

UNDER

THE PRIVACY ACT 2020

IN THE MATTER OF

INTENDED PROCEEDINGS BY

JULIE PUIA

AT WELLINGTON

BEFORE:

Ms Sarah Eyre, Chairperson

REPRESENTATION:

Mr C Patterson for the intended plaintiff, Ms Puia

The intended defendant was not heard

DATE OF DECISION: 25 September 2023

**DECISION OF TRIBUNAL THAT INTENDED STATEMENT OF CLAIM
NOT BE ACCEPTED FOR FILING¹**

[1] On 26 April 2023, Ms Puia presented for filing in the Tribunal a statement of claim (on the official claim form) purportedly filed under s 98 of the Privacy Act 2020 (the Act).

[2] The form on page 5 after Step 3 states:

Please tick the boxes that apply to you (refer to the relevant Certificate or notice given by the Privacy Commissioner or [if applicable] refer to the notice given by the Director of Human Rights Proceedings):

[3] Ms Puia had 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.

[4] Ms Puia did not attach to her form any certificate or notice given by the Privacy Commissioner. On 27 April 2023, Ms Puia was asked if she had a Certificate of

¹[This decision is to be cited as *Re Puia (Rejection of Statement of Claim)* [2023] NZHRRT 29]

Investigation from the Privacy Commissioner and her counsel advised the matter had not been investigated so there was no Certificate of Investigation.

[5] On 8 June 2023, the Tribunal Secretary emailed Ms Puia noting it appeared the claim may not meet the jurisdictional criteria set out in s 98 of the Act as, while the claim form indicated that the Privacy Commissioner had declined to investigate this matter, under s 77(2)(a) of the Act, there appeared to be no evidence of any such settlement attempts or assurances sought. Ms Puia was provided with the opportunity to provide further information for the Chairperson to consider in determining whether to accept the claim.

[6] Ms Puia responded (via her counsel) on 16 June 2023. It was submitted that Ms Puia's claim did meet the criteria in s 98 of the Act, as the Commissioner had determined under s 77(2)(a) not to investigate the complaint. No evidence was provided that the Commissioner had made a determination under that particular section.

THE LEGAL FRAMEWORK

[7] The Privacy Act 2020 provides a framework in Part 5 for resolution of complaints, investigations, and proceedings about an interference with the privacy of an individual. In the first instance a complaint about an interference with the privacy of an individual is made to and considered by the Privacy Commissioner.²

[8] Section 73 is the starting point for a complaint to the Commissioner and is set out in full below:

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).

[9] Accordingly, after receiving a complaint the Commissioner must:

[9.1] First, consider it and decide what action under s 73(1)(a)-(e) will be taken in respect of the complaint; and

[9.2] Secondly, advise the complainant of that decision; and if the decision was made under subsection s73(1)(a), which is a decision (in accordance with s 74) not to investigate the complaint, then the complainant must also be provided with the reasons for the decision.

² See Part 5, subpart 1, including ss 70 and 73.

[10] Section 74 provides the Commissioner a discretion not to investigate a complaint if any of the following circumstances apply:

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.

[11] Section 77 provides the Commissioner with a discretion to explore the possibility of settlement of the complaint without investigating the complaint as follows:

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.

[12] The exercise of the discretion in s 77 requires the Commissioner to use best endeavours to secure a settlement of the complaint and if appropriate a satisfactory assurance. If unable to secure a settlement or a satisfactory assurance, the Commissioner may decide not to investigate the complaint (s 77(2)(a)) or to investigate the complaint (s 77(2)(b)) and must notify the complainant of his decision (see s 77(3)).

[13] The Commissioner may also refer a complaint to the Director under s 78(a) if the Commissioner is unable to secure a settlement or a satisfactory assurance under s 77.

[14] Section 98 provides when an aggrieved individual may commence proceedings in the Tribunal. Section 98(1) is the relevant part of the provision for present purposes, it provides:

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.

[15] Accordingly, under s 98 an aggrieved individual may commence proceedings in the Tribunal in respect of a complaint if:

[15.1] It is a matter that has been investigated under subpart 2 and where any of the circumstances in s 98(1)(b)-(i) arise. It is noted that the Commissioner provides individuals with a Certificate of Investigation that they can provide to the Tribunal to establish jurisdiction under s 98; or

[15.2] The Commissioner without commencing an investigation decided to use best endeavours to secure a settlement or assurance under s 77, was unable to do so and decided under s 77(2) not to investigate the complaint (s 98(1)(a)). It is noted if this occurs the Commissioner must notify the individual of the decision under s 77(3) and the individual can provide that notice to the Tribunal to establish jurisdiction under s 98; or

[15.3] The Commissioner referred the complaint to the Director under s 78 and the Director decided not to commence proceedings (s 98(1)(h) and (i)).

[16] If the Commissioner exercises his discretion under s 73(1)(a) of the Act, not to investigate a complaint and has not exercised his discretion to explore the possibility of settlement under s 73(1)(d) and s 77 of the Act, then the aggrieved individual cannot commence proceedings in the Tribunal.

MS PUIA'S INTENDED CLAIM

[17] Ms Puia submits her application meets the criteria in s 98(1)(a) of the Act, as the Commissioner had determined under s 77(2)(a) not to investigate the complaint.

However, Ms Puia has not provided the Tribunal with any documentation that can be properly interpreted as notice under s 77(3).

[18] Furthermore, if the Commissioner had decided under s 73(1)(d) (in accordance with s 77) to explore the possibility of securing a settlement between Ms Puia and the intended defendant she would have been advised of this under s 73(2). There was no such notice provided to the Tribunal. It is irrelevant that Ms Puia attempted to settle the matter herself with the agency.

[19] It is apparent that the Commissioner decided under s 73(1)(a) not to investigate Ms Puia's complaint. The emails from the Commissioner to Ms Puia dated 18 July 2022 and 2 March 2023 clearly state this decision and the reasons for that decision. These emails are therefore the Commissioner's advice of his decision under s 73(2) and the reasons for that decision. While the emails do not refer to s 74, it is clear on their face and the context in which they were sent that the Commissioner has exercised his discretion under that provision in deciding not to investigate the claim.

[20] As the Commissioner's decision not to investigate Ms Puia's complaint was made under s 74 (and was not made under s 77(2)), she cannot commence proceedings in this Tribunal under s 98(1)(a) of the Act. None of the other circumstances identified in s 98(1)(b)-(i) have been shown to have application to Ms Puia's complaint, nor have submissions been made that engage them.

CONCLUSION

[21] The Tribunal has no jurisdiction in respect of the intended claim filed by Ms Puia, therefore the statement of claim presented for filing on 26 April 2023 cannot be accepted by the Secretary.

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Sarah Eyre
Chairperson
Human Rights Review Tribunal