IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA631/2019
[2022] NZCA 432

BETWEEN	YAN GUO Appellant
AND	STEPHEN JAMES CULPAN First Respondent
AND	HUMAN RIGHTS REVIEW TRIBUNAL Second Respondent

Hearing:	28 October 2021
Court:	Kós P, Cooper and Clifford JJ
Counsel:	Appellant in Person H C Stuart for First Respondent No appearance for Second Respondent
Judgment:	12 September 2022 at 11:00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs for a standard appeal on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] In a judgment delivered on 13 August 2019 the High Court dismissed an appeal by the appellant, Yan Guo, against a decision of the Human Rights Review Tribunal (the Tribunal) striking out her claim against the first respondent, Dr Stephen Culpan.[1] Dr Culpan was a medical practitioner whom Ms Guo had seen at the request of her employer. Ms Guo alleged that Dr Culpan had breached her right to privacy, but the Human Rights Review Tribunal struck out her claim when, at the substantive hearing before it, Ms Guo refused to be cross-examined.[2]

[2] In the same judgment, the High Court dismissed an application for review made by Ms Guo under the Judicial Review Procedure Act 2016 challenging various interlocutory decisions made by the Tribunal on issues arising out of the same proceeding.[3]

[3] The High Court later declined an application for leave to bring an appeal to this Court under s 124(1) of the Human Rights Act 1993.[4] Palmer J considered that Ms Guo had not identified a question or arguable error of law in the High Court judgment, and in any event none of the matters which she wished to raise on a second appeal were questions which by reason of their general or public importance, or for any other reason, should be submitted to this Court for decision.[5]

[4] Subsequently, this Court granted an application by Ms Guo under r 29A of the Court of Appeal (Civil) Rules 2005 for an extension of time to appeal from the High Court's dismissal of her application for review.[6] But this Court declined to grant special leave to appeal to this Court under s 124(3) of the Human Rights Act against the High Court's dismissal of her appeal against the Tribunal's decision.[7] This Court later declined an application for recall of that judgment.[8]

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1 *Guo v Culpan* [2019] NZHC 1963 [High Court judgment].
2 *Guo v Culpan (Strike-Out)* [2018] NZHRRT 25. Ms Guo maintains on appeal that she did not refuse to be cross-examined.
3 High Court judgment, above n 1, at [24]–[62].
4 *Guo v Culpan (No 2)* [2019] NZHC 2935.
5 At [7].
6 *Guo v Culpan* [2020] NZCA 293 at [32].
7 At [19].
8 *Guo v Culpan* [2020] NZCA 377.

[5] In the result we have before us an appeal against the High Court's refusal of the application for review.[9] In circumstances that we will briefly summarise Ms Guo challenges five decisions of the Tribunal, namely decisions:

(a) striking out much of the evidence she proposed to give in reply to evidence provided by Dr Culpan;

(b) declining her applications for the Tribunal to issue witness-summonses and for non-party discovery;

(c) declining applications to adjourn the hearing, including to allow her to be represented by counsel;

(d) declining her request that the co-chairperson of the Tribunal, Ms Roche, should recuse herself on grounds of bias;[10] and finally

(e) striking out her claim.

[6] In order to put these claims in context it is necessary to outline the nature of the claim made to the Tribunal and the various procedural issues that arose in dealing with it. Palmer J, who heard the application for review, fairly described the process as "fraught".[11]

The claim made to the Tribunal

[7] Palmer J described Ms Guo as a well-educated young New Zealander of Chinese origin.[12] She had been employed by Pricewaterhouse Coopers (PwC) as a graduate between February 2009 and February 2010. Dr Culpan is a doctor in general practice but with a speciality in occupational health. In November 2009 he

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9 The second respondent, the Human Rights Review Tribunal, filed a memorandum prior to the hearing advising that it abided by the Court's decision.

10 The High Court referred to Ms Roche as the co-chairperson throughout the judgment. We simply refer to the Tribunal, except where it is appropriate to refer to Ms Roche personally. She made all of the impugned decisions other than the decision to strike out the claim at the substantive hearing, in which she was joined by two other members of the Tribunal.

11 High Court judgment, above n 1, at [22].

12 At [13].

was asked to undertake an occupational health assessment of Ms Guo by PwC, who referred in a phone call to concerns about aspects of her behaviour at work, including her claims she was hearing voices and believed she was under surveillance. He saw her on 20 November for about 45 minutes.

[8] After the meeting, having been asked by PwC to sign a consent for it to obtain a report from Dr Culpan assessing her fitness for work, Ms Guo telephoned Dr Culpan and told him that she did not consent to the provision of a report. She told him not to divulge any information to PwC. On 22 December 2009 he wrote to PwC stating that while it was clear he could not divulge the content of his meeting with Ms Guo, he considered that he could, based on the information provided to him by PwC, "set some suggested guidelines for her care and safety at work as well as suggestions for any future actions should health issues arise". He expressed the opinion that the information he had received from PwC about Ms Guo suggested "a persisting paranoid false belief thought disorder which may become paranoid schizophrenia". He recommended that further medical and psychiatric advice be obtained. The Judge noted that on 22 January 2010, Ms Guo was seen by Dr Culpan again, although there were conflicting accounts about that meeting.[13] She resigned from PwC with effect from 21 January 2010, later claiming she was constructively dismissed.

[9] Over five and a half years later, on 28 August 2015, Ms Guo requested a copy of her file from Dr Culpan. Dr Culpan provided some file material to her on 29 September 2015, but she complained this was incomplete because some documents referred to in it were not disclosed and the notes recording the consultation on 20 November 2009 were very brief. On 30 September 2015 Dr Culpan provided additional material including the report to PwC, but she believed there was still material missing.

[10] On 15 October 2015, Ms Guo complained to the Privacy Commissioner | Te Mana Mātāpono Matatapu alleging Dr Culpan had intentionally failed to respond to her information request within the 20-day time limit prescribed by s 40(1) of the Privacy Act 1993 and that he had failed to provide her with the full file.

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13 High Court judgment, above n 1, at [16].

On 10 December 2015 an investigating officer in the Office of the Privacy Commissioner, Mr Tony Collins, advised Ms Guo of his preliminary views that:

(a) Her request had not been complied with within the statutory time period, which expired on 25 September 2015. This was due to a number of compounding factors, including the fact that Dr Culpan had put an alert in his practice's system telling staff not to hand the file over until he had seen Ms Guo to explain some of the material in the file. This had led to Ms Guo having to book an appointment which was later cancelled when it was realised it was unnecessary prior to the material being released. Mr Collins recommended an apology for this, which he said constituted an interference with Ms Guo's privacy under the Privacy Act.

(b) He was satisfied that with the response of 30 September, all the medical information held by Dr Culpan's practice relating to Ms Guo had been handed over.

[11] Mr Collins indicated that he would be prepared to consider any comments about these preliminary views by 24 December 2015. He told Ms Guo that if nothing was heard, a final view on her complaint might be formed. It appears that Ms Guo did not make any comments in response to Mr Collins' preliminary views. Dr Culpan made the apology that had been recommended by Mr Collins. However, on 4 May 2016 Ms Guo filed a statement of claim in the Tribunal. She alleged intentional delay by Dr Culpan and claimed there was still missing material. She said Dr Culpan had deliberately withheld information from the Privacy Commissioner, to "hide his severe professional misconduct".

[12] Until this point Ms Guo had not made any allegations that Dr Culpan had misused Ms Guo's personal information in providing his report to PwC. On 3 August 2016, however, Ms Guo made a second complaint to the Privacy Commissioner claiming that Dr Culpan had collected and disclosed her personal and health information to PwC without her consent, causing her to lose her job. She also

claimed he had formed an incorrect view about her state of health and had destroyed or edited information following receipt of her information request. By a letter to Ms Guo dated 10 August 2016, Mr Daimhin Warner, who was the acting team manager of investigations and dispute resolution in the Auckland office of the Privacy Commissioner declined to investigate these new complaints, and gave reasons.

[13] Mr Warner's letter noted that Ms Guo had visited Dr Culpan at PwC's request and had met with Dr Culpan in the company of a member of PwC's staff. He wrote:

> In our view, the sharing of information about you between Dr Culpan and PWC was necessary in order to facilitate Dr Culpan's provision of advice about your suitability for employment. You believe you did not consent. However, to be clear, consent is only one way in which such information may be shared. In this case, the sharing of information was one of the purposes, or directly related to the purposes, for which it was created and held.

[14] Although Mr Warner's letter did not specifically refer to the relevant provisions of the Privacy Act, it seems clear that the last sentence reflected Principle 10 of the information privacy principles set out in s 6 of the Privacy Act. Under Principle 10 an agency that holds personal information obtained in connection with one purpose must not use the information for any other purpose, unless it believes on reasonable grounds that, amongst other things, "the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained".[14]

[15] Mr Warner continued by noting that the Privacy Act did not regulate the way in which medical professionals form opinions or make diagnoses, and the correctness of Dr Culpan's opinions was not something that could be considered under the Privacy Act. He noted that Ms Guo's complaint about her right of access to the health information held about her by Dr Culpan had been investigated and that as she had already commenced a proceeding before the Tribunal, that was now the forum before which such concerns should be raised.

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[14] This principle was in substance re-enacted as part of information privacy principle 10: see Privacy Act 2020, s 22.

[16] Mr Warner also wrote that he considered Ms Guo's complaints had not been made in good faith. This was based on his views that Ms Guo had made multiple requests of Dr Culpan for the same information, ignoring the Privacy Commissioner's conclusion that he had responded appropriately; she had made numerous complaints to many agencies about Dr Culpan; the events complained of had taken place more than five years earlier, and no steps had been taken by Ms Guo in the intervening period to find a resolution; and she had demonstrated unreasonable behaviour towards Dr Culpan, including by making various threats against him.

Proceedings in the High Court

[17] The High Court dealt with each of Ms Guo's complaints in some detail. The Judge considered first the question of whether the Tribunal should have struck out a substantial amount of evidence that Ms Guo wished to give in reply to the evidence called for Dr Culpan.[15] He considered that Ms Guo had sought to deal in her reply brief with matters outside the proper scope of the hearing before the Tribunal, including the issue of whether Dr Culpan had wrongly released information to PwC without her consent. That issue had been the subject of her second complaint to the Privacy Commissioner, but not the first. In the circumstances it was not an issue that was properly before the Tribunal.[16] The only issue before the Tribunal was the consequences of Dr Culpan failing to provide Ms Guo's medical file to her. In the circumstances the reply evidence had been properly struck out.[17]

[18] The next complaint dealt with by the Judge was the failure of the Tribunal to issue a witness summons to Ms Tracy Ellis.[18] Ms Ellis was an employee of PwC who at one stage was intended to be a witness called by Dr Culpan. In the result, it was decided that she should not be called. Ms Ellis' statement of evidence that had been initially provided was based on her knowledge of PwC's business records and Ms Guo's personal file. Counsel for Dr Culpan before the Tribunal conceded at the interlocutory stage that this evidence would be of little assistance.[19] When Ms Guo

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15 High Court judgment, above n 1, at [31]–[36].
16 At [32].
17 At [36].
18 At [37]–[47].
19 At [27].

then sought a witness summons in respect of Ms Ellis, the Tribunal decided her evidence would not be relevant to the issues to be determined. The ruling included the following:[20]

> [5] Having had the benefit of reviewing the brief that was filed for Ms Ellis, I do not consider that her evidence is relevant to the issues to be determined. The circumstances which led to Ms Guo being seen by Dr Culpan are of no assistance to determining whether her subsequent information privacy request addressed to Dr Culpan in relation to her interactions with him was complied with. The jurisdiction of the Tribunal under the Privacy Act is narrowly confined to determining whether there has been an interference with privacy as defined in s 66 of the Act and the nature of any remedy. The Tribunal has no jurisdiction to investigate any other grievance Ms Guo may have. The application for the witness summons is declined. For the benefit of Ms Guo, it is noted that because Ms Ellis will not be a witness at the hearing her witness statement will not be considered or taken into account by the Tribunal.

[19] On 13 March 2018 Ms Guo purported to require Ms Ellis to answer interrogatories under the High Court Rules 2016. As counsel for Dr Culpan pointed out, this could not be required since Ms Ellis was not a party and in any event the High Court Rules did not apply. Subsequently, Ms Guo made a further application for a witness summons to Ms Ellis, to produce the communications between PwC and Dr Culpan about Ms Guo. However, the Tribunal dismissed the application. In a minute dated 19 April 2018 the Tribunal continued to express the view that the evidence of Ms Ellis would be of no relevance to the issues to be determined in the proceedings.[21] It also noted that the documents did not belong to Ms Ellis, that PwC was not a party to the proceeding, and the Tribunal could not direct Ms Ellis to provide the documents of a non-party.[22]

[20] The Judge concluded the PwC record sought to be produced through Ms Ellis would not be relevant as to whether Dr Culpan had breached Ms Guo's privacy by delaying in providing her records.[23] He considered a possibility that PwC might have records that were part of Dr Culpan's file on Ms Guo which he had not provided to her, but there was nothing in Ms Ellis' statement of evidence which suggested that was the case.[24] He then noted that the discovery phase of the proceeding had finished some

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20 *Guo v Culpan* HRRT 025/2016, 2 March 2018.
21 *Guo v Culpan* HRRT 025/2016, 19 April 2018 at [5].
22 At [6].
23 High Court judgment, above n 1, at [45] and [47].
24 At [45].

seven months earlier, and the previous application for a witness summons had already been determined on the basis of irrelevance given the issues before the Tribunal.[25] He concluded that the Tribunal's decision was not made in error.[26]

[21] The third issue raised by Ms Guo concerned the Tribunal's refusal to adjourn a two-day hearing set to commence on 14 May 2018. That fixture had been allocated on 6 March 2018. On 19 April Ms Guo sought leave to amend her statement of claim and for the Tribunal to adjourn the hearing if there would be insufficient time to consider her statement of claim as amended before the fixture date. She made similar applications to adjourn on 26 April and for a third time on 29 April, to allow for discovery to be completed. She then applied on 7 May for the Tribunal to adjourn its proceedings to give her the opportunity to apply for a removal of the proceeding to the High Court.

[22] Later, on 7 May, Ms Guo engaged senior counsel, Ms Joychild QC. Until that point she had not been represented and had endeavoured to progress her claim with the assistance of her mother, Li Yan. Ms Joychild filed a memorandum saying she was instructed to seek an adjournment of the hearing because Ms Guo wished to have all her Privacy Act concerns considered together, something that the co-chairperson of the Tribunal in her minute of 1 May had ruled was impossible at that stage.[27] In a further memorandum Ms Joychild submitted the nub of Ms Guo's claim would not be dealt with if the hearing proceeded "on [the] current limited grounds". She noted that if the proceeding were adjourned the reasons for rejecting an amendment to Ms Guo's claim, namely the proximity of the hearing date for a claim that had been on foot since May 2016, would fall away. Ms Joychild also referred to commitments she had which made it impossible for her to prepare for and attend the hearing on 14 May.

[23] This further application for adjournment was opposed by counsel for Dr Culpan and the Tribunal heard counsel on the matter by telephone on 10 May. The Tribunal declined the application for adjournment.[28] The High Court concluded it was justified in doing so. The Court said that, given the need to balance her late desire for legal representation against Dr Culpan's interests in proceeding with the

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25 At [46].
26 At [47].
27 *Guo v Culpan* HRRT 025/2016, 1 May 2018.
28 *Guo v Culpan* HRRT 025/2016, 10 May 2018 [Tribunal adjournment decision].

case and the public interest in the Tribunal getting through its work efficiently, Ms Guo should have instructed counsel who was available to attend the hearing.[29] Further, Ms Guo's wish to reformulate her case was understandable but not a valid reason for adjourning the hearing.[30] The Judge observed:[31]

> Ms Guo and her mother had determinedly pursued the case as it was framed. If an amended claim of the sort she now sought was within the Tribunal's jurisdiction, a separate proceeding could be brought afresh and an adjournment was unnecessary. If it were not within the Tribunal's jurisdiction, adjournment would not achieve anything. I consider it was in the interests of justice for the claim, as both parties had prepared it, to be heard as scheduled.

[24] The fourth issue raised by Ms Guo in the High Court was based on Ms Roche's rejection of a request that she recuse herself. Ms Roche recorded her view that she did not consider a fair-minded and informed lay observer could reasonably apprehend that there was a real possibility she could not bring an impartial mind to bear on the resolution of the issues before the Tribunal.[32] The application had been advanced on the basis that the Tribunal had consistently ruled against Ms Guo on interlocutory issues as the claim proceeded to hearing. The High Court upheld that decision. The Judge found that the Tribunal's interlocutory decisions that he had reviewed were fair, reasonable, and justified. The Tribunal had dealt with Ms Guo's arguments on their merits and given reasoned decisions. The fact that it had ruled against Ms Guo did not mean its co-chairperson, Ms Roche, was biased. He concluded that there had been no reason for Ms Roche to recuse herself.[33]

[25] The final issue concerned the Tribunal's decision to strike out Ms Guo's claim. The strike out occurred in circumstances where, despite several requests made by the Tribunal, Ms Guo refused to be cross-examined by Dr Culpan's counsel unless her own legal counsel was present. Counsel for Dr Culpan applied for the proceeding to be struck out because of Ms Guo's refusal to answer questions. After an adjournment, the Tribunal asked Ms Guo whether she would answer questions from counsel and sought her response to the application for strike out. Ms Guo maintained her refusal to answer questions, stating that she had insufficient time to prepare for

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29 High Court judgment, above n 1, at [56].
30 At [57].
31 At [57].
32 *Guo v Culpan* HRRT 025/2016, 11 May 2018 at [8].
33 High Court judgment, above n 1, at [62].

self-representation and that she believed she would not get a fair hearing without legal representation.

[26] The Judge considered that the Tribunal's decision to strike out was fair, reasonable, and justified.[34] He considered the decision was consistent with the principles of natural justice. Ms Guo had put the Tribunal in an impossible position and her refusal to be cross-examined prevented Dr Culpan from testing her evidence. That was unfair and prejudicial to Dr Culpan, especially given the serious allegations Ms Guo had made against him. In these circumstances, the Tribunal could not have placed any weight on Ms Guo's evidence.[35] Although the Tribunal had not identified the precise ground on which it struck out the proceeding, the Judge considered that it was reasonable for the Tribunal to have done so on the basis that the proceeding was likely to cause prejudice under s 115A(1)(b) of the Human Rights Act, or it constituted an abuse of process under s 115A(1)(d). He considered it would not have been fair to Dr Culpan to stay the proceeding until Ms Guo agreed to be cross-examined. An adjournment was not required, for reasons he had already given.[36]

[27] In the result, the Judge dismissed both the appeal and the application for review.

The appeal

[28] Ms Guo in this Court essentially repeats the same arguments that she addressed to the High Court. She claims that the Tribunal's decision striking out her evidence in reply demonstrated apparent bias and the decision that the struck-out parts of the evidence would prolong the proceedings indicated that it was not acting fairly, impartially, and consistently having regard to the different way in which Dr Culpan's evidence was treated. She also attacks the Tribunal's refusal to issue a witness summons to Ms Ellis. She claims that there were proper grounds on which the proceedings should have been adjourned and says that the Tribunal's decision not to adjourn deprived her of legal representation. She asserts the Ms Roche wrongly refused to recuse herself. Striking out the claim created a grave injustice and she had

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34 At [69].
35 At [69].
36 At [70].

not refused to be cross-examined, but only applied for an adjournment in order to be legally represented and secure a fair hearing of her claim. An adjournment would not have denied Dr Culpan's right to be heard as he could have cross-examined her at a later point.

[29] We have not been persuaded by any of the arguments that Ms Guo has advanced. She undoubtedly has a sense of grievance as a consequence of her claim being struck out and it is unfortunate that that is the way the proceeding came to an end. But that outcome reflected the tortuous path that the claim had taken. After it was commenced in May 2016, it became mired in a series of interlocutory applications in support of which Ms Guo's mother filed numerous memoranda. In the end all were decided against Ms Guo. She asserts that her lack of success at the interlocutory stage must be the result of bias on the part of Ms Roche. However, in agreement with Palmer J we do not consider such a case can be made out.

[30] Unfortunately, the real and underlying reason for the lack of interlocutory success was Ms Guo's failure to appreciate that the nature of the claim she filed was limited in scope, and the attempt to amend it once Ms Joychild was instructed foundered on a jurisdictional problem which meant that the Tribunal could not deal with what Ms Joychild described as the real "nub" of her complaint: Ms Guo's concern that Dr Culpan had improperly shared her personal information with PwC. As has been seen, her original claim to the Tribunal sought a declaration that Dr Culpan had breached the Privacy Act by intentionally delaying his response to her request for information, and had refused to provide her full medical file. She also sought an order to provide a copy of her full medical file, and claimed that he did not do so and had hidden the missing information.

[31] The allegation of improper sharing of information was not raised, and therefore had not been formally investigated by the Privacy Commissioner, in dealing with Ms Guo's first complaint. It was raised in her further complaint, and rejected without further investigation in the letter of 10 August 2016, which we have discussed above. At that point, Mr Warner considered there had been no breach of privacy because the sharing of the information was one of the purposes for which the information had been created and held, or was directly related to those purposes. He was able to reach that

view because of what he knew about the purposes, having investigated Ms Guo's previous complaint. We accept that did not require any further investigation, and the view about the application of Principle 10 was one that he could properly reach. But Mr Warner also declined to open an investigation for other reasons which, as noted above, included issues of delay and his perception that Ms Guo was not acting in good faith.

[32] Under ss 82 and 83 of the Privacy Act, Ms Guo's ability to bring proceedings before the Tribunal was contingent on there having been an investigation conducted in relation to any action alleged to have been an interference with the person's privacy. Because the Privacy Commissioner had decided not to open an investigation into the second complaint, there was an issue as to whether the Tribunal could have amended the proceeding before it to deal with it. And no attempt had been made to challenge Mr Warner's decision not to conduct an investigation.

[33] As the Judge observed, the Tribunal has a duty under s 105 of the Human Rights Act to act according to the substantial merits of the case, without regard to technicalities.[37] This means that a broad approach to what matters are relevant to the merits is appropriate, as befits the nature of the legislation and its purpose, expressed in the long title, "to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights". But this does not mean that the scope of the proceedings before the Tribunal can be expanded beyond their proper limits. Here, those limits were confined by the scope of the proceeding that Ms Guo filed in the Tribunal arising out of her first complaint.

[34] The narrow nature of the first complaint became one of the foundations of the decisions made by the Tribunal to reject the various interlocutory applications made by Ms Guo. It meant that the only issues before the Tribunal were those related to whether Dr Culpan had provided all of Ms Guo's file to her, whether he delayed in providing the material to her (a two-day delay was admitted in any event) and what consequences, if any, should follow. It was the reason why the Tribunal struck out

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37 At [35].

substantial parts of Ms Guo's reply brief — it extended beyond the issues properly before the Tribunal. The evidence concerned was focused on Ms Guo's life experience prior to going to work with PwC; her work experiences at PwC; allegations that PwC had constructively dismissed her; various other allegations against PwC; and alleged breaches by Dr Culpan of professional obligations and dishonesty.

[35] The narrowness of the complaint was also the principal reason for the Tribunal declining to issue a witness summons to Ms Ellis. And it formed an important part of the context in which the Tribunal decided to reject the application to adjourn the proceeding so an amended claim could be pursued. As stated earlier, the claim had been commenced in the Tribunal as long ago as 4 May 2016. And as noted by the Judge, if an amended claim of the sort that she wished to pursue was in fact within the Tribunal's jurisdiction, a separate proceeding could be brought and an adjournment was unnecessary. If the claim was not within the Tribunal's jurisdiction, adjournment would not achieve anything.

[36] Although Ms Guo had made a late decision to instruct counsel, the time that had elapsed made it inappropriate to instruct counsel who was unavailable for the hearing already set down for 14 May 2018. We consider the Tribunal could justifiably take the view it expressed that it was fair and reasonable to proceed in a forum where it was normal for litigants to be self-represented and proceedings were flexible and relatively informal.[38] The narrow focus of the issues properly before the Tribunal also justified this conclusion: it was not a complex case.

[37] Ms Guo's reaction to the adverse interlocutory decisions made by the Tribunal was to allege that Ms Roche should recuse herself because she would not conduct the hearing fairly. However, since the decisions were apparently reasonable and justified there was no substance in Ms Guo's allegation. We are satisfied there was nothing in what occurred here that would establish apparent bias in accordance with the principles stated by the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*.[39] A Tribunal that acts reasonably and in accordance with

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38 Tribunal adjournment decision, above n 28, at [11].

39 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

the law cannot be impugned for apparent bias, merely on the basis that the decisions have been consistently adverse to a party's interest.[40]

[38] In all the circumstances it was not possible or appropriate for Ms Guo to adopt the stance at the hearing that she would not submit to cross-examination. As the Judge said, her refusal put the Tribunal in an impossible position.[41] She had expressed herself in highly critical terms about Dr Culpan. If he was to have a fair hearing he needed to have the ability to cross-examine Ms Guo. Without that, there was no proper basis on which the Tribunal could uphold her complaint.

[39] Having said that, as noted by the Judge, the Tribunal did not identify a statutory power it exercised in striking out the claim. He overcame this difficulty by referring to s 115A(1) of the Human Rights Act, under which the Tribunal may strike out a proceeding before it if satisfied, amongst other things, that it is likely to cause prejudice or delay (s 115A(1)(b)), or is otherwise an abuse of process (s 115A(1)(d)).[42] The Judge thought that either of these provisions could have been relied on to justify the decision to strike out.[43]

[40] We have reservations about that approach. The position was that Ms Guo had given evidence, and declined to be cross-examined. She says now that she was not refusing to be cross-examined but her argument on that issue, in effect, simply restates her claim that the proceeding should have been adjourned. The fact is she did refuse to be cross-examined, so the Tribunal was presented with a situation in which, having heard her evidence in chief, it could give it little weight. But we doubt that justified summarily striking out the claim.

[41] It is difficult to say her refusal to be cross-examined meant that the proceeding would cause prejudice, as the substantive outcome would have remained in the Tribunal's hands. There would be no prejudice if the Tribunal dealt appropriately with the issues (and although the Judge did not rely on delay, we note in any event that

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40 *Russell v Taxation Review Authority* (2009) 24 NZTC 23,284 (HC) at [99]–[101].
41 High Court judgment, above n 1, at [69].
42 Section 115A(1)(a) provides for the striking out of proceedings that disclose no reasonable cause of action and s 115A(1)(c) provides for the same where a proceeding is frivolous or vexatious.
43 High Court judgment, above n 1, at [70].

it was not in issue, given the decision that the proceeding should not be adjourned). Similarly, the refusal to be cross-examined did not in our view mean that the proceeding was an abuse of process. As we see it, rather than striking out the claim the more appropriate course to follow in the circumstances would have been to proceed to hear Dr Culpan's evidence and then resolve the proceeding substantively. This would involve taking into account all of the evidence, and resolving disputed issues in Dr Culpan's favour when Ms Guo's evidence and his were in conflict on a material matter of primary fact.

[42] That approach would have been more in conformity with the Tribunal's obligation under s 105 of the Human Rights Act to act according to the substantial merits of the case. It would have enabled the Tribunal to issue a substantive decision that explained why the claim had been resolved against Ms Guo, rather than striking it out on the basis of her stance about cross-examination at the hearing. That might have reduced the feeling of grievance that she obviously has as a result of the way the proceeding was conducted, although we cannot be confident that would be so. The very aggressive way in which she conducted the claim, with the assistance of her mother, suggests that the different approach we have discussed might not have had any effect.

[43] Having said that, we do not consider there is point now in referring the matter back to the Tribunal for further proceedings. We have not been presented with any basis on which we could conclude the Tribunal might have resolved the claim in Ms Guo's favour, given its narrow scope. The jurisdiction of the Tribunal was confined by the ambit of the complaint properly before it, which did not offer an appropriate vehicle for the airing of the grievances that Ms Guo in fact sought to pursue against Dr Culpan. And the Privacy Act was not the appropriate vehicle for the pursuit of claims that Dr Culpan had not met proper standards of professional conduct. In all the circumstances we consider the appropriate course is to dismiss the appeal.

Result

[44] The appeal is dismissed.

[45] The appellant must pay the first respondent costs for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
Wotton + Kearney, Wellington for First Respondent