IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2021] NZHRRT 20**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 086/2016
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**MALVERN GWIZO**
	PLAINTIFF
AND	**ATTORNEY-GENERAL (ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT)**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms J Foster, Deputy Chairperson
Dr JAG Fountain, Member
Dr SJ Hickey MNZM, Member

REPRESENTATION:
Mr M Gwizo in person
Ms HM Carrad for defendant

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

DATE OF DECISION: **15 April 2021**

DECISION OF TRIBUNAL STRIKING OUT CLAIM[1]

[1] Mr Gwizo filed this claim in December 2016. He alleges the use of an occupational personality questionnaire by the Ministry of Business, Innovation and Employment (MBIE) to assess applicants for the role of immigration officer is discriminatory on the prohibited grounds of race, colour, ethnicity or national origin and disability in breach of the Human Rights Act 1993 (HRA). The Attorney-General (on behalf of MBIE) applied to strike out

[1] [This decision is to be cited as *Gwizo v Attorney-General (Strike-Out Application)* [2021] NZHRRT 20.]

the claim relying on Mr Gwizo's failure over a long period to comply with case management directions made by the Tribunal.

[2] The issue to be determined in this decision is whether Mr Gwizo's failure to comply with Tribunal directions amounts to an abuse of process, making it appropriate to strike out these proceedings.

BACKGROUND

[3] Mr Gwizo applied for the role of immigration officer at Immigration New Zealand, a business division of MBIE. As part of the application process he was required to undertake an occupational personality questionnaire. Mr Gwizo was not appointed to the role.

[4] In January 2016, Mr Gwizo complained to the Human Rights Commission that the use of the occupational personality questionnaire in pre-employment was discriminatory on the grounds of race, ethnicity or national origin. Mediation failed to take place and the complaint was not resolved.

[5] On 8 December 2016 Mr Gwizo filed these proceedings under the HRA naming the Governor-General and the Deputy Chief Executive of Immigration New Zealand as the defendants. The statement of claim alleges the use of the occupational personality questionnaire to screen applicants for the role of immigration officer was discriminatory on the prohibited grounds of colour, race, ethnicity or national origins and disability. Among the matters alleged in the claim was a failure by MBIE to consult with Māoridom about the design and use of the questionnaire in accordance with the principles of the Treaty of Waitangi.

[6] On 18 January 2017 the Crown filed a statement of reply denying the claim. The statement of reply noted the Governor-General and the Deputy Chief Executive for Immigration New Zealand were wrongly named as the defendants. That the Governor-General should not be defendant as the actions at issue in the claim have no bearing on the role or responsibilities of the Governor-General. That as the claim is under the HRA and involves the actions of Immigration New Zealand, a business division of MBIE, the defendant should be the Attorney-General (on behalf of MBIE).

[7] On 13 February 2017 Mr Gwizo filed a response to the statement of reply in which he maintained the Governor-General was a proper defendant as "the primary custodian of the Treaty of Waitangi" and because "The claim has come about as a result of a failure to abide by the Treaty Principles."

[8] On 11 October 2018 the first case management teleconference for this proceeding was held. At the teleconference:

> **[8.1]** It was explained to Mr Gwizo why in law the Attorney-General (on behalf of MBIE) was the proper defendant and that the claim could not proceed if he maintained the current defendants.
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> **[8.2]** It was also explained to him why the Tribunal had no jurisdiction to deal with Treaty of Waitangi issues.
>
> **[8.3]** Mr Gwizo agreed the primary issue to be determined in his claim was whether the use of the personality test as part of the recruitment process resulted in him being refused employment on the grounds of ethnic or national origins

(which includes nationality or citizenship) or on the grounds of intellectual or psychological disability or impairment.

[8.4] Mr Gwizo advised he required time to reflect and to seek advice as to whether he should proceed with his claim. He commented that given the time that has passed since filing it in 2016, he had thought that it was unlikely to proceed. Mr Gwizo intended to be away from New Zealand for approximately three months over the summer and wished to explore the possibility of obtaining legal representation or advice concerning his claim.

[8.5] Mr Gwizo requested the filing date for the amended claim, which would amend the identity of the defendant to the Attorney-General, and clarify the grounds of the claim, be deferred until late March 2019.

[9] Accordingly, on 11 October 2018 the Tribunal issued a *Minute* directing Mr Gwizo to file an amended claim identifying the Attorney-General (on behalf of MBIE) as the defendant and clarifying the grounds of the claim by 29 March 2019.

[10] On 24 April 2019 the Tribunal emailed Mr Gwizo as he had failed to comply with the direction to file an amended claim. Mr Gwizo was asked to advise whether or not his claim was withdrawn. The email noted that in the absence of such advice it would be expected that the Crown would consider filing an application to strike out the claim for lack of prosecution and failure to comply with directions.

[11] On 29 April 2019 Mr Gwizo emailed the Tribunal disputing he expressed uncertainty as to whether he would be proceeding with the claim and advising his claim was not withdrawn. He advised he did not oppose the Attorney-General being a defendant, but he did not surrender as regards to the Governor-General remaining as the other defendant. He again noted he would be seeking legal representation. He also requested the defendant provide him with "a comprehensive discussion" on the disputed defendant. On 7 May 2019 the defendant emailed Mr Gwizo with a further copy of the memorandum filed by the defendant prior to the teleconference that included a detailed explanation on why the Attorney-General should be the sole defendant.

[12] On 6 November 2019 the Tribunal issued a *Minute* addressing Mr Gwizo's failure to file an amended claim as directed. It was noted he had not filed anything further with the Tribunal and that it appeared he had lost interest in the proceedings. It was also noted that it was for him to progress his claim and he had had plenty of time to obtain legal representation or advice concerning his claim. In light of this a direction was made requiring the Attorney-General to file any application to strike out based on non-compliance with case management directions and failure to prosecute his case by 6 December 2019. A direction was also made substituting the Attorney-General as the sole defendant.

[13] On 12 November 2019 Mr Gwizo emailed the Tribunal noting he believed he had long consented to the change of the preferred defendant.

[14] On 20 November 2019 Mr Gwizo advised, over a year after the teleconference in October 2018, that he had re-approached the Director of the Office of Human Rights Proceedings for review and application for representation and was now awaiting a response.

[15] On 22 November 2019 the Tribunal advised Mr Gwizo that the directions set out in the *Minute* dated 6 November 2019 remain and should the Director of Human Rights Proceedings agree to represent him then further application should be made at that time.

[16] On 6 December 2019 the Attorney-General filed a memorandum requesting Mr Gwizo's claim be struck out for failing to comply with the Tribunal's direction unless by 17 January 2020 he complied with the Tribunal's 11 October 2018 direction by filing an amended statement of claim. The request that he comply was made on the basis that complying with the Tribunal's direction to name the correct defendant and clarify his claim would have shown he was serious about his case and that a commitment from Mr Gwizo with steps taken to comply with the Tribunal's direction was required in order for the claim to continue, as it would demonstrate he was committed to advancing his claim.

[17] On 15 January 2020 the Tribunal issued a *Minute* that provided Mr Gwizo an opportunity to rectify his non-compliance and therefore avoid the need for the Tribunal to determine whether the matter should be struck out. Directions were made requiring him to:

> **[17.1]** File an amended statement of claim by 31 January 2020;
>
> **[17.2]** Or, if he failed to do so and opposed the application for strike-out, to file his grounds for opposition to the strike-out by 7 February 2020.

[18] Mr Gwizo did not file an amended statement of claim. Instead, on 17 January 2020 he filed a memorandum opposing the strike-out. This memorandum is further referred to in [29] below.

JURISDICTION TO STRIKE OUT – PRINCIPLES

[19] The Tribunal's jurisdiction to strike out proceedings is provided for in s 115A of the HRA:

> **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.

[20] Section 115A was inserted in 2018 and mirrors r 15.1 of the High Court Rules that has 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].

[21] The relevant principles to be applied are clear and well-established: *Attorney-General v Prince and Gardiner* [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 *(Parohinog),* the jurisdiction to strike out is to be used sparingly. The fundamental constitutional importance of the right to access to courts and tribunals must be recognised but must nevertheless 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]).

[22] The categories of abuse of process under s 115A(1)(d) are numerous. The two relevant categories for this case are: consistent failure to comply with court orders and

continuing proceedings without any intention of bringing the proceedings to a timely conclusion; *Yarrow v Finnigan* [2017] NZHC 1755 at [10] – [16] (*Yarrow*). In particular:

> **[22.1]** A consistent failure to comply with court orders can amount to an abuse of process as follows. The long-established principle is the failure to comply must be deliberate and a consistent failure in the face of repeated warnings can properly be interpreted as wilful, in particular where the plaintiff was conscious of the breach and chose to do nothing; *Yarrow* at [11] – [14].
>
> **[22.2]** An alternative basis for finding an abuse of process is where the plaintiff lacks any intention of bringing the proceeding to a conclusion in a timely way, where there is a long period of inactivity: *Yarrow* at [15].

[23] The above two grounds of abuse of process for strike-out are different to the want of prosecution ground contained in r 15.2(a) of the High Court Rules and discussed in *Yarrow* at [17] – [18]. Unlike the want of prosecution ground a finding of abuse of process on either of these grounds does not require prejudice to be shown by the defendant.

[24] In respect of the above two categories of abuse of process in *Yarrow* at [16] Williams J noted:

> The courts must not be used for collateral purposes (whether conscious or unconscious) as this will be oppressive on defendants and tends to undermine the system of judicial adjudication of disputes between parties. The flip side, however, is that the Court's power to strike out proceedings on this basis is not to be used lightly as over-vigorous intervention in this area will oppress plaintiffs who may well deserve their day in court, whatever their quality of proceeding and knowledge of judicial process. Non-compliances, even multiple ones, and especially by lay litigants, will not always be deliberate or otherwise for wrongful reasons. They may be the result of ignorance, disorganisation, anxiety or a combination of these. The Court will tend to be tolerant of these things, but not endlessly so.

[25] In that case Mr Yarrow's proceedings were struck out as they were found to amount to an abuse of process on both limbs. His non-compliance with directions (other than unless orders) was found to be deliberate in that he engaged in complex litigation he knew he could not complete without legal assistance he could not obtain; at [49]. He also was found to plainly lack the practical intention of bringing the matter to a timely conclusion; at [50]. Whilst acknowledging the courts must be reasonably tolerant of lay litigants who engage in litigation that is not vexatious (no view was taken on the merits of the claim) it had reached the point where Mr Yarrow had exhausted the court's tolerance; at [51].

[26] In *Badillo-Lopez v Uber New Zealand (Strike-Out Application)* [2019] NZHRRT 18 the Tribunal, relying on *Yarrow v Finnigan*, struck out a proceeding as an abuse of process under s 115A(1)(d) and s 115A(1)(b) of the HRA as the plaintiff had failed to comply over a period of four months with a case management direction that he advise his position on jurisdiction.

SHOULD MR GWIZO'S CLAIM BE STRUCK OUT?

[27] The issue to be determined is whether Mr Gwizo's failure to comply with the Tribunal's direction to file an amended statement of claim should be struck out under s 115A(1)(d) of the HRA as an abuse of process on the basis that:

> **[27.1]** His failure to comply is deliberate;
>
> **[27.2]** Or, his failure to comply shows he does not intend to pursue this proceeding conscientiously.

[28] In summary, Mr Gwizo effectively had over 15 months to file an amended claim and avoid the risk that his claim may be struck out, however he chose not to do so. The key background facts are that:

> **[28.1]** The Tribunal directed Mr Gwizo to file an amended claim that identified the correct defendant and clarified the grounds of his claim and gave him nearly six months to do so at his own request [see [8]-[9] above].
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> **[28.2]** When Mr Gwizo failed to comply with that direction, the Tribunal twice reminded him of his obligation to do so and the consequence of not doing so [see [10] and [12] above].
>
> **[28.3]** Mr Gwizo was given a further opportunity to file an amended claim, which would rectify his failure to comply with the Tribunal directions and avoid his claim being struck out. He, however, instead of filing an amended claim chose to file a memorandum opposing the strike-out [see [16] - [18] above].

[29] That Mr Gwizo has deliberately made no attempt to file an amended claim and comply with the Tribunal directions is clear from his memorandum dated 17 January 2020. In that memorandum he submits:

> **[29.1]** That his failure to comply with the Tribunal's direction is merely a failure to meet technicalities and striking out the claim for this failure would be excessive and in disregard of s 105 of the HRA. He further submits, that as he has agreed to the Attorney-General as a defendant, the Attorney-General should not benefit from a strike-out merely because of concerns around another separate legal personality defendant (the Governor-General) as this does not affect the ability of the Attorney-General to defend the matter.
>
> **[29.2]** As regards the non-execution of his case, that the Tribunal delayed by almost two years in progressing the matter and the defendant did not complain about that. He says that he is seeking legal representation, but "progress is slow", he has significantly less resources than the Tribunal and he might need double the time to get proper legal representation. He further says that the defendant has not stated any inconvenience or prejudice that has been caused by delays.

[30] Mr Gwizo, accordingly, does not seek to provide any real excuse for his non-compliance. Rather, he admits he deliberately chose not to comply with the Tribunal's direction to amend his claim because he considers it an unnecessary technical matter and he is still seeking legal representation.

[31] Nor can Mr Gwizo's reasons for his non-compliance be attributed solely to ignorance or disorganisation.

[32] Mr Gwizo knew and understood why the direction requiring him to file an amended claim was necessary and not merely technical (this was explained to him at the teleconference on 11 October 2018 (see [8] above).

[33] Mr Gwizo had over 15 months to obtain legal representation or advice in respect of his claim - his failure to do so cannot be solely due to disorganisation. That the Tribunal may have delayed (for the reasons explained in *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8) in convening the teleconference does not alleviate or excuse his failure.

[34] Mr Gwizo fully understood what the Tribunal's direction required him to do and was aware of the consequences of not complying. Mr Gwizo had over 15 months to comply with the direction but deliberately failed to do so.

[35] As Mr Gwizo has consistently and deliberately failed to comply with the Tribunal's direction the Tribunal is satisfied his proceedings have become an abuse of process on this basis and should be struck out.

[36] The Tribunal is also satisfied that the proceedings have become an abuse of process on the basis that Mr Gwizo's failure to comply with the Tribunal's direction shows he does not intend to pursue this proceeding conscientiously.

[37] Mr Gwizo for over 15 months deliberately and inexcusably failed to file an amended statement of claim as directed so that his claim could be progressed. Further, this was following Mr Gwizo being given six months to comply with the direction, including to allow him to reflect and seek advice as to whether he should proceed with his claim.

[38] Had Mr Gwizo filed the amended claim it would have shown he was serious about advancing his claim (as was noted by the Attorney-General in the memorandum dated 6 December 2019).

[39] Further, Mr Gwizo deliberately chose not to take the further opportunity to show his commitment to advancing his claim (and avoid his claim being struck out) by filing an amended claim and instead filed a memorandum opposing the strike-out.

[40] Mr Gwizo's memorandum supports the inference that he does not intend to pursue this proceeding conscientiously in that it made clear Mr Gwizo deliberately failed to comply with the Tribunal's direction (the purpose of such is to ensure proceedings are progressed) and he was still seeking legal representation over 15 months later. If Mr Gwizo intended to pursue this proceeding conscientiously he would have filed an amended statement of claim as directed and would already have obtained legal representation or decided not to.

[41] For the reasons above the Tribunal is satisfied that Mr Gwizo's proceedings have become an abuse of process on two grounds:

> **[41.1]** Mr Gwizo's consistent non-compliance with the Tribunal's direction is deliberate; and
>
> **[41.2]** Mr Gwizo's consistent non-compliance with the Tribunal's direction shows he does not intend to pursue this proceeding conscientiously.

[42] It is irrelevant to our findings that the Attorney-General has not set out any serious prejudice arising from Mr Gwizo's non-compliance. A finding of abuse of process on either of these grounds does not require prejudice to be demonstrated, as noted at [23] above.

[43] We have found that the proceedings have become an abuse of process. The criteria for strike-out in s 115A(1)(d) of the HRA is satisfied and the proceedings will be struck out.

[44] In making that finding we do not come to any view as to whether Mr Gwizo's proceedings lack merit.

DECISION

[45] Mr Gwizo's consistent non-compliance over 15 months with the Tribunal's direction that he file an amended statement of claim has been found to be deliberate. It has also been found that Mr Gwizo does not intend to pursue this proceeding conscientiously. For each of these reasons the proceedings have become an abuse of process.

[46] As the proceedings have become an abuse of process the criteria for strike-out in s 115A(1)(d) of the HRA is satisfied. The claim is struck out.

COSTS

[47] No application has been made for costs. However, if the Attorney-General wishes to apply for costs, submissions must be filed within 14 days after the date of the decision. Any submissions in opposition by Mr Gwizo are to be filed within 14 days, with a right of reply to the Attorney-General within seven days after that.

[48] The Tribunal will then determine the issue of costs based on the written submissions without any further oral hearing.

[49] In case it should prove necessary, we leave it to the Chairperson or the Deputy Chairperson to vary the foregoing timetable.

ORDERS

[50] The following orders are made:

[50.1] Mr Gwizo's claim against the Attorney-General is struck out.

[50.2] Costs are reserved.

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Ms J Foster	**Dr JAG Fountain**	**Dr SJ Hickey MNZM**
Deputy Chairperson	**Member**	**Member**