

- (1) INTERIM ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING PARTICULARS OF THE PLAINTIFF AND POLICE WITNESS REFERRED TO IN DECISION
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2019] NZHRRT 15

Reference No. HRRT 017/2017

UNDER THE PRIVACY ACT 1993

BETWEEN MARGARET GREEN

PLAINTIFF

AND NEW ZEALAND POLICE

DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson
Dr SJ Hickey MNZM, Member
Mr BK Neeson JP, Member

REPRESENTATION:

Mr D Neild for plaintiff
Mr R May for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 20 March 2019

DECISION OF TRIBUNAL ON JURISDICTION¹

¹ [This decision is to be cited as *Green v New Zealand Police (Jurisdiction)* [2019] NZHRRT 15. Due to publication restrictions this decision has been anonymised by the redaction of the true name of the plaintiff.]

Introduction

[1] In June 2015, the plaintiff requested a copy of the investigation file into a complaint of rape made by her to the Police in 2014. The Police response to this request was the subject of an investigation by the Privacy Commissioner. A Certificate of Investigation dated 14 October 2016 records that the Office of the Privacy Commissioner (OPC) investigated the Police response under Information Privacy Principle 6. The Certificate recorded the opinion that there had been no interference with privacy.

[2] In March 2017, the plaintiff filed proceedings under the Privacy Act (PA) in the Tribunal. The statement of claim alleged that the Police had interfered with the plaintiff's privacy by failing to provide requested personal information in contravention of Principle 6. In particular, that the plaintiff should have been provided with the full statement to the Police made by a witness, Jane Smith (not her real name), rather than a redacted version. She sought an order that the Police release the full statement of Jane Smith to her.

[3] On 17 July 2018, the plaintiff filed an amended claim specifying that in addition to Principle 6, Principles 4, 7 and 8 were relied on.

[4] There is a dispute between the parties as to whether the Tribunal has jurisdiction to hear the claim under Principles 4, 7 and 8 or whether the jurisdiction of the Tribunal is limited to the claim that there has been a breach of Principle 6. The primary issue to be determined in this decision is whether the Tribunal has jurisdiction to hear the plaintiff's claim concerning Principles 4, 7 and 8.

Background

[5] In 2014 The plaintiff made a complaint of rape to the Police. The complaint was historical in that the alleged offending took place in 1985.

[6] The alleged perpetrator was the plaintiff's former partner whom the plaintiff has described as a "Police associate". Following an investigation, the Police decided not to prosecute. In the course of the Police investigation, they took a statement from Jane Smith who was the wife of a Police Constable and a close friend of the plaintiff's former partner. The plaintiff believes that Ms Smith's statement contained false evidence and had an influence on the decision of the Police not to prosecute.

[7] In 2016, the plaintiff requested a copy of the investigation file into her rape complaint from the Police. After receiving this in a redacted form, she became concerned about allegations made against her by a number of witnesses and believed that the Police had too easily accepted attacks on her credibility. She made a complaint to the Independent Police Conduct Authority and forwarded a copy of that complaint to the Ombudsman together with a request for the release of the redacted material.

[8] The Office of the Ombudsman forwarded the plaintiff's complaint to the OPC.

[9] On 22 April 2016, the Commissioner notified the Police it had received a complaint from the plaintiff that “she had to wait three months for this information to be released, and when this information was provided to her much of it was withheld”. The Police were advised that the Commissioner considered that this “may raise issues under Principle 6 of the Act”.

[10] As noted earlier, the Certificate of Investigation stated that the complaint was investigated under Principle 6. It further recorded that some information was initially withheld inappropriately under PA, ss 27(1)(c) and 29(1)(a) but was subsequently provided.

[11] The statement of claim filed in the Tribunal in March 2017 specified that the relevant provision of the PA was Principle 6. The claim stated that witness statements made to the Police who were investigating a rape complaint by the plaintiff were heavily redacted under the withholding sections of the PA and that the plaintiff wished to see the full statement of Ms Smith. The claim also noted that some redacted material was released to the plaintiff during the course of the investigation into her complaint.

[12] When proceedings are filed in the Tribunal under the PA, a copy of the statement of claim is sent to the OPC by the Secretary with an enquiry as to whether there are any preliminary matters of which the Tribunal should be aware, particularly if jurisdiction is an issue.

[13] On 31 March 2017, the OPC wrote to the Secretary confirming that the Privacy Commissioner had investigated the plaintiff’s complaint as involving a possible breach of Principle 6 of the PA.

[14] A case management teleconference was held on 22 June 2018. The *Minute* issued following the teleconference recorded that the claim filed alleged that the Police had interfered with the privacy of the plaintiff by failing to provide requested personal information in contravention of Principle 6 and that the statement of claim sought only an order that the Police release the full statement of Jane Smith although Mr Neild advised an amended claim may be filed seeking damages.

[15] On 17 July 2018, an amended claim was filed. For the first time, the claim specified that in addition to Principle 6, Principles 4, 7 and 8 were relied on. In addition to an order that the Police release the full statement of Jane Smith, the amended claim sought an order that:

When Police are collecting personal information in rape investigations, the complainant should have the opportunity to respond to and correct that information, before the information is used in a decision whether or not to prosecute.

[16] An amended statement of reply was filed on 27 July 2018. The expansion of the claim appears to have gone unnoticed. This is understandable as no indication was given on behalf of the plaintiff during the teleconference that it was intended that Principles 4, 7, and 8 be added to her claim or that an order affecting the procedure of Police in making prosecution decisions would be sought.

[17] On 8 August 2018, the Secretary issued a notice of hearing advising that the proceedings would be heard on 12 and 13 November 2018.

[18] On 18 October 2018, submissions for the plaintiff were filed. The submissions made it clear that, in addition to the issues under Principle 6, the case for the plaintiff placed considerable reliance on Principle 8 which requires agencies to check personal information before using it, including ensuring 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.

[19] The plaintiff's submissions suggested that information collected about her during the investigation into her Police complaint should have been put to her for a response and that, in the context of a Police investigation into a rape allegation, reasonable steps should include follow-up interviews with the complainant where allegations have been made by other witnesses which, if unchallenged, may influence a decision not to prosecute.

[20] The submissions stated that, in addition to an order for the witness statement to be provided without the redactions in the previous disclosure, the plaintiff sought a declaration that the Police breached Principle 8 by making a decision not to prosecute in reliance on information about the plaintiff (allegations in witness statements) without first asking her to respond to those allegations.

[21] In a *Minute* dated 24 October 2018, it was noted that the order sought with respect to Principle 8 raised issues of jurisdiction because, as noted above, the investigation of the Privacy Commissioner was confined to Principle 6 and the issue of access to personal information. The *Minute* noted that the case the plaintiff sought to bring under Principle 8 appeared to be outside of the subject matter of the Privacy Commissioner's investigation and that the Police evidence filed did not address the claim as now reformulated in the plaintiff's submissions.

[22] The *Minute* noted that it was necessary to determine the issue of jurisdiction prior to the hearing even though the fixture would need to be adjourned and that the alternative would be for the plaintiff to withdraw those parts of her amended claim that relate to Information Privacy Principles 4, 7 and 8. The *Minute* set a timetable for the plaintiff to advise whether she withdrew those parts of her claim that related to Principles 4, 7 and 8 or, in the alternative, that she intends to proceed with a claim relating to Principles 4, 6, 7 and 8.

[23] On 29 October 2018, the plaintiff filed a memorandum of submissions in support of the position that the Tribunal had jurisdiction to hear her claim in relation to Principles 4, 7 and 8 despite the OPC's investigating officer not explicitly considering those principles during her investigation. The focus of the submissions was on Principle 8, being the main principle relied on by the plaintiff in support of her claim that the Police should have asked her about the attacks on her credibility before making a decision not to prosecute.

[24] In accordance with a timetable subsequently set, the Police filed submissions on jurisdiction on 23 November 2018. Submissions in reply were filed on 7 December 2018.

[25] As noted earlier, the primary issue to be determined is whether the Tribunal has jurisdiction to hear the plaintiff's complaint concerning Principle 8.

Position of plaintiff

[26] The plaintiff's position is that her complaint did not raise specific information privacy principles but instead raised wide-ranging issues regarding the way the Police investigation was conducted. Her complaint was fundamentally about the allegations raised by witnesses and the fact she thought the Police investigation was inadequate. She relies on the following extract from her complaint:

I was so outraged by the disgusting lies about me that I underwent a Polygraph test in Auckland ... I now see myself as a survivor not a victim, and one who is intent on ensuring justice for other rape survivors so that the Police never again get away with the shoddy job carried out in Auckland largely driven by the offender and I believed, rubber stamped by "top brass" ...

I now request that information so that I may to the fullest degree understand the failure of my case. If rape survivors are to be empowered to stand up and challenge decisions to prosecute, particularly where they involve Police and their associates, they need to be armed with the full trust about what has been said about them.

[27] The plaintiff says that the complaint considered by the OPC raised all facts relied on at the Tribunal, including those which she says engage Principle 8. These facts are:

[27.1] The information collected by the Police during their investigation into the plaintiff's rape complaint included attacks on the plaintiff's credibility.

[27.2] The plaintiff first learned about the allegations when she received the OIA information, after the decision not to prosecute had been made.

[27.3] The plaintiff was critical of the Police's decision to rely on that information in deciding not to prosecute, claiming she had rights that the information not be used in that way.

[27.4] The plaintiff refutes the attacks on her credibility.

[28] The plaintiff submits that these facts engage Principle 8, as a reasonable step to ensure the accuracy of information before using it to make a decision not to prosecute, would have been to ask the plaintiff about the allegations. She submits she is not responsible for which principles the Commissioner chooses to apply in the investigation and that to exclude the Principle 8 claim because it was not specifically covered in the Commissioner's investigation would make the Commissioner a gatekeeper to what may be heard in the Tribunal.

[29] The plaintiff distinguishes her position from the plaintiffs in *Wati v Corrections* [2018] NZHRRT 38 and *Gray v Ministry for Children (Strike-Out Application)* [2018] NZHRRT 13. Unlike the plaintiffs in those cases, there is no attempt here to "leapfrog"

the OPC by trying to get around the statutory scheme in which a claim is first investigated by the Commission before an appeal is heard by the Tribunal.

[30] The plaintiff also argues that under PA, s 83 the Tribunal has jurisdiction if the OPC has concluded that the complaint does not have substance. Her position is that it must be assumed that the OPC was of the opinion that a Principle 8 argument “did not have substance or the matter ought not be proceeded with”.

Position of Police

[31] The position of the Police is that the OPC never considered the plaintiff’s IPP 8 complaint, either explicitly or implicitly and that there is no overlap between the IPP 6 and IPP 8 complaints which are wholly distinct.

[32] The Police submit that the issue is not whether all the facts now relied on were before the Commissioner but rather whether the Commissioner either investigated, or turned his or her mind to the matters raised before the Tribunal. If the plaintiff is unable to demonstrate the Commissioner investigated the principles in issue, the Tribunal has no jurisdiction to hear the matter under subsections 82 and 83 of the PA.

[33] The Police submit that, as noted by the Tribunal in *Lehmann v The Radioworks Ltd* [2004] NZHRRT 31 at [20], it is contrary to the legislative scheme for defendants to be required to answer a claim for the first time in the Tribunal, when the parties have not had the benefit of the filtering procedures covered by the Privacy Act. The declaration sought by the plaintiff has the potential to affect the process of every Police prosecution decision going forward. Given its importance, it is vital that the Police have the opportunity to respond to this under the auspices of an OPC investigation.

[34] In the alternative, the Police raise an argument concerning a lack of substantive merit in the complaint under IPP 8.

Analysis

[35] Part 8 of the PA sets out the process for the investigation and resolution of complaints by the Commissioner. A thorough analysis of the purpose of the resolution process in PA, Part 8 was conducted recently in *Toia v Corrections (Jurisdiction)* [2018] NZHRRT 46. At [68]–[76] the analysis of the Part 8 provisions in *Gray* was repeated, including the observation that it should not be overlooked that the complaints process is for the benefit of both the person aggrieved and the agencies complained against who are entitled to be given proper particulars of the complaint and afforded a fair opportunity to respond: [73].

[36] Sections 82 and 83 set out the circumstances in which proceedings under the PA can be brought in the Tribunal. Their effect is that proceedings before the Tribunal are permitted only where an investigation by the Commissioner has been conducted under Part 8 or where conciliation (under s 74) has not resulted in settlement: *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation* [2014]

NZHRRT 1, (2014) 10 HRNZ 279 at [19]. Sections 82 and 83 have been described as a deliberate legislative filtering mechanism that applies before cases can be brought to the Tribunal: *Gray* [23]–[24].

[37] Both parties rely on aspects of the decision in *Mitchell v Privacy Commissioner* [2017] NZHC 569, [2017] NZAR 1706 in support of their opposing positions on jurisdiction. In *Mitchell*, Ms Mitchell had argued the Commissioner should have conducted an investigation into all the privacy principles she alleged had been breached. Justice Cull dismissed this argument but commented, obiter, that the Tribunal was not confined in its review of the merits to only the principle identified by the Commissioner, if the facts engage an alternative or additional privacy principle: at [39]. The plaintiff relies on *Mitchell* as authority that the Tribunal has jurisdiction in respect of any IPP raised by the facts as long as those facts were before the OPC.

[38] The position of the plaintiff is that the Tribunal is not confined to Principle 6 as the facts engage Principle 8. With respect to the lack of an OPC investigation into Principle 8, the position taken by the plaintiff is that the Tribunal will have jurisdiction under s 83 if the Commissioner is of the opinion that the complaint does not have substance or that the matter ought not be proceeded with. It is submitted that, in restricting his investigation to Principle 6, it must be assumed that he was of the opinion that a Principle 8 argument did not have substance or ought not be proceeded with. The contention appears to be that it is immaterial that there was no Principle 8 investigation as long as it is arguable from the facts that Principle 8 arises. In such cases an assumption that the requirements of s 83 are met can be made.

[39] This argument is not accepted. While in *Mitchell* Cull J took the view that Principles other than those considered by the Commissioner could be considered by the Tribunal, she characterised the “critical question” with respect to the issue of the Tribunal’s jurisdiction as being “whether the Commissioner has in fact conducted an investigation into the matters that are to be the subject of a hearing in the Tribunal” at [36]. At [32](e), she referred to the procedure prescribed in s 73 before the Commissioner investigates and summarised this as being:

...to inform the complainant of any intention to investigate and the details that are the subject matter of the investigation, with the individual the subject of the investigation having a right to reply in relation to the subject matter of the investigation.

[40] In this case the Police were informed, pursuant to s 73, that the complaint was that the plaintiff “had to wait three months for this information to be released, and when this information was provided to her much of it was withheld” and that this “may raise issues under Principle 6 of the Act”. The Police responded to the Commissioner on this basis.

[41] There was no notification to the Police that the subject matter of the complaint included the issue of whether, prior to relying on witness statements with respect to a decision not to prosecute a complaint of rape, complainants should have the opportunity to review and comment on those statements. This issue was outside the scope of the

complaint notified to the Police and outside the matters investigated by the Commissioner. The complaint was articulated in this way and alleged to be a breach of Principle 8 for the first time in the amended statement of claim filed on 13 July 2018. This was one year and four months after the plaintiff's claim under Principle 6 was filed in the Tribunal seeking only that Ms Smith's full statement be released, and two years after the complaint was made to the Privacy Commissioner.

[42] The fact that the wording of the complaint, in the view of the plaintiff can be read as raising a Principle 8 issue, does not cure the absence of investigation or even consideration by the Commissioner. Nor does it cure the absence of notification under s 73, that issues concerning reliance by the Police on witness statements without reference to rape complainants, were included in the complaint and would be investigated by the Commissioner. The suggested approach renders nugatory the right of reply to the subject matter of the investigation provided by s 73.

[43] The Police have noted that the declaration sought by the plaintiff has the potential to affect the future process of every Police prosecution decision. Given the significance of the decision to them, they should not be required to answer the Principle 8 claim for the first time in the Tribunal and should, in accordance with the scheme of the PA, be given the opportunity to respond under the auspices of an OPC investigation.

[44] The plaintiff suggests that the difficulty arising from the Commissioner's lack of consideration of the Principle 8 argument could be cured by allowing the Commissioner the opportunity to file submissions on the point. This does not address the issues raised by the Police facing the argument for the first time at the Tribunal, without the benefit of the Commissioner's dispute resolution procedures, the effectiveness which was noted in *Gray* at [18]–[20].

[45] The complaint notified to the Police concerned the withholding of information under Principle 6. The case that the Police answered at the OPC concerned the plaintiff's request for access to Jane Smith's statement. The Police have not had the benefit of the investigation procedure to answer the Principle 8 complaint regarding their prosecution procedure and will be doing so for the first time in the Tribunal. As noted in *Lehmann*, requiring a defendant to answer a claim for the first time in the Tribunal is contrary to the legislative scheme.

[46] The requirements in PA, ss 82 and 83 are not met. There having been no investigation in relation to any action alleged to be a breach of IPP 8, the Tribunal has no jurisdiction in respect to those parts of the statement of claim which allege a breach of IPP 8. Although the focus of this decision has been on Principle 8, this finding applies equally to Principles 4, 7 and 8.

CONCLUSION

[47] For the forgoing reasons the Tribunal concludes that it does not have jurisdiction to determine the claim by the plaintiff that IPPs 4, 7 and 8 have been breached by the Police.

COSTS

[48] As this is a decision on an interlocutory issue, costs are reserved.

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Ms MA Roche
Co-Chairperson

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Dr SJ Hickey MNZM
Member

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Mr BK Neeson JP
Member