and provided to Ms McCall) no later than 5pm on Friday 1 September 2017.

The intended defendant, the Chief Executive, Department of Corrections, is to have an opportunity to make submissions as well.

Your submissions are to be filed (and provided to Ms McCall) no later 5pm on Friday 1 September 2017. Corrections are to file and serve their reply by 5pm on Friday 15 September 2017. If you intend responding your final submissions must be filed and served by 5pm on Friday 29 September 2017.

[11] On 28 August 2017 the Tribunal received from Mr Tai Rakena a two page undated letter which not only set out his submissions, it also made threats of violence against the Privacy Commissioner. By letter dated 28 August 2017 Mr Tai Rakena was told that the threats were unacceptable and that his submissions would be disregarded by the Tribunal:

Dear Mr Tai Rakena

On 28 August 2017 the Tribunal received from you a two page undated letter in which you reply to my letter dated 22 August 2017.

As your undated letter contains abusive and insulting comments and also makes threats against the Privacy Commissioner and his family the Chairperson has directed your submissions be disregarded. This decision is in line with the Chairperson's earlier *Minute in Tai Rakena v Corrections (AVL)* [2017] NZHRRT 23 at [15] and [16]. The relevant paragraphs are reproduced below for your information.

[15] Proceedings before the Tribunal are not to be used as an instrument of oppression or as a means of assaulting others with extravagant claims of wrongdoing. Nor are they to be a platform for insult or abuse. Papers filed are not to contain gratuitously insulting and derogatory comments about the parties, witnesses or about those employed by or associated with one or other of the parties. Lawyers representing a party are to be free from harassment, intimidation or threats. Nor are they to be gratuitously insulted or accused of criminal offending. Scandalous and offensive statements and allegations have no place in court or tribunal proceedings and cannot on any view be justified. Behaviour of the kind described is a needless distraction. It makes it more difficult for the Tribunal to conduct the proceedings in an orderly manner and more difficult to identify the merits of the case or of the particular interlocutory application. Those against whom abusive behaviour or allegations are directed may believe it necessary to respond to the allegations and abuse, thereby drawing the Tribunal into collateral issues of doubtful relevance.

[16] In appropriate circumstances the Tribunal will not accept for filing proceedings, applications or other documents which do not comply with the foregoing requirements.

The decision whether the Tribunal accepts your intended proceedings for filing will accordingly be determined on the basis of the submissions received from Corrections.

[12] By submissions dated 23 August 2017 Corrections submitted (inter alia) the Tribunal lacked jurisdiction because the attachments to the statement of claim showed the Privacy Commissioner did not investigate the matter complained of in the statement of claim. In particular:

[12.1] Certificate of investigation C/28243 pre-dates the response by Corrections to PC.01 #421148.

[12.2] The matter investigated (as shown on the certificate of investigation) differs from the allegations in the statement of claim.

[13] Mr Tai Rakena has not filed any submissions in reply.

The jurisdiction issue – discussion

[14] The Tribunal does not acquire jurisdiction over a proceeding filed by an aggrieved individual unless the intended defendant is a person “to whom section 82 applies”. See s 83 of the Privacy Act. As this provision must be read alongside s 82, both sections follow:

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) The Director of Human Rights Proceedings shall not take proceedings under subsection (2) against any person to whom this section applies unless the Director of Human Rights Proceedings has given that person an opportunity to be heard.
- (4) The Director of Human Rights Proceedings may, under subsection (2), bring proceedings on behalf of a class of individuals, and may seek on behalf of individuals who belong to the class any of the remedies described in section 85, where the Director of Human Rights Proceedings considers that a person to whom this section applies is carrying on a practice which affects that class and which is an interference with the privacy of an individual.
- (5) Where proceedings are commenced by the Director of Human Rights Proceedings under subsection (2), the aggrieved individual (if any) shall not be an original party to, or, unless the Tribunal otherwise orders, join or be joined in, any such proceedings.

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.

[15] In simple terms, s 82 applies to any person:

[15.1] In respect of whom an investigation has been conducted under Part 8; or

[15.2] In respect of whom a complaint has been made where conciliation has not resulted in a settlement.

[16] As no conciliation took place under s 74, the jurisdiction issue in the present case turns on the question whether Corrections was a person in respect of whom an investigation was conducted under Part 8.

[17] In this case there can be only one answer, namely that there was no Part 8 investigation. The Privacy Commissioner explicitly determined not to investigate the complaints which Mr Tai Rakena now wishes the Tribunal to examine in his intended proceedings. Indeed, the Privacy Commissioner stated that he would not respond to further correspondence.

[18] This finding is reinforced by the two points made by Corrections. First, that the certificate of investigation relied on by Mr Tai Rakena was issued by the Privacy Commissioner prior to the subject matter of these intended proceedings arising. Second, the matter investigated (as shown on the certificate) differs from the allegations in the statement of claim.

[19] The law in this respect is well-settled. Where the Privacy Commissioner determines not to investigate a complaint the Tribunal will have no jurisdiction to deal with the matter. See *Lehmann v The Radioworks Ltd* [2005] NZHRRT 20 at [54] and *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45 at [57].

CONCLUSION

[20] The Tribunal has no jurisdiction in relation to the complaints made by Mr Tai Rakena in the intended statement of claim submitted for filing on 11 August 2017. This is because the Chief Executive of the Department of Corrections is not a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Privacy Act 1993 in relation to any action alleged to be an interference with the privacy of Mr Tai Rakena.

[21] As the Tribunal lacks jurisdiction to hear the intended claim it is not to be accepted for filing.

.....
Mr RPG Haines QC
Chairperson

.....
Mr RK Musuku
Member

.....
Mr BK Neeson JP
Member