

UNDER Reference No. HRRT 066/2015
BETWEEN THE PRIVACY ACT 1993
AND KELVYN JAMES YOUNGMAN
PLAINTIFF
WAIKATO DISTRICT HEALTH BOARD
DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson
Ms LJ Alaeinia, Member
Mr MJM Keefe JP, Member

REPRESENTATION:

Ms OJ Morgan for plaintiff
Mr PM White for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 17 November 2017

**DECISION OF TRIBUNAL DISMISSING APPLICATION TO
STRIKE OUT CLAIM¹**

INTRODUCTION

[1] These proceedings for a breach of information privacy principle 6 were filed by Kelvyn Youngman on 2 November 2015. By application filed on 15 December 2015, the Waikato District Health Board (WDHB) has applied to have the proceedings struck out.

[2] Mr Youngman brought a personal grievance claim against WDHB which was settled by agreement in April 2012. The central issue is whether that settlement precludes Mr Youngman from enforcing statutory rights under the Privacy Act 1993 in this Tribunal and whether his proceeding is therefore an abuse of process.

¹ [This decision is to be cited as *Youngman v Waikato District Health Board (Strike-Out Application)* [2017] NZHRRT 43.]

The settlement and the Privacy Act proceedings

[3] Mr Youngman was employed by WDHB from August 2009. In December 2011, his position was disestablished, leading to a personal grievance claim.

[4] Section 4 of the Employment Relations Act 2000 (ERA) obliges employers to provide affected employees with access to information, relevant to continuation of their employment, and an opportunity to comment on that information before decisions likely to have an adverse effect on their employment are made.

[5] In submissions, the WDHB notes that Mr Youngman's personal grievance included a claim that the WDHB had failed to comply with s 4 of the ERA. As noted earlier, the grievance was settled by agreement in April 2012. That agreement provided that it was made in full and final settlement of all matters between the parties arising out of any intended or actual employment relationship.

[6] On 25 November 2013, Mr Youngman made a request to WDHB, pursuant to information privacy principle 6, seeking his personal files, files relating to the tenure of his employment, any material relating to the disestablishment of his position, subsequent negotiations and settlement, and material relating to his performance during his tenure.

[7] On 20 December 2013, the WDHB provided Mr Youngman with a number of documents and noted that some documents were either withheld or redacted pursuant to s 29(1)(a) and s 29(1)(f) of the Privacy Act.

[8] In response to a request made on 24 March 2014 for documents Mr Youngman considered should exist and had not been provided, the WDHB informed him that it would not be releasing the information as the information either did not exist or could not be found.

[9] In July 2014, Mr Youngman lodged a claim with the Privacy Commissioner seeking disclosure of the documents. On 21 November 2014, the Commissioner informed him that it was unable to be determined whether the missing documentation was held by the WDHB and issued a Certificate of Investigation in relation to the complaint.

[10] In his claim to the Tribunal, Mr Youngman alleged that the WDHB should have file notes, correspondence, and general documents in its possession relevant to him and that the WDHB had denied that further documents exist and therefore had failed to disclose them. Mr Youngman alleged that these documents do exist and that the failure of the WDHB to take diligent and reasonable steps to assess whether or not it holds the personal information requested, and to provide that information, pursuant to principle 6(1)(a) and (b) is an interference with his privacy.

The strike out application

[11] The WDHB applies for an order that the proceedings be struck out on the following grounds:

[11.1] The matters raised in the Privacy Act proceedings arise out of the former employment relationship between the parties.

[11.2] The parties have settled all matters between them arising out of any intended or actual employment relationship.

[11.3] The terms of settlement are final and binding.

[11.4] Mr Youngman's claim is in breach of the terms of settlement and frivolous, vexatious, an abuse of the Tribunal's processes and not in good faith.

[12] Mr Youngman opposes the strike out application on the following grounds:

[12.1] Mr Youngman is entitled to pursue his rights under the Privacy Act to have access to his personal information.

[12.2] His claim under the Privacy Act was not in existence at the time of the settlement agreement and the agreement does not bar him from bringing a Privacy Act claim in the Tribunal.

[12.3] Mr Youngman's Privacy Act claim is made in good faith and is not an abuse of process.

JURISDICTION TO STRIKE OUT - PRINCIPLES

[13] 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.

[14] Section 115 of the Human Rights Act additionally provides:

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.

[15] 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. More recently in *Couch v Attorney-General* [2008] NZSC 45, Elias C J stated at [33] that it is inappropriate to strike out a claim summarily unless the court can be certain it cannot succeed and that particular care is required in areas where the law is confused or developing.

DISCUSSION

[16] The WDHB submits that the personal grievance raised by Mr Youngman encompassed the WDHB's alleged failure to provide him with information about the disestablishment of his position. It submits that the matters raised in Mr Youngman's claim before the Tribunal are essentially the same as those raised in the settled personal grievance claim. Therefore, the settlement prevents Mr Youngman from bringing a claim against the WDHB under the Privacy Act for breaching his right to access his personal

information and bars the Tribunal from considering the merits of the claim. Reference is made to clause two of the settlement agreement which recorded that it was “a full and final settlement of all matters between parties arising out of any intended or actual employment relations.” The position of the WDHB is that the attempt by Mr Youngman to exercise his right to personal information under principle 6 breaches the settlement agreement and is therefore an abuse of process.

[17] Mr Youngman submits the personal grievance did not relate to whether he was entitled to access his personal information but rather, whether the WDHB had failed in its duties as an employer. Accordingly, Mr Youngman did not surrender his right to access his personal information by entering into the settlement agreement which did not give rise to a contracting out of Privacy Act obligations. The present claim arises separately to the employment relationship and relates to the failure of the WDHB to provide Mr Youngman with documentation to which he is entitled to pursuant to the Privacy Act. It is unrelated to the WDHB failing to provide access to information and the opportunity to comment on it in the context of the termination of his employment. In addition, the request under the Privacy Act was not limited to the documents the WDHB were required to provide him with during the review of his position. Therefore, the Privacy Act claim is separate and distinct from the personal grievance and should not be struck out on the ground that they are similar.

Assessment

[18] Section 11(1) of the Privacy Act provides:

11 Enforceability of principles

- (1) The entitlements conferred on an individual by subclause (1) of principle 6, in so far as that subclause relates to personal information held by a public sector agency, are legal rights, and are enforceable accordingly in a court of law.

[19] There is an issue as to whether the statutory right provided under s 11(1) of the Privacy Act can be defeated by a private settlement. In our view, the question as to whether Mr Youngman has waived a legally enforceable statutory right, is a question for determination in the context of a substantive hearing when all the facts are known.

[20] Further, there is a difference between a right of access to information on the one hand, and the use to which information can be put on the other. It may not be possible for Mr Youngman, having been given access to his personal information, to use that information to challenge or go behind a binding settlement agreement. It is quite another thing however to shut him out from his personal information, which may include personal information collected by the agency subsequent to the settlement agreement and personal information in addition to that which Mr Youngman was entitled to access pursuant to s 4 of the ERA.

[21] We are not satisfied that Mr Youngman’s proceedings are trivial, frivolous, vexatious or not brought in good faith in terms of s 115 of the Human Rights Act or that they are an abuse of process. It is arguable that Mr Youngman’s Privacy Act claim can exist alongside the full and final settlement of his employment dispute. The settlement of a grievance, related to a failure to provide access to information and an opportunity to comment on it pursuant to s 4 of the ERA, may be able to exist alongside a complaint, made independently of and at a different time from the grievance, relating to a failure to provide personal information pursuant to principle 6.

[22] The issues raised require full enquiry and are unsuitable to be dealt with on a strike out application.

DECISION

[23] For the foregoing reasons the decision of the Tribunal is that:

[23.1] The application by the WDHB to strike out the claim of Mr Youngman is dismissed.

[23.2] The Secretary is directed to convene a further teleconference so that the Chairperson can give directions as may be necessary to allow the case to be set down for hearing.

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Ms MA Roche
Co-Chairperson

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Ms LJ Alaeinia
Member

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Mr MJM Keefe JP
Member