IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA598/2021
[2022] NZCA 419

BETWEEN	NEW ZEALAND POLICE Appellant
AND	JAMES LEONARD WILLIAMS Respondent

Hearing:	29 June 2022
Court:	French, Gilbert and Dobson JJ
Counsel:	M J McKillop and M R G van Alphen Fyfe for Appellant N Levy QC for Respondent
Judgment:	8 September 2022 at 2 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The answers to the questions of law are set out at [40] of this judgment.

C The High Court judgment is set aside.

D The decision of the Human Rights Review Tribunal is reinstated.

E There is no order for costs.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Mr Williams brought a claim for breach of privacy in the Human Rights Review Tribunal (the Tribunal) after the Police wrongly provided a copy of his criminal record to his ex-wife's lawyer in response to a request made under the Official Information Act 1982 (the OIA). The Tribunal struck out the claim on the basis the

Police were immune from suit in terms of s 48 of the OIA because the information was made available in good faith pursuant to its provisions.[1]

[2] The High Court allowed Mr Williams' appeal, finding that the Tribunal could not make factual findings in the context of a strike-out application as to whether the statutory immunity under s 48 of the OIA applied.[2] The High Court remitted the proceeding back to the Tribunal for determination.[3]

[3] The High Court subsequently granted leave to appeal to this Court on the following three questions of law:[4]

(a) Can the Tribunal grant summary judgment?

(b) Who carries the burden of establishing, or negativing, the elements of s 48 of the OIA?

(c) Is good faith to be presumed from a disclosure of information in response to an OIA request?

The facts

[4] The essential facts are not in dispute. In August 2009, Mr Williams' ex-wife instructed her lawyer to make an application to the Family Court for a protection order against Mr Williams. To support that application, the lawyer wrote to the Paeroa Police Station making a request for information pursuant to the OIA. The request was sent by facsimile at 2.55 pm on 20 August 2009 and read as follows:

> I act for [Mr Williams' ex-wife)] in applying for a Protection Order against [Mr Williams].
>
> I understand there is a history of domestic violence between these parties requiring police assistance.
>
> Under the Official Information Act 1982 would you please forward all information held by Police as regards [my client] and Mr Williams.

---

1 *Williams v Police* [2020] NZHRRT 26 [Tribunal decision].
2 *Williams v New Zealand Police* [2021] NZHC 808, [2021] 2 NZLR 292 [High Court judgment] at [88] and [91].
3 At [111].
4 *Williams v Police* [2021] NZHC 2345 [Leave judgment] at [24] and [33].

> Please note I have a copy of the statement made by [my client] on the 17th August 2009 so do not require that.

[5] The request was actioned by Ms Kelly Ross, a non-sworn member of the Police working in the Paeroa watchhouse. At 3.05 pm that day, she accessed and printed out Mr Williams' criminal history. This was included with the information sent to the lawyer later that afternoon by Sergeant Philip Caldwell, who was on duty at the Paeroa Police Station. The covering facsimile message read:

> I have faxed 3 x pages of criminal history for [Mr Williams]. There is also 11 pages of occurrences for [your client] where she is the complainant and he is the offender.
>
> There will also be hard copies of several enquiry and prosecution files that we would have to request from Hamilton if you require them.

Tribunal proceedings

[6] Mr Williams did not become aware of this disclosure until five years later, in August 2014, when he received documents from his ex-wife in connection with Family Court proceedings. These included a copy of his criminal history.

[7] Mr Williams then made a complaint to the Privacy Commissioner. The Police advised the Commissioner that although they had accessed Mr Williams' criminal history in 2009, there was no evidence this was printed out or released to Mr Williams' ex-wife or her lawyer.

[8] Mr Williams was adamant that the information had been provided by the Police. He commenced his claim in the Tribunal in February 2016. At that stage, the Police maintained their position that they had not done so.

[9] Ms Levy QC was instructed to act for Mr Williams in connection with his claim in March 2018. She approached Mr Williams' ex-wife's lawyer to find out how she had obtained the criminal record. It was then that the facsimile exchange referred to in [4]–[5] above was found. Equipped with this email exchange, the Police applied to have the claim struck out, relying on the jurisdictional immunity provided by s 48 of the OIA. This section relevantly reads:

> **48 Protection against certain actions**
>
> (1) Where any official information is made available in good faith pursuant to this Act,—
>
> (a) no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information; …
>
> …

[10] The Police filed two affidavits in support of the strike-out application, one from Ms Kelly and the other from Mr Colin Gibson, a police analyst who described how the criminal record was accessed from the relevant database. Ms Kelly stated that she did not specifically recall the matter. This is unsurprising given almost 10 years had passed since she received and actioned the request. She attached the facsimiles evidencing the information request and the response. She also attached a copy of the electronic access log showing that her police identifier number is recorded as the user who had accessed and printed out Mr Williams' criminal history.

[11] Mr Williams filed an affidavit in opposition from an experienced family lawyer to the effect that the provision of the full criminal history in response to such a request was not in accordance with her experience of usual police practice at the relevant time.

[12] The strike-out application came before the Tribunal on 29 June 2020. Counsel were in agreement that the Police had the initial evidential burden of establishing, "albeit to a low standard", that s 48 applied.[5] This required showing that official information was made available under the OIA and there was no evidence of dishonesty or of an ulterior motive.[6] If that "low threshold" was met, the jurisdictional bar could only be overcome if Mr Williams alleged, with sufficient supporting particulars, that the Police had breached their duty of good faith.[7] Mr Williams made it clear that he did not allege bad faith on the part of the Police. It followed that if the Tribunal found the initial threshold was met, the proceeding would have to be struck out.[8]

---

5 Tribunal decision, above n 1, at [41].
6 At [41].
7 At [42].
8 At [48].

[13] The Tribunal accepted the agreed position of counsel as to the correct approach[9] and described the issue for determination as a narrow one:

> [47] As a consequence the narrow issue for determination by the Tribunal is whether it can be inferred from the circumstances that the official information made available by the Police on 20 August 2009 was made available in good faith.
>
> [48] If that threshold is passed the proceedings must be struck out as Mr Williams does not allege bad faith on the part of the Police.

[14] Mr Williams submitted that the Police needed to provide evidence of Sergeant Caldwell's reasoning processes, or lack of them, to enable the Tribunal to assess whether the information was made available in good faith and with an honest, even if mistaken, belief that its provision was appropriate. The Tribunal considered this submission was answered by the High Court's decision in *Director of Human Rights Proceedings v Commissioner of Police*.[10] In that case, the Director made a similar submission that an examination of the decision-making process was required. After reviewing the authorities and the purpose of the provision, the High Court rejected this submission:[11]

> [44] In our view, that accords with the language used in s 48 and gives effect to the legislative intention to confer a wide immunity as evidenced by the 1987 amendment. In our view, it also accords with the policy of the Official Information Act. The purpose of the immunity is to ensure officials are not inhibited from releasing information. In our view, the Director's interpretation would have an inhibiting effect and would undermine the benefit of the immunity. It would also have the potential to create arguments about the process that was adopted — witness the divergent views of the Director and the police about public interest in the present case. An immunity provision needs to be straightforward, and provide a clearcut test readily understood and readily applied.

[15] The Tribunal was not persuaded that the evidence of the experienced family lawyer as to usual practice established that the circumstances were so unusual or extraordinary that an explanation from Sergeant Caldwell was required.[12] The Tribunal readily drew the inference from the evidence that the information was made available in good faith:

---

9 At [46].

10 At [59], considering *Director of Human Rights Proceedings v Commissioner of Police* (2008) HRNZ 749 (HC).

11 *Director OF Human Rights Proceedings v Commissioner of Police*, above n 11.

12 Tribunal decision, above n 1, at [63].

> [57] On the face of the circumstances established by the evidence, the facts are unexceptional and allow the straightforward application of the principle that inferences can be drawn from facts. We see no basis to draw any inference other than that the information was made available in good faith. That is, shortly before 3pm on 20 August 2009 the Police received a request for official information relating to Mr Williams and his then partner. Almost immediately Ms Ross accessed and printed Mr Williams' then criminal history and that same afternoon the document along with the rest of the requested information was dispatched by Sergeant Caldwell in response to the request. In these circumstances it is difficult to see what rational impediment can be found to the conclusion that the official information was made available in good faith.

[16] There being no allegation of bad faith, the Tribunal concluded that the immunity applied and accordingly the proceedings had to be struck out:

> [64] In the result we see nothing to inhibit the drawing of an inference which flows naturally from the evidence namely, that the criminal history of Mr Williams as at August 2009 was provided under the OIA in good faith to the lawyer representing his then partner in proceedings before the Family Court. None of the evidence or submissions presented on behalf of Mr Williams is adequate to challenge this inference.
>
> [65] As Mr Williams does not allege bad faith it follows the immunity conferred by OIA s 48(1) applies and the Tribunal has no jurisdiction to hear these proceedings. They must be struck out pursuant to the Human Rights Act 1993, s 115A(1)(a) which is incorporated into proceedings under the Privacy Act by virtue of s 89 of the latter Act.

High Court judgment

[17] Mr Williams appealed to the High Court on the sole ground that the Tribunal was wrong in determining that good faith could be inferred in the absence of evidence from Sergeant Caldwell.

[18] However, at the hearing of the appeal, the High Court raised what it considered was a more fundamental question, namely whether the Tribunal had followed the correct approach in exercising its jurisdiction to strike out proceedings.[13] The Court observed that the statutory immunity in s 48 did not form part of Mr Williams' claim for breach of privacy; it was an affirmative defence that must be raised by a defendant who seeks to rely on it.[14] In the Court's view, the effect of the Tribunal's decision was to treat the immunity as an element of Mr Williams'

---

13 High Court judgment, above n 2, at [42].
14 At [49].

privacy claim.[15] However, good faith must be pleaded and proved by the defendant.[16] The Court concluded:

> [67] So, while there is no doubt the [Police are] entitled to rely on the s 48 immunity in response to Mr Williams' claim for breach of privacy, the immunity itself represents an important incursion into the rights conferred under the Privacy Act. If applied too broadly, s 48 might inappropriately undermine the protections that the Privacy Act seeks to achieve. Accordingly, it is appropriate in our view to require the [Police] to establish, on the basis of evidence, that the breach of Mr Williams' privacy interests was justified.
>
> [68] It follows from our analysis that the Tribunal was wrong to consider that a burden fell on Mr Williams to establish the disclosure of his personal information was other than in good faith. That obligation remained on the [Police].

[19] This conclusion was sufficient to dispose of the appeal.[17] However, the Court turned to address the scope and nature of the Tribunal's strike-out jurisdiction under s 115A of the Human Rights Act 1993. This section relevantly reads:

> **115A Tribunal may strike out, determine, or adjourn proceedings**
>
> (1) The Tribunal may strike out, in whole or in part, a proceeding if satisfied that it—
>
> (a) discloses no reasonable cause of action; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of process.
>
> …

[20] The Court observed that strike-out applications are generally determined by assessing a pleading against the legal elements of a cause of action or defence.[18] It is only if the pleaded facts are incapable of making out the cause of action that it is vulnerable to being struck out as untenable.[19] So long as the pleading survives scrutiny

---

15 At [50].
16 At [52].
17 At [69].
18 At [79].
19 At [79].

on this basis, it is generally inappropriate to strike it out.[20] The Court therefore found that the Tribunal erred in its approach:[21]

> [82] Given the Tribunal's strike out jurisdiction brings an end to proceedings summarily and without affording a claimant a hearing, it has a potentially significant impact on access to justice. In order to ensure the correct balance is struck between access and the avoidance of abuse, it is necessary to exercise some discipline in relation to its application to a claim. We find that the Tribunal erred by failing to have sufficient regard to the nature and scope of its statutory jurisdiction, informed by the principles and approach applicable in the High Court and elsewhere.
>
> [83] In its decision the Tribunal did not clearly identify the nature of Mr Williams' claim or its essential elements. It did not then go on to consider whether the claim as pleaded disclosed no reasonable cause of action.

[21] The Court considered that instead of following the orthodox approach on a strike-out application of presuming that pleaded facts are capable of proof, the Tribunal wrongly embarked on a factual inquiry.[22] The "closest procedural analogue" would be "an application by a defendant for summary judgment", but Parliament had not conferred "this additional and significant jurisdiction" on the Tribunal.[23] Accordingly, the Tribunal "fell into error by examining the evidence in order to draw inferences as part of a striking out enquiry".[24]

[22] Although not strictly relevant to the appeal, the Court observed that the evidence provided by the Police would not have met the requirements for summary judgment, even if that jurisdiction had been available.[25] For a defendant to obtain summary judgment, it is required to establish that no other inference is available whereas the Tribunal appeared to apply a lesser standard in inferring that the information was provided in good faith.[26]

[23] Finally, the Court addressed the argument presented by Ms Levy on behalf of Mr Williams. The Court accepted that the initial and unexplained denials by the Police that they were responsible for the disclosure combined with the apparently excessive

---

20 At [79].
21 Footnote omitted.
22 At [85].
23 At [86]–[87].
24 At [88].
25 At [89].
26 At [89].

disclosure and the absence of any evidence from Sergeant Caldwell were "an unfortunate starting point from which to draw an inference of good faith conduct".[27] However, the Court accepted Mr McKillop's submissions for the Police that there is no mandatory requirement for evidence from the official who made the disclosure; that would "place the threshold too high".[28] Had it been open to the Tribunal to undertake a factual investigation in the context of a strike-out application, the Court would have concluded that a good faith inference could be drawn but that this was not the only available inference on the evidence provided.[29] The Court therefore remitted the proceeding back to the Tribunal for determination at a hearing at which all relevant evidence would be adduced and examined.[30]

Submissions

[24] Mr McKillop's submissions can be summarised as follows. First, he submits that the Tribunal has inherent power to determine proceedings summarily, including by way of summary judgment. That inherent power was not removed or limited by the statutory clarification of the Tribunal's strike-out powers with the enactment of s 115A of the Human Rights Act. Secondly, s 48(1) of the OIA provides a broad immunity from jurisdiction which prevents the Tribunal hearing a claim; it is not a justification for infringing privacy and does not form part of a substantive privacy breach assessment. Thirdly, a defendant seeking to rely on the immunity in s 48(1) must prove the existence of a relevant OIA request and response, but good faith is to be assumed from the fact of that response. A claimant seeking to displace the immunity has the burden of showing the absence of good faith is properly in issue.

[25] Ms Levy makes the following broad submissions in response. First, she submits that the Tribunal has no power to grant summary judgment. However, she agrees that s 115A(1)(a) of the Human Rights Act enables the Tribunal to strike out a cause of action if s 48(1) of the OIA applies. Secondly, Ms Levy does not support the High Court's assessment that the immunity provided by s 48(1) is an affirmative defence; she agrees with Mr McKillop that the immunity deprives the Tribunal of

---

27 At [107].
28 At [108].
29 At [109].
30 At [110]–[111].

jurisdiction regardless of whether the point is pleaded by the Crown agency. Thirdly, Ms Levy submits that the relevant Crown agency carries the burden of establishing the elements of s 48(1). She says it should not be presumed from a disclosure of information in response to an OIA request that the information was released "in good faith pursuant to the Act". Any such presumption would effectively reverse the burden. She submits that the evidence required to activate the immunity would usually be limited to proof that the person tasked with responding to the request made an honest attempt at compliance with a known policy or practice as to how official information requests are to be processed so as to balance the competing rights of access to official information and privacy. A claimant would then be entitled to respond with evidence or submissions in rebuttal for the purposes of a strike-out hearing, as occurred in this case.

[26] Applying these principles to the present case, Ms Levy submits that the proceedings should not have been struck out by the Tribunal. For the immunity to apply, the Police would need to show an honest belief on the part of the disclosing officer (Sergeant Caldwell) that the OIA allowed such disclosure. This would require direct or inferential evidence of a reasoning process or policy that facilitated recognition of the potential for conflict between the request and an individual's privacy rights and a scheme for resolving that conflict. In this case, there was no direct evidence of the process followed, nor any evidence of any police policy or practice that should have been followed. The speedy disclosure of the entire criminal record without redaction indicates that Sergeant Caldwell did not "mentally refer to a process or policy requiring consideration of privacy interests". Ms Levy submits that Sergeant Caldwell was most likely grossly negligent or indifferent and so lacked a good faith belief that the OIA permitted release of the information. She agrees with the outcome in the High Court, albeit for different reasons, that the proceeding should be remitted to the Tribunal to enable the Police a further opportunity to provide evidence in support of the immunity, if such evidence exists.

Our assessment

[27] Like many seeking to vindicate their rights before the Tribunal, Mr Williams was unrepresented at the time he completed his statement of claim against the Police

alleging a breach of privacy. The full circumstances were not known at that stage. Mr Williams claimed that a constable at the Hamilton Police Station gave a copy of his criminal and traffic history to his ex-wife. Mr Williams was unaware at that stage that the information had been provided by staff at the Paeroa Police Station in response to a request under the OIA. That remained the position following the filing and service of the statement of reply because the Police denied that they had provided the information. There was therefore no reason for Mr Williams or the Police to address in their pleadings the question of jurisdictional immunity under s 48 of the OIA; the issue simply did not arise on the facts as pleaded by either party.

[28] As noted, it was not until Ms Levy became involved that it was discovered that the information had in fact been provided by the Police in response to an OIA request. Once that discovery was made, the question of the jurisdictional immunity in s 48 had to be confronted. The issue was raised by the Police in their strike-out application. The application was made on the sole ground that the Tribunal lacked jurisdiction. This had to be addressed as a preliminary issue given the Tribunal's jurisdiction to determine the claim turned on whether the immunity applied.

[29] We agree with the High Court's observation that the immunity did not form part of Mr Williams' claim for breach of privacy. However, we disagree with its assessment that the Tribunal in effect treated the immunity as an element of Mr Williams' privacy claim. The Tribunal made no such error and appropriately confined its attention to whether it had jurisdiction to determine the claim. Contrary to the view taken in the High Court, the Tribunal was not required, for the purposes of the strike-out application, to identify the elements of Mr Williams' claim and consider whether the claim as pleaded disclosed a reasonable cause of action. That was not the issue.

[30] We also consider the High Court erred in describing the immunity as an affirmative defence to the claim. Rather, we see the s 48 as providing an exemption from *jurisdiction*, akin to diplomatic immunity, not merely an exemption from

liability.[31] In our view, the failure to recognise this important distinction led the High Court into error.

[31] The High Court also considered that the Tribunal was wrong to embark on any factual inquiry in the context of a strike-out application. Again, we respectfully disagree. In exercising its jurisdiction, the Tribunal has broad powers to regulate its procedure as it thinks fit in accordance with the principles of natural justice, in a manner that is fair and reasonable, and according to equity and good conscience.[32] The Tribunal is directed to act according to the substantial merits of the case and without regard to technicalities.[33] Consistent with these important objectives, the purpose of the Human Rights Review Tribunal Regulations 2002 is to enable proceedings before the Tribunal to be determined in harmony with the purpose and spirit of the Acts under which the proceedings arise.[34] Regulation 16(1)(a) specifically empowers the Tribunal to:

> … give any directions and do any other things … 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 …

[32] We see nothing wrong with the approach taken by the Tribunal and agreed to by the parties (both represented by experienced counsel), in conducting a preliminary hearing to determine whether it had jurisdiction to hear the claim. Indeed, we consider this process was entirely appropriate. The determination was not in the nature of a summary judgment on the claim, rather, it was a finding that the Tribunal had no jurisdiction to determine it.

[33] We turn now to consider who has the burden of proving that s 48 applies.

[34] A case directly on point is *Ilich v Accident Rehabilitation and Compensation Insurance Corporation*, a decision of the High Court concerning s 115(1)(a) of the Privacy Act 1993,[35] which is in materially the same terms as s 48(1)(a) of the OIA:

---

31 For a helpful discussion of the distinction, see Law Commission Crown *Liability and Judicial Immunity*: A response to *Baigent's case and Harvey v Derrick* (NZLC R37, 1997) at [C31], citing *Dickinson v Del Solar* [1930] 1 KB 376 at 380.

32 Human Rights Act 1993, ss 104(5) and 105(2).

33 Section 105(1).

34 Human Rights Review Tribunal Regulations 2002, reg 4(1).

35 *Ilich v Accident Rehabilitation and Compensation Insurance Corp* [2000] 1 NZLR 380 (HC).

> **115 Protection against certain actions**
>
> (1) Where any personal information is made available in good faith pursuant to principle 6, —
>
> (a) no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information …
>
> …

[35] Tompkins J held that information is made available in good faith for the purposes of this provision if it is made available honestly and with no ulterior motive, even though it may have been made available negligently.[36] The Judge considered that the person claiming the absence of good faith was required to establish this.[37] The agreed statement of facts established that the information was made available in response to a request coming within the scope of s 115. This was sufficient for the Judge to draw the inference that, in providing the information, the respondent was acting honestly, without any ulterior motive and in compliance with what it considered to be its obligations under principle 6 of the Privacy Act.[38] The Tribunal therefore lacked jurisdiction to hear the complaint.[39] It can be seen that *Ilich* provides strong support for both the approach taken and the conclusion reached by the Tribunal in this case.

[36] While there is a material difference between "no jurisdiction" and "no liability" provisions, a similarly protective approach has been taken in respect of the onus and burden of proof where "no liability" provisions have been engaged in comparable contexts. For example, in *Stockman v Health and Disability Commissioner*, the High Court struck out claims against the Health and Disability Commissioner and another office holder in reliance on the no liability provision in s 121(2) of the Crown Entities Act 2004.[40] This section provides that an office holder is not liable to any person in respect of any act or omission by the office holder in good faith and in

---

36 At 383, citing *X v Attorney-General* [1994] NZFLR 433 (HC) at 435; and *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48 (CA) at 55 per Lord Denning MR.

37 At 383.

38 At 383; and Privacy Act 1993, s 6, principle 6.

39 At 384.

40 *Stockman v Health and Disability Commissioner* [2019] NZHC 1098 [*Stockman* High Court judgment].

performance or intended performance of the entity's functions.[41] Because the plaintiff, Mr Stockman, did not plead or produce any evidence to show that the defendant office holders acted in bad faith, the claim was struck out.[42] This outcome was confirmed on appeal.[43] This Court held that a plaintiff can only overcome a defence under s 121 by pleading adequate particulars of facts to establish bad faith.[44] There must be a proper basis before any such allegation can be made. The pleading and initial evidential burden therefore rested with the plaintiff seeking to overcome the defence.

[37] A more recent example is this Court's decision in *Peters v Attorney-General*, which was concerned with the immunity in s 86 of the State Sector Act 1988.[45] This section provides that "Public Service chief executives and employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers".[46] This Court considered that the purpose of the provision was to protect "the ability of public servants to carry out their functions impartially and fearlessly, without being deflected from doing so by the threat of proceedings".[47] This purpose would be "undermined if proceedings are brought against public servants without a proper basis for alleging bad faith".[48] This Court agreed with the High Court that in the absence of any evidence to support an allegation of bad faith, the claims should not have been brought against the Chief Executives personally.[49] Again, the burden of pleading and proving absence of good faith was found to rest with the plaintiff even though the immunity from liability was predicated on the acts or omissions being done in good faith.

[38] In the present case, the Police properly raised the jurisdictional immunity in their strike-out application. They also discharged the initial evidential onus by showing that the information was provided in response to a request under the OIA. This was sufficient to show that s 48 was engaged absent any indication of bad faith.

---

41 Crown Entities Act 2004, ss 121(2) and 126 definition of "excluded act or omission".
42 *Stockman* High Court judgment, above n 40, at [53]–[55].
43 *Stockman v Health and Disability Commissioner* [2020] NZCA 588.
44 At [79].
45 *Peters v Attorney-General* [2021] NZCA 355, [2021] 3 NZLR 191.
46 Sector Act 1988, s 86(1).
47 *Peters v Attorney*-General, above n 45, at [147].
48 At [147].
49 At [150].

We agree with the Tribunal that there was no basis to infer bad faith from the evidence provided. The onus then shifted to Mr Williams to plead and prove bad faith. Quite properly, he acknowledged that he could not make any such allegation. It inevitably followed that the Tribunal had no jurisdiction to determine the claim and it had to be struck out.

[39] We do not accept Ms Levy's submission that good faith could not be inferred without evidence from Sergeant Caldwell of his reasoning process with reference to a known policy or practice. Any failure on the part of Sergeant Caldwell to address relevant factors under an established practice or policy could not be sufficient to negate the jurisdictional immunity. He may have been negligent, even grossly negligent, but that does not amount to bad faith. The approach urged by Ms Levy would substantially undermine the protective purpose of the provision.

Answers to questions of law

[40] We answer the questions of law as follows:

Can the Tribunal grant summary judgment?

Answer: Yes, in appropriate cases where it is shown that a claim cannot succeed.

Who carries the burden of establishing, or negativing, the elements of s 48 of the OIA?

Answer: The party seeking to overcome the statutory immunity carries the burden of showing bad faith once it is shown that the information was provided in response to a request under the OIA in circumstances giving no indication that this was done other than in good faith.

Is good faith to be presumed from a disclosure of information in response to an OIA request?

Answer: Yes, absent any indication of bad faith.

Costs

[41] The Crown, responsibly in all the circumstances, does not seek costs on the appeal. We accordingly make no order for costs.

Result

[42] The appeal is allowed.

[43] The answers to the questions of law are set out at [40] of this judgment.

[44] The High Court judgment is set aside.

[45] The decision of the Human Rights Review Tribunal is reinstated.

[46] There is no order for costs.

Solicitors:
Crown Law Office, Wellington for Appellant