

Reference No. HRRT 006/2022

UNDER THE PRIVACY ACT 2020

BETWEEN VANESSA HAYWARD

PLAINTIFF

AND BARNARDOS NEW ZEALAND
INCORPORATED

DEFENDANT

AT WELLINGTON

BEFORE:

Ms GJ Goodwin, Deputy Chairperson

Dr SJ Hickey MNZM, Member

Ms S Stewart, Member

REPRESENTATION:

Ms V Hayward in person

Ms K Wallace and Ms A Sawant for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 30 June 2022

DECISION OF TRIBUNAL¹

Background

[1] On 13 March 2021 Ms Hayward made an access request to Barnardos New Zealand Incorporated (Barnardos) under the Privacy Act 2020 (PA). Following Barnardos' response, on 10 April 2021 Ms Hayward emailed a list of her concerns to Barnardos. As she continued to be dissatisfied with Barnardos' reply to her PA requests Ms Hayward

¹ [This decision is to be cited as *Hayward v Barnardos NZ Inc (Jurisdiction)* [2022] NZHRRT 22.]

took her claim to the Privacy Commissioner. On 21 April 2021 the Privacy Commissioner responded, inter alia:

We have received your complaint about Barnardos Child and Family Services. I understand you asked for your file and you are concerned that information is missing. You also believe there are inaccuracies in the information that was disclosed to you.

Barnardos has advised you that it has added your amendments to the file. To the extent that your concerns were requests for correction of information about you, Barnardos' decision to attach your comments to the file would comply with its obligations under the Privacy Act. An agency does not have to make changes you have requested if it is satisfied the information is accurate, or an accurate record of its actions at the time.

[2] In her reply to the Privacy Commissioner, also dated 21 April 2021, Ms Hayward made comments about various of Barnardos' Information Privacy Principle (IPP) 6 disclosures and also said that she wanted Barnardos' file "fixed" because of what she described as its inaccuracies and misrepresentations.

Matter to be determined

[3] In her claim before the Tribunal Ms Hayward alleges Barnardos interfered with her privacy by breaching IPPs 6 and 7.

[4] Pursuant to IPP 7, individuals have a right to ask an organisation to correct information about them if they think that information is wrong. If an organisation does not agree that the information needs correcting, the individual can ask that an agency attach a statement of correction to its records.

[5] It is not disputed that the Tribunal has jurisdiction to hear Ms Hayward's allegation that Barnardos has breached IPP 6. Barnardos says, however, that the Tribunal does not have jurisdiction to consider that part of Ms Hayward's claim which relates to an alleged breach of IPP 7.

[6] Ms Hayward is firmly of the view that the Tribunal does have jurisdiction to consider her allegation of a breach of IPP 7. Relying on the correspondence referred to at [1] and [2] above she says:

[6.1] PA s 98(1) gives individuals the right to commence proceedings in the Tribunal where the subject matter of the proceedings has already been before the Privacy Commissioner.

[6.2] She raised the issue of a breach of IPP 7 with the Privacy Commissioner before 21 April 2021 and again on that date, so that the allegation of such a breach has already been before the Privacy Commissioner.

[7] The Tribunal has determined that the issue of whether it has jurisdiction to hear and consider Ms Hayward's allegation that Barnardos has breached IPP 7 is to be dealt with as an interlocutory matter.

The statutory framework

[8] The Tribunal's jurisdiction is limited to considering claims involving a complaint received by the Privacy Commissioner or a matter investigated by the Privacy Commissioner, provided any of the scenarios set out in PA, s 98(1) applies:

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.

[9] For the Tribunal to have jurisdiction, a complaint must come within one of the above scenarios.

[10] In considering jurisdiction in the context of whether any of the above scenarios applies, the Certificate of Investigation issued by the Privacy Commissioner is the starting point. In this case, the Certificate, which is dated 22 November 2021, refers to the matter considered as being Barnardos' response to Ms Hayward's information request of 13 March 2021. It notes that only IPP 6 was applied. In a letter dated 1 March 2022, addressed to the Tribunal, the Privacy Commissioner confirmed that the investigation was limited to Ms Hayward's IPP 6 request and that there was no investigation of any matters under IPP 7, nor of any concerns relating to the accuracy of information.

[11] Given there has been no investigation by the Privacy Commissioner of any alleged breach of IPP 7, only PA, s 98(1)(a) is potentially relevant to confer jurisdiction on the Tribunal in relation to Ms Hayward's allegation of a breach of that IPP.

[12] Section 98(1)(a) does not, however, refer simply to where the Commissioner elects not to investigate a complaint, but only to where the Commissioner decides under PA, s 77(2)(a) not to investigate a complaint:

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] The application of PA, s 98(1)(a) was discussed in *Re Jones (Rejection of Statement of Claim)* [2021] NZHRRT 19 at [14]:

[14] ... Proceedings under s 98(1)(a) are only possible where the Commissioner first decides to use best endeavours to secure a settlement of the complaint and second, following failure to secure such settlement, the Commissioner further decides not to investigate the complaint. In short, if the Commissioner decides under s 74 not to investigate a complaint and also decides not to use best endeavours under s 77, there can be no relevant decision under s 77(2)(a) on which an aggrieved individual can base proceedings under s 98(1)(a).

Application to Ms Hayward's claim

[14] In this case there has been no suggestion by the Commissioner or by either of the parties that the Commissioner used any endeavours to either secure a settlement of Ms Hayward's complaint in relation to IPP 7, or to secure a satisfactory assurance that there would not be a repetition of the action giving rise to that complaint.

[15] This means that the threshold required by PA, s 98(1)(a) for Ms Hayward to commence proceedings in the Tribunal for an alleged breach of IPP 7 has not been met. Likewise, on the facts, none of the other circumstances listed in PA, s 98(1) have been shown to apply. Accordingly, the Tribunal has no jurisdiction over the complaint made by Ms Hayward of an alleged breach of IPP 7.

[16] Given this, Ms Hayward is to file an amended statement of claim, omitting references to an alleged breach of IPP 7 and restricting her claim for damages to those flowing from her allegation of a breach of IPP 6, in accordance with the directions below.

DIRECTIONS

[17] The following directions are made:

[17.1] Ms Hayward is to file an amended statement of claim as required by [16] above by Friday 29 July 2022.

[17.2] Barnardos New Zealand Incorporated is to file any amended statement of reply by Friday 26 August 2022.

[17.3] The Tribunal Secretary is to convene a teleconference to progress case matters after 29 August 2022.

[17.4] Leave is reserved to the parties to make further application should the need arise.

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Ms GJ Goodwin
Deputy Chairperson

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Dr SJ Hickey MNZM
Member

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Ms S Stewart
Member