IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 14**

	Reference No. HRRT 052/2017
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**PAUL CRAWFORD JUDGE**
	PLAINTIFF
AND	**CARE PARK NEW ZEALAND LIMITED**
	FIRST DEFENDANT
AND	**WAIKATO INSTITUTE OF TECHNOLOGY**
	SECOND DEFENDANT

AT AUCKLAND

BEFORE:
Ms MA Roche, Co-Chairperson
Dr SJ Hickey MNZM, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr P Judge in person
Mr J Horner for first defendant
Mr S Hood for second defendant

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

DATE OF DECISION: **12 April 2018**

DECISION OF TRIBUNAL DISMISSING APPLICATION TO STRIKE OUT CLAIM AGAINST FIRST DEFENDANT AND STRIKING OUT CLAIM AGAINST SECOND DEFENDANT[1]

[1] [This decision is to be cited as: *Judge v Care Park New Zealand Ltd (Strike-Out Application)* [2018] NZHRRT 14]

[1] Paul Judge has brought proceedings under the Privacy Act 1993 against his former employer, the Waikato Institute of Technology (Wintec) and against Care Park New Zealand Limited, who are contracted by Wintec to manage Wintec's car parks. The proceedings concern Care Park's disclosure of information about Mr Judge's parking fines to Wintec and Wintec's use of that information.

[2] Wintec has applied for the claim against it to be struck out on grounds which included the assertion that all claims Mr Judge might have had against it were settled by agreement dated 17 November 2016. Mr Judge denies that the settlement agreement included his privacy claim and also says that he signed the agreement under duress. The essential issue to be determined in respect of Wintec is whether the agreement fully and finally settled Mr Judge's privacy claim against Wintec. If so, he is not able to bring these proceedings and the claim against Wintec will be struck out.

[3] Care Park has applied for the claim against it to be struck out on the ground that there is no arguable claim against it as the Privacy Commissioner found that Care Park had not interfered with Mr Judge's privacy. In addition, the statement of claim specifies that the provisions of the Privacy Act relevant to the claim are information privacy principles 3, 10 and 11. Care Park claims that the Tribunal has no jurisdiction with respect to the claim against it under principles 3 and 10 as the Privacy Commissioner's investigation in respect of it concerned only principle 11. The essential issue to be determined in respect of Care Park is whether Mr Judge has a tenable claim against it.

Background

[4] Mr Judge was employed by Wintec as an academic staff member. Following a complaint from another staff member relating to Mr Judge's use of the Wintec car park, Wintec requested information from Care Park about Mr Judge's outstanding parking notices. It then launched a disciplinary investigation into whether Mr Judge had breached its car parking policy. Wintec was at the time also investigating other concerns about Mr Judge.

[5] Mr Judge complained to the Privacy Commissioner that Wintec used information it obtained for managing its car parks, for the purpose of pursuing a disciplinary investigation against him in breach of privacy principle 10. Principle 10 restricts personal information obtained in connection with one purpose from being used for any other purpose.

[6] Following Mr Judge's complaint to the Privacy Commissioner, Wintec informed Mr Judge that it would cease using the information provided by Care Park.

[7] Mr Judge also complained to the Privacy Commissioner that Care Park had interfered with his privacy in disclosing information about him to Wintec concerning his outstanding parking notices. Following an investigation, the Commissioner formed the view that there had been no breach of privacy. He found Care Park was entitled to rely on principle 11(a) as the disclosure of information about parking notices issued is directly relevant to the management of Wintec car parks and one of the purposes for which Care Park collected information was to disclose it to Wintec.

[8] On 17 November 2016, following a mediation convened by the Ministry of Business Innovation and Enterprise (MBIE) employment mediation service, Mr Judge and Wintec entered into a settlement agreement in respect of their employment relationship problem. Clause 17 of the settlement agreement provided:

> [17] The Settlement is in full and final settlement of the settled matters. For avoidance of doubt, this includes any and all complaints that the employee has made, or may make against the employer, to any statutory body including the Privacy Commissioner.

Wintec's application to strike out claim against it

[9] On 15 December 2017, Wintec applied for an order striking out Mr Judge's claim against it on the grounds that:

> **[9.1]** the claims made by Mr Judge have been fully and finally resolved;
>
> **[9.2]** the claims made by Mr Judge disclose no reasonably arguable course of action; and
>
> **[9.3]** the claims made by Mr Judge are an abuse of process of the Tribunal and/or are vexatious.

[10] Mr Judge opposes the Wintec strike out application on the grounds that:

> **[10.1]** Wintec dropped its "investigation" into Mr Judge's parking fines following Mr Judge's complaint to the Privacy Commissioner. Therefore no settlement in respect of the privacy interference has ever been made; and
>
> **[10.2]** he signed the settlement agreement under duress.

The jurisdiction to strike-out – principles

[11] 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 2016, 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.

[12] Section 115 of the Human Rights Act 1993 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.

[13] 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. The Tribunal has in recent cases addressed its jurisdiction to strike out proceedings. Examples include *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)*

[2015] NZHRRT 14 (5 May 2015) at [21] – [33], *New Zealand Private Prosecution Services Ltd v Key (Strike-Out Application)* [2015] NZHRRT 48 at [36] – [45], *Rossi v Chief Executive, Ministry of Business, Innovation and Employment (Strike-Out Application)* [2016] NZHRRT 18 at [11] – [23] and *Apostolakis v Rennie (Strike-Out Application)* [2017] NZHRRT 42 at [8] – [17].

Assessment - Wintec

[14] If Mr Judge's claim that Wintec interfered with his privacy has been the subject of a full and final settlement, he is precluded from pursuing that same claim in the Tribunal. It is recognised that a subsequent proceeding may be an abuse of process if it attempts to relitigate matters that have been resolved by a settlement agreement: See *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL), applied in New Zealand in *Z v Dental Complaints Assessment Committee* (2008) NZSC 55, [2009] 1 NZLR 1 at [63] and *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7 at [62].

[15] A copy of the settlement agreement is annexed to the affidavit of Katrina Van de Ven, filed in support of Wintec's strike out application. The "employment relationship problem" between Mr Judge and Wintec is described in the recitals to the agreement in the following terms:

> B. An employment relationship problem has arisen between the employer and the employee. Specifically, the employer is concerned with certain aspects of the employee's conduct and behaviour and is currently investigating these concerns. The employee believes the employer has breached his privacy, has failed to support him in his role and has made unjustified allegations against him causing him significant distress (employment relationship problem).

[16] The recitals go on to state:

> C. The parties have agreed to settle all matters arising from the employment relationship between them including the employment relationship problem and the termination of the employment relationship (settled matters).
>
> D. The parties wish to record the agreed terms of settlement of the settled matters pursuant to s 149 of the Employment Relations Act 2000.

[17] As noted earlier at [8], clause 17 of the agreement provided that the "settled matters" included any complaints Mr Judge has made or may make against Wintec, to any statutory body including the Privacy Commissioner.

[18] At the time the settlement agreement was made, Wintec had obtained information about Mr Judge's parking fines from Care Park for the purpose of an investigation into a breach by Mr Judge, of Wintec's parking policy. Mr Judge had complained about this to the Privacy Commissioner and Wintec had consequently ceased its investigation. It does not follow that because the investigation was no longer on foot, that the alleged breach of privacy it gave rise to was not covered by the agreement. On the contrary, the agreement specifically includes the alleged breach of privacy within the description of the employment relationship problem and records that the settled matters include any complaints that Mr Judge has made or may make to the Privacy Commissioner. It clearly covers the privacy complaint regarding Wintec's obtaining of and use of Mr Judge's parking fine information.

[19] The agreement was made in full and final settlement of the employment relationship problem which included the privacy complaint. Not only was it expressed to be on a full and final basis, it was signed off by the MBIE mediator pursuant to s 149 of the Employment Relations Act 2000. Section 149 requires the mediator to explain the effects

of such an agreement to the parties before they sign it and provides that the terms of a settlement recorded pursuant to s 149 are final, binding on and enforceable by the parties.

[20] As Judge Inglis stated in *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [19], referring to s 149(3):

> The combined effect of these provisions is that a settlement agreement which has passed through the s 149 process cannot be challenged or set aside, except with the possible exception of duress on public policy grounds.

[21] Unless the exception of duress applies, the claim against Wintec for an interference with Mr Judge's privacy relating to the car park fine information cannot proceed as it has already been the subject of a full and final settlement.

Was there duress?

[22] In his opposition to Wintec's strike out application, Mr Judge sets out at length his views concerning the alleged breach of his privacy, an account of the difficulties he experienced with Wintec which culminated in his resignation, the impact that the difficulties with Wintec have had on his life, and his impressions of the disciplinary and subsequently the mediation process. Although acknowledging he was legally represented, he described the mediation as "a textbook case of power imbalance". With respect to the agreement, he asserts at paragraph [12](p) of his submission:

> In November I signed a settlement agreement under duress. I had asked to remain employed on a part-time basis until I found other employment. The reply gave me no choice but to resign.

[23] In reply submissions, Wintec argues that there is no evidence Mr Judge entered into the settlement agreement under duress. Rather, Mr Judge entered into the settlement agreement after mediation and with the benefit of legal representation and a support person. Wintec also points out that the agreement records that Mr Judge confirmed to the MBIE mediator that he fully understood the agreement and accepted that, except for enforcement purposes, neither party may seek to re-litigate it. Wintec also submits that even were there duress, having accepted the benefits of the agreement and having taken no timely steps to avoid it, Mr Judge has thereby affirmed it. Wintec relies on the decision of the Court of Appeal in *Pharmacy Care Systems Ltd v The Attorney-General* (2004) 2 NZCCLR 187 (CA) where the elements of duress were summarised as follows:

> [98] In summary, the elements of duress in New Zealand law today are these: First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.

[24] Although Mr Judge is clearly dissatisfied by the agreement, there is nothing to suggest that it was obtained by duress as that term is understood in law. Further, he has taken no timely steps to avoid the agreement which provided for, amongst other things, the payment of various sums to him including a contribution towards his legal costs.

[25] The Tribunal finds that the agreement settled all claims that Mr Judge had against Wintec including claims relating to the alleged breach of his privacy. The Tribunal further

finds that there is no tenable claim that Mr Judge signed the agreement under duress. The claim against Wintec is struck out. Wintec seeks costs. This issue will be dealt with at the end of this decision.

Application by Care Park to strike out claim against it

[26] We turn now to the application by Care Park. Care Park seeks to have the claim against it struck out on the following grounds:

> **[26.1]** The matters raised in the statement of claim filed by Mr Judge arise out of the former employment relationship between Mr Judge and Wintec.
>
> **[26.2]** The claim filed discloses no arguable case against Care Park.
>
> **[26.3]** The Tribunal does not have jurisdiction over the alleged breach of information privacy principles 3 and 10.

[27] In submissions, Care Park says Mr Judge's statement of claim is largely focused on the issues he had with Wintec and that it appears his grievance involves the events that have occurred between himself and Wintec following the release of information from Care Park to Wintec. It further notes that the release of this information was investigated by the Privacy Commissioner who determined there was no interference with Mr Judge's privacy. Care Park submits:

> The release of the information was the extent of [Care Park's] involvement in Mr Judge's grievance and the statement of claim does not actually appear to put the release of the information in issue, rather Mr Judge is aggrieved that he was unaware that such information was able to be shared between Care Park and Wintec. That issue relates to IPP3 and as set out below, we consider the Tribunal does not have jurisdiction to investigate that privacy principle. Again [Care Park] fails to see how Mr Judge's claim provides any issue that it can answer to.

[28] In his opposition to the strike out application, Mr Judge expands on the claim against Care Park. He questions the providing of private information to a person's employer that can be potentially used against that employee. He notes the statement in the Privacy Commissioner's decision about his complaint that:

> Care Park also said it is reviewing its privacy statement and will amend it to include information about the collection and disclosure of personal information.

And that:

> I consider it would be better practice for Care Park to explicitly state on the signs that it provides information about non-compliant vehicles to Wintec. As noted above, Care Park has agreed to review its privacy statement and will update signs with its new statement.

[29] Mr Judge does agree however that his case against Care Park is confined to principle 11. In his opposition at [4] he states:

> I acknowledge that principle 11 of the Privacy Act 1993 is the key principle that relates to Care Park and that principle 11 was investigated in regard to Care Park by the Privacy Commission(er).

[30] He also states at [6]:

> I understand that it is within the jurisdiction of the HRRT to examine principle 11…in relation to this case. Should a parking company, contracted to a person's employer, so willingly and

> thoughtlessly give out private information that can be potentially used against that employee? Is it legal that an employer can access records of parking fines accrued by an employee and use that record against them? Does it make any difference if the parking company is contracted by the employer?

[31] Mr Judge identifies the central issue to his claim being that, "in response to a request from Wintec, Care Park released an itemised list of my parking fines without due care or diligence as to how that information may be used". He goes on to say that the result of the release of that information and the effect on his life had been devastating.

Assessment

[32] Principle 11 limits the disclosure by an agency of personal information to a person body or agency unless one of the numerated exceptions apply. Principle 11(a) provides that information may be disclosed if an agency believes on reasonable grounds that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained.

[33] It is correct that the Privacy Commissioner found no breach of principle 11 because principle 11(a) applied. The certificate of investigation notes the Commissioner's opinion that there was no interference with privacy as one of the purposes for which Care Park collected information was to disclose it to Wintec. It does not follow however that Mr Judge has no arguable case against Care Park before the Tribunal. The Tribunal is not bound by the opinion of the Privacy Commissioner concerning principle 11 and must reach its own decision on the cases before it. Having had his complaint investigated by the Privacy Commissioner, Mr Judge is entitled under s 83 of the Privacy Act to bring proceedings to the Tribunal concerning the subject matter of that investigation.

[34] Having regard to the strike out principles articulated at [11] – [16] above, Mr Judge's claim against Care Park should only be struck out if the Tribunal is satisfied that there is no reasonably arguable claim that the disclosure by Care Park of Mr Judge's parking information to Wintec breached principle 11 and is therefore certain that the claim cannot succeed.

[35] The evidence before the Privacy Commissioner which led him to conclude that principle 11(a) allowed the release of Mr Judge's parking fine information to Wintec is not presently before us. Because case management directions have yet to be given as to the filing of evidence by the parties, the Tribunal does not yet have evidence concerning the purposes for which Mr Judge's parking fine information was collected or establishing that one of those purposes was its provision to Wintec. Prima facie it seems at least tenable that principle 11 may apply to the release of Mr Judge's parking fine information to Wintec. In the absence of the entire factual context and without the benefit of argument, the Tribunal declines to strike out the claim by Mr Judge against Care Park.

[36] The Tribunal does however agree with the submission of Care Park that much of the statement of claim relates to Mr Judge's grievance against Wintec and that the claims against Care Park require clarification. Mr Judge has confirmed that his case against Care Park is brought in relation to principle 11. It is appropriate therefore for an amended statement of claim to be filed that is confined to the allegations Mr Judge makes against Care Park and confined to the principle 11 issues.

[37] The following directions are made:

[37.1] The claim against Wintec is struck out. Wintec is removed as a defendant to the proceedings.

[37.2] Should Wintec wish to proceed with an application for costs such application and any supporting material is to be filed by (14 days following date of decision).

[37.3] Any submissions in opposition by Mr Judge are to be filed (14 days after that). Wintec is to have the right to reply by (7 days after that).

[37.4] The Tribunal will then determine the issue of costs on the basis of the written submissions.

[37.5] The application by Care Park to strike out the claim of Mr Judge against it is dismissed.

[37.6] Mr Judge is to file an amended claim confined solely to his allegation that Care Park breached principle 11. The amended statement of claim is to be filed and served no later than 5pm on Friday (one month after decision)

[37.7] Care Park is to file and serve an amended reply by (one month later).

[37.8] The Secretary is thereafter to convene a case management teleconference.

[37.9] Leave is reserved to the parties to make further application should the need arise.

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Ms MA Roche **Co-Chairperson**	**Dr SJ Hickey MNZM** **Member**	**Mr BK Neeson JP** **Member**