

Reference No. HRRT 016/2019

UNDER THE PRIVACY ACT 1993

BETWEEN ANA BENJAMIN

PLAINTIFF

AND SOUTHERN DISTRICT HEALTH BOARD

DEFENDANT

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Deputy Chairperson
Dr SJ Hickey MNZM, Member
Dr JAG Fountain, Member

REPRESENTATION:

Mr D More for plaintiff
Mr G Gallaway and Ms M Nicol for defendant

DATE OF HEARING: Heard on the Papers

DATE OF DECISION: 3 June 2020

DECISION OF TRIBUNAL STRIKING OUT CLAIM¹

[1] Ms Benjamin is a former patient of the Southern District Health Board (SDHB). Ms Benjamin claims that the SDHB collected personal information about her without her authority and that the SDHB did not check the information was accurate or correct it when errors were brought to the SDHB's attention. Ms Benjamin is also concerned that the information was used and disclosed in a way that was an interference with her privacy.

¹ [This decision is to be cited as *Benjamin v Southern District Health Board (Strike-Out application)* [2020] NZHRRT 21.]

[2] Ms Benjamin complained to the Privacy Commissioner, but the Privacy Commissioner decided, after correspondence with Ms Benjamin's lawyer, that he would not investigate the complaint.

THE APPLICATION TO STRIKE OUT

[3] The SDHB has applied to have Ms Benjamin's claim struck out. It submits the claim is not within the Tribunal's jurisdiction because there was no investigation by the Privacy Commissioner.

[4] Ms Benjamin opposes the application to strike out her claim. Ms Benjamin asserts that the Privacy Commissioner did investigate the complaint and that the investigator from the Privacy Commission erred when stating that the complaint had not been investigated.

JURISDICTION UNDER THE PRIVACY ACT 1993

[5] The Tribunal only has jurisdiction to determine claims under the Privacy Act 1993 if the criteria in ss 82 and 83 of that Act are met. The practical effect of these sections is that an aggrieved individual can only bring a claim in this Tribunal under the Privacy Act 1993 if there has been an investigation by the Privacy Commissioner; or there has been an unsuccessful attempt at conciliation.

[6] The relevant parts of those sections are set out below.

82 Proceedings before Human Rights Review Tribunal

- (1) This section applies to any person—
 - (a) in respect of whom an investigation has been conducted under this Part in relation to any action alleged to be an interference with the privacy of an individual; or
 - (b) in respect of whom a complaint has been made in relation to any such action, where conciliation under section 74 has not resulted in a settlement.
- (2) Subject to subsection (3), civil proceedings before the Human Rights Review Tribunal shall lie at the suit of the Director of Human Rights Proceedings against any person to whom this section applies in respect of any action of that person that is an interference with the privacy of an individual.

83 Aggrieved individual may bring proceedings before Human Rights Review Tribunal

Notwithstanding section 82(2), the aggrieved individual (if any) may himself or herself bring proceedings before the Human Rights Review Tribunal against a person to whom section 82 applies if the aggrieved individual wishes to do so, and—

- (a) the Commissioner or the Director of Human Rights Proceedings is of the opinion that the complaint does not have substance or that the matter ought not to be proceeded with; or
- (b) in a case where the Director of Human Rights Proceedings would be entitled to bring proceedings, the Director of Human Rights Proceedings—
 - (i) agrees to the aggrieved individual bringing proceedings; or
 - (ii) declines to take proceedings.

[7] If a claim is filed which does not meet the criteria in ss 82 and 83, then it is not within this Tribunal's jurisdiction and the claim will be struck out. See *Re Tai Rakena (Rejection of Statement of Claim)* [2017] NZHRRT 27 at [22]-[26] for a further discussion of this issue.

[8] This Tribunal has canvassed in previous decisions the statutory requirements of what constitutes an investigation by the Privacy Commissioner. In *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* [2014] NZHRRT 1 at [25], the Tribunal noted those requirements were:

[25.1] There must be a complaint alleging that an action is or appears to be an interference with the privacy of an individual (s 67(1)).

[25.2] The Privacy Commissioner must decide whether to investigate the complaint, or to take no action on the complaint (s 70(1)).

[25.3] The Privacy Commissioner must advise both the complainant and the person to whom the complaint relates of the procedure that the Commissioner proposes to adopt (s 70(2)).

[25.4] The Privacy Commissioner must inform the complainant and the person to whom the investigation relates of the Commissioner's intention to make the investigation (s 73(a)).

[25.5] The Privacy Commissioner must inform the person to whom the investigation relates of:

[25.5.1] The details of the complaint (if any) or, as the case may be, the subject-matter of the investigation; and

[25.5.2] The right of that person to submit to the Commissioner, within a reasonable time, a written response in relation to the complaint, or as the case may be, the subject-matter of the investigation.

[9] The Tribunal must determine whether it has jurisdiction to hear this claim. That will depend on whether the Privacy Commissioner did or did not investigate Ms Benjamin's complaint. If it did not, then the Tribunal must strike out Ms Benjamin's claim under s 115A (1) Human Rights Act 1993.

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.

WAS MS BENJAMIN'S CLAIM INVESTIGATED BY THE PRIVACY COMMISSIONER?

[10] The SDHB maintain that the complaint by Ms Benjamin to the Privacy Commissioner was not investigated, as it was not notified to the SDHB either at the beginning or the conclusion of any investigation, nor was the SDHB given any opportunity to respond to the complaint.

[11] As discussed in [8] above, these notifications are a mandatory requirement of an investigation by the Privacy Commissioner. Ms Benjamin has provided no evidence to indicate that these statutory requirements of an investigation were undertaken.

[12] The only evidence Ms Benjamin has presented regarding the claimed investigation is the correspondence between her lawyer and staff at the Privacy Commission. These communications are attached to the affidavit of Ms Benjamin's lawyer, Mr Medicott, dated 27 January 2020. However, rather than confirm Ms Benjamin's view that the complaint was investigated, these communications indicate that the complaint was not investigated. In particular:

[12.1] On 7 August 2017, Mr Medicott wrote to the Privacy Commissioner detailing Ms Benjamin's complaint. Mr Stephen from the Privacy Commission responded by summarising the rules from the Health Information Privacy Code that were being challenged by Ms Benjamin. Mr Stephen then explained the next step would be to notify the SDHB of the complaint, but that before he could do so, specific information about the alleged incidents would be required. Mr Stephen stated:

Our office can only investigate specific incidents that raise issues under the Privacy Act and cannot investigate general concerns. For example, for our office to investigate the disclosure of information, we need evidence of what was disclosed, when this occurred and by whom.

In these circumstances I cannot accept a complaint with the information provided.

[12.2] On 3 November 2017 an email from Mr Ritchie at the Privacy Commission to Mr Medicott, summarised a phone call between Mr Ritchie and Mr Medicott. The email stated that the Privacy Commissioner requires particular instances of disclosure or use of information to be identified before it notifies a complaint to an agency. Mr Ritchie requested that Mr Medicott point out to him any instances of disclosure or other information that was particularly important or telling. The email then concluded:

I will be in touch once I have reviewed the information you have provided more thoroughly. In the meantime, please don't hesitate to contact me if you would like to discuss.

[12.3] This email was followed by a letter from Mr Ritchie to Mr Medicott on 13 November 2017. The letter stated that Mr Ritchie had been unable to find any clear evidence of the SDHB disclosing information about Ms Benjamin inappropriately. Mr Ritchie then provided comments on each of the documents Mr Medicott had provided and concluded:

At this stage I have not been able to identify any issues our office could investigate.

[12.4] On 30 November 2017 Mr Medicott asked Mr Ritchie to review the complaint with a view to the civil standard of proof of the balance of probabilities. Mr Ritchie responded explaining that the Privacy Commissioner is not able to investigate a complaint without clear evidence that the SDHB mishandled Ms Benjamin's personal information. Mr Ritchie confirmed the Privacy Commissioner applies the civil standard of proof, but he noted there was nothing in the information provided which made it clear on the balance of probabilities that the SDHB had breached the Health Information Privacy Code. Mr Ritchie concluded by advising that the Privacy Commissioner was declining to investigate the complaint and the file would be closed.

[13] The Tribunal finds that these communications show the Privacy Commissioner did not investigate the complaint, in the manner required by the Privacy Act 1993. These communications were clearly intended to ascertain and understand the nature of the complaint, in effect triaging the complaint, to determine whether it should be investigated. There is no other meaning that can be taken from the repeated statements from Mr Ritchie and Mr Stephen that the Privacy Commissioner would not be investigating the complaint.

[14] The Tribunal has had regard to Ms Benjamin's submissions that the "*wrong words*" were used by the staff at the Privacy Commission. That submission is untenable given the communications above. The staff at the Privacy Commission clearly detailed what was required for them to investigate the complaint and unequivocally stated the complaint was not being investigated.

[15] The Human Rights Review Tribunal has no jurisdiction in this matter, as the SDHB has not been investigated by the Privacy Commissioner. Ms Benjamin's claim is not within the jurisdiction of this Tribunal and must be struck out under s 115A (1)(a) of the Human Rights Act 1993.

ORDERS

[16] Ms Benjamin's claim against the SDHB is struck out.

COSTS

[17] The SDHB seeks costs. It is to file submissions within 14 days after the date of this decision. Any submissions in opposition by Ms Benjamin are to be filed within a further 14 days with a right of reply to the SDHB within seven days after that.

[18] The Tribunal will then determine the issue of costs based on written submissions without a hearing.

[19] In case it should prove necessary we leave it to the Chairperson or Deputy Chairperson to vary the foregoing timetable.

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Ms SJ Eyre
Deputy Chairperson

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Dr SJ Hickey MNZM
Member

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Dr JAG Fountain
Member