IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2023] NZHRRT 37**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 013/2021
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**AMY SUE VAN WEY LOVATT**
	PLAINTIFF
AND	**TE WHATU ORA - HEALTH NEW ZEALAND**
	DEFENDANT

AT AUCKLAND

BEFORE:
Ms GJ Goodwin, Deputy Chairperson
Ms BL Klippel, Member
Dr M Koloamatangi, Member

REPRESENTATION:
Ms K Dalziel for plaintiff
Mr P White for defendant

DATE OF HEARING: **27 March 2023**

DATE OF DECISION: **15 November 2023**

DECISION OF TRIBUNAL STRIKING OUT AMENDED STATEMENT OF CLAIM[1]

[1] In April 2021 Dr Van Wey Lovatt filed a claim alleging the Waikato District Health Board (now Te Whatu Ora - Health New Zealand ("HNZ")) interfered with her privacy by breaching Rules 5 and 6 of the Health Information Privacy Code 1994 (Code).

[2] Dr Van Wey Lovatt alleged a breach of Rule 5 in respect of a change to her address in HNZ's records she said had been made without her authorisation or consent. She also

[1] [This decision is to be cited as *Van Wey Lovatt v Health New Zealand (Strike-Out)* [2023] NZHRRT 37]

alleged a breach of Rule 6 in respect of a request she made on 5 February 2020 for certain of her personal information. The claim attached a Privacy Commissioner's (Commissioner's) certificate of investigation confirming those alleged breaches had been investigated.

[3] HNZ denied the claim. It said Dr Van Wey Lovatt had requested the change of address. HNZ also said that it had provided all information required of it, but that it had withheld certain information in reliance on s 29(1)(j) of the Privacy Act 1993 (PA 1993), as the request was frivolous or vexatious and on s 29(2)(a) as the information was not readily retrievable.

[4] At a teleconference held on 21 July 2021 the parties were in apparent agreement that the issues arising from Dr Van Wey Lovatt's claim were confined to the alleged breaches of Rules 5 and 6 of the Code. A timetable was set for the filing of the parties' evidence. The timetable provided for HNZ to file its evidence first.

[5] On 14 October 2021 HNZ filed its evidence. The evidence addressed the history of the very unhappy interaction between the parties, why HNZ considered Dr Van Wey Lovatt's request for her information was vexatious and why certain personal information was withheld from her. The evidence also addressed the communications plan HNZ had put in place to manage its interactions with Dr Van Wey Lovatt. Pursuant to that communications plan, all correspondence between Dr Van Wey Lovatt and HNZ was to be routed through Ms Chandler, a Consumer Engagement Manager employed by HNZ. HNZ's evidence also addressed its reasons for believing that Dr Van Wey Lovatt had requested the change of address. Together with its evidence, HNZ filed an application seeking orders striking out Dr Van Wey Lovatt's claim on the basis that it was vexatious, not brought in good faith, disclosed no reasonable cause of action and was an abuse of the process of the Tribunal.

[6] On 15 November 2021 Dr Van Wey Lovatt filed her opposition to the strike out application.

[7] On 15 March 2022, nearly a year after her claim had been brought, Dr Van Wey Lovatt filed an amended claim which expanded the scope of her original claim. The amended claim added a number of additional alleged breaches of the Code, in respect of Rules 3, 5, 7, 8 10 and 11 (additional alleged breaches). The certificate of investigation provided with the original claim had not referred to those additional alleged breaches as having been investigated. No additional certificate was filed with the amended statement of claim.

[8] On 14 April 2022 HNZ filed an amended application to strike out Dr Van Wey Lovatt's expanded claim. HNZ again applied to strike out the whole of Dr Van Wey Lovatt's claim on the basis that it was vexatious, an abuse of process and disclosed no reasonable cause of action. HNZ also applied to strike out the additional alleged breaches, saying that the Tribunal did not have jurisdiction to consider those breaches as they were not investigated by the Commissioner and they were raised later than six months after the Commissioner notified Dr Van Wey Lovatt that her claims did not have substance.

[9] Dr Van Wey Lovatt opposed the amended strike out application. She continued to deny her claim was vexatious and that it disclosed no reasonable cause of action. She also said the Tribunal has jurisdiction, under PA s 98, to hear the amended claim.

ISSUES

[10] The application to strike out this claim, in part or in whole, requires the Tribunal to determine the following issues:

[10.1] Whether the Tribunal has jurisdiction under PA s 98 to hear the amended claim that includes the additional alleged breaches including:

[10.1.1] Whether there is only jurisdiction under PA s 98 if the Commissioner has investigated the additional alleged breaches.

[10.1.2] If so, whether the additional alleged breaches were investigated by the Commissioner.

[10.2] Whether the claim discloses no reasonable cause of action or is vexatious, so that it should be struck out entirely.

WHETHER THE TRIBUNAL HAS JURISDICTION TO CONSIDER THE AMENDED STATEMENT OF CLAIM

[11] There is no dispute the Tribunal has jurisdiction to hear the original claim, alleging breaches of Rules 5 and 6 of the Code.

[12] The basis on which HNZ seeks to strike out the amended claim includes:

[12.1] There is no jurisdiction for the Tribunal to consider the additional alleged breaches as what is required for jurisdiction under PA s 98 is the same as under the PA 1993. For jurisdiction, the additional alleged breaches must have been the subject of a complaint to the Commissioner, notified to HNZ and investigated by the Commissioner.

[12.2] The additional alleged breaches were neither notified to HNZ as complaints nor investigated. Accordingly, only the alleged breaches of Rules 5 and 6 of the Code in the original statement of claim satisfy the jurisdictional pre-requisites.

[13] Dr Van Wey Lovatt, while submitting that all of the additional alleged breaches were investigated by the Commissioner, also says:

[13.1] Section 98 is an important development from the PA 1993 in that it allows individuals to bring a complaint before the Tribunal where the Commissioner has received a complaint and the Commissioner decides not to investigate that complaint or having commenced an investigation, decides not to further investigate.

[13.2] As PA s 98 allows aggrieved individuals to commence proceedings before the Tribunal even if the Commissioner has not taken a complaint any further, this provides individuals with an alternative to having to make application for judicial review against the Commissioner.

[13.3] All the additional alleged breaches were the subject of complaints to the Commissioner and HNZ was on notice about those matters. The original statement of claim referred to issues of trespass, false accusations by the defendant and issues with treatment and care in the claim for damages. The amended statement

of claim revisits those matters and re-asserts them as claims under other privacy principles. There is no statutory bar to that approach.

[13.4] The defendant's arguments in relation to jurisdiction effectively invite the Tribunal to ignore any new facts alleged by the plaintiff at the outset or during the course of her complaint and limit the inquiry to the matters the Commissioner chose to investigate. That is not the law.

[14] In summary, we understand that (while Dr Van Wey Lovatt says there had been an investigation in this case into all of the additional alleged breaches) Dr Van Wey Lovatt is submitting that under PA s 98, if a matter has been raised with the Commissioner during the course of a complaint, that is enough for jurisdiction before the Tribunal. Accordingly, the first issue the Tribunal must determine is whether an investigation of the additional alleged breaches is required for jurisdiction under PA s 98.

WHETHER AN INVESTIGATION OF ALLEGED ADDITIONAL BREACHES IS REQUIRED FOR JURISDICTION

[15] Section 98 provides for when an aggrieved individual can bring an alleged breach of privacy to the Tribunal. Section 98(1) sets out the circumstances in which an individual can bring a claim and subs (2) to (7) then set out the timeframes within which a claim must be brought.

[16] The following parts of PA s 98(1) are relevant in this case:[2]

> **98 Aggrieved individuals may commence proceedings in Tribunal**
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> (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—
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> (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
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> …

[17] Section 98(1) refers to either a "complaint received by the Commissioner" or to "a matter investigated under subpart 2".

[18] In this case we are concerned only with "a complaint received by the Commissioner". Such a complaint must, under PA s 72(1), be made to the Commissioner

[2] The other parts are not relevant in this case as: PA s 98(1)(f) and (g) apply when an access direction has been made by the Commissioner under s 92; and PA s 98(h) and (i) apply when the Commissioner has referred a complaint to the Director. There is no suggestion any of those circumstances are relevant here.

and, under PA s 70(1), must allege that an action of an agency is, or appears to be, an interference with privacy of that individual.[3]

[19] Under PA s 98(1) in respect of "a complaint received by the Commissioner", jurisdiction arises only "in any case where" one of the circumstances in PA s 98(1)(a)-(i) applies.

[20] Accordingly, before proceedings can be brought in respect of a complaint:

[20.1] The complaint (alleging that an action of an agency is, or appears to be, an interference with privacy of that individual) must have been received by the Commissioner; **and**

[20.2] One of the circumstances listed in s 98(1)(a)-(i) must apply to that complaint.

[21] Only PA ss 98(1)(a)-(e) are potentially relevant in this case. All but one of the circumstances set out in those provisions require that the complaint has been the subject of an investigation:[4]

[21.1] Section 98(1)(b) applies where the Commissioner, "having commenced an investigation, decides not to further investigate the complaint". In this context the phrase "decides not to further investigate the complaint" is a reference to the decision the Commissioner can make at any time during an investigation under PA s 81(3). It is, however, clear that a Tribunal proceeding can only be brought under s 98(1)(b) where an investigation into the complaint was commenced.[5]

[21.2] Sections 98(1)(c), (d) and (e) then set out various other circumstances which give rise to the Tribunal's jurisdiction. In each of those sections an investigation by the Commissioner is a necessary pre-requisite to the particular circumstances because:

[21.2.1] Section 98(1)(c) applies where the Commissioner "does not make a determination" under PA ss 91(2), 93(2), or 94(1). Each of those sections only applies after the completion of an investigation. Accordingly, a Tribunal proceeding can only be brought under s 98(1)(c) where an investigation into the complaint has been completed.[6]

[21.2.2] Section 98(1)(d) applies where the Commissioner "determines that the complaint does not have substance, or that the matter should not be proceeded with". That phrase is, in this context, a reference to the determinations the Commissioner can make after completion of an investigation under PA ss 91[7] or 94[8]. Accordingly, a Tribunal proceeding

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[3] There is no suggestion in this case that any of the alleged breaches were "a matter investigated under subpart 2" which under PA s 79(b) means an investigation conducted by the Commissioner on his own initiative, into any matter in respect of which a complaint may be made under the PA.

[4] PA ss 98(1)(f) and (g) also require the complaint to have been investigated as they only apply when an access direction has been made by the Commissioner under s 92 which can only be made following an investigation. Sections 98(h) and (i) do not necessarily require the complaint to have been investigated, as the Commissioner may refer a complaint to the Director without conducting an investigation under PA s 78.

[5] PA s 98(3) requires those proceedings to be commenced within 6 months after notice was given under s 81(4).

[6] PA s 98(4) requires those proceedings to be commenced within 6 months after notice was given under ss 91(7), 93(4) or 94(6).

[7] See ss 91(2)(a)(ii) and 91(2)(b)(ii).

[8] See ss 94(1)(a)(ii) and 94(1)(b)(ii).

can only be brought under s 98(1)(d) where an investigation into the complaint has been completed.[9]

[21.2.3] Section 98(1)(e) applies where 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. The phrase "determines that the complaint has substance, or the matter should be proceeded with" is, in this context, once again a reference to the determinations the Commissioner can make after completion of an investigation under either PA ss 91[10] or 94[11]. Accordingly, a Tribunal proceeding can only be brought under s 98(1)(e) where an investigation into the complaint has been completed.[12]

[22] The only circumstance under PA ss 98(1)(a)-(e) where a Tribunal proceeding can be brought when the complaint has not been investigated is under s 98(1)(a), where the Commissioner decides under PA s 77(2)(a) not to investigate the complaint.[13] That circumstance can only arise if the Commissioner has decided under s 73(1)(d) to use best endeavours to secure a settlement of the complaint under s 77 and is unable to do so.[14] As was said in *Re Puia (Rejection of Statement of Claim)*[15]:

> [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.

[23] There has been no suggestion that the Commissioner attempted to settle Dr Van Way Lovatt's complaints under s 77, so that PA s 98(1)(a) does not apply to this case.

[24] The effect of PA s 98 is to create the same "filtering mechanism" that applied under the PA 1993.[16] The Tribunal will only have jurisdiction under PA ss 98(1)(b) to (e) where there has been a complaint made to the Commissioner, the Commissioner has notified the respondent of the details of the complaint;[17] and the complaint has been the subject of an investigation, whether or not that investigation was completed.

[25] Our conclusion is that an investigation into each of the additional alleged breaches in the amended claim is required for the Tribunal to have jurisdiction under PA s 98.

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[9] PA s 98(4) requires those proceedings to be commenced within 6 months after notice was given under ss 91(7) or 94(6).
[10] See ss 91(2)(a)(i) and 91(2)(b)(i).
[11] See ss 94(1)(a)(i) and 94(1)(b)(i).
[12] PA s 98(4) requires those proceedings to be commenced within 6 months after notice was given under ss 91(7) or 94(6).
[13] PA 98(2) requires those proceedings to be commenced within 6 months after notice was given under s 77(3).
[14] If the Commissioner under s 78 refers the complaint to the Director without conducting an investigation and the Director does not commence Tribunal proceedings under s 97 then the aggrieved individual can commence proceedings in respect of the complaint either under ss 98(1)(h) or (i) as is applicable in the particular case.
[15] [2023] NZHRRT 29.
[16] This filtering mechanism was discussed in *Lehmann v The Radioworks Ltd* [2004] NZHRRT 31 at [20]; in *Waugh v New Zealand Association of Counsellors Inc* [2003] HRRT 9, 17 March 2003 *(Waugh),* at [20(c)]; and was affirmed by the High Court in *Edwards v Capital and Coast District Health Board* [2016] NZHC 3167 at [45] *(Edwards*).
[17] The investigation must be following the statutory pre-requisite steps of the Commissioner deciding under PA s 73(1)(e) to investigate and notifying the respondent under PA s 80 of the scope of the investigation.

WHETHER THE ADDITIONAL ALLEGED BREACHES WERE INVESTIGATED BY THE COMMISSIONER

[26] The Tribunal must now consider whether there was an investigation into each of the additional alleged breaches in the amended statement of claim. The additional alleged breaches were that:

> **[26.1]** HNZ had breached Rule 3 of the Code in that it failed to comply with the transparency requirements under that Rule, relating to access to her information, and refused to provide HNZ's privacy policies.
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> **[26.2]** HNZ committed additional breaches in Rule 5 of the Code in allowing unauthorised access to Dr Van Wey Lovatt's information by staff, including Ms Chandler, by allowing Ms Chandler's interception of Dr Van Wey Lovatt's communications and an allegation of destruction or alteration of her information.
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> **[26.3]** HNZ had breached Rule 7 of the Code in that it failed to correct inaccurate reports and information, when this was brought to its attention, or to amend reports to include Dr Van Wey Lovatt's own amendments and those of her physician.
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> **[26.4]** HNZ had breached Rule 8 of the Code in connection with the unauthorised changing of her address and subsequently providing misleading, inaccurate and false information to the Commissioner, the Health and Disability Commissioner, the Police and other organisations.
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> **[26.5]** HNZ had breached Rule 10 of the Code as HNZ employees used Dr Van Wey Lovatt's health information for a purpose other than for which it was obtained, without her consent.
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> **[26.6]** HNZ had breached Rule 11 of the Code in that HNZ employees had disclosed Dr Van Wey Lovatt's health information to other agencies, without her consent.

[27] Dr Van Wey Lovatt submitted her allegations above were investigated by the Commissioner. In her affidavit filed on 26 August 2022 Dr Van Wey Lovatt said that the additional alleged breaches were issues raised with the Commissioner and that HNZ was aware of those matters.

[28] HNZ submitted none of the additional alleged breaches were investigated. The evidence of Carolyn Gardner, in-house counsel at HNZ and one of its privacy officers, was that the only two matters which were notified to HNZ as complaints and investigated were the original alleged breaches relating to the change of address and the alleged failure to disclose Dr Van Wey Lovatt's personal information. This evidence is supported by:

> **[28.1]** The Commissioner's first letter to HNZ dated 24 June 2020 notifying HNZ of Dr Van Wey Lovatt's complaint. That notification referred only to Dr Van Wey Lovatt's request of 5 February 2020 for certain of her personal information and Dr Van Wey Lovatt's complaint to HNZ, dated 19 May 2020, that her address had been incorrectly changed.
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> **[28.2]** The letter of 6 October 2020 from the Commissioner to Dr Van Wey Lovatt setting out the Commissioner's final view. That letter clearly referred to the

complaints investigated as being only Dr Van Wey Lovatt's request of 5 February 2020 and the complaint about her address being changed

[28.3] The certificate of investigation from the Commissioner dated 6 October 2020 which referred to the only matters investigated as being HNZ's decision on Dr Van Wey Lovatt's 5 February 2020 request for information and whether HNZ had changed Dr Van Wey Lovatt's address details without authorisation. The certificate said that Rules 5 and 6 were applied. The Commissioner's opinion was that HNZ had a proper basis for withholding information under s 29(2)(a) of the PA 1993 and that there was no evidence that HNZ had breached Rule 5 by changing Dr Van Wey Lovatt's address.

[29] For jurisdiction we must be satisfied that the Commissioner did conduct an investigation into each of the additional alleged breaches. The determination of whether there has been an investigation by the Commissioner into the additional alleged breaches is a factual one.[18] The Tribunal is required to determine whether the Commissioner has in fact investigated the matters that are to be subject to a hearing in the Tribunal, rather than the way in which the Commissioner carried out his statutory responsibilities.[19] While the Commissioner's certificate of investigation evidences what was within scope of the investigation it is not, on its own, determinative of this issue.[20]

[30] We have considered the submissions and evidence of the parties and found, for reasons set out in full below, the only matters investigated by the Commissioner were Dr Van Wey Lovatt's request of 5 February 2020 for certain of her personal information and Dr Van Wey Lovatt's complaint to HNZ, dated 19 May 2020, that her address had been incorrectly changed. Those matters go to the alleged breaches of Rules 5 and 6 in Dr Van Wey Lovatt's original statement of claim.

Alleged breach of Rule 3

[31] Dr Van Wey Lovatt refers to an alleged breach of Rule 3, being a failure to comply with "transparency requirements" (not being transparent as to how HNZ was going to collect, manage or use her personal health information) and refusing to provide HNZ's privacy policies. There was no evidence that the Commissioner notified these matters to HNZ as complaints, nor that they were investigated for the following reasons.

[32] Dr Van Wey Lovatt says emails between her and the Commissioner dated 10 and 11 June 2020 show this matter was raised as a complaint and that she was advised to go directly to the Ombudsman. The emails, however, do not refer to a request for HNZ's privacy policies nor allege a lack of transparency. Further HNZ was not copied into these emails.

[33] The email Dr Van Wey Lovatt sent to the Ombudsman on 11 June 2020, which was copied to the Commissioner but not to HNZ, (while alleging breaches of the

[18] See *Waugh,* as above n 16, at [20](a). See also *Re Apostolakis No. 2 (Rejection of Statement of Claim)* [2017] NZHRRT 33 at [6], *Rafiq v Chief Executive, Ministry of Business, Innovation and Employment* [2013] NZHRRT 9 at [10] and *Mitchell v Privacy Commissioner* [2017] NZHC 569; [2017] NZAR 1706 at [36], [37] and [39]. Although these decisions were made in respect of the PA 1993, they equally apply to the 2020 Act. As noted at [PA98.3(b)] the authors of *Privacy Law and Practice* suggest that it is doubtful s 98(1) resolves difficulties about the Tribunal's jurisdiction with respect to what constitutes "a complaint or matter investigated under subpart 2" apart from clarifying the different pathways under s 98(1)(a)–(i).

[19] *Edwards* as above n 16 at [45] . See also *Mitchell v Privacy Commissioner* as above, at [36]

[20] *Edwards* as above n 16 at [43]-[44] and [65]. See also *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation* [2014] NZHRRT1, (2014) 10 HRNZ 279 at [19].

Crimes Act 1961, the New Zealand Bill of Rights Act 1990 and an alleged incorrect application of provisions of the Official Information Act 1982) does not refer to a refusal by HNZ to make its policies available nor go to a lack of transparency in the collection of her health information.

[34] Dr Van Wey Lovatt also refers to an email dated 4 March 2021 sent by her to 14 recipients, including HNZ, the Health and Disability Commissioner's office, the Privacy Commissioner, an individual at Middlemore Hospital, an employee at the office of the Serious Fraud Office and a Minister of the Crown. In that email Dr Van Wey Lovatt alleges she has received correspondence from an individual at HNZ claiming to be another person, that documents have been manufactured or altered, that HNZ has made false accusations about her to the Police and breaches of the Crimes Act by HNZ in relation to HNZ's communications plan. Dr Van Wey Lovatt lists nine matters she wants actioned. One of these states:

> Once the Waikato DHB has published their policies, so that consumers may be informed and the DHB shows transparency in their actions, I will stop making OIA requests for the policies.

[35] This correspondence is dated some five months after the Commissioner concluded his investigation and there is no evidence that the Commissioner notified the alleged lack of transparency to HNZ as a complaint, nor that it was investigated. Overall, the emails relied on by Dr Van Wey Lovatt do not indicate that there was a complaint that was notified to HNZ or investigated.

Additional alleged breaches of Rule 5

[36] The alleged unauthorised change of Dr Van Wey Lovatt's address was investigated by the Commissioner as an alleged breach of Rule 5. Dr Van Wey Lovatt says, however, that she raised certain additional alleged breaches of Rule 5 with the Commissioner. These related to unauthorised access to her personal information by HNZ staff (including pursuant to the communications plan), interception of communications by Ms Chandler without Dr Van Wey Lovatt's consent (again pursuant to the communications plan), and the destruction or alteration of her information without her consent.

[37] HNZ says these matters were neither notified to it as complaints, nor investigated. We agree, for the following reasons.

[38] Dr Van Wey Lovatt referred to her letter of 21 September 2020 to the Commissioner (responding to the Commissioner's letter of 24 August 2020 which set out his preliminary view on her complaints). Dr Van Wey Lovatt said the Commissioner had not addressed all of the issues she had raised. These included:

> **[38.1]** Alleged breaches of privacy by HNZ employees beyond the interception of communication by Ms Chandler. Dr Van Wey Lovatt said inaccurate statements had been made by HNZ employees. Dr Van Wey Lovatt said the only way she could find out how pervasive the breach of privacy was for her to receive all inter and intra agency communications.
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> **[38.2]** That her medical records were accessed numerous times by a number of agencies while she was out of the country.
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> **[38.3]** HNZ not having the right to decide who could access her personal health information nor for what reason. Dr Van Wey Lovatt referred to Ms Chandler accessing her medical records, despite Dr Van Wey Lovatt's repeated insistence

that she (Ms Chandler) stop doing so. Dr Van Wey Lovatt was concerned that the preliminary view from the Privacy Commissioner did not make reference to matters relating to access and interception of her communications pursuant to the communications plan.

[38.4] That HNZ's approach to intercepting emails was in breach of Rule 4 of the Code and contrary to the provisions of the Crimes Act, the Search and Surveillance Act 2012 and the New Zealand Bill of Rights Act.

[38.5] That HNZ's claims of not having a record of certain incident reports conflicted with information it gave to the Police, the District Court, the Ombudsman and the Health and Disability Commissioner.

[39] The Commissioner's final report of 6 October 2020, addressed these matters and, as applicable, the reasons for them not being investigated as follows:

[39.1] In relation to the submission that she needed to receive all inter and intra agency communications to assess the pervasiveness of the breach of privacy, the receipt of such information had been investigated (as part of the alleged breach of Rule 6). The Commissioner said he relied on the assurance of HNZ that it had sent to Dr Van Wey Lovatt all readily retrievable information within the scope of her request.

[39.2] In relation to access of medical records while Dr Van Wey Lovatt was out of the country, the Commissioner noted that Dr Van Wey Lovatt had been advised by the Ministry of Health that, if she had concerns about agencies accessing her health records, she would need to contact the agencies directly. They would be the best placed to explain the accesses.

[39.3] In relation to the access and interception allegations referred to at [38.3] the Commissioner said that he had written to Dr Van Wey Lovatt on 28 April 2020 and 24 June 2020 explaining that he was not going to investigate such allegations. The Commissioner said that as he did not investigate the access and interception issue in relation to the communications plan he did not refer to it again in the letter setting out his preliminary view.

[39.4] The Commissioner said that there was no general right under the Code for Dr Van Wey Lovatt to insist that a designated staff member at HNZ cannot respond to requests, correspondence, or complaints. HNZ decided on a communications plan that required Ms Chandler to access records so that she could respond to Dr Van Wey Lovatt. The Commissioner said that if Dr Van Wey Lovatt believed she had the right to decide who may or may not access her records "under current legislation and Ministry of Health standards" she would need to follow up with the Ministry of Health and/or the agency that regulated the legislation she was referring to.

[40] Dr Van Wey Lovatt also referred to an email from the Commissioner to her, dated 17 March 2021. That email was a response to Dr Van Wey Lovatt's email of the same date addressed to a large number of recipients including individuals at the Health and Disability Commission, Ministers of the Crown, the Department of Internal Affairs, the Ombudsman, the Police and the Ministry of Health. Dr Van Wey Lovatt's email did not relate to the Commissioner's investigation that was concluded five months previously but was an official complaint against HNZ and two named individuals in relation to alleged

alteration and destruction of documents she said were required to be maintained under the Public Records Act 2005, the Electronic Transactions Act 2002, the Crimes Act 1961 and the Privacy Act 2020.

[41] Relevantly, the Commissioner's response email said:

> **[41.1]** Setting up a communications plan was not a breach of the Code, and the Commissioner would not be responding to further emails about that.
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> **[41.2]** In relation to the alleged destruction of information, the context did not give rise to PA issues (Dr Van Wey Lovatt's email of 17 March 2021 referred to an alleged alteration of a consent form and failure to keep records of student attendees at a medical procedure). The Commissioner said that if Dr Van Wey Lovatt believed HNZ was required to retain records, she should raise her concerns with the Ministry of Health.
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> **[41.3]** The Commissioner was not going to investigate Dr Van Wey Lovatt's allegations that HNZ had made false statements to the Police, the Health and Disability Commissioner or the District Court nor whether incident reports correctly recorded Dr Van Wey Lovatt's actions. That was not something the Commissioner was able to investigate or make a finding on.

[42] Overall, there was no evidence that any of the matters which had been raised by Dr Van Wey Lovatt as additional breaches of Rule 5 of the Code were either notified to HNZ as complaints or investigated as such by the Commissioner. Indeed, in the case of certain of the allegations, the Commissioner expressly said he would not be investigating those matters.

Alleged breaches of Rule 7

[43] Dr Van Wey Lovatt alleges breaches of Rule 7, being a failure to correct inaccurate reports or to amend reports to include her amendments and those of her physician. There is no doubt that Dr Van Wey Lovatt had raised the issue of correction of allegedly inaccurate medical reports with HNZ and that HNZ responded.[21] There is, however, no evidence that this was subsequently either notified as a complaint to HNZ or investigated by the Commissioner. The matters relating to allegations of breaches of Rule 7 are, therefore, not within our jurisdiction.

Alleged breach of Rule 8

[44] Dr Van Wey Lovatt alleges a breach of Rule 8, in relation to changing her address without her authorisation or consent. She says that she suffered humiliation and distress as a result of the breach of Rule 8, in that HNZ provided misleading, inaccurate and false information to the Privacy Commissioner, the Health and Disability Commissioner, the Police and other organisations (presumably because it supplied an incorrect address for her to those parties). This appears to be a re-statement of her original allegation of a

[21] Dr Van Wey Lovatt's email of 16 January 2019 at 3.59pm and the letter of response from NNZ dated 25 January 2019.

breach of Rule 5, but also referencing alleged incorrect disclosures made to various agencies.

[45] HNZ said there was no breach of Rule 8, the matter was not investigated by the Commissioner and, accordingly, there was no basis for any compensation for that alleged breach.

[46] There is a distinction between the matters which are addressed by each of Rules 5 and 8. Rule 5 relates to the storage and security of health information. It requires an agency to ensure that information is protected by such security safeguards as are reasonable in the circumstances to take against access, use, modification or disclosure, except with the authority of the agency.

[47] Rule 8 relates to a requirement to ensure that the accuracy of health information is checked before it is used. Rule 8 requires an agency that holds health information not to use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant and not misleading.

[48] To determine whether the complaint Dr Van Wey Lovatt made in relation to her address covered only Rule 5, or whether the facts of her complaint engaged, as an alternative or additional matter, a breach of Rule 8 we must consider the nature of Dr Van Wey Lovatt's complaint.

[49] The Commissioner's letter of 24 June 2020 to HNZ, notifying Dr Van Wey Lovatt's complaint, was as follows:

> On 19 May 2020 Dr Lovatt complained to Waikato DHB about a change of her address to [redacted] which she said she did not authorise. She complained that Waikato DHB failed to protect her personal information against unauthorised modification. I understand Waikato DHB said a member of the Service Administration Team made this change on 18 November 2019 after speaking to Dr Lovatt. However, Dr Lovatt said she did not phone Waikato DHB to request such change.

[50] In his letter to HNZ the Commissioner asked HNZ certain questions relating to consents obtained before changing Dr Van Wey Lovatt's address. None of those questions touched on any alleged disclosure of address information (as is the focus of Rule 8) but rather went to whether HNZ had obtained Dr Van Wey Lovatt's consent in relation to the address change (as is the focus of Rule 5).

[51] The information before us is not sufficient for us to be satisfied that Dr Van Wey Lovatt's complaint properly engaged an alleged breach of Rule 8 of the Code or that the Commissioner investigated it.

Alleged breaches of Rules 10 and 11

[52] Dr Van Wey Lovatt alleges HNZ breached Rules 10 and 11 by using her health information for a purpose other than that for which it was obtained, and disclosing her health information to other agencies, in each case without her consent.

[53] These allegations apparently relate to the communications plan and what Dr Van Wey Lovatt alleges was disclosed to the Health and Disability Commissioner, the Police and the District Court. The Commissioner, however, expressly declined to investigate her

allegations around the communications plan.[22] In relation to her allegations that false information was disclosed, in his email dated 17 March 2021 the Commissioner advised Dr Van Wey Lovatt "This isn't something that our Office is going to be able to investigate or make a finding on". Accordingly, there was nothing before us to indicate that the allegations of breaches of Rules 10 and 11 were investigated.

Conclusion on jurisdiction

[54] In relation to the issue posed at [10.1.2] above, our conclusion is that none of the additional alleged breaches were investigated by the Commissioner, in accordance with the investigation procedures set out in the PA. The additional alleged breaches in Dr Van Wey Lovatt's amended statement of claim are, therefore, not within the jurisdiction of the Tribunal and must be struck out. In this case it is appropriate to strike out the whole of the amended statement of claim, so Dr Van Wey Lovatt's case reverts to that pleaded in her original statement of claim.

[55] Having reached the conclusion at [54] we do not need to consider whether the six-month time period prescribed by PA s 98 applied to the additional alleged breaches of Rules 3, 5, 7, 8, 10, and 11 of the Code.[23]

WHETHER THE CLAIM AS A WHOLE SHOULD BE STRUCK OUT

[56] HNZ also says that Dr Van Wey Lovatt's claim as a whole should be struck out as being vexations, not brought in good faith and disclosing no reasonable cause of action. HNZ says that to have the claim continue will be an abuse of process of the Tribunal.

[57] Dr Van Wey Lovatt opposes the strike out application. She says her claims are not vexatious and have been brought in good faith. She says the causes of action are tenable and her claims are arguable.

The law

[58] The Tribunal has an express power to strike out proceedings under s 115A of the Human Rights Act 1993 (HRA) as follows:

> **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.

[59] The Tribunal may also dismiss a proceeding if is satisfied that proceeding is trivial, frivolous or vexatious or is not brought in good faith.[24]

[60] Also of relevance is HRA s 105, which requires the Tribunal to act in accordance with the substantial merits of the case, without regard to technicalities, but in accordance with the principles of natural justice and in a manner that is fair and reasonable and according to equity and good conscience.

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[22] See [39] above.
[23] The six-month periods in PA ss 98(2) to (4) only require consideration if it is determined that the Tribunal otherwise has jurisdiction.
[24] HRA, s 115.

[61] In respect of HRA s 115(1)(a), it is a well-established principle that it is inappropriate to strike out a claim summarily unless the court or tribunal can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.[25]

[62] In respect of HRA s 115(1)(c), a vexatious proceeding is one which contains an element of impropriety.[26] Also:

> **[62.1]** A proceeding may be vexatious, notwithstanding that it may contain the germ of a legitimate grievance or may disclose a cause of action or a ground for institution.[27]
>
> **[62.2]** A proceeding which discloses an arguable cause of action or is based upon an underlying legitimate grievance may nevertheless be vexatious when considered in context. The subjective intention of the party is not determinative of vexatiousness, which is a matter to be objectively assessed.[28]
>
> **[62.3]** The issue is not whether the proceeding was instituted vexatiously, but whether it is a vexatious proceeding.[29]

Submissions

[63] In its application to strike out the whole of Dr Van Wey Lovatt's claim HNZ says the claim is vexatious and not brought in good faith. It referred to the wide discretionary power the Tribunal has to strike out matters.[30]

[64] HNZ submits the following principles are relevant:

> **[64.1]** While a strike out application proceeds on the basis that the facts pleaded in the statement of claim are true, where they are plainly incorrect it is not appropriate to assume they are the truth.[31] There must be an objective factual basis for the allegations. A court or tribunal is not required to assume the correctness of factual allegations obviously put forward without any foundation.
>
> **[64.2]** It is well established that a vexatious proceeding is one which contains an element of impropriety.[32]
>
> **[64.3]** A proceeding may be vexatious not withstanding that it may contain the germ of a legitimate agreements or disclose a cause of action.[33]

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[25] See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J
[26] See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [89] and *Burchell v Auckland District Court* [2012] NZHC 3413, [2013] NZAR 219 at [16].
[27] See *Attorney-General v Hill* (1993) 7 PRNZ 20 (CA) at 23.
[28] See *Attorney-General v Collier* [2001] NZAR 137 (HC) at [35].
[29] See *Attorney-General v Brogden* [2001] NZAR158 (HC)a t [58] (appeal dismissed in *Brogden v Attorney-General* [2001] NZAR 809 (CA)).
[30] *Mackerel v Universal College of Learning* HC Palmerston North CIV-2005-485-000802, 17 August 2005 (Mackerel).
[31] *Collier v Panckhurst* CA 136/97, 6 September 1999 at [19].
[32] See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [89] and *Burchell v Auckland District Court* [2012] NZHC 3413, [2013] NZAR 219 at [17].
[33] See *Attorney-General v Hill* (1993) 7 PRNZ (CA) at 23.

[64.4] A proceeding which discloses an arguable cause of action or is based on an underlying legitimate grievance may nevertheless be vexatious set-in context. The subjective intention of the party is not determinative of vexatiousness, this is a matter to be objectively assessed.[34]

[65] In support of its submission that Dr Van Wey Lovatt's alleged breach of Rule 6 of the Code (refusal to provide Dr Van Wey Lovatt with all intra and inter-agency information about her), set in context must be seen as vexatious, HNZ submitted that the interactions of Dr Van Wey Lovatt with HNZ staff were relevant, including her:

[65.1] Requests for multiple invasive procedures, sometimes against clinical advice.

[65.2] Turning up unannounced in unauthorised areas of the hospital, looking for clinicians to question.

[65.3] Drawing incorrect conclusions from the information she was obtaining through her own research and asking for HNZ protocols to be altered based on her individual situation.

[65.4] Requesting test results within unreasonable timeframes.

[65.5] Making complaints to the Health and Disability Commissioner, none of which were upheld.

[65.6] Imposing her own consent form for a procedure.

[65.7] Repeatedly requesting clinical records, including requesting information that did not exist.

[65.8] Using an alias to request information, using a student email account to avoid the communications plan and blocking hospital email and addresses.

[65.9] Complaining to the Police about, and applying for a restraining order against, Ms Chandler (in her role as the person through whom communications were intended to be made pursuant to the communications plan).

[65.10] Breaching a trespass order she had been subjected to in respect of accessing the hospital.

[65.11] Issuing High Court proceedings against the hospital in relation to the transportation of tissue samples.

[65.12] Issuing proceedings against Ms Chandler in Seattle.

[65.13] Making over 148 Official Information Act requests.

[65.14] Complaining to a range of agencies (including the Ministry of Health, Archives New Zealand, the Health and Disability Commissioner, the media, the New Zealand Police, the New Zealand Law Society, the Legal Complaints Review

[34]See *Attorney-General v Collier* [2001] NZAR 137 at [35].

Officer, International Accreditation New Zealand, the Ombudsman and the Department of Internal Affairs) none of which complaints were upheld.

[66] In support of HNZ's submission that the alleged breach of Rule 5 of the Code (in relation to the change in her address) should be struck out as being frivolous and vexatious, HNZ said the only explanation for it changing her address was that she had authorised the change.

[67] Opposing the strike out, Dr Van Wey Lovatt submits:

[67.1] The facts as pleaded in the original statement of claim enjoy an assumption that those facts pleaded are true. The facts are clear. They are not vague. They disclose tenable causes of action under the PA.

[67.2] There is a well-established and important principle in determining strike-out application that access to justice and the courts is a fundamental constitutional right.[35] The decision in *Mackerel* does not address this principle. The principles considered relevant in the *Mackerel* case were focused on Ms Mackerel's "morass of information" filed and with the vagueness of the pleadings. The wide discretionary power referred to in *Mackerel* does not change the starting point which is that care and caution must be exercised before depriving a plaintiff of their right of access to justice. The use of strike out jurisdiction must be used sparingly.

[68] Dr Van Wey Lovatt says:

[68.1] She is neither vexatious nor unreasonable. Rather she says that she has substantial and complex health issues, in respect of which she has experienced inadequate diagnosis, treatment and follow up care.

[68.2] She is intelligent, with the ability to research and understand complex matters.

[68.3] She wants to engage with her doctors on her diagnosis, treatment and care, which is her legal right. Just because other patients do not do so, that does not make her enquiries and discussion points unreasonable.

[68.4] When HNZ's processes for engagement proved inadequate she went to various agencies for help, as recommended to her.

[68.5] The affidavits of Ms Chandler and Ms Gardner contain hearsay, which is not established on the balance of probabilities. By way of example, the allegation that she (Dr Van Wey Lovatt) accessed restricted areas of the hospital is without any evidence as to how a particular area was restricted.

[68.6] The allegation that she changed her contact address does not explain why HNZ continued to communicate with her at her original address.

[35] New Zealand Bill of Rights Act 1990, s 27

Consideration of strike out application

[69] In relation to the application to strike -out the whole of Dr Van Wey Lovatt's claim on the basis that it discloses no reasonable cause of action, the elements of Dr Van Wey Lovatt's claim are:

> **[69.1]** She requested certain health information, including all intra and inter agency communications about her from 1 January 2017 to the date of her request, 5 February 2020.
>
> **[69.2]** HNZ provided certain information requested by Dr Van Wey Lovatt but declined to provide all intra and inter agency communications in reliance on PA s 29(1)(j) (the request was frivolous and vexations or the information sought was trivial) or PA s 29(2)(a) (the information was not readily retrievable).
>
> **[69.3]** Dr Van Wey Lovatt says that the response to her request for information was inadequate and that HNZ could not properly rely on PA ss 29(1)(j) or 29(2)(a).
>
> **[69.4]** Her address was changed by HNZ, without her authorisation in breach of Rule 5.

[70] In relation to the allegation of a breach of Rule 5 there is a dispute as to the facts. There is also a dispute as to certain of the factual allegations made in relation to the alleged breach of Rule 6.[36] While for a strike out application facts are generally assumed, in this case where the facts are disputed it is appropriate that the parties have the ability, at a hearing, to cross examine those witnesses whose evidence relates to the disputed facts.

[71] Section 29(2)(a) of PA 1993 (information not readily retrievable) forms part of HNZ's substantive defence to the alleged breach of Rule 6 of the Code. We are, accordingly, of the opinion that this needs to be properly tested before the Tribunal.

[72] Section 29(1)(j) of PA 1993 (the request is frivolous or vexations or the information requested is trivial) also forms part of HNZ's substantive defence to the alleged breach of Rule 6. It is one of the reasons that HNZ advanced for making the responses it did to Dr Van Wey Lovatt's request for her personal information. While the matters in [65] above set the scene and give context to the allegations that Dr Van Wey Lovatt's request for information was vexatious, that context should be able to be tested by Dr Van Wey Lovatt at a hearing.

[73] Overall, we are not of the opinion that the originally pleaded allegations of breaches of Rules 5 and 6 should be struck out, but rather that they must proceed by way of a hearing before the Tribunal.

CONCLUSION

[74] We have found that the additional alleged breaches of Rules 3, 5, 7, 8, 10 and 11 of the Code in Dr Van Wey Lovatt's amended statement of claim, not having been

[36] By way of example, Dr Van Wey Lovatt says in her witness statement that Mr Dunham has misspelt his own name, but HNZ says the document relied on for this statement actually just shows a typical signature.

investigated by the Commissioner, are not within the jurisdiction of the Tribunal. Accordingly, they must be struck out.

[75] In this circumstance, it is appropriate to revert to the pleadings as set out in Dr Van Wey Lovatt's original statement of claim dated 1 April 2021.

[76] The application to strike out the whole of Dr Van Wey Lovatt's claim involves issues relating to HNZ's substantive defences to Dr Van Wey Lovatt's original claim. Accordingly, these defences should be tested at a hearing before the Tribunal. It is not appropriate for the claim to be struck out before Dr Van Wey Lovatt has had the opportunity to challenge the defences.

[77] The original claim should now be progressed. The next step is for the Tribunal Secretary to convene a teleconference to schedule the remaining pre-hearing steps.

ORDERS

[78] Dr Van Wey Lovatt's amended statement of claim dated 15 March 2022 is struck out in its entirety.

[79] Dr Van Wey Lovatt's claim before the Tribunal will proceed on the basis of her statement of claim dated 1 April 2021.

.....	.....	.....
Ms GJ Goodwin	**Ms BL Klippel**	**Dr M Koloamatangi**
Deputy Chairperson	**Member**	**Member**