IN THE HUMAN RIGHTS REVIEW TRIBUNAL [2018] NZHRRT 49

Reference No. HRRT 009/2018

UNDER	THE PRIVACY ACT 1993
BETWEEN	JOHN MATSUOKA
	PLAINTIFF
AND	E TŪ INCORPORATED
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:
Mr MW O'Brien for plaintiff
Mr S Meikle for defendant

DATE OF HEARING OF APPLICATION FOR PRESERVATION ORDERS: Heard on the papers

DATE OF DECISION ON APPLICATION FOR PRESERVATION ORDERS: 12 November 2018

DECISION OF CHAIRPERSON GRANTING APPLICATION BY PLAINTIFF FOR PRESERVATION ORDERS[1]

Introduction

[1] E tū Incorporated (E tū) is a union registered under Part 4 of the Employment Relations Act 2000 and Mr Matsuoka is one of its members.

[2] As is his entitlement, Mr Matsuoka requested access to his personal information held by E tū. The union did not make any response to that request. The Privacy Act 1993 (PA) deems such failure to be a refusal of the request.

[1] [This decision is to be cited as: *Matsuoka v E Tū Incorporated (Preservation Orders)* [2018] NZHRRT 49]

[3] In his statement of claim Mr Matsuoka seeks by way of remedy (inter alia) an order that access be given to the requested information. Being concerned some or all of that information might be lost or destroyed before the case has been heard and determined by the Tribunal, Mr Matsuoka on 25 June 2018 asked E tū to give an undertaking to preserve the information. The union has refused to give such undertaking. Mr Matsuoka now applies for interim preservation orders. The application is opposed by E tū.

[4] In this decision I explain why the making of interim preservation orders is necessary in the interests of justice to preserve Mr Matsuoka's position.

The interim order application and its grounds

[5] The forms of relief sought in the statement of claim are:

> [5.1] A declaration of interference with privacy.
>
> [5.2] An order requiring E tū to provide Mr Matsuoka with all communications between itself and LSG Sky Chefs New Zealand Ltd (LSG) relating to Mr Matsuoka.
>
> [5.3] Special damages of $1,556.
>
> [5.4] Damages of $15,000 as compensation for injury to feelings. In this regard there is a possible typo in para 34 of the statement of claim because the figure of $1,500 given in that paragraph is to be contrasted with the sum of $15,000 given in para 43. It will be necessary for Mr Matsuoka to clarify whether the difference was intended or whether an error has been made.

[6] The application for preservation orders relates to the second form of relief sought, namely the provision of access to the requested personal information. The specific orders sought in the interim order application are:

> a That the defendant be required to take steps to preserve all electronic and hard copy material:
>
> (i) Related to the plaintiff; and
>
> (ii) Communications between the defendant and any employees or officers of LSG Sky Chefs New Zealand Ltd relating to the plaintiff.
>
> ('Information')
>
> b That the defendant notifies all internal departments and/or individuals who may have access to the Information of the obligations imposed by paragraph 1(a) above.
>
> c That the above orders continue until further order of the Tribunal, or the conclusion of the proceedings (including any appeals).

[7] The grounds on which the order are sought are as follows:

> a The Information sought by the plaintiff relates to events occurring as early as 2011.
>
> b The Tribunal is unlikely to hear and determine the plaintiff's case before the end of 2019.
>
> c In light of the amount of time that will elapse before the plaintiff receives Judgment, there is a real risk that the Information will be inadvertently destroyed and the plaintiff's remedies will be rendered nugatory.
>
> d Taking steps to preserve the Information is proportionate and appropriate in the circumstances. The plaintiff has sought to resolve the issue informally with the defendant, but has not received any response.

[8] Mr Matsuoka has filed in support an affidavit sworn on 5 July 2018 and he has given an undertaking dated 10 August 2018 as to damages. It is to be observed, however, that such undertakings are not ordinarily required by the Tribunal given its unique human rights jurisdiction.

[9] By *Minute* dated 23 July 2018 I gave case management directions for the filing of the union's notice of opposition and affidavit evidence. Submissions dated 23 August 2018 in opposition to the application have been filed. Those submissions are summarised and addressed in a later section of this decision. No evidence has been filed by the union.

Brief account of the facts as pleaded

[10] The parties have not yet filed statements of evidence addressing the substantive claim itself but the matters in dispute are nevertheless readily apparent from the terms of the statement of claim and statement of reply. Most of the material parts of Mr Matsuoka's claim have been admitted by E tū.

[11] It is common ground that on 25 May 2017 Mr Matsuoka made an IPP 6 request for access to his personal information held by the union and no decision on that request was made or communicated within the 20 working days allowed by PA, s 40. The pleadings show the parties are agreed the time for the union to respond to the request expired on 23 June 2017.

[12] It was not until nearly four months had passed beyond the statutory deadline and only after Mr Matsuoka on 4 July 2017 had filed a PA, Part 8 complaint with the Privacy Commissioner that the union on 11 October 2017 sent an email to Mr Matsuoka's solicitors attaching three documents said to comprise all Mr Matsuoka's personal information held by the union, namely:

> **[12.1]** A membership record.
>
> **[12.2]** A statement in reply and two associated applications for urgency in respect of the statement in reply and an application to remove the proceedings directly to the Employment Court, all dated 8 March 2011.
>
> **[12.3]** An affidavit by John Ryall dated 16 March 2011 (the union's national secretary at the time) in support of the union's application for leave to appear and be represented in the proceedings. The application for leave to appear was not among the documents provided.

[13] Mr Matsuoka does not accept the above documents comprise all his personal information held by E tū. Notice of this fact and the grounds of his belief was given by Mr Matsuoka in a letter dated 13 October 2017 addressed to the solicitor for the union. The terms of that letter as summarised in the statement of claim are admitted by E tū:

> 19 On 13 October 201 7, the plaintiff wrote to the defendant's solicitor.
>
> **Particulars**
>
> a The plaintiff was concerned by the defendant's failure to acknowledge his Privacy Act request and the amount of time it had taken the defendant to provide this limited information.
>
> b The plaintiff was extremely concerned by the amount of missing information.

c The plaintiff considered such further information existed given the defendant's involvement in the former eligibility proceedings and the transfer of the plaintiffs employment to LSG.

d Given the defendant's solicitor's involvement in related matters, he must be aware that further communications exist.

e The plaintiff requested all personal information be provided by 5pm on Tuesday 17 October 2017.

[14] The union admits failing to reply to this letter within the stipulated timeframe of 17 October 2017.

[15] The further personal information believed by Mr Matsuoka to be held by E tū is outlined by him in a letter to the Privacy Commissioner dated 6 November 2017. The particulars provided in the statement of claim are in the following terms:

> 23 On 6 November 2017, the plaintiff wrote to the Privacy Commissioner outlining the personal information he considered had been withheld:
>
> **Particulars**
>
> a The plaintiff was seeking the provision of all communications between the defendant and LSG.
>
> b The defendant participated in the former eligibility proceedings as an interested party and would have been served by LSG with various legal documents throughout those proceedings. At a minimum, those documents exist and have not been disclosed.
>
> c The plaintiff believes the defendant and LSG would have discussed the proceedings between themselves because:
>
> i The defendant was the relevant union at LSG and the outcome of the eligibility proceedings would have affected their ongoing dealings, particularly as a number of the defendant's members had transferred their employment to LSG at the same time as the plaintiff.
>
> ii The plaintiff did not tell the defendant about the proceedings. Therefore, the only way the defendant could have found out about the proceedings (and thus applied to be an interested party) was through communication with LSG.
>
> iii The defendant has previously acknowledged that such communications exist (in the context of the plaintiff's personal grievance proceedings) but claimed that the communications were not 'relevant' and should not be disclosed.
>
> iv The defendant's solicitor, Mr Cranney, has referred to at least one of these communications in other proceedings:
>
> A The Court's Judgment in *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 108 involved another employee that transferred her employment to LSG at the same time as the plaintiff. The Court was determining a dispute over documents held by the defendant and Mr Cranney, as counsel for the defendant, described each document to the Court so that it could determine whether the document was relevant to those proceedings.
>
> B At paragraph [30], the Court refers to an email dated 8 March 2011 at 3.44pm 'relating to the Matsuoka litigation'.

[16] Sometime in December 2017 E tū advised the Privacy Commissioner that a further search of its records had located personal information about Mr Matsuoka which had not previously been disclosed. However, none of the newly found information was given by the union to the Privacy Commissioner to enable him to form a view on whether any of the

information had been properly withheld. The following description in the statement of claim of this information has been admitted by the union:

> 25 In or around December 2017, the defendant advised the Privacy Commissioner:
>
> **Particulars**
>
> a That a further search had located:
>
> i Four Employment Court Judgments, which it declined to provide on the grounds that they were publicly available;
>
> ii Several emails the defendant declined to provide on the grounds that it considered they were legally privileged; and
>
> iii One email which the defendant understood LSG had provided to the plaintiff in 2014.
>
> b The defendant did not provide any of this information to the Privacy Commissioner to enable it to form a view on whether the defendant was entitled to withhold the information.

[17] On 21 December 2017 the Privacy Commissioner released his findings. Those findings have been summarised in the statement of claim in a paragraph admitted by the union:

> 26 On 21 December 2017, the Privacy Commissioner issued the findings of its investigation.
>
> **Particulars**
>
> a The defendant had failed to respond to the plaintiff's initial request for personal information in accordance with s 40 of the Act, creating a technical interference with the plaintiff's privacy under s 66(3) of the Act.
>
> b The defendant had failed to provide compelling reasons with reference to the withholding grounds at ss 27-29 of the Act for its failure to provide the plaintiff's information to him.
>
> c The defendant failed to provide evidence of a proper basis for withholding the information from the plaintiff, creating an interference with the plaintiff's privacy under s 66(2)(a)(i) of the Act.
>
> d The Privacy Commissioner did not intend to refer the matter to the Director of Human Rights Proceedings.

[18] The Certificate of Investigation issued by the Privacy Commissioner on 21 December 2017 provides the following outline of the Commissioner's investigation and conclusions:

Certification of Investigation for Human Rights Review Tribunal

Complainant	**John Matsuoka (Our Ref: C/28880)**
Respondent	**E tū Incorporated ("E tū")**
Matters investigated	Whether E tū provided Mr Matsuoka with all the personal information he is entitled to in response to his 25 May 2017 access request.
Principle(s) applied	IPP 6
Commissioner's opinion: • **application of principle(s)**	Interference with privacy under ss 66(2)(a)(i) and 66(3). E tū failed to respond to the request within 20 working days. It also failed to provide reasons for withholding some information.

• **adverse consequences**	N/A.
• **interference with privacy**	Yes.

[19] For present purposes the salient points emerging from the foregoing are:

[19.1] The union does not dispute it failed to respond to the IPP 6 request within the statutory timeframe prescribed by PA, s 40.

[19.2] On 11 October 2017 (nearly four months out of time) the union made partial disclosure by providing three documents to Mr Matsuoka.

[19.3] Mr Matsuoka by letter dated 13 October 2017 provided E tū with a reasoned basis for asserting it holds additional personal information about him. The union failed to respond to the renewed request that the personal information be provided by 17 October 2017.

[19.4] In December 2017 the union disclosed it was indeed holding further personal information but declined to provide copies of the four disclosed Employment Court judgments. It also declined to provide a copy of an email which the union understood LSG had provided to Mr Matsuoka in 2014. These actions confirm Mr Matsuoka's belief that E tū does indeed hold other personal information about him, the existence of which has either not been disclosed or in relation to which access has not been provided.

[19.5] E tū has refused to give an undertaking to preserve the documents and other material held by it and which comprise the personal information about Mr Matsuoka held by the union.

[19.6] For an agency which is in clear breach of its obligations under IPP 6 and PA, s 40 and which has admitted to holding more information than that belatedly disclosed some four months after expiry of the statutory deadline (and then only after Mr Matsuoka had lodged a complaint with the Privacy Commissioner), the refusal to provide the undertaking sought is surprising. The validity of the reasons proffered for that refusal are examined next.

The grounds of opposition

[20] The union's submissions in opposition to the application for a preservation order are:

[20.1] Sections 84 and 85 of the Privacy Act do not permit interim or substantive relief in the nature of a preservation order.

[20.2] The Tribunal has no jurisdiction to order injunctive relief, being the true nature of para 1(b) of Mr Matsuoka's application (ie that E tū notifies all internal departments and/or individuals who may have access to the information of the obligation to preserve the personal information).

[20.3] The reasons why the union has refused to sign the "unsolicited" undertaking requested by Mr Matsuoka are:

[20.3.1] It is "telling" that Mr Matsuoka has sought a rehearing of his grievance [before the Tribunal] when he has been successful before the Privacy Commissioner.

[20.3.2] If Mr Matsuoka had any real concerns the application for a preservation order would have been made well prior to the application date of 5 July 2018. Mr Matsuoka has not provided any explanation for that delay.

[20.3.3] Mr Matsuoka is not qualified to make "bald assertions" that the inadvertent deletion or loss of information, including emails is possible.

[21] The attention of the Tribunal is also drawn to a decision of the Employment Court in *Matsuoka v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 14 in which that court dismissed what E tū asserts was a similar application by Mr Matsuoka for a preservation order. The application failed because no evidence had been filed to support his belief preservation orders against LSG Sky Chefs were necessary.

[22] In proceedings before the Tribunal the preservation of information and documents is an aspect of a party's disclosure (ie discovery) obligations and of its obligations under IPP 5. Those obligations are addressed next.

DISCUSSION

THE DISCOVERY OBLIGATIONS OF PARTIES TO PROCEEDINGS BEFORE THE TRIBUNAL

The rationale for discovery

[23] There is compelling public interest in ensuring a court or tribunal is able to get at the truth so that justice may be done between the parties. See *Riddick v Thames Board Mills Ltd* [1977] QB 881 at 895-896. Experience shows the discovery process is essential for the achievement of this objective. The underlying principle is that of promoting the administration of justice and the public interest in ensuring that all relevant evidence is provided to the court or tribunal in litigation. See for example *Tchenguiz v Grant Thornton UK LLP* [2017] EWHC 310, [2017] 4 All ER 895 at [6]:

> **[6]** For all the challenges just summarised, '[f]ew if any common lawyers would doubt the importance of documentary discovery [disclosure] in achieving the fair disposal and trial of civil actions'. Lord Bingham (as Bingham LJ) so observed in *Davies v Eli Lilly & Co* [1987] 1 All ER 801 at 815, [1987] 1 WLR 428 at 445, itself also a piece of large-scale litigation. Lord Donaldson (as Sir John Donaldson MR) described the right of discovery available in litigation in England and Wales as part of what enabled the court to achieve 'real justice between opposing parties' (in the same case, [1987] 1 All ER 801 at 804, [1987] 1 WLR 428 at 431). Lord Bingham (as Sir Thomas Bingham MR) went on to identify the promotion of the administration of justice as the underlying principle (*Process Development Ltd v Hogg* [1996] FSR 45 at 52). Rose and Hobhouse LJJ agreed, and the principle continues to be referenced: see for example *IG Index Ltd v Cloete* [2014] EWCA Civ 1128, [2015] ICR 254 at [28] by Christopher Clarke LJ, with whom Barling J and Arden LJ agreed.
>
> **[7]** These fundamentals have not dimmed: disclosure exists as a feature of litigation because 'there is a public interest in ensuring that all relevant evidence is provided to the court' in litigation (*Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1409, [2014] All ER (D) 14 (Nov) at [56] per Jackson LJ, with whom Sharp and Vos LJJ agreed).

The Tribunal's power to order discovery

[24] The Tribunal's power to order discovery was explained in *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31 (21 July 2015) at [9]:

> **[9]** Neither the Privacy Act 1993 nor Part 4 of the Human Rights Act 1993 (incorporated into the Privacy Act by s 89 of the Privacy Act) employ the term "discovery" when setting out the powers of the Tribunal or its Chairperson. The Tribunal nevertheless has jurisdiction to order parties before it to give discovery either on a formal or informal basis. This power flows from three primary sources:
>
> > **[9.1]** Section 106(1)(a), (b) and (c) of the Human Rights Act which confers power on the Tribunal to call for evidence and information from the parties or any other person and to require the parties or any other person to attend the proceedings to give evidence. The "any other person" phrase is of particular relevance to non-party discovery:
> >
> > > **106 Evidence in proceedings before Tribunal**
> > >
> > > (1) The Tribunal may—
> > > (a) call for evidence and information from the parties or any other person:
> > > (b) request or require the parties or any other person to attend the proceedings to give evidence:
> > > (c) fully examine any witness:
> >
> > **[9.2]** Section 104(5) which confers power on the Tribunal to regulate its own procedure:
> >
> > > (5) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal may regulate its procedure in such manner as the Tribunal thinks fit and may prescribe or approve forms for the purposes of this Act.
> >
> > **[9.3]** Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002 which confers power on the Chairperson to give such directions as may be necessary or desirable for the proceedings to be heard, determined or otherwise dealt with, as fairly, efficiently, simply and speedily as is consistent with justice:
> >
> > > **16 Conduct of proceedings: power to give directions, etc**
> > >
> > > (1) Subject to decisions of the Tribunal, the Chairperson may give any directions and do any other things—
> > > (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and
> > > (b) that are not inconsistent with the Act or, as the case requires, the Privacy Act 1993 or the Health and Disability Commissioner Act 1994, or with these regulations.
>
> **[10]** The Tribunal's power to order discovery of even confidential documents was not questioned in *Alpine Energy Ltd v Human Rights Review Tribunal* [2014] NZHC 2792 (11 November 2014) and see also the discussion of discovery in the Tribunal's subsequent decision in *Hood v American Express International (NZ) Inc (Discovery)* [2015] NZHRRT 1 (23 January 2015) at [5] to [10].
>
> **[11]** As to the procedure for ordering a non-party to give discovery in proceedings before the Tribunal, s 104(5) gives the Tribunal a wide discretion. In the exercise of that discretion appropriate account must be taken of the procedure prescribed by the High Court Rules. While those Rules do not apply to the Tribunal, they are often drawn on to provide guidance on such matters as discovery subject to the proviso the Rules are to be appropriately modified and adapted to the Tribunal's distinctive jurisdiction.

The duty to preserve

[25] There is a long-recognised common law duty to preserve documents once litigation is reasonably contemplated. That duty is now expressly affirmed in High Court Rules, r 8.3 which provides:

8.3 Preservation of documents

(1) As soon as a proceeding is reasonably contemplated, a party or prospective party must take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding.

(2) Without limiting the generality of subclause (1), documents in electronic form which are potentially discoverable must be preserved in readily retrievable form even if they would otherwise be deleted in the ordinary course of business.

[26] To the same degree the duty to preserve documents applies also to parties in proceedings before the Tribunal because their duty to provide discovery cannot be frustrated by the careless or deliberate destruction of documents reasonably likely to be of relevance in the proceeding. Of necessity the duty to preserve documents as expressed in High Court Rules, r 8.3 must (and does) apply also in proceedings before the Tribunal.

[27] The duty to preserve documents in the context of proceedings before the Tribunal is congruent with IPP 5 which separately imposes on an agency a duty to take reasonable security safeguards to prevent loss of personal information:

Principle 5

Storage and security of personal information

An agency that holds personal information shall ensure—

(a) that the information is protected, by such security safeguards as it is reasonable in the circumstances to take, against—

(i) loss; and

(ii) access, use, modification, or disclosure, except with the authority of the agency that holds the information; and

(iii) other misuse; and

(b) that if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information.

[28] The litigation duty to preserve documents and the IPP 5 duty to protect personal information from loss work in tandem to impose on an agency an obligation to ensure personal information the subject of a complaint to the Privacy Commissioner or of proceedings before the Tribunal is not accidentally or deliberately lost or destroyed. In that sense an interim order of the kind sought in the present case merely writes large a duty which attaches to an agency in any event. However, an interim order may be justified where the agency appears to be unaware of its obligations or where there are grounds to believe it is reluctant to discharge them. An interim order may be particularly indicated where (as here) the substantive relief sought by a plaintiff includes a restraining order or an order for specific performance in terms of PA, s 85(1)(b) or (d) which provide:

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:

...

(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:

...

(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.

[29] It should not be open to a defendant to frustrate in advance the grant of such remedies by the careless or deliberate failure to preserve the plaintiff's personal information.

Enforcing the duty to preserve – interim orders to restrain or to perform specific acts

[30] In view of the union's submission (unsupported by authority) that HRA, s 95 does not confer jurisdiction to make an interim order in the nature of injunctive relief it is necessary to repeat that the remedies which can be granted by the Tribunal by way of substantive relief under PA, s 85(1) include the following mandatory orders:

> **[30.1]** 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 (PA, s 85(1)(b)).
>
> **[30.2]** 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. See PA, s 85(1)(c).

[31] If in its "final determination of the proceedings" the Tribunal is expressly empowered to grant remedies against a defendant in the form of injunctive or mandatory orders, there can be no principled basis for limiting the Chairperson's powers under s 95 to forms of interim relief falling short of such orders. Such limitation would largely emasculate s 95 in the context of Part 8 of the Privacy Act. The section itself does not limit the nature of the interim orders which can be made. All that is required is that the Tribunal have jurisdiction to hear the particular case and that the applicant for the interim order satisfy the decision-maker that it is necessary in the interests of justice that the order be made to preserve the position of the parties pending a final determination of the proceedings. See also *IDEA Services Ltd v Attorney-General (Interim Order Application)* [2013] NZHRRT 24 at [41].

[32] In *Winther v Housing New Zealand Corporation* [2010] NZCA 601, [2011] 1 NZLR 825 at [80] it was held an interim order could have been made under HRA, s 95 restraining the landlord in that case from proceeding with the termination of the plaintiffs' tenancies until a determination had been made under the HRA on a complaint of discriminatory conduct. In *Hosking v Wellington City Transport Ltd (t/a Stagecoach Wellington)* (1995) 1 HRNZ 542 the Chairperson of the (then) Complaints Review Tribunal granted an interim order restraining Wellington City Transport from taking delivery of 24 buses unless all such buses had been constructed and equipped in a manner which made them wheelchair-accessible. The Tribunal's wide jurisdiction under HRA, s 95 has been recognised in other cases. See for example *Eaglesome v Department of Corrections (Interim Orders)* [2015] NZHRRT 20 where the Tribunal granted interim orders requiring the Department of Corrections to provide Mr Eaglesome with kosher meals until the final determination of the proceedings, or his release from prison (whichever was earlier). While that determination was made following a consent memorandum, the Tribunal considered it had jurisdiction to make such orders.

[33] However, given the union has, without citing statutory or other authority, put in issue the reach of interim orders made by the Tribunal it is necessary that more particular reference be made to the jurisdiction of the Tribunal to make such orders.

INTERIM ORDERS – PRINCIPLES

[34] By virtue of the Human Rights Act 1993 (HRA), s 95 the Chairperson of the Tribunal has power to make an interim order if satisfied it is necessary in the interests of justice to make the order to preserve the position of one or both parties pending a final determination of the proceedings:

> **95 Power to make interim order**
>
> (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[35] Section 95 is incorporated into proceedings under the Privacy Act by virtue of s 89 of the latter Act.

[36] There are similarities as well as differences between HRA, s 95 and s 8 of the then Judicature Amendment Act 1972, now the Judicial Review Procedure Act 2016, s 15. As the differences can be significant, HRA, s 95 is to be interpreted in its own terms although the established case law in applications for review is a useful point of reference. The following points were collected in *IDEA Services Ltd v Attorney-General (Interim Order Application)* at [50] to [53]:

> **[50.1]** Being "satisfied" in this context simply means that the Chairperson has made up his or her mind that the interim order is necessary in the interests of justice to preserve the position of one of the parties pending a final determination of the proceedings. The term "satisfied" does not require that the Chairperson should reach his or her judgment having been satisfied that the underlying facts have been proved to any particular standard. See by analogy *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26] (Elias CJ) and [96] (Blanchard, Tipping and McGrath JJ).
>
> **[50.2]** The term "necessary" means reasonably necessary. See by analogy *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.
>
> **[50.3]** As to "the interests of justice" it was held in *X v Police* HC Auckland AP 253/91, 9 October 1991 by Barker J that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.
>
> **[50.4]** There is a clear distinction between preserving the position of a party on the one hand and improving it on the other. It is clear from s 95(1) of the HRA and from s 8(1) JAA 72 that the position of a plaintiff cannot be improved: *Movick v Attorney-General* [1978] 2 NZLR 545 (CA) at 551 line 35; *Nair v Minister of Immigration* [1982] 2 NZLR 571 at 575-576 (Davison CJ) and more recently *Squid Fishery Management Co Ltd v Minister of Fisheries* (2004) 17 PRNZ 97 at [29] (Ellen France J).]
>
> **[50.5]** The phrase "the position of the parties" must in this context be read as including the singular "party". See Interpretation Act 1999, s 33 and Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 428. Were the position otherwise, an interim order could seldom, if ever be made, as it is difficult to envisage circumstances in which an interim order could be couched in terms which preserved, simultaneously, the position of both parties to the proceedings.
>
> **[50.6]** The phrase "pending a final determination of the proceedings" in the context of a case where a reference has been made from the Tribunal to the High Court under s 92R HRA means pending the final determination of the Tribunal under s 92U ie after the

decision of the High Court on remedies has been remitted to the Tribunal; or alternatively, upon the reference coming to an end for some other reason and the Tribunal then making its final determination.

[51] The power in s 95(1) HRA is to be applied flexibly. Here s 8 JAA 72 assists by analogy:

> **[51.1]** In *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) Cooke J at 430 said that the s 8 power should not be restricted by any formulation such as that found in the cases on interim injunctions, for example *American Cyanamid*. Specifically there is no general rule that a prima facie case must be established by the applicant for the order. The Court has a wide discretion to consider all the circumstances of the case:
>
> > Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.
>
> **[51.2]** The broad language of this section was also emphasised by Richardson J at 430-431 and by Somers J at 433. In the interests of brevity only the passage from the judgment of Richardson J is reproduced here:
>
> > Section 8 of the Judicature Amendment Act 1972 does not mandate any particular approach to the statutory test of whether an interim order is necessary for the purpose of preserving the position of the applicant. The legal answer must depend on an assessment by the Judge of all the circumstances of the particular case. Clearly the nature of the review proceedings will be material. So will the character, scheme and purpose of the legislation under which the impugned decision was made. And appropriate weight must of course be given to all the factual circumstances including the nature and prima facie strength of the applicant's challenge and the expected duration of an interim order. Nor should the residual discretion under s 8 be circumscribed by reading qualifications into the broad language of the section.
>
> The *Carlton & United Breweries* approach was recently described by the Supreme Court in *Easton v Wellington City Council* [2010] NZSC 10 at [5] as settled principle. See also *Minister of Fisheries v Antons Trawling Company Ltd* (2007) 18 PRNZ 754 (SC) at [3] and [8].

[52] Also relevant in the context of exercising the power to make an interim order under s 95 are the provisions of s 105 of the HRA which provide:

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

[37] The recent decision in *Greer v Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [22] is of assistance in the present case. Although that decision related to the Judicial Review Procedure Act, s 15 two points were made which apply by analogy to interim order applications under HRA, s 95:

> **[37.1]** A narrow approach to the threshold question [in cases under the HRA that question is whether it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the

proceedings] is inappropriate. Interim orders are not limited to preserving the status quo:

> **[22]** ... The Court should avoid an overly formalistic approach to the threshold question, and allow the relevant factors to be addressed at the discretionary phase. Interim relief can encompass orders placing the applicant in the position it would have been but for the illegality alleged. It is not limited to preserving the status quo.

[37.2] The interim order power should be interpreted and applied in light of its purpose:

> **[24]** Other considerations also support a broader approach. Like all legislation, s 15 should be interpreted in light of its purpose. There are two evident purposes of the interim relief power – to relieve the applicant from the adverse effects of a challenged decision until the challenge is heard and determined, and to preserve the ability of the Court to grant effective relief if the challenge is successful. The threshold question should be interpreted and applied in light of these purposes.

[38] The first point explains there is jurisdiction to make orders placing the applicant in the position he or she would have been but for the illegality alleged. In the Tribunal's jurisdiction this point is underlined by the decision in *Winther*.

[39] As to the second point, there are two evident purposes of the interim relief power in HRA, s 95. First, to relieve the plaintiff from the adverse effects of a challenged decision until the challenge is heard and determined. See again for example *Winther* and *Hosking*. Section 95 is not limited to preserving the status quo. The focus is on whether the interim order is necessary to preserve the position of the applicant. The interim order can keep the plaintiff in, or restore him or her to, the position he or she would have been in but for the alleged interference with privacy. Second, to preserve the ability of the Tribunal to grant effective relief if the challenge is successful.

[40] It is accordingly plain a mandatory or injunctive interim order can be made under HRA, s 95.

WHETHER AN INTERIM ORDER SHOULD BE MADE

[41] Applying these principles to the present case the outcome is clear. Mr Matsuoka and the union agree the request for access to personal information was not responded to in time. As a consequence the Privacy Act, s 66(3) deemed that failure to be a refusal to make the information available. The parties are further agreed the union holds other personal information regarding Mr Matsuoka but the union has declined to acknowledge its duty to give access to that information and to preserve the relevant documents until the Tribunal can rule whether there has been an interference with Mr Matsuoka's privacy and whether access to the information should be formally ordered. At this stage of the case Mr Matsuoka has in his favour not only these factors but also the finding by the Privacy Commissioner at first instance that E tū has interfered with his privacy in terms of PA, s 66. He also has in his favour the unsupportable refusal by the union to provide an undertaking which does no more than acknowledge existing obligations under the discovery process and under IPP 5.

[42] In these circumstances there is every reason for an interim order to be made in the terms sought by Mr Matsuoka. The order is reasonably necessary in the interests of justice to preserve Mr Matsuoka's position pending final determination of these proceedings and to preserve the ability of the Tribunal to grant effective relief if Mr Matsuoka's proceedings are ultimately successful.

[43] Making an interim order will not prejudice E tū. If anything, the order will be to its potential benefit because enforcing the duty to preserve Mr Matsuoka's personal information may well have the effect of precluding Mr Matsuoka from claiming damages for documents lost or destroyed subsequent to the making of the IPP 6 access request. That is, an award of damages under PA, s 88(1)(b) for loss of benefit and under s 88(1)(c) for humiliation, loss of dignity or injury to his feelings. See *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [46]. In that case Mr and Mrs Jans, unhappy with the outcome of a mortgagee sale of their home, requested a copy of the real estate agent's file relating to the sale. That request was not complied with and it was eventually said the file had been lost. Damages were awarded not only for loss of the benefit of the file but also for emotional harm. Reference should also be made to the earlier decision in *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274 where documents sought in connection with proceedings before the then Employment Tribunal had not been disclosed. Damages were awarded because the plaintiff had lost the benefit of being able to utilise two letters in cross examination of a witness and in submissions before the Employment Tribunal. Damages were also awarded for emotional harm.

Conclusion

[44] For the reasons given I am of the view PA, s 95 permits the making of preservation orders in the terms sought by Mr Matsuoka and that the making of such orders is entirely consistent with the purpose of the interim relief power.

[45] I accordingly reject the union's submissions that the Privacy Act does not permit interim or substantive relief in the nature of a preservation order and that the Tribunal has no jurisdiction to order injunctive relief of the kind sought by Mr Matsuoka.

THE OTHER GROUNDS OF OPPOSITION

[46] It is now necessary to address the validity of the justification advanced by E tū for refusing to provide the undertaking requested by Mr Matsuoka on 25 June 2018. The two primary issues to address are whether proceedings before the Tribunal are "a rehearing of Mr Matsuoka's grievance when he has been successful before the Privacy Commissioner" and whether Mr Matsuoka has delayed the making of the present application.

The nature of the proceedings before the Tribunal

[47] The refusal by E tū to sign what it describes as "the unsolicited undertaking sent by the plaintiff on 25 June 2018" is explained by it on the ground (inter alia) that Mr Matsuoka has sought "a rehearing of his grievance when he has been successful before the Privacy Commissioner".

[48] This is a fundamental misconception of the complaints process in Part 8 of the Privacy Act. That process has been recently described in *Gray v Ministry for Children (Strike-Out Application)* [2018] NZHRRT 13 at [12] to [26] and it is not intended to repeat what is said there. It is sufficient for present purposes to note the Act requires that in the first instance complaints be dealt with by the Privacy Commissioner. If a mediated settlement cannot be reached the matter then proceeds to an enforcement stage before the Tribunal. The important point to be noted is that the statutory remedies for an interference with privacy can only be accessed through the Tribunal.

[49] The hearing before the Tribunal is conducted on a de novo basis and the Tribunal is not bound by any conclusions reached or views expressed by the Commissioner. The conclusions and views reached by the Commissioner in the course of his investigation are nevertheless entitled to respect, particularly in the context of interlocutory hearings before the Tribunal prior to the filing by the parties of their evidence and the determination of the case by the Tribunal. Consequently the undertaking sought by Mr Matsuoka regarding preservation of documents must be seen in the context that the Privacy Commissioner has found E tū has interfered with the privacy of Mr Matsuoka. Consequently, when the undertaking was sought on 25 June 2018 the request could not be dismissed out of hand. Nor could the evidence of Mr Matsuoka be dismissed as "self-serving, speculative and of no weight", being the characterisation used in the union's submissions at para 10.

[50] Mr Matsuoka is not seeking a "rehearing of his grievance". Rather he is seeking from the Tribunal a range of remedies permitted by PA, ss 85 and 88, remedies which are not available from the Privacy Commissioner.

A technical breach?

[51] The union also pleads in the statement of reply at para 29 that while it admits interfering with Mr Matsuoka's privacy under PA, s 66(3), the breach was "technical". On the information presently filed by the parties it is not at all clear to me that that is an accurate description of the facts of the case. Account must be taken of the fact that IPP 6 confers an **entitlement** to access to personal information, an entitlement which is enforceable as a legal right where the personal information is held by a public sector agency. That term is defined in PA, s 2 and includes "an organisation". That is to say, Mr Matsuoka has an enforceable right to the personal information held about him by the union.

[52] Consequently, to the degree the union's refusal to give an undertaking to preserve Mr Matsuoka's personal information was influenced by an inadequate understanding of the Act, the decision was misconceived.

The question of delay

[53] The union asserts that if Mr Matsuoka had any real concerns, the present application would have been made well prior to 5 July 2018.

[54] This submission fails to take into account two significant factors. First, all proceedings before the Tribunal currently face substantial delay. This is not the fault of the parties. The cause is systemic in that the Tribunal has been grossly under-resourced for a substantial number of years and it has taken me, as Chairperson, at least five years to get Government to remedy the problem. Cross-reference must be made to *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8. The Human Rights Act has in the last week been amended to permit the appointment of deputy chairs to assist with the Tribunal's workload but it will take some time for the backlog to be meaningfully addressed.

[55] Second, there is the point made by Mr Matsuoka in his reply submissions that the present application was made upon his becoming aware (in late March 2018) that the Tribunal was unlikely to hear and determine his substantive proceedings for some time.

[56] In these circumstances it is difficult to see any basis for criticising the timing of the present application. A further point is that entitlement to access one's personal information

is open ended. If personal information is held by an agency it must be disclosed on request and it does not matter how old the information is. That is, if E tū holds any personal information about Mr Matsuoka that dates back to 2011, that information should have been disclosed in response to Mr Matsuoka's IPP 6 request. The fact that the information is from 2011 is in this context not a defence to a finding of interference with privacy and equally no defence to the duty to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding.

The evidence regarding risk of loss

[57] In his affidavit sworn on 5 July 2018 Mr Matsuoka makes the unexceptional statement that personal information can be inadvertently deleted or lost. By way of illustration he refers to the loss of data as a consequence of the automatic deletion of emails after a certain period of time or as a consequence of computer upgrades or the transfer of digital information to a new system. The union objects to this evidence on the basis that Mr Matsuoka is unqualified to make these points.

[58] The objection is difficult to fathom. Mr Matsuoka is stating nothing more than the obvious. The very factors referred to by him explain why High Court Rules, r 8.3 imposes a duty to preserve discoverable documents. In the privacy context *Winter v Jans* demonstrates that loss of documents can and does occur. The objection is not one to which any weight can be given.

The Employment Court decision

[59] The union refers to the decision of the Employment Court given in proceedings by Mr Matsuoka against LSG and in which a preservation order was sought by Mr Matsuoka. The application failed as there was an absence of evidence to justify the order.

[60] The present proceedings, however, are against a different party and under a different Act. Most importantly, for the reasons given earlier Mr Matsuoka has established on the evidence before me that the interim order is necessary to preserve his position. See particularly the findings at para [19] above.

CONCLUSION

[61] For the reasons given and in light of the findings of fact made (particularly at para [19]) I am satisfied it is necessary in the interests of justice to make the interim orders sought by Mr Matsuoka to preserve the position of the parties pending a final determination of these proceedings. On the evidence presently before me it is to be doubted whether E tū has a proper understanding of its obligations under the Privacy Act or of its discovery obligations in litigation before the Tribunal. It appears to have treated the IPP 6 request and the request for preservation of Mr Matsuoka's personal information somewhat dismissively. The undertaking as to preservation of documents sought by Mr Matsuoka has been refused on grounds which are unsupportable. In these circumstances the personal information sought by Mr Matsuoka is at potential risk.

Costs

[62] Costs are reserved.

THE INTERIM ORDERS

[63] The following interim orders are made:

[63.1] E tū Incorporated must take all reasonable steps to preserve all electronic and hard copy documents and material which is personal information about the plaintiff, John Matsuoka. It must also take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding. Without prejudice to the generality of this order, the documents, electronic and hard copy material to which this duty to preserve applies is declared to include communications between E tū Incorporated and any employees or officers of LSG Sky Chefs New Zealand Ltd and which is about or relates to Mr Matsuoka.

[63.2] E tū Incorporated must notify the obligations contained in this interim order to all internal departments and/or individuals who may have access to the information described in the preceding paragraph.

[63.3] These interim orders are to have immediate effect and are to continue in force until further order of the Chairperson or of the Tribunal.

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

....

Mr RPG Haines ONZM QC
Chairperson