IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 29**

	Reference No. HRRT 016/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**FRIEDRICH JOACHIM FEHLING**
	PLAINTIFF
AND	**MINISTRY OF HEALTH**
	FIRST DEFENDANT
AND	**WEST COAST DISTRICT HEALTH BOARD**
	SECOND DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:
Mr RPG Haines QC, Chairperson
Dr SJ Hickey MNZM, Member
Mr RK Musuku, Member

REPRESENTATION:
Mr FJ Fehling in person
Ms N Bailey for first defendant
Mr GM Brogden for second defendant

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

DATE OF DECISION: **17 August 2016**

DECISION OF TRIBUNAL DISMISSING CLAIM AGAINST SECOND DEFENDANT[1]

[1] In this decision the Tribunal sets out its reasons for dismissing Mr Fehling's claim against the West Coast District Health Board (WCDHB). The claim against the Ministry of Health is not affected. Case management directions for that claim follow at the end of this decision.

[1] [This decision is to be cited as: *Fehling v Ministry of Health (Strike-Out of Second Defendant)* [2016] NZHRRT 29.]

BACKGROUND

[2] In his statement of claim filed on 7 March 2016 Mr Fehling alleges the Ministry of Health and the WCDHB interfered with his privacy (as that term is defined in ss 66(1)(a)(i) and 66(1)(b)(ii) and (iii)) by collecting personal information about him in breach of information privacy principles 1, 2 and 4.

[3] It would appear the essence of the complaint is that the Ministry of Health has recorded Mr Fehling's name in the National Health Index (NHI).

[4] As to the facts, Mr Fehling contends that when on 16 December 2014 he enrolled at the South Westland Area Practice, nominating it as his regular and ongoing provider of general practice and first level primary health care services, he objected to the provision of his personal details to the Ministry of Health.

[5] More particularly, during the enrolment process he was provided by the Practice with a Health Information Privacy Statement, which stated (inter alia):

> **Patient Enrolment Information**
>
> The information I have provided on the Practice Enrolment Form will be:
> - held by the practice
> - used by the Ministry of Health to give me a National Health Index (NHI) number, or update any changes
> - sent to the PHO and Ministry of Health to obtain subsidised funding on my behalf
> - used to determine eligibility to receive publicly-funded services. Information may be compared with other government agencies but only when permitted under the Privacy Act.

[6] The enrolment form he was asked to sign contained a line which read:

> I have read and I agree with the Health Information Privacy Statement.

[7] In view of his objection Mr Fehling on 16 December 2014 made a handwritten amendment to this line so that it read:

> I agree with the Health Information Privacy Statement and have read it, with following limitation: The MOH must not receive personal details and an identification NHI number as this would result in criminal fascistic-corrupt government mates overriding all privacy matters by "guarding" the liquor cabinet. The DHB can issue such a number NHI!

[8] Subsequently, by letter dated 18 April 2015, Mr Fehling made inquiry of the Ministry of Health as to the information it held about him. The Ministry by letter dated 5 May 2015 confirmed Mr Fehling's name was recorded in the NHI. The Ministry's letter went on to say the Ministry does not hold clinical health information recorded by general practitioners for patients and explained that the NHI number is stored in an encrypted form to protect privacy. Non-identifiable information is distributed to healthcare providers and funders, researchers and the Ministry of Health for policy formation and for the monitoring and review of health services provided. Data is used in publications prepared by the Ministry of Health.

The complaint to the Privacy Commissioner

[9] By handwritten letter dated 28 June 2015 Mr Fehling made complaint to the Privacy Commissioner about the Ministry of Health collecting and holding personal information about him. It is this letter of 28 June 2015 which is the basis of the present claim before the Tribunal (see statement of claim para 5) and a copy of the letter was attached to the statement of claim.

[10] The letter is in fact addressed to the Ombudsman, it being Mr Fehling's expectation that the Ombudsman would forward the complaint to the Privacy Commissioner. It is not clear why the letter was not sent directly to the Privacy Commissioner in the first place.

[11] As the text of Mr Fehling's letter assumes some importance in this decision it is reproduced below, at least insofar as it is decipherable:

> Ombudsman
> PO Box 10-152
> Wellington 6143
>
> Ref: Forwarding this Privacy Act Complaint to the Privacy Commissioner
> Request for status info of 399 368
>
> Dear Ombudsman Wakem
>
> As you support the arrogant fascistic-corruption-protecting character of the Privacy Commissioner and his refusal to respond to a public-interest official-info request, I direct this Privacy Act complaint to you per s 67(1, 2, 3) Privacy Act that requires you to forward it as soon as possible. If I do not receive an official Certificate of Investigation within 20 working days, I will file a claim to the Human Rights Review Tribunal and will publicise this failure widely!
>
> I also ask for status/activity info regarding 399 368 due to extreme delay in that public-interest whitebait-stand complaint started 12/13 and then 19/2/15.
>
> **Privacy Act Complaint, urgent in the public interest** regarding access to primary health provision (refusal to publicly funded health services after lawful refusal to agree to health data sharing with the criminally fascistic-corrupt govt's Ministry of Health MoH); The MoH breached following Privacy Act provisions:
>
> S66(1) (a) (i) Interference with privacy by breaching several information privacy principles
> (b) (ii) has adverse affected **rights**, benefits
> (iii) resulted in significant humiliation or loss of dignity or injury to feelings
> (I explicitly disallowed MoH to have both the data-providing NHI number in connection with my personal details – this was disregarded on top of the above health service refusal, leaving **all** my health data open to MoH fascists without any checks & balances, not even pretentious unworkable Govt-spy checks!, causing severe anger and distress.)
> Principle 4 (a) Personal info shall not be collected by agency by unlawful means (see s 96J-M)
> (b) by unfair means (plain unjustifiable power without lawful purpose!)
> Principle 1 (a,b) Personal info shall not be collected by any agency unless for lawful purpose and need for it.
> Principle 2 (1),(2)(a)(i) info need not be collected **directly** from individual if it will not be used with identification of individual (govt agencies cannot be relied on this without workable checks & balances – fascists cannot be trusted!), (d)(iii) no public revenue due to refusal.
> Part 9A, S96J-M Info-sharing between health provider and MoH needed Order in Council (signature of Gov-Gen, which was not obtained and should not be given due to lack of checks & balances! Relevant is an identifiable individual's health record, not general anonymous statistical or account data).
> S11 makes above principles enforceable in court of law.
> For sharing individuals' data the following checks & balances need to be created: Data matching of NHI and an individual's details only through independent (not govt-appointed prostitutes as at present) Parliament-appointed Privacy Commissioner **together** with Health & Disability Commissioner.
> [emphasis in original]

[12] It can be seen the letter has as its exclusive focus an allegation that "the MoH breached [the Privacy Act]". No mention at all is made of the WCDHB.

[13] Also submitted with the statement of claim were:

> **[13.1]** A letter dated 24 August 2015 from Mr Fehling to an Investigating Officer at the Office of the Privacy Commissioner. This letter reinforces the fact that Mr

Fehling's complaint was directed at the Ministry of Health. No mention was made of the WCDHB. The relevant paragraph reads:

> I haven't received any reply from you, despite that you announced one by now in your letter 24/7/15.
>
> As this matter is quite clear, while health services are discriminately denied via increased costs and removal of privacy rights, a drawn-out attrition "investigation" is not acceptable, and would be pre-empted by filing a case with higher compensation demands in the interest of the public.
>
> I may remind you that despite my refusal to agree to this removal of privacy, any use of the PHO facilities at higher costs without enrolment is currently enabling the further breach of my privacy rights, because "my" NHI number together with my name and therefore all health info is freely available to your fascistic govt's Ministry of "Health".

[13.2] On 28 October 2015 Mr Fehling wrote once more to the Investigating Officer. The opening paragraph again emphasised the complaint made by Mr Fehling was against the Ministry of Health:

> Following are the requested s 66(b) privacy-interference conditions in more detail to the original complaint that contained a list of privacy-principle breaches by the Ministry of Health …

[13.3] The subject line and content of a reply dated 18 November 2015 from the Office of the Privacy Commissioner to Mr Fehling makes it clear the Privacy Commissioner understood the complaint was against the Ministry of Health:

> Privacy Act Complaint: Fritz Fehling and Ministry of Health

In this letter (only an incomplete version has been provided by Mr Fehling) the Investigating Officer stated that it was her preliminary view the Ministry of Health had not interfered with Mr Fehling's privacy and that she intended recommending the file be closed. The letter referred exclusively to the Ministry of Health as the agency the subject of the complaint.

[13.4] A letter dated 23 November 2015 from the Office of the Privacy Commissioner (again with the subject line of "Privacy Act Complaint: Fritz Fehling and Ministry of Health") recording that Mr Fehling had sent in a letter requesting that the investigation be finalised and a certificate of investigation issued so that he (Mr Fehling) could then pursue the matter before this Tribunal. The Certificate of Investigation was issued the same day and enclosed with the letter. Mr Fehling was advised the Commissioner's file would "now be closed".

[13.5] The Certificate of Investigation specifies the Respondent to the complaint as the Ministry of Health.

[14] Notwithstanding all the correspondence between Mr Fehling and the Office of the Privacy Commissioner referred to the Ministry of Health as the agency which was the subject of the complaint (as does the Certificate of Investigation dated 23 November 2015), when on 7 March 2016 the statement of claim was filed with the Tribunal, in addition to the Ministry of Health being cited as (first) defendant, the WCDHB was named as the second defendant.

The strike out application by WCDHB

[15] Not having been the subject of Mr Fehling's complaint to the Privacy Commissioner and not having been heard in the investigation process the WCDHB unsurprisingly

objects to being a party to the present proceedings before the Tribunal. By application dated 24 May 2016 it seeks an order dismissing the proceedings as against it on the basis the Tribunal does not have jurisdiction.

[16] The evidence placed before the Tribunal by the WCDHB is contained in an affidavit by Mr Brogden, the Chief Legal Advisor of the Canterbury District Health Board. As part of this role Mr Brogden is responsible for the provision of legal advice and support to the WCDHB. He confirms the WCDHB was never made aware of Mr Fehling's complaint under the Privacy Act or of the Commissioner's investigation into that complaint. All the WCDHB received was a letter dated 10 May 2015 from Mr Fehling enquiring about the circumstances in which his name had been removed from the roll of patients at the South Westland Area Practice. In this letter Mr Fehling explained the requested information was required in the context of his challenge under the Privacy Act to what Mr Fehling described as "invalidation and unlawful discrimination with intimidation" by the Ministry of Health:

> This info is required to correct Privacy Act invalidation and unlawful discrimination with intimidation by MoH.

[17] The specific focus in this letter on the Ministry of Health reinforces the overall submission made by the WCDHB that no complaint under the Privacy Act was made by Mr Fehling in 2015 against the WCDHB. His complaint was against the Ministry of Health only.

[18] The WCDHB provided the requested information to Mr Fehling under cover of a letter dated 8 June 2015.

[19] In his affidavit Mr Brogden further deposes:

> **[19.1]** The WCDHB was never advised by the Privacy Commissioner that Mr Fehling had made a complaint under the Privacy Act or that the Commissioner was investigating such complaint.
>
> **[19.2]** Being unaware of any complaint or investigation and not having received any request from the Privacy Commissioner to respond to any investigation, the WCDHB had had no opportunity to respond to any of the matters now complained of by Mr Fehling.
>
> **[19.3]** The WCDHB was not a party to any discussion or request for information as between the Privacy Commissioner and the Ministry of Health.
>
> **[19.4]** The WCDHB first learnt of Mr Fehling's complaint to the Privacy Commissioner when the WCDHB was served with the statement of claim on 7 March 2016.
>
> **[19.5]** The Certificate of Investigation dated 23 November 2015 issued by the Privacy Commissioner in relation to Mr Fehling's complaint (complaint ref No. C/27168) makes no reference to the WCDHB and confirms the respondent to Mr Fehling's complaint was the Ministry of Health only.

[20] In these circumstances the WCDHB seeks an order dismissing the proceedings as against the WCDHB on the grounds the Tribunal has no jurisdiction vis-à-vis the WCDHB. Reliance is placed on ss 82 and 83 of the Act and on *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out*

Application) [2014] NZHRRT 1, (2014) 10 HRNZ 279. The two grounds on which the order is sought are:

> **[20.1]** The WCDHB is not a person in respect of whom an investigation was conducted by the Privacy Commissioner.
>
> **[20.2]** The WCDHB was not given an opportunity to be heard by the Privacy Commissioner during the investigation into the allegations made against the Ministry of Health.

Mr Fehling's response to the strike out application

[21] Seeking to overcome the jurisdiction objection Mr Fehling by letter dated 1 June 2016 wrote to the Privacy Commissioner asking that he (the Commissioner) now open an investigation into the WCDHB. The request is not a model of clarity and only someone in possession of all the documents filed by the parties in these proceedings would be able to follow its cryptic terms. Specifically no reference is made in the letter to the challenge by the WCDHB to the jurisdiction of the Tribunal nor is mention made of the strike out application filed by the WCDHB and the grounds on which that application is based. The letter read:

> Dear Privacy Commissioner
>
> I ask you to investigate against West Coast District Health Board regarding the enclosed "Chronological Summary; Questions of Law; Argumentation" dated 13/4/16, and the evidence you have got in this matter which inherently relates also to the DHB – your reference was C/27168.
>
> Enclosed is also a copy of a new PHO enrolment application that is identical to the earlier one except the date, and is the relevant basis of this very complaint.
>
> Hurry up! as this case is before the HRRT, as you know. As you have all necessary evidence/info, no further time-wasting correspondence with me is needed except the speedy provision of your certificate of "investigation".

[22] Beneath the signature line Mr Fehling added:

> There will be no settlement as the best and proper way is a court process with consideration of aggravating and mitigating factors. Any settlement (esp. a secret one) is not in the interest of the public, as a secret one cannot be enforced in court, nor would settlements lead to a lasting correct application of the Law, nor would the lack of publicity of details lead to a correction of the fascistic-corrupt govt via General Elections!

[23] The letter was treated by the Office of the Privacy Commissioner as raising issues about unfair collection of Mr Fehling's personal information through the NHI number. In a reply mistakenly dated "1 June 2016" an Enquiries Officer (Wellington) at the Office of the Privacy Commissioner advised Mr Fehling that as this issue had been previously investigated and a Certificate of Investigation provided (complaint ref No. C/27168), no action would be taken on the complaint:

> Dear Mr Fehling
>
> **Privacy Act Enquiry (Our Ref: ENQ/116886)**
>
> Thank you for your letter dated 1 June 2016 which included a copy of a new Primary Health Organisation enrolment form.
>
> In your letter you have raised issues about unfair collection of your personal information through your National Health Identity number. We cannot assist you with these concerns. This is because we have previously investigated this matter and provided you with a Certificate of Investigation (complaint reference number C/27168). I understand you have now approached

> the Human Rights Review Tribunal (the Tribunal) about this. The Tribunal is the appropriate body to consider your concerns.
>
> This means we will take no further action on your enquiry and this enquiry file is now closed.

[24] Mr Fehling submits that as his new 1 June 2016 complaint was specifically directed against the WCDHB, this letter is evidence the Privacy Commissioner had on the previous complaint of 28 June 2015 investigated both the Ministry of Health and the WCDHB. This submission is addressed below.

The Ministry of Health response to the strike out application

[25] By email dated 9 June 2016 counsel for the Ministry of Health advised no submissions on the strike out application would be filed by the Ministry.

FINDINGS OF FACT

[26] In relation to Mr Fehling's original complaint of 28 June 2015 findings must be made as to the identity of the agency complained about and of the agency in respect of which the investigation by the Privacy Commissioner was conducted.

[27] In relation to Mr Fehling's more recent complaint of 1 June 2016 it is necessary to identify not only the agency complained against but also the relevance of that complaint to the present strike out application.

The complaint of 28 June 2015

[28] It is clear from its explicit terms that the complaint of 28 June 2015 was against the Ministry of Health and the Ministry of Health alone. Mr Fehling's subsequent letters of 24 August 2015 and 28 October 2015 to the Privacy Commissioner reinforce that conclusion. There is nothing in the correspondence to suggest any other agency was the subject of the complaint. Similarly, the correspondence from the Privacy Commissioner dated 18 November 2015 and 23 November 2015 to Mr Fehling is about the Ministry of Health and the Ministry alone. Unsurprisingly the Certificate of Investigation names only the Ministry of Health as the respondent to the investigation. Even Mr Fehling's information request of 10 May 2015 to the WCDHB identified the agency complained against as the Ministry of Health.

[29] It follows there can be no doubt as to the accuracy of Mr Brogden's evidence that there was never a complaint by Mr Fehling against the WCDHB and no investigation by the Privacy Commissioner in respect of the WCDHB. The legal consequences of this finding are addressed shortly.

The complaint of 1 June 2016

[30] While Mr Fehling's very recent complaint of 1 June 2016 is explicit in requesting an investigation by the Privacy Commissioner into the WCDHB, we do not accept that the making of the request (and the response by the Privacy Commissioner) have relevance to the present application by the WCDHB that the proceedings against it be dismissed. Our reasons follow:

> **[30.1]** The terms of the complaint are, as previously observed, cryptic and only a person in possession of all the documents filed by the parties in these proceedings would be able to understand what was being asked of the Privacy Commissioner. As the Commissioner is not a party to the present proceedings he could not, unaided, be expected to fathom what Mr Fehling was asking him to

do and the context of that request. Specifically, Mr Fehling's letter of complaint made no reference to the challenge by the WCDHB to the jurisdiction of the Tribunal and no mention was made of the strike out application filed by the WCDHB and the grounds on which that application is based.

[30.2] Not being on notice that the new complaint was an attempt to address a jurisdiction objection taken by the WCDHB before the Tribunal, it was understandable the investigating officer in the Office of the Privacy Commissioner would treat the complaint as raising issues already determined by the Commissioner, namely the alleged unfair collection of Mr Fehling's personal information through the NHI number. The significance of the complaint being in relation to the WCDHB as opposed to the Ministry of Health was not explained or made clear by Mr Fehling.

[30.3] In these circumstances we do not accept the Privacy Commissioner's reply of "1 June 2016" is evidence of the fact the Commissioner had, in the context of the earlier 28 June 2015 complaint, investigated not only the Ministry of Health but also the WCDHB. The fact that the evidence is all one way in demonstrating the 2015 investigation was in respect of the Ministry of Health alone makes it impossible to argue the investigation into the original complaint was also an investigation into the WCDHB. The evidence precludes Mr Fehling from advancing the claim that the Commissioner's letter of 1 June 2016 is to be interpreted as demonstrating the Commissioner had investigated the WCDHB in response to the 2015 complaint.

[30.4] Above all, however, even if, contrary to the evidence, it is assumed the 1 June 2016 complaint can somehow be construed as establishing an investigation was carried out by the Privacy Commissioner into the WCDHB in 2015, that conclusion is of no assistance to Mr Fehling. That is because the jurisdiction gap relied upon by the WCDHB cannot be filled retrospectively by the 1 June 2016 complaint and the subsequent response by the Privacy Commissioner.

Evidence – conclusions

[31] In summary, the conclusions we have come to are:

[31.1] Mr Fehling's complaint dated 28 June 2015 was in respect of the Ministry of Health only and it triggered an investigation by the Privacy Commissioner in respect of the Ministry of Health and the Ministry alone. There was no complaint against the WCDHB.

[31.2] The WCDHB was never advised by the Privacy Commissioner that Mr Fehling had in 2015 made a complaint under the Privacy Act or that the Commissioner was investigating such complaint. Being unaware of any complaint or investigation and not having received any request from the Privacy Commissioner to respond to any investigation, the WCDHB had no opportunity to reply to any of the matters now complained of by Mr Fehling as against the WCDHB. Furthermore, the WCDHB was not a party to any discussion or request for information as between the Privacy Commissioner and the Ministry of Health.

[31.3] There is no basis for the submission that in responding to the new complaint of 1 June 2016 the Privacy Commissioner acknowledged the original complaint of 28 June 2015 was investigated not only in relation to the Ministry of Health, but also in relation to the WCDHB.

[31.4] Having no notice of any new complaint by Mr Fehling as against the WCDHB or of an investigation by the Privacy Commissioner in regard to the WCDHB and not having received any request from the Privacy Commissioner to respond to Mr Fehling's complaint of 28 June 2015 the WCDHB has never had opportunity to reply to any of the matters now complained of by Mr Fehling.

JURISDICTION TO STRIKE OUT

[32] In *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005, Wild J held the Tribunal has a wide discretionary power to strike out or dismiss a proceeding brought before it:

> [45] Subject to observance of natural justice, fairness and reasonableness, and equity, the Tribunal has a wide discretion as to the procedure which follows: ss 104 and 105 of the Human Rights Act. Section 105 requires the Tribunal "to act according to the substantial merits of the case, without regard to technicalities". That section applies, with necessary modifications, to decisions of this Court on appeal against a decision of the Tribunal: s123(5).
>
> [46] The Tribunal has an express power to dismiss proceedings, if satisfied that they are frivolous, vexatious or not brought in good faith: s115. As Mr Laurenson points out, the Tribunal deliberately did not exercise this power. It struck out Ms Mackrell's claim.
>
> [47] There are also the Human Rights Review Tribunal Regulations 2002 which place, in terms of the Tribunal's procedures, an emphasis on fairness, efficiency, simplicity and speed. I refer particularly to regulation 4.
>
> [48] Thus, the Tribunal has a wide discretionary power to strike out or dismiss a proceeding brought before it. This will be appropriate in situations similar to those contemplated by rr 186 and 477 of the High Court Rules which are the basis for the present application.

[33] The reference by Wild J to rr 186 and 477 of the High Court Rules is now to be read as a reference to High Court Rules, r 15.1 which provides:

> **15.1 Dismissing or staying all or part of proceeding**
> (1) The court may strike out all or part of a pleading if it—
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
> (b) is likely to cause prejudice or delay; or
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
> (4) This rule does not affect the court's inherent jurisdiction.

[34] In the present case the challenge by the WCDHB to the Tribunal's jurisdiction can be classified as a challenge that the statement of claim discloses no reasonably arguable cause of action and in the alternative, that as the Tribunal has no jurisdiction, the continuation of these proceedings would be an abuse of process.

[35] It is clearly established that abuse of process extends to proceedings which are seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment: *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30]-[32]:

> [30] We accept the submission of Mr Harrison that the power, under the High Court Rules or the inherent powers of a court, to stay a proceeding for abuse of process is not limited to the narrow tort of abuse of process. In any event, Mr Mills accepts the abuse of process ground would also be available in the circumstances set out by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*:

> ... the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[31] In Australia, a majority of the High Court in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* identified the following categories of conduct that would attract the intervention of the court on abuse of process grounds:

> (a) proceedings which involve a deception on the court, or those which are fictitious or constitute a mere sham;
> (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
> (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose; and
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[32] The majority also said that, although the categories of abuse of process are not closed, this does not mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party. It does, however, extend to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment".

[Footnote citations omitted]

[36] We address next the relevant provisions of the Privacy Act.

COMPLAINTS UNDER THE PRIVACY ACT – THE RELEVANT LAW

The investigation of complaints by the Privacy Commissioner

[37] As explained in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* at [19], the purpose of Part 8 of the Privacy Act is to ensure that in the first instance a complaint about an interference with the privacy of an individual must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by s 82 only where an investigation has been conducted under Part 8 or where conciliation (under s 74) has not resulted in settlement. For the reasons explained in that decision at [20] to [23], an important aim of the Privacy Act is to secure voluntary compliance with its principles and on receiving a complaint the Privacy Commissioner must attempt to reach a settlement between the parties. Only if those efforts fail can the matter proceed to the Tribunal. Following an adversarial hearing the Tribunal can award a wide range of remedies and substantial damages.

[38] It is clear from the statistics set out in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* at [21] and [22] that the alternative dispute resolution scheme as facilitated by the Privacy Commissioner is an effective one, providing speedy, low-cost, informal and non-adversarial resolution of complaints where possible. The more recent *Annual Report 2015* (Wellington, November 2015) at 14-15 confirms the effectiveness of the Commissioner's informal investigation and resolution processes.

[39] However, as noted in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* at [24], for the complaint resolution

process to work a person in respect of whom a complaint is made and an investigation conducted must know he or she is under investigation and must also know what is under investigation so an effective response can be made. This imperative is explicitly recognised by the Privacy Act. The complaints process mandated by it is designed to ensure that the person under investigation and the matter under investigation by the Privacy Commissioner are clearly identified.

Investigation by the Commissioner – the statutory provisions

[40] We adopt the summary of the statutory provisions set out in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* at [25]:

> **[40.1]** 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)).
>
> **[40.2]** The Privacy Commissioner must decide whether to investigate the complaint, or to take no action on the complaint (s 70(1)).
>
> **[40.3]** 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)).
>
> **[40.4]** 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)).
>
> **[40.5]** The Privacy Commissioner must inform the person to whom the investigation relates of:
>
> > **[40.5.1]** The details of the complaint (if any) or, as the case may be, the subject-matter of the investigation; and
> >
> > **[40.5.2]** 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.

[41] On the evidence we have found there was in Mr Fehling's letter of 28 June 2015 no complaint by him against the WCDHB nor was any investigation by the Privacy Commissioner conducted in relation to the WCDHB.

Establishing jurisdiction – the Tribunal

[42] The statutory stipulations governing the investigative process under Part 8 are logically reflected in the provisions (ss 82 and 83) which govern access to the Tribunal:

> **82 Proceedings before Human Rights Review Tribunal**
>
> (1) This section applies to any person—
> (a) in respect of whom an investigation has been conducted under this Part in relation to any action alleged to be an interference with the privacy of an individual; or
> (b) in respect of whom a complaint has been made in relation to any such action, where conciliation under section 74 has not resulted in a settlement.
> (2) Subject to subsection (3), civil proceedings before the Human Rights Review Tribunal shall lie at the suit of the Director of Human Rights Proceedings against any person to whom this section applies in respect of any action of that person that is an interference with the privacy of an individual.

(3) ...

83 Aggrieved individual may bring proceedings before Human Rights Review Tribunal

Notwithstanding section 82(2), the aggrieved individual (if any) may himself or herself bring proceedings before the Human Rights Review Tribunal against a person to whom section 82 applies if the aggrieved individual wishes to do so, and—

(a) the Commissioner or the Director of Human Rights Proceedings is of the opinion that the complaint does not have substance or that the matter ought not to be proceeded with; or

(b) in a case where the Director of Human Rights Proceedings would be entitled to bring proceedings, the Director of Human Rights Proceedings—

(i) agrees to the aggrieved individual bringing proceedings; or

(ii) declines to take proceedings.

[43] As stated in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (20 September 2013) at [58], the effect of s 82 of the Privacy Act is that a plaintiff is required to establish that the defendant in any proceeding is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the privacy of the aggrieved individual. Similarly, before an aggrieved individual can bring proceedings before the Tribunal under s 83 the complaint must first have been considered by the Privacy Commissioner as a complaint. See for example *L v T* (1998) 5 HRNZ 30 (Morris J, A Knowles, GDS Taylor) at 35 and 36; *Steele v Department of Work and Income* [2002] NZHRRT 12; *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45; *Lehmann v Radio Works* [2005] NZHRRT 20 and more recently *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10, *[NKR]*, *VUW v Accident Compensation Corporation (Jurisdiction Objection)* [2014] NZHRRT 26, *WVU v Real Estate Agents Authority and Valuer General* [2014] NZHRRT 49 and *Edwards v Capital and Coast DHB (Strike-Out Application)* [2016] NZHRRT 20.

[44] In the present case the applicable provision is s 82(1). For the reasons given our finding of fact is that the WCDHB is not a person in respect of whom an investigation has been conducted under Part 8 of the Act. Consequently the Tribunal does not have jurisdiction to hear these proceedings as against the WCDHB.

[45] The jurisdiction gap which existed at the time these proceedings were filed on 7 March 2016 cannot be remedied retrospectively by the new 1 June 2016 complaint and the subsequent response by the Privacy Commissioner. In any event, for the reasons given earlier, we do not accept the Privacy Commissioner's reply of "1 June 2016" is evidence of the fact the Commissioner had, in the context of the 28 June 2015 complaint investigated not only the Ministry of Health but also the WCDHB. The evidence is all the other way in demonstrating the investigation was in every respect in relation to the Ministry of Health alone.

DECISION

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

[46.1] The Tribunal has no jurisdiction to hear that part of Mr Fehling's claim which relates to the WCDHB.

[46.2] All allegations in the statement of claim against the WCDHB are struck out and the WCDHB is dismissed as a party to these proceedings.

[46.3] Case management directions for the claim against the Ministry of Health follow below. In case it should prove necessary we leave it to the Chairperson of the Tribunal to vary those directions.

Costs

[47] Costs are reserved.

CASE MANAGEMENT DIRECTIONS FOR CLAIM AGAINST MINISTRY OF HEALTH

[48] By memorandum dated 25 April 2016 Mr Fehling has submitted these proceedings should be determined on the papers or by audio link with the courthouse at Greymouth.

[49] In response the Ministry of Health by memorandum dated 12 May 2016 advises it will abide the decision of the Tribunal. While the Ministry is amenable to the matter being heard on the papers it acknowledges it is preferable for Mr Fehling to have the opportunity to present his case at a teleconference and a hearing on the papers will not provide for this. Counsel's understanding is that the court at Greymouth is willing and able to provide voice and/or video-link teleconference facilities.

[50] The Tribunal notes the present proceedings are not the first to have been filed by Mr Fehling and on at least two previous occasions the Tribunal has sat at Hokitika. While the circumstances of each case will differ and no general rule applies, the experience of the Tribunal in these previous cases is that a face to face hearing facilitates better communication with Mr Fehling and identification of the real issues in the case.

[51] Because Hokitika is accessible by air but Greymouth is not, we direct an oral hearing be held at Hokitika at a time and place to be notified by the Secretary. To avoid the unnecessary attendance of witnesses we further direct that cross-examination of witnesses be by leave of the Tribunal.

[52] The following directions are made:

[52.1] By 5pm on Friday 30 September 2016 Mr Fehling is to file and serve his written statements of evidence together with all the documentary evidence on which he will rely.

[52.2] By 5pm on Friday 11 November 2016 the Ministry of Health is to file and serve its written statements of evidence together with all the documentary evidence on which it will rely.

[52.3] Should Mr Fehling wish to file any statement of evidence in reply, such statement is to be filed and served by 5pm on Friday 2 December 2016.

[52.4] If either party wishes to cross-examine a witness (or witnesses) called by the opposing party, application must be made. Such application must be filed and served by 5pm on Friday 16 December 2016.

[52.5] When they file their respective statements of evidence, the parties are to notify the Tribunal of the expected duration of the oral hearing. Once these estimates have been given and the number of witnesses identified a date of hearing will be allocated. It is likely the fixture will be in the first half of 2017. If there are matters relevant to the availability of witnesses in this indicated

timeframe, the parties are to give notice to the Secretary when filing their witness statements, if not before.

[52.6] The proceedings are to be heard in Hokitika on a date and at a venue to be advised by the Secretary.

[52.7] Mr Fehling's written submissions are to be filed and served three clear weeks before the hearing date.

[52.8] The submissions for the Ministry are to be filed and served one clear week before the hearing date.

[52.9] Leave is reserved to both parties to make further application should the need arise.

.....	.....	.....
Mr RPG Haines QC	**Dr SJ Hickey MNZM**	**Mr RK Musuku**
Chairperson	**Member**	**Member**