TRENDS IN THE TRIBUNAL

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Cases: Volume and Type

The number of cases under the Privacy Act jurisdiction coming before the Tribunal remains consistent. In the period July 2001-June 2002, 22 complaints were taken, in comparison to 25 for the previous period. All cases in the 2001-02 period were taken by the complainant. Whilst some of these have been the subject of investigation and opinion by the Privacy Commissioner, the bulk appear to be complaints where an investigation has been discontinued under the discretion provided in section 71 of the Act.

The effect of this is that the parties' cases are often ill defined in terms of the jurisdiction of the Tribunal, or the particular breaches of the Act/Code alleged. Recent cases have raised jurisdictional issues, which have had to be resolved before any substantive issues could be addressed: *O'Neill, Steele*. Plaintiffs are understandably determined to bring the full range of their grievances against a defendant to the Tribunal for resolution, even where that grievance may not involve (or only involve in part) a breach of the Privacy Act.

The re-naming of the Complaints Review Tribunal to the Human Rights Review Tribunal may have compounded this difficulty, with plaintiffs believing that they are now able to bring any matter which they consider raises a breach of their "human rights" to the Tribunal, irrespective of whether the matter has ever been dealt with by the appropriate Commission, and the fact that the matter has been brought under the Tribunal's Privacy Act jurisdiction.

Procedure: Striking Out vs Hearings

At the last Forum, Bob Stevens reflected on the frequency with which the (then) Complaints Review Tribunal disposed of matters coming before it using the mechanism of striking out. He reported that of the 35 cases which had been taken before it in the period January 2000-October 2001 the Tribunal had struck out 23 without having held a hearing into the issues. Notably, all cases disposed of in this way had been brought under section 83 of the Act by the aggrieved individual.

That "practice" has now ceased, with the last striking out occurring in September 2001 (*Robertson v NZ Police*). Although one case has been dismissed, this occurred only after a hearing had been held (*CD*).

The move to full hearings has led to an increase in the percentage of time expended by the Tribunal in dealing with cases under the Privacy Act jurisdiction. The greater numbers of hearings, the increasing complexity of the issues raised, the need to clarify jurisdiction, and the move to reasoned decisions have combined to increase the overall turnaround time for each case.

Having said that, parties appear to accept this extended timeframe as a concomitant of

the careful approach demonstrated by the Tribunal both in ensuring the process is transparent and in dealing with matters brought before it.

The value of hearings in assisting the Tribunal to assess the facts and produce a decision should not be doubted:

- In *Pointu* the Tribunal was able to receive evidence on oath about the promise of confidentiality at the heart of the defendant's withholding of information sought by the plaintiff, thus satisfying itself that the defendant had proven the ground relied upon.
- In *Poysden* the existence of an original set of minutes containing information sought by the plaintiff and withheld from him by the defendant (and which had also been concealed from the Commissioner during his investigation of the matter) was only revealed in the course of cross-examination of a witness.
- In *Steele* the Tribunal had the opportunity to assess the credibility of the defendant's officer against the plaintiff's witnesses in relation to the officer's claim not to have disclosed personal information about the plaintiff in the course of a social function held in the plaintiff's immediate neighbourhood.
- In *CD* it was only possible for the Tribunal to dismiss the proceedings having established from witnesses that there had not been a "use" in breach of Rule 8 of the Code within the period covered by the Act.

Minutes and Decisions

The Tribunal's recent Minutes and Decisions demonstrate a more fully reasoned basis for the rulings and decisions they contain. This is the case in respect of both preliminary as well as substantive matters: *O'Neill, Steele, Plumtree, Parker, CD*.

Of particular note is the work of the current Tribunal in providing detailed and reasoned statutory interpretation of sections 82 and 83 of the Act, which relate to its jurisdiction to hear proceedings (*Steele*), and the proper tests to be applied by it to the question of when an interference with the privacy of an individual can be said to have been established (*Plumtree, Poysden*). A detailed analysis of how section 66 of the Act is to be applied is currently awaited.

Such clarification from the Tribunal provides useful guidance for parties seeking to bring proceedings as well as for those defending them. In some instances once the position is drawn to the party's attention the reasoning in the decisions has meant that they do not commence, or persist with, arguments on certain issues.

Quantum: Damages and Costs

The Tribunal has indicated it is prepared to hear arguments in support of increasing awards in this jurisdiction, in line with awards made by it in the Human Rights Act jurisdiction (*Parker*), and to make meaningful awards in appropriate cases (*Steele*).

In respect of costs, the Tribunal's decision in *W* can be seen as the high water mark, and may in future be confined to its specific facts.

Name Suppression

The Tribunal's previous practice of providing name suppression on an almost automatic basis (often without having received an application from either of the parties) reflected

the underlying interest generally understood to adhere to proceedings alleging a breach of the Privacy Act, and the peculiar tension which results from having to take a public action in order to defend a right to privacy.

It is interesting to note therefore that this practice of "automatic" name suppression is unlikely to continue, and that parties seeking suppression will need to apply for a formal order, and advance grounds in support, in order to be certain of preserving their privacy. Whilst this process has proven to be straightforward so far (*CD, AB*) it relies on parties appreciating the need to seek such an order. Unrepresented parties may be disadvantaged if they fail to understand the need to seek a suppression order.

Arguably, in view of the jurisdiction involved, the Tribunal should be alert to the potential for anomalies to arise in consequence of this approach: *Parker*.

It may also be necessary for parties to consider the need for *interim* orders in the pre-hearing phase if the case raises any jurisdictional issues warranting a Minute being written.

10 Years On In the Tribunal

It is in a sense disappointing that detailed analyses of many central sections of the Privacy Act are only now being produced, however: better late than never. Although awards in the Tribunal under the Privacy Act jurisdiction have fallen behind those under the Human Rights Act, the wider impact of the Privacy Act and the value of the Tribunal in setting the parameters for privacy rights continues to be evident: *CD, Steele*.

An aggrieved individual's ability to take a matter to the Tribunal themselves, and to receive a binding decision from an independent third party, is often critical to their ultimate understanding of the interests protected by the Act (or the Code). The decision of the Tribunal can often act as a "circuit-breaker" between parties whose positions have hardened as a result of power imbalances or pre-existing bad relations between them: *Plumtree*, *Poysden*.

For agencies who are alleged to have interfered with an individual's privacy a decision from an independent body following a hearing into the matter can serve its interests equally well – either because they have been vindicated (*Young*, *Pointu, CD*) or (if they are receptive) because they have been educated on their obligations under the Act/Code (*Steele, Parker*, *Plumtree*).

Both, however, are reliant on clear, reasoned, decisions being provided. The decisions now being produced by the current Tribunal are welcomed in that respect. However, the educative value of the Tribunal's decisions is also dependent on those decisions being generally accessible. There may be a need for work to be done in this area, perhaps by way of a comprehensive publication covering all the jurisdictions handled by the Tribunal.

It is pleasing to note that, although the panel of lay persons continues to be maintained below strength, the current panel members' engagement with the issues and parties during the hearings has become more evident in recent times, possibly reflecting the more inclusive style of the current Chairman.

Finally, in view of the rising volume of cases coming before it (a trend which is likely to continue in the foreseeable future), the thoroughness of the decisions now being given, and the potential for possible conflicts of interest in individual cases (whether in relation to parties or witnesses) it may be timely to consider whether the appointment of a Deputy Chair is now warranted.

Cases In the Human Rights Review Tribunal

The following summaries of the cases dealt with by the Tribunal are intended to give a brief indication of the issues before the Tribunal and the Tribunal's decisions on them. The purpose is to assist the discussion of the issues raised in the paper.

The summaries are not intended as comprehensive analyses of the cases or the decisions. The reader is referred to the case analyses in Butterworth's *Privacy Law and Practice* and the cases themselves for this.

Young v Commissioner of Police (Dec No 4/2002, CRT 50/2001): *Information Privacy Principle 11(e)(iv).* (*8pp*).

The plaintiff alleged that the Police had disclosed personal information about him to the Family Court, namely information contained in an Affidavit from a Police officer, a letter written by the plaintiff to his Probation Officer, details of his criminal history, a Summary of Facts in relation to charges laid against the plaintiff and the Police's Notice of Opposition to Bail in relation to those charges. This was said to be in breach of Principle 11. The Family Court was due to hear an application from the plaintiff for discharge of the protection order granted under the Domestic Violence Act 1995 against him. In the plaintiff's view the material supplied by the Police was prejudicial to his application, which he understood to be a *de novo* hearing.

The plaintiff sought to bring proceedings against the NZ Police and the officer who had sworn the Affidavit. The proceedings therefore raised an initial question of jurisdiction, as the Privacy Commissioner had not investigated a complaint against the officer. It also raised the question of whether all of the information which had been appended to the Affidavit had been "disclosed", given the Court's ability access to such information directly from its own records.

The defendant accepted that there had been a *prima facie* disclosure of information but argued that the exception provided at Principle 11(e)(iv) (disclosure necessary to avoid prejudice to the maintenance of the law) applied.

The Tribunal found that only some of the information at issue had been "disclosed" and that the exception under Principle 11(e)(iv) applied to that disclosure.

Young v Department of Corrections (Dec No 6/2002, CRT 49/2001): *Information Privacy Principle 11(e)(i), 11(e)(iv), and 11(f). (8pp).*

The proceeding arose out of the disclosure by the defendant to the NZ Police of a letter written by the plaintiff to one of the defendant's employees, a Probation Officer. The background to the writing of the letter, and the reasons for that release, are common to this matter and to *Young v Police*, above.

The defendant accepted that a *prima facie* disclosure of personal information had occurred but argued that the exceptions provided at Principle 11(e)(i) (disclosure necessary to avoid prejudice to the maintenance of the law), and 11(f) (disclosure necessary to prevent serious/imminent threat to safety of an individual) applied.

There were a number of preliminary jurisdictional issues as a result of the plaintiff having sought to include in his *Notice* matters raising Principles in respect of which no investigation had been conducted by the Privacy Commissioner, and the naming as defendants individuals (including the Privacy Commissioner) who had not been the subject of the Commissioner's investigation. These matters were able to be resolved in the pre-hearing process by the withdrawal of the additional principles and the plaintiff's acceptance that the proceeding could not include the other persons named as defendants.

The Tribunal found that both exceptions advanced by the defendant applied in the circumstances of the case.

Parker v MAF (Dec No 9/02), HRRT 46/01: *Information Privacy Principle 11, section 88 Privacy Act. (8pp).*

The plaintiff alleged that the defendant had disclosed personal information about her to a third party in breach of its own policy to maintain, as confidential, the names of those who acted as informants regarding animal welfare. The disclosure alleged was said to have been done by means of a confirmation to an inquiry as to the source of information used by the defendant's officers in conducting an inspection of the third party's premises and other animal welfare matters.

The defendant accepted that there had been a breach to which no exception applied. The central issue before the Tribunal was therefore whether the plaintiff had suffered any adverse consequences, and if so, whether all the adverse consequences advanced by the plaintiff, as grounds for seeking damages were, as a result of that disclosure.

The Tribunal found that although the plaintiff had suffered adverse consequences sufficient to meet the requirements of section 66(1)(b), only some of the matters advanced were connected to the disclosure so that in making an award under section 88(1) only certain losses could be compensated.

In awarding a modest amount of damages ($4,000) the Tribunal also took into account the defendant's behaviour, including its early acknowledgement of the breach and the steps it had already taken (by way of personal apologies to the plaintiff from the employees involved) to resolve the matter.

No suppression order was sought by the plaintiff and none was ordered by the Tribunal, despite the underlying issue in the case, namely that disclosure of the plaintiff's name had the potential to put her at risk should it become generally known in the district that she acted as an informant for this agency and others.

Plumtree v NZ Defence Force (Dec No 10/02, HRRT 29/01): *Information Privacy Principles 6 and 7, section 66, section 88 Privacy Act. (35pp).*

The plaintiff alleged that the defendant had failed to comply with its obligations under Principles 6 and 7 of the Act, in that it had withheld personal information about him which it held, namely personnel and medical records relating to his military service during the Vietnam War, and that it had failed to correct those records (in particular certain medical records) when asked to do so by him.

The defendant denied that it had breached either of these Principles but argued that even if it had the plaintiff could not point to any adverse consequences to him as a result of

that failure. It argued that the plaintiff, in order to show that there had been an interference with his privacy as a result of any action on its part, would need to satisfy the matters set out in section 66(1)(b)(i)-(iii) of the Act, rather than section 66(2).

The proceedings therefore raised the issue of what an agency's obligations were in respect of these principles, and what was required to find an interference with an individual's privacy in respect of an information privacy request (see section 33 definition).

The Tribunal found that the defendant had breached its obligations under Principle 6 in that it had failed to comply with the procedural obligations under Part V (which attach to Principle 6) and had failed to provide him with access to all the information about him which it held.

In respect of Principle 7 the Tribunal found that the defendant had not caused an interference with the plaintiff's privacy. Although it was satisfied there had been a general request for correction of certain records, as the defendant was, at the time of the request, unaware that it held the information (which would have enabled it to make the correction sought) it had had no basis to believe the information it acknowledged it held was incorrect, and was therefore not obliged to correct its records: Principle 7(2).

The Tribunal also confirmed that the defendant had no obligation under Principle 7(3) to advise the plaintiff of his right to have a statement of the correction sought but not made attached to his record even though doing so would have been prudent in all the circumstances.

Without resolving the issue under section 66 the Tribunal considered it was able to make an award of damages ($3,000) for the interference with the plaintiff's privacy arising from the improper withholding because it was satisfied that there was evidence of adverse consequences to the plaintiff as a result of that withholding.

Pointu v Employrite (Dec No 11/02, HRRT 17/02): *Information Privacy Principle 6, sections 29(1)(b) and 29(3) Privacy Act. (8pp).*

The plaintiff alleged that the defendant had withheld personal information about him without having had a proper basis under the Act to do so. The information at issue was a reference about the plaintiff supplied to one of the defendant's operatives, and on which it had based its recommendation that the plaintiff should not be appointed to a position with one of its clients.

The proceedings were initially instituted against the Director of the defendant company. During the course of the hearing the plaintiff confirmed that he did not wish to proceed against the Director personally but against the company.

The defendant argued that section 29(1)(b) was applicable (information supplied solely for evaluation of individual for employment on the basis of a promise of confidentiality as to the information and the supplier).

The information at issue was supplied in a sealed envelope to the Tribunal and was not opened until after all argument had been heard. An expurgated copy was supplied to the plaintiff in order that argument could be received on the issue of the existence of the promise.

The hearing was obliged to extend into a second day in consequence of the failure of the defendant to call the operative who could speak to the question of whether the elements required to prove the withholding ground existed.

The Tribunal found that the defendant had a proper basis to withhold the information and the name of the supplier. It was satisfied that the information fell within the requirements of section 29(3) (that it be compiled solely and that it be evaluative or opinion material) and that there was sufficient evidence of a promise of confidentiality in respect of the name of the supplier and the information supplied to find that the ground had been made out.

The decision has been taken on appeal by the plaintiff.

Steele v DWI (Dec No 12/02, HRRT 04/02): *Information Privacy Principle 11, sections 70, 71 and 82 Privacy Act. (17pp).*

The plaintiff alleged that an employee of the defendant had disclosed personal information about him to a third party during the course of a social function held in his immediate neighbourhood. The third party to whom the information was allegedly disclosed was his next-door neighbour. The social function was at the home of the employee's baby-sitter, and only two houses away from the plaintiff's (then) residence. The employee was the plaintiff's Case Manager.

The defendant accepted that there had been a discussion between its employee and the neighbour but denied that personal information had been disclosed. It argued that the information used had been anonymised (on the basis that as no names were used the client involved could not be identified) but that in any event the neighbour had already been aware of the matters discussed, so there had been no "disclosure". It further argued that, even if there had been a disclosure, the plaintiff had not suffered any adverse consequences as a result, or if he had that this was as a result of the neighbour's subsequent actions in discussing the information disclosed to her with others.

There was also a preliminary issue for the Tribunal to decide: whether, as a result of the Privacy Commissioner having discontinued his investigation under section 71, the defendant was a person to whom section 82(1) applied (i.e. was a person in respect of whom an investigation had been conducted).

On the jurisdictional issue the Tribunal found that where an investigation has been discontinued (whether under section 71(1) or 71(2)) the agency or person who had been named as the respondent in the Commissioner's investigation will be a person to whom section 82(1) applies so as to found the Tribunal's jurisdiction to hear the matter. In reaching this decision the Tribunal confirmed its earlier position (in *Cable*) that it does not have jurisdiction to review the conduct of the Privacy Commissioner's investigation.

On the substantive issue the Tribunal found that there had been a disclosure of personal information about the plaintiff by the defendant's employee, and that this disclosure had caused the plaintiff adverse consequences sufficient to meet the requirements under section 66(1)(b) of the Act.

The Tribunal accordingly awarded the plaintiff $10,000 in damages.

Poysden v Lower Hutt Memorial RSA Inc. (Dec No 14/02, HRRT 35/01): *Information Privacy Principle 6, section 66 Privacy Act. (18pp).*

The plaintiff alleged an interference with his privacy arising out of his right of access under Principle 6, namely that the defendant had withheld personal information about him contained in Minutes of meetings held by its Executive Committee in which a complaint made by him about the conduct of the (then) Club President was discussed, and had also not provided other information sought by him in a timely manner. The matter raised a possible further breach under sections 40 (timeframe for decisions on requests) and 44 (obligation when refusing requests) of the Act, in that the plaintiff alleged that the defendant had failed to deal with a second request for access in the manner prescribed by these sections, in consequence of which a further interference with his privacy had occurred.

The defendant argued that it had provided the plaintiff with all the information about him contained in the Minutes of meetings where his complaint was discussed and in respect of information which the plaintiff alleged had been withheld it argued that it had a proper basis for withholding this information under section 29(2)(a) (that the information was not readily retrievable) and/or section 29(2)(b) (that the information did not exist/could not be found). It also argued that the plaintiff's second request had been responded to within the terms of sections 40 and 44 of the Act.

During the course of cross-examination it became clear that the defendant held information which had not been supplied to the plaintiff when he had received the information he had sought (some two years after he had made his request) and had also not been supplied to the Privacy Commissioner during the course of his investigation of the complaint. The content of that information was directly relevant to the request for access and the contest in the Tribunal.

The Tribunal found that the defendant's failure to provide the plaintiff with all the information it held about him, and its failure to provide him with information in a timely manner had led to the original dispute becoming more entrenched and had caused the plaintiff considerable distress at not being able to access information to which he was otherwise entitled. It therefore found that the defendant's actions had caused an interference with the plaintiff's privacy.

Although this case again raised the issue as to which of sections 66(1)(b) or 66(2) should apply in respect of interferences with privacy arising out of infractions of the right of access (first raised before the current Tribunal in *Plumtree*), the Tribunal considered it was not necessary to resolve the issue in this case because the circumstances were such that it was satisfied that the plaintiff had suffered adverse consequences as a result of the defendant's actions and because the plaintiff had made it clear that he was not seeking an award of damages against the defendant, so that there was no need for the kind of detailed enquiry into the loss (whether pecuniary or of a benefit) or other kinds of adverse consequence alleged, which an award under section 88(1) would otherwise entail.

CD v Hawkes Bay District Health Board (Dec No 15/02, HRRT 40/01): *Health Information Privacy Code Rule 8. (11pp).*

The plaintiff alleged that the defendant had used health information it held without first taking steps to ensure it was accurate and up to date. The information at issue was a report dating from the mid 1960s (from another healthcare provider) and a diagnosis

(from one of the defendant's employees, the basis of which was the 1960s report) dating from the 1970s. The content of both was disputed by the plaintiff.

The plaintiff claimed that the defendant had used the disputed information in the provision of treatment, and had disclosed it to other healthcare providers in the district. The plaintiff alleged that these "uses" had occurred within the period of coverage of the Health Information Privacy Code, citing an instance from the late 1990s as an instance of a recent use in breach of Rule 8. The plaintiff gave evidence of the adverse consequences suffered as a result of this failure to comply with Rule 8.

The defendant argued that the matter should be struck out as the facts did not disclose any evidence of "use" since the Privacy Act and related Code had come into force. It admitted that there was evidence of use of the information prior to that time, but submitted that such uses had ended before the Act/Code became operative. It denied that the reference to the information in the 1990s constituted a "use" as that term should be understood in the context of the Rule.

The Tribunal found that in the circumstances of the case there had been no "use" of the disputed information within the period covered by the Act/Code and therefore dismissed the matter.

The decision is notable for the Tribunal's reflections on the relevance of the Privacy Act and the changes in attitude and approach to the handling of health information evident since its enactment.

AB v ACC (Dec No 17/02, HRRT 40/02): *Health Information Privacy Code Rule 3. (14pp).*

The plaintiff and the defendant had a longstanding relationship as a result of which the defendant had collected information from the plaintiff, including during the period prior to the enactment of the Privacy Act in 1993, and in relation to which it continued to use that information, both internally and by way of disclosure of it to relevant third parties, most relevantly in 1998/9.

The plaintiff alleged that the defendant had breached Rule 3 of the Health Information Privacy Code when it failed to comply with its Rule 3 obligations, in particular by failing to advise the plaintiff of its intention to provide the information it had collected to a previously unacknowledged third party recipient. The plaintiff argued that as a result of this failure there had been a number of (predictable) adverse consequences arising from contact being initiated by that third party in circumstances where the plaintiff had received no previous indications that information would be disclosed to that person, and where the plaintiff had made it clear that any further requirement for contact with such third parties would be rejected.

The defendant argued that no obligations under Rule 3 existed because there had been no "collection" as a result of the contact between the third party and the plaintiff in 1998/9 so as to trigger these. In the alternative, it argued that if any obligations under Rule 3(1)(c) existed in relation to information it had collected prior to 1993, which it had disclosed to the third party for the purposes of further assessment of the plaintiff (arising out of the obligation under Rule 3(2) to communicate the matters under Rule 3(1) as soon as reasonably practicable after collection if this could not be done prior to it) then these had been met by correspondence between its officers and lawyers acting for the

plaintiff prior to it having forwarded that information to the third party and contact having been initiated by that person.

The defendant argued that, notwithstanding that the correspondence relied on had been sent in late December (at a time when it might have been anticipated that the plaintiff's lawyers would not immediately receive and act upon it) this action constituted a reasonable step in the circumstances to ensure the plaintiff was aware of the fact that the third party was an intended recipient of historical health information held about the plaintiff, and in respect of which it now sought further assessment.

The Tribunal held that there had been no breach of Rule 3.

The Tribunal found itself unable to determine whether the defendant had fulfilled its obligations under Rule 3(1)(c) when it had collected information from the plaintiff (in or about 1993) because of the absence of any evidence as to what had been said to the plaintiff at the time (the plaintiff did not appear or give evidence on these matters by way of written Brief). For the same reason it considered itself unable to resolve the question of whether the defendant had any obligations to advise the plaintiff of a new recipient in respect of that information arising as a result of Rule 3(2) prior to providing it to the third party.

In respect of the contact initiated by the third party in 1998/9 the Tribunal found that no obligations existed because, although contact had been made, the third party had been unable to proceed to "collect" information from the plaintiff because that contact had been terminated before collection could occur.

O'Neill v Health and Disability Commissioner (Dec No 02/03, HRRT 02/02): *Sections 14(a) and 82 Privacy Act. (6pp)*

This was a decision on a preliminary matter arising from the breaches of the Privacy Act alleged and the relief sought by the plaintiff in his *Notice of intention to Bring Proceedings*.

The plaintiff had named the Health and Disability Commissioner as defendant, had alleged that he had breached section 14(a) of the Privacy Act (which obliges the Privacy Commissioner to take account of certain important human rights and social interests competing with privacy, as well as certain international obligations) and had sought, as a remedy, a review of the whole of the conduct of the Privacy Commissioner's investigation of his complaint.

Following submissions from the parties and the Privacy Commissioner the Tribunal struck out that part of the plaintiff's complaint in which he sought a review of the conduct of the Privacy Commissioner's investigation on the basis that it had no jurisdiction to deal with that matter. It referred to its earlier decisions on this issue: *Cable, Steele*.

In respect of the remainder of the plaintiff's complaint, the Tribunal made a number of orders with which the plaintiff must comply before he may proceed with the substantive matter against the defendant.