IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2021] NZHRRT 12**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 048/2017
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**KANE HUNIA**
	FIRST PLAINTIFF
AND	**NEW ZEALAND POLICE ASSOCIATION INCORPORATED**
	SECOND PLAINTIFF (discontinued)
AND	**NEW ZEALAND POLICE**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms L Ashworth, Member
Sir RK Workman KNZM QSO, Member

REPRESENTATION:
Mr B Scotland and Mr HD Dwyer for plaintiffs
Mr D Jones and Ms A Lawson for defendant

DATE OF HEARING: **15, 16 and 17 February 2021**

DATE OF DECISION: **4 March 2021**

DECISION OF TRIBUNAL DISMISSING PROCEEDINGS ON A POINT OF LAW[1]

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[1] [This decision is to be cited as *Hunia v New Zealand Police* [2021] NZHRRT 12.]

INTRODUCTION

The issue to be determined

[1] Information privacy principle 10 (IPP 10) stipulates that personal information obtained in connection with one purpose may not (subject to certain exceptions) be used for any other purpose.

[2] In the present case, in the course of a criminal investigation into the actions of a third party who had caused a road traffic accident, the Police collected personal information (a blood specimen) from an off-duty Police officer (the plaintiff) who was the injured victim of the accident.

[3] The Police also commenced an employment investigation after an analysis of the blood sample suggested the plaintiff had consumed an illegal substance prior to the accident. The plaintiff submits IPP 10 prevents personal information obtained in the course of a criminal investigation from being used for the different purpose of an employment investigation. The Police submit the effect of the Policing Act 2008, s 57 and the Privacy Act 2020 (PA 2020), s 24 is that as a matter of law the limitations prescribed by IPP 10 have no application and the plaintiff's personal information can be used in an employment investigation.

[4] In this decision the Police submission is upheld with the result the plaintiff's proceedings are dismissed.

Procedure

[5] A three day hearing was held at Wellington on 15, 16 and 17 February 2021. However, neither party closed their case. For the plaintiff the reason was that from 11:59pm on Sunday 14 February 2021 Auckland moved to COVID-19 Alert Level 3 and the rest of New Zealand moved to Alert Level 2. This meant that Dr PW Daniels, Consultant Psychiatrist based in Auckland and a witness for the plaintiff would have had difficulty travelling to Wellington to give evidence.

[6] For the Police there were two difficulties. First, as the witness statement for Dr Daniels had only been provided by the plaintiff on 10 February 2021 (five days before the hearing), the Police required an adjournment to instruct their own consultant psychiatrist and to decide whether that person would be required to give evidence. Second, one of the Police witnesses was severely ill with a lung infection and it was not known how long it would be before she would be fit to give evidence.

[7] In the result neither party was in a position to call all their witnesses and to close their respective cases. Nevertheless at the commencement of the hearing the Tribunal was asked to proceed on the basis that the plaintiff and his partner, Ms NM Snowdon, would give evidence and without the plaintiff having closed his case, the Police would thereafter open and call their available evidence.

[8] It was proposed that once the available witnesses ran out and without either the plaintiff or the Police closing their respective cases, the Tribunal would hear legal submissions on the application of the Policing Act, s 57 and the Privacy Act, s 24. The understanding was that if the Police submissions were rejected, the Tribunal would reconvene in the future to hear the balance of the witnesses and to hear submissions on

the application of the two exceptions to IPP 10 relied on by the Police. Thereafter, if appropriate, the question of remedies would be the subject of consideration.

[9] Unorthodox though the proposals were, the Tribunal agreed to them on the grounds the proceedings have already been once adjourned as a consequence of the Level 4 lock down which applied from 25 March 2020 to 27 April 2020 and the plaintiff and his partner have understandably been distressed at the long time it has taken to resolve this case. There was also a considerable measure of goodwill and cooperation between counsel who were confident the arrangement would be beneficial to the parties and helpful to the Tribunal.

[10] Consequently, the plaintiff called all his (then) available witnesses as did the Police. Thereafter the Tribunal heard legal submissions on the s 57 challenge by the Police to the Tribunal's jurisdiction. Credibility is not in issue and the Tribunal has been content to determine the narrow legal point on the facts agreed by the parties.

[11] The decision of the Tribunal was reserved.

Changes to the relevant legislation

[12] The event in question occurred on 28 October 2016, being the date of the accident in which Sergeant Hunia suffered injuries which were both extensive and severe. While the Privacy Act 1993 (PA 1993) had initial application, it was repealed from 1 December 2020 by the Privacy Act 2020 which came into force on that date. The effect of the transitional provisions in PA 2020 Schedule 1, Part 1, cl 9(1) is that the present proceedings must be continued and completed under the 2020 Act:

> **9 Proceedings**
>
> (1) Any proceedings commenced before the Human Rights Review Tribunal under Part 8 of the Privacy Act 1993 before the commencement day, but not completed by that day, must be continued and completed under this Act.

[13] However, as counsel properly agreed, the slight differences which can be found when IPP 10 and s 7 of PA 1993 are compared with IPP 10 and s 24 of PA 2020 are not material.

[14] In this decision the provisions of the 2020 Act will be referred to unless otherwise expressly indicated.

Discontinuance by the second plaintiff

[15] When these proceedings were first filed the New Zealand Police Association Inc (NZPA) was named as second plaintiff and no objection was taken by the Police.

[16] However, it was Sergeant Hunia alone who filed the complaint with the Privacy Commissioner and at the hearing before the Tribunal the NZPA called no evidence. Nor were any submissions made on its behalf different to those made by Sergeant Hunia. All submissions were jointly made.

[17] In these circumstances, at the end of the first day of the hearing, the Tribunal raised with Mr Scotland the utility of the NZPA continuing as a party. At the conclusion of the final day of hearing Mr Scotland told the Tribunal that the NZPA would withdraw from the proceedings. No objection was raised by the Police.

[18] A formal notice of discontinuance dated 19 February 2021 by the NZPA was subsequently filed. It records that Sergeant Hunia's consent to the discontinuance has been obtained.

THE AGREED FACTS

[19] While neither party has yet called all their witnesses, they are agreed that for the purpose of determining whether, in the present case, the Policing Act, s 57 displaces IPP 10, the Tribunal is to proceed on the basis that the matters not in dispute are those set out in the Police opening submissions at paras 8 to 13. Those paragraphs are accordingly adopted:

> **[19.1]** The plaintiff (Sergeant Hunia) is a Police sergeant with a long and exemplary record. On 28 October 2016, while off-duty, he was seriously injured in a motor vehicle accident in the Bay of Plenty. In this accident he was the victim, the other driver having subsequently been convicted of careless driving.
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> **[19.2]** While he was in hospital, receiving emergency medical treatment, a sample of his blood was taken under s 73 of the Land Transport Act 1998 to check for the presence of alcohol or drugs. The sample was collected at the request of Police, in line with its usual practice for investigating serious motor vehicle accidents.
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> **[19.3]** That blood test result revealed the presence of tetrahydrocannabinol (THC), the active ingredient in cannabis and a Class C controlled drug under the Misuse of Drugs Act 1975. Police were advised by the Institute of Environmental Science and Research Ltd (ESR), who undertook the analysis of the plaintiff's blood sample, that there are no legal drugs currently available in New Zealand that contain THC, no drugs which could result in a false positive reading for THC and that the amount of THC in the plaintiff's system could not be from passive ingestion. A second blood sample, taken at the same time as the first, was subsequently tested by ESR and yielded the same result.
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> **[19.4]** Police in the Bay of Plenty District, where the accident occurred, determined that there were no criminal charges that could be brought against the plaintiff as a result of this blood test result. However, because it appeared he had consumed an illegal substance, they determined the information should be brought to the attention of the Professional Conduct Team in the Waikato Police District, where he worked.
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> **[19.5]** In accordance with the defendant's internal processes, a categorisation committee was convened to consider what, if any, action should be taken in relation to the plaintiff. The committee decided to commence an employment investigation.
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> **[19.6]** The plaintiff was informed of the employment investigation in January 2017. Due to the state of his health he was not able to meet with the assigned investigator immediately. The employment investigation was then put on hold by Police to accommodate the plaintiff's complaints to the Office of the Privacy Commissioner and, subsequently, to the Human Rights Review Tribunal. The employment investigation remains on hold pending the determination of this claim.

THE STATUTORY PROVISIONS

[20] While the purpose of taking the blood sample from Sergeant Hunia was for the investigation and prosecution of offences under the Land Transport Act, as is standard practice, the sample was subsequently used by the Police to commence an employment investigation into the plaintiff's actions. The plaintiff submits that this contravened IPP 10 as personal information obtained for one purpose (the investigation into the accident and the subsequent prosecution of the other driver) was thereafter used for another purpose (an employment investigation by the Police). IPP 10 provides:

> Information privacy principle 10
> *Limits on use of personal information*
>
> (1) An agency that holds personal information that was obtained in connection with one purpose may not use the information for any other purpose unless the agency believes, on reasonable grounds,—
> (a) that the purpose for which the information is to be used is directly related to the purpose in connection with which the information was obtained; or
> (b) that the information—
> (i) is to be used in a form in which the individual concerned is not identified; or
> (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
> (c) that the use of the information for that other purpose is authorised by the individual concerned; or
> (d) that the source of the information is a publicly available publication and that, in the circumstances of the case, it would not be unfair or unreasonable to use the information; or
> (e) that the use of the information for that other purpose is necessary—
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including prejudice to the prevention, detection, investigation, prosecution, and punishment of offences; or
> (ii) for the enforcement of a law that imposes a pecuniary penalty; or
> (iii) for the protection of public revenue; or
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
> (f) that the use of the information for that other purpose is necessary to prevent or lessen a serious threat to—
> (i) public health or public safety; or
> (ii) the life or health of the individual concerned or another individual.
>
> (2) In addition to the uses authorised by subclause (1), an intelligence and security agency that holds personal information that was obtained in connection with one purpose may use the information for any other purpose (a secondary purpose) if the agency believes on reasonable grounds that the use of the information for the secondary purpose is necessary to enable the agency to perform any of its functions.

[21] The Police rely on IPP 10(1)(e)(i) and IPP 10(1)(f)(i) but the IPP 10 issues cannot be determined unless and until the s 57 issue has been resolved in favour of the plaintiff and the balance of the evidence heard by the Tribunal.

[22] For present purposes the Police submit IPP 10 does not apply to the case and for that reason no breach of the principle took place. It is said this is the logical consequence of two statutory provisions. The first is the Policing Act, s 57 which expressly displaces IPP 10:

> **57 Application of Privacy Act 2020 to assessment for suitability for employment**
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> Nothing in information privacy principles 2, 3, and 10 set out in section 22 of the Privacy Act 2020 applies in relation to information collected, obtained, held, used, disclosed by, or disclosed to the Police for the purpose of any assessment by the Commissioner of the suitability of any particular person for employment with the Police.

[23] The second statutory provision is PA 2020, s 24(2) which expressly provides that an action taken by an agency does not breach IPP 10 if the action is authorised or required by or under New Zealand law:

> **24 Relationships between IPPs and other New Zealand law**
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> (1) Nothing in IPP 6, 11, or 12 limits or affects—
> (a) a provision contained in any New Zealand enactment that authorises or requires personal information to be made available; or
> (b) a provision contained in any other New Zealand Act that—
> (i) imposes a prohibition or restriction in relation to the availability of personal information; or
> (ii) regulates the manner in which personal information may be obtained or made available.
>
> (2) An action taken by an agency does not breach IPPs 1 to 5, 7 to 10, or 13 if the action is authorised or required by or under New Zealand law.

[24] The short issue is whether the Police action in using the plaintiff's personal information was "authorised or required by or under New Zealand law". The Police case is that the action was so authorised as it was, in the language of s 57, for the purpose of an assessment by the Commissioner of Police of the suitability of the plaintiff for employment with the Police.

THE SUBMISSIONS

[25] In the interests of brevity it is not intended to repeat at length the submissions made by the parties. A summary only is sufficient.

The submissions by the plaintiff

[26] The essential point made by the plaintiff is that the Policing Act, s 57 applies only to the assessment of the suitability of persons applying for employment with the New Zealand Police. It is directed at pre-employment vetting, not to assessing the suitability of an existing employee for ongoing employment with the Police. The plaintiff, as a current employee, fell into the latter category.

[27] In support attention was drawn to the fact that the Policing Bill was introduced in February 2008 following an extensive and wide-ranging two-year review of the former Police Act 1958 which had no equivalent to s 57. Policy documents and commentary surrounding s 57 make it clear the purpose of s 57 was to provide for robust pre-employment vetting of Police staff.

[28] Reference was made (inter alia) to:

[28.1] A policy document entitled "Policing Directions in New Zealand for the 21st Century" (May 2007) which referred to better vetting procedures in recruitment. The document records that the logic behind strengthened pre-employment checks is to ensure a job seeker fits with Police values:

> 4.13 The logic behind these enhancements is clear. Not only are background checks an established way to help identify the people best suited to work in particular roles, but vetting offers a means of ensuring a job seeker's fit with an organisation's values. Even more so than for most departments of state, it is a fair expectation that anyone joining New Zealand Police will be trustworthy, with a strong track record of ethical conduct and lawful behaviour. This applies just as much to a frontline constable as it does to a call-taker in a Police Communications Centre. Pre-employment vetting can provide additional levels of assurance around these expected characteristics. It is

> also a 'first line of defence' to stop ill-suited people gaining employment with Police. On all these counts, there is a case to strengthen Police's current vetting practices.

However, there is nothing in this document which suggests that the same values and high standards are not also expected of Police staff already employed.

[28.2] A paper dated 5 September 2007 from the then Minister of Police to the Cabinet Policy Committee inviting the committee to make policy decisions about the content of the intended legislation. One of the key policy decisions is stated to be a more robust pre-employment vetting of Police staff. Such checks are said to have a strong policy rationale. The paper recommends a change to the then Privacy Act 1993 by exempting the Police from certain provisions in order to allow for the proposed pre-employment checks.

However, once again, there is no suggestion that the same policy rationale (high trust roles and the expectation that anyone assisting to administer the law will be trustworthy with a strong track record of lawful behaviour) should not apply also to existing staff.

[28.3] There is a *Minute* recording the decision taken on 19 September 2007 by the Cabinet Policy Committee recommending a change to PA 1993 to allow for pre-employment checks. In this regard the plaintiff emphasises the reference in the *Minute* to the purpose of the proposed amendment, namely:

> to enable the Commissioner of Police to decide whether to employ a particular person.

The submission is that the Privacy Act exemption in the Policing Act was clearly for pre-employment vetting and not for decisions relating to the ongoing employment of existing employees.

[28.4] Email exchanges in December 2007 between the Police and the Office of the Privacy Commissioner relating to the Policing Bill. The focus of these emails is on pre-employment vetting.

[28.5] *Hansard* extracts from when the Policing Bill was first introduced, the second reading and the Committee Stage. However, Mr Scotland responsibly conceded that it was difficult to glean from these materials any specific parliamentary intention regarding the now s 57. He described the record as "opaque". With that observation we agree.

[28.6] The Explanatory Note to the Policing Bill made the following statement in relation to cl 56 (which became s 57 on enactment):

> Clause 56 provides that certain privacy principles in the Privacy Act 1993 do not apply where the Commissioner is assessing the suitability of a person for employment with the Police.

However, it is difficult to find in the explanatory note anything useful to the plaintiff as the language largely replicates what was then already in cl 56 (now s 57).

[29] The plaintiff submits the references in these extrinsic materials to pre-employment checks and the absence of consideration of the effect of the proposed section on existing Police employees supports a conclusion that the purpose of s 57 was solely to reinforce pre-employment checks when assessing suitability for employment with the Police. It is argued there is no suggestion that the section was intended to be used in relation to the

ongoing employment of existing Police officers or to deny privacy rights to every person once they are employed by the Police. Even the Police internal instructions on the operation of the information privacy principles make no reference to a s 57 exemption to IPPs 2, 3 and 10.

[30] It was argued that as s 57 provides the Police with the ability to disregard the Privacy Act in the pre-employment context, the ability to do the same in relation to assessing the suitability of existing employees for ongoing employment must be conferred explicitly by Parliament.

[31] The submissions for the plaintiff made reference also to the Part 4 heading "Provisions relating to employment of Police employees". It was said the content of this Part addresses the logical steps in becoming employed, suspension from employment and termination of employment. The location of s 57 towards the beginning of Part 4 suggests it relates to the commencement of the employment relationship rather than its termination. In addition emphasis was given to the concluding phrase in s 57 "for employment", the submission being this phrase is to be understood to mean "being considered for employment". However, in our view the submission based on the early numerical placement of s 57 in Part 4 provides little support for reading down the plain words of the provision and also involves an over-nuanced approach to the interpretation of the Act.

[32] Reference was also made to the fact that the Policing Act, s 56 provides that the Employment Relations Act 2000 applies in relation to the Police and consequently there is an obligation on the Police, as a good faith employer, to safeguard the privacy rights of employees. This led to a submission that New Zealand's human rights obligations under the International Covenant on Civil and Political Rights 1966 (ICCPR), art 17 gives protection against arbitrary interference with "privacy".

[33] As will be seen, the ICCPR, art 17 is not in the present circumstances a helpful aid to interpretation given its lack of specificity and the fact that the primary drivers of domestic statutory interpretation are text and purpose.

The submissions by the Police

[34] The Police offer six reasons why the Policing Act, s 57 applies to information used by the Police for the purpose of investigating alleged misconduct by Police employees:

> **[34.1]** The language of s 57 is broad and clearly capable of applying to decisions in relation to the continued employment of existing employees as well as to decisions about whether to employ an applicant to a position within the Police.
>
> **[34.2]** The context of s 57 suggests that it applies both to decisions to appoint prospective employees and to dismiss existing employees. It appears in Part 4 of the Act which deals with decisions relating to Police employees and sets out the powers of the Commissioner to appoint and to dismiss.
>
> **[34.3]** Section 57 can be contrasted with other provisions in the Act which expressly apply either to "employees" or to "prospective employees". Had Parliament intended s 57 to apply only to pre-employment vetting, it would have made it plain that s 57 applied only to prospective employees.

[34.4] This interpretation is in accordance with the principles that underpin the Act, which are set out at s 8. In contrast, the interpretation advanced by the plaintiff would have the effect of undermining those principles.

[34.5] There is no reason of principle to support the plaintiff's interpretation. Section 57 is not to be given an interpretation that best gives effect to the protections of the PA 2020 since the purpose of the section is expressly to limit the effects of that Act. Further, the plaintiff does not enjoy a reasonable expectation that material obtained in the course of a criminal investigation will not be used for a misconduct investigation.

[34.6] The Cabinet material relied on by the plaintiff may suggest that Cabinet was particularly concerned with pre-employment vetting. However, the Court in *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [40] to [42] deprecated the use of Cabinet material for the purpose of statutory interpretation. The issue is what the legislature enacted, not what was of concern to the executive in proposing the legislation. In any event, the material relied on by the plaintiff does not have the meaning that he attributes to it.

[35] It was common ground that if these submissions are upheld Sergeant Hunia's proceedings come to an end.

DISCUSSION

[36] The reach of the Policing Act, s 57 is a question of statutory interpretation. The fundamental principles are set out in the Interpretation Act 1999, s 5:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[37] The key issues to be addressed are text, context and purpose. In this context both parties cited *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]:

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment10 must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment. [Footnote citation omitted]

[38] Reference has also been made to *Tan v Auckland Council* [2015] NZHC 3299 at [30]:

> [30] The purposive approach to interpretation under s 5 of the Interpretation Act 1999 requires me to apply the following principles:
> (a) If words have two or more possible meanings, they should be given the one that best accords with the purpose of the legislation.
> (b) A strained interpretation may be put on words if the purpose of the provision requires it, but only if that strained interpretation is one that the words can legitimately bear.

(c) General words should be given a construction consistent with the legislation in question.

(d) Legislation that is obscure, prolix or poorly drafted should be interpreted to give effect to the underlying purpose of the legislation. [Footnote citations omitted]

[39] Given the plaintiff's extensive reference to extrinsic pre-parliamentary and Parliamentary material it is necessary to note that in *Skycity Auckland Ltd v Gambling Commission* at [40] to [42] the use of such material for the purposes of statutory interpretation was discouraged:

> [40] It is true that, as Mr Browne pointed out, Cabinet materials are not "parliamentary", in that they are not placed before Parliament and are not part of the parliamentary processes like, for example, select committee reports or explanatory notes are. Nevertheless they are now often in the public domain and obtainable under the Official Information Act 1982. That was so in this case. However, we doubt that reference to Cabinet papers and reports to Cabinet will ever be of much assistance to courts involved in interpreting specific statutory provisions. They may provide some indication of the overall purpose of the legislation, but that will normally be apparent from the text of the Bill itself or, if not, from the explanatory memorandum or other parliamentary material. In the present case the two possible interpretations of ss 11 and 12 are both broadly consistent with the overall purpose of preventing any expansion of gambling activities, which is one of the general purposes of the legislation identified in the Cabinet material.
>
> [41] Another factor is that, while Cabinet papers may reveal the intention of the Executive at the time of the relevant Cabinet meeting, that may differ from Parliament's intention when a Bill is passed. That is particularly so in an MMP environment, where the government of the day may well need to seek support from minor parties, and make trade-offs to obtain that support.
>
> [42] For these reasons, we do not consider that the extensive references to Cabinet materials by counsel for the appellants were advisable in this case. We would not encourage counsel in future cases to do so. Having said that, we heard extensive submissions on the parliamentary history, which were supported by references to a combination of parliamentary and other material, and it is not easy to do justice to those submissions without considering all of the material to which we were referred. So we have decided to consider the Cabinet materials to which counsel referred us in this case. That should not be taken as an invitation to counsel in future cases to refer the court to non-parliamentary materials.

[40] It is now necessary to address the issues of text, context and purpose.

Text

[41] We agree with the submission by the Police that the words of s 57 are clear. The section applies to **any assessment** by the Commissioner of the suitability of **any particular person** for employment. The phrase **any assessment** must cover an assessment of the suitability of someone for new employment and also continued employment. Further, the words **any particular person** must apply to applicants for employment and also current employees.

[42] But even if the meaning of the provision was not clear on the face of the legislation, it is necessary to regard context and purpose as essential guides to meaning. See *Commerce Commission v Fonterra Co-Operative Group* at [24]. We have not found any of the pre-parliamentary and Parliamentary material of assistance and note again the concession that the *Hansard* extracts are opaque. It is also necessary to bear in mind the cautions articulated in *Skycity Auckland Ltd v Gambling Commission*. We accordingly attach no weight to the material. It is now possible to turn to the subjects of context and purpose.

Context

[43] The reading of "employment" in s 57 as including both prospective employment and the continuation of existing employment is reinforced by the context in which s 57 appears, namely Part 4 of the Act. Our reasons for so concluding follow.

[44] First, the heading to the Part (an interpretation aid expressly recognised by the Interpretation Act, s 5(2) and (3)) is in the following terms:

Provisions relating to employment of Police employees

It is plain from this heading and from what follows in Part 4 that "employment" is used to describe both applications for employment and the continuation of existing employment.

[45] Second, the Policing Act, s 56 applies the Employment Relations Act to the Police. That Act unambiguously has application to the continuation of employment, personal grievances, disputes and the termination of employment.

[46] Third, the reach of Part 4 to existing employees is underlined by the requirement that the Commissioner operate a personnel policy that complies with the principle of being a good employer (s 58) given that the Commissioner has all the rights, duties and powers of an employer in respect of Police employees (s 18(4)).

[47] Fourth, ss 62 to 65 provide for the review of appointments, acting appointments, the power to transfer employees within Police and the power to temporarily assign, second and locate employees and other persons within the Police.

[48] Fifth, there is express power in s 70 to suspend any Police employee or to remove any Police employee from that employee's employment.

[49] From this we conclude that contextually, the term "employment" in s 57 is to be read as applying to suitability assessments made by the Commissioner not only when deciding whether to employ a person but also whether to continue the employment of any particular individual. Or, as submitted by the Police, s 57 is concerned with decisions affecting both the decision to employ prospective employees and misconduct investigations into existing employees that may lead the Commissioner to cease to employ them.

[50] Context can include provisions in other Parts of the Act. So it is to be observed the provisions in Part 5 relating to the supply of biometric information specifically differentiate between prospective Police employees and existing Police employees. The former may be required to provide a bodily sample or biometric information as a condition of being considered for employment as a Police employee. See s 81. However, for Police employees provision of such sample or information is voluntary only. See s 82. The fact that the Policing Act differentiates between prospective employees and existing employees in the context of the provision of personal information underlines the absence of such distinction in s 57 itself and strengthens the contextual reading of that section as applying in both pre and post-employment contexts.

Purpose

[51] The Policing Act is based on the six principles set out in s 8:

> **8 Principles**
>
> This Act is based on the following principles:
> (a) principled, effective, and efficient policing services are a cornerstone of a free and democratic society under the rule of law:
> (b) effective policing relies on a wide measure of public support and confidence:
> (c) policing services are provided under a national framework but also have a local community focus:
> (d) policing services are provided in a manner that respects human rights:
> (e) policing services are provided independently and impartially:
> (f) in providing policing services every Police employee is required to act professionally, ethically, and with integrity.

[52] Of particular relevance in the employment context is principle (f):

> (f) in providing policing services every Police employee is required to act professionally, ethically, and with integrity.

[53] The Police submit their interpretation of s 57 gives effect to principles (a), (b) and (f) by ensuring that personal information can be used to both determine whether applicants should be employed by the Police and whether existing employees who may be guilty of serious misconduct should remain as Police officers. By ensuring that Police officers behave ethically and professionally public confidence in the Police is maintained.

[54] With this submission we agree. As noted by the then Police Commissioner in his Comment in the *Police Code of Conduct*, the reputation of the New Zealand Police is everything.

[55] Acceptance of the plaintiff's submission that s 57 applies only to pre-employment vetting would lead to an irrational result. That is, while applicants for employment by the Police may have their personal information used for the purpose of determining their application and suitability for employment, Police officers who have taken the oath, agreed to the *Police Code of Conduct* and who are exercising their statutory powers might be shielded from similar investigation in the context of continued employment. The logic of post-employment investigations is indistinguishable from the logic of pre-employment investigations.

[56] The submissions for the plaintiff emphasise the privacy rights of Police staff and the consequent need to interpret s 57 narrowly. Reference was also made to the ICCPR, art 17. But as to this:

[56.1] IPP 10 is not a right enforceable in a court of law. It has the status of a "principle". See PA 2020, s 31(1).

[56.2] Section 57 expressly limits the application of IPPs 2, 3 and 10.

[56.3] There is no statutory obligation to interpret legislation in a manner that gives best effect to the privacy principles. The Privacy Act 2020 contains no equivalent provision to the New Zealand Bill of Rights Act 1990, s 6 which provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any

other meaning. The ICCPR right to privacy was not incorporated into New Zealand domestic law by the Bill of Rights.

[56.4] As submitted by the Police, employees of the Police have no reasonable expectation (*Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305) that information obtained as a result of a criminal investigation will not be used for the purpose of misconduct inquiries. The Police occupy a unique position of power and responsibility. The *Police Code of Conduct* and s 8(a), (b) and (f) of the Act make it clear that Police employees should be professional, ethical and law abiding in both their personal and professional lives. Unlawful activity is not tolerated and improper behaviour by fellow officers should be reported and may lead to an employment investigation. In these circumstances, no reasonable expectation as to the non-use of information obtained as a result of a criminal investigation could arise.

[57] As mentioned little assistance is to be gained by reference to ICCPR, art 17, particularly given its general terms and lack of specificity as to what is included in its reference to "privacy". The commentary on art 17 by Sarah Joseph and Melissa Castan in *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, Oxford, 2013) at [16.01] and [16.02] notes that privacy is a notoriously difficult term to define and that as far as the ICCPR is concerned, the meaning of privacy for the purposes of art 17 has not yet been thoroughly defined in either the General Comment or in the case law of the Human Rights Committee.

CONCLUSION

[58] We see nothing in the text, context and purpose of the Policing Act, s 57 which would justify reading the provision down so as to apply only to pre-employment vetting of applicants. It was plainly intended that the assessment referred to in that section is to be understood as an assessment by the Commissioner in respect of the suitability of any particular person for either entering employment with the Police or continuing with such employment. Of the competing interpretations advanced by the parties, only that of the Police gives effect to the plain meaning of the text and advances the principles articulated in s 8 of the Act, particularly the principle which requires every Police employee to act professionally, ethically and with integrity. Such requirement is essential to the attainment of a principled, effective and efficient Police service which is reliant on a wide measure of public support and confidence.

[59] Consequently the Policing Act, s 57 is a bar to Sergeant Hunia alleging in these proceedings that there has been an interference with his privacy as defined in PA 2020, s 69(2). As a matter of law no breach of IPP 10 can be established. It follows the proceedings must be dismissed.

[60] In these circumstances there will be no reason for the hearing to be reconvened or for the Tribunal to hear the balance of the evidence and submissions on whether the Police could, in any event rely on one or more of the exceptions to IPP 10.

[61] We are grateful to the parties for the dignified manner in which these proceedings have been conducted. It is also necessary to record our gratitude for the assistance we have received from all counsel.

Costs

[62] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

> **[62.1]** The New Zealand Police are to file their submissions within 14 days after the date of this decision. The submissions for the plaintiff are to be filed within a further 14 days with a right of reply by the New Zealand Police within seven days after that.
>
> **[62.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.
>
> **[62.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

ORDERS

[63] The following orders are made:

> **[63.1]** The plaintiff's proceedings are dismissed.
>
> **[63.2]** Costs are reserved.

....	....	....
Mr RPG Haines ONZM QC	**Ms L Ashworth**	**Sir RK Workman KNZM QSO**
Chairperson	**Member**	**Member**