

Reference No. HRRT 025/2016

UNDER THE PRIVACY ACT 1993

BETWEEN YAN GUO

PLAINTIFF

AND STEPHEN JAMES CULPAN

DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson
Dr SJ Hickey MNZM, Member
Mr RK Musuku, Member

REPRESENTATION:

Ms Yan Guo in person
Ms HC Stuart for defendant

DATE OF HEARING: 14 May 2018

DATE OF DECISION: 19 June 2018

DECISION OF TRIBUNAL GIVING REASONS FOR STRIKING OUT CLAIM¹

[1] At a hearing on 14 May 2018, the Tribunal struck out Ms Guo's proceedings against Dr Culpan and advised that written reasons would follow. These reasons are set out below.

BACKGROUND

[2] In November 2009, Ms Guo attended an appointment with Dr Culpan that had been arranged by her employer, Price Waterhouse Cooper (PwC). Ms Guo attended a further appointment with Dr Culpan in January 2010. On 31 August 2015, Ms Guo requested Dr Culpan to provide her with her medical file. The file was provided to her on 29 September 2015.

¹ [This decision is to be cited as: *Guo v Culpan (Strike-Out)* [2018] NZHRRT 25]

[3] On 6 May 2016, Ms Guo filed a claim in the Tribunal against Dr Culpan alleging that he had delayed in responding to her request for a copy of her medical file and had not provided a full copy of the file. The claim was accompanied by a Certificate of Investigation from the Privacy Commissioner recording that he had investigated a complaint by Ms Guo under information privacy principle 6 and section 40 of the Privacy Act. The certificate recorded the opinion of the Commissioner that there had been no breach of principle 6 in respect of the information released and that no information had been withheld. In her claim, Ms Guo sought a number of remedies including an order that Dr Culpan be ordered to provide her with a full copy of her medical file.

[4] The statement of claim filed on 6 May 2016 specified that the relevant provisions of the Privacy Act on which Ms Guo relied were principle 6 and section 40. Accordingly, the proceedings were conducted on this basis.

[5] Ms Guo filed four amended statements of claim on 8 June 2017, 6 September 2017, 22 September 2017, and 5 January 2018 respectively. Each of these specified that the relevant provisions of the Privacy Act were principle 6 and section 40. In the amended claim filed on 5 January 2018, Ms Guo claimed damages from Dr Culpan in the sum of \$200,000. Ms Guo also alleged that Dr Culpan had committed an offence under s 127 of the Privacy Act. This part of the fourth amended statement of claim was struck out by *Minute* dated 2 March 2018 on the basis that the Tribunal had no jurisdiction to determine charges under the Privacy Act.

[6] On 6 March 2018 the parties were notified that the proceedings would be heard at Auckland on 14 May 2018.

[7] On 19 April 2018, Ms Guo sought leave to file a fifth amended statement of claim adding claims under principles 2, 3, 8, 10 and 11 to her existing claim. She also sought to add an additional defendant, "CityMed Medical Centre", to the proceeding. This is the name of the practice where Dr Culpan saw Ms Guo.

[8] On 1 May 2018, the Co-Chairperson issued a *Minute* where, amongst other things, she declined Ms Guo's application to file the amended claim. Leaving aside the issue of jurisdiction, the filing of evidence in the claim was by then complete, and a fixture had been allocated for 14 May 2018. In these circumstances, the Co-Chairperson stated she was not persuaded that it was either in the interests of justice, or fair and reasonable to allow an amended, expanded claim to be brought. With regard to the adding of CityMed as a defendant, the Co-Chairperson noted that Ms Guo had clarified that Dr Culpan rather than CityMed was the proper defendant to her proceedings at a teleconference on 16 June 2017 and had never previously resiled from this position. In the circumstances, she declined to join CityMed as an additional defendant.

[9] Until recently, Ms Guo has been represented in these proceedings by her mother, Ms Yan in accordance with the *Minute* of the Chairperson dated 16 June 2017, which noted Ms Yan is a fluent writer of English, speaks English well, and has successfully attained a Master's degree from a New Zealand university.

[10] Between 7 December 2017 and 26 April 2018 a large number of applications were filed by Ms Guo. Details of these and the Tribunal's determinations in respect of them are

set out below. This list does not include the series of applications made in May 2018 immediately prior to the hearing on 14 May 2018.

Date	Document	Minute	Direction
7.12.17	Application for an order that Dr Culpan provide names	8.12.17	Time table directing submissions to be filed by both parties addressing jurisdiction of Tribunal to order Dr Culpan to provide names
11.12.17	Application withdrawn		
18.12.17	Application for Tribunal to issue witness summons to three people identified as "Natalie" of "People and Capability HRPWC", a CityMed staff member whose initials are "SCU" and "the senior receptionist at CityMed" referred to in Dr Culpan's statement of evidence	20.12.17	Timetable directing submissions addressing jurisdiction to issue witness summons to a witness whose proper identity is unknown and in respect of whom no will-say statement provided
20.12.17	Memorandum advising amongst other things that Ms Guo does not need to file any further submissions about the matter of witnesses		
26.01.17	Memorandum addressing admissibility of [fourth] amended statement of claim and objections to admissibility of evidence		
30.01.17	Memorandum concerning prejudice caused by defendant's failure to file common bundle	05.02.18	Directions for filing common bundle issued
09.02.18	Application for a witness summons to be issued to Tracy Ellis	02.02.18	Application declined. Ms Guo directed not to file any further applications without leave

19.02.18	Application for direction requiring Lawyers Complaints Service to produce a Standards Committee decision to the Tribunal relating to a complaint made by Ms Guo against Counsel for Dr Culpan	02.03.18	Application declined
06.04.18	Application for orders that Dr Culpan and Ms Ellis answer interrogatories on oath plus application for leave	12.04.18	Application declined
17.04.18	Second application for witness summons to be issued to Ms Ellis	19.04.18	Application declined
19.04.18	Application to file amended claim adding CityMed as a defendant and adding additional information privacy principles to the claim plus application for leave	01.05.18	Application declined
26.04.18	Application for order that CityMed and PwC make formal discovery under oath	01.05.18	Application declined

[11] On 7 May 2018, Ms Joychild QC advised that she had been instructed by Ms Guo and filed an application seeking an adjournment of the hearing on 14 May 2018 and also a telephone conference for the purpose of setting a timetable for filing an amended statement of claim and reply, and any other interlocutory matters.

[12] Ms Guo's application for an adjournment was opposed by Dr Culpan. His counsel, Ms Stuart, filed a memorandum raising issues of fairness and abuse of process. Ms Stuart noted that Ms Guo had had every opportunity to seek legal advice in the two years since her claim was filed, that she had chosen to be represented by her mother notwithstanding the objection by Dr Culpan, that she had been represented by counsel in other proceedings including before the Tribunal, and that she had therefore been fully aware of her rights regarding representation. A further memorandum in reply to this was filed by Ms Joychild in which she stated that her instructions were triggered by the *Minute* of the Co-Chairperson dated 1 May 2018 declining Ms Guo's application to file an amended statement of claim. The memorandum stated that Ms Guo "believes that the nub of her claim will not be dealt with if the hearing goes ahead on current limited grounds".

[13] A teleconference to discuss the adjournment application was convened on 10 May 2018. Ms Joychild was asked to explain what it was that Ms Guo saw as "the nub of her

claim” that would not be dealt with at the hearing on 14 May 2018. Ms Joychild explained that her instructions were that Ms Guo’s greatest concern was that information she provided to Dr Culpan for one purpose had been used for another. Ms Guo did not understand that Dr Culpan would be reporting to her employer, PwC, about her and had a sense of betrayal and distress around this.

[14] At the teleconference, Ms Stuart opposed an adjournment for the purpose of Ms Guo obtaining legal representation. She also opposed an adjournment for the purpose of allowing an amended claim to be filed on the basis that the matters Ms Guo now saw as forming the nub of her claim, were not matters investigated by the Privacy Commissioner, and the Tribunal accordingly has no jurisdiction in respect of them. She further submitted that having these proceedings hanging over him had been a source of stress to Dr Culpan, that he was entitled to a prompt resolution of the claim against him, and that he would be disadvantaged by any adjournment.

[15] Ms Joychild advised that she was not available to represent Ms Guo on 14 May 2018 and would not be available for approximately one month. Ms Joychild took the position that should the hearing concerning the breach of principle 6 and section 40 proceed on 14 May 2018, her advice to Ms Guo would be to file new proceedings regarding Ms Guo’s other privacy concerns.

[16] By *Minute* dated 10 May 2018, the Co-Chairperson declined the application for an adjournment of the 14 May 2018 hearing. With respect to the issue of adjournment for the purpose of obtaining legal representation, the Co-Chairperson stated:

[10] It is necessary to balance the interests of Ms Guo in being legally represented and pursuing an application to amend her claim at this late stage against the interests of Dr Culpan in proceeding with a case that is otherwise ready for hearing and which has had a long gestation since being filed with the Tribunal in May 2016.

[11] While the assistance of legal counsel at a hearing is greatly valued, it is the norm in the Tribunal for litigants to be self-represented. The Tribunal’s proceedings are flexible and relatively informal and able to accommodate self-representation. I resolve that it is fair and reasonable in all the circumstances to proceed with the hearing on 14 May 2018 notwithstanding Ms Guo’s wish to have legal representation.

[17] In regard to Ms Guo’s wish for an adjournment to amend her claim, the Co-Chairperson stated:

[12] ...Ms Guo’s complaint in these proceedings has concerned the breach of section 40 of the Privacy Act and the alleged breach of principle 6. An amended claim in the terms proposed would necessitate essentially starting again with the proceedings in that an amended reply would be required, further discovery, amended briefs of evidence etc. Given the length of time the claim as currently formulated has been before the Tribunal and the fact that the hearing is but two working days away, I am not persuaded that it is fair or reasonable to grant an adjournment for this purpose.

[18] On 11 May 2018, the Co-Chairperson declined an application for her recusal for the reasons set out in that *Minute*.

THE 14 MAY 2018 HEARING

[19] Ms Guo appeared at the hearing with her mother Ms Yan. Ms Guo advised that her mother was no longer representing her, was now in the capacity of support person, and that she would be self-represented. Ms Yan sat alongside her at the hearing however and during the proceedings made a number of interjections. In opening submissions, Ms Guo stated that she was attending the hearing under protest as she had been given insufficient time to prepare properly for self-representation and denied legal representation. Ms Guo also submitted that she strongly believed that she was entitled to amend her statement of claim and proceeded to make submissions concerning alleged breaches of information privacy principles 2, 3, 5, 8, 10 and 11 in addition to the breaches of principle 6 and section 40.

[20] Because Ms Guo's opening submissions contained a mixture of submission and evidence, she was sworn in as a witness prior to reading the submissions. Many of the paragraphs in the submissions duplicated exactly paragraphs in Ms Guo's brief of evidence dated 11 August 2017. Because of this duplication, when Ms Guo read that brief, the Co-Chairperson requested her to omit the paragraphs that had already been read out by reason of their inclusion in her opening submissions. Ms Guo refused this request and proceeded to read the brief of 11 August 2017 in full and did so without interruption.

[21] Ms Guo then read aloud her brief of reply evidence. In a *Minute* dated 2 March 2018 parts of this evidence had been struck out on the grounds that it was not relevant to the issues in the proceedings and would unduly and significantly prolong the proceedings. Ms Guo advised that, notwithstanding the ruling in the *Minute* of 2 March 2018, she would read her evidence in reply in full. She stated this was because she believed, "My whole evidence in reply is important and necessary in response to Dr Culpan's fabricated evidence and thereby relevant to this case under section 73 of the Evidence Act 2006". Despite this however, she then complied with the Co-Chairperson's request to read the statement in its redacted form but said that she was doing so under protest and wanted her objection noted on the record.

[22] Following the completion of Ms Guo's evidence in chief, counsel for Dr Culpan, Ms Stuart, advised the Tribunal that she wished to cross-examine Ms Guo. The Co-Chairperson requested Ms Guo to answer the questions that would be put to her by Ms Stuart. Ms Guo refused. Ms Guo was asked several more times if she would answer Ms Stuart's questions in cross-examination, however she refused saying she would not do so unless her legal counsel was present. The Co-Chairperson explained to Ms Guo that her adjournment application had been declined several days earlier, that Ms Stuart was entitled to cross-examine her, and that it would be very unfair to Dr Culpan for her to refuse. Ms Yan interjected and stated that Ms Guo would not be answering questions.

APPLICATION TO STRIKE OUT

[23] Ms Stuart submitted that given Ms Guo's refusal to answer questions in cross-examination, her evidence could not be taken into consideration and that the Tribunal therefore had no evidence before it upon which to base any finding. She applied to have

the proceedings struck out. The Tribunal then took a one hour adjournment. On return from the adjournment, in light of the strike out application that had been made just prior to the adjournment, Ms Guo was asked again whether she would answer Ms Stuart's questions in cross-examination or whether she maintained her refusal to do so. Ms Guo confirmed that she maintained her refusal to answer any questions put to her by Ms Stuart. The Co-Chairperson advised that it was proposed that the Tribunal strike out the proceedings and asked whether Ms Guo had any further comment. Ms Guo maintained her refusal to answer questions. She stated she had had insufficient time to prepare for self-representation and that she believed she would not get a fair hearing without legal representation.

REPETITION OF ADJOURNMENT APPLICATION

[24] Before turning to the strike-out application and the consequences of Ms Guo's refusal to answer questions in cross-examination, it is necessary to briefly address Ms Guo's assertion that she would not answer questions without her legal counsel being present. This was essentially a reiteration of the adjournment application that had been determined on 10 May 2018. No grounds in addition to those considered in the 10 May 2018 *Minute* were advanced. It was explained to Ms Guo that her adjournment application had been declined and the hearing was proceeding.

[25] As noted in the *Minute* at [11] as set out above, it is the norm for litigants to be self-represented at the Tribunal and Tribunal procedure accommodates this. The Tribunal currently has limited resources which have led to unacceptable delays in allocating fixtures for telephone conferences, hearings and in the issuing of decisions. See, *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8. Given the resource pressures in the Tribunal and the long delays that litigants endure waiting for hearings, applications for adjournment of hearings shortly before commencement require careful consideration. Having determined on 10 May 2018 that it was not fair or reasonable to allow an adjournment to enable legal representation, the Tribunal proceeded with the hearing on 14 May 2018 notwithstanding the clear dissatisfaction of Ms Guo and her mother.

JURISDICTION TO STRIKE OUT

[26] In *Mackrell v Universal College of Learning* (HC Palmerston North, CIV-2005-485-802, 17 August 2005) at [48], Wild J held that the Tribunal has a wide discretionary power to strike out or to dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by High Court Rules, r 15.1 which provides:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

- (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[27] It is also necessary to have regard to s 105(2) of the Human Rights Act which provides that in exercising its powers and functions, the Tribunal must act—

- (a) in accordance with the principles of natural justice; and
- (b) in a manner that is fair and reasonable; and
- (c) according to equity and good conscience.

Evidence in the Tribunal and the effect of refusal to answer questions in cross-examination

[28] The application to strike out Ms Guo's proceedings arose in the context of her refusal to answer questions put to her in cross-examination at the hearing. It is necessary to examine this refusal in light of the relevant provisions of the Human Rights Act 1993 and the Evidence Act 2006.

[29] We note that the purpose of the Evidence Act, as set out in s 6(b) and (c), includes providing for facts to be established by the application of logical rules and promoting fairness to parties and witnesses. It is relevant to note that a witness is defined in s 4 of the Evidence Act as meaning "a person who gives evidence and is able to be cross-examined in a proceeding".

[30] Section 106 of the Human Rights Act concerns evidence in proceedings before the Tribunal. It provides that:

106 Evidence in proceedings before Tribunal

- (1) The Tribunal may—
 - (a) call for evidence and information from the parties or any other person;
 - (b) request or require the parties or any other person to attend the proceedings to give evidence;
 - (c) fully examine any witness;
 - (d) receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law.
- (2) The Tribunal may take evidence on oath, and for that purpose any member or officer of the Tribunal may administer an oath.
- (3) The Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Tribunal thinks fit, verifying it by oath.
- (4) Subject to subsections (1) to (3), the Evidence Act 2006 shall apply to the Tribunal in the same manner as if the Tribunal were a court within the meaning of that Act.

[31] As can be seen, the Evidence Act applies to the Tribunal as if it were a court unless one of the exceptions in subs (1) to (3) apply. The "any evidence" provision in s 106(1)(d) does not impact on the mechanics by which evidence is taken, which are set out in ss 83 to 100 of the Evidence Act.

[32] Section 84 of the Evidence Act sets out the process for the examination of witnesses. It provides:

84 Examination of witnesses

- (1) Unless this Act or any other enactment provides otherwise, or the Judge directs to the contrary, in any proceeding—
 - (a) a witness first gives evidence in chief; and
 - (b) after giving evidence in chief, the witness may be cross-examined by all parties, other than the party calling the witness, who wish to do so; and
 - (c) after all parties who wish to do so have cross-examined the witness, the witness may be re-examined.
- (2) If a witness gives evidence in an affidavit or by reading a written statement in a courtroom, it is to be treated for the purposes of this Act as evidence given in chief.

[33] Section 92 of the Evidence Act sets out the duties of parties concerning cross-examination. It provides:

92 Cross-examination duties

- (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
- (2) If a party fails to comply with this section, the Judge may—
 - (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
 - (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
 - (c) exclude the contradictory evidence; or
 - (d) make any other order that the Judge considers just.

[34] As stated in Mathew Downs (ed) *Cross on Evidence* (online loose-leaf ed, LexisNexis, Wellington, 2017) at EVA84.3(a) the objects of cross-examination are threefold:

[34.1] To elicit information favourable to the party conducting the cross-examination:

[34.2] To cast doubt upon the accuracy of the evidence-in-chief given against that party and damaging that party's case; and

[34.3] To comply with the advocate's duty [under s 92] to put the case.

[35] The overall purpose of the provisions in the Evidence Act concerning cross-examination is to promote accurate fact-finding by the court or tribunal and to ensure a fair hearing for both parties.

[36] In these proceedings, the briefs of Ms Guo and Dr Culpan contradicted each other on significant matters. In her evidence, Ms Guo alleged that Dr Culpan and his staff had lied to her on a number of occasions and had deceived the investigating officer from the Office of the Privacy Commissioner who investigated her complaint under information privacy principle 6. She alleged that Dr Culpan had deliberately withheld information about her. In addition, she alleged that his brief contained “faked information” and “faked and false” evidence. In his brief, Dr Culpan denied many factual allegations made in the briefs of Ms Guo and claimed that he had provided her with a complete copy of her medical file. He claimed that his breach of the statutory time limit for doing so was unintentional, that he had apologised for this, and that he had done his best to assist Ms Guo. In contrast, Ms Guo claimed that Dr Culpan had placed an alert on her file to stop it being released

and that she and her mother had then been provided with an incomplete file “to fool us and palm us off”.

[37] Where, as here, plaintiff and defendant contradict each other and the plaintiff alleges - in strong terms - that the defendant has lied, withheld information about her, and has included “faked information” in his brief of evidence, the refusal to submit to cross-examination undermines the fundamental principle of fairness. The more so given Ms Guo was the only witness to give evidence in support of her case.

[38] Given the disputes between Dr Culpan and Ms Guo in this proceeding, Ms Stuart had a duty to cross-examine Ms Guo on the matters concerning which Dr Culpan would be giving contradictory evidence. Ms Guo’s refusal to allow herself to be cross-examined allowed Dr Culpan no fair opportunity to test the veracity of her evidence. This was unfair and prejudicial to Dr Culpan in light of the serious factual allegations made against him in Ms Guo’s evidence in chief.

[39] The refusal to submit to cross-examination effectively prevented the Tribunal from fact-finding in these proceedings and effectively denied Dr Culpan a right to be heard in defence of the allegations made against him by Ms Guo. Accordingly, the Tribunal determined that the evidence of Ms Guo could not be accepted and should be excluded as unfairly prejudicial. In the absence of any evidence that could be accepted, and Ms Guo’s steadfast refusal to be cross-examined, the application to strike out Ms Guo’s proceedings was granted. The proceedings were therefore struck out.

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Ms MA Roche
Co-Chairperson

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Dr SJ Hickey MNZM
Member

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Mr RK Musuku
Member