

UNDER

THE PRIVACY ACT 2020

IN THE MATTER OF
INTENDED PROCEEDINGS BY

TANYA DUNSTAN

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Chairperson

REPRESENTATION:

Ms Dunstan, in person

The intended defendants were not heard

DATE OF DECISION: 9 April 2024

**DECISION OF CHAIRPERSON
REJECTING INTENDED STATEMENTS OF CLAIM¹**

[1] In August 2023, Ms Dunstan presented five statements of claim for filing in the Tribunal, each one alleging interferences with her privacy in breach of the Privacy Act 2020 (the Act).

[2] The two intended claims filed on 15 August 2023 sought to commence proceedings against Oranga Tamariki and the Department of Corrections (Corrections). The three intended claims filed on 16 August 2023 sought to commence proceedings against the New Zealand Police (Police), the Ministry of Justice (MOJ), and the Psychology Group.

[3] All of Ms Dunstan's intended claims were completed on the official claim form. That form requires a plaintiff to state the basis on which the plaintiff says the Tribunal has jurisdiction to hear the claim. The form also requires a plaintiff to attach the relevant certificates or notices (from the Privacy Commissioner or the Director of Human Rights Proceedings) confirming the Tribunal's jurisdiction.

¹This decision is to be cited as *Re Dunstan (Rejection of Statements of Claim No. 2)* [2024] NZHRRT 16.

[4] Confirmation of the basis of jurisdiction on the official claim form is in a tick box format. When filing her intended proceedings, Ms Dunstan ticked the following as the jurisdictional bases for her claims:

[4.1] For all five claims, Ms Dunstan said that there was jurisdiction because the Privacy Commissioner has decided, under section 77(2)(a) of the Act, not to investigate the complaint.

[4.2] For her claims against the Psychology Group, the Police, and Corrections, Ms Dunstan also said that there was jurisdiction because the Privacy Commissioner had determined that those complaints did not have substance, or that the matters should not be proceeded with.

[4.3] For her claim against MOJ, Ms Dunstan also said that there was jurisdiction because the Privacy Commissioner had determined that the complaint had substance, or that the matter should be proceeded with, but had not referred the complaint or matter to the Director of Human Rights Proceedings.

[5] Ms Dunstan did not attach to her statements of claim any certificates or notices from the Privacy Commissioner or the Director of Human Rights Proceedings confirming any of those jurisdictional bases.

[6] On 13 October 2023, the Chairperson issued a *Minute* noting it appeared the intended claims might not meet the jurisdictional criteria for the matters to come before the Tribunal. Ms Dunstan was given the opportunity to provide further information for the Chairperson to consider, in order to determine if the claims could be accepted for filing.

[7] On 20 October 2023, Ms Dunstan filed a memorandum and 23 documents she said were relevant to this issue. On 5 February 2024, Ms Dunstan sent a further memorandum to the Tribunal addressing these intended proceedings as well as other matters. Neither of the memoranda nor the 23 documents assisted the Tribunal in respect of whether it had jurisdiction in these matters.

THE LEGAL FRAMEWORK

[8] The Act provides a framework in Part 5 for the making of complaints to the Privacy Commissioner, the procedure which must be followed by the Commissioner on receipt of a complaint, investigations by the Commissioner and how matters may, after the conclusion of the Commissioner's procedure then come before the Tribunal.

[9] Section 98(1) sets out the situations in which matters may come before the Tribunal. The relevant provisions of section 98 relevant to Ms Dunstan's claims are:

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
[...]
 - (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

...

[10] For the Tribunal to have jurisdiction to accept Ms Dunstan's claims, those claims must come within one of the criteria of section 98.

MS DUNSTAN'S INTENDED CLAIMS

Jurisdiction where no investigation by Privacy Commissioner

[11] Ms Dunstan says the Tribunal has jurisdiction to hear all of her intended claims because the Privacy Commissioner decided, under section 77(2)(a) of the Act, not to investigate those complaints. If this is the case, the Tribunal has jurisdiction to hear Ms Dunstan's intended claims under section 98(1)(a).

[12] Section 77 provides:

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.

[13] Section 77 allows the Commissioner, without conducting an investigation, to use best endeavours to secure a settlement of the complaint and if appropriate a satisfactory

assurance from the agency that there will not be a repetition of the behaviour complained of. If the Commissioner is unable to secure a settlement or a satisfactory assurance, the Commissioner must determine whether to investigate the complaint or not;² and is required under the Act to notify the complainant of that determination.³

[14] Accordingly, in the case of Ms Dunstan’s claims, if the Commissioner (being unable to secure a settlement or assurance) had decided under section 77(2)(a) not to investigate the complaint, he would have notified Ms Dunstan of this decision. Ms Dunstan would then have been able to supply that notice to the Tribunal to establish jurisdiction under section 98(1)(a).

[15] Ms Dunstan did not supply any such notice, either with her original statements of claims or with her subsequent memoranda (although she did supply 23 other documents). There is no evidence that the Commissioner followed the procedure prescribed in section 77(2)(a) and therefore no evidence that the Tribunal has jurisdiction under section 98(1)(a).

Jurisdiction where the Commissioner determines a complaint does not have substance, or that the matter should not be proceeded with

[16] Ms Dunstan also says the Tribunal has jurisdiction to hear her claims against the Psychology Group, the Police, and Corrections because the Privacy Commissioner determined that those complaints did not have substance, or that the matters should not be proceeded with. If this had been the case, the Tribunal would have had jurisdiction to hear these three intended claims under section 98(1)(d).

[17] The phrase “determines that the complaint does not have substance, or that the matter should not be proceeded with” in section 98(1)(d) is a reference to the determinations the Commissioner can make after completion of an investigation under sections 91⁴ or 94⁵. Proceedings before the Tribunal can only be brought under section 98(1)(d) where an investigation into a complaint has been completed.⁶

[18] Where, following the completion of an investigation, the Commissioner determines that a matter does not have substance and that the matter should not be proceeded with he must give notice to the parties of that determination.⁷ In practice, to comply with his obligation to give notice the Commissioner issues a Certificate of Investigation to the parties, particularising the subject of his investigation.

² Privacy Act 2020, ss 77(2)(a) or (b).

³ Section 77(3).

⁴ Sections 91(2)(a)(ii) and 91(2)(b)(ii).

⁵ Sections 94(1)(a)(ii) and 94(1)(b)(ii).

⁶ Section 98(4) requires those proceedings to be commenced within 6 months after notice was given under ss 91(7) or 94(6).

⁷ Section 91(7).

[19] Ms Dunstan has provided no evidence that any investigation was undertaken by the Commissioner in respect of her complaints about Psychology Group, the Police, or Corrections. If there had been any investigation conducted by the Commissioner Ms Dunstan would have been issued with a Certificate of Investigation stating this. Ms Dunstan has not supplied any Certificate of Investigation, either with her original statements of claims or with her subsequent memoranda. There is accordingly, no evidence that the Tribunal has any jurisdiction to hear these claims under section 98(1)(d).

Jurisdiction where the Commissioner determines a complaint has substance, or that the matter should be proceeded with, but has not referred the complaint or matter to the Director of Human Rights Proceedings

[20] Finally, Ms Dunstan says that in respect of her claim against MOJ, the Tribunal has jurisdiction because the Privacy Commissioner has determined that the complaint has substance, or that the matter should be proceeded with, but has not referred the complaint or matter to the Director of Human Rights Proceedings. If this had been the case, the Tribunal would have had jurisdiction to hear this claim under section 98(1)(e).

[21] The phrase “determines that the complaint has substance, or the matter should be proceeded with” in section 98(1)(e) is, once again, a reference to the determinations the Commissioner can make after completion of an investigation under either sections 91⁸ or 94⁹. Accordingly, a Tribunal proceeding can only be brought under section 98(1)(e) where an investigation into the complaint has been completed.

[22] As with section 98(1)(d), following the conclusion of his investigation the Commissioner must give notice to the parties, which in practice is done by issuing a Certificate of Investigation.

[23] If there had been any investigation conducted by the Commissioner into Ms Dunstan’s allegations against MOJ, she would have been issued with a Certificate of Investigation stating this. Ms Dunstan has not supplied any Certificate of Investigation, either with her original statement of claims or with her subsequent memoranda. There is, no evidence of any investigation and so no evidence that the Tribunal has any jurisdiction to hear this claim under section 98(1)(e).

CONCLUSION

[24] There is no evidence that the Commissioner has (without conducting an investigation) attempted to secure a settlement as required for jurisdiction under section 98(1)(a). There is no evidence that the Commissioner has investigated any of the complaints giving rise to these intended proceedings as required under sections 98(1)(d)

⁸ Privacy Act, ss 91(2)(a)(ii) and 91(2)(b)(ii).

⁹ Sections 94(1)(a)(ii) and 94(1)(b)(ii).

or (e). There is therefore, no evidence that the five intended claims filed by Ms Dunstan meet the criteria in section 98 for the Tribunal to have jurisdiction.

[25] The Tribunal has no jurisdiction in respect of the intended claims filed by Ms Dunstan against Oranga Tamariki, Corrections, the Police, MOJ, and the Psychology Group on 15 and 16 August 2023; therefore, the statements of claims cannot be accepted for filing by the Secretary.

“Ms SJ Eyre”

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**Ms SJ Eyre
Chairperson
Human Rights Review Tribunal**