IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2019] NZHRRT 39**

	Reference No. HRRT 063/2017
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**PETER JOSEPH THOMAS**
	PLAINTIFF
AND	**MINISTRY OF SOCIAL DEVELOPMENT**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms GJ Goodwin, Deputy Chairperson
Dr SJ Hickey MNZM, Member
Mr RK Musuku, Member

REPRESENTATION:
Mr G Paine for plaintiff
Ms A Todd and Ms A Lawson for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **15 August 2019**

DECISION OF TRIBUNAL STRIKING OUT PART OF STATEMENT OF CLAIM[1]

BACKGROUND

[1] There is a dispute between the parties as to whether the Tribunal has jurisdiction to hear Peter Thomas' allegation that, in its conduct, the Ministry of Social Development (MSD) breached information privacy principle (IPP) 10.

[2] Between 2012 and 2013 Mr Thomas's partner was investigated by MSD, in connection with her entitlement to certain benefits. As part of this investigation a number of letters were sent to various people and agencies. Those letters sought information

[1] [This decision is to be cited as *Thomas v Ministry of Social Development (Strike-Out Application)* [2019] NZHRRT 39.]

about Mr Thomas, pursuant to s 11 of the Social Security Act 1964 (SSA). Mr Thomas considers the letters breached his privacy and caused him harm. He complained about this to the Privacy Commissioner.

[3] Having completed his investigation, the Commissioner on 29 November 2017 issued a Certificate of Investigation. That Certificate records Mr Thomas' complaint was investigated under IPPs 1 to 4. No reference was made to IPP 10.

[4] In his most recent statement of claim Mr Thomas alleges not only a breach of IPPs 1 to 4 but also that MSD breached IPP 10 by holding and using information obtained in connection with one purpose for other purposes. MSD disputes the Tribunal's jurisdiction to hear and determine the IPP 10 complaint.

JURISDICTION OF THE TRIBUNAL

[5] A person complaining of an interference with privacy can only bring proceedings before the Tribunal where the alleged interference with the privacy of that person has first been investigated by the Commissioner or where conciliation under s 74 has not resulted in a settlement (s 82(1)). In *VUW v Accident Compensation (Jurisdiction Objection)* [2014] NZHRRT 26 the Tribunal at [11] set out the statutory process:

> **[11]** The circumstances in which the Tribunal has jurisdiction to hear matters under the Privacy Act are not unlimited. Indeed they are tightly circumscribed by ss 82 and 83 of the Act. This is fully explained in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike Out Application)* [2014] NZHRRT 1 (30 January 2014) (*[NKR]*) at [18] to [42] and no point is served by repeating what is said there. It is sufficient to note that the scheme of the Act is that in the first instance complaints must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by ss 82 and 83 only where an investigation has been conducted by the Commissioner under Part 8 or where conciliation (under s 74) has not resulted in settlement. Before either ss 82 and 83 are engaged the following statutorily prescribed steps must be taken (see *[NKR]* at [25]):
>
> > **[11.1]** There must be a complaint alleging that an action is or appears to be an interference with the privacy of an individual (s 67(1)).
> >
> > **[11.2]** The Privacy Commissioner must decide whether to investigate the complaint, or to take no action on the complaint (s 70(1)).
> >
> > **[11.3]** The Privacy Commissioner must advise both the complainant and the person to whom the complaint relates of the procedure that the Commissioner proposes to adopt (s 70(2)).
> >
> > **[11.4]** The Privacy Commissioner must inform the complainant and the person to whom the investigation relates of the Commissioner's intention to make the investigation (s 73(a)).
> >
> > **[11.5]** The Privacy Commissioner must inform the person to whom the investigation relates of:
> >
> > > **[11.5.1]** The **details of the complaint (**if any) or, as the case may be, the subject-matter of the investigation; and
> > >
> > > **[11.5.2]** The right of that person to submit to the Commissioner, within a reasonable time, a written response in relation to the complaint, or as the case may be, the subject-matter of the investigation.
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> …
>
> **[13]** As stated in *[NKR]* at [29], the critical and determinative point is whether the Commissioner complied with the mandatory duty in ss 70(2) and 73 to:

> **[13.1]** Notify the person to whom the complaint relates that the Commissioner intends making an investigation into the matter; and
>
> **[13.2] Inform that person of the details of the complaint** and of the right of that person to submit a written response to the complaint. [Emphasis added]

Privacy Commissioner's Investigation

[6] The Tribunal does not have jurisdiction in respect of matters not investigated by the Commissioner: see *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike Out Application)* [2014] NZHRRT 1 *(NKR); Gray v Ministry of Children (Strike-Out Application)* [2018] NZHRRT 13 *(Gray), Toia v Corrections (Jurisdiction)* [2018] 46 *(Toia)* and *Wati v Corrections* [2018] NZHRRT 38.

[7] In determining its jurisdiction, the Tribunal is guided by the content of the Certificate. The Certificate sets out the matters investigated, IPPs applied and the Commissioner's opinion in relation to the alleged privacy breach. The Certificate is the basic determinant of what alleged privacy breach had been investigated and so of the Tribunal's jurisdiction.

[8] The Certificate, in relation to jurisdiction of the Tribunal, was specifically considered in *NKR* at [33]:

> **[33]** In proceedings before the Tribunal under the Privacy Act it is not unusual for an issue to arise as to whether the alleged interference with the privacy of an individual is within the Tribunal's jurisdiction and in particular whether the alleged interference was the subject of an investigation by the Privacy Commissioner. Inevitably this category of challenge to the Tribunal's jurisdiction necessitates an enquiry into what matter or matters were in fact investigated by the Privacy Commissioner. For the assistance of the Tribunal and to ensure clarity as to what "action alleged" has been investigated by the Privacy Commissioner, the Commissioner issues a Certificate of Investigation particularising the subject of the investigation. It is this certificate which potentially sets the boundary of the Tribunal's jurisdiction. The certificate does not have any statutory basis and in that respect is informal and is capable of challenge. See in the analogous context of the Human Rights Act 1993 the recent decision in *Peters v Wellington Combined Shuttles Ltd (Application by Defendant that Jurisdiction be Declined)* [2013] NZHRRT 21 (28 May 2013). For a decision under the Privacy Act reference can be made to *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (20 September 2013) at [58]...

[9] In the context of considering whether the Tribunal has jurisdiction to consider IPP breaches other than those shown in the Certificate it is also relevant to consider the decision in *Mitchell v Privacy Commissioner* [2017] NZHC 569 [2017] NZAR 1706 (*Mitchell*). In that case Ms Mitchell argued that the Commissioner should have investigated all privacy principles she alleged had been breached. Justice Cull dismissed this argument. She characterised the "critical question" with respect to the issue of the Tribunal's jurisdiction as being "whether the Commissioner has in fact investigated the matters that are to be the subject of a hearing in the Tribunal": at [36].

[10] However, by way of obiter Cull J noted:

> [39] I do not consider that the Tribunal is limited in its review of the merits and the statutory provisions make it plain that the Tribunal must not have regard to technicalities but act in accordance with the principles of natural justice and act fairly and reasonably. I do not consider that the Tribunal is 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. That is a matter for the Tribunal, in considering the substantial merits of the case.

[11] Application of this obiter statement means that the Tribunal, while using the Certificate as indicating the boundaries of the Commissioner's investigation, may consider whether on the facts before it another IPP is properly engaged.

[12] In any consideration of whether an IPP not referred to in the Certificate is engaged the Tribunal notes there are significant differences between the subject matter of various IPPs. These differences mean the issues raised by a privacy complaint will vary significantly depending upon which IPPs are considered relevant. The investigation of one IPP ought not be treated as, in effect, the investigation of another IPP (see *Waugh v New Zealand Association of Councillors Inc* [2003] NZHRRT 9 (*Waugh*) and also *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45).

[13] Also relevant is the need for a defendant to be advised of the allegations made against it. As discussed in both *Gray* at [21] and *Toia* at [73]:

> Not to be overlooked is the fact that the complaints process is not just for the benefit of the person aggrieved. It is also for the benefit of the agencies complained against. They are entitled to be given notice of the complaint and of the fact that an investigation has been opened by the Commissioner. Proper particulars of the complaint must be given and the agency afforded a fair opportunity to respond.

[14] Given the above, the Tribunal concludes:

[14.1] The Tribunal should be slow to examine breaches of IPPs that have not been investigated by the Commissioner.

[14.2] As a minimum requirement the facts must engage the proffered alternative or additional privacy principle.

[14.3] This needs to be clearly demonstrated in the statement of claim.

Whether IPP 10 is properly engaged?

[15] The Certificate records that the matter investigated by the Commissioner was whether MSD was entitled to collect Mr Thomas' personal information from several agencies under s 11 of the SSA. The IPPs applied were 1 to 4, being the collection principles. The Commissioner's opinion was that the SSA was operating to override IPPs 1 to 4 by virtue of s 7 of the Privacy Act.

[16] Section 11 of the SSA provides:

> **11 Power to obtain information**
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> (1) Subject to this section and to the code of conduct established under section 11B, the chief executive, for any purpose specified in subsection (2), may by notice in writing require any person (including any person who is an officer or employee in the service of the Crown in a government department or public body (other than as an officer of a court), in his or her official capacity)—
>
> (a) to provide the department or a specified employee of the department with such information as the chief executive requires; or
>
> (b) to produce to the department or to a specified employee of the department any document in the custody of or under the control of that person, and to allow copies of or extracts from any such document to be made or taken; or
>
> (c) to furnish to the department or to a specified employee of the department any copies or extracts from any document or record in the custody or under the control of that person—
>
> …

[17] Section 11 of the SSA deals only with the collection of information and not with the use of the information collected. Equally, IPPs 1 to 4 deal (as mentioned) with the collection of information. IPP 1 deals with the purpose and collection of information, IPP 2 deals with the source of the information, IPP 3 deals with collection from the subject and

IPP 4 deals with the manner of collection of information. By contrast, IPP 10 deals with limits on the use of information once collected and held.

[18] There is no indication from the Certificate that the Commissioner did consider, or would have had cause to consider, matters other than information collection.

[19] Mr Thomas' amended statement of claim received on 12 February 2019 raised for the first time the alleged breach of IPP 10. No particulars are given in relation to the alleged breach or the allegation made regarding the use of the information for a purpose other than that for which it was collected.

[20] There is no indication that the use of the information for any purpose other than that for which it was collected has been previously raised with MSD (or the Commissioner) or that MSD has had opportunity to respond to any allegation in this regard.

[21] For the Tribunal to have jurisdiction in relation to IPP 10, the principle must be clearly engaged. In other words, IPP 10 would have to be relevant to the claim and this needs to be clearly demonstrated in the statement of claim. The Tribunal does not consider this to have been done here. The Tribunal does not consider that IPP 10 is engaged in this case.

CONCLUSION

[22] For the reasons above we conclude that the Tribunal has no jurisdiction to determine the alleged breach of IPP 10 contained in paragraph 5 of the amended statement of claim filed on 12 February 2019.

ORDERS

[23] It is ordered that paragraph 5 of Mr Thomas' amended statement of claim be struck out. Mr Thomas is to file a further statement of claim with that paragraph deleted. This will be known as the second amended statement of claim.

[24] The second amended statement of claim is to be filed by 4pm on Friday 30 August 2019.

[25] Thereafter a case management teleconference is to be arranged by the Secretary.

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Ms GJ Goodwin	**Dr SJ Hickey MNZM**	**Mr RK Musuku**
Deputy Chairperson	**Member**	**Member**