

Reference No. HRRT 017/2016

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN JARVIS-MONTREL HANDY

PLAINTIFF

AND NEW ZEALAND FIRE SERVICE COMMISSION

DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson
Dr SJ Hickey MNZM, Member
Mr RK Musuku, Member

REPRESENTATION:

Mr J Handy in person
Mr GC Davenport defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 22 March 2019

DECISION OF TRIBUNAL STRIKING OUT CLAIM¹

[1] In March 2016 Mr Handy filed proceedings in the Tribunal against the New Zealand Fire Service Commission, now known as Fire and Emergency New Zealand (FENZ). The claim concerned two complaints against FENZ. The first was of racial harassment and the second was of discrimination on the ground of sexual orientation. The complaints concerned events that occurred during the period Mr Handy was employed by FENZ, between July 2012 and November 2013.

¹ [This decision is to be cited as *Handy v New Zealand Fire Service Commission (Strike-Out Application No. 2)* [2019] NZHRRT 19.]

[2] In November 2016 FENZ applied for an order that the racial harassment limb of the proceedings be struck out. The basis of the strike out application was that Mr Handy, having applied to the Employment Relations Authority for the resolution of his racial harassment grievance against FENZ, was prevented by s 79A of the Human Rights Act 1993 (the HRA) from making a complaint about the same racial harassment in the Tribunal.

[3] There were lengthy delays in determining the strike out application. Despite being given repeated extensions, no submissions or affidavits in opposition were ever filed by Mr Handy who, after repeatedly seeking extensions of time in response to the arrival of deadlines, eventually made an application to adjourn the application sine die. Despite making applications for adjournments on medical grounds, Mr Handy failed to ever provide a medical report setting out the reasons why he could not participate in his proceedings.

[4] In a decision, dated 26 June 2018, the Tribunal granted the application and struck out the part of the statement of claim that related to racial harassment. In the decision, Mr Handy was directed, if he wished to continue his proceeding concerning sexual orientation discrimination, to file an amended claim clearly setting out his allegations in this regard by 27 July 2018. He was warned that in the event the amended claim was not filed, the claim of discrimination based on sexual orientation would be struck out for want of prosecution.

[5] On 27 July 2018, Mr Handy duly filed an amended statement of claim alleging a breach of s 22(1)(b) of the HRA.

[6] On 17 October 2018 FENZ filed an application to strike out Mr Handy's amended statement of claim on the grounds that:

[6.1] The amended claim does not contain any pleadings which would on any view satisfy the requirements of s 22(1)(b) of the HRA.

[6.2] The passage of time will materially prejudice FENZ as the events on which Mr Handy seeks to rely comprise of three conversations which allegedly occurred in November 2012, January 2013 and January 2013.

[7] Following a teleconference on 29 November 2018, the Co-Chairperson issued a *Minute* setting a timetable for the filing of opposition to the strike out application and submissions. Under this timetable, Mr Handy's notice of opposition together with any affidavits in support were to be filed by 5.00 pm on Tuesday, 22 January 2019.

[8] On 24 January 2019 Mr Handy emailed the Secretary requesting an extension of time due to medical reasons. The request was supported by a medical certificate, dated 18 January 2019, issued by Dr Chetan Patel. The certificate stated:

The above patient was seen and examined by me and in my opinion he has medical conditions that affect his ability to act as his own attorney. Due to this, Mr Handy enquired about an extension of timeframe for file submission from November to late February. From a medical perspective I do believe this a reasonable request. Thank you for your consideration.

[9] In response to an enquiry by the Secretary, Mr Handy clarified that he was seeking an extension until the end of February 2019.

[10] By email, dated 29 January 2019, Mr Davenport opposed Mr Handy's application for an extension on behalf of FENZ. Mr Davenport noted that for several years Mr Handy has claimed that poor health has prevented him from progressing various litigation matters he has commenced against FENZ without provision of any medical report that provides any specifics as to a condition that would prevent engagement with proceedings and while representing himself in other litigation matters.

[11] Mr Davenport noted that the current application was not supported by any specific medical report and was made two days after the Tribunal's deadline expired. He submitted that given that the events giving rise to the proceedings allegedly occurred six years previously, ongoing delays are very prejudicial to FENZ and there must be an approach whereby fairness is accorded to both parties.

[12] In a *Minute* of 31 January 2019, the Co-Chairperson noted that Mr Handy's response to the previous strike out application was characterised by persistent failure to comply with timetables, repeated seeking of extensions of time and failure to ever provide proper medical evidence supporting claims to be prevented for medical reasons from prosecuting his case. Despite this, Mr Handy's application for an extension of time for filing his opposition was his first with respect to the current strike out application. The Tribunal was reluctant to strike out proceedings following a single timetable breach even in light of Mr Handy's previous conduct.

[13] In the circumstances, an "unless" direction giving Mr Handy a final opportunity to file his opposition or be struck out was made in a *Minute*, dated 31 January 2019. This direction provided that:

[13.1] Mr Handy's notice of opposition to the strike out application together with any affidavits in support were to be filed by 5.00 pm on Thursday, 28 February 2019.

[13.2] Unless the direction was complied with, an order striking out the claim would be made.

[14] On 25 February 2019 Mr Handy sent an email to the Secretary stating:

For various reasons I wish to withdraw my claim currently before the Human Rights Review Tribunal having reference number HRRT 017/16. This email message is an effort to quit/withdraw any/all claims.

The jurisdiction to strike out

[15] The Tribunal has jurisdiction to strike out a proceeding pursuant to s 115A of the HRA, which provides:

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.

...

[16] Applying s 115A of the HRA to this application, the striking out of a proceeding by reason of extended delay in compliance with case management directions plainly falls within s 115A(d) (abuse of process).

[17] Consistent failure to comply with court orders can amount to an abuse of process: *Yarrow v Finnigan* [2017] NZHC 1755 at [10]. Mr Handy failed to comply with the direction that opposition to the strike out be filed by 22 January 2019. His application for an extension of time was made on medical grounds but was not supported by an adequate medical certificate. Rather than complying with the “unless order” that opposition be filed by 28 February 2019 or the claim be struck out, Mr Handy has indicated that he wishes to withdraw.

Decision

[18] Mr Handy has persistently failed to comply with case management directions. After seeking a lengthy adjournment for the filing of his opposition to the current strike out application, he emailed his wish to withdraw the claim. In these circumstances, the claim is struck out.

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Ms MA Roche
Co-Chairperson

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Dr SJ Hickey MNZM
Member

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Mr RK Musuku
Member