

Reference No. HRRT 090/2016

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN KATRINA BELLE

PLAINTIFF

AND FOGI LIMITED

FIRST DEFENDANT

AND RICK ANTHONY YOUMANS

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson
Dr SJ Hickey MNZM, Member
Mr BK Neeson JP, Member

REPRESENTATION

Mr P Kennelly for plaintiff
Ms K Tyson for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 12 February 2019

DECISION OF TRIBUNAL STRIKING OUT CLAIM¹

[1] These proceedings under the Human Rights Act 1993 (HRA) were brought against Fogi Ltd and Richard Youmans by Katrina Belle in November 2016. Ms Belle's claim concerns a complaint that her employment was terminated by the defendants by reason of her pregnancy.

¹ [This decision is to be cited as *Belle v Fogi Ltd (Strike-Out Application)* [2019] NZHRRT 7.]

[2] By application dated 11 October 2018, the defendants applied for an order that the proceedings be struck out. The basis of the strike-out application is that Ms Belle has failed to comply with the Tribunal's case management directions. The grounds of the application are that the proceedings:

[2.1] are not brought in good faith; and

[2.2] are likely to cause prejudice or delays; and

[2.3] are otherwise an abuse of the process of the Tribunal.

[3] Ms Belle has failed to comply with case management directions made by the Tribunal. The essential issues to be determined are whether this failure has caused prejudice to the defendants and amounts to an abuse of process and whether it is appropriate to strike out the proceeding.

Background

[4] Ms Belle was employed by Fogi Ltd as a Sales Representative. Mr Youmans was the Managing Director of Fogi.

[5] In March 2015, Ms Belle's employment was terminated when her role at Fogi was disestablished.

[6] Ms Belle alleges that her employment was terminated because she was pregnant. On 1 July 2015, she made a complaint of discrimination to the Human Rights Commission (HRC). She then pursued a personal grievance against the defendants pursuant to the Employment Relations Act 2000.

[7] On 29 June 2016, Ms Belle recommenced her discrimination complaint under the Human Rights Act 1993 (HRA). She was able to do so as she had not filed proceedings in the Employment Relations Authority (ERA). Section 79A of the HRA did not therefore apply. The defendants declined to attend mediation and on 6 September 2016, the HRC closed Ms Belle's complaint file, leading to her filing of proceedings in the Tribunal in November 2016. Ms Belle claimed lost wages, compensation for maternity leave payments, damages in the sum of \$40,000 for hurt and humiliation and costs.

[8] Unfortunately, the limited resources of the Tribunal have affected its ability to hear and determine claims in a timely and efficient manner. There was considerable delay after the filing of the claim before a procedural teleconference was able to be convened.

[9] On 14 February 2018, a procedural teleconference was held. The purpose was to timetable the claim to a hearing. In a *Minute* dated 26 February 2018, case management directions made at the teleconference were recorded. These directions had been agreed to by Mr Kennelly on behalf of Ms Belle.

[10] The *Minute* recorded that with respect to discovery, the defendants were seeking documents relating to Ms Belle's claimed pecuniary loss, including evidence of actions taken to gain employment, income received and documents relevant to Ms Belle not receiving maternity leave. The defendants also sought a copy of a recording made at a meeting between Ms Belle, Mr Youmans, and his then wife, prior to Ms Belle being made redundant. The *Minute* recorded a direction that discovery and inspection of documents be attended by Friday, 16 March 2018.

[11] The *Minute* also recorded a direction that the written statements of the evidence to be called at the hearing by Ms Belle be filed and served by Friday, 13 April 2018.

[12] Ms Belle failed to provide discovery and to file her written statements of evidence.

[13] On 17 April 2018, the Secretary sent an email to Mr Kennelly reminding him that Ms Belle's written statements of evidence were due on 13 April 2018 and advising that the Registry had not received them.

[14] On 18 April 2018, the Secretary emailed Mr Kennelly recording his telephone advice that the witness statements due on 13 April 2018 would be filed by 20 April 2018. However, nothing was filed on 20 April 2018 and no further communication was received from Mr Kennelly until October 2018.

[15] On 27 April 2018, the defendants filed a memorandum concerning Ms Belle's failure to comply with the direction to provide discovery, the direction to file and serve written statements of evidence and the direction to notify the defendants of the list of documents she wished to include in the common bundle. The defendants complained that the delay was prejudicing them and resulting in increased costs. They sought a direction varying the timetable.

[16] On 30 April 2018, the Tribunal issued a *Minute* varying the timetable directions and directed that the written statements of evidence to be called by the defendants be filed and served six weeks from the date of the written statements of evidence to be called at the hearing by Ms Belle. The *Minute* recorded that Ms Belle had not filed her evidence, complied with her discovery obligations or provided the list of documents for the common bundle. The Tribunal noted that should Ms Belle fail to comply with the case management directions, the defendants may file an application to strike out based on her non-compliance and her failure to prosecute her case.

[17] Despite this warning, Ms Belle took no action to comply with the case management directions.

[18] On 20 September 2018, the Tribunal issued a *Minute* "Notifying Plaintiff Her Claim at Risk of Being Struck Out". In the *Minute*, the Tribunal advised that unless Ms Belle complied with the directions in the *Minute* of 26 February 2018 concerning the provision of discovery and filing of evidence by 5pm on Friday, 5 October 2018, her claim would be struck out due to her non-compliance with the case management directions.

[19] On 5 October 2018 at 2:47pm, Mr Kennelly filed a memorandum requesting an extension for two weeks on the basis that his personal assistant had been admitted to hospital on 24 September 2018 and he had been on leave on 27 and 28 September 2018.

[20] The application for an extension was opposed by the defendants, who requested the opportunity to provide a memorandum opposing the extension and seeking the strike out of the proceedings. In accordance with a timetabling direction, the application to strike out the proceedings and submissions in support were filed on 11 October 2018. Opposition to the application was filed on 9 November 2018 and a reply to that opposition was filed on 23 November 2018.

The strike-out application

[21] In support of the application for strike-out, the defendants submitted:

[21.1] No explanation had been provided for Ms Belle's more than six months' non-compliance with the filing directions.

[21.2] The absence of Mr Kennelly's assistant and Mr Kennelly being on leave for two days does not provide a valid reason for not having filed evidence.

[21.3] In *Minutes* dated 30 April 2018 and 20 September 2018, Ms Belle was made aware of the risk of strike-out if her evidence was not filed. She still did not comply with the timetabling directions and did not file evidence.

[21.4] The proceedings are not brought in good faith and are an abuse of the Tribunal's process. Ms Belle has made a claim but has not progressed her own case and complied with the Tribunal's case management directions.

[21.5] Due to continuing and significant non-compliance by Ms Belle, the proceedings are seriously and unfairly burdensome and prejudicial to the defendants. This includes the burden and costs of litigation and increased costs due to non-compliance.

The opposition to the strike-out application

[22] Ms Belle opposed the strike-out application. In a submission in opposition the history of the dispute prior to the Tribunal proceedings being filed was canvassed, including an unsuccessful mediation at the ERA and the failure of Mr Youmans to attend a mediation arranged by the HRC. It was submitted that:

[22.1] No settlement offer has ever been made.

[22.2] The discoverable recording was sent to counsel for the defendants on 22 May 2018. It discloses that Ms Belle's redundancy was due to her being pregnant.

[22.3] Trying to calculate Ms Belle's claim has taken time. Ms Belle lives in the Bay of Plenty, whereas she had previously lived north of her counsel's office.

[22.4] The claim is not frivolous or vexatious and the plaintiff can file her evidence without delay.

Reply to opposition

[23] In reply to Ms Belle's opposition, the defendants submitted that:

[23.1] The history of the dispute and the failure of the defendants to settle is not relevant. There is no obligation on the defendants to settle the claim.

[23.2] No justification has been provided for Ms Belle's non-compliance with the Tribunal's timetabling directions and not filing evidence to progress or substantiate her claim.

[23.3] The defendants do not accept the recording supports Ms Belle's claims as she asserts.

[23.4] The fact of Ms Belle living in the Bay of Plenty does not provide any valid reason for not filing evidence.

[23.5] Failure to file evidence for over seven months is very onerous on the defendants, resulting in increased costs including, but not limited to, responding to communications and *Minutes*.

[23.6] There is an unnecessary and inappropriate litigation burden on the defendants. Mr Youmans instructs he is experiencing depression and anxiety as a result of the ongoing litigation and the uncertain nature of Ms Belle's claim.

The jurisdiction to strike out – principles

[24] 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.

...

[25] Section 115A mirrors r 15.1 of the High Court Rules, which, until s 115A was inserted in November 2018, had guided the approach of the Tribunal to applications for strike-out: *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005 at [48].

[26] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267. As noted by the Tribunal in *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14, it should be added that the jurisdiction is to be used sparingly. In addition, the fundamental constitutional importance of the right of access to courts and tribunals must be recognised. Nevertheless, such right of access must be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or an abuse of process: *Parohinog* at [30]–[31].

Assessment

[27] Considerable time has passed since the events giving rise to these proceedings took place in March 2015. The complaint made to the HRC in July 2015 was then placed on hold for a year while unsuccessful attempts were made to settle a personal grievance. A further delay of 14 months occurred between the filing of the proceedings in the Tribunal and the procedural teleconference, which cannot be attributed to Ms Belle. However, since 16 March and 13 April 2018, she has both failed to provide discovery and file evidence as directed. At no time, until the Tribunal issued a *Minute* warning of the risk of strike-out, did Ms Belle contact the Registry to explain her delay or seek a timetable extension.

[28] It is accepted that the delay has caused prejudice to the defendants in terms of increased legal costs and with respect to the litigation burden borne for an extended period. With respect to the submission concerning the effect on Mr Youmans' depression and anxiety, it is noted that a medical certificate concerning this condition was filed in the Tribunal by his former counsel on 27 February 2017. It is accepted that the unresolved litigation is a source of stress to him.

[29] No reason has been provided for the failure to comply with the Tribunal's case management directions to file evidence and provide discovery for over seven months except for Ms Belle's relocation to the Bay of Plenty. It is not accepted that such relocation would have prevented communication between Ms Belle and her counsel. There is simply no adequate explanation advanced for the failure to comply.

[30] Two reasons were advanced for the failure to comply with the deadline set in the *Minute* of 20 September 2018. These were Mr Kennelly's leave for two days and the absence of his personal assistant due to illness. Neither of these things can sensibly be said to have prevented the provision of discovery or the filing of evidence in accordance with the deadline.

[31] 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(b) (prejudice) and s 115A(d) (abuse of process).

[32] Consistent failure to comply with court orders can amount to abuse of process: *Yarrow v Finnigan* [2017] NZHC 1755 at [10]. A long period of inactivity evidencing a lack of intention to bring proceedings to a conclusion can similarly amount to an abuse: *Yarrow* at [15]. Both are featured here. Prejudice to the defendants in terms of the strain placed on Mr Youmans by the ongoing litigation has been accepted.

DECISION

[33] Ms Belle has failed to comply with case management directions on three occasions (the first *Minute* (26 February 2018); the second *Minute* containing a warning that a strike out application may be filed (30 April 2018); and the third *Minute* warning that unless the timetabling directions were complied with the claim would be struck out (20 September 2018)). No word was heard from Mr Kennelly until October 2018, six months after he advised the Secretary that Ms Belle's evidence would be filed by 20 April 2018.

[34] The Tribunal is reluctant to strike out a plaintiff's claim and deprive them of having its merits substantively determined. However, there comes a point where the rights of defendants must be given weight with respect to procedural defaults. Here, the consistent and unexplained failure to comply with timetabling directions is both an abuse of process and has caused prejudice to the defendants, particularly Mr Youmans. The criteria for strike out in s 115A of the HRA are satisfied. 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 BK Neeson JP
Member