

Reference No. HRRT 022/2017

UNDER THE PRIVACY ACT 1993

BETWEEN BENJAMIN WILLING

PLAINTIFF

AND NEW ZEALAND POLICE

DEFENDANT

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Deputy Chairperson

Ms DL Hart, Member

Ms ST Scott QSM, Member

REPRESENTATION:

Mr BA Willing in person

Mr MJ McKillop for the defendant

DATE OF HEARING: Heard on the Papers

DATE OF DECISION: 28 May 2020

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**DECISION OF TRIBUNAL STRIKING OUT PART OF STATEMENT OF CLAIM<sup>1</sup>**

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[1] Benjamin Willing unsuccessfully applied to become a Police recruit in 2011. He sought a review of the recruitment decision and made an information privacy request at the same time. The New Zealand Police (the Police) were late in responding to the request. Mr Willing complained about the delay and other matters to the Privacy Commissioner in 2012. He then made a further information privacy request in 2015 and complained to the Privacy Commissioner in 2016 about concerns arising from that request.

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<sup>1</sup> [This decision is to be cited as *Willing v New Zealand Police (Strike-Out Application)* [2020] NZHRRT 17]

[2] On 30 March 2017, Mr Willing filed a claim in this Tribunal seeking compensation for interferences with his privacy. The Police filed a statement of reply on 7 July 2017, but noted the claim was difficult to respond to. It was agreed at the case management teleconference on 8 November 2018 that Mr Willing would amend his claim.

[3] On 24 January 2019 Mr Willing submitted his second statement of claim (the second statement of claim). Notwithstanding the amendments, the Police filed on 25 February 2019 an interlocutory application seeking a partial strike out of the claim.

## **JURISDICTION TO STRIKE OUT**

[4] The Tribunal's jurisdiction to strike out proceedings is explicitly provided for in s 115A 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.

[5] The jurisdiction to strike out must be used sparingly and if a defect in a claim can be cured, an amendment of the statement of claim is preferred to striking out the claim. See the Tribunal's previous discussions on this point in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [30] and [31].

[6] Sections 82 and 83 of the Privacy Act 1993 limit proceedings in this Tribunal to matters where there has been an investigation by the Privacy Commissioner into the alleged interference with privacy.

[7] The Tribunal has canvassed in previous decisions 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 para [25], the Tribunal noted the statutory requirements related to an investigation by the Privacy Commissioner:

[25] We do not intend to recite the statutory provisions at length. For present purposes a summary of those provisions is sufficient:

[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.

## **THE APPLICATION TO STRIKE OUT**

**[8]** The Police submit that the Privacy Commissioner has not investigated all the allegations raised by Mr Willing in his second statement of claim. Accordingly, the Police say the Tribunal has no jurisdiction over those parts of Mr Willing's claim.

**[9]** If Mr Willing's claim contains allegations that were not investigated by the Privacy Commissioner, then those matters are not within the Tribunal's jurisdiction and must be struck out.

**[10]** Mr Willing's complaint made in 2012 resulted in a Privacy Commissioner investigation. The Certificate of Investigation issued on 31 March 2015 stated the matters investigated were:

**[10.1]** The delay of almost twelve months by the Police in responding to Mr Willing's Privacy Act request dated 10 November 2011 under IPP 6; and

**[10.2]** The collection of information by the Police from individuals not named by Mr Willing as referees as part of Mr Willing's recruitment application to the Police, which was investigated under IPP 2.

**[11]** The Privacy Commissioner found there was no breach of IPP 2 in relation to the collection of information but there was a breach of IPP 6 in relation to Mr Willing's access to his personal information. This was determined to be an interference with privacy.

**[12]** Mr Willing then made a further complaint to the Privacy Commissioner in 2016. The Privacy Commissioner issued a Certificate of Investigation dated 1 November 2016 which records that the Privacy Commissioner investigated under IPP 6:

Whether the Police responded appropriately to Mr Willing's 22 November 2015 request for information and correction.

**[13]** The Privacy Commissioner determined that the Police's initial response to the information privacy request was not adequate, however it was accepted additional information was provided and the requested corrections were made. The Privacy Commissioner concluded there was no interference under IPP 5 but there was an interference with Mr Willing's privacy under IPP 6 regarding access to Mr Willing's personal information, and IPP 7 in respect of the correction of personal information.

### **SHOULD SOME OF MR WILLING'S CLAIM BE STRUCK OUT?**

**[14]** The Police submit that certain paragraphs from Mr Willing's second statement of claim should be struck out. Those paragraphs are set out as headings below. Whether or not they should be struck out is assessed with regard to what constitutes an investigation by the Privacy Commissioner and what was actually investigated by the Privacy Commissioner.

#### **Paragraph 33**

**[15]** Paragraph 33 refers to the gathering of information about Mr Willing from someone other than Mr Willing himself. This was investigated by the Privacy Commissioner as an IPP 2 issue (relating to the collection of information from the individual concerned), not an IPP 4 issue (which addresses collection of personal information by unlawful, unreasonable or unfair means).

[16] Therefore, while Mr Willing has listed this in his second statement of claim as being an IPP 4 issue, this allegation has already been investigated by the Privacy Commissioner under IPP 2. Accordingly, it is within this Tribunal's jurisdiction on that basis. Whether the Tribunal determines it will inquire into this as a breach of IPP 2 or IPP 4 will be determined by the Tribunal at the substantive hearing once all the evidence is in, therefore paragraph 33 will not be struck out.

### **Paragraph 32 and paragraphs 34 to 40**

[17] These paragraphs relate entirely to recruitment and human resources matters. None of these matters were part of the Privacy Commissioner's investigation, accordingly these paragraphs are all struck out.

### **Paragraphs 46 to 47**

[18] Paragraphs 46 and 47(a) set out Mr Willing's concern that his recruitment profile was altered and backdated. Mr Willing states this matter was raised with the Privacy Commissioner, but he has presented no evidence that it was actually investigated by the Privacy Commissioner. The Police submit there has been no investigation of these allegations by the Privacy Commissioner. As this concern was not investigated under either complaint, paragraphs 46 and 47(a) must be struck out.

[19] Paragraph 47(b) relates to credit checks conducted after Mr Willing's Police recruit application was declined. This was investigated in the 2012 complaint. Paragraph 47(b) therefore remains part of the claim.

### **Paragraph 48**

[20] Paragraph 48 alleges references were lost by the Police and that other references were misconstrued. The Police submit that while concerns about emails with referees were investigated by the Privacy Commissioner, concerns about lost or misconstrued references were not investigated. There is no reference in the Privacy Commissioner findings or Certificate of Investigation to the loss of references, nor is there any reference to the recruitment concerns expressed in the latter part of this paragraph. Accordingly, paragraph 48 is struck out.

### **Paragraph 49**

[21] Paragraph 49 expresses Mr Willing's concern that he was provided with someone else's typing proficiency certificate. The Police accept this was part of the 2012 complaint but note there was no investigation in relation to the wrong typing speed and date. The investigation was only into the fact it was provided at all.

[22] The Police have accepted that Mr Willing being provided with the wrong typing proficiency certificate was investigated by the Privacy Commissioner. Accordingly, this action was investigated by the Privacy Commissioner and paragraph 49 remains in the claim.

### **Paragraph 50**

[23] Paragraph 50 claims that a letter Mr Willing provided to the Police and a recording of a meeting he had with Mr Van Hofwegen were not stored reasonably securely.

[24] The Police submit that this was not investigated. Mr Willing acknowledged this was not raised in the Privacy Commissioner investigation, although he notes it was raised in the Independent Police Conduct Authority (IPCA) investigation. As this concern was not investigated by the Privacy Commissioner, it is not within jurisdiction and paragraph 50 must be struck out.

### **Paragraph 52**

[25] Paragraph 52 alleges that someone within the Police opened a sealed envelope. The Police submit this was not investigated by the Privacy Commissioner. Mr Willing states that the issue had been raised with the Privacy Commissioner and that it was evident in the supporting documents he filed. Notwithstanding this, there is no evidence the allegation was investigated by the Privacy Commissioner. Paragraph 52 is to be struck out.

### **Paragraphs 55 to 56**

[26] Paragraphs 55 and 56 express Mr Willing's concern that the Police did not record his meetings with Mr Van Ooyen and Mr Van Hofwegen. The Police state that this was not investigated, and the information privacy principles do not require an agency to proactively collect information.

[27] Mr Willing has pointed to no evidence that these matters were investigated by the Privacy Commissioner. Accordingly, paragraphs 55 and 56 must be struck out.

### **Paragraphs 61 to 65**

[28] Paragraphs 61 to 65 are detailed assertions by Mr Willing of actions of the Police which he says were unfair and unreasonable. The Police submit the Privacy Commissioner did not investigate these claims. Mr Willing has explained these matters were raised with the Privacy Commissioner. However, there is no evidence they were investigated, accordingly, paragraphs 61 to 65 must be struck out.

### **Paragraph 66**

[29] Paragraph 66 claims the Police were involved in attempts to "mislead or conceal accurate information" from the IPCA and from the Privacy Commissioner. The Police submit this claim must be struck out as the IPCA is not under the jurisdiction of the Tribunal.

[30] The Tribunal does not investigate matters relating to the IPCA, so that aspect of paragraph 66 must be struck out. The remainder of paragraph 66 repeats earlier claims. Paragraph 66 is therefore to be struck out in its entirety.

### **Damages**

[31] The Police submit Mr Willing's damages claim should be revised as he is claiming damages related to income as a Police Officer, but the alleged interferences with his privacy were after the 2011 decision to decline his admission as a police recruit.

[32] In response, Mr Willing stated he was entitled to compensation but will leave it for the Tribunal to determine the amount, as his focus is not on financial compensation.

[33] The Tribunal cannot determine the success or otherwise of a damages claim without hearing the substantive matter. However, Mr Willing may wish to seek legal advice on the most appropriate type and amount of damages to claim in the Tribunal.

#### **ADJOURNMENT REQUEST BY MR WILLING**

[34] Mr Willing requested an adjournment of this proceeding to obtain further information from the Privacy Commissioner and/or request a further investigation if parts of his claim were found to have not been investigated. The Police oppose this request.

[35] The Tribunal will not adjourn these proceedings to allow further discussion, further complaint or further investigation by Mr Willing through the Privacy Commissioner. Mr Willing has made two complaints to the Privacy Commissioner. This proceeding relates only to those complaints. The claim has already been drafted wider than the jurisdiction of this Tribunal and it is now being reduced. Mr Willing has had ample time to take any necessary steps he wished to take prior to this claim being heard.

#### **COSTS**

[36] Costs reserved.

#### **ORDERS**

[37] It is ordered that the following paragraphs of the second statement of claim received on 24 January 2019 be struck out: paragraphs 32,34-40, 46, 47(a), 48, 50, 52, 55, 56, 61-65 and 66.

[38] A case management conference is to be convened by the Secretary at the earliest available opportunity.

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**Ms SJ Eyre**  
**Deputy Chairperson**

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**Ms DL Hart**  
**Member**

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**Ms ST Scott QSM**  
**Member**