

Reference No. HRRT 45/2018

UNDER THE PRIVACY ACT 1993

BETWEEN ANGELA WATSON

PLAINTIFF

AND EMPLOYERS MUTUAL LIMITED

DEFENDANT

AT Wellington

BEFORE:

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

REPRESENTATION:

Mr A J McKenzie for plaintiff
Ms P Muir and Ms R Judge for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 23 March 2020

DECISION OF TRIBUNAL STRIKING OUT CLAIM¹

[1] Ms Watson was employed by the Capital and Coast District Health Board (CCDHB) as a nurse. In May 2012, while Ms Watson was still an employee, the CCDHB requested medical information about Ms Watson from Catalyst NZ Ltd (Catalyst). At that time Catalyst was managing ACC claims on behalf of the CCDHB, as part of the ACC Accredited Employers Programme. Ms Watson did not agree to Catalyst releasing her medical information to the CCDHB. Notwithstanding this, Catalyst released Ms Watson's medical information to the CCDHB.

¹ [This decision is to be cited as *Watson v Employers Mutual Limited (Strike-Out Application)* [2020] NZHRRT 10]

[2] Ms Watson became aware of the disclosure of information from Catalyst to the CCDHB in 2013 and complained to the Privacy Commissioner about it in March 2018. On 19 April 2018, the Privacy Commissioner advised Ms Watson's lawyer by email that the complaint would not be investigated. The reasons given in that email are set out below in full:

The Privacy Commissioner has discretion to take no action on a complaint, if in the Commissioner's opinion, 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. In the Commissioner's view, it is neither practicable or desirable to investigate an alleged disclosure of information that occurred in 2012, particularly given that Catalyst has been sold to a new entity.

[3] The Privacy Commissioner advised the Tribunal in a letter dated 21 December 2018 that this decision was made under s 71(1)(a) of the Privacy Act 1993.

[4] Catalyst is now known as Employers Mutual Limited (EML), which is the defendant company in these proceedings. EML responded to Ms Watson's claim by protesting jurisdiction and filing a strike-out application.

THE APPLICATION TO STRIKE-OUT

[5] EML has applied to have Ms Watson's claim struck out. EML asserts the claim is not within the Tribunal's jurisdiction, because EML is not an agency that has been investigated by the Privacy Commissioner, as required by s 82(1)(a) of the Privacy Act 1993.

[6] Ms Watson opposes the application to strike-out her claim. She submits that the Tribunal's approach to ss 82 and 83 of the Privacy Act 1993 is too narrow and restrictive. Ms Watson suggests that even though her claim was not investigated by the Privacy Commissioner, it should still be within the Tribunal's jurisdiction as it was raised with the Privacy Commissioner, which should be enough to meet the jurisdictional threshold.

[7] The issue to be determined is whether the Tribunal has jurisdiction to hear this claim. If it does not, then the Tribunal must strike out Ms Watson's claim.

JURISDICTION UNDER THE PRIVACY ACT 1993

[8] 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. Those sections are set out in full 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.

- (3) The Director of Human Rights Proceedings shall not take proceedings under subsection against any person to whom this section applies unless the Director of Human Rights Proceedings has given that person an opportunity to be heard.
- (4) The Director of Human Rights Proceedings may, under subsection (2), bring proceedings on behalf of a class of individuals, and may seek on behalf of individuals who belong to the class any of the remedies described in section 85, where the Director of Human Rights Proceedings considers that a person to whom this section applies is carrying on a practice which affects that class and which is an interference with the privacy of an individual.
- (5) Where proceedings are commenced by the Director of Human Rights Proceedings under subsection (2), the aggrieved individual (if any) shall not be an original party to, or, unless the Tribunal otherwise orders, join or be joined in, any such proceedings.

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.

[9] 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:

[9.1] There has been an investigation by the Privacy Commissioner; or

[9.2] There has been an unsuccessful attempt at conciliation.

[10] If a claim is filed which does not meet these criteria this Tribunal cannot determine it and the claim will be outside its jurisdiction. See *Re Tai Rakena (Rejection of Statement of Claim)* [2017] NZHRRT 27 at [22]-[26] for a further discussion of this issue.

[11] If a claim is outside of the Tribunal's jurisdiction, then it must be struck out 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.

IS MS WATSON'S CLAIM WITHIN THE JURISDICTION OF THIS TRIBUNAL?

[12] As detailed above, the Privacy Act 1993 only entitles aggrieved individuals to bring a claim in this Tribunal against an agency that has been investigated by the Privacy Commissioner and to whom s 82 therefore applies.

[13] Ms Watson and EML agree that her claim against EML was not investigated by the Privacy Commissioner. Accordingly, s 82 does not apply to EML and the claim by Ms Watson against EML is not within the jurisdiction of this Tribunal.

[14] The Tribunal has had regard to Ms Watson’s submission that its interpretation of ss 82 and 83 is too narrow. It is noted that Ms Watson suggests s 83 should be viewed as a standalone enabling provision and that the reference in s 83 to “a person to whom s 82 applies” is an ambiguity, rather than a requirement. The implication being that this “ambiguity” should be simply ignored. However, s 83 unequivocally states an aggrieved individual may bring proceedings against “a person to whom s 82 applies”. To completely ignore this reference to s 82, on the basis that it is an ambiguity, would require the Tribunal to ignore the plain and ordinary meaning of these words. That would be an entirely incorrect approach to statutory interpretation.

[15] Furthermore, Ms Watson’s submission relies on obiter comments by the Tribunal in *Lehmann v The Radio Works Limited* [2005] NZHRRT 20. However, *Lehmann* does not support the substance of Ms Watson’s submissions. To the contrary, in *Lehmann*, the Tribunal accepted in paragraph [54] that it was common ground that there was no ability to bring proceedings in this Tribunal if the Privacy Commissioner had taken no action whatsoever. The Tribunal also accepted in paragraph [105] that:

for those comparatively few cases where the Privacy Commissioner does nothing at all on receipt of a complaint, the Legislature did not intend to give an aggrieved individual any right of access to the Tribunal.

[16] The situation described directly above is what happened to Ms Watson’s complaint. Accordingly, *Lehmann*, supports this Tribunal’s application of ss 82 and 83 of the Privacy Act 1993, not the wider approach suggested by Ms Watson. *Lehmann* concludes that there is no jurisdiction without a Privacy Commissioner investigation. This Tribunal reaches the same conclusion in relation to Ms Watson’s claim.

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

ORDERS

[18] Ms Watson’s claim against EML is struck out.

COSTS

[19] EML wishes to be heard on costs. It is to file submissions within 14 days after the date of this decision. Any submissions in opposition by Ms Watson are to be filed within a further 14 days with a right of reply to EML within seven days after that.

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

[21] 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