

Reference No. HRRT 036/2019

UNDER THE PRIVACY ACT 2020

BETWEEN SARAH MUIR

PLAINTIFF

AND TIMOTHY ZHOU

DEFENDANT

AT WELLINGTON

BEFORE:

Ms GJ Goodwin, Deputy Chairperson

Ms BL Klippel, Member

Ms SP Stewart, Member

REPRESENTATION:

Ms S Muir in person

Mr T Zhou in person (did not attend)

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 30 November 2022

DECISION OF TRIBUNAL STRIKING OUT CLAIM¹

INTRODUCTION

[1] Ms Muir's statement of claim was filed with the Tribunal on 10 September 2019. Ms Muir alleges that Mr Zhou breached Information Privacy Principles 1, 2, 3 and 4 in secretly looking at, or recording, Ms Muir and her friends.

¹ [This decision is to be cited as *Muir v Zhou* (Strike Out) [2022] NZHRRT 49.]

[2] While the statement of claim was served on Mr Zhou, he has never participated in any aspect of this claim.

[3] Likewise, Ms Muir is now not taking any active part in pursuing her claim. Ms Muir's interactions with the Tribunal are set out below.

BACKGROUND

[4] The first teleconference on this matter took place on 13 February 2020. Mr Zhou did not attend. Directions were made for Mr Zhou to file a statement of reply and thereafter for Ms Muir to file written statements of her evidence by 3 April 2020. Mr Zhou did not file a statement of reply. Ms Muir was late in filing her evidence but did so on 3 June 2020.

[5] A second teleconference was convened on 21 September 2020. Again, Mr Zhou did not attend. Ms Muir advised that she wished to file further evidence of her own and evidence from an additional witness. Ms Muir was directed to file any additional evidence and any updated evidence of her own by Friday 16 October 2020.

[6] Ms Muir did not file any further evidence. By email dated 8 December 2020 Ms Muir was given another opportunity to file further evidence but did not do so.

[7] Ms Muir also did not respond to the Tribunal's emails of 11 January 2021, 21 January 2021, 15 February 2021, 17 March 2021 and 1 April 2021, asking her to contact the Tribunal to advise progress in her claim.

[8] Thereafter, Ms Muir failed to comply with timetable directions made in *Minutes* dated 23 April 2021, 31 May 2021, 24 November 2021, 6 April 2022, 5 May 2022 and 9 September 2022.

[9] While Ms Muir did respond to *Minutes* dated 10 August 2021 and 3 May 2022, advising that she wanted to continue her case, she did not comply with subsequent Tribunal directions requiring her to file any additional evidence or to advise the Tribunal that she wished to continue with her claim on the basis of her evidence filed to date.

[10] Ms Muir has been on notice since the *Minute* dated 23 April 2021 that unless she progresses her claim, consideration may be given as to whether it would be appropriate for her claim to be struck out for being an abuse of process pursuant to s 115A(1)(d) of the Human Rights Act 1993 (HRA).

[11] In the *Minute* dated 9 September 2022, Ms Muir was again directed to either file additional evidence or advise whether she wished to proceed with her evidence filed to date, by 23 September 2022. She was advised that, if she failed to comply with that direction, the Tribunal would consider striking out Ms Muir's claim on its own motion. Ms Muir was directed to make any submissions as to why her claim should not be struck out by Friday 14 October 2022.

[12] Ms Muir was sent an email reminder on 17 October 2022 and on 9 November 2022, again by email, Ms Muir was given until 25 November 2022 to progress her claim. Ms Muir did not respond to either correspondence.

JURISDICTION TO STRIKE OUT

[13] Against the above background, the issue for the Tribunal is whether Ms Muir's claim should be struck out.

[14] The Tribunal has a power to strike out proceedings pursuant to HRA, s 115A:

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.

[15] In this case, we are concerned with HRA, s 115A(1)(d), as to whether there has been an abuse of process.

[16] In *Gwizo v Attorney-General* [2022] NZHC 2727 (*Gwizo*), the High Court recently gave guidance to the Tribunal when exercising its discretion to strike out a proceeding for an abuse of process. At [47] the Court in *Gwizo* said a decision to strike out for an abuse of process involves a two-stage test: whether there was an abuse of process; and if so, should the discretion be exercised to strike out the proceeding?

[17] In *Gwizo* the High Court also said that the Tribunal's strike-out jurisdiction under HRA, s 115A is equivalent to the strike-out jurisdiction of the High Court under r 15.1 of the High Court Rules, so that the principles adopted by the High Court under r 15.1 inform the approach of the Tribunal to strike out decisions, subject to any other relevant provisions of the HRA.

[18] There is a useful discussion of the High Court's jurisdiction to strike out a proceeding under r 15.1 in *Gwizo* at [43] to [45], which is also relevant to this case:

[43] The High Court's jurisdiction to strike out a proceeding as an abuse of process is available in several situations. Two are potentially relevant here. Each sets a high threshold.

[44] The first is where there has been a consistent failure to comply with court orders. This will be an abuse of process only where the failure is deliberate. Failures, even repeated ones, and especially where the plaintiff is a lay litigant, will not always be deliberate. They may be a result of ignorance, disorganisation or anxiety. However, a consistent failure in the face of repeated warnings will be regarded as deliberate, particularly where the plaintiff was conscious of the breach and chose to do nothing.

[45] The second is where a plaintiff lacks any intention of bringing the proceeding to a conclusion in a timely way. This may be evidenced by a long period of inactivity. [Footnotes omitted]

[19] Similarly, in *Yarrow v Finnigan* (2017) NZHC 1755 at [16]:

The courts must not be used for collateral purposes (whether conscious or unconscious) as this will be oppressive on defendants and tends to undermine the system of judicial adjudication of disputes between parties. The flip side, however, is that the Court's power to strike out proceedings on this basis is not to be used lightly as over-vigorous intervention in this area will oppress plaintiffs who may well deserve their day in court, whatever their quality of proceeding and knowledge of judicial process. Non-compliances, even multiple ones, and especially by lay litigants, will not always be deliberate or otherwise for wrongful reasons. They may be the result of ignorance, disorganisation, anxiety or a combination of these. The Court will tend to be tolerant of these things, but not endlessly so.

WHETHER THE CLAIM SHOULD BE STRUCK OUT

Whether an abuse of process

[20] The first issue to be determined is whether Ms Muir's failure to progress her claim is an abuse of process. The tests referred to in *Gwizo* at [44] and [45] are relevant in this determination.

[21] As to whether there has been a consistent failure to comply with directions, as summarised above, Ms Muir has been given multiple opportunities to either file additional evidence or to advise whether she wishes to proceed with the claim on her evidence alone. Ms Muir has failed on nine separate occasions over a two-year period to comply with Tribunal directions in relation to the filing of evidence. She has been put on notice on six separate occasions (*Minutes* dated 23 April 2021, 31 May 2021, 10 August 2021, 6 April 2022, 3 May 2022 and 9 September 2022) that a failure to progress her case or to file evidence risks her claim being struck out.

[22] We are of the view that this is a situation where Ms Muir's consistent failure in the face of repeated warnings should be regarded as deliberate, in accordance with the test prescribed by *Gwizo* at [44].

[23] We are also of the view that Ms Muir lacks an intention of bringing the proceeding to a conclusion in a timely way. While Ms Muir first advised the Tribunal on 21 September 2020 that she wanted to file additional evidence from a third party, she has not yet done so, nor has she confirmed that she wishes to proceed with her evidence alone. Ms Muir has only sporadically engaged with the Tribunal since 21 September 2020, and she has not engaged in any way with the Tribunal since her very brief email of 3 May 2022. She has made no submissions as to why her claim should not be struck out, notwithstanding that she has clearly been put on notice of this.

[24] For the reasons set out at [21] to [23] above, we find that Ms Muir's claim is an abuse of process.

Whether the Tribunal should exercise its discretion to strike out Ms Muir's claim

[25] Having found that her proceeding is an abuse of process, we must now consider whether to exercise our discretion to strike out Ms Muir's claim.

[26] There is a need for finality for both the Tribunal and the defendant. Also, as acknowledged in *Gwizo* at [75], in a case of an abuse of process a relevant consideration (as to the exercise of the discretion whether to strike out) is the effect of the plaintiff's non-compliance on the Tribunal itself. The resources of the Tribunal are limited and, in this case, the Tribunal has had to become repeatedly and unnecessarily involved in the proceeding as a result of Ms Muir's failure to comply with directions.

[27] In the circumstances, we are satisfied that the Tribunal should exercise its discretion to strike out Ms Muir's claim.

COSTS

[28] Mr Zhou has never taken any part in this case. This is not an appropriate case for any award of costs. Costs are to lie where they fall.

ORDER

[29] The following order is made:

[29.1] Ms Muir's claim against Mr Zhou is struck out in its entirety.

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Ms GJ Goodwin
Deputy Chairperson

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Ms BL Klippel
Member

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Ms SP Stewart
Member