IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 43**

I TE TARAIPIUNARA MANA TANGATA

Reference No. HRRT 039/2020

UNDER **THE PRIVACY ACT 1993**

IN THE MATTER OF INTENDED PROCEEDINGS BY **AHMED ALKAZAZ**

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:
Mr A Alkazaz in person
The intended defendant was not heard

DATE OF DECISION: 23 October 2020

DECISION OF TRIBUNAL THAT INTENDED STATEMENT OF CLAIM NOT BE ACCEPTED FOR FILING[1]

Introduction

[1] Mr Alkazaz has asked the Chairperson of the Tribunal to review a decision by the Secretary to reject proceedings which Mr Alkazaz wishes to file under the Privacy Act 1993. He is currently living abroad and all communications with him have necessarily been by email.

Background

[2] By three emails dated Monday 5 October 2020 Mr Alkazaz presented for filing in the office of the Tribunal an informal document styled as "Statement of Claim" together with assorted supporting documentation.

[1] [This decision is to be cited as: *Re Alkazaz (Rejection of Statement of Claim)* [2020] NZHRRT 43.]

[3] The three intended defendants were named as Deloitte Limited (Deloitte), Asparona Limited (Asparona) and DeloitteAsparona Limited (DeloitteAsparona).

[4] Included with the supporting documentation were:

[4.1] A Certificate of Investigation dated 30 May 2019 issued by the Privacy Commissioner. This document records that on 6 July 2018 Mr Alkazaz addressed an IPP 6 request to Deloitte. On a complaint by Mr Alkazaz that not all his personal information had been provided in response to that request, the Commissioner found Deloitte had in fact provided the readily retrievable information it held and which was within the scope of the request. The Commissioner further found that Deloitte had a proper basis for declining to provide further information on the basis that that information was not readily retrievable in terms of the Privacy Act, s 29(2)(a) and (b) which provide:

> (2) An agency may refuse a request made pursuant to principle 6 if—
> (a) the information requested is not readily retrievable; or
> (b) the information requested does not exist or cannot be found; or
> (c) …

[4.2] Documentation which shows that Mr Alkazaz is presently in an employment dispute with Deloitte, Asparona and DeloitteAsparona. There is a memorandum dated 10 July 2020 filed in the Employment Court by counsel for those three defendants addressing their disclosure obligations in those proceedings and explaining why certain documents could not be retrieved without significant expense and difficulty:

> 13. As explained in our Memorandum dated 25 September 2019, the Defendants have had great difficulty and have incurred significant expense accessing pre-November 2016 documents to conduct disclosure for this matter to date.
>
> 14. This is because pre-November 2016 documents are stored on physical tapes offsite and these tapes require a complex restoration process before the files can be searched and reviewed. We understand that the cost to the Defendants in undertaking this exercise again for Category (e) are estimated to be in excess of $5,000 per month of data. This is because the process requires recovering the entire firm's email data for the relevant period (it is not stored according to individual email accounts). This cost is only in relation to the external third party required to conduct part of the process, it does not include the cost of internal time required to review and disclose any documents (if they exist). Counsel refers to the affidavit of Ms Selena Skilton, sworn on 25 September 2019 that sets out this process in greater detail.

The Secretary's first email

[5] By email dated 6 October 2020 timed at 10:55am the Secretary advised Mr Alkazaz his statement of claim could not be accepted for filing. Four grounds were given. First, the Tribunal required a statement of claim to be in the form provided on the Tribunal's webpage. Second, the Tribunal had jurisdiction only in relation to the person or entity investigated by the Privacy Commissioner. As the Certificate of Investigation referred only to Deloitte it followed it was not possible for a Privacy Act claim to be brought against Asparona and DeloitteAsparona. Third, the Tribunal had jurisdiction only in relation to the matters investigated by the Privacy Commissioner and it was clear from the documentation submitted by Mr Alkazaz that his complaint was focused elsewhere and related to other matters. Finally, it was not possible for Mr Alkazaz to complain of an alleged failure to provide personal information relating to a third party who had not made the original request for information, had not complained to the Privacy Commissioner and who had not filed proceedings in the Tribunal.

The Secretary's second email

[6] By email dated 6 October 2020 timed at 12:10pm Mr Alkazaz accepted the only defendant could be Deloitte and asked that the Secretary disregard the Certificate of Investigation "as it might not be relevant in light of the change of circumstances [which] followed the issuance of this certificate".

[7] By email dated 6 October 2020 timed at 2:24pm the Secretary addressed the request that the Certificate be disregarded. She stressed that the Tribunal had jurisdiction only in relation to the matters investigated by the Privacy Commissioner and that it is not possible for a plaintiff to make a claim under the Privacy Act where there has been no investigation into that claim by the Commissioner and no certificate of investigation issued.

The second statement of claim

[8] By email dated 7 October 2020 timed at 10:02am Mr Alkazaz submitted a further statement of claim and attachments. The sole intended defendant was shown as Deloitte.

[9] His complaint as now articulated in this document is that the information requested in July 2018, while not then readily retrievable, had in 2020 been retrieved in the course of the disclosure process in the Employment Court. Mr Alkazaz had complained once again to the Privacy Commissioner who had declined to investigate. It is that refusal which is now challenged, not the Commissioner's original decision of 30 May 2019 which found a justified refusal under s 29(2)(a) and (b) and no breach.

The Secretary's third email

[10] By email dated 9 October 2020 timed at 4:54pm the Secretary once again advised Mr Alkazaz his documents could not be accepted for filing. It was pointed out that as explained by him, the intended proceedings are based on events in 2020, not on the 6 July 2018 request. Those 2020 events have not been the subject of an investigation by the Privacy Commissioner. Consequently the Tribunal does not have jurisdiction over the new claim. The Secretary further pointed out that the misconceived nature of the claim by Mr Alkazaz is illustrated by the fact that he is seeking damages in relation to matters which are well outside the jurisdiction conferred on the Tribunal by the Privacy Act (loss of privacy in relation to a person named Nancy Nasef and "damages with the entire Egyptian community in New Zealand"). The email from the Secretary read:

> Your email dated 7 October 2020 timed at 10:02am refers.
>
> The new documents presented by you cannot be accepted for filing. Reasons follow.
>
> 1. At para 5 of the intended statement of claim you state that documents held by Deloitte which were not readily retrievable when requested in 2018 were retrieved by 13 August 2020 in the context of discovery orders made by the Employment Court. You refer to a memorandum dated 10 July 2020 filed in those proceedings by Ms J Hardacre, the lawyer for Deloitte in which she sets out the substantial difficulty and significant expense Deloitte encountered in accessing pre-November 2016 documents because those documents had been stored on physical tapes offsite and required a complex restoration process before the files could be searched and reviewed. In the statement of claim you say that on or after 13 August 2020 you made another attempt to request your personal information from the documents which had then become available. But as was made clear at para 3 in my email dated 6 October 2020 timed at 1:55am and my subsequent email dated 6 October 2020 timed at 2:24pm, the Tribunal has jurisdiction only in relation to the matters investigated by the Privacy Commissioner. As the 2020 request now relied on by you was made two years after the request of 6 July 2018 (being the request

investigated by the Commissioner), the Tribunal does not have jurisdiction over the claim or to make the order sought by you at Part 5, para 3 of the claim.

2. The misconceived nature of your claim is further illustrated by the orders sought by you in Part 5, paras 1 and 2 of the intended statement of claim:

    - First, you seek damages of $20,000 for interference with your privacy "in relation to [redacted] and causing me damages with the entire Egyptian community in New Zealand".
    - Second, you seek an additional $30,000 for the humiliation, loss of dignity and injury to feelings suffered as a result of that alleged interference with your privacy.

    These two claims for damages cannot be advanced in the context of an alleged refusal to provide personal information and in any event the claims have not been investigated by the Privacy Commissioner.

3. The position remains that as none of the matters complained of in the intended statement of claim have been investigated by the Privacy Commissioner, the Tribunal has no jurisdiction and the papers attached to your email dated 7 October 2020 cannot be accepted for filing.

4. As it is not acceptable for you to repetitively present for filing claims over which the Tribunal does not have jurisdiction, it is strongly recommended that you obtain legal advice before taking further steps.

The response by Mr Alkazaz to the Secretary's email dated 9 October 2020

[11] By email dated 13 October 2020 timed at 9:01am Mr Alkazaz confirmed:

[11.1] His case is that because documents which were not readily retrievable in 2018 had in 2020 been retrieved during the disclosure process in the Employment Court, he had a proper basis to complain about the withholding of the information:

> … I accordingly wish for my Statement of Claim to be referred to the Chairperson as I've repeatedly requested from the Privacy Commission to re-investigate my claim this year in light of the fact that the documents didn't exist in the past but do exist now but they refused to investigate my claim nonetheless in 2020 … I accordingly seek the tribunal to its discretion to allow make this complaint and to consider my claim putting the certificate of 2018 into perspective and accounting for the new event of those documents becoming retrievable by the time I made by personal information privacy request this year, while the Privacy Commission refuses to investigate the matter.

[11.2] The Privacy Commissioner had refused to investigate the claim by Mr Alkazaz that he had in 2020 been wrongly refused access to his personal information.

[12] There are two obstacles which Mr Alkazaz cannot overcome. First, the Tribunal's jurisdiction is governed by statute and unless and until a matter is investigated by the Privacy Commissioner, jurisdiction does not exist. Second, s 29(2)(a) and (b) make it clear that a request for access to personal information may be refused where the information is not readily retrievable or does not exist or cannot be found. The fact that some years later, in the context of formal court proceedings and after the expenditure of considerable time and cost, the information is in fact retrieved does not undermine the earlier determination by the Commissioner that information had been properly withheld under s 29(2)(a) and (b) on the grounds that the information was not "readily retrievable" or did not exist or could not be found.

[13] Mr Alkazaz has cited *Re Stryder (Rejection of Statement of Claim)* [2019] NZHRRT 34. However, that decision simply reinforces the points made by the Secretary and the decision to reject the statement of claim. The jurisdiction point is explained in the following terms:

> **THE JURISDICTION ISSUE**
>
> **The investigation of complaints by the Privacy Commissioner**
>
> **[14]** The Tribunal's jurisdiction is governed by statute.
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> **[15]** As explained in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* [2014] NZHRRT 1, (2014) 10 HRNZ 279 at [19], the purpose of Part 8 of the Privacy Act is to ensure that in the first instance a complaint about an interference with the privacy of an individual must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by s 82 only where an investigation has been conducted under Part 8 or where conciliation (under s 74) has not resulted in settlement. For the complaint resolution process to work a person in respect of whom a complaint is made and an investigation conducted must know he or she is under investigation and must also know what is the subject of the investigation so an effective response can be made. This imperative is explicitly recognised by the Privacy Act. The complaints process mandated by it in ss 67, 70 and 73 is designed to ensure the person under investigation and the matter under investigation by the Privacy Commissioner are clearly identified.
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> **[16]** The statutory stipulations governing the investigative process under Part 8 are reflected in the provisions (ss 82 and 83) which govern access to the Tribunal:
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> > **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) ...
> >
> > **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.
>
> **[17]** The effect of s 82 of the Privacy Act is that an aggrieved individual who wishes to bring proceedings before the Tribunal must establish that the defendant is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the privacy of that individual. Similarly, before an aggrieved individual can bring proceedings before the Tribunal under s 83 the "complaint" must first have been considered by the Privacy Commissioner as a complaint.

CONCLUSION

[14] Mr Alkazaz has shown no grounds on which he could challenge (and does not in fact challenge) the ruling of the Privacy Commissioner as summarised in the Certificate of Investigation dated 30 May 2019. His complaint is that the Commissioner has declined to investigate a subsequent complaint relating to 2020. However, the Tribunal does not have jurisdiction or power to direct the Commissioner to carry out an investigation.

[15] As the Tribunal has no jurisdiction over the complaint made by Mr Alkazaz it follows the statement of claim presented for filing on 7 October 2020 cannot be accepted.

[16] I accordingly conclude the Secretary acted correctly in rejecting the intended statement of claim. That decision is upheld.

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Mr RPG Haines ONZM QC
Chairperson