

	Reference No. HRRT 046/2016
UNDER	THE PRIVACY ACT 2020
BETWEEN	CAROLINE ANN SAWYER
	PLAINTIFF
AND	VICTORIA UNIVERSITY OF WELLINGTON
	DEFENDANT

AT WELLINGTON

BEFORE:

Ms GJ Goodwin, Deputy Chairperson

Ms AE McCarthy, Member

Ms SP Stewart, Member

REPRESENTATION:

Dr CA Sawyer in person

Ms M Scholtens KC and Mr G Davenport for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 8 March 2024

DECISION OF TRIBUNAL TO PARTIALLY STRIKE OUT CLAIM¹

[1] Dr Sawyer alleges Victoria University of Wellington (VUW) breached information privacy principles (IPPs) 1, 3, 4, 5, 6, 7, 8, and 11 by collecting and using what she described as false information and documents about her, which she said were created by

¹ [This decision is to be cited as *Sawyer v Victoria University of Wellington (Strike Out)* [2024] NZHRRT 9.]

a colleague. Dr Sawyer also seeks an order preventing VUW's counsel from acting in these proceedings.

[2] VUW denies the allegations made by Dr Sawyer and has applied to have the claim struck out.

[3] VUW says the claim should be struck out because:

[3.1] The proceedings allege breaches of IPPs 1, 3, 4, 5, 6, 7, 8, and 11. Those principles, not having been investigated by the Privacy Commissioner, are not within the jurisdiction of the Tribunal.

[3.2] There has been a full and final settlement of the matters complained of in these proceedings under the Employment Relations Act 2000. That settlement is recorded in a settlement agreement dated 24 July 2014 (Record of Settlement)².

[3.3] Dr Sawyer's claim is, in any event, an abuse of process.

[4] VUW says there is no basis for orders preventing VUW's counsel acting in these proceedings. VUW has also made application for an order for security for costs, in the event the Tribunal declines to strike out Dr Sawyer's claim in full.

BACKGROUND

[5] Dr Sawyer was employed as a law lecturer by VUW in 2010. In March 2014, Dr Sawyer made a complaint against two other senior members of the law faculty.

[6] On 24 July 2014 Dr Sawyer and her then counsel attended an employment relations mediation with representatives of VUW. The mediation resulted in a settlement of the employment problems between Dr Sawyer and VUW. The certified Record of Settlement provides that it is to comprise a settlement of all matters between the parties arising out of their employment relationship, including the termination of that relationship. That includes any claims against any officer or employee of VUW in any jurisdiction which relates in any way to any matter leading up to and including the mediation on 24 July 2014, which resulted in the Record of Settlement.

² The Record of Settlement was produced to the Tribunal, but its terms are confidential to the parties and it is subject to the confidentiality orders in *Sawyer v Victoria University of Wellington (Non-Publication Order)* [2022] NZHRRT 43. Those orders are that the permanent non-publication order issued by the Employment Court in *Sawyer v Vice Chancellor of Victoria University of Wellington* [2018] NZEmpC 71, (Settlement Agreement decision), in relation to the settlement agreement dated 24 July 2014 between Dr Sawyer and Victoria University of Wellington also apply in these proceedings.

[7] In August 2016 Dr Sawyer filed this claim. She attached a Certificate of Investigation from the Privacy Commissioner dated 31 May 2016. The Commissioner's certificate stated that only IPP 6 was applied. It noted that no interference with Dr Sawyer's privacy nor adverse consequences for her were found. VUW filed its statement of reply, denying the claim, on 12 September 2016.

[8] On 18 November 2016 the Tribunal made orders staying these proceedings. This followed advice from VUW that Dr Sawyer was challenging the validity of the Record of Settlement (as well as related matters) before the Employment Relations Authority (ERA).

[9] On 16 December 2016 Dr Sawyer filed an application (disqualification of counsel application) seeking Mr GC Davenport be disqualified from acting as counsel for VUW, together with a supporting affirmation.

[10] On 21 December 2016 the ERA issued a determination that the Record of Settlement was binding on the parties.³ On 22 December 2016 Dr Sawyer gave notice to the Tribunal that she intended challenging that ruling by appealing to the Employment Court. By email dated 6 February 2017 Dr Sawyer advised she expected both VUW and the Tribunal would want to continue the stay until the conclusion of the Employment Court process.

[11] On 14 February 2017 VUW formally sought continuation of the stay made on 18 November 2016 and asked that the stay also include the disqualification of counsel application.

[12] On 14 March 2017 the Tribunal made orders continuing the stay of these proceedings, including in relation to the disqualification of counsel application. The stay orders were to apply until the Employment Court had delivered a decision on the question of whether or not the Record of Settlement was a valid document or until further order of the Tribunal or Chairperson. The Tribunal noted that only after the Employment Court had given a ruling would it become clear whether VUW could raise the Settlement Agreement as a defence to Dr Sawyer's proceedings before the Tribunal.

[13] On 22 November 2021 the Tribunal, not having received any update from Dr Sawyer as to whether the Employment Court had delivered its decision and whether she still wished to continue her claim before the Tribunal, asked Dr Sawyer for such an update. Dr Sawyer responded by emails dated 18,19 and 21 January 2022, however her position in relation to these proceedings was not made clear.

³ *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2016] NZERA Wellington 158 (ERA decision).

[14] By memorandum dated 28 January 2022 VUW advised that the Employment Court and subsequently the Court of Appeal had determined that the Record of Settlement was a valid document. The memorandum also advised that Dr Sawyer's challenge to Mr Davenport's continuing representation of VUW had been dismissed by the High Court and the Court of Appeal.⁴

[15] Accordingly, on 1 March 2022 the Tribunal lifted the stay orders to enable this matter to proceed. Dr Sawyer was directed to advise the Tribunal whether she wished to continue these proceedings and whether or not she would still be pursuing the application to disqualify Mr Davenport as counsel.

[16] On 25 March 2022 Dr Sawyer filed an application for orders preventing Mr Davenport, Ms Scholtens KC, and various other solicitors continuing to represent VUW in these proceedings. The application was subsequently accompanied by an affirmation of Dr Sawyer in support, dated 28 March 2022. Although Dr Sawyer did not expressly advise whether she wished to continue these proceedings this could be inferred from her application relating to VUW's counsel.

[17] On 6 May 2022 VUW filed an application for orders striking out Dr Sawyer's claim, a notice of opposition to Dr Sawyer's application for an order removing counsel and a supporting affidavit of Simon Johnson, General Counsel for VUW. VUW also made application for security for costs.

[18] On 22 November 2022 the Tribunal directed that Dr Sawyer's submissions, as to why her claim should not be struck out, should be filed by 23 December 2022. Dr Sawyer did not file any submissions.

[19] On 10 May 2023 the Tribunal directed:

[19.1] VUW to file further legal submissions in support of its application to strike-out Dr Sawyer's claim by 9 June 2023, and

[19.2] Dr Sawyer to file any legal submissions in opposition to VUW's strike-out application by 30 June 2023.

[20] VUW complied with the direction at [19.1] above. Dr Sawyer did not file any submissions opposing the strike-out application.

⁴ (Settlement Agreement decision) as above n 2; *Sawyer v The Vice Chancellor of Victoria University of Wellington* [2018] NZEmpC 72(EC) (Compliance Order decision); *Sawyer v The Vice Chancellor of Victoria University of Wellington* [2018] NZCA 533 (CA).

ISSUES

[21] The issues for the Tribunal to determine are:

[21.1] Whether, the Tribunal has jurisdiction to consider the alleged breaches of IPPs 1, 3, 4, 5, 7, 8, 10 and 11 in this claim.

[21.2] Whether this claim should be struck out (in whole or in part) as being an abuse of process, as the claim is:

[21.2.1] An attempt to re-litigate matters already determined; and

[21.2.2] A collateral attack on existing ERA, Employment Court and Court of Appeal decisions.

[21.3] Whether Dr Sawyer's application for an order preventing VUW's counsel from acting should be granted.

[21.4] Whether VUW's application for security for costs should be granted.

DR SAWYER'S STATEMENT OF CLAIM

[22] The determination of the issues requires consideration of the matters Dr Sawyer seeks to bring before the Tribunal. Dr Sawyer's statement of claim alleges breaches of IPPs 1, 3, 4, 5, 6, 7, 8, or 11. She seeks a declaration that her privacy has been interfered with, orders that VUW produces documents which it holds and other orders relating to alleged derogatory remarks made about her (which do not appear to be orders that the Tribunal can make).

[23] The alleged facts in support of her claim are, however, at times, difficult to understand, go to employment related grievances and do not refer to any specific instances of allegations of breaches of IPP 6. Rather, the claim alleges VUW created, used and withheld fabricated or fraudulent documents. In support of her claim Dr Sawyer says:

[23.1] From at least 2011 a former colleague forged documents about her work performance and used those documents to persuade a second former colleague to put false allegations to Dr Sawyer. Dr Sawyer says if she had been shown those documents in 2011 she would have known they were false. She also says her former colleague "got angry and ranted in public" about her.

[23.2] In 2012 her former colleague "tried a bigger bout of false allegations so contorted that those to whom they were copied sometimes thought he must have a point". She says that when she told the former colleague he had altered

documents he “gave up” but then began boasting that he would have Dr Sawyer removed from the law faculty and that the immediate superior of her former colleague supported that position.

[23.3] In late 2013 the second former colleague began sending false allegations about Dr Sawyer in emails. In a meeting held in January 2014 he claimed that certain course forms which had been completed were not correct. Dr Sawyer then made a formal complaint about harassment. She also refers to her exclusion from some unspecified event, which Dr Sawyer says was egregious.

[23.4] The second former colleague provided “swathes of obsessive correspondence between the men, including false allegations that had never been put as they were too obviously false”. Dr Sawyer says the second former colleague provided documents in relation to the false allegations of 2011, including emails that made no sense and had no context and were sent when the purported sender was not at his desk. Dr Sawyer says the VUW Human Resources Department never produced anything when it was asked for her file, although she had been at VUW over four years.

[23.5] An external IT expert said a password capture had been put on her private email on her office computer. She also says the IT expert said someone else was using Dr Sawyer’s email. Dr Sawyer alleges that a friend of her former colleague said he would do violence to Dr Sawyer if she did not withdraw her complaint. Dr Sawyer says she saw a statement showing her colleagues had a letter from the union “expressing concern” about Dr Sawyer.

[23.6] She became frightened on realising that her former colleague had good reason to fear losing his job. Her car was being vandalised and, shortly after she requested a copy of the union letter, her balcony light was shot out at 4 am. She says that she obtained a letter from the union confirming that the letter VUW held was forged. She alleges she was receiving bizarre and wild documents from VUW.

[23.7] She at first, believed VUW would conduct a proper investigation. She then believed that if VUW was “for some reason so protective of these men” it would move her to another faculty. She then says VUW threatened to “confirm” the false documents if she did not go. She believed if she went, the harassment would stop and she was terrified.

[23.8] VUW has not stopped making or encouraging others to make false documents about her. She says that after the Law Society told her to resolve all of this in September 2015 she started to obtain VUW papers, some apparently from mid-2014, that were obviously false, such as tables of purported student feedback on courses that never existed.

[23.9] In September 2015 VUW produced a “draft report” dated 9 July 2014. Dr Sawyer had not seen it before. It consisted largely of disjointed paragraphs purporting to be quotations about her teaching record, except that the content was obviously untrue. It contained parts of the 2011 fake emails. She says there was a meeting to which she was not invited.

[23.10] That “other specific documents are fairly easily obtainable e.g. the supporting documents for a false money claim of \$36,027.00” when VUW claimed she was at work, but in fact she had been sent to Karori. She says there appeared to be falsified medical certificates, the original stress leave certificates from earlier being “missing”. She alleges that the effect of this havoc has been to wreck her career deliberately.

[24] In its statement of reply dated 8 September 2016, VUW denies all of these allegations and says that they are, for the most part, re-statements of past allegations which have been dealt with and determined (in VUW’s favour) in the employment jurisdiction. Specifically VUW denies the allegation that it did not provide documents and says the VUW provided such information and documents as were readily retrievable and were able to be found.

JURISDICTION TO CONSIDER ALLEGED BREACHES OF IPPS 1, 3, 4, 5, 7, 8, and 11

[25] The first issue is whether, the Tribunal has jurisdiction to consider the alleged breaches of IPPs 1, 3, 4, 5, 7, 8, or 11 in this claim (regarding alleged creation and use of fabricated or fraudulent documents). It is not disputed the Tribunal has jurisdiction in respect of the alleged breaches of IPP 6 that were investigated by the Commissioner.

[26] For the Tribunal to have jurisdiction to consider a complaint it must first have been dealt with by the Privacy Commissioner. At the time Dr Sawyer lodged her complaint with the Tribunal, the relevant provisions were ss 82 and 83 of the Privacy Act 1993 (PA 1993).⁵ These are “gateway” provisions through which claims must pass if they are to be determined by the Tribunal.

[27] Dr Sawyer can only bring proceedings before the Tribunal in respect of an action alleged to be an interference with her privacy which has been investigated by the Privacy Commissioner as such.⁶ The Tribunal will only have jurisdiction where, following a complaint, the Commissioner has notified the respondent of the action alleged to be an

⁵ The relevant sections are now ss 97 and 98 of the Privacy Act 2020 (PA 2020).

⁶ See *Lehmann v Radioworks* [2005] NZHRRT 20, *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 and equivalent provisions in PA 2020 as discussed in *Van Wey Lovatt v Health New Zealand (Strike-Out)* [2023] NZHRRT 37 (*Van Wey Lovatt*) at [15]-[20].

interference with privacy and that alleged action has been the subject of an investigation, whether or not that investigation was completed.

[28] The Commissioner's investigation sets the boundary of the Tribunal's jurisdiction⁷. To bring clarity to what "action alleged" has been investigated the Commissioner issues a Certificate of Investigation particularising the subject of the investigation. While that certificate evidences what was within scope of the investigation it is not, on its own, determinative of this issue.⁸

[29] In this case, the Commissioner's certificate refers to the matters investigated as being:

Within the context of an employment dispute with VUW, Ms Sawyer made a number of Privacy Act requests for a copy of the information held about her. These requests were made between 18 February 2014 and mid-June 2015. Ms Sawyer believed that VUW had not provided her with all the information she requested and also that VUW had fabricated documents which had not been provided to her.

[30] As referred to at [7] the certificate noted that only IPP 6 was applied and that no interference with privacy nor adverse consequences were found. The Commissioner decided to take no further action on the complaint pursuant to s 71(2) of the PA 1993.

[31] The Certificate of Investigation does not refer to any investigation of alleged breaches of IPPs 1, 3, 4, 5, 7, 8, or 11.

[32] The certificate refers to Dr Sawyer's allegations that fabricated documents had not been provided to her. There is, however, no indication in her statement of claim, or in the statement of reply, that Dr Sawyer complained to the Commissioner about, or that the Commissioner investigated, either any failure to correct the allegedly fabricated information (IPP 7) or any failure by VUW to check allegedly false information before using it (IPP 8). There is no indication in Dr Sawyer's statement of claim, or in the statement of reply, that any alleged breaches of IPPs 1, 3, 4, 5, or 11 were complained of to, or investigated by, the Commissioner.

[33] The conclusion must be that the Tribunal does not have any jurisdiction in these proceedings, other than in relation to allegations of breaches of IPP 6. Specifically, the Tribunal does not have jurisdiction in respect of alleged breaches of IPPs 1, 3, 4, 5, 7, 8, or 11 regarding alleged creation and use of fabricated or fraudulent documents.

[34] IPP 6 deals with access to information. It provides that where an agency holds personal information about an individual in such a format that it can readily be retrieved,

⁷ *Van Wey Lovatt* as above n 6, at [24].

⁸ *Van Wey Lovatt* as above n 6, at [29].

that individual should be entitled to obtain from the agency confirmation of whether or not the agency holds such personal information and to have access to that information. This right of access is subject to various statutory defences and exceptions set out in sections 27-29 of the PA 1993.

[35] As referred to at [28] the Certificate of Investigation refers to requests for Dr Sawyer's personal information being made between 18 February 2014 and mid-June 2015. Some of those requests were before, and some after, the date of the Record of Settlement.

[36] Dr Sawyer's statement of claim does not, however, particularise any requests for her personal information. The closest Dr Sawyer comes to alleging a breach of IPP 6 is at paragraph 4 where (in the context of her employment dispute and when referring to having received "swathes of obsessive correspondence between the men, including false allegations that had never been put as they were too obviously false") she alleges that VUW human resources department "never produced anything when asked for my H.R. file, although I had been there over four years". There is also a brief reference at paragraph 10 of the statement of claim in relation to an allegation of a "false money claim" made against her that supporting documents would be, allegedly, "fairly easily obtainable".

[37] Our conclusion is that (other than perhaps, the statements referred to at [36] above) the matters Dr Sawyer refers to in her statement of claim are not allegations of any breaches of IPP 6, are not therefore matters within the Tribunal's jurisdiction and must be struck out.

STRIKE OUT FOR ABUSE OF PROCESS

[38] We have determined that the Tribunal only has jurisdiction to consider those parts of Dr Sawyer's claim that allege a breach of IPP 6. The next issue is whether Dr Sawyer's claim should nevertheless be struck out, in whole or in part, as an abuse of process.

[39] VUW submits the whole claim should be struck out as:

[39.1] The Record of Settlement has been held to be valid, binding and enforceable by the ERA, the Employment Court and the Court of Appeal. The Record of Settlement settled all matters between the parties arising from their employment relationship.⁹

[39.2] The majority of the assertions made by Dr Sawyer (including allegations of the creation, use and withholding of fabricated or fraudulent documents) predate

⁹ See the description in [6] above.

24 July 2014, being the date of the Record of Settlement, and so are unable to be pursued before the Tribunal.

[39.3] Assertions relating to fabricated or fraudulent documents have been considered and dismissed by the Employment Court.¹⁰ That decision was subsequently upheld on appeal.

[39.4] In substance, these proceedings seek to re-litigate the validity of the Record of Settlement and Dr Sawyer's attempt to do so:

[39.4.1] Is an abuse of process.

[39.4.2] Is a collateral attack on the existing ERA, Employment Court and Court of Appeal decisions.

[39.4.3] Comprises Dr Sawyer raising allegations that relate to a work context, which the Supreme Court has confirmed and clarified are matters over which the ERA has exclusive jurisdiction.¹¹

[40] If the Tribunal determines it is theoretically possible for Dr Sawyer to make and pursue allegations of a breach of IPP 6 occurring after 24 July 2014 (the date on which the Record of Settlement was negotiated). VUW submits such claims should nevertheless also be struck out in full as also being:

[40.1] An abuse of process; and again

[40.2] A collateral attack on existing decisions of the Employment Court in regards to the existence of contended faked and forged documents.¹²

The law

[41] Section 111 of the Privacy Act 2020 (PA 2020) provides that various sections of the Human Rights Act 1993 (HRA) apply to proceedings under the PA 2020. This includes most of Part 4 of the HRA.

[42] Part 4 of the HRA includes ss 115 and 115A which provide:

115 Tribunal may dismiss trivial, etc, proceedings

The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

¹⁰ *Sawyer v The Vice-Chancellor of Victoria University of Wellington and Others* [2018] NZEmpC 25.

¹¹ *FMV v TZB* [2021] NZSC 102.

¹² Settlement Agreement decision as above n 2at [28].

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.

[43] It is an abuse of process for a litigant to use one jurisdiction to attempt to re-litigate claims already decided by another court under some other guise.¹³

[44] We also note s 161 of the Employment Relations Act 2000 (ER Act) gives exclusive jurisdiction to the ERA in relation to employment relationship problems:

161 Jurisdiction

- (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including-
- ...
- (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[45] An employment relationship problem is defined to include any problem “relating to or arising out of an employment relationship”.¹⁴

Whether to strike out the whole of Dr Sawyer’s claim

[46] The Tribunal has already struck out (for want of jurisdiction) the majority of the allegations in Dr Sawyer’s statement of claim that to relate to alleged creation and use by VUW of fabricated or fraudulent documents. Had those allegations not been struck out for want of jurisdiction the Tribunal agrees with VUW that they seek to re-litigate the validity of the Record of Settlement and, as such, are an abuse of process, for the following reasons.

[47] The Record of Settlement settled all matters between the parties arising out of the employment relationship, including any claims against any officer or employee of VUW in any jurisdiction which relates in any way to any matter leading up to and including the mediation held on 24 July 2014.

¹³ See *New Zealand Social Credit Political League Inc v O’Brien* [1984] 1 NZLR 84 (CA) at 95 and *Dotcom v District Court at North Shore* [2018] NZCA 442, [2018] NZAR 1859 at [16]. See also *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC) at 586 and *Little v New Zealand Law Society* [2023] NZHC 1880.

¹⁴ Employment Relations Act 2000, s 5.

[48] The Record of Settlement was held to be valid, binding and enforceable by the ERA¹⁵ and the Employment Court¹⁶. Dr Sawyer then sought to raise her assertions that it was not valid by way of review proceedings filed in the Court of Appeal. The Court of Appeal struck out those proceedings noting¹⁷:

[8] We are satisfied that the proceeding must be struck out for two reasons. First, it is clearly an abuse of process of the court in that it is a collateral attack on the final determination of the Employment Court that their settlement agreement is valid and binding. That issue was finally determined when this court declined leave to appeal against the decision of the Employment Court on 29 November 2018. Dr Sawyer is no longer able to challenge the validity of the settlement agreement.

[49] Much of the employment dispute between Dr Sawyer and VUW, which was settled by the Record of Settlement, concerned Dr Sawyer's allegations about the purported creation and use of faked and forged documents. Such allegations were specifically addressed by the Employment Court which, in dismissing Dr Sawyer's claims about the invalidity of the Record of Settlement said:¹⁸

[42] ... She claimed emails had been produced by someone other than her, using her work computer. The evidence was that these emails may have formed part of a body of information used to adversely influence Professor Willis' investigation (or perhaps weaken the universities confidence in her as an employee). She also said that the university held (or may have held) fake medical information about her. There was no evidence the university produced fake information of any type or that strange and bizarre documents had ever existed. Furthermore, Mr Miller said the university did not have emails they knew to be fake, or fake medical records and he was not challenged about that evidence. I accept Mr Miller's evidence.

[50] The facts alleged in Dr Sawyer's statement of claim in these proceedings make the same allegations relating to faked and forged documents. The existence of allegedly false documents is referred to in all but one of Dr Sawyer's 10 paragraphs of alleged facts in her statement of claim. The remaining paragraph contains the same assertion that someone was using her email as is referred to at [49] above.

[51] Overall, considering the content of Dr Sawyer's statement of claim (as summarised at [23]) and the decisions made in the employment jurisdiction we are satisfied that these proceedings are, for the most part (excepting alleged breaches of IPP 6), an attempt to re-litigate Dr Sawyer's employment claims about the purported existence of faked and forged documents and an attempt to re-litigate the validity of the Record of Settlement. The claims relating to faked and forged documents, again raised in these proceedings,

¹⁵ ERA decision as above n 3.

¹⁶ Settlement Agreement decision as above n 2..

¹⁷ *Sawyer v The Employment Relations Authority, the Employment Court and the Vice Chancellor of Victoria University of Wellington* [2020] NZCA 237 at [8].

¹⁸ Settlement Agreement decision as above n 2, at [42].

have been considered and dismissed by previous courts.¹⁹ To enable them to continue would be an abuse of process.

[52] In respect of the allegations of IPP 6 breaches VUW submits these should all be struck out as an abuse of process as:

[52.1] Dr Sawyer is raising allegations that relate to a work context, which are matters over which the ERA has exclusive jurisdiction.

[52.2] The allegations of IPP 6 breaches arising from requests for personal information arising before 24 July 2014 are covered by the settlement evidenced by the Record of Settlement, so cannot be considered by the Tribunal.

[52.3] The allegations of a breach of IPP 6 occurring after 24 July 2014 should nevertheless also be struck out in full as being an abuse of process.

[53] In support of its submission that the whole of the claim is an abuse of process, VUW refers to paragraph 9 of the statement of claim where Dr Sawyer refers to a draft report dated 9 July 2014, which she says she had not seen before. VUW says that following Dr Sawyer's allegations against her colleagues, the Vice-Chancellor of VUW appointed an investigator to undertake an investigation of those allegations. The investigator provided a draft report to VUW in July 2014 and this was subsequently provided to Dr Sawyer for comment. Accordingly, Dr Sawyer's contention that she had not seen the report was false, and that this was upheld by the Employment Court.²⁰ VUW says Dr Sawyer's knowingly false assertions support its contention that her claim is properly one which, as a whole, should be struck out as an abuse of process.

[54] We note, however, that the privacy and employment jurisdictions are different and distinct. This distinction has previously been considered by the Tribunal ²¹ We also note, as referred to by VUW, the jurisdiction of the ERA has recently been considered by the Supreme Court in *FMV v TZB*.²²

[55] The determination of any allegations of breaches of IPP 6 (whether before or after the date of the Record of Settlement) and whether these can be considered by the Tribunal, including whether they are covered by the ERA settlement or are an abuse of

¹⁹ The majority in *FMV v TZB* as above n 11, at [99] held that the jurisdiction of the ERA includes disputes arising after the employment itself has ended where the dispute concerns obligations entered in to during the course of the relationship and in the work context.

²⁰ Settlement Agreement decision as above n 2, at [13] and [14].

²¹ See *Youngman v Waikato District Health Board (Strike-Out Application)* [2017] NZHRRT 43 at [20] and *Watson v Capital and Coast District Health Board* [2015] NZHRRT 27 (*Watson*) at [115]-[122] and *Cooper v Hamilton Pharmacy 2011 Ltd (Strike-Out Application)* [2017] NZHRRT 38 at [60].

²² *FMV v TZB* as above n 11. See also the obiter statement in *FMV v TZM* at [192] per William Young J.

process, are best considered after Dr Sawyer has an opportunity to re-plead, as referred to below.

Opportunity to re-plead

[56] Dr Sawyer's present statement of claim is defective in that it alleges breaches of IPPs which have not been investigated by the Privacy Commissioner and so are not within the jurisdiction of the Tribunal. Also, the statement of claim alleges matters which have been dealt with and determined in the employment jurisdiction (particularly relating to false and forged documents and the validity of the Record of Settlement) which it would be an abuse of process for the Tribunal to again consider.

[57] We are not, however, at this stage prepared to strike out the whole of Dr Sawyer's statement of claim, given it contains some allegations relating to a breach of IPP 6 and she has not yet had an opportunity to re-plead to cure the defects.²³

[58] The jurisdiction to strike out must be used sparingly and if a defect in a claim can be cured, an amendment of the statement of claim is preferred to striking out the claim.²⁴ Where a defect in a statement of claim can be cured by amendment, a court will generally permit such an amendment rather than striking the pleading out. In *Marshall Futures Ltd v Marshall Tipping J* said:²⁵

It seems to me that in a case where the Plaintiff can undoubtedly start again, being within time, the Court should only strike out if satisfied that on the best view of the facts from the Plaintiff's point of view he cannot succeed at law, or alternatively where the pleading is so deficient as to require a de novo start rather than an amendment. As Mr Goddard aptly put it, the question will often be one of degree. The difference, using by analogy the terminology of motor vehicle insurance, is between a pleading which is a total write off and one which is deficient but capable of effective repair.

[59] In this case Dr Sawyer's pleadings are substantially deficient and we have some doubt that they are "capable of effective repair". This opportunity should, nevertheless, be afforded to Dr Sawyer. If Dr Sawyer wishes to continue with her claim (noting the matters referred to at [60] and [61]) she is to do so in accordance with the order below. If Dr Sawyer does not wish to continue her claim she should advise the Tribunal of this.

[60] In any re-pleading, Dr Sawyer should confine herself strictly to alleged breaches of IPP 6. The parties cannot re-litigate matters already determined. This includes the validity of the Record of Settlement and any allegations relating to false or forged documents.

²³ See [36] above.

²⁴ See the Tribunal's previous discussions on this point in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [30] and [31].

²⁵ *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 at 324.

[61] In any re-pleading, Dr Sawyer should also note the Tribunal's decision in *Apostolakis v Public Trust* where the principles set out in *Commissioner of Inland Revenue v Chesterfields Preschools* in relation to the adequacy of pleadings were approved in relation to matters before the Tribunal, specifically:²⁶

[61.1] The pleadings must be accurate, clear and intelligible.

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

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

[62] If Dr Sawyer does wish to continue her claim but fails to comply with the direction to replead alleged breaches of IPP 6 claim in accordance with requirements set out above she risks this claim being struck out. If any re-pleading still includes matters outside the jurisdiction of the Tribunal or which give rise to arguments of an abuse of process VUW may re-apply to strike out these proceedings.

APPLICATION FOR ORDERS PREVENTING COUNSEL FROM ACTING

[63] The next issue to be determined is whether Dr Sawyer's application for orders preventing Mr Davenport, Ms Scholtens, and various other solicitors continuing to represent VUW in these proceedings should be granted.

[64] Dr Sawyer seeks orders preventing solicitors of the firm of McBride Davenport James, Simon Johnston, Steven Wragg, Geoff Davenport and Mary Scholtens from continuing to represent VUW in these proceedings. The grounds cited by Dr Sawyer are that those parties are litigating their own previous advice or may be required to give contentious evidence.

[65] In reply, VUW has file a notice of opposition and an affidavit of Simon Johnson, General Counsel for VUW.

[66] In his affidavit of Mr Johnston says:

[66.1] In November 2019 Dr Sawyer filed proceedings in the Court of Appeal, which included numerous contentions of wrongdoing by counsel acting for VUW.

²⁶ *Apostolakis v Public Trust (Strike-Out Application)* [2018] NZHRRT 21 (*Strike-Out Application*) [2018] NZHRRT 21 at [20], citing *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [84].

[66.2] The voluminous documents filed in their Court of Appeal included an affidavit from Dr Sawyer advancing many of the same arguments and assertions Dr Sawyer is seeking to advance in the Tribunal to support her application to remove counsel from these proceedings.

[66.3] The Court of Appeal dismissed her application to remove counsel.²⁷

[66.4] Ms Scholtens had no involvement in the factual issues that relate to Dr Sawyer's claim, her involvement at all times being limited to actions as counsel for VUW in the resulting litigation, and in respect of which there has been no waiver of legal privilege.

[66.5] Mr Davenport's involvement in the factual issues that relate to Dr Sawyer's claims were at all times in the role of VUW's external legal adviser. Mr Davenport has assumed no personal responsibility for Dr Sawyer (and this has been confirmed by the High Court in its 2019 decision striking out Dr Sawyer's claims against the Vice Chancellor and against Mr Davenport).²⁸

[66.6] Mr Johnston's own involvement in the factual issues that relate to Dr Sawyer's claims were at all times in the role of VUW's General Counsel, in respect of which he assumed no personal responsibility to Dr Sawyer and in respect of which there has been no waiver of legal privilege.

[66.7] While Dr Sawyer has included the firm of lawyers at McBride Davenport James and Steve Wragg in her application for orders removing counsel, neither McBride Davenport James nor Mr Wragg are involved in representing VUW in these proceedings.

[67] The ability of the Tribunal to consider this application was not argued before us and we have some doubts as to whether the Tribunal is able to determine this matter. Both parties have, however, assumed the Tribunal has jurisdiction. On the assumption that we can determine this application and having considered the content of Dr Sawyer's application and Affidavit in Support, we are firmly of the view that there are no grounds for making any order preventing Mr Davenport or Ms Scholtens continuing to represent VUW in these proceedings, nor preventing Mr Johnston acting as the instructing solicitor in this matter. The other parties referred to by Dr Sawyer are not involved in these proceedings. Dr Sawyer's application is declined.

²⁷ *Sawyer v Employment Relations Authority* [2020] NZCA 237.

²⁸ *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2019] NZHC 2149.

APPLICATION FOR SECURITY FOR COSTS

[68] In the event the Tribunal determines that any part of Dr Sawyer's proceedings can proceed, VUW seeks an order for security for costs and a stay if those are not paid. In support, Mr Johnson, in his affidavit of 5 May 2022, refers to Dr Sawyer having unpaid outstanding costs of \$133,476.02 in relation to various previous proceedings. Mr Johnson also refers to Dr Sawyer being adjudged bankrupt on 23 March 2021.

[69] The Tribunal has sympathy with this application by VUW. The Tribunal's power to award costs in respect of proceedings under the Privacy Act is, nevertheless, limited by statute, being conferred by s 110 of the PA 2020. While the Tribunal may award costs against either party (whether or not it makes any other order), there is no ability for the Tribunal to order security for costs.

[70] We do note, however, that litigants in person do not enjoy immunity from costs, especially where there has been conduct which has added to the difficulty and cost of the proceedings.²⁹ Dr Sawyer is reminded that there are potential cost consequences in continuing these proceedings.

CONCLUSION

[71] Dr Sawyer's application dated 25 March 2022 for orders preventing Mr Davenport, Ms Scholtens and other solicitors continuing to represent Victoria University of Wellington in these proceedings is declined.

[72] Victoria University of Wellington's application for security of costs is declined.

[73] Dr Sawyer is to be given the opportunity to file and serve an amended statement of claim, particularising and restricted to the alleged to IPP 6 breaches that Tribunal has jurisdiction to consider and which takes into account the matters referred to in this decision. If Dr Sawyer does not wish to continue with this claim she is to advise the Tribunal.

ORDERS

[74] The following orders are made:

[74.1] Those parts of Dr Sawyer's claim that relate to other than allegations of breaches of IPP 6 are struck out.

²⁹ See *Rafiq v Commissioner of Inland Revenue (Costs)* [2013] NZHRRT 30, *Rafiq v Commissioner of Police (Costs)* [2013] NZHRRT 31 and *Apostolakis v Attorney-General No. 3 (Costs)* [2019] NZHRRT 11.

[74.2] Dr Sawyer is to file and serve an amended statement of claim in accordance with [73] above, by 3 April 2024.

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Ms GJ Goodwin
Deputy Chairperson

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Ms AE McCarthy
Member

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Ms SP Stewart
Member