

Reference No. HRRT 063/2015

UNDER THE PRIVACY ACT 1993

BETWEEN MARY FISHER

PLAINTIFF

AND DR ALISON FOSTER

DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson

Ms LJ Alaeinia JP, Member

Dr JAG Fountain, Member

REPRESENTATION:

Ms M Fisher in person

Mr AH Waalkens QC and Ms HC Stuart for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 19 December 2019

DECISION OF TRIBUNAL STRIKING OUT CLAIM ¹

INTRODUCTION

[1] Mary Fisher has filed a claim with this Tribunal alleging a breach of information privacy principle 6 on the part of Dr Alison Foster, arising from Dr Foster's care of Ms Fisher's late mother, Agnes Titchener, at the Seatoun Medical Centre.

[2] Dr Foster has applied for an order dismissing the claim or alternatively, striking it out on the basis that the claim is incomprehensible and excessively prolix so that Dr Foster

¹ [This decision is to be cited as *Fisher v Foster (Strike-Out Application)* [2019] NZHRRT 54.]

cannot sensibly determine what is being alleged against her and would be prejudiced if required to respond. Ms Fisher has opposed this application.

[3] The issue to be determined in this decision is whether Ms Fisher's claim ought to be struck out by the Tribunal.

Procedural history

[4] On 27 October 2015 Ms Fisher commenced proceedings before the Tribunal by filing a statement of claim in which she alleged breaches of information privacy principles 1, 2, 4, 5, 6, 8 and 11 on the part of Dr Foster, arising from Dr Foster's care of Ms Titchener, at the Seatoun Medical Centre.

[5] In response to the claim, Dr Foster made a protest to jurisdiction. The basis of this was that, as the Privacy Commissioner investigated only an alleged breach of Principle 6, Ms Fisher was precluded from bringing proceedings in respect of Principles 1, 2, 4, 5, 8 and 11. At a teleconference on 2 December 2016, Ms Fisher accepted her proceedings were necessarily restricted to Principle 6 and agreed to file an amended statement of claim focused exclusively on the allegation that Dr Foster breached Principle 6.

[6] On 24 February 2017, Ms Fisher filed an amended statement of claim. The amended claim ran to some 18 pages. It made a number of wide-ranging allegations unrelated to an alleged breach of Principle 6 and contained large amounts of evidence rather than assertions of fact.

[7] On 31 March 2017, Dr Foster made an application for an order dismissing Ms Fisher's claim, or in the alternative, striking it out on the basis that the allegation that Dr Foster did not provide Ms Fisher with her personal information upon request is not clearly particularised anywhere in the claim and instead, Ms Fisher has raised various other grievances against Dr Foster.

[8] In support of the application, Dr Foster filed an affidavit sworn by Lucy Jane Smith on 27 March 2017. Ms Smith is the secretary for Dr Foster's counsel, Mr Waalkens and Ms Stuart. In the affidavit, Ms Smith noted the procedural history of the claim and stated that after receiving Ms Fisher's amended claim on 24 February 2017, Dr Foster sent Ms Fisher a letter by email dated 20 March 2017, advising that the amended claim did not comply with the Tribunal's direction and inviting her to file a further amended claim confined solely to the allegation that Dr Foster breached Principle 6. Ms Smith stated that Ms Fisher did not respond to the email letter which was annexed to the affidavit.

[9] In a *Minute* dated 6 April 2017, the Tribunal directed that Ms Fisher have an opportunity to respond to the strike-out application. The *Minute* directed that she file a clear statement as to whether she opposes the strike-out application or consents to having her proceedings dismissed, and to file an affidavit if any part of the affidavit sworn by Lucy Jane Smith in support of the strike-out application is disputed. The *Minute* also directed Dr Foster to file submissions in reply if Ms Fisher opposed the strike-out application and provided leave to both parties to make any further application should the need arise.

[10] On 21 April 2017, Ms Fisher sought a two-week extension to the timetable set in the *Minute* of 6 April 2017. This was opposed by Dr Foster, however, in light of the fact that Ms Fisher was self-represented and that her proceedings were at risk of being summarily struck out, the Tribunal determined that fairness required the extension should be granted. In a further *Minute* dated 27 April 2017, Ms Fisher was given an extension until 12 May

2017. The timetable for Dr Foster’s reply submissions was similarly extended by two weeks to 26 May 2017. The *Minute* noted that the application for an order dismissing Ms Fisher’s proceedings would then be heard by the Tribunal on the papers.

[11] On 12 May 2017, Ms Fisher filed submissions and an affidavit in response to Dr Foster’s strike-out application. In the affidavit, she stated that she had not responded to the email letter of 20 March 2017 as she had not received it, having previously notified the Tribunal case manager on 1 February 2017 that she would be away until April 2017. Ms Fisher also filed another amended statement of claim. As before, it made a number of allegations unrelated to an alleged breach of Principle 6. It did however itemise nine requests for personal information allegedly made, in date order between 3 August 2010 and 30 October 2014. On 17 May 2017, Ms Fisher filed a four-page document entitled “Personal Information Requested but not Received”. This document is essentially a companion to the third claim and is discussed in detail later in this decision.

[12] In a memorandum of reply dated 19 May 2017, Dr Foster submitted Ms Fisher had failed to comply with the Tribunal’s direction that an amended statement of claim be filed confined solely to her allegation that Dr Foster breached Principle 6. Accordingly, Dr Foster requested the claim be dismissed or struck out.

Delay

[13] It is acknowledged that there has been considerable delay in determining this strike out application. Until very recently, the Tribunal has had 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. This situation was resolved in June 2019 with the appointment of five Deputy Chairpersons to the Tribunal.

The jurisdiction to strike out – principles

[14] The Tribunal has jurisdiction to strike out a proceeding pursuant to s 115A of the Human Rights Act 1993, which provides:

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.

...

[15] Section 115A mirrors r 15.1 of the High Court Rules 2016, which, until s 115A was inserted in November 2018, had guided the approach of the Tribunal to applications for strike out: *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005 at [48].

[16] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267. As noted by the Tribunal in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [30], the jurisdiction is to be used sparingly. In addition, the fundamental constitutional importance of the right of access to courts and tribunals must

be recognised. Nevertheless, such right of access must be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or an abuse of process: *Parohinog* at [30]–[31].

[17] It is clearly established that abuse of process extends to proceedings where there is no arguable case and to proceedings which are seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment: *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30]–[32].

[18] Striking out is often the appropriate course where the statement of claim is prolix and unintelligible. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679. At [84] the Court of Appeal set out the requirements of a statement of claim (High Court Rules 2016, rr 5.17, 5.26 and 5.27). Those requirements apply equally in proceedings before the Tribunal. Specifically:

[18.1] The pleading must be accurate, clear and intelligible.

[18.2] Sufficient particulars must be given to enable the defendant to be fairly informed of the case to be met.

[18.3] While adequate particulars are required, the statement of claim must not stray into setting out the evidence relied upon.

[19] On the facts, the Court of Appeal found the statement of claim filed by Chesterfield Preschools to constitute an abuse of process because it was pleaded in a highly prolix and diffuse way in relation to material facts spread throughout the pleadings in an incomprehensible way.

Assessment of strike out application

[20] Dr Foster has submitted that:

[20.1] Ms Fisher has failed to clearly particularise her claim insofar as it relates to alleged breaches of Principle 6.

[20.2] Ms Fisher has relied on irrelevant information.

[20.3] Ms Fisher appears to be using the Tribunal process to air grievances that do not relate to Dr Foster or to an alleged breach of Principle 6.

[20.4] Dr Foster would be prejudiced if required to respond to the claim in its present form.

[20.5] The claim is not amenable to further amendment.

[21] Dr Foster's position is that from the information provided, she cannot sensibly determine what is being alleged against her, let alone which aspects of the claim relate to an alleged breach of Principle 6. She should not be put to the expense and delay of deciphering an incomprehensible and excessively prolix statement of claim. Without clear and concise pleadings, Dr Foster does not have notice of the basis of the claim against her and would be prejudiced if required to respond.

[22] Dr Foster also submits that having regard to the content of the claim filed, Ms Fisher sees the claim as an opportunity to air other grievances, not only with Dr Foster but with other people including her sister, various lawyers and other medical professionals which is an improper use of the Tribunal's purpose and amounts to an abuse of process. Dr Foster also points out that Ms Fisher has maintained a breach of her right to correct her personal information (a Principle 7 claim) within her most recently filed claim.

[23] Ms Fisher's most recent claim is accompanied by submissions entitled "Submissions in response to interlocutory application for an order to dismiss or strike out the claim of Mary Fisher". These submissions make some reference to Dr Foster's alleged failure to provide Ms Fisher with her personal information. They also set out, over nine pages, a series of grievances against Dr Foster relating to Dr Foster's interactions with Ms Fisher, her sister, and her deceased mother and concerning Dr Foster's behaviour as a doctor. For example, in the submissions at paragraph 6 Ms Fisher states:

At the same time Dr Foster was using my personal information that she collected without checking it was correct, and my personal information was used in support of Kathleen Baird, my sister who has a smear campaign to defame me in every way possible and through others too, as she has done for over 30 years. In conjunction with this Kathleen Baird has used Trespass Notices etcetera. Here the Trespass Notice was premeditated by Kathleen and this Trespass Order was used by Dr Foster as a Restraining Order exactly as Kathleen Baird confided in a private conversation to staff on 23/7/10 that she personally wanted a Restraining Order against Mary to deny her access to our mother which was against our mother's wishes as documented.

[24] She later complains, at page 4 paragraph 11:

It must be noted that Dr Foster would not speak or meet with me and would not even tell me what rest home my mother was discharged to which was unusual behaviour for a medical professional who works as a GP and so unprofessional and regards herself as a family GP.

[25] The most recent (third) statement of claim filed by Ms Fisher itemises nine requests for personal information allegedly made between 3 August 2010 and 30 October 2014.

[26] The four-page handwritten document entitled "Personal information requested but not received" filed on 17 May 2017 purports to identify the information that is allegedly outstanding. However, it includes many items that can be more correctly characterised as complaints or requests for explanations. For example, Item 5 is "Documentation of 5/8/10 as Dr Foster wrote 'Mary verbally abusive to her mother'. How and where this abuse was done by Mary as Dr Foster was not present." In a similar vein, Item 7 is "On 5/8/10 Dr Foster wrote she discussed progress with the family. What information this was as I was Agnes Titchener's family, and nothing was discussed with me."

[27] Item 13 is a request for an explanation. Ms Fisher seeks: "An explanation that Dr Foster wrote on 12/8/10 that Mary may visit, but on 4/8/10 that if she were to enter the Rest home, police would be called."

[28] Item 15 is a complaint that:

On 8/10/10 Dr Foster stated Mary had to agree to conditions of all parties. Therefore, the name of all parties Mary had to agree to conditions as mother was competent and Dr Crawford Duncan stated mother was free to choose her own visitors herself and as competent she was free to seek a second opinion under the Code of Health Rights. These were decisions being made in a govt funded institution and official decisions were made as a result.

[29] Item 18(g) is:

All information about the trespass order and Dr Foster's rights to use a restraining order as was also contrary to the wishes of our mother. To include all information that is retrievable from the head as Mary had a right to her personal information that was discussed as regards the trespass order.

[30] Three statements of claim have now been filed by Ms Fisher. Each is interspersed with large amounts of material relating to Dr Foster's care of Ms Fisher's mother and relating to surrounding events such as the issuing of a trespass notice against Ms Fisher.

[31] Self-represented litigants should be given latitude and the opportunity, where necessary, to amend pleadings they have drafted themselves. Ms Fisher has been provided with several opportunities to cure the defects in her claim against Dr Foster. Her claim remains prolix and oppressive. Its main focus is to air grievances against Dr Foster that arose while her mother was Dr Foster's patient. These grievances are outside the scope of an alleged breach of Principle 6.

[32] It is accepted that it would be prejudicial to require Dr Foster to respond to the claim in its present form. Having had the opportunity to amend the claim on three occasions, and having failed to file a claim confined to breaches of Principle 6, it would not now be fair and reasonable to allow a yet further opportunity to file an amended claim.

[33] It is clear from the documents filed that Ms Fisher holds deep grievances relating to the events that occurred when her mother was in the care of Dr Foster and events that occurred subsequently following her mother's death. This Tribunal, exercising its jurisdiction under the Privacy Act 1993, is an inappropriate forum to air those grievances. Ms Fisher has been directed to file a claim limited to the alleged breach of Principle 6 by Dr Foster. She has not done so. In the circumstances the Tribunal is persuaded that it is appropriate to strike the proceedings out.

Costs

[34] Costs are reserved. Any application for costs is to be filed within 15 working days from the date of this decision. Should such application be received, the Tribunal will set a timetable for the filing of opposition and reply submissions.

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Ms MA Roche
Co-Chairperson

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Ms LJ Alaeinia JP
Member

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Dr JAG Fountain
Member