

Reference No. HRRT 035/2022

UNDER THE PRIVACY ACT 2020

BETWEEN HAMISH BROOK KESTON

PLAINTIFF

AND REDWOOD CORPORATION LIMITED

TRADING AS PELICAN CLUB

DEFENDANT

AT WELLINGTON

BEFORE:

Ms J Foster, Deputy Chairperson

REPRESENTATION:

Mr HB Keston in person

Mr C Eggleston for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 20 December 2022

DECISION OF DEPUTY CHAIRPERSON¹
ON APPLICATION TO EXTEND TIME TO COMMENCE PROCEEDINGS

Mr Keston has applied under s 98(8) of the Privacy Act 2020 (the Act) to extend the six-month statutory time period to commence proceedings in this Tribunal, as he sought to commence proceedings under s 98(1)(b) of the Act one week late.

¹ [This decision is to be cited as *Keston v Redwood Corporation Ltd (Extension of Time to Commence Proceedings)* [2022] NZHRRT 50.]

BACKGROUND

[1] In May 2021 Mr Keston made an IPP6 request to the Redwood Corporation Limited trading as Pelican Club (Pelican Club) to access his personal information.

[2] Pelican Club did not respond to the request within the statutory timeframe and Mr Keston complained to the Privacy Commissioner that his right to access his personal information under IPP 6 had been breached.

[3] The Commissioner commenced an investigation of Mr Keston's complaint. On 22 February 2022 the Commissioner gave notice to Mr Keston under s 81(4) of the Act that he had decided not to further investigate the complaint. That notice informed Mr Keston, if he wished to bring proceedings in the Tribunal, of the six-month limitation period as follows:

Under the Privacy Act 2020, if you wish to take a claim about this issue to the Human Rights Review Tribunal you must file your claim in the Tribunal within **six months** after today's date.

This is a strict timeframe. The Tribunal can only extend time beyond this if it finds "exceptional circumstances" stopped you from filing your claim sooner.

[4] On 29 August 2022 Mr Keston emailed the Tribunal attaching a statement of claim purporting to commence proceedings under s98(1)(b) of the Act alleging that the Pelican Club failed to properly respond to his request and were wrongly withholding information. Mr Keston's email included the following:

I acknowledge that I am a week late on the deadline however I ask that this be forgiven because as you will see from my claim that I have undertaken extensive dialogue with the defendants lawyer in order to try to come to a resolution prior to making this application.

[5] In a *Minute* dated 6 September 2022 Mr Keston was directed to file an application under s 98(8) of the Act by 30 September 2022, to extend the time for commencing proceedings. Mr Keston was directed to include submissions and affidavit evidence in support that set out the exceptional circumstances that prevented his claim being commenced within the six-month limitation period.

[6] On 11 September 2022 Mr Keston emailed the Tribunal setting out the reasons he considered were exceptional circumstances. In summary, these reasons are that:

[6.1] The Pelican Club had not replied to his privacy request until over eight months after it had been made despite the legal requirement to respond within 20 working days.

[6.2] Since February 2022 he had made extensive efforts to resolve the situation without applying to the Tribunal as shown by his correspondence with the Pelican Club and their lawyers during this period.

[6.3] He had travelled twice to the USA for work and was away for a total of six weeks (from 5 to 30 April and from 16 July to 3 August). That his second trip was last-minute with little notice and he was then "catching up with work and general life admin after the July trip that this slipped my mind and led to me resubmitting my application 6 days late".

[7] In a *Minute* dated 15 September 2022 Mr Keston was given a further opportunity to file a full application to extend the time for commencing proceedings by 7 October 2022,

including submissions and evidence in support of his application. It was noted that affidavit evidence was required as the application would be considered on the papers and little or no weight can be given by the Tribunal to unsworn evidence.

[8] Mr Keston did not file an application or affidavit, instead he sent the following email to the Tribunal on 18 October 2022:

To be honest I can't really be bothered complying with your overly bureaucratic process – this has been hard enough already. I question why you need an affidavit. If I was going to lie and fabricate evidence why would having a JP watching me do it deter me?

A few facts for you – I was 6 days late on an arbitrary 6 mth deadline. The defendant was 8 mth late on a legal requirement to reply in 20 days. I really don't think much more needs to be said on the need for review of this case and the negligent disregard for the law that the Pelican Club has shown ... which breaches my rights under the privacy act

LEGAL FRAMEWORK

[9] Section 98 of the Act provides when aggrieved individuals may commence proceedings in the Tribunal. Proceedings can only be commenced if one of the circumstances listed in ss 98(1)(a) to (i) apply. Further, the proceedings must be commenced within the relevant time period that applies under ss 98(2)-(7). The relevant time period for commencing the proceedings may however be extended under s 98(8).

[10] The relevant parts of section 98 to this case are set out below:

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—

...

(b) the Commissioner, having commenced an investigation, decides not to further investigate the complaint or matter; or

...

(3) A person commencing proceedings under subsection (1)(b) must do so within 6 months after the Commissioner has given notice to the parties under section 81(4).

...

(8) The Chairperson may agree to extend any period specified in subsections (2) to (7) for commencing proceedings if, on an application made for the purpose by the person proposing to commence proceedings, the Chairperson is satisfied that exceptional circumstances prevented proceedings from being commenced within the specified period.

[11] Section 98(1)(b) applies to Mr Keston's case as on 22 February 2022 the Privacy Commissioner gave notice to the parties that having commenced an investigation of Mr Keston's complaint he had decided not to further investigate the complaint under s 81(4). Mr Keston therefore had the right to commence proceedings in the Tribunal under s 98(1)(b) provided they were brought within the six month time limit provided in s 98(3), that is by 22 August 2022.

[12] Mr Keston did not commence proceedings within the specified period in s 98(3). Rather, Mr Keston sought to commence proceedings a week after that period, on

29 August 2022 and requested that the specified period for commencing proceedings in s 98(3) be extended by a week under s 98(8).

[13] Section 98(8) provides that the Chairperson (which includes a Deputy Chairperson pursuant to Human Rights Act 1993, s 101A) may agree to extend any time period specified in subsections (2)-(7) for commencing proceedings if the Chairperson is satisfied that “exceptional circumstances prevented proceedings from being commenced within the specified period.”

Exceptional Circumstances

[14] The phrase “exceptional circumstances” is not defined in the Act.

[15] The meaning of the phrase “exceptional circumstances” as it arose in a different statute but a similar context relating to the power to extend time to bring a late claim was considered by the Supreme Court in *Creedy v Commissioner of Police* [2008] NZSC 31 at [24]-[33]. At issue in that case was s 114(4) of the Employment Relations Act 2000 that allows the Employment Relations Authority to grant leave to extend the time for raising a personal grievance after the statutory time limit if “satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances.” The Court held “exceptional circumstances” in this context meant unusual or uncommon. This interpretation was preferred as it accords with ordinary English usage, is easier to apply and did not unduly limit the power to extend time. At [32] it was noted that in *R v Kelly* [1999] 2 All ER 13 (CA) at p 20 when construing a reference to “exceptional circumstances” Lord Bingham of Cornhill said:

“We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.”

[16] The phrase “exceptional circumstances” in s 98(8) of the Privacy Act 2020 should similarly be given its ordinary or plain meaning of circumstances that are unusual, or uncommon. This interpretation accords with the purpose and context of s 98(8). The purpose of s 98(8) is to provide a discretion to the Chairperson of the Tribunal to agree to late commencement of proceedings when exceptional circumstances have prevented an aggrieved individual from commencing proceedings within the six-month statutory time limit. The jurisdiction to extend time under s 98(8) is a narrowly confined one and it should not be unduly limited by adopting a more stringent interpretation of “exceptional circumstances”.

ISSUES TO BE DETERMINED

[17] The issues to be determined are:

[17.1] Did exceptional circumstances prevent Mr Keston commencing proceedings by 22 August 2022?

[17.2] If so, should the discretion under s 98(8) be exercised and the time for commencing proceedings be extended to 29 August 2022?

EXCEPTIONAL CIRCUMSTANCES?

[18] Section 98(8) allows the Chairperson (or Deputy Chairperson) to extend the time for commencing proceedings only if “exceptional circumstances” prevented Mr Keston’s commencing proceedings by 22 August 2022.

[19] The reasons Mr Keston has provided to justify the consideration of exceptional circumstances for not commencing proceedings within six months are set out at [6] above and addressed below.

[19.1] The Pelican Club may have breached the Act by not providing Mr Keston a response to his request for personal information, but this could not as a matter of logic prevented these proceedings from being commenced by 22 August 2022.

[19.2] Mr Keston may have made extensive efforts to resolve this claim directly with the Pelican Club and its’ lawyers, but this does not justify the failure to commence proceedings by 22 August 2022. To the contrary it shows Mr Keston was actively engaged with this matter over that time period and had time to commence proceedings by 22 August 2022. The involvement in discussions with the Pelican Club does not prevent the commencement of any proceedings.

[19.3] Mr Keston’s six-week absence from New Zealand at short notice does not in the context of a six-month time period to file the claim, provide any basis for exceptional circumstances which may have prevented him from commencing proceedings by 22 August 2022. Nor does the suggestion that this “slipped his mind”. Mr Keston could have commenced proceedings any time after the Privacy Commissioner gave notice to the parties on 22 February 2022.

[20] None of the reasons advanced by Mr Keston are exceptional circumstances which could be considered to have prevented him from commencing proceedings within the six-month statutory time-period. I am therefore not satisfied that exceptional circumstances prevented Mr Keston from commencing proceedings by 22 August 2022.

[21] The merits of the proceedings and the fact Mr Keston sought to commence proceedings only a week late are matters that have not been taken account of in this decision as it solely concerns whether exceptional circumstances *prevented* proceedings being commenced. Those matters could be relevant to whether the discretion under s 98(8) should be exercised. However, it is unnecessary for me to determine whether I should exercise my discretion under s 98(8) and agree to extend the time for commencing proceedings to 29 August 2022 as I have found there were no exceptional circumstances.

[22] For the above reasons, Mr Keston’s application to extend time for commencing proceedings under s 98(8) of the Act is declined.

[23] As the application has been declined, proceedings have not been commenced and the Tribunal file on this matter will be closed.

ORDER

[24] For the reasons given above, Mr Keston's application to extend time to commence proceedings under s 98(8) of the Privacy Act 2020 is declined.

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Ms J Foster
Deputy Chairperson