

Reference No. HRRT 036/2017

UNDER THE PRIVACY ACT 1993

BETWEEN DIRECTOR OF HUMAN RIGHTS
PROCEEDINGS (in respect to BENJAMIN
LIGHTBODY)

PLAINTIFF

AND THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS

FIRST DEFENDANT

AND SERCO NEW ZEALAND LIMITED

PROPOSED SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson
Dr SJ Hickey MNZM, Member
Mr BK Neeson JP, Member

REPRESENTATION:

Mr R Kee, Director of Human Rights Proceedings
Ms V McCall for defendant
Mr B Duthie for proposed second defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 20 July 2018

**DECISION OF TRIBUNAL DECLARING SERCO NEW ZEALAND LIMITED
SHOULD BE JOINED AS SECOND DEFENDANT¹**

¹ [This decision is to be cited as *Director of Human Rights Proceedings [Lightbody] v Corrections (Joinder of Second Defendant)* [2018] NZHRRT 32.]

Introduction

[1] The statement of claim was filed on 3 July 2017. An amended statement of claim followed on 18 August 2017. The Chief Executive of Corrections (Corrections) filed a statement of reply on 15 September 2017.

[2] By application dated 11 July 2018 Corrections applied for an order that Serco New Zealand Ltd (Serco) be joined to the claim as a second defendant. The order is sought on the basis that Serco's presence before the Tribunal is necessary to adjudicate on and settle all the questions involved in the proceeding. A brief overview of the circumstances of the case as presently known to the Tribunal is accordingly required. Neither the Director of Human Rights Proceedings (Director) nor Corrections have been required to file statements of evidence and no findings of fact have been made by the Tribunal in relation to the competing versions of events. Consequently, on this application for joinder, reference to the "facts" is not to be taken as suggesting those "facts" have been found to be established. The narration has been taken from the various pleadings and memoranda filed to date.

The background circumstances

[3] From April 2011 to 24 July 2015 Serco managed Mt Eden Corrections Facility (MECF) pursuant to the Prison Management Contract for Mt Eden Corrections Facility. On 24 July 2015 Corrections issued a "step-in notice" under that contract, thereby resuming direct management of MECF.

[4] As to the present case, the events in question largely occurred during the period that MECF was managed by Serco. In particular, on 15 May 2013, when Mr Benjamin Lightbody was a remand prisoner in custody at MECF, he was assaulted by another prisoner who king-hit him on the right side of his head, rendering him unconscious and causing serious injury. Mr Lightbody was admitted to the Intensive Care Unit at Auckland Hospital and continues to experience major permanent physical and mental deficits due to the incident.

[5] The Director alleges that MECF CCTV cameras recorded footage of all relevant events and at least two CCTV cameras recorded the alleged assault and associated aftermath. Subsequently the footage from at least one of the CCTV cameras was deleted or lost.

[6] When in December 2015 Mr Lightbody made an information privacy request for a copy of the CCTV footage relating to the incident for the purposes of considering a civil claim against Corrections, Corrections declined, relying on s 27(1)(c) and s 29(1)(a) of the Privacy Act 1993 (PA). It claimed disclosure would be likely to prejudice the maintenance of the law and that disclosure would involve the unwarranted disclosure of the affairs of other individuals. While not providing a copy of the undeleted CCTV footage to Mr Lightbody and his lawyer, Corrections did make the surviving CCTV footage available for viewing at the Mt Eden (Community Corrections) Service Centre.

The causes of action

[7] The Director advances two causes of action:

[7.1] Breach of IPP 5: Failure to take reasonable steps to safeguard personal information against loss or destruction.

[7.2] Breach of IPP 6: There was no proper basis for refusing to make Mr Lightbody's personal information available in the manner preferred by Mr Lightbody.

[8] In the present context it is the first cause of action which is relevant. More particularised, the Director alleges:

[8.1] By losing or deleting footage from one of the CCTV cameras which recorded the assault, and by losing or deleting other footage relevant to the events, Corrections failed to take reasonable steps to safeguard Mr Lightbody's personal information against loss or destruction.

[8.2] That failure to safeguard Mr Lightbody's personal information:

[8.2.1] Caused loss to Mr Lightbody, including loss of the benefit of the use of the footage in civil proceedings and the peace of mind that would have come from knowing what had taken place; and

[8.2.2] Resulted in significant humiliation, significant loss of dignity and significant injury to Mr Lightbody's feelings.

The joinder application

[9] The principal ground on which joinder of Serco is sought by Corrections is that Serco managed MECF pursuant to a contract with Corrections from April 2011 to July 2015. That contract:

[9.1] Provided that Serco was to ensure that where any law granted a right or entitlement to a prisoner, Serco was to ensure that right or entitlement was granted to the prisoner;

[9.2] Required Serco to undertake all prison management services including managing prisoner security, welfare, activities and movements, managing prison infrastructure, and assessing and identifying rehabilitation and reintegration needs.

[10] During the period April 2011 to July 2015 Corrections did not control the day-to-day management of the prison, including the operation of the CCTV system. Responsibility for retaining CCTV footage during that period (to the extent there was any such obligation) was Serco's.

[11] As the first cause of action likely relates to acts or omissions of Serco staff, it is submitted Serco's presence before the Tribunal is necessary to adjudicate on and settle all the questions involved in the proceeding.

Position taken by Serco

[12] Serco has consented to being joined to this proceeding as second defendant. That consent has been endorsed on the memorandum dated 11 July 2018 filed by Corrections.

Position taken by the Director

[13] By memorandum dated 17 July 2018 the Director has advised he does not in principle oppose the joinder application. He does, however, quite properly point to an issue as to jurisdiction because the Privacy Commissioner did not investigate Serco during the first instance complaint stage. Apparently Corrections did not then raise any concerns about its (Corrections') liability but if it had the Commissioner would have considered

notifying Serco at the time. Nevertheless, as will be seen, the Director has helpfully suggested an appropriate route by which the jurisdiction hurdle may be overcome and Serco joined to the proceedings.

[14] The Director further reports Mr Lightbody is aware of the joinder application and is not opposed to it or to the Privacy Commissioner reopening his investigation of his complaint in respect of Serco.

The jurisdiction issue

[15] As pointed out by the Director, it would appear the Tribunal does not currently have jurisdiction to hear proceedings against Serco as that company has not been the subject of an investigation 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 Lightbody. See *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation* [2014] NZHRRT 1, (2013) 10 HRNZ 279 at [39] to [42].

[16] Nevertheless the Director reports he has been advised by the Office of the Privacy Commissioner that the Commissioner would consider reopening his investigation of Mr Lightbody's complaint in respect of Serco's actions if this was necessary for the matter to be properly determined before the Tribunal. In this regard the Director says he does not contest the following statements by Corrections:

[16.1] The joinder order is sought on the basis that Serco's presence before the Tribunal is necessary to adjudicate on and settle all the questions involved in the proceeding.

[16.2] The first cause of action likely relates to acts or omissions of Serco staff. Accordingly, Serco is an appropriate defendant in this proceeding.

[16.3] Serco consents to being added to the proceeding as second defendant.

Suggested procedure to address joinder of Serco

[17] To overcome the jurisdiction hurdle the Director suggests the Tribunal confirm that Serco's presence before the Tribunal is necessary to adjudicate and settle all the questions involved in the proceeding. At that point the Privacy Commissioner will consider reopening his investigation to address Serco's actions. Thereafter consideration will be given by the Commissioner to referring the matter to the Director who would thereafter decide whether to bring proceedings against Serco.

[18] If the Director decides to take proceedings against Serco, he will file an application for joinder of Serco and a draft amended statement of claim in which Serco is named as a defendant.

Joinder – the law

[19] As observed by the Tribunal in *Director of Human Rights Proceedings v Wellington Advkit Services Ltd (Joinder of Second and Third Defendants)* [2015] NZHRRT 11 at [18] to [21], the joinder of a defendant to proceedings before the Tribunal is to be determined according to the High Court Rules, suitably adapted to the Tribunal's processes:

[18] Neither the Human Rights Act 1993 nor the Privacy Act 1993 make explicit provision for the striking out or addition of parties but Regulation 16 of the Human Rights Review Tribunal Regulations 2002 allows the Tribunal and the Chairperson to give any directions and to do other things:

[18.1] That are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and

[18.2] That are not inconsistent with the Human Rights Act or, as the case requires, the Privacy Act or with the Human Rights Review Tribunal Regulations.

[19] In the absence of an explicit statutory regime addressing the joinder of parties, we intend adopting, with all necessary modifications, High Court Rules, r 4.56 which provides:

4.56 Striking out and adding parties

- (1) A Judge may, at any stage of a proceeding, order that—
 - (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
 - (b) the name of a person be added as a plaintiff or defendant because—
 - (i) the person ought to have been joined; or
 - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.
- (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[20] On the facts, it is r 4.56(1)(b)(i) and (ii) which have application. These provisions are to be read with High Court Rules, r 4.3 which relevantly provides a person may be joined as a defendant if it is alleged there is a right to relief against that person:

4.3 Defendants

- (1) Persons may be joined jointly, individually, or in the alternative as defendants against whom it is alleged there is a right to relief in respect of, or arising out of, the same transaction, matter, event, instrument, document, series of documents, enactment, or bylaw.
- (2) It is not necessary for every defendant to be interested in all relief claimed or every cause of action.
- (3) The court may make an order preventing a defendant from being embarrassed or put to expense by being required to attend part of a proceeding in which the defendant has no interest.
- (4) A plaintiff who is in doubt as to the person or persons against whom the plaintiff is entitled to relief may join 2 or more persons as defendants with a view to the proceeding determining—
 - (a) which (if any) of the defendants is liable; and
 - (b) to what extent.

[21] The current approach in New Zealand to joinder is liberal. See *Chan v The Seyip Association of New Zealand Inc* [2008] NZAR 37 at [12]. Once jurisdiction is established, joinder is usual. See *NZI Insurance Ltd v Hinton Hill & Coles Ltd [Joinder]* (1996) 9 PRNZ 615 at 619.

Discussion

[20] At the time of the assault (15 May 2013) and the collection of Mr Lightbody's personal information by way of CCTV, MECF was managed by Serco on behalf of Corrections. At some point some CCTV footage was lost by Serco or by Corrections. The circumstances in which this occurred will require close examination in the context of the first cause of action based on IPP 5. If the loss occurred during Serco's management of MECF it is likely the Tribunal will be required to determine whether such loss involved a breach of IPP 5 and whether, in the event of such breach, Corrections shares liability for any consequential interference with Mr Lightbody's privacy. This will likely require examination of the prison management contract and investigation of the acts or omissions of Serco staff.

Formal declaration

[21] It follows that in the circumstances presently known to the Tribunal we conclude and declare that the presence of Serco before the Tribunal may be necessary for it to adjudicate on and settle all questions involved in the proceeding. Furthermore, the presence of Serco before the Tribunal will enable the proceedings to be determined fairly and consistently with the interests of justice as required by Regulation 16(1) of the Human Rights Review Tribunal Regulations.

[22] For the reasons explained earlier, the Tribunal does not yet have jurisdiction over Serco and our conclusion on the joinder application is simply a conclusion which we express as a formal declaration. No formal joinder order can be made until jurisdiction is established. As outlined by the Director, the establishment of jurisdiction will most likely require:

[22.1] The reopening by the Privacy Commissioner of his investigation.

[22.2] A referral under PA, s 77(2) by the Commissioner to the Director.

[22.3] A decision by the Director under PA, s 77(3) whether to bring proceedings against Serco.

Direction

[23] To enable the Tribunal to monitor the progress made in addressing the jurisdiction issue and to safeguard against the proceedings being left in suspension indefinitely, the parties are to provide the Tribunal with progress reports at four monthly intervals. The first such report must be filed no later than 5pm on Friday 30 November 2018 or earlier if the jurisdiction issue is resolved faster than expected.

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Mr RPG Haines ONZM QC
Chairperson

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Dr SJ Hickey MNZM
Member

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Mr BK Neeson JP
Member