

Reference No. HRRT 011/2018

UNDER THE PRIVACY ACT 1993

BETWEEN ARTHUR WILLIAM TAYLOR

PLAINTIFF

AND CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS

DEFENDANT

AT WELLINGTON

BEFORE:

Ms GJ Goodwin, Deputy Chairperson

Dr SJ Hickey MNZM, Member

Mr JAG Fountain, Member

REPRESENTATION:

Mr AW Taylor in person

Mr D Jones for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 11 January 2021

DECISION OF TRIBUNAL STRIKING OUT CLAIM¹

[1] On 8 March 2017, while in prison, Mr Taylor had a telephone conversation with a friend of his, outside prison. Certain comments made during the course of this conversation were recorded on the prisoner telephone monitoring system (PTMS). The PTMS record of the conversation was sent to the manager of the New Zealand Parole Board Services and placed on Mr Taylor's parole board record. The PTMS record of the conversation was also seen by Parole Board members, who assessed Mr Taylor's parole eligibility.

¹ [This decision is to be cited as *Taylor v Corrections (Strike-Out Application)* [2021] NZHRRT 1.]

[2] On 10 March 2017 Mr Taylor requested the Parole Board to provide him with an audio copy of the telephone conversation between him and his friend. This request was transferred to the Department of Corrections (Corrections).

[3] Mr Taylor alleges that his request was not transferred within the time specified in s 39(b) of the Privacy Act 1993 (PA) and that Corrections breached information privacy principle (IPP) 6. Mr Taylor also alleged that IPPs 5 (storage and security of personal information), 10 (limits on use of personal information), and 11 (limits of disclosure of personal information) were breached as a result of the events referred to in [1] above. Mr Taylor says that the failure to send him the audio copy of the telephone conversation and the dissemination of his telephone conversation to the Parole Board members lessened his chances of a successful parole outcome.

[4] The allegations made by Mr Taylor in [3] are denied by the Chief Executive.

BACKGROUND

[5] By letter dated 16 May 2017 Mr Taylor made a complaint to the Privacy Commissioner alleging a breach by Corrections of IPPs 5, 6, 10 and 11. The Commissioner investigated the alleged breaches and reached a view on 22 February 2018. The Commissioner found no breach of IPPs 5, 10 or 11. He found a breach of IPP 6, but noted that Corrections had agreed to release further information.

[6] On 7 March 2018 Mr Taylor filed a statement of claim with the Tribunal, alleging breaches of IPPs 5, 6, 10 and 11. Corrections filed a statement of reply on 18 April 2018, denying the alleged breaches.

[7] On 30 May 2018 Mr Taylor applied to have the proceedings transferred to the High Court under s 122A of the Human Rights Act 1993 (HRA). However, on 6 September 2018 a joint memorandum from the parties was filed, withdrawing the s 122A application.

[8] The first teleconference in this matter was held on 18 February 2020. In the course of that teleconference Mr Taylor advised that, because of the effluxion of time and because he had relocated his address, his file on the case had gone missing. He said he could not constructively participate in the teleconference without that file. As a result:

[8.1] Corrections was directed to send the file documentation to Mr Taylor;

[8.2] Mr Taylor was directed to advise Corrections and the Tribunal when he was in a position to take part in a further teleconference.

[9] On 9 March 2020 the parties were requested by email to provide an update to the Tribunal. On the same day Corrections advised the Tribunal that on 18 February 2020 it had provided Mr Taylor with the file and that, on the same day, he had acknowledged receipt.

[10] Mr Taylor did not respond to the Tribunal's request of 9 March 2020 in connection with his participation in a further teleconference.

[11] On 11 May 2020 the Tribunal sent a further email to Mr Taylor requiring him to indicate whether he intended to continue with his proceedings. No response was provided.

[12] On 10 September 2020 Corrections filed an application seeking an order that Mr Taylor's claim be struck out on the grounds of his failure to comply with directions and for want of prosecution.

[13] By *Minute* dated 21 September 2020 the Tribunal directed Mr Taylor either to file and serve his evidence or to file and serve a notice of opposition to the strike-out application by Friday 16 October 2020. Mr Taylor did not file any evidence or any notice of opposition to the strike-out application.

[14] By *Minute* dated 26 November 2020 the Tribunal advised the parties that it intended to determine the strike-out application on the papers. It directed that any comments regarding the intention of the Tribunal to determine Corrections' strike-out application on the papers be filed with the Secretary of the Tribunal by Wednesday 9 December 2020. Neither party has filed any comments.

Jurisdiction to strike out

[15] The Tribunal's jurisdiction to strike out proceedings is explicitly provided for in HRA, s 115A(1), which applies to privacy claims pursuant to PA, s 89. HRA, s 115A(1) 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] The Tribunal has canvassed the key principles for applications to strike out in a number of decisions. As noted in *Willing v New Zealand Police (Strike-Out Application)* [2020] NZHRRT 17 the jurisdiction to strike out must be used sparingly.

[17] However, any allowance for a plaintiff not complying with Tribunal directions must be balanced against the desirability of freeing defendants from the burden of litigation which is not being progressed to resolution. Failure to comply with an order or direction of the Tribunal causes prejudice and as reiterated in *Handy v New Zealand Fire Service Commission (Strike-Out Application No. 2)* [2019] NZHRRT 19 at [17], a consistent failure to comply with directions can amount to an abuse of process.

SHOULD MR TAYLOR'S CLAIM BE STRUCK OUT?

[18] Mr Taylor was provided with a further copy of his file in this matter on 18 February 2020.

[19] He has not engaged with Corrections or the Tribunal since that date. Specifically, Mr Taylor has not responded to the Tribunal's *Minute* of 18 February 2020 or the Tribunal's requests for updates on 9 March 2020 and 11 May 2020. Mr Taylor has not, as requested, indicated that he is willing to take part in a teleconference to progress the case timetabling. He has not filed his evidence or served a notice of opposition to the strike-out application as directed by the Tribunal's *Minute* of 21 September 2020. Mr Taylor has not made any comments to the *Minute* of 26 November 2020 regarding the intention of the Tribunal to determine Corrections' strike-out application on the papers.

[20] Corrections has applied to strike out Mr Taylor's claim on the basis of s 115A(1)(d) of the HRA, namely that it is an abuse of process.

[21] The Tribunal has previously held that a consistent failure to comply with court orders and a long period of inactivity evidencing a lack of intention to bring proceedings can amount to abuse of process (see *Belle v Fogi Ltd (Strike-Out Application)* [2019] NZHRRT 7 at [32] and *Tan v Ministry of Social Development (Strike-Out Application)* [2020] NZHRRT 2 at [11] – [16]).

[22] Mr Taylor has filed this claim. He has the obligation to proceed with and prove it. He has failed to do so. He has not responded to two opportunities to indicate his willingness to participate in a teleconference to progress the case. He has not filed any evidence nor has he filed any opposition to the strike-out application, as directed. Mr Taylor has failed to engage with these proceedings at all for over ten months. It is an abuse of process to consistently and without explanation fail to comply with the directions of the Tribunal.

[23] If the proceedings were to remain on foot, Corrections would be significantly prejudiced by being required to repeatedly and for an extended period remain ready to defend this case. Mr Taylor's actions are an abuse of process and his claim must now be struck out.

ORDER

[24] Mr Taylor's claim against the Chief Executive, Department of Corrections is struck out.

COSTS

[25] Costs are reserved. Unless the parties come to an arrangement on costs the following timetable is to apply:

[25.1] Corrections is to file its submissions within 14 days after the date of this decision. The submissions for Mr Taylor are to be filed within the 14 days which follow. Corrections is to have a right of reply within seven days after that.

[25.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[25.3] In case it should prove necessary, the Chairperson or Deputy Chairperson of the Tribunal may vary the foregoing timetable.

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Ms GJ Goodwin Deputy Chairperson	Dr SJ Hickey MNZM Member	Mr JAG Fountain Member
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