IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 18**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 023/2020
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**SIMON ROBERT VON TUNZELMAN**
	PLAINTIFF
AND	**SOUTHLAND REGIONAL DEVELOPMENT AGENCY LIMITED**
	FIRST DEFENDANT
AND	**TRACEY WAYTE LIMITED**
	SECOND DEFENDANT

AT WELLINGTON

BEFORE:
Ms SJ Eyre, Deputy Chairperson
Dr SJ Hickey MNZM, Member
Ms S Stewart, Member

REPRESENTATION:
Mr SR Von Tunzelman representing himself
Mr A Hitchcock and Ms J Hayes for the first defendant
Ms BR Webster for the second defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **16 May 2022**

DECISION OF TRIBUNAL ON STRIKE-OUT APPLICATIONS[1]

[1] [This decision is to be cited as *Von Tunzelman v Southland Regional Development Agency Ltd (Strike-Out Applications)* [2022] NZHRRT 18.]

BACKGROUND

[1] Mr Von Tunzelman applied in July 2019 for a position advertised by recruitment agency Tracey Wayte Limited trading as HR South (HR South). The position was Tourism and Trades Co-Ordinator for the Southland Regional Development Agency Ltd, trading as Great South (Great South). Mr Von Tunzelman's application was unsuccessful.

[2] After his unsuccessful application, Mr Von Tunzelman made information privacy requests to Great South and HR South in August and September 2019 respectively. Those requests were responded to, but Mr Von Tunzelman alleges that the timing and nature of the responses was in breach of the Privacy Act 1993 (the Privacy Act) and therefore an interference with his privacy.

[3] On 16 July 2020 Mr Von Tunzelman filed this claim against Great South and HR South alleging an interference with his privacy through breaches of Information Privacy Principles (IPPs) 5, 6, 7 and 8 of the Privacy Act.

[4] Great South and HR South dispute that there has been any interference with Mr Von Tunzelman's privacy.

THE STRIKE-OUT APPLICATIONS

[5] On 23 September 2020 HR South filed an application to strike out Mr Von Tunzelman's claim on the basis that:

> **[5.1]** The Tribunal has no jurisdiction to hear the claim relating to alleged breaches of IPPs 5, 7 and 8; and
>
> **[5.2]** Mr Von Tunzelman's claim that there has been a breach of IPP 6 discloses no reasonably arguable cause of action and is trivial, frivolous and/or vexatious.

[6] On 24 September 2020 Great South also filed an application to strike out Mr Von Tunzelman's claim. This application was filed on the grounds that:

> **[6.1]** The Tribunal does not have jurisdiction to make an order in regard to IPPs 5, 7 and 8 as those IPPs were not investigated by the Privacy Commissioner;
>
> **[6.2]** The statement of claim is, amongst other things, unintelligible, makes unsubstantiated claims and does not establish an arguable case;
>
> **[6.3]** The proceedings are frivolous, vexatious or an abuse of process; and
>
> **[6.4]** The proceedings have not been brought in good faith and are a misuse of the Tribunal's processes.

[7] The strike-out applications rely on s 115A of the Human Rights Act 1993, which states:

> **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.

(2) If a party is neither present nor represented at the hearing of a proceeding, the Tribunal may —
(a) if the party is required to be present, strike out the proceeding; or
(b) determine the proceeding in the absence of the party; or
(c) adjourn the hearing.

[8] The key principles the Tribunal must have regard to in considering applications to strike out are well established in case law, including most recently in *Lavender v Attorney-General (Strike-Out Application)* [2021] NZHRRT 52 *(Lavender)* at [7] to [10] and *Kropelnicki v Wellington City Council (Strike-Out)* [2021] NZHRRT 30 (*Kropelnicki*) at [25] to [34].

[9] The Tribunal's jurisdiction to strike out was also considered by the High Court in *Williams v New Zealand Police* [2021] 2 NZLR 292 (*Williams*) at [71] to [76]. While *Williams* is currently under appeal to the Court of Appeal, it remains a useful current summary of the principles applicable to the strike-out jurisdiction of this Tribunal.

[10] The key principles from *Lavender, Kropelnicki* and *Williams* can be summarised as follows:

[10.1] The pleaded facts are assumed to be true;

[10.2] A cause of action must be clearly untenable to be struck out;

[10.3] The jurisdiction to strike out is to be used sparingly and if there is a way in which a defect in a claim or proceeding can be cured, that is preferable;

[10.4] The jurisdiction to strike out is not excluded by the need to decide a difficult question of law;

[10.5] The Tribunal should be particularly slow to strike out a claim in any developing area of law; and

[10.6] The fundamental constitutional importance of the right of access to courts and tribunals must be recognised but must be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or an abuse of process.

JURISDICTION

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

[12] The relevant parts of ss 82 and 83 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.

[13] 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] to [26] for a further discussion of this issue.

[14] 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) (NKR)* [2014] NZHRRT 1 at [25], the Tribunal summarised those requirements:

> **[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.

[15] After Mr Von Tunzelman filed his claim, the Privacy Act was repealed and replaced by the Privacy Act 2020 on 1 December 2020. However this claim was filed under the Privacy Act 1993. The transitional provisions in Privacy Act 2020 Schedule 1, Part 1, clause 9(1) provide that these proceedings must be continued and completed under the 2020 Act, but that does not alter the relevant legal rights and obligations in force at the time that actions subject to this claim were taken. Accordingly, all references in this decision are to the Privacy Act 1993 and the Tribunal's jurisdiction (or not) to determine claims in respect of IPPs 5, 7 and 8 are determined under the Privacy Act 1993.

THE SCOPE OF THE PRIVACY COMMISSIONER'S INVESTIGATION

[16] Great South and HR South submit the Privacy Commissioner only notified them of concerns relating to IPP 6 and did not refer at all to complaints relating to IPPs 5, 7 or 8.

[17] Mr Von Tunzelman submits that parts of his complaint which could have given rise to IPPs 5, 7 and 8 were referenced in his communications with the Privacy Commissioner, but that he had no influence on which IPPs the Privacy Commissioner decided to notify to Great South and HR South and subsequently investigate.

[18] The evidence available to the Tribunal regarding the scope of the Privacy Commissioner's investigation included:

[18.1] The notification letter dated 31 January 2020, sent to Great South, which states:

[18.1.1] The Privacy Commissioner was investigating a complaint from Mr Von Tunzelman;

[18.1.2] The complaint raises issues under IPP 6 and ss 27 to 29 of the Privacy Act 1993, which relate to possible withholding grounds.

[18.2] The letter sent to Mr Von Tunzelman dated 31 January 2020 confirming the details of his complaint and advising him that the complaint raised issues under IPP 6, specifically in relation to the withholding grounds in ss 27 to 29 of the Privacy Act 1993.

[18.3] The Privacy Commissioner's preliminary ruling in respect of HR South dated 17 March 2020 which stated:

[18.3.1] This complaint raised issues under IPP 6 of the Privacy Act 1993.

[18.3.2] HR South has not established a proper basis for withholding information from Mr Von Tunzelman under s 29(1)(b) of the Privacy Act 1993.

[18.3.3] A recommendation that HR South release the emails between Tracey Wayte and Bobbi Brown and the shortlist table, along with an explanation about the candidate scores.

[18.4] The Privacy Commissioner's final ruling in respect of HR South dated 19 March 2020 which states:

[18.4.1] The complaint raised issues under IPP 6 which entitle an individual to access personal information about them;

[18.4.2] Great South had provided Mr Von Tunzelman with all requested personal information and had not interfered with his privacy.

[18.5] The Certificate of Investigation in respect of HR South dated 27 May 2020 which states:

[18.5.1] The investigation was discontinued as HR South agreed to release emails to Mr Von Tunzelman and had no recollection of any other verbal information.

[18.5.2] The only IPP considered was IPP 6.

[18.6] The Certificate of Investigation in respect of Great South dated 27 May 2020, which stated that:

[18.6.1] IPP 6 has been investigated; and

[18.6.2] There was no breach of IPP 6.

[18.7] A letter dated 5 August 2020 from the Office of the Privacy Commissioner, advising the Tribunal that Mr Von Tunzelman's claim referenced matters under IPPs 5, 6, 7 and 8. However, the Privacy Commissioner's investigations only related to IPP 6.

[19] It is apparent from this evidence that the fifth requirement from *NKR*, at [14] above has not been met in respect of the aspects of Mr Von Tunzelman's claim which relate to IPPs 5, 7 and 8. HR South and Great South were notified of a complaint by Mr Von Tunzelman but the Privacy Commissioner made it clear in the notification letters and the notification of both his preliminary and final decisions that he only investigated matters relating to IPP 6. This is also clearly stated in the Certificates of Investigation and the letter from the Privacy Commissioner to the Tribunal dated 5 August 2020.

[20] While the Certificate of Investigation alone cannot be relied on to determine what was investigated by the Privacy Commissioner, the initial manner in which the complaint was viewed, notified and investigated by the Privacy Commissioner is important in determining if there has been an investigation. In this instance, the scope was very clearly limited to IPP 6.

[21] In reaching this conclusion the Tribunal has had regard to the submissions Mr Von Tunzelman filed in response to the strike-out application dated 9 October 2020 and on 3 June 2021. Mr Von Tunzelman submitted that the Tribunal should not take a narrow view of its jurisdiction as it leaves someone such as him, who did his best to articulate his complaint, in a situation of unwittingly limiting his future redress from the Tribunal. Mr Von Tunzelman submitted a purposive approach should be taken rather than a narrow approach.

[22] Mr Von Tunzelman has provided as evidence, a copy of his original complaint to the Privacy Commissioner. The Tribunal acknowledges this does suggest his concerns were wider than simply the failure to fully respond to his information privacy request. However, Mr Von Tunzelman was notified by the Privacy Commissioner on 31 January 2020 that he was only investigating the complaint under IPP 6. There is no evidence Mr Von Tunzelman challenged this, or suggested to the Privacy Commissioner that the complaint was wider than this. Accordingly, that was what was investigated.

[23] This Tribunal is bound by its jurisdiction in ss 82 and 83 of the Privacy Act, which is set out at [12] above. Those provisions are very clear that before the Tribunal can determine a complaint it must have been investigated by the Privacy Commissioner. It is not enough for Mr Von Tunzelman to simply show that he raised a matter in a complaint to the Privacy Commissioner if that aspect of the complaint was not notified by the Privacy Commissioner to the defendant. It is a fundamental requirement of natural justice that a defendant knows what it is that they are accused of doing wrong.

[24] Accordingly, the Tribunal must strike out those parts of Mr Von Tunzelman's claim before this Tribunal which relate to IPPs 5, 7 and 8 as they were not investigated by the Privacy Commissioner.

SHOULD THE IPP 6 CLAIM BE STRUCK OUT?

[25] HR South submits that Mr Von Tunzelman's claim under IPP 6 should be struck out as it is untenable and reveals no reasonable cause of action. This submission is made on the basis that Mr Von Tunzelman's information privacy request was responded to in a timely manner in accordance with the Privacy Act and despite the Privacy Commissioner finding otherwise, HR South submits it did have a "proper basis" to withhold information.

[26] HR South also submits Mr Von Tunzelman's claim is frivolous, vexatious or an abuse of process but there were no specific submissions addressing why this is said to be so.

[27] The jurisdiction to strike out is one to be used lightly and sparingly. In this claim, Mr Von Tunzelman has filed the claim against HR South after making a complaint to the Privacy Commissioner as required; he is simply using the statutory process available to him to bring this claim. While HR South may consider it had a proper basis for withholding Mr Von Tunzelman's personal information, the Privacy Commissioner did not agree. Mr Von Tunzelman's IPP 6 claim has been pleaded in accordance with the law and the Tribunal will consider it de novo. This claim is tenable and does give rise to a reasonable cause of action, accordingly it falls far short of being a frivolous, vexatious or abuse of process claim.

[28] Great South has also submitted that Mr Von Tunzelman's claim in respect of IPP 6 is frivolous, vexatious and discloses no reasonable cause of action. This submission is centred on its view that this claim arises from Mr Von Tunzelman being aggrieved that his application for employment with Great South was unsuccessful. Great South suggest that Mr Von Tunzelman has filed this claim in an attempt to publicly vilify Great South, when it was entitled to decline Mr Von Tunzelman's application for employment and should not be subjected to proceedings that the plaintiff's privacy was interfered with.

[29] Great South also submits that the claim is unintelligible, contains multiple accusations, alleges the filing of false evidence, makes claims of withholding evidence without producing the same and "ignores the fact that the plaintiff wrote the statements that formed in part only the reason why his application for employment with the first defendant was declined".

[30] These submissions by Great South are founded in its view that it was justified in not employing Mr Von Tunzelman. That is a peripheral matter in this claim. This Tribunal will be considering Mr Von Tunzelman's claim under IPP 6 of the Privacy Act. Whether or not Mr Von Tunzelman was employed by Great South, the Privacy Act applies.

[31] The Tribunal does not consider Mr Von Tunzelman's claim under IPP 6 is trivial, frivolous or vexatious, nor is it unintelligible. Mr Von Tunzelman made an information privacy request, then complained to the Privacy Commissioner when he was dissatisfied with the response to his request. He has now chosen to follow the statutory scheme and file this claim. While the Privacy Commissioner did not find there had been any breach of Mr Von Tunzelman's privacy by Great South, it does not follow that this Tribunal should therefore strike out Mr Von Tunzelman's claim as being frivolous or vexatious. If that was the case then the precedent would be that no-one should file a claim in this Tribunal where the Privacy Commissioner has not found in their favour. That is clearly not how the Privacy Act operates.

[32] The Tribunal must only strike out a claim if it is clearly untenable. There is no basis for the Tribunal to conclude that, nor have any convincing submissions been made that the claim is frivolous or vexatious; instead Great South has focused on justifying its decision not to employ Mr Von Tunzelman.

[33] Mr Von Tunzelman's IPP 6 claim is not frivolous or vexatious and it cannot be said to disclose no reasonable cause of action.

[34] The applications by both HR South and Great South to strike out Mr Von Tunzelman's IPP 6 claim are dismissed.

ORDERS

[35] The following orders are made:

[35.1] Mr Von Tunzelman's claims under IPPs 5, 7 and 8 of the Privacy Act 1993 are struck out.

[35.2] The applications to strike out Mr Von Tunzelman's claim under IPP 6 are dismissed.

[35.3] The Secretary of the Tribunal is to set down a teleconference as soon as possible for case management in respect of the IPP 6 claim.

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Ms SJ Eyre	**Dr SJ Hickey MNZM**	**Ms S Stewart**
Deputy Chairperson	**Member**	**Member**