

UNDER

THE PRIVACY ACT 2020

IN THE MATTER OF

INTENDED PROCEEDINGS BY

TANYA DUNSTAN

AT WELLINGTON

BEFORE:

Ms Sarah Eyre, Chairperson

REPRESENTATION:

Ms Dunstan, in person

The intended defendant was not heard

DATE OF DECISION: 13 October 2023

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**DECISION OF TRIBUNAL THAT INTENDED STATEMENT OF CLAIM  
NOT BE ACCEPTED FOR FILING<sup>1</sup>**

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[1] On 19 April 2023, Ms Dunstan 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 Dunstan 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.

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<sup>1</sup>This decision is to be cited as *Re Dunstan (Rejection of Statement of Claim)* [2023] NZHRRT 34.

[4] Ms Dunstan did not attach to her form a certificate from the Privacy Commissioner or any other document that showed the Commissioner had in fact decided under s 77(2)(a) of the Act not to investigate the complaint.

[5] Ms Dunstan added the following words next to the box she ticked “no legislation provided – just a general email by Tara Reynolds dated 19/04/2023 [sic]”. She also attached to her form an email dated 18 April 2023 from the Office of the Privacy Commissioner that stated, “for the reasons set out in my previous correspondence we will not be investigating your complaint”.

[6] On 30 May 2023, the Tribunal Secretary emailed Ms Dunstan noting it appeared the claim may not meet the jurisdictional criteria set out in s 98 of the Act. Ms Dunstan was provided with the opportunity to provide further information for the Chairperson to consider in determining whether to accept the claim.

[7] Ms Dunstan responded on 2 June 2023 attaching a letter from the Director of Human Rights Proceedings which she maintained stated that she could bring proceedings in the Tribunal and that accordingly the claim could be accepted. The Tribunal Secretary by email dated 6 June 2023 told Ms Dunstan the Director of Human Rights Proceedings does not determine if the Tribunal has jurisdiction and provided her a further opportunity to provide information or submissions regarding the acceptance of her claim.

[8] On 6 June 2023 by email Ms Dunstan asserted the Tribunal did have jurisdiction over her intended claim. No further information has been provided by Ms Dunstan on this matter since then.

## THE LEGAL FRAMEWORK

[9] 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. The Tribunal has previously considered how this framework applies to instances where the Privacy Commissioner has not investigated a complaint.<sup>2</sup> That legal framework is repeated here for Ms Dunstan’s benefit.

[10] In the first instance a complaint about an interference with the privacy of an individual is made to and considered by the Privacy Commissioner.<sup>3</sup>

[11] 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.

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<sup>2</sup> See *Re Puia (Rejection of Statement of Claim)* [2023] NZHRRT 29

<sup>3</sup> See Part 5, subpart 1, including ss 70 and 73.

- (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).

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

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

**[12.2]** 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.

**[13]** 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.

**[14]** 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.

**[15]** 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)).

**[16]** 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.

**[17]** 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.

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

**[18.1]** 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

**[18.2]** 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

**[18.3]** 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)).

**[19]** 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 DUNSTAN'S INTENDED CLAIM**

**[20]** Ms Dunstan submits her intended claim meets the criteria in s 98(1)(a) of the Act because the Commissioner has decided under s 77(2) not to investigate the complaint. She has however not provided any evidence to support that contention. Likewise, there is no suggestion by Ms Dunstan that her claim was investigated by the Privacy Commissioner and could therefore meet the criteria under any other subsection of s 98(1) as described in [18.1] above.

**[21]** The letter Ms Dunstan provided from the Director dated 2 June 2023 has no relevance to this claim that she seeks to file under the Act. That letter relates to a complaint she made to the Human Rights Commission under the Human Rights Act 1993. Accordingly, there is no evidence before the Tribunal that the Commissioner had decided under s 73(1)(d) (in accordance with s 77) to explore the possibility of securing a settlement between Ms Dunstan and the intended defendant.

**[22]** It is instead apparent that the Commissioner decided under s 73(1)(a) not to investigate Ms Dunstan's complaint in reliance on s 74. The email from the Commissioner to Ms Dunstan dated 18 April 2023 clearly states this. This email is the Commissioner's advice of his decision under s 73(2) and the reasons for that decision. While the email does not refer to s 74, it is clear on its face and the context in which it was sent that the Commissioner has exercised his discretion under that provision in deciding not to investigate the complaint made by Ms Dunstan.

**[23]** As the Commissioner's decision not to investigate Ms Dunstan'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 nor under any of the other subsections in s 98(1)(b) -(i).

### **CONCLUSION**

**[24]** The Tribunal has no jurisdiction in respect of the intended claim filed by Ms Dunstan, therefore the statement of claim presented for filing on 19 April 2023 cannot be accepted by the Secretary.

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**Sarah Eyre**  
**Chairperson**  
**Human Rights Review Tribunal**