

Reference No. HRRT 047/2017

UNDER THE PRIVACY ACT 1993

BETWEEN MARTYN BRADBURY

PLAINTIFF

AND NEW ZEALAND POLICE

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms GJ Goodwin, Deputy Chairperson

Ms DL Hart, Member

Ms ST Scott QSM, Member

REPRESENTATION:

Mr G Edgeler for plaintiff

Ms V McCall and Ms A Lawson for defendant

DATE OF HEARING: 14 August 2019

DATE OF DECISION: 15 January 2020

DECISION OF TRIBUNAL DECLARING CASE MOOT¹

Introduction

[1] On 14 August 2019 the Tribunal heard full oral argument on an opposed application by the Police for an order that the Tribunal utilise a “closed” process in relation to certain evidence and submissions intended to be presented by the Police at the substantive hearing. The decision of the Tribunal was reserved. At the request of the Tribunal the

¹ [This decision is to be cited as: *Bradbury v Police (Mootness)* [2020] NZHRRT 1]

parties subsequently filed supplementary submissions following delivery of judgment in *Dotcom v Attorney-General* [2019] NZCA 412, [2019] 3 NZLR 397.

[2] The attention of the Tribunal was thereafter drawn to an article published in the *New Zealand Herald* on Thursday 7 November 2019 reporting that these proceedings had been settled. Counsel were directed to notify the Tribunal whether a settlement had indeed been reached and if it had, to file submissions addressing the issue of mootness. That is, whether the Tribunal should decline to deliver a decision on the grounds the issues were now moot. Attention was drawn to the decision in *Body Corporate 375933 v Tenancy Tribunal* [2017] NZHC 1619, [2017] NZAR 1555. That decision will be referred to as *Body Corporate 375933*.

[3] The submissions of the parties having now been received we explain our reasons for not delivering a decision on the preliminary issues argued on 14 August 2019 on the grounds that the outcome has become moot.

Background to the case

[4] As neither party has yet filed evidence on the substantive issues the factual account of the circumstances leading to the present proceedings has been taken from the Police submissions dated 22 July 2019. At the preliminary hearing on 14 August 2019 no substantive issue was taken with the general tenor of that account:

2. In 2014 Mr Bradbury was investigated by Police in relation to a complaint by Cameron Slater that his emails, social media, and website had been unlawfully accessed ("hacked") and that the information obtained had been used by others for personal and pecuniary gain. In particular, his emails and social media content formed the basis of Nicky Hager's book *Dirty Politics*, which was published in August of that year.
3. On 22 September 2014, Police made a request to all banks using the New Zealand Bankers' Association Information Request Form for information about Mr Bradbury.
4. In January 2017, Mr Bradbury made a request to Police under the Privacy Act 1993 for correspondence concerning him between Police and the banks. On 17 February 2017 Police responded to Mr Bradbury's request by providing:
 - 4.1 a copy of the request form sent to various New Zealand banks; and
 - 4.2 a copy of the responses received from each bank.
5. A copy of the covering letter and request form is annexed to these submissions.
6. Police refused Mr Bradbury's request for information about why his banking records were sought, in reliance on s 27(l)(c) (prejudicing the maintenance of the law) and s 29(1)(a) (unwarranted disclosure of the affairs of another individual) of the Privacy Act.
7. Mr Bradbury subsequently complained to the Office of the Privacy Commissioner (OPC), which concluded that the manner of collection of this information had resulted in an interference with Mr Bradbury's privacy under information privacy principle (IPP) 4. The OPC concluded there was no breach of IPPs 1, 2 or 6.
8. The plaintiff filed this proceeding on 7 September 2017. He seeks to proceed under IPPs 4 and 6. The defendant has applied to have the Tribunal use the "closed hearing" procedure for part of the hearing of the proceeding. This application is opposed by Mr Bradbury.

[Footnote citations omitted.]

The reasons why the Police submit a closed hearing is necessary

[5] As noted, the Police withheld certain information from Mr Bradbury under s 27(1)(c) of the Privacy Act 1993 (prejudice to the maintenance of the law) and s 29(1)(a) (unwarranted disclosure of the affairs of another individual). The Privacy Commissioner agreed the Police were not required to disclose that information to Mr Bradbury. The Police intended arguing (in the context of the substantive hearing) that the withholding of the information in response to the IPP 6 request was properly justified. While the withheld information related to why Mr Bradbury was included in the investigation by the Police, it

was submitted the fact that information had been withheld would not interfere with his ability to mount his case under IPP 4.

Opposition by Mr Bradbury

[6] Mr Bradbury opposed the Police application. His grounds were set out in submissions dated 5 August 2019. For the purpose of the present decision we refer only to the succinct summary found in the earlier joint memorandum dated 10 May 2019:

Briefly put, Mr Bradbury accepts that, in respect of any claim of breach of IPP 6 (access to personal information), the Tribunal would obviously have to see the withheld documents to be able to determine whether they were properly withheld. To the extent that the Tribunal considers that it needs to hear legal argument from people who have themselves seen the information, he says it would need to appoint counsel to assist to contradict the Police case. Beyond that limited procedure, Mr Bradbury objects to any use of closed evidence in defending the other aspects of the claim, for example, breach of IPP 4, and is likely to say that the Tribunal lacks jurisdiction to impose such a procedure without his agreement.

The settlement – outline of terms

[7] As mentioned, three months after the Tribunal heard argument on the closed hearing procedure the parties entered into a settlement agreement resolving the issues between them. By memorandum dated 19 November 2019 Mr Edgeler disclosed the following information in respect of that settlement:

[7.1] The Police have provided additional information to Mr Bradbury (although still not everything sought), have provided an apology to him and have agreed to pay damages. The settlement does not involve an express admission of liability.

[7.2] When the terms of settlement have been fulfilled, Mr Bradbury will withdraw his claim before the Tribunal. There will be no outstanding issues as to costs.

Whether proceedings now moot

[8] By memorandum dated 14 November 2019 Ms McCall has advised the Police do not now seek to have the Tribunal decide the preliminary issue argued on 14 August 2019 and do not wish to expend further public resources in relation to the proceedings. They are also conscious that the Tribunal “has experienced resource constraints in recent years which have resulted in cases in which there remain live issues between parties not being able to be heard or determined”.

[9] Mr Bradbury, on the other hand, invites the Tribunal to issue a ruling. While accepting that the decision in *Body Corporate 375933* will likely guide the Tribunal, he submits the issues argued are of general importance and likely to arise again. Making a decision in the present case would more likely save work than create it, thereby benefiting the Tribunal and potential future claimants.

The doctrine of mootness

[10] It was not disputed by the parties that the doctrine of mootness applies and that that doctrine is correctly summarised in *Body Corporate 375933*. As noted at [25] of that decision, the doctrine of mootness was articulated in the following terms in *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at 502:

The mootness doctrine is really the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). Thus because an actual controversy must exist at all stages of the proceedings a case is moot when the issues presented are no longer live.

[11] The starting point is that in general, courts will not hear moot cases. Because mootness is a general principle of the common law it must also be applied by tribunals. Moreover, the power of a tribunal to refuse to hear a claim on the basis of mootness must be understood as an aspect of the implicit and necessary power of a tribunal to regulate its own procedure. See *Body Corporate 375933* at [28] to [30]. In the context of the Human Rights Act 1993, that power is conferred in express terms by s 104(5) read with the Privacy Act 1993, s 89.

[12] While the higher (senior) courts have exceptional jurisdiction to hear moot cases in narrow circumstances, inferior tribunals do not. See *Body Corporate 375933* at [31], [33] and [35].

Application of mootness doctrine to the facts

[13] The parties have by settlement agreement resolved the substantive issues between them. The preliminary issues argued at the hearing on 14 August 2019 are indisputably no longer live. Because the Tribunal is bound to apply the doctrine of mootness it must recognise the absence of jurisdiction to now determine those issues.

[14] In the alternative, even were the Tribunal to have the jurisdiction of a senior court to declare the law (which it does not), there are two reasons why, on the present facts, there are no exceptional circumstances which would justify the delivery of a decision.

[15] First, the Privacy Bill presently before Parliament (and in the form reported from the Justice Committee) would, for the first time, confer express jurisdiction on the Tribunal to hold a closed hearing in IPP 6 cases. Once enacted this provision will remedy any supposed lacuna. Clause 114A, in its present form, provides:

114A Proceedings involving access to personal information

- (1) This section applies if—
 - (a) proceedings are commenced in the Tribunal under section 102 or 103 in respect of a complaint about a decision made by an agency under subpart 1 of Part 4 to refuse access to personal information; or
 - (b) an appeal is lodged in the Tribunal under section 110 against an access direction directing an agency to provide access to personal information.
- (2) During the proceedings the Tribunal may, for the purpose of determining whether the agency may properly refuse access to personal information, do either or both of the following:
 - (a) require the agency to produce the personal information to the members of the Tribunal (but to no other person):
 - (b) allow the agency to give evidence and make submissions in the absence of—
 - (i) other parties; and
 - (ii) all lawyers (if any) representing those other parties; and
 - (iii) all members of the public.
- (3) However, the Tribunal may only exercise the powers in subsection (2) if it is necessary to do so to avoid compromising the matters that the agency considers justify refusing access to the personal information.

[16] Second, the Tribunal is presently facing critical resource constraints as a consequence of being overwhelmed by a caseload well beyond the capacity of its then sole Chairperson to address on his own. These circumstances are more fully explained in *Wall v Fairfax New Zealand (Delay)* [2017] NZHRRT 8 and in the *Minute* dated 27 April 2018 published in the present proceedings. The situation was not helped by the fact that the Chairperson was not appointed on a full-time basis until 18 July 2016. From at least 2016 the Chairperson made submissions to successive Ministers of Justice and Associate Ministers of Justice drawing attention to the magnitude of the delays and the simplicity of the solution, namely the amendment of the Human Rights Act to permit the appointment of deputy chairs to assist with the Tribunal's workload. The required amendment to the

Act was not included in the Statutes Amendment Bill (No. 2) introduced on 24 May 2017. In the absence of legislative intervention the severe difficulties faced by the Tribunal compounded.

[17] Eventually, in its Final Report published on 25 May 2018 on the Tribunals Powers and Procedures Legislation Bill, the Justice Committee adopted the Chairperson’s submission that the Act be amended to enable the appointment of deputies. It was not until 14 November 2018 that the Human Rights Act was amended to permit such appointment. Deputies were not appointed until 8 May 2019 and it was not until October 2019 that all had taken up their positions. The present best estimate is that it will not be until the first half of 2020 that any appreciable progress will be made in accelerating the rate at which cases are set down for hearing and decisions published.

[18] These difficulties were referred to by the Tribunal when reserving its decision at the conclusion of the hearing on 14 August 2019.

[19] The need for economical use of scarce judicial time is well-recognised as a sound reason for a court to decline to hear moot cases. See *Body Corporate 375933* at [15] and [33]. In the circumstances presently faced by the Tribunal it must of necessity focus its energies on resolving live issues between parties, some of whom have been waiting several years for a hearing and sometimes as long for a decision.

Conclusion

[20] In the circumstances outlined the present case is moot and the Tribunal does not have jurisdiction to determine the preliminary issues argued at the hearing held on 14 August 2019. In any event even were the Tribunal to possess the requisite jurisdiction, there are no exceptional circumstances which would justify its exercise.

Order

[21] It is declared these proceedings are moot. The Tribunal having no jurisdiction it will not issue a decision on the Police application for an order that the Tribunal utilise the “closed” process with respect to certain evidence and submissions. The proceedings being at an end the Tribunal file is to be closed.

..... Mr RPG Haines ONZM QC Chairperson Ms GJ Goodwin Deputy Chairperson Ms DL Hart Member Ms ST Scott QSM Member
-------------------------------------------------------------	------------------------------------------------------------	---------------------------------------------	--------------------------------------------------