IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-000011

UNDER	the Human Rights Act 1993
IN THE MATTER OF	an appeal against a decision of the Human Rights Review Tribunal pursuant to s123 of the Human Rights Act 1993
BETWEEN	COLYN DAVID STOVES Appellant
AND	COMMISSIONER OF POLICE Respondent

Hearing: 31 March 2009

Appearances: Appellant in person
A L Russell for Crown

Judgment: 20 April 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] This is an appeal under s123 of the Human Rights Act 1993 against a decision of the Human Rights Review Tribunal ("the Tribunal").

[2] The decision concerned a complaint made by Mr Stoves about the refusal of the respondent, the New Zealand Police, to grant him access to certain personal information.

[3] The issues raised by the appeal are:

i) a procedural issue as to whether the appeal is out of time;

ii) substantive issues relating to the application of principle 6 and s27(1)(c) of the Privacy Act 1993.

[4] At the hearing, I heard argument on the procedural issue, reserved my ruling on that point and then heard submissions on the substantive issues.

Factual background

[5] In October 2001 the appellant, Mr Stoves, was dismissed by the Christchurch City Council ("the council") from his employment as a park ranger, a position he had held for some five years. Mr Stoves was unhappy with the way he was treated and, by letter dated 27 March 2002, he made a formal complaint about the council to the Ombudsman.

[6] Shortly after a copy of the complaint had been forwarded to the council, the police executed a search warrant at Mr Stoves' address. Mr Stoves suspects the timing is no coincidence. The search warrant related to the alleged theft of a hydraulic ram from a front-end loader, as well as other equipment belonging to a local contractor. Mr Stoves was subsequently convicted of two counts of theft, and one count of attempted theft, although one of the theft counts was overturned on appeal to the Court of Appeal.

[7] The affidavit sworn by a police officer in support of the search warrant included reference to certain fingerprint evidence. It also referred to Mr Stoves' current address, and correctly stated that Mr Stoves had previously worked in the wood splitting industry and in the past had made a log splitter using hydraulic equipment.

[8] Mr Stoves believed it must have been the council who provided the police with the information about his address and the fact he had built a log splitter using hydraulic equipment.

[9] He therefore sought confirmation of this from the police under principle 6 of the Privacy Act.

[10] The relevant parts of principle 6 are as follows:

> *Principle 6 Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
>
> (a) To obtain from the agency confirmation of whether or not the agency holds such personal information; and
>
> (b) To have access to that information.
>
> …
>
> (3) The application of this principle is subject to the provisions of Parts 4 and 5 of this Act.

[11] It was common ground that the police are an agency for the purposes of principle 6 and that the information sought could readily be retrieved. However, the police refused to provide the information requested, relying inter alia upon s27(1)(c) of the Privacy Act.

[12] Section 27(1)(c) provides:

> **27 Security, defence, international relations, etc**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if the disclosure of the information would be likely—
>
> …
>
> (c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; …

[13] When the police denied Mr Stoves' request, he complained to the Privacy Commissioner. However, the Commissioner found the complaint had no substance.

[14] Dissatisfied with the Commissioner's ruling, Mr Stoves then exercised his right under the Privacy Act to complain to the Tribunal.

The Tribunal's decision

[15] In dismissing Mr Stoves' claim, the Tribunal identified the central issue in the case as being:

> [13] … whether disclosure of the identity of the informant to the Police would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

[16] The Tribunal then went on to refer to its own previous decision in *Director of Human Rights Proceedings v Police* [2007] NZHRRT 22 and stated that there was nothing magical in the label 'police informant':

> [14] … Anyone who gives information to the Police can be described using those words. Instead the assessment that has to be made under s.29(1)(c) needs be informed by an evaluation of the context in which the information was given to the Police, and its content.
>
> [15] We agree with Mr Martin that if the Police were to be required to disclose the identity of the informant in this case then that might have a chilling effect on the free flow of other like information to the Police in subsequent cases. This was, after all, information given to the Police in the context of their investigation of criminal offences…
>
> [16] Does it make any difference if, as the plaintiff already believes to be the case, the informant should turn out to have been the Council? We do not think so.
>
> [17] An obvious concern is that the informant might not have been the Council after all. We understand that the plaintiff considers that that is most likely, but the reality is that he does not know for certain (nor do we). We think it would set a dangerous precedent to hold that the Police should be required to disclose the identity of an informant on the basis of a guess that it might not have been an individual but an entity such as Council. In any event, we think there is force in the argument for the Police that disclosure of the fact that it was Council that provided the relevant information to the Police might effectively identify who it was within the Council that gave the information.
>
> [18] We therefore agree with the Privacy Commissioner's assessment of this case. We consider that the Police had (and continue to have) reason under s27(1)(c) of the Privacy Act 1993 to refuse to disclose the identity of the informant to the plaintiff.

Grounds of appeal

[17] The Tribunal's decision was given on 10 December 2008.

[18] On 9 January 2009, Mr Stoves filed a notice of appeal in the High Court.

[19] The grounds of the appeal are that the Tribunal effectively applied a blanket policy about police informers without considering the individual merits of the case, including in particular the fact that the informant in question was not a private individual, but rather a public sector organisation.

[20] Mr Stoves also argues that at the very least the Tribunal should have asked to look at the information itself before coming to its decision. All he wanted to know was whether or not the informant was the council. He would have been satisfied with the response that it was not the council.

[21] When I asked Mr Stoves why he wanted to know the source of the police's information, Mr Stoves told me it might provide grounds for a further appeal against his convictions, either to the Court of Appeal or the Supreme Court.

[22] Mr Stoves also told me if it was the council, he would be able to narrow down which individual council employee it must have been

Application to strike out

[23] The respondent contends the appeal has been brought out of time, and has accordingly applied for a strike out order.

[24] The right of appeal is conferred by s123 of the Human Rights Act.

[25] Section 123(4) provides:

> Every appeal under this section shall be made by giving notice of appeal within 30 days after the date of the giving by the Tribunal in writing of the decision to which the appeal relates.

[26] At the relevant time, the mode of bringing an appeal from the Tribunal was governed by r706 of the High Court Rules:

> **706 When appeal brought**
>
> (1) An appeal is brought when the appellant—

(a) files a notice of appeal in the High Court; and

(b) files a copy of the notice of appeal in the administrative office; and

(c) serves a copy of the notice of appeal on every other party directly affected by the appeal.

(2) Service at the address for service stated in the proceedings to which the appeal relates is sufficient service for the purposes of this rule.

[27] The rule means that an appeal has been properly brought when the notice of appeal has been filed in the High Court, filed in the Tribunal, and served on every party directly affected. Each of these requirements must be satisfied within the 30 day time period allowed for appealing.

[28] As mentioned above, in this case the decision was given on 10 December 2008. It was common ground that the last day for bringing the appeal was Friday 9 January 2009.

[29] Mr Stoves filed his notice of appeal in the High Court on 9 January 2009. On Sunday 11 January 2009, he posted copies of the notice of appeal to the office of the Privacy Commissioner, Crown Law, and to the Director of Human Rights Proceedings.

[30] He did not, however, send it to the Tribunal itself until 16 February 2009, and it is this failure which the respondent relies upon in seeking to have the appeal struck out.

[31] The reason Mr Stoves failed to send it to the Tribunal in time was that:

(1) He wrongly assumed that the time limit of 30 days only applied to the filing of the notice of appeal in the High Court.

(2) He mistakenly thought that by sending it to the Director of Human Rights Proceedings, he was sending it to the Tribunal.

(3) He was misled by the layout of a letter from the Tribunal advising him of his rights of appeal. The letter in question concludes by

setting out the addresses of service for the Director of Human Rights Proceedings and Crown Law, but not the Tribunal, although the need to file the notice of appeal with the Tribunal is mentioned in the body of the letter.

[32] It seems clear that the notice of appeal had come to the Tribunal's attention by at least 9 February 2009. In an affidavit sworn on 9 February 2009, the Tribunal's case manager said she had received a copy from Crown Law. The affidavit does not say when this was received, but it must have been some time between 12 January 2009 (the first working day after Mr Stoves posted a copy to Crown Law) and 9 February 2009.

[33] Mr Stoves asks me to invoke the Court's powers under r20.4(3) of the High Court Rules and grant him an extension of time. He submits allowances should be made for the fact he is not a lawyer, and that it would be unfair to strike out his appeal, having regard to all the circumstances, including the fact that the 30 days includes the Christmas vacation period and the fact that no-one has been prejudiced.

[34] It is difficult not to feel some sympathy for that argument. To deny someone his or her day in Court purely on the grounds of a procedural technicality, which has not prejudiced anyone, is hardly a desirable outcome. The mistake Mr Stoves made was understandable. However, counsel for the respondent submits that the law is clear and that the Courts take a very strict approach to compliance with the requirements.

[35] Unfortunately, it does indeed seem clear that I cannot cure the problem by exercising the Court's powers under r20.4(3) to grant an extension of time.

[36] Rule 20.4(3) is expressed to apply only if the statute conferring the right of appeal either permits the extension or does not limit the time prescribed for bringing the appeal. In this case, s123 of the Human Rights Act does not permit any extension, and it does limit the time. That r20.4(3) cannot be invoked to grant an extension of time of the appeal rights under s123 of the Human Rights Act has been confirmed in a number of decisions: *Cullen v Police* (1999) 14 PRNZ 315; (2000) 5

HRNZ 577 (HC); *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404; and *Ta'ase v Victoria University of Wellington* (2000) 5 HRNZ 577 .

[37] Ms Russell responsibly drew my attention to an obiter statement to the contrary in *Simpson v Accident Compensation Corporation* HC Wellington AP 130/01, 21 October 2002, Durie J where it was suggested the empowering enactment could arguably be construed as impliedly authorising an extension of time. However, I agree the dicta is contrary to the weight of authority and should not be followed. Apart from anything else, the dicta overlooks the important point that another provision creating a right of appeal in the Human Rights Act (s124(2)) expressly allows for an extension of time. The fact of the different wording lends credence to the argument that a deliberate choice was made in the case of s123(4).

[38] I also accept that the general power to extend time contained in r1.19 cannot assist, as that rule is limited to time limits imposed by the rules themselves, not time limits created by an enactment such as the Human Rights Act.

[39] I have considered whether I could invoke r1.9 (amendment of defects and errors) or r1.5 (non-compliance with rules).

[40] Unfortunately, the authorities also seem to have ruled out the use of those rules in this context. See for example *Cullen*, *Inglis Enterprise, Sharma v Askelund* (2004) 17 PRNZ 853 and *Commissioner of Inland Revenue* v *Boanas* (2007) 18 PRNZ 455 and most recently *Attorney-General v Howard* HC Wellington CIV-2008-485-001291, 7 April 2009, Joseph Williams J. The one exception has been a situation where the *mode* of filing or service was irregular, but effected in time: *Ministry of Justice v Small* (2005) 17 PRNZ 784.

[41] That however is not the situation here. Here, both the mode and the timing were irregular. In fact, even the copies to Crown Law and the Director were posted out of time.

[42] Finally, for completeness, I record that I have considered the applicability of r20.7 (power to dispense with service) but that power expressly relates to the requirement of service on a party, not the filing of the documents in the Tribunal.

[43] I have therefore reluctantly come to the conclusion that the appeal is indeed out of time, is unable to be salvaged and therefore must be struck out.

Substantive merits

[44] It may be of some consolation to Mr Stoves to know that, even if he had brought his appeal in time, he still would not have succeeded.

[45] For, in my view, the Tribunal's decision was undoubtedly correct and supported by long-standing authority, including the decision of *Nicholl v Chief Executive of the Department of Work & Income* [2003] 3 NZLR 426. As explained in that case at [16],

> There is ... a substantial body of decisions dating from 1982 which have recognised that in a proper case, s.27(1)(c) [of the Privacy Act] may be relied on to deny access to the name of an informant. The decisions are firmly grounded in the words of the statute and in the pragmatic concerns which, since *R v Hardy* (1794) 24 St Tr 199, have conferred public interest immunity on police informants. For more than two centuries it has been accepted that the public interest favours preserving the anonymity of police informers by keeping open avenues of information which will assist in the detection and investigation of crime.

[46] At common law, the one exception to the rule protecting the anonymity of police informers was if disclosure would help establish the innocence of an accused person: *R v Hughes* [1986] 2 NZLR 129 (CA). See also s67 of the Evidence Act 2006.

[47] However, in this case the information at issue was correct. Mr Stoves was living at the address cited, and he had been involved in log splitting. I note further that the validity of the search warrant was an argument which Mr Stoves has already raised with the Court of Appeal, and which that Court rejected. I am unable to see any way in which ascertaining the identity of a police informant who gave correct information could possibly afford Mr Stoves grounds for a second appeal. That must

be so, even if the informant was acting maliciously because of the Ombudsman complaint (an allegation which is actually contradicted by other evidence).

[48] I also do not accept that the fact the informant may have been connected with a public sector organisation, or acquired his or her information as a result of their employment with a public sector organisation, should create some exception to the general rule. If the person who gave the police the information was a council employee, then that person could not have been giving the police the information pursuant to any of the council's statutory functions, including of course its law enforcement functions. In those circumstances, issues about the need for transparency on the part of public sector organisations simply do not arise. The policy reasons for the general non-disclosure rule must in my view be equally applicable on the facts of this case as in the cases relied on by the Tribunal and the respondent concerning private individuals.

[49] Mr Stoves' suggestion he was not wanting the Tribunal to say who it was, only that it was not the council, is also untenable. It would be highly problematic and unprincipled for the Tribunal to engage in such an exercise, and they wisely refrained from doing so.

[50] Mr Stoves' criticism of the Tribunal that without looking at the information, they were not in a position to evaluate it is similarly unfounded. The Tribunal already knew the nature of the information and the context in which it was given. It was the identity of the person who gave it to the police that was the only issue.

[51] In summary, I am satisfied that the respondent has discharged the burden of establishing there was a good reason for withholding the identity of the informant from Mr Stoves. There was a distinct or significant possibility that prejudice to the maintenance of the law would otherwise result because of the chilling effect disclosure is likely to have on that informer and more importantly informers generally.

Costs

[52] As a general rule, a successful party is entitled to costs against an unsuccessful party.

[53] In this case, my provisional view is that the general rule should apply, and that costs be awarded against Mr Stoves to the police on a 2B basis.

[54] If the parties are unable to reach agreement on the question of costs and a formal order is necessary, then I direct that written submissions are to be filed within 21 working days. Submissions are to be no more than five pages in length.

Solicitors:
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Crown Law, Wellington