IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 2**

	Reference No. HRRT 059/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**KONG HWEE TAN**
	PLAINTIFF
AND	**CHIEF EXECUTIVE, MINISTRY OF SOCIAL DEVELOPMENT**
	DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr KH Tan in person
Ms K Laurenson and Ms E Devine for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **9 February 2016**

DECISION OF TRIBUNAL DECLINING NON-PARTY ACCESS TO TRIBUNAL FILE[1]

Introduction

[1] By statement of claim filed on 14 October 2015 Mr Tan complains of the decision by the Ministry of Social Development (MSD) to the effect that payments made to him under the New Zealand Superannuation and Retirement Income Act 2001 must be reduced by the amount Mr Tan receives from the Central Provident Fund Board of Singapore. He alleges he is discriminated against on the basis of being a citizen of Singapore and challenges the application of s 70 of the Social Security 1964.

[1] [This decision is to be cited as: *Tan v Chief Executive, Ministry of Social Development (Non-Party Access to Tribunal File)* [2016] NZHRRT 2]

[2] A statement of reply by the defendants (as originally named) was filed on 18 November 2015.

[3] By decision dated 23 December 2015 the Tribunal made an order pursuant to s 92D(1) of the Human Rights Act 1993 that the complaint by Mr Tan be referred back to the Human Rights Commission for resolution by the parties and the Commission (whether through mediation or otherwise). See *Tan v Chief Executive, Ministry of Social Development (Referral back to Human Rights Commission)* [2015] NZHRRT 56.

The application

[4] On 15 January 2016 the Tribunal received from Mr KC Vijayan of the Singapore based *The Straits Times* a request for copies of the statement of claim and related papers filed by Mr Tan with the Tribunal.

[5] The parties have now been heard on that application. Mr Tan consents to the application. The Ministry is opposed on two main grounds:

> **[5.1]** The matter has been referred back to the Human Rights Commission where mediation is confidential; and
>
> **[5.2]** The material sought by *The Straits Times* includes allegations against a defendant which were struck out by the Tribunal in its decision of 23 December 2015.

The law to be applied

[6] The principles to be applied are conveniently set out in *IHC New Zealand v Ministry of Education (Non-Party Access to Tribunal File)* [2013] NZHRRT 2 (31 January 2013) at [6] to [23]. It is not intended to repeat what is said there.

[7] As no substantive hearing has yet taken place, the relevant provisions in the High Court Rules are (by analogy) rr 3.13 and 3.16 which provide:

> **3.13 Applications for permission to access documents, court file, or formal court record other than at hearing stage**
>
> (1) This rule applies whenever the permission of the court is necessary under these rules and is sought to access a document, court file, or any part of the formal court record, except where access may be sought under rule 3.9.
> (2) An application under this rule is made informally to the Registrar by a letter that—
> (a) identifies the document, court file, or part of the formal court record that the applicant seeks to access; and
> (b) gives the reasons for the application.
> (3) The application is heard and determined by a Judge or, if a Judge directs the Registrar to do so, by the Registrar.
> (4) On receipt of an application made in accordance with subclause (2), the Judge or Registrar may direct that the person file an interlocutory application or originating application.
> (5) The applicant must give notice of the application to any person who is, in the opinion of the Judge or Registrar, adversely affected by the application.
> (6) The Judge or Registrar may dispense with the giving of notice under subclause (5) if it would be impracticable to require notice to be given.
> (7) The Judge or Registrar may deal with an application on the papers, at an oral hearing, or in any other manner the Judge or Registrar considers just.
>
> **3.16 Matters to be taken into account**
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> In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge or Registrar must consider the nature

of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

(a) the orderly and fair administration of justice:
(b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
(c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:
(d) the freedom to seek, receive, and impart information:
(e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:
(f) any other matter that the Judge or Registrar thinks just.

[8] While freedom to seek, receive and impart information is a principle of first importance, it is clear from r 3.16 that other, equally important principles and considerations must from time to time affect the decision whether a non-party is to be granted access to the Tribunal file.

[9] In the present case those considerations include the orderly and fair administration of justice and the protection of confidentiality. As the Ministry rightly points out, mediation proceedings before the Human Rights Commission are for good reason held in confidence, a point which warrants the extended discussion which follows.

MEDIATION, CONFIDENTIALITY AND THE HUMAN RIGHTS ACT

[10] The statutory setting in which dispute resolution meetings are held under the Human Rights Act and the statutory confidentiality which attaches to what is said during those meetings has a significant bearing on the outcome of this application by the media for access to the Tribunal file.

The dispute resolution process – overview

[11] The mechanism provided by the Human Rights Act for the resolution of complaints of unlawful discrimination is one of dispute resolution (including mediation). Attached to that process is a mandatory statutory duty to keep confidential anything said or agreed to at a dispute resolution meeting.

[12] The significance of the dispute resolution process as presently found in the Act cannot be overemphasised. The Human Rights Amendment Act 2001 required the Human Rights Commission to replace the formal investigation of complaints of unlawful discrimination and the issuing of opinions with facilitation of their resolution in the most efficient, informal and cost-effective manner possible.

[13] The account of these changes in Sylvia Bell (ed) *Brookers Human Rights Law* (looseleaf ed, Brookers) vol 1 at [HR75.01] follows:

> **HR75.01**
>
> **Change in complaints process**
>
> Part 3 outlines the new process for managing complaints. Prior to the Human Rights Amendment Act 2001 (the "2001 Amendment Act") the process was based on investigation. A group of Commissioners (known as the Complaints Division) investigated complaints and attempted conciliation. If the conciliation was unsuccessful the Commissioners could refer the complaint to the Proceedings Commissioner to decide whether to instigate proceedings. The need for Commissioners to personally determine whether complaints had substance in terms of the Act had lent the process a quasi-judicial character and the requirement of observing the principles of natural justice had resulted in an elaborate and protracted system of provisional and final opinions. The length of the process and the resources consumed led the Re-Evaluation team to recommend a conciliation process to be carried out principally by staff rather

than by Commissioners. Where this was unsuccessful, the complaint was to be referred to the (then) Proceedings Commissioner to decide whether to initiate proceedings before the Tribunal (Re-Evaluation of Human Rights Protections in New Zealand (Human Rights Commission, Wellington, 2000)). The current process, which is based on alternative dispute resolution, is designed to be more flexible and allow the parties themselves to retain control: s 75(b).

[14] The new provisions for the resolution of disputes about compliance with Part 1A and Part 2 of the Act are set out in Part 3. The separate "objects" clause in s 75 of the Act specifically state that the object of Part 3 is (inter alia) to recognise disputes over compliance with the non-discrimination provisions of the Act are more likely to be successfully resolved by the parties themselves and to that end the Commission is to provide expert problem-solving support, information and assistance to the parties to those disputes:

PART 3
RESOLUTION OF DISPUTES ABOUT COMPLIANCE WITH PART 1A AND PART 2

75 Object of this Part

The object of this Part is to establish procedures that—
(a) facilitate the provision of information to members of the public who have questions about discrimination; and
(b) recognise that disputes about compliance with Part 1A or Part 2 are more likely to be successfully resolved if those disputes can be resolved promptly by the parties themselves; and
(c) recognise that, if disputes about compliance with Part 1A or Part 2 are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available to the parties to those disputes; and
(d) recognise that the procedures for dispute resolution under this Part need to be flexible; and
(e) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
(f) recognise that difficult issues of law may need to be determined by higher courts.

[15] Consistent with s 75, a "primary function" of the Commission is to facilitate the resolution of disputes about compliance with Part 1A or Part 2, by the parties concerned, in the most efficient, informal, and cost-effective manner possible. See ss 76(1)(b) and 77. The flexibility of the methods used by the Commission in the resolution of disputes is noted in Bell (ed) *Brookers Human Rights Law* vol 1 at [HR75.03]:

HR75.03

Flexibility of methods used in resolution

Unlike the Employment Relations Act 2000, which includes a specific procedure for conciliation, no particular method of dispute resolution is preferred. Rather the legislation refers to resolving disputes flexibly with expert support and assistance.

[16] As noted by Miller J in *Attorney-General v Human Rights Review Tribunal [Judicial Review]* (2006) 18 PRNZ 295 at [47], private enforcement proceedings have since 2001 assumed significant importance in the legislative scheme.

[17] It is not necessary for the present context to address the other statutory provisions which relate to the dispute resolution process but they are listed for ease of reference:

77 Dispute resolution services
78 Method of providing services
79 How complaints received to be treated
79A Choice of procedures
80 Taking action or further action in relation to complaint
81 Commission to inform parties of process
82 Information gathering and disclosure by Commission

[18] The Commission is required by s 83(2) to use its "best endeavours" to assist the parties to secure a "settlement" as defined in s 83(3):

> **83 Settlement**
>
> (1) This section applies if at any time it appears to the Commission from a complaint (including one referred back to the Commission by the Director, under section 90(1)(b), or the Tribunal, under section 92D), or from information gathered in relation to the complaint (including any response made under section 81(4)(b)), that it may be possible to reach a settlement.
> (2) The Commission must use its best endeavours to assist the parties to secure a settlement.
> (3) In this section, *settlement*—
> (a) means the agreement of the parties concerned on actions that settle the matter, which may include the payment of compensation or the tendering of an apology; and
> (b) includes a satisfactory assurance by the person to whom the complaint relates against the repetition of the conduct that was the subject matter of the complaint or against further conduct of a similar kind.

[19] A settlement between the parties to a complaint may be enforced by proceedings before the Tribunal:

> **89 Enforcement of terms of settlement agreed by parties**
>
> A settlement between parties to a complaint may be enforced by proceedings before the Tribunal brought under section 92B(4)—
> (a) by the complainant (if any) or the aggrieved person (if not the complainant); or
> (b) by the person against whom the complaint was made.

The dispute resolution process and the Tribunal

[20] The centrality of dispute resolution (including mediation) to the Part 3 process is underlined by the fact that when proceedings under s 92B are brought before the Tribunal, the Tribunal is under a mandatory duty to consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and must refer the complaint back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission will not be productive. Indeed, the Tribunal may at any time before, during, or after the hearing of proceedings refer a complaint back to the Commission if it appears to the Tribunal from what is known to it about the complaint, that the complaint may yet be able to be resolved by the parties and the Commission. See s 92D:

> **92D Tribunal may refer complaint back to Commission, or adjourn proceedings to seek resolution by settlement**
>
> (1) When proceedings under section 92B are brought, the Tribunal—
> (a) must (whether through a member or officer) first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise); and
> (b) must refer the complaint under section 76(2)(a) to which the proceedings relate back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission—
> (i) will not contribute constructively to resolving the complaint; or
> (ii) will not, in the circumstances, be in the public interest; or
> (iii) will undermine the urgent or interim nature of the proceedings.
> (2) The Tribunal may, at any time before, during, or after the hearing of proceedings, refer a complaint under section 76(2)(a) back to the Commission if it appears to the Tribunal, from what is known to it about the complaint, that the complaint may yet be able to be resolved by the parties and the Commission (for example, by mediation).
> (3) The Tribunal may, instead of exercising the power conferred by subsection (2), adjourn any proceedings relating to a complaint under section 76(2)(a) for a specified period if it appears to the Tribunal, from what is known about the complaint, that the complaint may yet be able to be resolved by the parties.

Confidentiality

[21] As a necessary adjunct to the statutory dispute resolution process there is a mandatory statutory duty to keep confidential what is said and what is agreed to at mediation. The statutory duty to keep the information confidential is imposed on (inter alia) both parties and cannot be waived unless by consent. See s 85:

> **85 Confidentiality of information disclosed at dispute resolution meeting**
>
> (1) Except with the consent of the parties or the relevant party, persons referred to in subsection (2) must keep confidential—
> (a) a statement, admission, or document created or made for the purposes of a dispute resolution meeting; and
> (b) information that is disclosed orally for the purposes of, and in the course of, a dispute resolution meeting.
> (2) Subsection (1) applies to every person who—
> (a) is a mediator for a dispute resolution meeting; or
> (b) attends a dispute resolution meeting; or
> (c) is a person employed or engaged by the Commission; or
> (d) is a person who assists either a mediator at a dispute resolution meeting or a person who attends a dispute resolution meeting.

[22] These provisions are reinforced by s 86 which provides that no evidence can be given of information required by s 85(1) to be kept confidential:

> **86 Evidence as to dispute resolution meeting**
>
> (1) No mediator at a dispute resolution meeting may give evidence in any proceedings, whether under this Act or any other Act, about—
> (a) the meeting; or
> (b) anything related to the meeting that comes to his or her knowledge for the purposes of, or in the course of, the meeting.
> (2) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, under section 85(1), is required to be kept confidential.

[23] The confidentiality imposed by s 85(1) is extended by s 87 to requests under the Official Information Act 1992 and the Local Government Official Information and Meetings Act 1987. There are strictly limited circumstances in which confidential information can be disclosed (see s 88) but the principle of confidentiality is unaffected.

[24] The rationale for the duty of confidentiality has frequently been explained in the analogous private mediation context. See for example *Vaucluse Holdings Ltd v Lindsay* (1997) 10 PRNZ 557 (CA) at 559 and *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2008] 2 NZLR 210 at [34] and [35]. More recently in *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [23] the following statement of principle from *Ocean Bulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 at [19] to [29] was articulated. The quote which follows is from the New Zealand decision:

> The public policy consideration is that parties should be encouraged to settle disputes without resort to litigation and should not be discouraged from this endeavour by facing the risk that things said in the context of settlement negotiations might be used against them in court. To facilitate settlement, parties should be encouraged to discuss the matters in dispute freely and frankly and this can only be achieved if it is clear that things said in the discussions may not subsequently be used against them in proceedings.

[25] See also *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713 at [11].

Summary

[26] The point of this possibly over-extended discussion of the dispute resolution process in Part 3 of the Human Rights Act and of the confidentiality provisions can possibly be summarised as follows:

> **[26.1]** Disputes about compliance with Part 1A or Part 2 of the Human Rights Act are primarily left to be resolved by the parties with the assistance and support of mediators provided by the Human Rights Commission.
>
> **[26.2]** Resolution of such disputes is facilitated by a statutory assurance of confidentiality.
>
> **[26.3]** A settlement agreement between parties to a complaint may be enforced by proceedings before the Tribunal.

THE DECISION ON THE REQUEST FOR ACCESS TO THE TRIBUNAL FILE

[27] The issues at the forthcoming mediation will relate to those set out in Mr Tan's statement of claim and the Ministry's admissions and denials as set out in the statement of reply. It can also be expected the voluminous documents filed with the statement of claim will be the subject of discussion. In our view granting access to the Tribunal file at this time is likely to lead to a breach of the mandatory statutory duty imposed on the parties by s 85 to keep confidential what is said and what is agreed to at mediation. While open justice is an important principle to be considered, it must yield in the face of the specific provisions of the Human Rights Act referred to. The application is premature.

[28] There are also the further points made by the Ministry namely:

> **[28.1]** The material sought includes allegations against a defendant that have now been struck out with the result the statement of claim is no longer a proper representation of the claim before the Tribunal.
>
> **[28.2]** If mediation is unsuccessful and this matter is returned to the Tribunal and progresses to a hearing, the statement of claim will need to be repleaded.

DECISION

[29] Weighing these various factors we are of the clear view the application should be declined at the present time.

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Mr RPG Haines QC	**Mr RK Musuku**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**