

Reference No. HRRT 010/2019

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN BRETT JAMES TAYLOR

PLAINTIFF

AND NEW ZEALAND DEFENCE FORCE

DEFENDANT

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Deputy Chairperson

Dr SJ Hickey MNZM, Member

Ms BL Klippel, Member

REPRESENTATION:

Mr BJ Taylor representing himself

Mr I Auld for defendant

DATE OF HEARING: Heard on the Papers

DATE OF DECISION: 5 July 2021

DECISION OF TRIBUNAL ON STRIKE-OUT APPLICATION¹

[1] Mr Taylor joined the New Zealand Army in August 2012 and was discharged on 18 September 2018. Mr Taylor claims he suffered discrimination during his employment with the New Zealand Defence Force (NZDF) and that he also experienced racial and sexual harassment. These allegations are denied by the NZDF.

¹ [This decision is to be cited as *Taylor v New Zealand Defence Force (Strike-Out Application)* [2021] NZHRRT 29.]

THE APPLICATION TO STRIKE OUT PART OF MR TAYLOR'S CLAIM

[2] On 28 January 2020 the NZDF filed an application seeking an order striking out section 2 of Mr Taylor's amended statement of claim dated 4 November 2019.

[3] On 20 March 2020, Mr Taylor filed a second amended statement of claim.

[4] On 14 April 2020, following receipt of the second amended statement of claim, the NZDF stated that it still held concerns about the manner in which Mr Taylor's claim was pleaded, but it was withdrawing its application to strike out the claim in respect of the allegations under s 22 of the Human Rights Act 1993 (HRA). The NZDF maintained its submission that the Tribunal has no jurisdiction to hear and determine allegations relating to the conduct of a Summary Trial regarding charges laid against Mr Taylor under the Armed Forces Discipline Act 1971.

[5] The NZDF sought an order that paragraphs 5.1.1 to 5.1.4 of Mr Taylor's second amended statement of claim dated 20 March 2020 be struck out.

Opposition to the Application

[6] Mr Taylor opposed the application to strike out part of his claim and on 20 March 2020 he filed a second amended statement of claim, which partially addressed the deficiencies in his claim that had been identified in the application to strike out. As noted above that resulted in the strike-out application being redefined by the NZDF.

[7] In relation to the outstanding application to strike out Mr Taylor's allegations about the Summary Trial process, Mr Taylor submitted that he was not attempting to re-litigate these matters but had included them to demonstrate collusion by the NZDF against him.

ISSUES

[8] The Tribunal's jurisdiction to strike out part of a proceeding is explicitly provided for in s 115A, 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.

[9] The Tribunal has canvassed the key principles for applications to strike out in a number of decisions, including most recently *Gwizo v Attorney-General (Strike-Out Application)* [2021] NZHRRT 20 at [20] and [21].

[10] The key principles are that jurisdiction to strike out must be used sparingly and if there is a way in which a defect in a claim or proceeding can be cured, that is preferable to striking out a claim. However, this must be balanced against the desirability of freeing defendants from the burden of litigation which is an abuse of process or discloses no reasonable cause of action.

[11] To determine the application by NZDF, the Tribunal must consider whether paragraphs 5.1.1 to 5.1.4 of Mr Taylor's claim "concerns a judgment or other order of a court, or an act or omission of a court affecting the conduct of any proceedings". The HRA

specifically excludes claims relating to those matters from the jurisdiction of this Tribunal. Section 79(3) of the HRA states:

79 How complaints received to be treated

- (1) ...
- (3) Despite every other provision of this section, if the complaint or part of it concerns a judgment or other order of a court, or an act or omission of a court affecting the conduct of any proceedings, the Commission must take no further action in relation to the complaint or relevant part of it.

[12] Section 92B(7) then extends the application of s 79(3) of the HRA to proceedings before this Tribunal, as set out below:

92B Civil proceedings arising from complaints

- (1) ...
- (7) Despite subsections (1) to (6), no proceedings may be brought under this section in respect of a complaint or relevant part of a complaint to which section 79(3) applies.

ANALYSIS

[13] The paragraphs which the NZDF submit breach ss 79(3) and 92B(7) of the HRA are set out below:

- 5.1.1 The Defendant used PTE Wilson as a witness against the Plaintiff in the Summary Trial. PTE Wilson was not at slushies. His witness statement was made up from what SGT Wise and PTE Ben Taylor told him.
- 5.1.2 The Plaintiff had a neutral Navy witness regarding SGT Wise's charge, who gave a statement by email that the Plaintiff was present for duty. He could not be on land to appear in the trial in person. The Defendant would not consider the evidence at the Summary Trial.
- 5.1.3 SGT Allen confirmed that MAJ Kerr agreed that the Plaintiff should never have been made to provide a child schedule as he was being treated differently. Later, when questioned during the investigation, MAJ Kerr revoked her agreement.
- 5.1.4 CPL Eriha gave a Witness Statement in support of CPL Field's charge against the Plaintiff. CPL Eriha was not in the room where the incident took place.

[14] These paragraphs refer to the conduct of the NZDF at a summary trial hearing and then the subsequent appeal in respect of charges against Mr Taylor under the Armed Forces Discipline Act 1971. Mr Taylor was the subject of two summary trial hearings in 2018. The paragraphs above appear to relate to the hearing before a disciplinary officer on 12 July 2018 and the unsuccessful appeal against the finding that Mr Taylor was guilty. The appeal was heard on 11 September 2018 and dismissed on 14 September 2018.

[15] Mr Taylor used the statutory and procedural mechanisms available to him at that time under the Armed Forces Discipline Act 1971 to appeal against the finding that he was guilty. However he now seeks to effectively allege perjury by NZDF witnesses and challenge the manner in which his evidence was considered by the disciplinary officer at the Summary Trial hearing and the Summary Appeal Court.

[16] Mr Taylor suggests that this information is provided to support his claim of "collusion" against him in the Army, rather than to relitigate the proceedings related to those charges. However, these four paragraphs in Mr Taylor's second amended

statement of claim could only support “collusion”, if the Human Rights Review Tribunal determined that the disciplinary officer and/or the Summary Appeal Court hearing actions in assessing the evidence were not appropriate and if this Tribunal assessed the conduct of the prosecution. For this Tribunal to undertake this exercise would be outside of its jurisdiction and to file a claim seeking this exercise of the Tribunal’s jurisdiction is an abuse of process.

[17] This is the type of allegation that could undermine other judicial processes and is clearly intended to be outside this Tribunal’s jurisdiction, by virtue of ss 79(3) and 92B(7), HRA. Mr Taylor appears to be using this part of his claim to challenge actions in other judicial proceedings.

[18] This Tribunal does not have jurisdiction to review the hearing processes and/or decisions of the disciplinary officer or the Summary Appeal Court. To do so would be an abuse of process and in direct contravention of ss 79(3) and 92B(7), HRA. Accordingly, paragraphs 5.1.1 to 5.1.4 will be struck out.

ORDERS

[19] Paragraphs 5.1.1 to 5.1.4 of Mr Taylor’s second amended statement of claim dated 20 March 2020 and related allegations are struck out under s 115A(d) Human Rights Act 1993.

[20] The Secretary of the Tribunal is to convene a teleconference at the soonest opportunity regarding further case management directions.

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Ms SJ Eyre Deputy Chairperson	Dr SJ Hickey MNZM Member	Ms BL Klippel Member
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