**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2017] NZHRRT 38**

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| | **Reference No. HRRT 068/2016** |
| **UNDER** | **THE PRIVACY ACT 1993** |
| **BETWEEN** | **SIMON COOPER** |
| | **PLAINTIFF** |
| **AND** | **HAMILTON PHARMACY 2011 LIMITED** |
| | **FIRST DEFENDANT** |
| **AND** | **GRAHAM BURNETT** |
| | **SECOND DEFENDANT** |

**AT WELLINGTON**

**BEFORE:**
**Mr RPG Haines QC, Chairperson**
**Ms K Anderson, Member**
**Dr SJ Hickey MNZM, Member**

**REPRESENTATION:**
**Ms AV Twaddle and Ms AJH Shadbolt for plaintiff**
**Ms J Forrest and Ms E Wilson for defendants**

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

**DATE OF DECISION:** **2 October 2017**

## DECISION OF TRIBUNAL ON STRIKE-OUT APPLICATION BY DEFENDANTS[1]

## INTRODUCTION

**[1]** When on 11 November 2016 the defendants filed their statement of reply they simultaneously filed an objection to the Tribunal's jurisdiction and applied for the claim to

[1] [This decision is to be cited as *Cooper v Hamilton Pharmacy 2011 Ltd (Strike-Out Application)* [2017] NZHRRT 38.]

be struck out on the basis that it is an abuse of process and vexatious. In the alternative a stay was sought.

**[2]** That application has now been supported by submissions dated 7 July 2017. Mr Cooper's submissions in opposition of 4 August 2017 and the defendants' submissions in reply of 18 August 2017 have also been received.

**[3]** In this decision we explain our reasons for rejecting the challenge to jurisdiction as well as the strike-out and stay applications. In essence the jurisdiction challenge is without factual foundation and in any event rests on a misinterpretation of the Privacy Act 1993. The balance of the challenges are misconceived or, at best, premature.

## Background

**[4]** The background circumstances to these proceedings have already been addressed by the Chairperson in a decision published on 7 September 2017 declining Mr Cooper's application for interim name suppression. See *Cooper v Hamilton Pharmacy 2011 Ltd (Application for Non-Publication Orders)* [2017] NZHRRT 34. That factual narrative (provisional in the sense that this case is still in its preliminary stages) is adopted.

**[5]** The short summary is that Mr Cooper was employed by Hamilton Pharmacy 2011 Ltd (Hamilton Pharmacy) as a pharmacist for about 18 months until approximately late June 2014 when he resigned after attending a disciplinary meeting. That meeting resulted in the parties agreeing to various terms, those terms being recorded in a Record of Settlement. There were obligations of confidentiality on both parties. Mr Burnett is one of the four directors of Hamilton Pharmacy.

**[6]** In his proceedings before this Tribunal, Mr Cooper alleges Hamilton Pharmacy and Mr Burnett thereafter disclosed to various third parties personal information relating to his (Mr Cooper's) alleged fitness to be employed as a pharmacist. It is said the disclosures have been the direct cause of Mr Cooper being subsequently unable to obtain employment within the pharmacy profession. This has resulted in illness, stress and financial loss. Mr Cooper has had to retrain to find employment outside the pharmacy field. He nevertheless presently remains at risk of disciplinary proceedings and has initiated his own proceedings.

## Three sets of proceedings

**[7]** Mr Cooper currently has three sets of proceedings in train.

**[8]** First in time are the proceedings filed in the Employment Relations Authority (ERA) on 23 October 2014 in which Mr Cooper seeks penalties against Hamilton Pharmacy for its alleged breach of the Record of Settlement. It is claimed the disclosures earlier referred to were in breach of an express term of confidentiality. When the ERA dismissed his application for name suppression Mr Cooper appealed to the Employment Court. In that court an unopposed interim suppression order was made by Chief Judge Colgan on 8 May 2015. That order was continued by Judge Perkins on 16 July 2015. However, since obtaining interim name suppression Mr Cooper has taken no further steps in the proceedings and does not intend taking such steps.

**[9]** The second set of related proceedings is a civil action brought by Mr Cooper under the Defamation Act 1992. Those proceedings were filed in the High Court at Tauranga on 15 January 2015. The High Court proceedings and the present Privacy Act

proceedings require some of the same disputed facts to be resolved as both proceedings arise out of the same circumstances.

**[10]** The third set of proceedings are the current proceedings before the Human Rights Review Tribunal. They were filed on 11 October 2016 and allege various breaches of the Privacy Act, particularly information privacy principles 8 and 11.

**Other matters and potential proceedings**

**[11]** Two additional matters have been set in train by the preceding events.

**[12]** First, Mr Burnett forwarded to the Pharmacy Council a copy of the Record of Settlement.

**[13]** The Pharmacy Council, in turn, on 10 September 2014 appointed a Professional Conduct Committee to investigate the alleged actions of Mr Cooper. That investigation has taken some time. The outcome, if there is one, has not been notified to the Tribunal. In the result it is not yet known whether charges will be laid before the Health Practitioners Disciplinary Tribunal. But the Pharmacy Council has placed conditions on Mr Cooper's annual practising certificate. Those conditions are that:

> **[13.1]** Mr Cooper must work under a Council-approved supervisor at all times.
>
> **[13.2]** Mr Cooper must disclose to any employer that he is under investigation by a Professional Conduct Committee.

## THE JURISDICTION CHALLENGE AND THE PRIVACY ACT

**Overview**

**[14]** The starting point of the argument by both Hamilton Pharmacy and by Mr Burnett is that the effect of ss 82 and 83 of the Privacy Act is that an aggrieved individual who wishes to bring proceedings before the Tribunal must establish that the defendant is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the privacy of the individual.

**[15]** Thereafter the contention by Hamilton Pharmacy is that while Mr Cooper by letter dated 10 July 2015 filed a complaint with the Privacy Commissioner against Hamilton Pharmacy, the Commissioner's actions which followed cannot be described as an "investigation" for the purposes of Part 8 of the Act.

**[16]** The contention by Mr Burnett is different. He says that as Mr Cooper made no complaint to the Privacy Commissioner about him in his personal capacity, no investigation (as against him) was conducted by the Commissioner and the Tribunal therefore has no jurisdiction to hear that part of Mr Cooper's proceedings which relate to Mr Burnett in his personal capacity.

**[17]** The difficulty with the argument by Hamilton Pharmacy is twofold. First, it is unsustainable on the facts. As will be shown, it is clear from the correspondence the Commissioner investigated the complaint against Hamilton Pharmacy. Second, the submissions as to the meaning of "investigation" are wrong in law because they assume that before an investigation can qualify as an "investigation" under the Privacy Act, the investigation must arrive at a conclusion and finding as to whether any information

privacy principle was breached and whether there has been a consequential interference with the privacy of the person aggrieved.

**[18]** The difficulty with Mr Burnett's case is that while it is correct he was not personally the subject of an investigation by the Privacy Commissioner, his actions as a director of Hamilton Pharmacy were investigated and the question whether he remains a party to the proceeding depends on resolution of the capacity in which he is sued.

**Whether there was an investigation regarding Hamilton Pharmacy – the facts**

**[19]** As mentioned, it was by letter dated 10 July 2015 that Mr Cooper filed a complaint with the Privacy Commissioner. While the complaint was against Hamilton Pharmacy allegations were also made against the four directors of the pharmacy (including Mr Burnett). The allegations against Mr Burnett are multiple but all appear to be made against him in his capacity as director of Hamilton Pharmacy.

**[20]** By email dated 7 August 2015 the solicitors for Hamilton Pharmacy and Mr Burnett made representations to the Privacy Commissioner outlining why, in their submission, it would be inappropriate for the Commissioner to investigate the complaint made by Mr Cooper. In essence the argument was that the claim before the Employment Relations Authority and the defamation proceedings in the High Court should be allowed to run their course before the Commissioner opened his own investigation.

**[21]** By email dated 2 September 2015 the solicitors for Mr Cooper argued to the contrary, submitting it would be unreasonable and unjust for Mr Cooper to be denied the opportunity to have the alleged breaches of the Privacy Act investigated by the Commissioner.

**[22]** The outcome was that by email dated 23 September 2015 (with the subject line "Privacy Act complaint: Simon Cooper and Hamilton Pharmacy 2011 Limited") the Privacy Commissioner gave notice to the solicitors for Hamilton Pharmacy that a decision had been made to investigate Mr Cooper's complaint. The email explicitly stated "our Office has decided to investigate Mr Cooper's complaint" and the text of the document included a heading which read "We will now investigate":

> **We will now investigate**
>
> Having considered your submissions, the Complainant's submissions, the seriousness of the allegations, and having consulted the Commissioner, we have now decided to notify you about this complaint. Although there are several other proceedings under way, it is now our view there are privacy concerns that our Office should investigate.

**[23]** The submissions of 6 November 2015 for Hamilton Pharmacy which followed acknowledged that Hamilton Pharmacy knew the Privacy Commissioner was conducting an investigation. The submissions at para 2 said:

> … we understand that you have decided to investigate …

**[24]** The extensive submissions which followed addressed not only the allegation made against Hamilton Pharmacy but also the alleged actions of Mr Burnett (see particularly paras 43 to 58). This will be relevant to the jurisdiction challenge by Mr Burnett. The submissions refer to seven separate allegations. The five which relate to Mr Burnett follow:

> …

(c) That Mr Burnett (a director of Hamilton Pharmacy) disclosed personal information about Mr Cooper by sending the Pharmacy Council a copy of the Record of Settlement;

(d) That "at unknown dates" Mr Burnett talked to other pharmacies to warn them against employing Mr Cooper;

(e) That Mr Burnett sent a fax to two pharmacy wholesalers, and pharmacies in Tauranga which disclosed personal information about Mr Cooper including that he had been caught for theft of banking, drinking while on duty, and sacked from his employment;

(f) That Mr Burnett disclosed personal information to Dr Currie by providing him with a copy of his notification to the Pharmacy Council;

(g) That Mr Burnett disclosed to Bjorn Baker details regarding Mr Cooper's employment, including that he had an "employment issue" with Mr Cooper and that he had referred this to the Pharmacy Council.

**[25]** The Privacy Commissioner must have found the submissions for Hamilton Pharmacy persuasive because by email dated 12 November 2015 addressed to the solicitors for Hamilton Pharmacy the Commissioner advised Mr Cooper's complaint would be closed under s 71(1)(g):

> My final view is that because Mr Cooper has other adequate remedies available, further action by our Office is unnecessary and inappropriate. Consequently, I will now close this file at this Office.
>
> …
>
> Under section 71(1)(g) of the Privacy Act, the Commissioner has a discretion to take no action on a complaint, if in the circumstances there is an adequate remedy or right of appeal available.
>
> It is our final view there is an adequate remedy or right of appeal available. Accordingly, any further action by our Office is unnecessary or inappropriate in the circumstances, and this file will now be closed.
>
> I have informed Mr Cooper of his right to take the matter as a case before the Human Rights Review Tribunal.

**[26]** On 18 November 2015 the Privacy Commissioner issued a Certificate of Investigation. The third box clearly shows an investigation was carried out:

**Certification of Investigation for Human Rights Review Tribunal**

| | |
|---|---|
| **Complainant** | **Simon Cooper (Our Ref: C/27147)** |
| **Respondent** | **Hamilton Pharmacy 2011 Limited** |
| **Matters investigated** | Whether Hamilton Pharmacy interfered with Mr Cooper's privacy under principles 8 and 11 of the Privacy Act 1993. Concurrent proceedings for the same set of facts in the High Court, the Employment Relations Authority, and the Pharmacy Council. |
| **Principle(s) applied** | 8 and 11 |
| **Commissioner's opinion:** | Adequate alternative remedy or right of appeal available. File closed under section 71(1)(g). |
| • **application of principle(s)** | N/A |
| • **adverse consequences** | N/A |
| • **interference with privacy** | N/A |

**[27]** In a "jurisdiction" letter to the Tribunal dated 26 October 2016 the Privacy Commissioner confirmed he did in fact investigate the complaint made by Mr Cooper but drew attention to the fact that the investigation was as against Hamilton Pharmacy although certain actions by Mr Burnett as director were investigated as part of that investigation. The text of the letter follows:

> Thank you for sending us notice of these proceedings.
>
> I have read the Statement of Claim and am familiar with the Privacy Commissioner's investigation file. The Privacy Commissioner investigated the complaint as involving a possible breach of principles 8 and 11 of the Privacy Act 1993, and closed the complaint under section 71(1)(g) of the Act. The matters in the Statement of Claim are among the matters considered by the Commissioner.
>
> There are some difficulties with jurisdiction. These are that Mr Cooper listed Graham Burnett as a second defendant. Our Office investigated Hamilton Pharmacy 2011 Limited as a respondent. However we note Mr Burnett is a director of Hamilton Pharmacy 2011 Limited, and some of his actions were investigated as part of our investigation of that agency.

**[28]** More recently, responding to the jurisdiction objection by Mr Burnett, the solicitors for Mr Cooper by email dated 18 April 2017 wrote to the Privacy Commissioner making formal complaint against Mr Burnett in his personal capacity and seeking an investigation of his actions.

**[29]** By email reply dated 24 April 2017 the Privacy Commissioner advised there was no reason for the matter to be "reinvestigated":

> Thank you for your email. I apologise for the delay in responding, we have taken some time to review the original complaint file and to take advice from our General Counsel.
>
> On review of the file our view is there seems no reason to reinvestigate a matter based on the same facts as the previous complaint.
>
> If the Tribunal has concerns about its jurisdiction following the teleconference you are welcome to contact us again.

**[30]** We will return to this correspondence later in this decision.

### Whether there was an investigation regarding Hamilton Pharmacy – conclusion on the facts

**[31]** It is plain on the face of the correspondence from the Privacy Commissioner (or his Office) to the solicitors for Hamilton Pharmacy that an investigation was carried out by the Commissioner into Mr Cooper's complaint against Hamilton Pharmacy and Hamilton Pharmacy cannot realistically contend otherwise. The statement "we will now investigate" must mean what it says. The Certificate of Investigation likewise unambiguously states that there was an investigation and the most recent email dated 24 April 2017 from the Office of the Privacy Commissioner speaks of there being an absence of reason "to reinvestigate".

**[32]** The real issue is whether Hamilton Pharmacy is correct in submitting that in those cases where (as here) the Privacy Commissioner arrives at no conclusion on the facts but reaches a view that the person aggrieved has other adequate remedies, the steps taken by the Commissioner leading up to the reaching of that conclusion cannot be described as an "investigation".

**Whether there was an investigation regarding Hamilton Pharmacy – the law**

**[33]** The submission for Hamilton Pharmacy is that before it can be said there has been an investigation for the purposes of Part 8 of the Act the Privacy Commissioner must have asked (and answered) the question whether, in terms of s 66 of the Act, there has been a breach of an information privacy principle and a consequential interference with the privacy of an individual. If the Commissioner "diverts" by focusing on "a preliminary question" (whether there was an adequate remedy in terms of s 71(1)(g)) "the inquiry [has] ceased before the actions were investigated".

**[34]** This submission is misconceived. The complaint and investigation provisions in Part 8 of the Act do not have the suggested complexity. The Privacy Commissioner has a discretion whether to investigate a complaint. He can decide to take no action or, if action is taken ie if the complaint is investigated, he can, in the course of that investigation, decide to take no further action if one or more of the circumstances specified in s 71(1) apply. The Commissioner's discretion is not limited to those circumstances alone. Section 71(2) confers a broad discretion to take no further action on a complaint "if in the course of the investigation of the complaint" it appears to the Commissioner any further action is unnecessary or inappropriate.

**[35]** Simply put, the text and context of the provisions precludes the argument that there is no "investigation" until the Commissioner reaches a conclusion whether an information privacy principle has been breached with a consequential interference with privacy. This interpretation is consistent with the ordinary meaning of the word "investigation", namely "the action of investigating, the making of a search or inquiry". See *Oxford English Dictionary* (Oxford, online ed). There is no requirement that a result, outcome or conclusion be reached as a consequence of the investigation.

**[36]** To explain the foregoing a brief summary of the relevant provisions of the Privacy Act follows.

**[37]** Part 8 of the Privacy Act applies where a complaint is made that there has been an interference with the privacy of an individual. Section 66 defines the circumstances in which such interference is established. This provision is followed by a heading "Investigations by Commissioner".

**[38]** Under this heading the sections make clear the Commissioner has a discretion whether to commence an investigation. See s 69(1) and (2):

> **69 Investigation of interference with privacy of individual**
>
> (1) The functions of the Commissioner under this Part shall be—
>  (a) to investigate any action that is or appears to be an interference with the privacy of an individual:
>  (b) to act as conciliator in relation to any such action:
>  (c) to take such further action as is contemplated by this Part.
> (2) The Commissioner may commence an investigation under subsection (1)(a) either on complaint made to the Commissioner or on the Commissioner's own initiative.

**[39]** The discretion is recognised also by ss 70 and 71.

**[40]** Section 70 provides that the Commissioner "may" investigate the complaint or decide to take no action. If the Commissioner decides to take no action it must be on the basis of one of the grounds listed in s 71(1):

**70 Action on receipt of complaint**

(1) On receiving a complaint under this Part, the Commissioner may—
  (a) investigate the complaint; or
  (b) decide, in accordance with section 71, to take no action on the complaint.
(2) The Commissioner shall, as soon as practicable, advise the complainant and the person to whom the complaint relates of the procedure that the Commissioner proposes to adopt under subsection (1).

**[41]** Whereas s 70 refers to the options of investigating the complaint or deciding to take no action on the complaint, s 71 adds a further option of taking "no **further** action". This makes it clear the Commissioner does not have to pursue an investigation to any particular degree nor does the investigation need to reach any particular stage of completion before such investigation can be described as an "investigation" for the purposes of Part 8. Whether what the Commissioner has done in any given case amounts to an investigation is a question of fact.

**[42]** Section 71(2) allows no room for argument on the point. It provides a general discretion to not take any further action on a complaint if "in the course of the investigation of the complaint, it appears to the Commissioner that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate":

**71 Commissioner may decide to take no action on complaint**

(1) The Commissioner may in his or her discretion decide to take no action or, as the case may require, no further action, on any complaint if, in the Commissioner's opinion,—
  (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
  (b) the subject matter of the complaint is trivial; or
  (c) the complaint is frivolous or vexatious or is not made in good faith; or
  (d) the individual alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
  (e) the complainant does not have a sufficient personal interest in the subject matter of the complaint; or
  (f) where—
    (i) the complaint relates to a matter in respect of which a code of practice issued under section 46 is in force; and
    (ii) the code of practice makes provision for a complaints procedure,—
    the complainant has failed to pursue, or to pursue fully, an avenue of redress available under that complaints procedure that it would be reasonable for the complainant to pursue; or
  (g) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the individual alleged to be aggrieved to exercise.
(2) Notwithstanding anything in subsection (1), the Commissioner may in his or her discretion decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Commissioner that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.
(3) In any case where the Commissioner decides to take no action, or no further action, on a complaint, the Commissioner shall inform the complainant of that decision and the reasons for it.

**[43]** This interpretation of the Act is consistent with the Tribunal's earlier decision in *Steele v Department of Work and Income* [2002] NZHRRT 12 where at [46] and [47] it was said:

> 46. Having commenced an investigation, it logically follows that whenever the Privacy Commissioner decides to stop it the investigation can then be described as having been "conducted". It may be that the parties consider that further steps could have been taken, or that the wrong steps were taken. Perhaps it may be thought there are further persons who ought to have been interviewed, or other avenues of enquiry followed. But in our view the only question for the Tribunal is whether the Privacy Commissioner has finished ('*conducted*', in the past tense) his investigation, whatever he chooses it to be.

> 47. For all of these reasons we consider that the Tribunal has jurisdiction on any privacy complaint brought to it by an aggrieved individual where (all other things being equal) it is established that the Privacy Commissioner has commenced an investigation and is finished with it – even if that is only in the sense that he has made it clear to the parties and to the Tribunal that he does not intend to do anything more in his investigation of the matter..

**[44]** Far from s 71(1)(g) being a "diversion" it is a provision which allows an investigation to be not commenced or if commenced, for it to be brought to an end without any conclusion being reached in relation to the matter investigated.

**Conclusion on jurisdiction challenge by Hamilton Pharmacy**

**[45]** For the reasons given the jurisdiction challenge by Hamilton Pharmacy must fail both on the facts and on the law.

**[46]** It is now possible to turn to the jurisdiction challenge by Mr Burnett.

**The jurisdiction challenge by Mr Burnett**

**[47]** Mr Burnett correctly relies on the principle that an aggrieved individual (here Mr Cooper) who wishes to bring proceedings before the Tribunal must establish that the defendant is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the privacy of that individual.

**[48]** As explained in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* [2014] NZHRRT 1, (2014) 10 HRNZ 279 at [19], the purpose of Part 8 of the Privacy Act is to ensure that in the first instance a complaint about an interference with the privacy of an individual must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by s 82 only where an investigation has been conducted under Part 8 or where conciliation (under s 74) has not resulted in settlement. For the complaint resolution process to work a person in respect of whom a complaint is made and an investigation conducted must know he or she is under investigation and must also know what is the subject of the investigation so an effective response can be made. This imperative is explicitly recognised by the Privacy Act. The complaints process mandated by it in ss 67, 70 and 73 is designed to ensure the person under investigation and the matter under investigation by the Privacy Commissioner are clearly identified.

**[49]** Unfortunately, while the principle is clear, the facts of the present case are less so:

> **[49.1]** First, as is apparent from the letter dated 26 October 2016 from the Privacy Commissioner to the Tribunal, the Commissioner's investigation into Hamilton Pharmacy included an investigation into certain actions of Mr Burnett in his capacity as director of Hamilton Pharmacy. In this regard it is to be recalled that the submissions addressed by Hamilton Pharmacy to the Commissioner specifically included rebuttals of five allegations made against Mr Burnett by Mr Cooper.
>
> **[49.2]** Second, when Mr Cooper on 18 April 2017 asked the Privacy Commissioner to investigate Mr Burnett in his personal capacity the Commissioner responded that "there seems no reason to reinvestigate a matter based on the same facts as the previous complaint". It is difficult to know how to interpret this response:

> **[49.2.1]** It could be saying the Privacy Commissioner made a decision to not investigate Mr Burnett in his private capacity. If such was the Commissioner's decision the Tribunal will have no jurisdiction in relation to Mr Burnett (in his private capacity) because it would be impossible for Mr Cooper to establish that Mr Burnett is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the privacy of Mr Cooper.
>
> **[49.2.2]** Or the response could mean there was an investigation but the "adequate remedy" ground which justified the termination of the investigation into Hamilton Pharmacy applied equally to Mr Burnett in his personal capacity.

**[50]** In *Edwards v Capital and Coast District Health Board* [2016] NZHC 3167 at [44] and [62] it was said that where there is a lack of clarity as to who or what was investigated it is necessary to focus on the question whether the Privacy Commissioner has in fact conducted an investigation into the matters that are to be the subject of the hearing in the Tribunal. The High Court also expressed the view at [70] to [73] that as the striking out of proceedings is a last resort it is open to the Tribunal to adjourn the proceedings to ascertain from the Privacy Commissioner (or to require one of the parties to ascertain) whether the complaint was actually investigated.

**[51]** It is in this context that reference can now be made to an exchange which occurred during the teleconference convened by the Chairperson on 9 June 2017. It is recorded at [10] and [11] of the *Minute* of that date and occurred in the context of a discussion of the jurisdiction challenge by Mr Burnett. Ms Twaddle (for Mr Cooper) said the point could turn out to be a non-issue because the defendants had been asked to advise whether it was accepted that at all material times Mr Burnett was acting as director on behalf of Hamilton Pharmacy. Should the defendants state Mr Burnett was at any material time acting personally or outside his authority as a director, Mr Cooper wanted him to remain as a second defendant in the proceedings. The *Minute* records that on behalf of the defendants Ms Forrest gave the following response:

> **[11]** As to the last point, Ms Forrest responded she has not taken instructions and cannot provide the clarification sought by Mr Cooper regarding the capacity in which Mr Burnett acted when making the alleged disclosures. Her submission is that the capacity issue falls to be determined in the context of the substantive hearing itself but as it is not disputed Mr Burnett was, at the relevant time, a director of Hamilton Pharmacy, she wondered whether the issue would be difficult to resolve.

**[52]** As best the Tribunal can tell the exchange during the teleconference strongly suggests that if at all times Mr Burnett was acting as director on behalf of Hamilton Pharmacy it would be inappropriate for him to remain as a party. If, on the other hand, he at any time acted in his personal capacity or outside his authority as a director, Mr Cooper wants him to remain as a second defendant in these proceedings provided jurisdiction can be established.

**Conclusion on jurisdiction challenge by Mr Burnett**

**[53]** The jurisdiction challenge by Mr Burnett cannot presently be determined as there is an information vacuum first, as to whether he was the subject of an investigation in his personal capacity and second, as to the matters the subject of the inconclusive

exchange at the teleconference on 9 June 2017. It is possible the issue will be resolved by the provision of the information requested by Mr Cooper.

**[54]** If there was an investigation into Mr Burnett (in his private capacity) but discontinued, the jurisdiction objection will fall away as it will be without substance. In our view it is for the parties (or one of them) to make inquiry with the Privacy Commissioner as to what the true situation is. A direction to that effect follows at the end of this decision. On one view the issue is both simple and straightforward and could possibly be framed in the following terms: What action (if any) did the Privacy Commissioner take in relation to Mr Cooper's complaint against Mr Burnett in his personal capacity as opposed to in his capacity as director of Hamilton Pharmacy? Put another way is Mr Burnett (in his personal capacity) a person in respect of whom the Commissioner has conducted an investigation?

**[55]** Given the answer to these questions is not presently known the striking out of the proceedings against Mr Burnett is not justified.

## THE ABUSE OF PROCESS ARGUMENT

**[56]** The essence of the argument by the defendants is that the proceedings before the Tribunal are vexatious and an abuse of process due to the oppressive and unjustified duplicity of the various proceedings in which the parties are presently engaged. In the alternative the defendants seek the striking out of the allegations at para 9(d) and (g) of the statement of claim and a stay.

**[57]** We do not find it necessary to repeat the defendants' arguments at length. Summarised the primary submissions are:

> **[57.1]** The defamation hearing will require the High Court to make factual findings about Mr Cooper's conduct as a pharmacist while he was employed by Hamilton Pharmacy. There will be a substantial overlap with the findings required to be made by the Tribunal.
>
> **[57.2]** The claim in the Employment Relations Authority is substantially the same as the claim before the Tribunal.
>
> **[57.3]** If charges are laid before the Health Practitioners Disciplinary Tribunal the parties will be involved in a yet further inquiry into very much the same circumstances.

**[58]** It is submitted there is every opportunity for the different courts and tribunals to pronounce differently on the facts and on the same or similar issues.

**[59]** The defendants also refer to the substantial judicial resources which will be occupied as well as the significant consequences for the parties. Those consequences include the fact that witnesses will be required for each proceeding, despite not being directly involved in the dispute. There will be legal costs as well as practical considerations such as time off work, child care and family arrangements, travel and the general stress and inconvenience of attending at least three (and potentially four) hearings on the same subject. The submissions make reference to the principle of finality of proceedings and contend that the pursuit by Mr Cooper of all three claims is oppressive and unjustifiable.

**[60]** In our view the submissions overlook the fact that the claims filed by Mr Cooper in the High Court, Employment Relations Authority and the Tribunal reflect the unique and specific jurisdictions of these three courts and tribunals. While the three different claims arise from the same factual matrix, each concerns separate and distinct rights which Mr Cooper is entitled to have resolved in the appropriate jurisdiction. The submissions for Mr Cooper expressly acknowledge that should he secure a remedy in relation to one claim that may be a relevant consideration to the grant of a remedy in the other jurisdictions. That is, if in the one jurisdiction he receives damages for a specific harm he will not in other proceedings be able to recover damages for the same harm.

**[61]** Looking at the defamation proceedings in a little more detail, these proceedings will require (inter alia) consideration whether:

> **[61.1]** The defendants published particular statements to third parties and that those statements harmed Mr Cooper's reputation or standing; and
>
> **[61.2]** That those statements are not covered by any of the defences set out in the Defamation Act 1992.

**[62]** As pointed out by Mr Cooper in his submissions, the defamation proceedings are only in relation to the specific statements pleaded that the defendants published about Mr Cooper. In contrast, his claim under the Privacy Act seeks to address the wider disclosure of Mr Cooper's personal information by Hamilton Pharmacy and Mr Burnett to other parties. The issue will be whether an interference with privacy has been established.

**[63]** The privacy and employment jurisdictions are equally different and distinct. See *Watson v Capital and Coast District Health Board* [2015] NZHRRT 27 at [115] to [122]:

> **[115]** If the submission for the CCDHB is to be understood as meaning that damages should not be awarded in circumstances where the plaintiff has already received damages or compensation from a different court or tribunal for the same harm, the proposition is entirely unremarkable and is not challenged in these proceedings.
>
> **[116]** But it is altogether a different matter if the submission is to be understood as a claim that whenever the application of an information privacy principle arises in the context of an employment relationship, the ERA alone has jurisdiction to determine the application of those principles, to make a finding whether there has been an interference with the privacy of an individual and to award remedies under ss 85 and 88 of the Privacy Act. Such is a startling proposition and no authority has been cited in support.
>
> **[117]** While s 161(1) of the Employment Relations Act confers on the ERA exclusive jurisdiction to make determinations about "employment relationship problems", such "problems" are not open ended. They are confined to the limited circumstances which fall within the definition of that term in s 5 of the Act:
>
> > ***employment relationship problem*** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment
>
> **[118]** The terms "personal grievance" and "dispute" are further defined but neither definition can possibly be interpreted to include, for example, issues under the Privacy Act in relation to access to personal information of potential relevance to an employment dispute. Nor can the final phrase "any other problem relating to or arising out of an employment relationship" be sensibly construed as including any issue under the Privacy Act.
>
> **[119]** This is because the Privacy Act and the Employment Relations Act have different objects and purposes. The Employment Relations Act does not address privacy issues. Rather, the object of the Employment Relations Act is to build productive employment relationships. See s 3:

**3 Object of this Act**

The object of this Act is—

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
  (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
  (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
  (iii) by promoting collective bargaining; and
  (iv) by protecting the integrity of individual choice; and
  (v) by promoting mediation as the primary problem-solving mechanism; and
  (vi) by reducing the need for judicial intervention; and
(b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

**[120]** By contrast the object of the Privacy Act is (inter alia) to promote and protect individual privacy. The Long Title provides:

An Act to promote and protect individual privacy in general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, and, in particular,—

(a) to establish certain principles with respect to—
  (i) the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and
  (ii) access by each individual to information relating to that individual and held by public and private sector agencies; and
(b) to provide for the appointment of a Privacy Commissioner to investigate complaints about interferences with individual privacy; and
(c) to provide for matters incidental thereto

**[121]** It is significant the Employment Relations Act itself does not recognise the claimed overlap with the Privacy Act. Contrast the position where the Employment Relations Act overlaps with the Human Rights Act 1993. Section 112 of the former Act expressly provides that where the circumstances giving rise to a personal grievance by an employee are also such that that employee would be entitled to make a complaint under the Human Rights Act, the employee may pursue one, but not both of the statutory paths. The absence of an analogous provision in relation to interferences with privacy is consistent with the view the view the Privacy Act and Employment Relations Act are not in conflict.

**[122]** Applying the rule in s 5 of the Interpretation Act 1999 that the meaning of the two statutes is to be ascertained not only from their text but also their purpose, it is inescapable that the two statutes are not in conflict, nor do they overlap. Each is confined to its own subject matter and the jurisdictions remain separate and distinct. The "exclusive jurisdiction" of the ERA is explicitly confined by the opening words of s 161 to "employment relationship problems" and that phrase is not to be interpreted expansively to mean "anything at all which arises in the course of a person's employment". The CCDHB submission would require the Employment Relations Act to be read as impliedly vesting in the ERA and the Employment Court jurisdiction to determine liability and to award remedies under the Privacy Act. By no known orthodox rule of statutory interpretation could such result be brought about.

**[64]** Similarly, any proceedings which are initiated before the Health Practitioners Disciplinary Tribunal will be disciplinary in nature and serve a very different function to the proceedings before the Tribunal.

## Conclusion on abuse of process argument

**[65]** Each of the separate proceedings currently in train and the potential proceedings before the Health Practitioners Disciplinary Tribunal bring into play distinct and separate

statutory rights and obligations. Each of the proceedings has a separate purpose. There is no forum to which Mr Cooper can go to have all claims resolved in one consolidated set of proceedings. He should not be required to forfeit one or more of his proceedings on the basis there may, at the present time, be theoretical prejudice to the defendants. This is not a case in which duplicate proceedings have been issued forcing the defendants to litigate the same matter in separate proceedings. That the defendants believe the separate proceedings can be characterised as in some sense unfair does not mean that Mr Cooper's conduct is an abuse of process. See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [32]:

> **[32]** The majority [in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43] also said that, although the categories of abuse of process are not closed, this does not mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party. It does, however, extend to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment". [Footnote citations omitted]

**[66]** The defendants are a very long way from satisfying that test.

**[67]** It must also be said that the abuse of process argument advanced by the defendants is premature in the sense that the alleged burdensome and prejudicial consequences of the three sets of proceedings commenced by Mr Cooper are, at the present time, entirely speculative. None of the feared complexities which might arise from any potential interrelationship between findings made in different jurisdictions but on the same facts have yet arisen. The High Court proceedings have yet to be heard, the proceedings before the Employment Relations Authority have stalled and no charges have yet been filed with the Health Practitioners Disciplinary Tribunal. If an abuse of process argument is to be advanced, it must be done when there are actual facts to support the argument.

**Whether paras 9(d) and (g) of the statement of claim to be struck out**

**[68]** The defendants ask that the following paragraphs in the statement of claim be struck out:

> 9(d) The first defendant, through the second defendant, disclosed personal information relating to the plaintiff by sending the Pharmacy Council a copy of the Record on or about 29 July 2014. The personal information included the terms of the termination of the plaintiff's employment. Disclosure of the personal information contained in the Record was not required by law to be disclosed to the Pharmacy Council. The plaintiff became aware of this disclosure on or about 8 August 2014.
>
> …
>
> 9(g) In November 2014 the second defendant disclosed to Mr Bjorn Baker details regarding the plaintiff's employment, including that he had an "employment issue" with the plaintiff and the second defendant had cited him to the Pharmacy. The disclosure was not made for a purpose connected with or directly related to the plaintiff's employment. The plaintiff became aware of this disclosure in June 2015.

**[69]** In relation to para 9(d) the defendants rely on s 34(4) of the Health Practitioners Competence Assurance Act which confers a degree of immunity on certain disclosures to the Pharmacy Council.

**[70]** Mr Cooper responds by acknowledging the right of notification to the Pharmacy Council of reasons for a resignation or dismissal but says his claim in para 9(d) relates to the extent of that notification ie disclosure of personal information which was not required by law to be disclosed to the Council.

**[71]** In our view this is an issue best addressed in the context of a hearing at which all the evidence and submissions can be tested. It is necessary also to mention that information privacy principle 11 has potential relevance and it is inappropriate to determine its application ahead of the substantive hearing.

**[72]** In relation to para 9(g) the defendants rely on s 76(7) of the Health Practitioners Competence Assurance Act 2003 which provides:

> (7) No civil or disciplinary proceedings lie against any person in respect of any evidence given, or statements or submissions made, under this section by that person, unless the person has acted in bad faith.

**[73]** Mr Cooper responds that he alleges that the actions of the defendants were in bad faith and therefore the section has no application. This is an issue for determination at the substantive hearing, not in the context of a strike-out application which proceeds on the basis the allegations made by the plaintiff are true.

**[74]** It should also be observed that the protection in s 76 applies only in relation to a professional conduct committee. The Tribunal has yet to hear argument as to whether the Pharmacy Council is such committee, as to which note s 71. It should also be added that in the context of determining whether information privacy principle 11 was breached, the Tribunal will necessarily have to give consideration to whether any of the exceptions in that principle had application.

**[75]** In these circumstances there is no justifiable reason to strike out para 9(g). All issues must be addressed at the hearing.

## OVERALL CONCLUSION

**[76]** None of the defendants' objections having succeeded their various applications (including the application for a stay) must be dismissed.

### Directions for future conduct of case

**[77]** The Secretary is directed to convene the next case management teleconference.

**[78]** Should any of the parties wish to bring clarity to the question whether the Privacy Commissioner commenced an investigation in relation to Mr Burnett in his private capacity, or declined to make such investigation, inquiry with the Commissioner must be made by them at the earliest opportunity.

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|---|---|---|
| ..... | ..... | ..... |
| **Mr RPG Haines QC** | **Ms K Anderson** | **Dr SJ Hickey MNZM** |
| **Chairperson** | **Member** | **Member** |