

Reference No. HRRT 069/2016

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN BEN SMITH  
PLAINTIFF

AND STEVE MCCALLUM  
FIRST DEFENDANT

AND SIMONE ROSS  
SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson  
Mr RK Musuku, Member  
Mr BK Neeson JP, Member

REPRESENTATION:

Mr B Smith in person  
Mr T Mackenzie for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 30 October 2018

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DECISION OF TRIBUNAL<sup>1</sup>

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[1] By application dated 12 September 2018, the first and second defendants have applied to have these proceedings struck out on the ground that the plaintiff has failed to prosecute the claim.

**Background**

[2] On 25 May 2015, Ben Smith made a complaint to the Human Rights Commission against Steve McCallum and Simone Ross.

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<sup>1</sup> [This decision is to be cited as *Smith v McCallum and Ross (Strike-Out Application)* [2018] NZHRRT 47]

[3] A letter from the Human Rights Commission to the Secretary dated 22 November 2016 records that on 12 August 2015, Mr Smith informed the Human Rights Commission that he did not wish to proceed with his complaint and the Commission closed its file.

[4] On 12 October 2016, Mr Smith filed a claim in the Tribunal alleging that he had been subjected to behaviour in breach of the Human Rights Act while employed at FC Engineering Limited by Simone Ross and naming Ms Ross and Mr McCallum as defendants. At this time, Mr Smith was represented by Christina Gordon of The Work Place.

[5] Unfortunately, the limited resources of the Tribunal have affected its ability to hear and determine claims in a timely and efficient manner and there was considerable delay before a case management teleconference was able to be convened. On 1 June 2018, the Secretary emailed Ms Gordon about arrangements for the conference. Ms Gordon replied advising that she was no longer acting for Mr Smith and requested that the Secretary contact his new representative, Kevin Murray.

[6] On 11 June 2018, Mr Murray advised the Secretary that he had attempted to contact Mr Smith via telephone and email but had had no response. On 12 June 2018, the Secretary sent a letter by courier to Mr Smith at the address he had provided on his statement of claim and a further address provided by Mr Murray. The letter advised Mr Smith that:

You must contact Mr Murray urgently so that he has proper instructions from you as to whether you intend continuing with this claim or whether it is to be discontinued. If you do not immediately contact Mr Murray or me (as the case manager) there is a real risk that when the teleconference is convened at 10.00 am on 29 June 2018 your claim will be dismissed for want of prosecution.

[7] On 19 June 2018, Mr Smith contacted the Secretary and advised that he wished to proceed with the claim and to have Mr Murray represent him at the teleconference.

[8] At the teleconference, Mr Mackenzie raised the issue as to whether, Mr Smith having withdrawn his complaint at the Commission, the Tribunal had jurisdiction pursuant to s 92B of the Human Rights Act. The issue arose without notice and both Mr Murray and Mr Mackenzie considered that it would be appropriate to take instructions from their clients regarding what happened at the Commission and to make enquiries with the Commission as to any record of Mr Smith's withdrawal of his complaint. A timetable for resolving the jurisdiction issue was recorded in a *Minute* dated 29 June 2018.

[9] On 14 August 2018, Mr Murray sought the leave of the Tribunal to withdraw as Mr Smith's representative on the grounds that he could not get instructions from Mr Smith, that Mr Smith has failed to attend appointments or answer correspondence, and Mr Murray was therefore unable to represent him.

[10] In a *Minute* dated 15 August 2018, the Co-Chairperson noted that Mr Smith had shown little commitment to the proceedings he had filed and in the circumstances, the defendants may intend to file a strike-out application based on the want of prosecution by Mr Smith, or on the jurisdiction issue raised at the conference on 29 June 2018, or both. The Co-Chairperson directed that Mr Murray's office would remain the address for service until such application is served, and that he would then cease to be Mr Murray's representative in these proceedings.

[11] The Co-Chairperson directed that any strike-out application by the defendants be filed and served by 14 September 2018 on Mr Murray's office, Mr Smith's last known residential address, at the address provided on Mr Smith's statement of claim, at the office of Mr Smith's former representative, Ms CM Gordon, and at the most recent email address used by Mr Smith to communicate with the Secretary. The Co-Chairperson further directed that should Mr Smith wish to oppose the strike-out application, he was to file a notice of opposition and an affidavit in support by 28 September 2018.

[12] On 13 September 2018, the defendants' notice of application to strike-out the proceedings was filed and served by email on Ms Gordon, Mr Murray and the email address used by Mr Smith.

[13] On 18 September 2018, Mr Mackenzie filed a process server's report recording that service of the strike-out application had been attempted at both residential addresses directed in the *Minute* of 15 August 2018. The report advised that the occupant of one of the addresses had no knowledge of Mr Smith and that the other address was vacant. The report records that enquiries were made with a neighbour of the vacant address who had no knowledge of the former occupants except to say they had left the address four months previously.

[14] No opposition to the strike-out application was filed by Mr Smith.

#### DECISION

[15] Mr Smith has not taken any steps necessary to pursue his claim. His whereabouts are not known. There is no address where he can be contacted and it is not possible for the Tribunal to serve any notice on him.

[16] As noted in *Mihaka v Housing New Zealand Corporation (Dismissal)* [2017] NZHRRT 29 at [79.7] the resources of the Tribunal have been under sustained pressure. The reasons are set out in *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8. Consequently, the Tribunal has a backlog of cases awaiting hearing as well as a backlog of cases awaiting determination. Because the Tribunal's resources are limited it has a responsibility to all litigants to ensure those resources are employed effectively and not needlessly wasted on trying to find a litigant who has not bothered to maintain contact with his representative or with the Tribunal.

[17] Mr Smith ceased communicating with his representative and has not communicated with the Tribunal since June 2018. Mr Smith has not prosecuted his case and has not indicated to the Tribunal that he opposes the application to strike out his claim.

[18] In the circumstances, the claim is dismissed on the grounds that Mr Smith has not prosecuted his proceedings and has not notified the Tribunal of an address to which communications about his case can be addressed.

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Ms MA Roche  
Co-Chairperson

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Mr RK Musuku  
Member

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Mr BK Neeson JP  
Member