IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 13**

	Reference No. HRRT 062/2017
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**BARRY JOHN GRAY**
	PLAINTIFF
AND	**MINISTRY FOR CHILDREN**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms K Anderson, Member
Dr SJ Hickey MNZM, Member

REPRESENTATION:
Mr BJ Gray in person
Ms HM Carrad and Ms A Lawson for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **11 April 2018**

DECISION OF TRIBUNAL[1]

BACKGROUND

[1] Consequent on a series of events which began in 2011 Mr Gray has been in dispute with what is now known as Oranga Tamariki (the Ministry for Children). In the course of that dispute he has sought access to such of his personal information as may be held by the Ministry and has also sought correction of that information.

[2] Dissatisfied with the Ministry's compliance with his access requests he complained to the Privacy Commissioner alleging that information privacy principles 6 and 7 had been breached. According to Mr Gray, the Commissioner began his investigation on 16 June 2017. See Mr Gray's letter dated 15 January 2018 to the Tribunal. The submissions for the Ministry state that the Ministry has engaged substantively with that investigation.

[1] [This decision is to be cited as *Gray v Ministry for Children (Strike-Out Application)* [2018] NZHRRT 13]

Complaint withdrawn

[3] It is common ground that during the course of the Commissioner's investigation, Mr Gray on 13 November 2017 withdrew his complaint so that he could bring a claim before the Tribunal sooner than if he had waited for its completion. In his letter dated 15 January 2018 to the Tribunal Mr Gray explained:

> Secondly, the office of the Privacy Commissioner began their investigation on the 16th of June 2017, and I withdrew my complaint on the 13th of November 2017 after discussions with the privacy commissioner investigator as to the best way forward after we had received no response to my requests.

[4] To similar effect see Mr Gray's subsequent letter dated 31 January 2018:

> The second issue is over my withdrawal of my complaint to the privacy commissioner's office. Having originally requested the correction of incorrect information and the access to information in late March 2017, I have had no reply on the issue. I believe that the investigator from the office of the privacy commissioner assigned to the case also was unable to get a response from the ministry also. So I believe I had a right to move on to the HRRT for assistance with these matters.

[5] The withdrawal of the complaint was acted on by the Commissioner who decided to take no further action on the complaint, a decision he was entitled to make under the Privacy Act 1993 (PA), s 71(1)(d) discussed below.

[6] In support of his claim Mr Gray has submitted Certificate of Investigation C/28745 issued by the Privacy Commissioner in which it is recorded (inter alia) that the Commissioner, having commenced an investigation, reached no final view on Mr Gray's complaint because Mr Gray withdrew his complaint and therefore PA, s 71(1)(d) applied. The final field of the certificate is in the following terms:

Commissioner's opinion:	No opinion, complaint withdrawn – section 71(1)(d).
• **application of principle(s)**	Principle 6 and Principle 7 – No final view formed.
• **adverse consequences**	N/A
• **interference with privacy**	No final view formed.

Mr Gray's claim

[7] In these proceedings filed with the Tribunal on 30 November 2017 Mr Gray alleges the Ministry for Children breached information privacy principles 6 and 7. Mr Gray also alleges that his right to the observance of the principles of natural justice was breached by the Ministry in the course of its determination of his Principle 6 and Principle 7 requests.

The jurisdiction objection

[8] By memorandum dated 22 December 2017 the Ministry has made two jurisdictional objections:

> **[8.1]** Because Mr Gray withdrew his complaint prior to the Privacy Commissioner reaching a final view on the complaint it is not possible for Mr Gray to bring proceedings before the Tribunal.

> **[8.2]** In proceedings under the Privacy Act the Tribunal has no jurisdiction to consider a claim that the New Zealand Bill of Rights Act 1990 has been breached.

[9] By *Minute* dated 25 January 2018 the Chairperson gave timetable directions for the parties to file written submissions on these two objections. Those submissions having been filed, this decision now follows.

THE FIRST OBJECTION TO JURISDICTION – COMPLAINT WITHDRAWN

[10] The issue raised by the first objection is whether an individual who, having withdrawn his or her complaint to the Commissioner can then, without more, institute before the Tribunal proceedings based on that same complaint.

[11] We are of the clear view that, applying the Interpretation Act 1999, s 5, the answer to this question is "No". Our reasons, which we now develop, are that once a complaint to the Privacy Commissioner has been withdrawn and s 71(1)(d) applied by the Commissioner, the complaint is at an end. In addition, it would be contrary to the scheme and purpose of Part 8 of the Privacy Act to permit an individual, at his or her election, to bypass the Privacy Commissioner's Part 8 complaints process and file proceedings directly with the Tribunal.

The Part 8 provisions of the Privacy Act – text

[12] The focus of the first objection to jurisdiction is, as mentioned, the fact that prior to the completion of the investigation by the Privacy Commissioner, Mr Gray withdrew his complaint.

[13] The text of the Act recognises that withdrawal or discontinuance of a complaint is permissible and in such circumstances the Commissioner may decide to take no action or no further action on the complaint. See PA, s 71(1)(d) which relevantly provides:

> **71 Commissioner may decide to take no action on complaint**
>
> (1) The Commissioner may in his or her discretion decide to take no action or, as the case may require, no further action, on any complaint if, in the Commissioner's opinion,—
>
> …
>
> (d) the individual alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
>
> …
>
> (2) Notwithstanding anything in subsection (1), the Commissioner may in his or her discretion decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Commissioner that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.
>
> (3) In any case where the Commissioner decides to take no action, or no further action, on a complaint, the Commissioner shall inform the complainant of that decision and the reasons for it.

[14] The principle explicitly recognised by Part 8 is that the individual alleged to be aggrieved can desire that no action be taken on his or her complaint or reach a decision to discontinue the complaint. This is consistent with the general principle which applies in civil litigation namely, that a plaintiff cannot be compelled against his or her will to continue with a proceeding. A plaintiff can elect to discontinue at any time before the giving of judgment or a verdict. See High Court Rules, r 15.19 and *O'Brien v New Zealand Social Credit Political League Inc (No 2)* [1984] 1 NZLR 68 (CA) at 73. To require otherwise would be contrary to the objective of the High Court Rules, which is to

secure the just, speedy and inexpensive determination of any proceeding. See *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* [2012] NZHC 223 at [6].

[15] Although there are distinct differences between an investigation by the Privacy Commissioner and litigation under the High Court Rules, the principle remains the same. An individual alleged to be aggrieved can, subsequent to the making of a complaint to the Commissioner, decide to withdraw or discontinue the complaint. The logic is readily apparent. An individual should not be compelled to pursue a complaint and the Commissioner's finite resources should not be wastefully applied to the investigation of a complaint where the complainant does not wish to proceed.

[16] This reading of the text is supported by the purpose of the relevant Part 8 provisions.

The Part 8 provisions of the Privacy Act – purpose

[17] As pointed out in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation* [2014] NZHRRT 1, (2014) 10 HRNZ 279 at [19], the scheme of Part 8 of the Act is that in the first instance complaints must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by ss 82 and 83 only where an investigation by the Commissioner has been conducted under Part 8 or where conciliation (under s 74) has not resulted in settlement. Voluntary compliance is not only an important aim of the Act it is also an important aspect of the Part 8 complaints system. On receiving a complaint the Privacy Commissioner must attempt to reach a settlement between the parties. If that fails, there is provision for the matter to then proceed to an enforcement stage before the Tribunal.

[18] That the voluntary compliance provisions of the Act have proved to be effective was explicitly noted in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation*. There, at [21] the Tribunal referred to the Privacy Commissioner's *Annual Report 2013* (Wellington, November 2013) which at 21 recorded that most complaints to the Commissioner are either settled or complainants decide not to pursue the matter further after the investigation has been completed. At that time the aim of the Privacy Commissioner was to settle 30% of all complaints but in fact of the complaints closed for the year 2012/13, 36% were closed with some level of settlement. This, in turn, was an increase in the settlement rate from the previous year. Overall, the Privacy Commissioner achieved some level of resolution in nearly 63% of all notified complaints. Settlements ranged from apologies through to payments of money for harm caused.

[19] The Privacy Commissioner's most recent *Annual Report 2017* (Wellington, November 2017) at 9, 17-20 evidences a continuation of the effectiveness of the dispute resolution process. Whereas the aim of the Commissioner in 2017 was to settle 40% of all complaints, some 48% of cases were in fact closed by settlement. The Commissioner also continues to work hard to quickly and fairly resolve complaints. To this end, 90% of cases were completed within six months and at year end, 90% of files were less than six months old. The total number of complaints received in 2017 was 736.

[20] It is apparent from these figures that the Part 8 alternative dispute resolution scheme as facilitated by the Privacy Commissioner is achieving its intended goal of speedy, low-cost, informal and non-adversarial resolution of complaints wherever

possible. There is therefore good reason for Part 8 to provide for complaints to be withdrawn or discontinued by the complainant.

[21] Not to be overlooked is the fact that the complaints process is not just for the benefit of the person aggrieved. It is also for the benefit of the agencies complained against. They are entitled to be given notice of the complaint and of the fact that an investigation has been opened by the Commissioner. Proper particulars of the complaint must be given and the agency afforded a fair opportunity to respond. See the summary of the relevant statutory provisions in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation* at [25].

[22] It is this overall process which promotes the speedy, cost effective dispute resolution process referred to. Persons aggrieved have the opportunity to decide whether they no longer desire that action be taken or to decide that the action taken by the Commissioner be discontinued. Alternatively the parties can decide on an appropriate form of settlement, such as the release of the requested information, an apology, the partial release of the information, correction of the information, the giving by the agency of assurances, changes to the policy of the agency, training or payment of money or monies worth.

[23] Seen in this context the Part 8 provisions are properly described as a "filtering mechanism" which applies to cases before they can be brought before the Tribunal. See *Waugh v New Zealand Association of Counsellors Inc* [2003] NZHRRT 9 at [20(c)]. In that case the Tribunal recognised it would:

> … defeat the object of that filtering process if the Tribunal were to … assume jurisdiction over issues in respect of which the Privacy Commissioner … has not formed [an opinion on a complaint] … That defect cannot be cured by a hearing in the Tribunal.

[24] In *Lehmann v The Radioworks Ltd* [2004] NZHRRT 31 at [20] the Tribunal said:

> … it would be contrary to the legislative scheme to impose on the defendant a requirement to answer the claim … in the Tribunal for the first time, when the parties have not had the benefit of the "filtering" procedures provided by the Privacy Act.

[25] To the above must be added the following points properly stressed by the Ministry:

[25.1] If claimants were able to by-pass a Part 8 investigation by the Privacy Commissioner by submitting a complaint and then withdrawing it in order to go straight to the Tribunal, the Tribunal would receive an influx of claims.

[25.2] Hearing time before the Tribunal is a limited resource. Hearings are also resource intensive in that the Tribunal comprises not only a Chairperson but also two other persons appointed by the Chairperson from the Panel maintained by the Minister of Justice under the Human Rights Act 1993, s 101 (incorporated into proceedings under the Privacy Act 1993 by s 89 of that latter Act). The proceedings are adversarial in nature. The average length of a hearing is presently three days. It is not uncommon for hearings in complex cases to run for two weeks or more.

[25.3] Any influx of cases taking a short cut will limit the effectiveness of the Tribunal's processes for those claimants who have proceeded in good faith through the Privacy Act's mandated consideration by the Privacy Commissioner followed by a decision in accordance with the requirements of the Act. It would also be unfair to those people who engage with the Commissioner's process

were it permissible for other complainants to jump the queue by withdrawing from the statutory filtering mechanism in order to file proceedings with the Tribunal. The Part 8 complaint process would be substantially undermined.

> **[25.4]** Adversarial litigation is expensive for agencies which are the subject of complaints. The requirements of the Privacy Act with respect to jurisdiction provide a valuable protective mechanism for potential defendants in that before a claim may be filed in the Tribunal, the agency will have had opportunity to be heard by the Commissioner on the merits of the underlying complaint. If the Commissioner considers a claim has substance, the agency will have had the opportunity to consider the possibility of settlement under the auspices of the Commissioner. Having so engaged, as the Ministry did in this case, agencies are entitled to receive a decision from the Privacy Commissioner on the complaint. That decision might be that the Commissioner decides to take no further action on a complaint under PA, s 71 or a decision as to whether the complaint has merit. This is particularly significant given defendants in proceedings before the Tribunal are unlikely to be able to recover anything like the costs they would be awarded if faced with a claim in the District or High Courts. See *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [59] to [71].

[26] We conclude that viewed in the context of Part 8, powerful policy reasons support the submission by the Ministry that if a claim has been withdrawn or discontinued, the jurisdiction threshold in PA, ss 82(1) and 83 cannot be crossed as there is no longer a complaint with which the provisions of the Act can engage.

[27] Mr Gray understandably relies on *Cooper v Hamilton Pharmacy 2011 Ltd (Strike-Out Application)* [2017] NZHRRT 38 to which attention was drawn by the Chairperson in the *Minute* issued on 25 January 2018. In that case the Commissioner unambiguously commenced an investigation but having done so, closed the file under PA, s 71(1)(g) on the grounds that Mr Cooper had an adequate alternative remedy or right of appeal available. The submission for Hamilton Pharmacy was that before it could be said there had been an investigation for the purposes of Part 8 of the Act, the Commissioner must first come to a conclusion as to whether there has been a breach of an information privacy principle and a consequential interference with the privacy of an individual. As no such conclusion had been reached, there had been no “investigation”. In rejecting this submission the Tribunal examined the provisions of Part 8 in some detail and at [35] concluded that the text and context of the provisions preclude the argument that in the context of Part 8 there can be no “investigation” unless and until the Commissioner arrives at a decision whether an information privacy principle has been breached.

[28] The point of distinction between the present case and that in *Cooper* is that here Mr Gray withdrew his complaint with the consequence that once withdrawn, there was no live complaint in respect of which PA, ss 82 and 83 could engage. Put another way, there is no jurisdiction under PA, s 83 for the Tribunal to hear a complaint which has been withdrawn or discontinued by the person aggrieved during the Part 8 investigation stage. This is a very different circumstance to that in *Cooper* where the complaint was at all times prosecuted by Mr Cooper and therefore “live” at the time the Commissioner decided to take no further action.

[29] For the Tribunal to accept jurisdiction in the circumstances of Mr Gray’s case it would mean that by the simple expedient of first lodging and then withdrawing his or her complaint an individual could bypass the statutory filtering mechanism and proceed straight to the Tribunal. An agency might not learn of the complaint until being served

with the statement of claim. This would subvert the policy behind the requirement of Part 8 of the Act that the alternative dispute resolution scheme, as mandated by the Act and facilitated by the Commissioner, be allowed to function by filtering claims and reducing the number of cases requiring resolution by the Tribunal. It would also deprive agencies of the opportunity to engage in meaningful mediation with all of its advantages. In our view the Privacy Act provisions are not to be interpreted so as to subvert the jurisdictional requirements of the Act and the policy benefits they are intended to achieve.

Conclusion

[30] For these reasons the Tribunal does not have jurisdiction to hear and determine Mr Gray's claim that the Ministry interfered with his privacy.

THE SECOND OBJECTION TO JURISDICTION – THE ALLEGED BREACH OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

[31] In his statement of claim Mr Gray also seeks an order declaring that the Chief Executive's Advisory Panel failed to comply with the rules of natural justice and accordingly violated Mr Gray's right to natural justice under the New Zealand Bill of Rights Act 1990, s 27(1). The actual terms of the statement of claim are:

> … the plaintiff will ask the Tribunal to make the following orders:
> 1. That the Chief Executive's Advisory Panel was run outside of its terms of reference by not implementing natural justice or transparency as stated and in doing so has breached my rights under s 27(1) of the Bill of Rights.

[32] In his letter dated 31 January 2018 addressed to the Tribunal Mr Gray acknowledged that in the *Minute* dated 25 January 2018 the Chairperson had drawn attention to the fact that the Tribunal does not have jurisdiction to make such declarations. He submits, however, that (on his argument) it must be taken into account that it was the alleged breach of the terms of reference by the Advisory Panel which resulted in an interference with his privacy under Principle 6(1)(a) and that if the terms of reference had been adhered to, many of the issues in his statement of claim would not exist. He asks that any reference to breaches of the Bill of Rights be substituted with a reference to breaches of the Panel's terms of reference:

> I would thereby ask that my reference to breaches of the Bill of Rights be removed from my statement of claim but the reference to breaches of the Chief Executive's Advisory Panel's terms of reference remain as this is what has been at the heart of the problem.

[33] The difficulty facing Mr Gray is twofold:

> **[33.1]** The Tribunal does not have jurisdiction to hear a complaint which has been withdrawn.
>
> **[33.2]** In any event, the Tribunal does not, in the context of a claim under Principles 6 and 7 of the information privacy principles, have jurisdiction to determine whether the Advisory Panel breached its terms of reference and whether the claimed consequences followed.

ORDER

[34] For the reasons given the Tribunal does not have jurisdiction to hear the proceedings filed by Mr Gray. The proceedings are dismissed.

....	....	....
Mr RPG Haines QC **Chairperson**	**Ms K Anderson** **Member**	**Dr SJ Hickey MNZM** **Member**