

Reference No. HRRT 062/2016

UNDER THE PRIVACY ACT 1993

BETWEEN DAVID MITCHELL

PLAINTIFF

AND ACCIDENT COMPENSATION CORPORATION

DEFENDANT

AT WELLINGTON

BEFORE:

Ms MA Roche, Co-Chairperson

Ms D Hart, Member

Ms G Goodwin, Member

REPRESENTATION:

Mr D Mitchell in person

Mr P McBride for defendant

DATE OF HEARING: 13 and 14 May 2019

DATE OF DECISION: 5 June 2019

DECISION OF TRIBUNAL¹

[1] David Mitchell has had a long and difficult relationship with ACC. In February 2010 he became frustrated and tipped over a table in an ACC interview room. No one else was present.

[2] CCTV footage of this incident was subsequently used by ACC as a health and safety training resource for its staff. Mr Mitchell believes that this footage was sent by ACC to a private psychologist, Thomas Nesar, who ACC had asked to assess Mr Mitchell and that this breached information privacy principle 11. ACC denies sending

¹ [This decision is to be cited as *Mitchell v Accident Compensation Corporation* [2019] NZHRRT 29.]

Mr Nesor the footage. The essential issue to be determined in this decision is whether the footage was sent to Mr Nesor in breach of Principle 11.

Background

[3] Between 1989 and December 2003, Mr Mitchell was employed as a guillotine operator by Printlink and its predecessor company, G P Print.

[4] On 29 July 2003, Mr Mitchell reported a sore chest and arms due to his heavy workload on the guillotines. He continued to work and on 26 August 2003 filled out an accident report, reporting he was suffering the same injury as before but now to both sides of his chest and arms. He applied for coverage from ACC.

[5] On 30 September 2003, Mr Mitchell blacked out at his machine and hit his head on the guillotine. He attempted to drive home but blacked out again and had an accident.

[6] In October 2003, Mr Mitchell's general practitioner, Dr Middleton, completed a medical practitioner cover questionnaire for ACC. She diagnosed biceps tendonitis with pain in both arms and chest wall. She also noted Mr Mitchell's volume of work had increased when he was obviously unwell. She recorded a marked increase in his stress levels and diagnosed him as being in serious depression.

[7] In October or November 2003, an occupational physician, Mr Turner, examined Mr Mitchell for ACC. He concluded that there was no evidence Mr Mitchell was suffering from a physical injury. He also found evidence of non-accident related psycho-social problems.

[8] On 11 December 2003, ACC declined Mr Mitchell's claim for cover.

[9] On 30 December 2003, Mr Mitchell resigned from Printlink. A decision of the Employment Court issued in December 2008 subsequently found that Mr Mitchell had been unjustifiably constructively dismissed and awarded him damages.

[10] Mr Mitchell sought a review of the ACC decision to decline him cover. This was successful, and his cover was reinstated and backdated. A report by another doctor had refuted Mr Turner's opinions and found all of Mr Mitchell's symptoms arose out of and in the course of his employment. The ACC reviewer found that Mr Mitchell had suffered a personal injury caused by gradual process (bilateral tendonitis) and that he had also suffered major psychological damage.

[11] In May 2004, Mr Mitchell saw a registered psychiatrist. Her report diagnosed post-traumatic stress symptoms triggered by the physical injury, being off work, and Mr Mitchell's perceived unfairness and treatment by Printlink management and ACC.

[12] Mr Mitchell attempted to have Mr Turner investigated in connection with allegations of fraud that he made against him. He took his concerns to ACC, the Office of the Ombudsman and the Minister for ACC.

[13] On 23 February 2010, an incident occurred at the Masterton ACC office. Mr Mitchell was there in connection with his complaint concerning Mr Turner. There, he was placed into an interview room where he sat alone for nine or ten minutes. The Tribunal understands that Mr Mitchell was waiting to talk to someone on the telephone

during this period. When Mr Mitchell finally spoke to someone, she asked him who he was. In response, Mr Mitchell stood up and tipped over the interview table and threw a chair against the wall. He was subsequently arrested and charged with an offence of wilful damage for which he was convicted. Mr Mitchell has never been convicted of any other similar offences and has no convictions relating to violence against people.

[14] ACC operates CCTV systems in its premises and records events there for safety and security purposes. The 23 February incident was captured on CCTV footage. Anonymised pixelated CCTV footage of such incidents is routinely used by ACC as an internal staff safety training resource.

[15] Initially, the footage of the incident was loaded onto an internal ACC intranet page which staff could access. In about March 2010, an unpixelated photo from the footage was introduced into an ACC staff training package. The full footage was subsequently included in a training resource. This has not been used since 2015.

[16] Since the 23 February incident, Mr Mitchell has been treated by ACC as a security risk. Security guards are present when he engages with ACC and he has to deal with a remote claims unit. In the course of visits to potential work places arranged by ACC, he is accompanied by two security guards. Mr Mitchell finds this demeaning and humiliating. He also considers that this ensures he has no chance of being employed.

[17] In late 2012, ACC requested a clinical psychologist, Thomas Nesor, to provide a psychological assessment of Mr Mitchell. Mr Nesor had previously been employed by ACC between 2008 and 2011 for approximately eight hours a week working in the ACC Sensitive Claims Unit. In this capacity, Mr Nesor had had access to the intranet available to ACC staff.

[18] On 23 November 2012, Mr Nesor met Mr Mitchell at the Masterton Medical Centre. Mr Mitchell was accompanied by his partner, Jennifer Turney, who acted as his support person. Prior to this meeting, ACC had provided Mr Nesor with material about Mr Mitchell, including advice that Mr Mitchell was considered to be a risky client.

[19] At their meeting, Mr Nesor asked Mr Mitchell why ACC considered him risky. Mr Mitchell told him that this was because he had become frustrated and upended a desk in an ACC interview room. There is a dispute about the rest of this conversation. Mr Nesor says that he recognised the description of the event as he had seen a video clip of this incident while he was working at ACC. He told Mr Mitchell of this and that the footage had been used as a staff training resource. Mr Mitchell and Ms Turney say that Mr Nesor told them that ACC had sent him the CCTV footage prior to the meeting but that this should not have happened, and that if he was asked about this in the future he would deny it.

[20] Mr Mitchell was and remains distressed that the footage was used as a training resource. He is embarrassed that the people he deals with at ACC might have seen it. He also left the meeting with Mr Nesor understanding that Mr Nesor had been sent the footage and wondering who else around New Zealand had also been sent it.

[21] Shortly after his meeting with Mr Nesor, Mr Mitchell contacted his GP, Dr Middleton. It was very difficult to obtain an appointment and he finally saw her on 28 January 2013. Dr Middleton's notes from this consultation recorded that Mr Mitchell

had been given the news that the CCTV footage was being used for training purposes which had really upset him.

[22] On 11 December 2012, Mr Nesor provided a report about Mr Mitchell to ACC. ACC requested clarification of some aspects of the report and on 25 January 2013, Mr Nesor provided a second report to ACC.

[23] On 19 April 2013, ACC wrote to Mr Mitchell advising that they had received the two reports from Mr Nesor and, after looking at all the information available, his entitlement to weekly compensation would be suspended from 17 May 2013 because the medical information received showed the current cause of his incapacity was not a direct consequence of the covered personal injury. ACC also noted that the reports associated the onset of Mr Mitchell's anxiety and depression with employment issues and other events that occurred prior to and after the physical injury was diagnosed, rather than being a direct consequence of the physical injury.

[24] On 23 April 2013, Mr Mitchell and Ms Turney telephoned Mr Nesor. They recorded this telephone conversation.

[25] Following the suspension of his weekly compensation, Mr Mitchell was unable to pay his mortgage or to pay for insurance. He relied on credit cards and loans from family members.

[26] On 3 July 2013, Mr Mitchell applied for a review of ACC's decision to suspend his weekly compensation. He was represented by John Miller Law, a specialist ACC firm.

[27] On 2 April 2014, a psychiatrist, Mark Davies, provided a report about Mr Mitchell to John Miller Law. In 2006, Mr Davies had prepared a report on Mr Mitchell diagnosing him with anxiety and clinical depression which he concluded were related to Mr Mitchell's physical injury and pain and subsequent workplace stress. Mr Davies' April 2014 report was based on an interview with Mr Mitchell and a review of documentation, including Dr Middleton's notes and Mr Nesor's report amongst other things. The report of Mr Davies concluded that Mr Mitchell's physical and mental symptoms were attributable to his physical injury. He confirmed his 2006 diagnosis of chronic pain disorder.

[28] On 18 September 2014, ACC reinstated and backdated Mr Mitchell's weekly compensation. Accordingly, the ACC review did not proceed. However, Mr Mitchell was left with a legal aid debt.

[29] In late 2015 or early 2016, Mr Mitchell made a complaint against ACC to the Office of the Privacy Commissioner (OPC). A letter from OPC to ACC dated 13 January 2016 recorded allegations made by Mr Mitchell that in 2013, ACC provided Mr Nesor with a copy of CCTV footage of him tipping over a table at the Masterton ACC site in 2010. The letter also recorded that Mr Mitchell had raised concerns regarding a handwritten letter placed on his file in 2006.

[30] On 17 June 2016 the OPC issued a Certificate of Investigation. This recorded that the OPC had investigated whether ACC had disclosed security footage of Mr Mitchell overturning a table to Mr Nesor, an assessing psychologist. The Certificate recorded the Commissioner's opinion that there was no evidence to establish an interference with privacy. The covering letter noted that ACC had denied providing the security footage to Mr Nesor and that Mr Nesor had advised the OPC he had never

received or viewed the security footage. The letter noted that, with the conflicting accounts of what occurred, it could not be found, on the balance of probabilities, that ACC had disclosed the security footage to Mr Nesor.

[31] On 21 September 2016, Mr Mitchell filed a claim against ACC in the Tribunal. In his claim, he sought the sum of \$5,920, being the legal aid debt he had been left with after seeking the ACC review. He also requested to be able to move on, for the security measures in respect of him to cease, and damages sufficient to “put things right” and to reinforce to ACC the seriousness of their wrongdoing to him. At the hearing, Mr Mitchell clarified that he wanted sufficient damages so that he could pay for his own vocational rehabilitation so that he did not have to engage with ACC, which he found distressing and humiliating.

The legal framework

[32] Information privacy principle 11 places limits on the disclosure of personal information. It provides “an agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds, [that one of the exceptions to Principle 11 applies]”.

[33] Section 66 of the Privacy Act provides:

66 Interference with privacy

- (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
 - (a) in relation to that individual,—
 - (i) the action breaches an information privacy principle;
... and
 - (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
 - (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
 - (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
 - (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

The issues

[34] The issues to be determined are as follows:

[34.1] Does the Tribunal have jurisdiction to consider the entirety of Mr Mitchell’s complaints about ACC or is it restricted in its jurisdiction to the matters investigated by the OPC?

[34.2] Did ACC breach information privacy principle 11?

Jurisdiction

[35] The statement of claim filed by Mr Mitchell raised a number of complaints against ACC. These included:

[35.1] The distribution of CCTV footage.

[35.2] Making a defamatory statement on his file (a handwritten note).

[35.3] Bullying him into signing a form.

[35.4] Conspiring against him.

[35.5] Breaching various rights of the Code of ACC Claimants' Rights including failing to treat him with dignity and respect, failing to treat him fairly and to consider his views, failing to have effective communication and failing to keep him fully informed.

[36] A letter that accompanied the statement of claim expanded on these complaints and included the failure of ACC to properly investigate the allegation of fraud Mr Mitchell made against Mr Turner and Mr Mitchell's concerns about being treated as a "security concern" since the 2010 incident. Of these complaints, only the first, the distribution of CCTV footage, is within the Tribunal's jurisdiction.

[37] At two procedural teleconferences held prior to the hearing the Co-Chairperson explained to Mr Mitchell that the Tribunal's jurisdiction was restricted to the matters investigated by the Privacy Commissioner.

[38] Part 8 of the Privacy Act sets out the process for the investigation and resolution of complaints by the Commissioner. Sections 82 and 83 set out the circumstances in which proceedings under the Privacy Act 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].

[39] In *NKR*, the Tribunal noted that it was not unusual for challenges to the Tribunal's jurisdiction to be made on the basis that the alleged interference with the privacy of an individual was not the subject of an investigation by the Privacy Commissioner. This necessitates an enquiry into what matters were investigated. The Tribunal noted that the Certificate of Investigation, particularising the subject of the investigation, is issued by the Commissioner for the assistance of the Tribunal. However, the Certificate does not have any statutory basis and in that respect is informal and capable of challenge: *NKR* at [33].

[40] As noted earlier, the Certificate of Investigation issued by the OPC recorded that the OPC had investigated whether ACC had disclosed security footage of Mr Mitchell overturning a table to Mr Naser, an assessing psychologist.

[41] When proceedings are filed in the Tribunal under the Privacy Act, 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.

[42] On 21 October 2016, the OPC wrote to the Secretary confirming that the Privacy Commissioner had investigated Mr Mitchell's complaint as involving a possible breach of Principle 11 of the Privacy Act and that in his complaint, Mr Mitchell had said that ACC had provided Mr Tom Naser with a copy of the CCTV footage of Mr Mitchell tipping a table over at the Masterton ACC site in 2010. The letter to Mr Mitchell from the OPC dated 17 June 2016 produced at the hearing recorded that Mr Mitchell had a long history with ACC and has had several difficult interactions with it. It recorded that he had

complained to the Privacy Commissioner that security footage of an incident in 2010 when he overturned a table in an ACC interview room was provided to Mr Nesor.

[43] Mr Mitchell is understandably disappointed that the entirety of his concerns about ACC could not be dealt with at the hearing. However, the issue of jurisdiction is not a matter of discretion and the Tribunal is confined to looking at the Principle 11 breach investigated by the Privacy Commissioner. This concerns the issue of whether Mr Nesor was sent the CCTV footage and, if so, whether this was a breach of Principle 11.

Was Principle 11 breached?

[44] In order to determine whether Principle 11 was breached, it is necessary to resolve the factual dispute between ACC and Mr Mitchell as to whether ACC sent Mr Nesor the CCTV footage of the 2010 incident.

[45] The evidence of Mr Mitchell and Ms Turney was that during their meeting with Mr Nesor, he told them that he had been sent the CCTV footage and that it had been used for training purposes. They also both gave evidence that Mr Nesor had told them that the CCTV footage had been sent to him by mistake and that he would deny it if subsequently asked about it.

[46] Mr Nesor's evidence was that he had not been provided by ACC with any CCTV footage or video clip prior to his assessment of Mr Mitchell but that when Mr Mitchell told him about the table tipping incident, he felt obliged to tell him what he knew, that he had some time previously seen an ACC training video segment that could well have been Mr Mitchell's 2010 incident. Mr Nesor has dealt with other clients who have been considered to be "risky" by ACC and has never been sent CCTV footage in respect of them or anyone else. Mr Nesor said he thought Mr Mitchell had misconstrued things and had reached the wrong conclusion.

[47] The CCTV footage was mentioned in the recorded telephone conversation between Mr Nesor and Ms Turney and Mr Mitchell on 23 April 2013. A copy of the transcript of that recording which had been typed by Ms Turney was produced at the hearing. In addition, the recording was produced and played in the presence of Mr Nesor. Mr Mitchell considered that the transcript corroborated his claim that Mr Nesor had been sent the CCTV footage. He relied on the following extract from the transcript:

DAVE: ... When I came to visit you you told me that you got sent the CT footage and its sent round the country to everyone so you know you see how I feel. How can they use that when I left your meeting I didn't even like that going through my mind what right have they got to do that sending that CT footage for all ACC people to train on you know it's just.

TOM: I think to try to get people to be aware of personal safety.

DAVE: But is there any you know I just felt stupid when I went to into ACC and the ladies I'm thinking I suppose she's seen the pictures of me every you said it's been sent right round the country.

TOM: No I think it wasn't a general round the country uh it was on a site for personal safety.

DAVE: So it's on the computer.

TOM: It's on the computer and not everyone would see it let me give you that reassurance and I also want to apologise to you personally I actually should not have even said that because I technically wasn't allowed to see that.

DAVE: That's what I'm saying. They sent it to you by mistake.

[48] The extract above records Mr Mitchell saying to Mr Nesor that Mr Nesor was sent the CCTV footage. Mr Nesor was asked at the hearing why, if he had not been sent the footage, he did not correct Mr Mitchell and tell him he hadn't been sent it. Mr Nesor said that he was very concerned for Mr Mitchell, and concerned that recommendations in his report had not been accepted by ACC. He said that he allowed the conversation to move past a number of points when he should have challenged what Mr Mitchell was saying. However, his concern was what ACC had done with his report, that Mr Mitchell was upset, that he was trying to give him reassurance, and that he was hopeful he could sort things out for Mr Mitchell. He said that with hindsight he should have been clearer with Mr Mitchell and not "allowed it to go".

[49] Mr Nesor commented that he might have said to Mr Mitchell that he should not have seen the footage as he would have seen it when browsing through health and safety information on the ACC intranet.

[50] Richard Boyes-Chair gave evidence for ACC at the hearing. He is a Safety Partner in ACC's Health Safety and Wellbeing Team. His evidence was that anonymised (pixelated) CCTV footage of past incidents is routinely used as an internal training resource for staff. However, he could not identify any basis for any suggestion that CCTV footage of incidents is circulated, let alone outside of ACC, and that this is the case both generally and in Mr Mitchell's case specifically.

[51] During Mr Boyes-Chair's evidence, the footage of the 2010 table tipping incident was played. It was not pixelated and Mr Boyes-Chair gave evidence that he was unable to locate a pixelated version. After the footage was played, Mr Boyes-Chair was asked whether a pixelated or unpixelated version of the footage would have been sent outside of ACC for any reason. He replied that it would not.

[52] Mr Mitchell produced a letter to him from an OPC investigator about his Privacy Act complaint dated 17 June 2016. The letter stated:

ACC was explicit in its response to me that the security footage is used for internal training purposes only, and was not provided to Dr Nesor. ACC explained it is not available to any external parties, and contains no references to where or when the event occurred, or who you are.

ACC provided me with copies of letters to you confirming what information was sent to Dr Nesor, as well as portions of Dr Nesor's report that set out the information he received. These documents do not mention the security footage you have complained about.

Our office also contacted Dr Nesor who said he never received or viewed the security footage.

[53] Mr Nesor was asked why he would have told the OPC investigator that he had not viewed the security footage when his evidence to the Tribunal was that he had. He replied that he recalled being telephoned by someone from the OPC in 2016. His recollection was that he was asked if he had received CCTV footage from ACC and he would have said "no". He cannot now be sure what else was said during the conversation, but stated that he cannot be certain that he had in fact seen Mr Mitchell's CCTV footage, as the person in the footage he viewed was not identifiable. He considered it likely however that the footage he had seen was Mr Mitchell's footage.

[54] Mr Mitchell and Ms Turney's belief that Mr Nesor was sent the CCTV footage by ACC, appears to have been reinforced by Mr Nesor's failure to correct or contradict

Mr Mitchell during the telephone conversation on 23 April 2013 during which Mr Mitchell stated to Mr Nesor that Mr Nesor had been sent the CCTV footage. It was also reinforced by the OPC letter of 17 June 2016, recording Mr Nesor's denial that he had been sent or seen the footage. He clearly saw the footage. The evidence of Mr Nesor was that there were very few such clips in the health and safety section of the ACC intranet, perhaps only one other. Given the distinctiveness of the incident, it is clear that the clip in question was the one viewed by Mr Nesor, which he recalled when Mr Mitchell described the table tipping incident to him at their meeting.

[55] Both Mr Mitchell and Ms Turney gave evidence that they recall Mr Nesor telling them he had been sent the footage. While their recollections may be sincere, the Tribunal considers that they misconstrued what Mr Nesor said. It is accepted that Mr Mitchell was and remains very upset that people within ACC were viewing the footage. Mr Nesor was one of these people. Given that the OPC letter recorded Mr Nesor's denial he had ever seen the footage, and Mr Nesor failed to correct Mr Mitchell during their telephone conversation, Mr Mitchell's belief that the footage had been sent to Mr Nesor appears reasonable.

[56] However, weighing all the evidence, we do not accept that ACC provided a copy of the CCTV footage to Mr Nesor prior to his assessment of Mr Mitchell in November 2012. Mr Nesor has given evidence that he did not receive that footage or any other footage from ACC at any time. Mr Boyes-Chair gave evidence that ACC does not send such footage outside the organisation for any reason. Mr Nesor and Mr Boyes-Chair were both credible witnesses. Their evidence is accepted. The transcript records Mr Mitchell asserting that Mr Nesor was sent the footage but does not record Mr Nesor saying this. It is not established on the facts that ACC sent the CCTV footage to Mr Nesor.

[57] Having found that the CCTV footage was not sent to Mr Nesor by ACC, it follows that the breach of Principle 11 is not established.

[58] Mr Mitchell's claim is dismissed. There has been no breach of any information privacy principle and consequently no interference with Mr Mitchell's privacy as that term is defined in s 66 of the Privacy Act.

Costs

[59] Costs are reserved.

[59.1] ACC is to file its submissions on costs within 14 days after the date of this decision.

[59.2] The submissions for Mr Mitchell are to be filed within a further 14 days and a right of reply by ACC within 7 days after that.

[59.3] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[59.4] In case it should prove necessary we leave it to the Co-Chairperson of the Tribunal to vary the forgoing timetable.

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Ms MA Roche
Co-Chairperson

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Ms D Hart
Member

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Ms G Goodwin
Member