

**(1) ORDER THAT FIFTH SENTENCE IN PARAGRAPH [5] NOT BE PUBLISHED TO ANY PERSONS OTHER THAN THE PARTIES**

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**IN THE HUMAN RIGHTS REVIEW TRIBUNAL**

**[2019] NZHRRT 9**

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	<b>Reference No. HRRT 063/2016</b>
<b>UNDER</b>	<b>THE HUMAN RIGHTS ACT 1993</b>
<b>BETWEEN</b>	<b>MARCUS STEELE</b>
	<b>PLAINTIFF</b>
<b>AND</b>	<b>COMMUNITY LEISURE MANAGEMENT LIMITED</b>
	<b>DEFENDANT</b>

**AT AUCKLAND**

**BEFORE:**

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

**REPRESENTATION:**

**Mr Steele in person  
Mr G Finnigan for defendant**

**DATE OF HEARING:       Heard on the papers**

**DATE OF DECISION:     27 February 2019**

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**DECISION OF TRIBUNAL STRIKING OUT CLAIM<sup>1</sup>**

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**INTRODUCTION**

**[1]** In June 2016, a verbal exchange between Marcus Steele and an employee in the café at the Whangarei Aquatic Centre (WAC) allegedly took place. What occurred led to the termination of Mr Steele's membership of the WAC. The WAC is managed by Community Leisure Management Ltd (CLM).

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<sup>1</sup> [This decision is to be cited as *Steele v Community Leisure Centre Ltd (Strike-Out Application)* [2019] NZHRRT 9.]

[2] In July 2016, Mr Steele lodged a sexual harassment complaint against the WAC with the Human Rights Commission (HRC). The HRC declined to accept the complaint and on 22 September 2016, Mr Steele filed a claim in the Tribunal against CLM alleging that he had been sexually harassed at the WAC.

[3] By application filed on 22 December 2016, CLM has applied to have the proceedings struck out. The central issue in this decision is whether there is a tenable claim that the behaviour complained about by Mr Steele breached s 62(2) of the Human Rights Act 1993 (the HRA).

## **Background**

[4] Mr Steele had been a long-time user of the WAC. At some stage, he took out a WAC membership.

[5] On 12 June 2016, a verbal exchange between Mr Steele and a WAC employee allegedly took place in the WAC café. Mr Steele's account of this exchange is set out at [32] below. An incident report was filled out by the WAC employee. It recorded, inter alia, that Mr Steele was clipping his toenails onto the floor of the café. [Redacted]. It did not record the details of the verbal exchange later alleged by Mr Steele to have taken place.

[6] Following the incident on 12 June 2016, Mr Steele continued to use the WAC daily until 20 June 2016.

[7] On 20 June 2016, a WAC manager, Mr David Mullins, advised Mr Steele by telephone that his WAC membership was revoked. Later that day, Mr Steele met Mr Mullins and another WAC manager, Mr Scott Linklater, at the WAC. His membership was terminated at this meeting.

[8] Mr Steele subsequently made a request to the WAC under the Privacy Act 1993 for a copy of the incident report.

[9] On 4 July 2016, Mr Steele complained to the HRC alleging sexual harassment and naming the WAC as the respondent to his complaint. The HRC did not accept the complaint on the ground that the behaviour complained of did not meet the threshold for sexual harassment, as it was neither repeated or of a particularly serious nature.

[10] On 3 September 2016, Mr Steele emailed a statement of correction which he sought to have attached to the WAC incident report pursuant to information privacy principle 7: Privacy Act 1993, s 6. This statement, which was sent to Mr Linklater, the WAC Facility Manager, to counsel for the WAC, and copied to the Privacy Commissioner, described his reaction to the 12 June 2016 incident in the following terms, "I thought it was quite normal for Maori [women] to be sexually aggressive and just walked away".

[11] On 22 September 2016, Mr Steele filed proceedings in the Tribunal alleging that he was subjected to language of a sexual nature by the WAC café worker, that details about the incident were circulated to staff at the WAC and that the café worker's remarks and the circulation of information to staff had a detrimental effect on his rights to receive goods and services and to access places and facilities.

[12] On 7 October 2016, Mr Steele was served with a trespass notice by the Police. The notice warned him to stay off the WAC.

## **Strike-out application**

[13] The application to strike-out Mr Steele's claim is made on various grounds, including the grounds that:

[13.1] Even if the facts set out in the statement of claim were taken as proved, the claim discloses no reasonably arguable cause of action under the HRA.

[13.2] The plaintiff's proceeding is trivial, frivolous, vexatious and/or not brought in good faith.

[13.3] The plaintiff's proceeding is an abuse of the process of the Tribunal.

[14] The strike-out application was supported by an affidavit by Mr Linklater. Mr Linklater's affidavit sets out the events that led to and followed the termination of Mr Steele's membership of the WAC, including the sending by Mr Steele of explicit emails to Mr Linklater, Mr Mullins and others. The report concerning the incident in the WAC café that led to the termination of Mr Steele's WAC membership is annexed.

[15] The strike-out application was also supported by an affidavit by Simon Colley, a lawyer who has acted for the WAC. Mr Colley's affidavit concerns communication between Mr Steele, CLM and himself largely regarding the Privacy Act but also concerning the termination of Mr Steele's WAC membership. A number of offensive and abusive emails from Mr Steele are annexed.

## **The opposition to the strike-out application**

[16] The strike-out application was opposed by Mr Steele who filed an affidavit in opposition in which he expanded on his allegations against CLM.

[17] In the affidavit, Mr Steele described the incident that led to the revocation of his membership of the WAC as follows:

[3] I went to the pool at the Centre to sauna as I always did during or about 12 June 2016. I went as an anonymous public person as I had always done for 30 years on 12 June 2016. I had bathed and washed for 2 hours and sat down at the table in the foyer to use Spark WIFI. I was with [...] who cut his toenails and then passed me the clipper to use too. I clipped a small piece of nail and it was on the floor waiting to be vacuumed up.

[4] A female approached staring at my genital area and commented on the size of my penis and asked if I was going to use it? I noticed her genitals too and her pants were wet. She mentioned something about sexual arousal. I told her to "piss off".

[18] Mr Steele made a further allegation concerning the meeting he attended on 20 June 2016 with Mr Mullins and Mr Linklater:

[8] I was at CLM in 10 Minutes and met MULLANS at the front door. We entered the room with LINKLATER and he became aggressive and agitated at the sight of me and was looking at my genitals.

[19] Mr Steele described how his access to places, facilities, goods and services were detrimentally affected by the alleged incidents as follows:

[11] A trespass notice from LINKLATER was served on the writer by Police on 7 October 2016. Copy attached marked "A". At that point the essential elements of the HRA 1993 s62(2)(3) were achieved and access to places, facilities and services were adversely affected at that point.

## JURISDICTION TO STRIKE OUT – PRINCIPLES

[20] 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.

...

[21] 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].

[22] 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].

## DISCUSSION

### Preliminary issue, application for in person hearing of strike-out application

[23] In an email to the parties the Secretary advised on 27 March 2017 that the strike-out application would be heard on the papers, but that if either party has proper grounds to request a face to face hearing, such an application must be filed and served by 7 April 2017.

[24] On 4 April 2017, Mr Steele sent an email in which he submitted that a “face to face meeting” was necessary so that CLM could be questioned by himself and the Tribunal about “the essential elements of the Human Rights Act section 62(2)” and questioned about allegations made in the incident report.

[25] On 6 April 2017, in response to a request for clarification by the Secretary regarding the 4 April 2017 email, Mr Steele responded “Listen, that email is an application for a face to face hearing. States the reason/grounds”.

[26] The grounds for the request for an in person hearing of the strike-out application are so that Mr Steele can address CLM about s 62 of the HRA and so that CLM can be questioned by Mr Steele in order to obtain information relating to allegations that have been raised in respect of Mr Steele by CLM.

[27] The Tribunal is not persuaded by the grounds advanced by Mr Steele. The hearing of a strike-out application is not a forum for making enquiries or gathering evidence concerning allegations. Neither is it a forum for providing advice to the defendant about the HRA. As noted earlier, a principle of strike-out is that the plaintiff’s allegations are treated as proven. The Tribunal must on that basis determine whether the allegations

made by Mr Steele provide an arguable case that CLM acted in breach of s 62 of the HRA. Alternatively, whether, as alleged by CLM, Mr Steele's proceedings do not disclose a reasonably arguable cause of action, are frivolous, vexatious and/or an abuse of process.

**[28]** The Tribunal currently has limited resources, which have led to unacceptable delays in allocating fixtures for telephone conferences, hearings and in the issuing of decisions. See, *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8. Face to face hearings before the Tribunal are a scarce resource. We are not persuaded, having regard to the grounds advanced by Mr Steele, that it is appropriate to allocate the extremely limited resources of the Tribunal to an oral hearing of the strike-out application. The reasons he has advanced in favour of an oral hearing are unrelated to the determination of a strike-out. Given that his allegations will be accepted as proven for the purpose of the strike-out application, Mr Steele is not disadvantaged by the hearing being held on the papers.

## The Law

**[29]** Sexual harassment is defined in s 62 of the HRA. Only subs (2) and (3)(g)–(h) are relevant:

### 62 Sexual harassment

- (1) ...
- (2) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that—
  - (a) is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and
  - (b) is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3).
- (3) The areas to which subsections (1) and (2) apply are—
  - (a) ...
  - (b) ...
  - (c) ...
  - (d) ...
  - (e) ...
  - (f) ...
  - (g) access to places, vehicles, and facilities:
  - (h) access to goods and services:
    - (i) ...
    - (j) ...
- (4) ...

**[30]** As the liability of CLM is vicarious, it is relevant to note also the terms of s 68 of the HRA:

### 68 Liability of employer and principals

- (1) Subject to subsection (3), anything done or omitted by a person as the employee of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.
- (2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.
- (3) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

## Assessment

**[31]** Mr Steele claims he was sexually harassed in the areas of access to places, vehicles and facilities and access to goods and services.

**[32]** In his statement of claim, Mr Steele has alleged that on a single occasion in June 2016, a WAC worker made comments to him “about penis size by looking at the area of the penis and commenting about the use of the penis”. He clarified this exchange in his affidavit and alleged that the staff member mentioned something to him about sexual arousal to which he responded by telling her to “piss off”. In his affidavit, he also alleges that Mr Linklater “was looking at my genitals” in a subsequent meeting held at the Centre when his membership was revoked.

**[33]** Turning first to the allegation concerning the WAC café worker, the effect of the statutory provisions set out above is that Mr Steele must establish, on the balance of probabilities, that the language allegedly used by the café worker to him was:

**[33.1]** of a sexual nature;

**[33.2]** unwelcome or offensive to him; and

**[33.3]** that it was either repeated, or of such a significant nature that it had a detrimental effect on Mr Steele in respect to his access to the WAC and/or goods or services provided by the WAC.

**[34]** For the purpose of this decision it is accepted that the language allegedly used by the café worker was as described by Mr Steele, that it was of a sexual nature and that it was unwelcome or offensive to Mr Steele. As it is not alleged that the comment was repeated, the issue to be considered is whether there is a tenable claim that the language used by the café worker was of such a significant nature that it had a detrimental effect on Mr Steele in respect of his access to the WAC or to goods and services provided by the WAC, and is therefore capable of constituting a breach of s 62 of the HRA.

**[35]** The difficulty for Mr Steele is that the detriment he identifies is unrelated to the significance of the café worker’s alleged remarks and the effect of the remarks on him.

**[36]** In his claim, Mr Steele states that “the consequences were terrible” and included contact from the Police and “months of correspondence between lawyers of CLM and Privacy Commission”. He sought compensation for the damage to his reputation. He stated in his affidavit that the “detriment” in his access to places, facilities, goods and services was “achieved” on 7 October 2016, when he was served with the trespass notice by Police. The detriment he complains of (the revocation of his WAC membership, the circulation of the incident report to other WAC employees and his being trespassed from the WAC) does not arise from the alleged remarks. It arises from Mr Steele’s alleged behaviour which was recorded in the incident report, some of which (clipping his toenails onto the floor) he does not dispute.

**[37]** There is no allegation that the alleged remarks themselves were of such a significant nature that they had a detrimental effect on Mr Steele who, as noted above, continued to use the WAC on a daily basis until his membership was revoked. In the statement of correction he sought to have attached to the incident report, he noted that he thought the café worker’s behaviour was normal for a person of her ethnicity and “just walked away”. Mr Steele’s continued daily use of the facilities and his comment that the behaviour was

“normal” does not indicate that the alleged verbal exchange itself had any particular significance or detrimental effect as opposed to its aftermath, which included him being banned from the WAC.

**[38]** There is an allegation that a WAC manager stared at Mr Steele’s genital area. That allegation is not part of Mr Steele’s case set out in the statement of claim and is therefore not part of the sexual harassment claim. In any event, Mr Steele has not suggested that it was of such a significant nature that it had a detrimental effect on him in relation to his use of and access to the WAC.

**[39]** It was noted earlier in this decision that Mr Steele complained to the Privacy Commissioner concerning matters at issue between himself and the WAC. The overriding concern he expresses in his affidavit appears to be the dissemination of the incident report to WAC staff. The correspondence annexed to Mr Colley’s affidavit concerns, amongst other things, Mr Steele’s request for the report to be removed from the WAC records and his email to the Office of the Privacy Commissioner requesting an investigation of the matter.

**[40]** The concerns of Mr Steele regarding privacy issues arising from the incident report may be genuinely held. However, they do not constitute “detriment” in relation to Mr Steele’s access to the WAC or in connection with goods and services provided there. They do not have any relevance in the assessment of the significance of the comments allegedly made to Mr Steele in terms of s 62(2)(b) of the HRA.

**[41]** Even assuming the facts alleged are proven, there is nothing in Mr Steele’s statement of claim and the subsequent documents he has filed that suggests that either his alleged verbal exchange with the café worker, or what occurred at the meeting with the CLM manager, was of such a significant nature that it had a detrimental effect on Mr Steele in respect to his access to the WAC and/or goods or services provided there. It follows that his claim is untenable. This being the case, it is unnecessary to consider the other grounds raised in the application, such as whether the claim is trivial, vexatious or an abuse of process.

**[42]** We conclude that because the statement of claim discloses no reasonably arguable cause of action against CLM, the claim must be struck out.

**[43]** The jurisdiction of the Tribunal to make orders concerning the prohibition of publication is provided in HRA, s 107.

**[44]** The incident report referred to at [5] above contains sensitive information that is referred to in the fifth sentence of that paragraph. The Tribunal is satisfied that it is desirable to make an order prohibiting the publication of this sentence.

## DECISION

[45] For the foregoing reasons, the proceedings by Mr Steele against CLM are struck out.

[46] An order is made pursuant to HRA, s 107 prohibiting the publication of the fifth sentence of paragraph [5] of this decision to all persons with the exception of the parties and the lawyers representing the defendant.

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**Ms MA Roche**  
**Co-Chairperson**

.....  
**Dr SJ Hickey MNZM**  
**Member**

.....  
**Mr BK Neeson JP**  
**Member**