

Reference No. HRRT 014/2021

UNDER THE PRIVACY ACT 2020

IN THE MATTER OF  
INTENDED PROCEEDINGS BY MICHAEL JOHN JONES

AT WELLINGTON

BEFORE:  
Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:  
Mr MJ Jones in person  
The intended defendant was not heard

DATE OF DECISION: 14 April 2021

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**DECISION OF TRIBUNAL THAT INTENDED STATEMENT OF CLAIM  
NOT BE ACCEPTED FOR FILING<sup>1</sup>**

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**BACKGROUND**

[1] On Friday 12 March 2021 Mr Jones presented for filing in the office of the Tribunal a statement of claim under the Privacy Act 2020, s 98.

[2] At Step 3, p 5 of the document he ticked the box which reads:

The Privacy Commissioner has decided, under section 77(2)(a) of the Privacy Act 2020, not to investigate the complaint.

[3] As no supporting documentation was filed to support this assertion and as there was a consequential need for Mr Jones to establish jurisdiction for the Tribunal to accept his intended proceedings, the Secretary by email dated 15 March 2021 asked Mr Jones to provide a copy of:

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<sup>1</sup> [This decision is to be cited as: *Re Jones (Rejection of Statement of Claim)* [2021] NZHRRT 19.]

**[3.1]** Any notice of decision given by the Privacy Commissioner under s 77(2)(a) and (3) of the Act,

**[3.2]** Any certificate of investigation.

**[3.3]** Any letter from the Commissioner giving reasons for refusing “to issue a section 98 Notice” as alleged by Mr Jones at Step 4, para 1 of the intended statement of claim.

**[4]** Mr Jones has subsequently provided emails from the Privacy Commissioner which establish:

**[4.1]** The Commissioner made a decision not to investigate the complaint made by Mr Jones. Such decision is permitted by s 74 of the Act.

**[4.2]** No action was taken by the Commissioner under s 77 of the Act.

**[5]** By email dated 23 March 2021 the Secretary advised Mr Jones that in view of this information the Tribunal had no jurisdiction to accept the intended proceedings:

Dear Mr Jones

Your email dated 18 March 2021 and attachments have been carefully considered.

As there is no decision by the Privacy Commissioner under the Privacy Act 2020, s 77(2)(a) not to investigate your complaint, the Tribunal has no jurisdiction and your statement of claim cannot be accepted for filing.

If you wish to challenge this ruling you may request the Tribunal to do so. The matter will be dealt with by the Chairperson or a Deputy Chairperson who will determine the proceedings on the papers unless you are able to show proper grounds that the procedure should be otherwise.

Any request must be filed promptly and no later than 10 working days after the date of this email.

You will also need to show proper grounds why, in your submission, the Tribunal does have jurisdiction over your intended proceedings.

Yours sincerely

**[6]** Although Mr Jones has not challenged this decision within the stipulated ten working days a formal ruling on jurisdiction is justified as the issue is of wider interest.

## **THE JURISDICTION ISSUE**

### **The statutory provisions**

**[7]** The aim of Part 5 of the Privacy Act 2020 is to ensure that in the first instance a complaint about an interference with the privacy of an individual must be made to and considered by the Privacy Commissioner. See ss 70 and 73. Section 73 requires that as soon as practicable after receiving a complaint, the Commissioner must consider the complaint and decide what, if any, action will be taken in respect of the complaint:

#### **73 Procedure on receipt of complaint**

- (1) As soon as practicable after receiving a complaint, the Commissioner must consider the complaint and—
  - (a) decide, in accordance with section 74, not to investigate the complaint; or
  - (b) decide, in accordance with section 75, to refer the complaint to another person; or

- (c) decide, in accordance with section 76, to refer the complaint, or part of the complaint, to an overseas privacy enforcement authority; or
  - (d) decide, in accordance with section 77, to explore the possibility of securing a settlement between the complainant and the agency whose action is the subject of the complaint; or
  - (e) decide to investigate the complaint in accordance with subpart 2.
- (2) As soon as practicable after making a decision under subsection (1), the Commissioner must—
- (a) advise the complainant of that decision; and
  - (b) advise the complainant of the reasons for the decision, if the decision is made under subsection (1)(a).

**[8]** It is clear from s 74 that in deciding not to investigate a complaint the Commissioner has a discretion. The Tribunal does not have jurisdiction to review the exercise of that discretion. Section 74 provides:

**74 Commissioner may decide not to investigate complaint**

- (1) The Commissioner may decide not to investigate a complaint if, in the Commissioner's opinion,—
- (a) the complainant has not made reasonable efforts to resolve the complaint directly with the agency concerned; or
  - (b) there is an alternative dispute resolution process available to resolve the complaint because of the agency's membership of a particular profession or industry; or
  - (c) there is an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the complainant to pursue; or
  - (d) the complaint relates to a matter in respect of which a code of practice has been issued that includes a complaints procedure, and the complainant has not taken reasonable steps to pursue, or fully pursue, the redress available under that procedure; or
  - (e) the aggrieved individual or aggrieved individuals knew about the action that is the subject of the complaint for 12 months or more before the complaint was made; or
  - (f) the time that has elapsed between the date on which the subject of the complaint arose and the date on which the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
  - (g) the aggrieved individual or aggrieved individuals do not want the complaint pursued; or
  - (h) the complainant does not have a sufficient personal interest in the subject of the complaint; or
  - (i) the subject of the complaint is trivial; or
  - (j) the complaint is frivolous, vexatious, or not made in good faith.
- (2) Despite anything in subsection (1), the Commissioner may, in the Commissioner's discretion, decide not to investigate a complaint if it appears to the Commissioner that, having regard to all the circumstances of the case, an investigation is unnecessary.

**[9]** The Commissioner also has a discretion whether to explore the possibility of settlement and assurance without investigating the complaint. If the Commissioner decides to use best endeavours to secure a settlement of the complaint (or to secure a satisfactory assurance from the agency), the Commissioner can thereafter decide either not to investigate the complaint or to carry out an investigation. See s 77:

**77 Exploring possibility of settlement and assurance without investigating complaint**

- (1) At any time after receiving a complaint and without commencing an investigation, the Commissioner may decide to use best endeavours to—
- (a) secure a settlement of the complaint; and
  - (b) if appropriate, secure a satisfactory assurance from the agency whose action is the subject of the complaint that there will not be a repetition of the action that gave rise to the complaint, or of any similar kind of action.
- (2) If the Commissioner is unable to secure a settlement or a satisfactory assurance, the Commissioner may—
- (a) decide not to investigate the complaint if the Commissioner—
    - (i) is satisfied of any of the matters set out in section 74; or
    - (ii) considers that any further action is unnecessary or inappropriate; or

- (b) decide to investigate the complaint under subpart 2.
- (3) As soon as practicable after making a decision under subsection (2), the Commissioner must notify the complainant of the decision.

**[10]** Each of the mentioned statutory provisions contextualises the circumstances in which the Act permits an aggrieved individual to commence proceedings in the Tribunal. Those circumstances are set out in s 98(1)(a) to (i):

**98 Aggrieved individuals may commence proceedings in Tribunal**

- (1) An aggrieved individual, a representative on behalf of an aggrieved individual, or a representative lawfully acting on behalf of a class of aggrieved individuals may commence proceedings in the Tribunal in respect of a complaint received by the Commissioner, or a matter investigated under subpart 2, in any case where—
  - (a) the Commissioner decides, under section 77(2)(a), not to investigate the complaint; or
  - (b) the Commissioner, having commenced an investigation, decides not to further investigate the complaint or matter; or
  - (c) the Commissioner does not make a determination under section 91(2), 93(2), or 94(1) in respect of the complaint or matter; or
  - (d) the Commissioner determines that the complaint does not have substance, or that the matter should not be proceeded with; or
  - (e) the Commissioner determines that the complaint has substance, or the matter should be proceeded with, but does not refer the complaint or matter to the Director; or
  - (f) the Commissioner makes an access direction under section 92, but an aggrieved individual is not satisfied with the terms of the access direction; or
  - (g) the Commissioner makes an access direction under section 92, but the aggrieved individual or aggrieved individuals seek 1 or more remedies under section 102 (whether or not the individual or individuals are satisfied with the terms of the access direction); or
  - (h) the Director decides not to commence proceedings in respect of the complaint or matter referred to the Director by the Commissioner; or
  - (i) the Director notifies the aggrieved individual or individuals that the Director agrees to the aggrieved individual or individuals commencing proceedings in respect of the complaint or matter referred to the Director by the Commissioner.

**[11]** Subsections (2) to (8) address the six month statutory limitation period but those provisions are not relevant in the present context and are not reproduced here.

**Application of the statutory provisions to the facts**

**[12]** Applying the statutory provisions to the facts of the present case Mr Jones, by relying on s 77(2)(a), is required by s 98(1)(a) to establish that the Commissioner has made a decision under s 77(2)(a) not to investigate the complaint:

**98 Aggrieved individuals may commence proceedings in Tribunal**

- (1) An aggrieved individual, ... may commence proceedings in the Tribunal in respect of a complaint received by the Commissioner, ... in any case where—
  - (a) the Commissioner decides, under section 77(2)(a), not to investigate the complaint;

**[13]** As to this the emails from the Office of the Privacy Commissioner clearly establish the Commissioner made a decision under s 74 not to investigate the complaint made by Mr Jones. The Commissioner equally did not explore under s 77 the possibility of settlement and assurance and accordingly made no decision under s 77(2) not to investigate the complaint.

**[14]** In simple terms, a decision by the Commissioner under s 74 not to investigate a complaint does not on its own provide a platform for an aggrieved individual to commence proceedings in the Tribunal under s 98(1), particularly under s 98(1)(a). A decision under s 74 not to investigate is not listed anywhere in s 98 as a circumstance permitting an

aggrieved individual to commence proceedings. Proceedings under s 98(1)(a) are only possible where the Commissioner first decides to use best endeavours to secure a settlement of the complaint and second, following failure to secure such settlement, the Commissioner further decides not to investigate the complaint. In short, if the Commissioner decides under s 74 not to investigate a complaint and also decides not to use best endeavours under s 77, there can be no relevant decision under s 77(2)(a) on which an aggrieved individual can base proceedings under s 98(1)(a).

**[15]** On the facts none of the other circumstances listed in s 98(1) have been shown to have application.

### **CONCLUSION**

**[16]** As the Tribunal has no jurisdiction over the complaint made by Mr Jones it follows the statement of claim presented for filing on 12 March 2021 cannot be accepted.

**[17]** The Secretary acted correctly in rejecting the intended statement of claim.

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**Mr RPG Haines ONZM QC**  
**Chairperson**