

Reference No. HRRT 025/2017

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: 28 July 2017

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

Introduction

[1] Mr Tai Rakena is currently serving a sentence of imprisonment at Whanganui Prison. He is due for release in August 2017.

[2] To date he has filed two proceedings with the Tribunal (HRRT058/2016 and HRRT011/2017) and has now presented for filing an intended third set of proceedings. In this decision we address those third intended proceedings which will be referred to as HRRT025/2017. All three matters have been brought under the Privacy Act and allege various interferences with Mr Tai Rakena's privacy.

[3] A brief outline of Mr Tai Rakena's first two sets of proceedings is necessary as this background has relevance to the question whether the third set of intended proceedings are within the Tribunal's jurisdiction.

¹ [This decision is to be cited as *Re Tai Rakena (Rejection of Statement of Claim)* [2017] NZHRRT 27]

[4] The two sets of proceedings under the Privacy Act which have been accepted for filing are as follows:

[4.1] HRRT058/2016. These proceedings filed on 15 September 2016 were based on a Certificate of Investigation issued by the Privacy Commissioner on 15 December 2016 in respect of file reference C/28243. In this Certificate the Commissioner certified that he conducted an investigation against the Chief Executive, Department of Corrections (Corrections) in relation to an alleged breach of Rule 5 of the Health Information Privacy Code 1994. The proceedings were heard by the Tribunal at Whanganui on 22 June 2017. In a decision given on 11 July 2017 (*Tai Rakena v Corrections* [2017] NZHRRT 24 (11 July 2017)) the proceedings were dismissed because while Mr Tai Rakena established a breach of the Health Information Privacy Code, he failed to establish also there had been an interference with his privacy as defined in s 66(1) of the Privacy Act.

[4.2] HRRT011/2017. These proceedings filed on 27 February 2017 are based on a Certificate of Investigation issued by the Commissioner on 21 December 2016 in respect of file reference C/28386. In this Certificate the Commissioner certifies he conducted an investigation into the question whether Corrections provided Mr Tai Rakena with all the information he requested on certain PC.01 forms, being PC.01 4001501; PC.01 401032 and PC.01 401143. In these proceedings a case management teleconference was held on 12 May 2017 but the timetable then made will not expire until 1 September 2017. Thereafter the proceedings will be heard by the Tribunal at the District Court at Palmerston North on a date to be advised by the Secretary.

[5] Against this background it is possible to turn to the third set of proceedings which are the subject of the present decision. As mentioned the issue is whether the Tribunal has jurisdiction to accept these proceedings for filing.

The intended proceedings in HRRT025/2017

[6] On 24 May 2017 Mr Tai Rakena presented for filing in the office of the Tribunal a statement of claim under the Privacy Act 1993. It was not supported by a Certificate of Investigation issued by the Privacy Commissioner. By letter dated 24 May 2017 the Secretary advised Mr Tai Rakena that the document would be rejected unless by 9 June 2017 he provided such certificate as it would (inter alia) establish whether the Privacy Commissioner had conducted an investigation under Part 8 of the Act. Unless such investigation had been conducted, the Tribunal would have no jurisdiction over the complaints intended to be raised by Mr Tai Rakena.

[7] Mr Tai Rakena's response was communicated to the Secretary by way of a handwritten annotation at the foot of the Secretary's letter dated 24 May 2017 which was returned to the Secretary. In this endorsement Mr Tai Rakena stated the Commissioner was refusing to provide a Certificate.

[8] On 31 May 2017 the Tribunal received from Mr Tai Rakena a copy of a letter dated 18 May 2017 from the Office of the Privacy Commissioner addressed to Mr Tai Rakena. There was no covering note or endorsement from Mr Tai Rakena to explain the reason for the provision of this document. However, in this letter the Commissioner responds to a request by Mr Tai Rakena for a Certificate of Investigation relating to complaints made by him against Corrections from November 2016 to the end of April 2017. The

Commissioner advises that apart from the Certificate of Investigation for file C/28243 dated 15 December 2016, no further Certificate of Investigation was available in relation to the complaints made by Mr Tai Rakena from November 2016 to the end of April 2017:

We sent you a Certificate of Investigation for file C/28243 on 15 December 2016 with our closing letter and, again, on 6 April 2017 as part of your request for all of our information held on that file. There are no further Certificates of Investigation available for this complaint file as we have not notified or investigated any further issues arising out of those circumstances.

As you have already received the Certificate of Investigation we are not going to send it to you again.

[9] By letter dated 2 June 2017 to Mr Tai Rakena the Secretary observed that it was not clear whether certificate C/28243 applied only to HRRT058/2016 or whether it had application also to HRRT025/2017, being the proceedings presented for filing on 24 May 2017.

[10] Mr Tai Rakena was asked to provide full reasons why he contended that Certificate C/28243 applied properly not only to HRRT058/2016 but also to the intended proceedings in HRRT025/2017. His submissions were required to be filed and served by 9 June 2017 while the submissions by Corrections were to be filed and served by 15 June 2017. Mr Tai Rakena had a right of reply by 20 June 2017.

The submissions by the parties

[11] Mr Tai Rakena filed no submissions by 9 June 2017 but did file submissions in reply to the submissions dated 15 June 2017 presented by Crown Counsel on behalf of Corrections.

[12] The submissions for Corrections are both detailed and helpful. The assistance of Crown Counsel is acknowledged. It is not intended to attempt a comprehensive summary of the points made. For present purposes the principal submissions are:

[12.1] The certificates of investigation relied upon by Mr Tai Rakena in HRRT058/2016 (C/28243 (15 December 2016)) and in HRRT011/2017 (C/28386 (21 December 2016)) relate only to those matters in issue in these two proceedings and neither certificate can support the filing of the intended claim in HRRT025/2017.

[12.2] The Privacy Commissioner explicitly declined to investigate the complaints made by Mr Tai Rakena which he now wishes to pursue before the Tribunal by way of the intended proceedings.

[12.3] No investigation into those complaints having been conducted under Part 8 of the Privacy Act, the effect of ss 82 and 83 is that the Tribunal lacks jurisdiction to hear the claim and, for that reason, it should not be accepted for filing.

[13] By letter dated 26 June 2017 Mr Tai Rakena has responded to these points. In essence, his case is:

[13.1] As a matter of fact his requests for access to personal information, although received by Corrections, were not responded to within the statutory timeframe allowed by the Privacy Act.

[13.2] Although the Privacy Commissioner did conduct an investigation he (the Commissioner) has refused to issue a Certificate of Investigation notwithstanding that he knows that a wrong has been committed by Corrections.

[13.3] The intended claims in HRRT025/2017 are exactly the same as those in HRRT011/2017 in which the Privacy Commissioner has issued a Certificate of Investigation (C/28386). Mr Tai Rakena is being treated unfairly by the decision of the Privacy Commissioner to withhold further Certificates.

[13.4] The reason why Mr Tai Rakena did not file submissions by 9 June 2017 was that he did not receive the Secretary's letter dated 2 June 2017 in which the timetable for the filing of submissions was set out.

Whether the Privacy Commissioner has conducted an investigation in relation to the complaints which are the subject of the intended proceedings

[14] Central to the question of jurisdiction is whether the Privacy Commissioner has conducted an investigation in relation to the complaints sought to be raised by Mr Tai Rakena with the Tribunal in the intended proceedings.

[15] In this respect the evidence before the Tribunal comprises (inter alia) a letter dated 27 March 2017 from the Privacy Commissioner to Mr Tai Rakena listing eighteen PC.01 requests made by Mr Tai Rakena for personal information. The investigating officer notes that all requests had been responded to, that further action by the Office of the Privacy Commissioner was not necessary and that the file would be closed. The letter also makes reference to "the bundle of PC.01 forms received this morning". The comment made is that as any new requests for access to personal information included in those forms were still within the statutory timeframes for compliance by Corrections, no action would be taken on them.

[16] By subsequent letter dated 12 April 2017 the Commissioner made two points. First, in relation to the complaints by Mr Tai Rakena that personal information requested by him had been provided outside the timeframe permitted by the Act, the Commissioner was not going to conduct an investigation as the requested information had been provided to Mr Tai Rakena:

8. I understand you are frustrated that the information was received outside of the timeframe required by the Act, however, as you have the information now there is no further action that this Office can take to assist you.
9. The function of our investigations and dispute resolution team is to assist the parties to resolve disputes. Where the complaint involves access to information, the resolution is generally for the agency to provide the requester with the requested information. We do not exercise our powers and functions under Part 8 where the necessary remedy has already occurred.
10. For this reason we are not going to investigate any of your complaints referred to in my letter of 27 March 2017. This is not a result of any "frustration" with you and we do not consider it a breach of your rights. It is simply an allocation of resource. Any interference with your privacy (the failure to respond within 20 working days) has been remedied by the provision of the information you requested. Accordingly no further action by this Office is necessary or appropriate.

[17] Second, the letter advised Mr Tai Rakena that new complaints made by him to the Privacy Commissioner would not be investigated as the time for response by Corrections had not yet expired.

[18] This communication was followed by a further letter dated 18 May 2017 from the Privacy Commissioner to Mr Tai Rakena. It refers to his request for a Certificate of Investigation for his complaints against Corrections from November 2016 to the end of April 2017. The request is denied in the following terms:

We sent you a Certificate of Investigation for file C/28243 on 15 December 2016 with our closing letter and, again, on 6 April 2017 as part of your request for all of our information held on that file. **There are no further Certificates of Investigation available for this complaint file as we have not notified or investigated any further issues arising out of those circumstances.** [Emphasis added]

[19] It is clear from this letter that Certificate C/28243 relates only to the disclosure which is now the subject of the Tribunal's decision in *Tai Rakena v Corrections* [2017] NZHRRT 24 that is, to the breach of the Health Information Privacy Code which occurred on 29 October 2015. It does not (and cannot) apply to any other complaints, particularly those which were made subsequent to the date of the certificate, being 15 December 2016. There is no ambiguity in relation to the statement by the Privacy Commissioner that no further Certificates of Investigation would be issued because he had not notified or investigated any further issues arising out of the new matters of which complaint is made by Mr Tai Rakena.

[20] Whether the Privacy Commissioner was correct to decline to conduct an investigation and to decline to issue a Certificate of Investigation is not for the Tribunal to determine. It is not a proper function of the Tribunal to review the way in which the Privacy Commissioner receives, processes or investigates complaints or the decisions made by the Privacy Commissioner regarding the issue (or non-issue) of certificates of investigation and the content of these certificates. As stated in *Steele v Department of Work and Income* [2002] NZHRRT 12 at [43], to the extent that such jurisdiction exists at all it, belongs to the High Court on an application for judicial review. There is nothing in the Privacy Act to suggest the Tribunal has such jurisdiction. It is the Privacy Commissioner's responsibility to decide how he will meet his statutory obligations.

[21] In the present case there is no evidence that the Privacy Commissioner has conducted an investigation in relation to the matters complained of by Mr Tai Rakena in his intended proceedings. It is also common ground the Privacy Commissioner has refused to issue a Certificate of Investigation in relation to those matters. It is against this background the question of jurisdiction is to be addressed.

The jurisdiction issue – discussion

[22] 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.

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

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

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

[24] 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.

[25] 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.

[26] 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

[27] 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 24 May 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.

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

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Mr RPG Haines QC
Chairperson

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Mr RK Musuku
Member

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Mr BK Neeson JP
Member