IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 8**

	Reference No. HRRT 033/2010
IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS [EFG (NO. 2)]**
	PLAINTIFF
AND	**COMMISSIONER OF POLICE**
	DEFENDANT

AT AUCKLAND

Mr RPG Haines QC, Chairperson
Mr R Musuku, Member
Mr B Neeson, Member

Mr R Stevens for plaintiff
Ms S McKechnie for Defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 13 April 2012

DECISION OF TRIBUNAL ON APPLICATION BY COMMISSIONER THAT PROCEEDINGS BE DISMISSED

[1] In broad terms, the Commissioner of Police applies for these proceedings to be struck out either because they are barred by res judicata (or similar principle) or are an abuse of process.

[2] Owing to name suppression orders made both by the High Court and by this Tribunal the complainant is referred to as EFG. As this is the second time in which he has been

the complainant in proceedings before the Tribunal, the intituling has been amended to distinguish these second proceedings from the first.

[3] No evidence yet having been filed by the parties the narrative which follows has been taken from such pleadings and submissions as there are and from the Tribunal's first decision. The narrative must be read with this proviso in mind.

Background

[4] In 2002 EFG authorised the Police to disclose personal information to a counselling organisation and to the (then) Department for Courts. The Police consequently disclosed (the first disclosure) to both organisations information showing that charges were laid against EFG in 1990 in respect of which he was later discharged under s 347 of the Crimes Act 1961. Such discharge is deemed to be an acquittal. The released information included the following "Noting":

> This Noting is the result of NIS conversion. Description: the suspect is a friend of the two female victims they all reside at the Centrepoint community at Albany. The 1st victim moved to Centrepoint with her mother when she was 3 yrs old. Whilst there she became involved in a number of sexual encounters with adult men all these encounters took place prior to victim turning 16 ys [sic] of age and were a result of the Centrepoint philosophy of loving and openness. This phylosophy [sic] included the removal of one's sexual limits. Children of any age were encouraged to become involved in sexual activity with men at the community. The 2nd victim moved to Centrepoint when she was 18 mths old with her parents and sister and brother. At the time of the offence the victims who were 8 to 9 yrs of age were in one of the longhouse buildings at Centrepoint. They were playing with some dolls. The suspect came into the longhouse and asked the victims if they wanted to know how to use a vibrator. They said yes and the suspect pulled a vibrator out from beside the bed. He plugged it in and operated it. He described it as the same type of thing the chemist shops sell for massage purposes. The suspect explained how to use the vibrator and then told the victims to remove their panties and spread their legs which they did. The suspect then used the vibrator on the victims' vaginas. Discharged under section 347 Crimes Act.

[5] EFG complained to the Privacy Commissioner in 2003 and again in 2005, after it transpired that not all aspects of his (then) complaint had been fully investigated. The Privacy Commissioner took the view that nothing that the Police had done constituted an interference with the privacy of EFG.

[6] In April 2005 EFG brought the first proceedings before this Tribunal. They were instituted under s 83 of the Act by EFG in his own name and alleged a breach of Principle 8 of the information privacy principles. His case was that the Noting disclosed to the counselling organisation and to the Department for Courts was generally unbalanced, failed to record his denial of the allegations, failed to explain what happened at the trial and the reasons for the discharge and failed to show the name suppression order made in the High Court. Those first proceedings were heard on 10 and 11 April, 8 June and 11 and 12 December 2006 by this Tribunal (differently constituted) and as will be seen, were determined in favour of EFG.

[7] Meanwhile, in or about May 2005 the Accident Compensation Corporation (ACC) informed EFG that he had been provisionally approved for accreditation to provide pain management and sexual abuse counselling services to ACC clients "subject to receiving a satisfactory vetting reply from the NZ Police Department". In early October 2005 EFG signed a waiver to the Police to release information to the ACC. Acting on that waiver the Police on 3 November 2005 disclosed (the second disclosure) personal information about EFG to the ACC, including the same Noting referred to earlier. The ACC thereafter declined to accredit EFG as a counsellor providing pain management and sexual abuse counselling services to its clients.

[8] On a date not presently known by the Tribunal EFG complained again to the Privacy Commissioner. It would appear that the investigation was not completed until May 2009.

[9] This second disclosure and the surrounding circumstances were referred to in general terms during the course of the evidence heard by the first Tribunal in 2006 and indeed were taken into account by that Tribunal when awarding damages to EFG for the first disclosure. The significance of this fact will be returned to later.

[10] In its decision given as *EFG v Commissioner of Police* [2006] NZHRRT 48 (21 December 2006) the first Tribunal found that the Noting disclosed by the Police did not meet the standard of accuracy required by Principle 8. The Tribunal further found that the breach had given rise to significant humiliation, significant loss of dignity and significant injury to feelings. The remedies granted were:

> **[10.1]** A declaration under s 85(1)(a) of the Privacy Act that the Police conduct in disclosing the Noting to third parties infringed Principle 8 of the Act and that as a consequence the Police had interfered with the privacy of EFG.
>
> **[10.2]** An order under s 85(1)(b) of the Act restraining the Police from disclosing the Noting in future.
>
> **[10.3]** An award of damages under ss 85(1)(c) and 88(1)(c) of the Act in the sum of $12,500.

[11] Made as it was on 21 December 2006, the restraining order came too late to prevent the earlier disclosure of the Noting to ACC on 3 November 2005.

[12] On 16 November 2010 the Director of Human Rights Proceedings brought these present proceedings under s 82 of the Act. The Director acknowledges that EFG is the complainant and that the Director's proceedings relate to the disclosure of the same Noting, albeit to ACC. It is said Principle 8 was separately breached by this disclosure. The relief sought is indistinguishable from that sought (and largely obtained) by EFG in the first proceedings:

> **[12.1]** A declaration that by disclosing the Noting to ACC, the Police infringed Principle 8 and thereby interfered with the privacy of EFG.
>
> **[12.2]** An order restraining the Police from disclosing the Noting in the future.
>
> **[12.3]** An award of damages for the interference with EFG's privacy.

The challenge by the Commissioner of Police

[13] The statement of reply by the Commissioner of Police raises two affirmative defences namely, res judicata and abuse of process.

[14] The Commissioner correctly pleads that the Noting relied upon by EFG in the present proceedings is the same as that relied upon in the earlier proceedings which led to the grant of the remedies outlined above. The Commissioner further pleads (correctly) that in addition, at the 2006 hearing, EFG gave oral evidence of the disclosure of the Noting in question to ACC and of its consequences. Indeed, in assessing the level of the damages, the first Tribunal explicitly took into account the emotional harm EFG had suffered in respect of the disclosure to ACC. That disclosure is included in the "subsequent occasions" referred to in the following paragraph:

[115] In our view, in this case the assessment needs to reflect:

[a] The humiliation, loss of dignity and injury to feelings suffered by the plaintiff when he first discovered that information about what had occurred in 1992 had been disclosed to the counselling organisation;

[b] **The humiliation, loss of dignity and injury to feelings he has suffered on subsequent occasions when there has been an application for vetting and the Police have dealt with it by disclosing the noting from the NIA database once again**;

[c] The fact that these events have to a significant extent resurrected the trauma that the plaintiff undoubtedly suffered at the time of his trial in 1992;

[d] The consequential destabilising of his sense of professional confidence;

[e] The fact that the hurt that the plaintiff has suffered is not altogether at an end.

[Emphasis added]

[15] The submission for the Commissioner is that the cause of action in respect of the November 2005 disclosure to ACC merged in the 2006 decision and cannot support these second proceedings. He further submits that the issues between the parties have already been determined and EFG has already been compensated for the alleged interference with his privacy vis-à-vis the ACC disclosure.

[16] In the alternative the Commissioner pleads that it is an abuse of process for these new proceedings to be commenced when the same issues were so clearly part of the subject matter of the earlier proceedings and that the current complaint by EFG ought to have been raised then. The Commissioner correctly points out that the fact the present proceedings are brought by the Director of Human Rights Proceedings and not by EFG himself is immaterial because under s 82 of the Privacy Act EFG is "the aggrieved individual" and is for the present purpose the "real party". See further Spencer Bower and Handley *Res Judicata* (4th ed, LexisNexis, 2009) at [9.14]. It can also be observed that any doubt about the matter could be resolved by a joinder order under s 82(5) of the Privacy Act but the Director of Human Rights Proceedings is not understood to challenge the point.

The principle of finality – a brief overview

[17] In her detailed and helpful submissions Ms McKechnie for the Commissioner has provided a comprehensive overview of the relevant principles. We do not find it necessary to engage in a protracted discussion of those principles as their application to the facts is straightforward.

[18] It is settled law that res judicata bars a party who has obtained relief from seeking it again. As stated by Elias CJ when delivering the majority judgment in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [58] and [59]:

> [58] ... The principles of finality familiar to our law are rules of public policy based on considerations of fairness to litigants and the need to bring litigation to an end ... They are behind the substantive rules of res judicata which govern cause of action and issue estoppel. Those rules prevent a party to a final judgment challenging the decision in other proceedings between the parties or their privies.
>
> [59] The principles of finality also underlie one application of the broad inherent procedural power to strike proceedings out as an abuse of process ... Proceedings have also been held to amount to abuse of process where defendants are harassed with issues that should have been raised in previous litigation, an approach usually traced to that taken by Sir James Wigram V-C in *Henderson v Henderson*. Although cause of action and issue estoppel apply only to proceedings between the same parties, the Courts have been prepared to find abuse of process in cases entailing collateral challenge by a party to an earlier determination in fresh proceedings with a different party. [Case citations omitted]

[19] The Commissioner's alternative argument based on abuse of process also draws on these passages. But as recognised at para [61] of *Lai v Chamberlains*, collateral challenge will not always be an abuse. Favourable reference was made to *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31 where Lord Bingham said:

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.... It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

[20] Res judicata and abuse of process are not absolute principles. Both recognise exceptions:

> **[20.1]** The common law merger rule does not apply to fresh or continuing acts of the same character such as repeated defamations, or continuing trespasses or nuisances. Nor does the rule apply where there are successive wrongs. So a judgment in defamation does not bar an action for another publication of the same defamatory matter, because each publication is a separate tort. See Spencer Bower and Handley *Res Judicata* at [21.05] and [21.08].
>
> **[20.2]** As recognised in *Lai v Chamberlains* at [61] and [62] and in *Johnson v Gore Wood & Co (a firm)* at [31] the question whether proceedings are an abuse of process requires a broad, merits-based judgment focusing attention on the crucial question whether, in all the circumstances, the party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before.

[21] Against this background we address first the question whether, in making the disclosures to the counselling organisation, the Department for Courts and ACC, Principle 8 was breached once only by the Police and second, whether any remedies sought in these second proceedings were granted in the first proceedings.

Principle 8 – whether a continuing duty to ensure accuracy etc

[22] The essential issue is whether, under the Privacy Act, the duty on an agency holding personal information is to ensure once only that it is accurate or whether such duty is imposed separately in respect of each occasion the information is used. The answer to this issue turns on the text of Principle 8 and its purpose as interpreted against the purposes of the Privacy Act itself. See s 5 of the Interpretation Act 1999. We address the latter first.

[23] The Long Title to the Privacy Act, after referring to the *Recommendation* of the OECD, goes on to state that it is an Act "to promote and protect individual privacy" and to establish "certain principles" with respect to "the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals":

> An Act to promote and protect individual privacy in general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, and, in particular,—

(a) to establish certain principles with respect to—

(i) the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and

(ii) access by each individual to information relating to that individual and held by public and private sector agencies; and

(b) ...

(c) ...

[24] In its simplest terms, the OECD *Recommendation* is that Member countries take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set forth in the *Guidelines* contained in the Annex to the *Recommendation*. That Annex is stated to be an integral part of the *Recommendation*. In the present context it is relevant to refer only to Annex Guideline 8:

Data Quality Principle

8. Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

[25] As its name suggests, the Data Quality Principle in Annex Guideline 8 underlines the need for data to have quality or integrity *vis-à-vis* the purpose for which it is to be used. Hence the stress on the need for the data to be accurate, complete and up to date. It is these terms which quantify the "quality" principle inherent in the OECD *Guidelines.* The only reasonable interpretation of Guideline 8 is that it imposes a continuing duty of "quality" because the reference to "the purposes for which [the data] is to be used" requires a case by case assessment of what the particular circumstances require in terms of accuracy, completeness and "up to dateness".

[26] The notion of "quality" lies at the heart of the information privacy principles articulated in Part 2 of the Privacy Act. As recently stated in *Lochead-MacMillan v AMI Insurance Limited* [2012] NZHRRT 5 at [50]:

The principles stress that if an agency is to collect and hold personal information there is a need for the information to be accurate. For example, the information must be collected for a purpose and be necessary for that purpose (principle 1). The information should be collected directly from the individual (principle 2) and the individual must know that the information is being collected and the purpose for which it is being collected (principle 3). The agency must protect against (inter alia) loss, unauthorised access, modification or disclosure. Above all the agency is under a mandatory duty to give to the individual access to the information (principle 6) and the individual has a right to request correction of that information (principle 7). Indeed the agency has an obligation on its own initiative to take such steps to correct the information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading (principle 7). It is not surprising that an agency holding personal information is under a mandatory duty not to use the personal information without taking such steps as are in the circumstances reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant and not misleading (principle 8).

[27] Principle 8 itself provides:

Principle 8

Accuracy, etc, of personal information to be checked before use

An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

[28] It is to be noted that the mandatory obligation on the agency holding personal information not to "use" the information without "ensuring" that the information is "accurate, up to date, complete, relevant and not misleading". It is clear from the phrase "shall not use" that this duty applies to each "use" of the information. Deployment of the time-focused expression "up to date" and the imposition of a mandatory duty to ensure that the information is accurate, complete, relevant and not misleading unambiguously point to the ongoing, ambulatory nature of the duty. Looked at another way, the terms "accurate", "up to date", "complete", "relevant" and "not misleading" are not empirical or absolute standards. As conceived of by Principle 8, they take their meaning from the context and from the particular circumstances of the case, including the purpose for which the personal information is to be used. The content of the Principle 8 duty is largely controlled by the purpose for which the information is proposed to be used. This necessarily requires a case by case analysis. In some circumstances "historical" information of the kind set out in the Noting may be adequate such as where the purpose of the personal information request is to ascertain only what allegations were made against EFG. But where the personal information is to be provided many years later to a prospective employer, much more is required, as this Tribunal held in its first decision at [70][b].

[29] We conclude that the text of Principle 8, read in the context of the information principles, imposes a continuing or ambulatory obligation on the agency and that that obligation attaches to each and every occasion on which the personal information is "used" by the agency. This interpretation is reinforced by the Data Quality Principle in Annex Guideline 8.

Duplication of remedies

[30] Our holding that Principle 8 imposes a continuing or ambulatory duty on an agency will, of course, impact on the remedies which can be granted.

[31] Once an "action" of an agency breaches an information privacy principle and once, in the opinion of the Tribunal, that action has caused one or more of the three forms of harm listed in s 66(1)(b)(i) to (iii), that action satisfies the definition of "an interference with the privacy of an individual" set out in s 66(1) of the Act. If such interference is established on the balance of probabilities the Tribunal is empowered by s 85(1) to grant one or more of the following remedies:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> > (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
> >
> > (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
> >
> > (c) damages in accordance with section 88:

> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
>
> (e) such other relief as the Tribunal thinks fit.

[32] The "damages in accordance with section 88 of this Act" are as follows:

> **88 Damages**
>
> (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
>
> > (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
> >
> > (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
> >
> > (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

[33] As it is our view that each breach of Principle 8 triggers a separate inquiry as to whether the "action" of the agency satisfies the s 66 definition of "interference with the privacy of an individual", a separate assessment of the ss 85 and 88 remedies is similarly required for each such breach. That having been said, however, it must be kept in mind that it is a general principle that damages cannot be recovered twice for the same breach and that parties are to be protected from oppressive proceedings. The assessment of damages is not a mechanical or "tick the box" exercise. As underlined by s 89 of the Privacy Act and s 105 of the Human Rights Act 1993, the Tribunal must act according to the substantial merits of the case, without regard to technicalities, in accordance with the principles of natural justice, in a manner that is fair and reasonable, and according to equity and good conscience.

[34] We turn now to the remedies sought in the present proceedings.

[35] When one compares the remedies granted in the first proceedings with the remedies now sought by the Director of Human Rights Proceedings under s 82 of the Act, there is clearly a degree of overlap. We address each remedy separately.

[36] First, a declaration is sought, in effect, that there has been a breach of Principle 8. Presumably such declaration will relate to the disclosure to ACC. A similar declaration has already been granted by the Tribunal at paras [70], [75] and [108] of the 21 December 2006 decision in respect of the disclosures to the counselling organisation and the Department for Courts. We do not see a further declaration relating to the ACC breach as offending any of the legal principles discussed earlier. If there has been a breach of an information privacy principle, the aggrieved individual is ordinarily entitled to a declaration to that effect. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384 (21 March 2012) at [108].

[37] Next the Director seeks an order restraining the Commissioner from further conduct of the same kind. Such order has already been made in the first decision at para [110]. In this respect we find that the statement of claim offends what might broadly be called the finality principle. The remedy having already been granted it is impermissible to invite the Tribunal on a second occasion to revisit the question whether the remedy

should now be granted. Furthermore it must also be recognised that the Police are in an invidious position. At the time the first decision of the Tribunal was given on 21 December 2006 the Noting had already been disclosed to ACC and the clock cannot now be turned back.

[38] The position with regard to damages is slightly different. In the first set of proceedings EFG sought damages for economic loss (s 88(1)(a) and (b)) and for what might loosely be called emotional harm (s 88(1)(c) – humiliation, loss of dignity, and injury to feelings). The claim for economic loss is itemised at para [54] of the first Tribunal decision. That claim was abandoned during the hearing after EFG recognised that the termination of his position with the counselling organisation had nothing to do with the information that had been supplied by the Police. See paras [55] to [57] of the first decision. We are of the view that because the first Tribunal did not enquire into or make a determination in relation to economic loss there would appear to be no reason in principle why a claim cannot now be made for the alleged economic loss flowing from the disclosure of the Noting to ACC. It is observed, however, that such loss will need to be established by clear evidence, not by assertion.

[39] The position in relation to the new claim for damages for emotional harm is in a different category altogether because para [115] of the first decision of the Tribunal did take into account the emotional harm said to have been caused by the ACC disclosure:

> The humiliation, loss of dignity and injury to feelings he has suffered on subsequent occasions when there has been an application for vetting and the Police have dealt with it by disclosing the noting from the NIA database once again;

[40] A further award in these present proceedings for the same harm would offend the rule that damages can only be assessed once. In fairness, the Director does not argue to the contrary. He submits that provided the Tribunal is alive to the possibility of "double recovery" for emotional harm, no injustice need be feared if the present proceedings are allowed to go to a substantive hearing.

[41] The conclusion we have reached on the emotional harm issue is one focussed entirely on whether the ACC disclosure was taken into account by the first Tribunal. The issue turns on what the Tribunal did rather than what it had jurisdiction to do. The rule against double recovery is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation. In addition, s 105 of the Human Rights Act requires the Tribunal to act according to the substantial merits of the case, without regard to technicalities. If EFG has been compensated for emotional harm caused by the disclosure to ACC it is not permissible, in other proceedings, for such harm to be compensated for again even if the first award was made without jurisdiction. The fact is that there has been recovery.

[42] However, in deference to the submissions we have heard on the point we will address the jurisdiction issue separately, albeit briefly.

The jurisdiction point – separation and conflation of complaints

[43] Any person may make a complaint (an oral complaint must be put in writing as soon as possible) to the Privacy Commissioner alleging that any action is or appears to be an interference with the privacy of an individual and the Privacy Commissioner has power to commence an investigation. See ss 67, 68 and 70 of the Act. Section 73 requires the Commissioner, before proceeding to investigate any matter, to inform the person to

whom the investigation relates of the Commissioner's intention to make the investigation and to afford that person an opportunity to be heard. The duty is to:

> ... inform the person to whom the investigation relates of –
>
> (i) the details of the complaint (if any) or, as the case may be, the subject-matter of the investigation; and
> (ii) 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.

[44] The statutory scheme thus envisages the formulation of a written complaint and the provision of details of that complaint to the person to whom the investigation relates so that that person has an opportunity to be heard. This is but fair play in action. The hearing, however, is only in relation to the written complaint.

[45] Where the Privacy 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" the aggrieved individual may himself or herself bring proceedings before this Tribunal. See s 83. Proceedings under that provision, however, are not of an open-ended nature, permitting a general inquiry into all privacy issues about which the individual may be aggrieved. Rather, the jurisdiction of the Tribunal depends on the "complaint" or "matter" as the case may be, which was before the Privacy Commissioner at first instance and in relation to which the person to whom the investigation relates has had an opportunity to be heard. See *L v T* (1998) 5 HRNZ 30 (Morris J, A Knowles, GDS Taylor) at 35.

[46] When the first proceedings were heard by the Tribunal in 2006 under s 83 the ACC complaint was still under consideration by the Privacy Commissioner, could not properly have been part of the proceedings before the Tribunal and ought not to have been taken into account in the assessment of damages for emotional harm. But even though the Tribunal was, in this respect, acting outside of jurisdiction, its decision remains operative until set aside by a Court. See the judgment of Elias J in *Murray v Whakatane District Council* [1999] 3 NZLR 276 at 320; aff'd [1999] 3 NZLR 325 (CA):

> It is settled law that every unlawful administrative act, except perhaps in extreme cases of clear usurpation of power, is operative until set aside by a Court. Even where a decision is challenged by a plaintiff entitled to do so in appropriate legal proceedings, the Court is not compelled to set aside the decision ... The validity of a decision is therefore a concept which is "relative, depending upon the court's willingness to grant relief in any particular situation ... It does not follow from the fact of illegality in the decision making that the decision will be set aside or, if it is, that it will be set aside ab initio ... [citations omitted]

[47] Applying this authority to the facts, we are of the view that we must take the decision of the first Tribunal as we find it. The ACC disclosure was taken into account in assessing damages for emotional harm. There can be no second assessment of those damages.

Abuse of process

[48] We now address the question whether a different outcome would be indicated were the alternative argument by the Commissioner of Police under the abuse of process doctrine to be deployed.

[49] As earlier mentioned, the question whether these proceedings are an abuse of process requires a broad, merits-based judgment focusing attention on the crucial question whether, in all the circumstances, the Director of Human Rights Proceedings is

misusing or abusing the process of the Court by seeking to raise before it an issue which could have been raised before. See the passages cited earlier from *Lai v Chamberlains* and *Johnson v Gore Wood & Co (a firm)*.

[50] As to this we have explained that the disclosure of the Noting to ACC was not, strictly speaking, a matter which could have been properly raised before the first Tribunal as an issue over which it had jurisdiction to decide. The matter was still before the Privacy Commissioner. Nevertheless the fact of the matter is that the ACC disclosure was taken into account when the Tribunal made the damages award in 2006 for emotional harm. That award has not been challenged in the High Court or otherwise set aside. This Tribunal in the present proceedings is accordingly bound to decline a further award under s 88(1)(c). This Tribunal must similarly recognise that the making of a further restraining order would be inappropriate. To this extent the abuse of process doctrine applies. But similar objections do not apply to the balance of the remedies sought for the ACC breach, namely a declaration that there has been a breach of Principle 8 and damages for pecuniary loss under s 88(1)(a) and (b).

Summary of conclusions

[51] For the reasons given we have determined not to dismiss these proceedings. That does not mean to say that the application by the Commissioner of Police has been wholly unsuccessful. In particular we have ruled that:

> **[51.1]** An order restraining the Commissioner from further conduct of the same kind cannot properly be sought.
>
> **[51.2]** There can be no further award to EFG of damages under s 88(1)(c) of the Act for humiliation, loss of dignity and injury to his feelings in relation to the ACC disclosure.

[52] On the other hand we have determined, against the Commissioner, that:

> **[52.1]** On a breach of Principle 8 being established, the aggrieved individual is ordinarily entitled to a declaration to that effect. The fact that a declaration has been made in relation to other breaches in other breaches is not a disqualification.
>
> **[52.2]** If by clear evidence it is established that EFG suffered economic loss from the disclosure of the Noting to ACC it would be open to the Tribunal to make an award of damages under s 88(1)(a) and (b).

Name suppression

[53] An order has been made in the High Court prohibiting publication of EFG's name, or of any details that might identify him as having been the accused in the relevant trial. In addition the first Tribunal at para [4] made an order under s 107(3) of the Human Rights Act permanently prohibiting the publication of his name, or of any details that might identify him in connection with this litigation in the Tribunal. We accordingly make an order under s 107(3)(b) of the Act in identical terms. We also direct that the Tribunal's file not be searched by anyone (save for the parties) without the leave of the Chairperson of the Tribunal having first been obtained in writing.

Direction for an early teleconference

[54] The Tribunal is conscious that there has been delay in dealing with the Commissioner's application and an apology is tendered in that respect. The transition from the outgoing Chairperson to the ingoing Chairperson unfortunately led to some matters not being attended to as soon as they ought to have.

[55] The Secretary is now directed to convene a teleconference at the earliest opportunity for the case to be timetabled to an early hearing.

.....	.....	.....
Mr RPG Haines QC	**Mr R Musuku**	**Mr B Neeson**
Chairperson	**Member**	**Member**