

FILED

08 MAY 2018



DEFENCE

COURT DETAILS

Court	Supreme Court
Division	Equity
List	General
Registry	Sydney
Case number	2017/374456

TITLE OF PROCEEDINGS

Plaintiff	Tracy Evans
First defendant	Health Administration Corporation
Second defendant	Waqar Malik

FILING DETAILS

Filed for	Health Administration Corporation, first defendant
Filed in relation to	Amended Statement of Claim
Legal representative	Lea Armstrong, Crown Solicitor
Legal representative reference	201800073 T01
Contact name and telephone	Katrina Sanders (02) 9224 5076
Contact email	crownsol@csso.nsw.gov.au

HEARING DETAILS

PLEADINGS AND PARTICULARS

In answer to the Amended Statement of Claim (**ASOC**) filed by the plaintiff on 27 March 2018, the first defendant:

- 1 Does not plead to paragraph 1, as it contains no material allegations of fact against the first defendant.
- 2 Does not plead to paragraph 2, as it contains no material allegations of fact against the first defendant.
- 3 Admits that the matters set out in paragraph 3 include questions of law or fact common to the claims of the group members, as those persons are described in paragraph 2.

- 4 Admits that the matters set out in paragraph 4 include questions of law or fact common to the claims of the group members, as those persons are described in paragraph 2.
- 5 Admits that the matters set out in paragraph 5 include questions of law or fact common to the claims of the group members, as those persons are described in paragraph 2.
- 5A Denies that the matters set out in paragraph 5A are questions of law or fact common to the claims of the group members, as those persons are described in paragraph 2.
- 5B Denies that the matters set out in paragraph 5B are questions of law or fact common to the claims of the group members, as those persons are described in paragraph 2.
- 6 Admits paragraph 6, save that it says that the plaintiff's employment commenced in 1998.
- 7 Admits paragraph 7.
- 8 In response to paragraph 8:
- a. admits sub-paragraph (a) and refers to paragraphs 16 and 18 below;
 - b. does not admit sub-paragraph (b);
 - c. admits sub-paragraph (c).
- 9 Admits paragraph 9, save that the plaintiff's employment commenced in 1998.
- 10 Denies paragraph 10.
- 11 Denies paragraph 11.
- 11A In response to paragraph 11A:
- a. admits that each of the group members (as defined in paragraph 2) was employed by the first defendant under a contract of employment; and
 - b. denies that the contracts of employment for all of the group members contained the implied terms alleged in paragraph 11 of the ASOC.
- 12 Admits paragraph 12.
- 12A In response to paragraph 12A:
- a. admits that each of the group members, as defined in paragraph 2, provided personal information to the first defendant for the purpose of facilitating Claims that they had made; and

- b. otherwise is not required to, and does not, plead to the allegations in so far as they concern group members until after the initial trial of the plaintiff's claim and after the claims of the group members are properly particularised.

13 Denies paragraph 13.

14 Denies paragraph 14.

15 Denies paragraph 15.

16 In response to paragraph 16:

- a. says that Hays Specialist Recruitment (Australia) Pty Limited (**Hays**) entered into a contract with Medical Assessments Australia Pty Limited (**Medical Assessments**) on or about 9 January 2013 in which it was agreed that Hays would offer Medical Assessments engagements to provide services to clients of Hays;
- b. says that the second defendant, **Waqar Malik (Malik)**, was the "Nominated Person" of Medical Assessments under the contract;
- c. says that the contract provided that Medical Assessments would employ or engage Malik to provide services on behalf of Medical Assessments and that **Malik was not an employee or contractor of Hays or of any client for which Medical Assessments provided services on assignment from Hays;** and
- d. denies paragraph 16.

17 In response to paragraph 17:

- a. says that it was a term of the contract between Hays and Medical Assessments that Medical Assessments must not disclose to any person or use for its own or any other person's benefit any information in relation to the employees, business affairs, transactions or finances of Hays or its clients; and
- b. denies paragraph 17.

18 In response to paragraph 18:

- a. admits that the first defendant through its agreement with Hays obtained the services of persons on assignment from Hays;
- b. otherwise denies paragraph 18.

19 In response to paragraph 19:

- a. says that from on or about 14 January 2013 Malik provided services to the first defendant as an Injury Management Coordinator;

- b. says that Malik did so in his capacity as a person engaged by Medical Assessments;
- c. says that pursuant to the agreement between Hays and the first defendant, Hays assigned Medical Assessments to provide services to the first defendant, which it did through making available the services of Malik;
- d. denies paragraph 19.

20 In response to paragraph 20:

- a. admits that on 14 January 2013 Malik signed a computer system access form which facilitated access to the computer share drive for the Metropolitan Division of the Risk Management Branch of the first defendant];
- b. says that through that form Malik agreed to abide by *SOP 2007/94 Information Technology Security Policy* and agreed that client information would be **regarded as sensitive and used for authorised purposes only**;
- c. **admits that the computer share drive for the Metropolitan Division of the Risk Management Branch contained claim files for employees of the first defendant and information relating to those employees;**
- d. **admits that Malik obtained access to TRIM; and**
- e. **otherwise denies paragraph 20**

21 Denies paragraph 21.

22 Denies paragraph 22.

23 In response to paragraph 23:

- a. admits that Malik was granted access to TRIM and to the computer share drive for the Metropolitan Division of the Risk Management Branch of the first defendant, which contained files for the Risk Management on ASNSW\group and contained Employee Health Information, Employee Private Information and Employee Confidential Information (as defined in the ASOC);
- b. admits that Malik was assigned particular responsibility for managing certain nominated files, which did not include the plaintiff's file;
- c. admits that Malik's access to TRIM and the computer share drive was not confined to the files referred to in (b);
- d. says that Malik and others engaged in the Risk Management Branch were expected as part of their general duties to assist others in the Branch with the management of other files from time to time; and

e. otherwise denies paragraph 23.

24 Denies paragraph 24.

25 In response to paragraph 25:

a. says that the Information Protection Principles and the Health Privacy Principles, as pleaded in the ASOC, do not give rise to any cause of action in this Court;

b. says in relation to the alleged breaches of the Australian Consumer Law that:

i. the first defendant is for the purpose of any Act a statutory body representing the Crown;

ii. in respect of the matters referred to in the ASOC, the first defendant was not carrying on a business for the purposes of the Australian Consumer Law or the *Fair Trading Act 1987*;

iii. **in respect of its dealings with the plaintiff and the group members as referred to in the ASOC, the first defendant was not providing services for the purposes of the Australian Consumer Law or the *Fair Trading Act 1987*.**

c. denies the paragraph.

26 In response to paragraph 26:

a. admits that on a date after 14 January 2013 Malik accessed the computer records and accessed claims information relating to the people named on the Coloured List;

b. says that Injury Management Coordinators were authorised to access computer records, including in relation to claims for which they are not directly responsible, where necessary to assist in the management of claims by others;

c. says that Malik accessed the information relating to people named on the Coloured List for an unauthorised purpose, namely to compile the Coloured List for the purpose of providing that list to other persons for purposes other than management of the claims;

d. admits that in accessing the information to compile the Coloured List Malik was not undertaking work that he was required to perform in his duties as an Injury Management Coordinator; and

e. Otherwise denies paragraph 26.

27 Admits paragraph 27.

28 Admits paragraph 28.

29 Admits paragraph 29.

30 In answer to paragraph 30:

- a. denies that the Second Unauthorised Use/Disclosure and the Third Unauthorised Use/Disclosure as defined in the ASOC constituted on their own breaches of confidence; and
- b. otherwise admits paragraph 30.

31 Admits paragraph 31.

32 In answer to paragraph 32:

- a. admits that on or about 26 June 2015, Malik was convicted pursuant to section 62(1) of the *Privacy and Personal Information Protection Act 1998* (NSW) in relation to the disclosure of the information in the coloured list;
- b. otherwise does not know and cannot admit paragraph 32.

33 Denies paragraph 33.

34 Denies paragraph 34.

35 Denies paragraph 35.

36 Denies paragraph 36.

37 Admits paragraph 37.

38 Admits paragraph 38.

39 In answer to paragraph 39:

- a. says that Malik acted in an unauthorised manner by accessing information about the plaintiff for the purposes of compiling the Coloured List;
- b. says that Malik breached obligations of confidence that he owed to the plaintiff by selling, and seeking to sell, the Coloured List to third parties;
- c. denies that the plaintiff has any relevant right to privacy or any cause of action in respect of a tort of privacy; and
- d. otherwise does not admit paragraph 39.

40 Denies paragraph 40.

41 Denies paragraph 41.

42 Denies paragraph 42.

43 Does not know and cannot admit paragraph 43.

44 Does not know and cannot admit paragraph 44.

45 In answer to paragraph 45:

- a. Denies that the plaintiff is entitled to relief as claimed in paragraph 45; and
- b. Says that if, contrary to (a), the plaintiff is entitled to damages in respect of any of the causes of action pleaded in the ASOC, the calculation of any such damages must take into account compensation that the plaintiff has already received from the first defendant in respect of her claim under the *Privacy and Personal Information Protection Act 1998*.

Particulars

Deed of release between the plaintiff and the first defendant dated 17 November 2017.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Lea Armstrong, Crown Solicitor
Solicitor for the first defendant

Capacity

Signed in my capacity as a solicitor
employed in the office of the said
Lea Armstrong



Date of signature

8.5.18

AFFIDAVIT VERIFYING

Name Susan Duffy
 Address NSW Ambulance, Balmain Rd, Rozelle NSW 2039
 Occupation A/Senior Legal Officer
 Date 7 May 2018

I affirm:

- 1 I am an Acting Senior Legal Officer at NSW Ambulance.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at Sydney

Signature of deponent

Name of witness

Address of witness

Capacity of witness

Sydney

S. Duffy
 Katrina Savelle
 60-70 Elizabeth Street Sydney NSW 2000

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*~~
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]
 #I have confirmed the deponent's identity using the following identification document:

Driver licence 14266621

Identification document relied on (may be original or certified copy) †

Signature of witness

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name Health Administration Corporation
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Legal representative for filing party

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