

Reference No. HRRT 015/11

IN THE MATTER OF

A CLAIM UNDER THE PRIVACY ACT 1993

BETWEEN

MARGARET HETA

PLAINTIFF

AND

MINISTRY OF SOCIAL DEVELOPMENT

DEFENDANT

BEFORE:

RPG Haines QC, Chairperson
GJ Cook JP, Member
R Musuku, Member

Margaret Heta in person
Deborah Harris for defendant

Date of Decision: 9 February 2012

**DECISION OF TRIBUNAL STRIKING OUT SECOND PLAINTIFFS
AND GIVING CONSEQUENTIAL DIRECTIONS**

[1] The decision of the Tribunal given on 9 November 2011 left for future consideration:

[1.1] Whether Ms Heta's children were appropriate parties to these proceedings.

[1.2] The giving of timetable directions for the filing of the evidence to be called at the hearing by the parties and for the allocation of a date of hearing.

[2] In accordance with Direction [24.4] the Secretary sent to the Privacy Commissioner the request of the Tribunal that she advise whether any of the investigations conducted by her were in respect of any or all of Ms Heta's children.

[3] By letter dated 16 December 2011 the Assistant Commissioner (Legal and Policy) advised that, subject to one minor exception, the Privacy Commissioner did not conduct an investigation into allegations that the Ministry of Social Development breached the privacy of Kerran, Jesse, Daniel or Isaiah Singh:

Our view is that – with one possible, though small, exception – we have not conducted an investigation into allegations that MSD breached the privacy of Kerran, Jesse, Daniel or Isaiah Singh. For the most part, therefore, the children cannot be plaintiffs in these Tribunal

proceedings. I have given a little more detail about the complaint below, to show why this is the case.

The only exception involves MSD's collection of hospital admission information about the children. We did seek MSD's response to Ms Heta's concerns about this collection. This is sufficient to be an investigation under the Privacy Act, so as to allow the matter to be raised in the Tribunal. It is possible for the children to be plaintiffs as regards this small aspect of the proceedings.

However, it is not plain that it is necessary to cite the children as plaintiffs. The collection of the hospital admission information was allegedly a breach of Ms Heta's privacy as well as the privacy of the children and we investigated it as such. As a result, the Tribunal can examine the collection of that information anyway.

It will be far less complicated if Ms Heta were the only plaintiff – for example plaintiffs usually need to give evidence, and it would be inappropriate for the children to be asked to do so. But there is no *jurisdictional* bar to them being plaintiffs as regards this issue.

The points raised by Ms Heta at the teleconference convened on 3 February 2012

[4] By email dated 1 February 2012 Ms Heta helpfully outlined the issues she wished to discuss at the teleconference convened on 3 February 2012:

[4.1] Whether her children were to remain as parties to the proceedings given the terms of the letter from the Privacy Commissioner dated 16 December 2011.

[4.2] Whether the Tribunal could clarify the reference made in the decision of 9 November 2011 at [4] to the "jurisdiction threshold".

[4.3] Whether it would be possible to clarify various issues, including the application in the present proceedings of the Official Information Act 1982 and the Human Rights Act 1993; whether agencies other than the Ministry of Social Development remained as parties to the current proceedings; the impact of alleged inappropriate behaviour of the Ministry on Ms Heta's recent trial at Rotorua and the request that compensation required by the Ministry be written off.

[5] As to the position of Ms Heta's children in these proceedings the Chairperson drew attention to the fact that the letter from the office of the Privacy Commissioner dated 16 December 2011 made it clear that the Privacy Commissioner had not conducted an investigation into allegations that the Ministry had breached the privacy of Ms Heta's children and consequently ss 82 and 83 of the Privacy Act 1993 meant that the Tribunal had no jurisdiction in relation to them. As to the minor exception mentioned in the letter of 16 December 2011 the determinative point is that the alleged breach of Ms Heta's privacy in relation to the hospital admission information about the children was investigated as a breach of Ms Heta's privacy as much as the privacy of the children. That being the case it was not necessary for any of the children to remain as parties to the proceedings as the alleged breach could be pursued by Ms Heta in her own right. Furthermore, as none of the children were of an age where they could give any useful evidence to the Tribunal, their continued participation in the proceedings served no purpose. The Chairperson expressed the view that it would indeed be far less complicated were Ms Heta to be the only plaintiff.

[6] After the matter had been explained and debated Ms Heta agreed that it was appropriate for her to be the only plaintiff in these proceedings.

[7] As will be seen from the directions which follow, the children (presently cited as second plaintiffs) are to be struck out as parties to these proceedings.

[8] As to the jurisdictional issues presented by ss 82 and 83 of the Privacy Act 1993, it was explained to Ms Heta that in these proceedings she is entitled to pursue only those complaints which flow from the Certificates of Investigation issued by the Privacy Commissioner on 6 October 2010 and 1 September 2011. All other issues lie outside the jurisdiction of the Tribunal. Similarly it was explained that these proceedings having been brought under the Privacy Act 1993 the Tribunal does not have jurisdiction in relation to alleged breaches of the Official Information Act 1982 and of Parts 1A and 2 of the Human Rights Act 1993. Nor could the Tribunal investigate alleged inappropriate behaviour in relation to evidence used in the criminal trial.

[9] Once the limited jurisdiction of the Tribunal had been explained to Ms Heta she expressed acceptance of the fact that in these proceedings she is confined to those matters investigated by the Privacy Commissioner and those alone. A timetable could now be set for the filing of evidence and a date of hearing could be allocated.

The points raised by the Ministry at the teleconference convened on 3 February 2012

[10] By memorandum dated 2 February 2012 Ms Harris for the Ministry asked that the following matters be addressed:

[10.1] Whether the children should continue to be named as second plaintiffs.

[10.2] Whether, given the removal of the second to fifth defendants, an amended statement of claim should be filed.

[10.3] Whether Ms Heta intended to pursue her complaint concerning the alleged breach of Privacy Principle 7 (correction of personal information).

[10.4] Whether Ms Heta intended to amend the relief sought in view of the fact that she had now been convicted in the District Court at Rotorua of benefit fraud. It was submitted that the Tribunal was not the appropriate forum for relief to be sought in respect of that prosecution or the manner in which it was conducted.

[10.5] Whether Ms Heta was to be permitted to pursue complaints not investigated by the Office of the Privacy Commissioner.

[11] To a large degree many of these issues were resolved in the context of the discussion and rulings on the matters raised by Ms Heta in her email. Specifically:

[11.1] As to [10.1] above, common ground having been reached that the participation of the children would serve no useful purpose, they were to be dismissed as plaintiffs.

[11.2] As to [10.2], in ordinary circumstances a plaintiff represented by a lawyer would be required to file an amended statement of claim addressing the changes necessarily brought about by the dismissal of not only the second plaintiffs but also the first to fifth defendants. But Ms Heta, as a litigant in person (and she confirmed that she would be representing herself at the hearing though assisted by Zalene Rodgers of the Rotorua District Community Law Centre) cannot reasonably be expected to conduct her case to the same standard as a plaintiff represented by a lawyer. Drafting of an amended statement of claim would be a challenge and in any event the document might well require further clarification or amendment. Ms Harris accepted the suggestion of the Chairperson that provided the existing statement of claim was read against the backcloth of the decision of

the Tribunal given on 9 November 2011 and the decision recording the outcome of today's teleconference, it was accepted that the Ministry would not be prejudiced.

[11.3] As to [10.3] Ms Heta confirmed that she intends to pursue her complaint as to the alleged breach of Principle 7.

[11.4] In relation to the Certificate of Investigation issued by the Office of the Privacy Commissioner on 6 October 2010, Ms Heta confirmed that the complaint pursued before the Tribunal will relate to the information requested from Immigration New Zealand and Sky Network.

[11.5] As to [10.4] Ms Harris was content with the indication given by the Chairperson that the jurisdiction of the Tribunal to grant relief is limited to that specified by the Privacy Act 1993. Indeed, Ms Heta did not seriously challenge this proposition once the terms of the Act had been explained to her.

Setting down for hearing

[12] Although Ms Heta was ready to discuss a timetable for the filing of evidence Ms Harris needed more time to take instructions from the Ministry in the light of the outcome of the teleconference. Specifically she was not in a position to advise how many witnesses are to be called for the Ministry nor was she aware of their availability for the briefing of evidence.

[13] The one matter which was resolved is that the venue for the hearing will be Rotorua.

Directions

[14] The following directions are made:

[14.1] The second defendants are struck out as parties to these proceedings.

[14.2] All further documents and pleadings in these proceedings are to be intitled in the manner set out in this decision.

[14.3] A telephone conference is to be convened at 9.30am on Tuesday 21 February 2012 to set the case down for hearing and to give timetable directions.

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Rodger Haines QC
Chairperson

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Gavin Cook JP
Member

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Ravi Musuku
Member