

Reference No. HRRT 015/2017

UNDER THE PRIVACY ACT 1993

BETWEEN EAMON HENNING MARSHALL

PLAINTIFF

AND IDEA SERVICES LIMITED

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms K Anderson, Member

Dr SJ Hickey MNZM, Member

REPRESENTATION:

Mr GW Marshall as agent for his son

Ms I Reuvecamp for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 29 March 2019

DECISION OF TRIBUNAL STRIKING OUT PARTS OF STATEMENT OF CLAIM¹

INTRODUCTION

[1] The second amended statement of claim dated 15 February 2019 alleges IDEA Services Limited (IDEA Services) breached Health Information Privacy Code 1994 (HIPC), rules 5, 6 and 8.

[2] On 20 March 2019 IDEA Services sought an order that the following paragraphs of the amended claim be struck out:

¹ [This decision is to be cited as: *Marshall v IDEA Services Ltd (Strike-Out Application)* [2019] NZHRRT 21]

[2.1] Paragraphs 1 to 5 which allege a breach of rule 5 (storage and security of health information).

[2.2] Paragraph 8(i) which alleges a breach of rule 6 in relation to a particular document dated 7 December 2017.

[2.3] Paragraphs 18 to 28 which allege a breach of rule 8 (accuracy etc of health information to be checked before use).

[3] Submissions in support of the application were also filed on 20 March 2019.

[4] Although the case management timetable recorded in the *Minute* dated 6 March 2019 allowed Mr Marshall (representing his son, Eamon), until 12 April 2019 to file submissions, Mr Marshall by email dated 20 March 2019 advised no submissions would in fact be filed as the issues for determination do not easily lend themselves to be addressed by a lay person. Mr Marshall is content to rely on the Tribunal's own expertise and sense of fairness.

BACKGROUND

[5] Eamon was born on 10 August 2002 and is now approaching 17 years of age. He is necessarily represented in these proceedings by his father, Glenn Walter Marshall, because he (Eamon) has a number of complex medical conditions, including epilepsy, generalised brain dysfunction, cerebral palsy and limited mobility. He is fully dependent for day-to-day care needs. See more particularly the report by the Deputy Health and Disability Commissioner in Case 16HDC00597, 12 October 2018 at paras 1, 21 and 35.

[6] Eamon was in the fulltime care of IDEA Services from 2004 to December 2015. Mr Marshall and his wife have been assiduous in pursuing a number of complaints regarding the standard of care given to Eamon in this period. Many of their complaints have been upheld by the Health and Disability Commissioner.

[7] The issues raised in the present proceedings under the HIPC are all related to concerns held by Mr and Mrs Marshall regarding the treatment of Eamon in the period he was in the care of IDEA Services.

[8] In an email dated 20 March 2019 addressed to the Tribunal Mr Marshall has explained that Eamon is fragile, his lifespan significantly shortened and his overall health is declining. He is due for major surgery in the next few months.

[9] In these circumstances the Tribunal has given priority to the determination of the present application. Because the legal principles are well-established, the issues can be addressed in relatively brief terms.

THE ISSUE OF JURISDICTION

[10] Common to all three of the objections by IDEA Services to the second amended statement of claim is the fact that access to the Tribunal is restricted. An aggrieved individual must first file his or her complaint with the Privacy Commissioner who then determines which aspects of that complaint to investigate. Only after the investigation process has reached a conclusion can the aggrieved individual file proceedings in the Tribunal. In determining those proceedings the Tribunal is limited to the matters inquired into by the Privacy Commissioner. The Tribunal does not have unlimited jurisdiction to

inquire into every complaint an aggrieved individual may wish to bring before the Tribunal under the Privacy Act 1993. Both the High Court and the Tribunal have reinforced that ss 82 and 83 of the Act provide a deliberate legislative filtering mechanism that applies before cases can be brought to the Tribunal. See for example *Mitchell v Privacy Commissioner* [2017] NZHC 569, [2017] NZAR 1706 at [36].

[11] Identification of the matters investigated by the Privacy Commissioner is facilitated by a Certificate of Investigation which is issued at the conclusion of the investigation. The Commissioner also provides to the Tribunal (and to the parties) a letter identifying potential issues regarding the Tribunal's jurisdiction.

The Certificate of Investigation

[12] In the present case the Certificate of Investigation dated 10 March 2017 makes it clear the alleged breach of HIPC, rule 5 was not investigated and that the rule 8 investigation was restricted to the question whether Mr and Mrs Marshall had been spoken to by IDEA Services before it produced a report to the Ministry of Health:

Certification of Investigation for Human Rights Review Tribunal

Complainant	Glenn, Fran, Eamon Marshall (Our Ref: C/28032)
Respondent	IDEA Services Limited ("IDEA Services")
Matters investigated	<p>Whether IDEA Services responded appropriately to the Marshall's 15 May 2016 request for personal information (concerning his family and son).</p> <p>Whether IDEA Services took reasonable steps to check information was accurate, complete, relevant, up to date and not misleading before producing a report for the Ministry of Health on 16 December 2015.</p> <p>Whether IDEA Services had reasonable safeguards in place to prevent loss, misuse or disclosure of personal information.</p>
Rules applied	5, 6, 8
Commissioner's opinion:	<p>Breach of rule 6 as IDEA Services did not respond appropriately to the Marshall's request for information.</p> <p>Breach of rule 8 as IDEA Services did not speak with the Marshall's before producing the 16 December 2015 report to the Ministry of Health, which resulted in adverse consequences.</p> <p>As complaint withdrawn, no finding made on rule 5.</p>
<ul style="list-style-type: none"> • application of rules • adverse consequences • interference with privacy 	<p>Breach of rule 6</p> <p>Breach of rule 8</p> <p>No finding made in relation of rule 5</p> <p>Yes</p> <p>Yes</p>

The Commissioner's letter dated 11 May 2017

[13] By subsequent letter dated 11 May 2017 addressed to the Tribunal and shared with the parties the Commissioner emphasised the limited degree to which the alleged breaches of HIPC, rule 8 had been investigated by him:

Thank you for sending us notice of these proceedings.

I have read the Statement of Claim and I am familiar with the Privacy Commissioner's investigation file.

The Privacy Commissioner investigated the complaint as involving a possible breach of rule 5, 6 and of the Health Information Privacy Code 1994. The matters in the Statement of Claim are therefore among the matters considered by the Commissioner.

However, there may be some difficulties with jurisdiction in relation to rule 8. Our Office considered rule 8 in relation to a report for the Ministry of Health on 16 December 2015.

In point 5, (page 5) of the Marshall's statement of claim they said that IDEA Services did not take reasonable steps to ensure medication sheets were accurate, complete and not misleading before copying and providing them as part of an access request. Our Office did not address the matter of the medication sheets directly in relation to rule 8. However I consider the medication sheets were information covered within the scope of Mr Marshall's information request on 15 May 2016, and accordingly were investigated in relation to rule 6.

There may also be issues relating to point 6 (page 6) of the rule 8 section of the Marshall's statement of claim, where the Marshalls describe how in a February 2016 report IDEA Services said the Marshall's orchestrated the situated in order to facilitate Eamon's move to residential services. This information was removed by IDEA Services as part of a principle 7 request. Our Office did not investigate this matter under rule 8. .

The Privacy Commissioner does not intend to appear in these proceedings but would appreciate being notified of the venue, date and time of the hearing.

He would appreciate, however, if he could be notified of the venue, date and time of the hearing.

THE JURISDICTION CHALLENGE – HIPC, RULE 5

[14] The point made by IDEA Services is that, as recorded in the Certificate of Investigation, the complaint in respect of HIPC, rule 5 was withdrawn by the Marshalls. Furthermore, among the papers filed by the Marshalls is a letter dated 10 March 2017 sent to them by the Privacy Commissioner in which there is confirmation of the withdrawal of the rule 5 complaint:

2. ... As you have withdrawn this complaint to pursue this matter in the Human Rights Review Tribunal, I have not formed a final view on rule 5.

...

14. As you have withdrawn this complaint in order to pursue the matter in another forum, we will not make a formal finding on whether there has been a breach of rule 5.

[15] In *Gray v Ministry for Children* [2018] NZHRRT 13 Mr Gray complained certain information privacy principles had been breached by Oranga Tamariki (the Ministry for Children). During the course of the investigation by the Privacy Commissioner Mr Gray withdrew his complaint so that he could bring a claim before the Tribunal without first waiting for the investigation to be completed.

[16] On Mr Gray filing proceedings in the Tribunal the Ministry protested jurisdiction, submitting that once Mr Gray withdrew his complaint it was not possible for him to thereafter bring proceedings before the Tribunal.

[17] This objection was upheld by the Tribunal at [10] to [11] and [28] to [29]. It is necessary to cite only the first two of these paragraphs:

[10] The issue raised by the first objection is whether an individual who, having withdrawn his or her complaint to the Commissioner can then, without more, institute before the Tribunal proceedings based on that same complaint.

[11] We are of the clear view that, applying the Interpretation Act 1999, s 5, the answer to this question is “No”. Our reasons, which we now develop, are that once a complaint to the Privacy Commissioner has been withdrawn and s 71(1)(d) applied by the Commissioner, the complaint is at an end. In addition, it would be contrary to the scheme and purpose of Part 8 of the Privacy Act to permit an individual, at his or her election, to bypass the Privacy Commissioner’s Part 8 complaints process and file proceedings directly with the Tribunal.

[18] The facts in the present case are indistinguishable. The complaint under HIPC, rule 5 having been withdrawn, there is no jurisdiction for the Tribunal to consider and determine the complaint. It follows paragraphs 1 to 5 of the second amended statement of claim dated 15 February 2019 must be struck out.

THE JURISDICTION CHALLENGE – AMENDED STATEMENT OF CLAIM PARA 8(i)

[19] The point made by IDEA Services is that the jurisdiction of the Tribunal is confined to matters investigated by the Privacy Commissioner. It is not possible, on filing proceedings in the Tribunal, for a plaintiff to introduce entirely new complaints.

[20] In the present case Eamon on 16 May 2016 made a request to IDEA Services under HIPC, rule 6 for access to his health information. He subsequently made complaint to the Commissioner that the request had not been dealt with in compliance with rule 6.

[21] The Commissioner concluded his investigation on 10 March 2017. The proceedings were filed in the Tribunal on 14 March 2017.

[22] The allegation in para 8(i) that a breach of HIPC, rule 6 occurred on 7 December 2017 is an allegation about an event which occurred some nine months after the Privacy Commissioner completed his investigation and postdates the filing of the proceedings in the Tribunal. The allegation is framed in the following terms:

8. When did this happen?

...

- (i) Email 7 December 2017 – information pack regarding Dr Olive Webb’s assessment and report.

[23] The Tribunal has no jurisdiction over the claim as it has not been the subject of an investigation by the Commissioner. No matter how broad an interpretation is given to *Mitchell v Privacy Commissioner* at [36] it cannot be said the Commissioner has conducted any investigation into the alleged 7 December 2017 breach.

[24] It follows para 8(i) of the second amended statement of claim dated 15 February 2019 must be struck out.

THE JURISDICTION CHALLENGE – HIPC, RULE 8

[25] Health Information Privacy Code, rule 8 provides:

Rule 8

Accuracy etc of Health Information to be Checked Before Use

- (1) A health agency that holds health information must 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.

- (2) This rule applies to health information obtained before or after the commencement of this code.

Note: An action is not in breach of this rule if it is authorised or required by or under law: Privacy Act, section 7(4).

[26] The investigation conducted by the Privacy Commissioner was in relation to the allegation that IDEA Services had not interviewed Mr and Mrs Marshall in the course of preparing a report to the Ministry of Health. This is the point made in the Certificate of Investigation and in the later letter dated 11 May 2017 addressed to the Tribunal.

[27] In relation to rule 8, the second amended statement of claim makes three allegations:

[27.1] That IDEA Services did not interview Mr and Mrs Marshall in the course of preparing the report to the Ministry of Health (paras 12 to 17). IDEA Services properly makes no challenge to the Tribunal's jurisdiction to hear this particular allegation.

[27.2] That three named persons collaborated in a premeditated manner to produce a report that was not accurate, complete and not misleading (paras 18 to 22).

[27.3] That Eamon's medication signing sheets for 2013, 2014 and 2015 had been found to contain anomalies in breach of HIPC, rule 8 (paras 23 to 28).

[28] The Privacy Commissioner's letter of 11 May 2017 addressed to the Tribunal clearly and unambiguously states that neither of the two last mentioned matters were investigated by him under rule 8.

[29] It follows the Tribunal has no jurisdiction to hear and determine these two new complaints and paras 18 to 28 of the second amended statement of claim dated 15 February 2019 must be struck out.

ORDERS

[30] It is ordered the following paragraphs be struck out from the second amended statement of claim dated 15 February 2019:

[30.1] Paragraphs 1 to 5.

[30.2] Paragraph 8(i).

[30.3] Paragraphs 18 to 28.

[31] To ensure these rulings are not inadvertently overlooked at later stages of these proceedings it is further ordered that Eamon must amend the statement of claim by deleting all references to the paragraphs which have been struck out. A third amended statement of claim is therefore required. No new claims are to be added to the third amended statement of claim unless leave of the Chairperson has been given for this step to be taken.

[32] The third amended statement of claim is to be filed and served by 4pm on Friday 5 April 2019.

[33] An amended statement of reply by IDEA Services is to be filed and served by 4pm on Thursday 18 April 2019.

[34] Thereafter a case management teleconference is to be convened.

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Mr RPG Haines ONZM QC
Chairperson

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Ms K Anderson
Member

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Dr SJ Hickey MNZM
Member