

Reference No. HRRT 007/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN BARTON KROPELNICKI

PLAINTIFF

AND WELLINGTON CITY COUNCIL

DEFENDANT

AT WELLINGTON

BEFORE:

Ms MG Coleman, Deputy Chairperson

Ms WV Gilchrist, Member

Dr NR Swain, Member

REPRESENTATION

Mr B Kropelnicki in person

Ms H Hedley for defendant

DATE OF HEARING: Heard on the Papers

DATE OF DECISION: 9 July 2021

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

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**INTRODUCTION**

[1] Barton Kropelnicki filed this claim in February 2018. He alleges that in 2014 and 2015 he suffered head injuries which impacted his health and exacerbated his existing attention deficit hyperactivity disorder (ADHD) diagnosis.

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<sup>1</sup> [This decision is to be cited as *Kropelnicki v Wellington City Council (Strike-Out)* [2021] NZHRRT 30.]

[2] In 2014 and 2015, Mr Kropelnicki was a tenant in a property owned by the Wellington City Council (Council). In August 2015 his tenancy came to an end. Mr Kropelnicki claims he was evicted because of his disability and is seeking \$350,000 in damages from the Council.

[3] The Council denies any discrimination occurred. It says Mr Kropelnicki had a fixed term tenancy which ended because the premises in which he was living were soon to be demolished.

[4] On 6 August 2019, the Tribunal directed Mr Kropelnicki to file an amended statement of claim. He has yet to do so.

[5] The issue determined in this decision is whether Mr Kropelnicki's claim should be struck out because his continued failure to comply with Tribunal directions to file an amended statement of claim amounts to an abuse of process.

## BACKGROUND

[6] On 14 September 2015, Mr Kropelnicki filed a complaint with the Human Rights Commission (HRC). He claimed the Council ending his tenancy amounted to discrimination on grounds of disability contrary to s 53 of the Human Rights Act 1993 (HRA).

[7] The HRC attempted to secure a date and an agreed basis for mediation but was unable to get Mr Kropelnicki to engage in a timely or constructive way and no progress was made. On 30 May 2016, after Mr Kropelnicki told the HRC he was unable to progress his complaint, the HRC closed its file.

[8] Seven months later, on 21 December 2016, Mr Kropelnicki asked the HRC to reopen his file. It did not do so because the Council were no longer willing to engage in mediation.

[9] Over a year later, on 22 February 2018, Mr Kropelnicki who was at that point represented by counsel, Mr Fraser, filed these proceedings.

[10] The first case management teleconference was not held until 6 August 2019. This was not due to any fault on Mr Kropelnicki's part. Rather the delay was as a consequence of the backlog of work in the Tribunal: See *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8 at [2].

[11] At that teleconference, it was agreed that Mr Kropelnicki would file an amended statement of claim that confined itself to matters of discrimination and contained particulars of his claim for damages. Timetable directions were set out in the 6 August 2019 *Minute* requiring Mr Kropelnicki to file an amended statement of claim by 13 September 2019.

[12] Three weeks later, on 29 August 2019, a three-month extension for the filing of the amended statement of claim was sought. Mr Fraser also sought leave to withdraw on the basis that legal aid had been declined and that Mr Kropelnicki, who was by that time in Costa Rica, refused to provide the information Mr Fraser had requested from him.

[13] By *Minute* dated 13 September 2019 the Tribunal granted Mr Fraser leave to withdraw as counsel. New timetabling directions were made with Mr Kropelnicki now to

file his amended statement of claim by 13 December 2019. The *Minute* noted that Mr Kropelnicki was expected to adhere to the new timeframes which were generous and made in accordance with his request.

[14] Later that same day, Mr Kropelnicki emailed a 17 page document to the Tribunal entitled “BLK – Part 1 of Amended Statement of Claim”. Despite its title, the document was in effect a well written witness statement. On 17 September 2019, Mr Kropelnicki asked the Tribunal and the defendant to disregard this document, advising it had been sent by mistake.

[15] On 20 September 2019, the Tribunal reminded Mr Kropelnicki that he had until 13 December 2019 to file his amended statement of claim.

[16] Mr Kropelnicki failed to file an amended statement of claim by 13 December 2019. Nor did he contact the Tribunal to explain why he was not able to meet the timetable or request a further extension.

[17] On 21 May 2020, a further *Minute* was issued by the Tribunal addressing Mr Kropelnicki’s failure to meet his timetable obligations. It noted that he needed to decide whether he intended to continue his claim. If he did, he was directed to file an amended statement of claim by 17 July 2020. Mr Kropelnicki was also put on notice that if he failed to do so the Tribunal would consider whether to strike out the claim for non-compliance with directions and for want of prosecution.

[18] He did not file an amended statement of claim by 17 July 2020. Rather, on 23 July 2020, Mr Kropelnicki (who was at that time in Mexico) emailed the Tribunal asking for a four-month extension to the timeframe for medical reasons.

[19] A further extension was granted in a *Minute* dated 14 August 2020 after a medical certificate was provided. Mr Kropelnicki was now to file and serve his amended statement of claim by 11 December 2020. The *Minute* said that if the amended statement of claim was not filed and served by that date, the Tribunal would then consider whether or not to strike out the claim. Directions made included a timetable for the filing of submissions in respect of the strike out in the event Mr Kropelnicki failed to file an amended statement of claim.

[20] On 23 October 2020, Mr Kropelnicki requested an electronic copy of his file. It was sent to him on 5 November 2020. He was unable to open the file originally sent but it was resent to him as a series of pdf documents on 19 November 2020.

[21] Mr Kropelnicki did not file an amended statement of claim by 11 December 2020. On 20 December 2020, he requested permission to send a video to explain his situation, claiming he could not write because his head injury had affected his cognitive ability.

[22] Permission was not granted because the next step in the proceeding (as directed in the 14 August *Minute*) was the filing of submissions on the issue of whether the claim should be struck out. On 21 December 2020, Mr Kropelnicki was reminded of this and that the deadline for those submissions was 5 February 2021. He was advised the submissions needed to be in writing.

[23] Submissions in support of a strike-out were filed by the Council on 5 February 2021.

[24] There has been no further correspondence from Mr Kropelnicki.

## JURISDICTION TO STRIKE OUT

[25] The Tribunal's jurisdiction to strike out proceedings is provided for in s 115A of the Human Rights Act 1993 (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.

[26] Section 115A was inserted into the HRA in 2008. It mirrors rule 15.1 of the High Court Rules: *Williams v Police* [2021] NZHC 801 (*Williams v Police*) at [73].

[27] Even prior to the inclusion of s 115A, it was accepted that the Tribunal has a wide discretionary power to strike out a proceeding before it: *Mackrell v Universal College of Learning* (HC) Palmerston North CIV-2005-485-802, 17 August 2005 at [46]–[48].

[28] The principles to be applied by the Tribunal when considering whether to strike out a claim are those articulated by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267. The jurisdiction is to be used sparingly: *Williams v Police* at [76]; *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 (*Parohinog*) at [30].

[29] In *Williams v Police* the High Court noted that the Tribunal's jurisdiction must be accessible to lay people and self-represented litigants. It was therefore undesirable to require of parties a strict approach to pleadings in proceedings before the Tribunal: at [80]. The need for accessibility is reflected in s 105 of the HRA which requires the Tribunal to act according to substantial merits of the case without regard to technicalities.

[30] An abuse of process, as set out in s 115A(1)(d) above, can arise when a party consistently fails in the face of repeated warnings to comply with timetabling orders. In these circumstances, it is possible to infer that the party's non-compliance is wilful: *Yarrow v Finnigan* (2017) NZHC 1755 (*Yarrow*) at [11]–[14]. Equally, parties are expected to pursue the litigation in a timely way to avoid bringing the Tribunal's processes into disrepute: *Yarrow* at [16].

[31] Nevertheless, as the Court in *Yarrow* noted, the power to strike out must be used lightly, particularly in cases involving lay litigants:

[16] ... 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.

[32] Section 105 of the HRA does not mean that proceedings cannot be struck out where there has been a significant failure by a lay litigant to advance his or her case in a timely way. The principles embodied in s 105, and more broadly by access to justice issues, must be balanced against the desirability of freeing defendants from litigation which amounts to an abuse of process: *Parohinog* at [31].

[33] In *Gwizo v Attorney-General (Strike-Out Application)* [2021] NZHRRT 20 (*Gwizo*), the Tribunal struck out Mr Gwizo's claim after he failed for a period of 15 months to comply with the Tribunal's direction that he file an amended statement of claim. The Tribunal held

his consistent non-compliance with the Tribunal was deliberate. In these circumstances the Tribunal was also satisfied he did not intend to pursue the proceeding conscientiously. His failures meant the proceedings had become an abuse of process and was struck out under s 115A(1)(d): at [34]–[43].

**[34]** The claim in *Badillo-Lopez v Uber New Zealand* [2019] NZHRRT 18 (*Badillo-Lopez*) was similarly struck out after Mr Badillo-Lopez consistently failed over a period of four months to advise his position on whether the Tribunal had jurisdiction to consider all the claims filed. His failure left Uber not knowing the ambit of the case against it. The Tribunal held that his delay in complying with the case management directions plainly fell within s 115A(1)(b) (prejudice) and s 115A(1)(d) (abuse of process): at [20]–[25].

### **SHOULD THE CLAIM BE STRUCK OUT?**

**[35]** The question here is whether Mr Kropelnicki's failure to file an amended statement of claim in accordance with Tribunal directions amounts to an abuse of process such that his claim should be struck out under s 115A(1)(d).

**[36]** As the *Gwizo* and *Badillo-Lopez* cases demonstrate, the nature and extent of the non-compliance is important when determining whether to strike out a claim.

**[37]** Since the first timetable directions were made on 6 August 2019 requiring Mr Kropelnicki to file an amended statement of claim, he:

**[37.1]** Almost immediately sought a three-month extension which was granted;

**[37.2]** Failed to meet the new deadline of 13 December 2019 without explanation;

**[37.3]** Failed to meet a further revision of the timetable under which he was to file the amended claim by 17 July 2020;

**[37.4]** Failed to meet a further extension granted on medical grounds under which he was required to file his amended statement of claim on 11 December 2020; and

**[37.5]** Claimed shortly afterwards, he could not write because of the impact of his head injury on his cognitive functioning despite communicating ably with the Tribunal in writing.

**[38]** Mr Kropelnicki has not filed any submissions opposing the strike out of his claim. It is therefore unclear whether he even wishes to continue this proceeding. He no longer resides in New Zealand and has not done so since 2018.

**[39]** The Council supports the claim being struck out. It says:

**[39.1]** In the absence of an amended statement of claim, the Council is unable to understand the core of the claim or prepare its defence;

**[39.2]** Mr Kropelnicki has not demonstrated that he intends to pursue his claim. He continually sought extensions which he repeatedly failed to comply with;

**[39.3]** The delays have caused prejudice:

**[39.3.1]** A key witness has left its employ;

**[39.3.2]** The events giving rise to the claim occurred over five years ago, memories are fading and briefing witnesses is becoming increasingly difficult;

**[39.3.3]** It is incurring increased legal costs.

**[40]** It is now nearly six years since the events which form the basis of the claim took place. Since Mr Fraser was granted leave to withdraw as counsel in September 2019, no real steps have been taken by Mr Kropelnicki to progress it.

**[41]** Mr Kropelnicki is entitled to reasonable accommodation of any impairment arising from his head injury. In this case, however, reasonable accommodation does not require communication by video. He is well able to do so in writing. His numerous communications with the Tribunal demonstrate that he writes well. It was only after he failed to meet the final deadline for filing the amended claim that he claimed an inability to respond in writing.

**[42]** As a lay litigant Mr Kropelnicki is also entitled to some latitude. However, that latitude does not extend so far as to permit the continuation of claims where there is no real likelihood the claim will be brought to a conclusion in the foreseeable future.

**[43]** Mr Kropelnicki is engaged in litigation he has not progressed. There comes a point where to leave the proceedings on foot, with no prospect the claim will be concluded within a reasonable timeframe, amounts to an abuse of the Tribunal's processes.

**[44]** In our view, that point has now been reached and the Tribunal has a duty to intervene on its own motion. Our reasons are these:

**[44.1]** There is a history of delay and non-compliance both prior to and since the claim was filed in the Tribunal:

**[44.1.1]** Mr Kropelnicki did not cooperate with the HRC so that a date for mediation could be arranged and told the HRC he was not able to progress his complaint;

**[44.1.2]** He did not co-operate with his lawyer to meet the timetable while he was represented and has not complied with any timetable directions since being self-represented; and

**[44.1.3]** He has been on notice since 21 May 2020 that a failure to comply with the timetable risks his claim being struck out.

**[44.2]** Mr Kropelnicki's continued failure to meet the timetable in the knowledge that he risks his claim being struck out, indicate that his non-compliance is wilful. His last minute claimed inability to communicate in writing, an assertion contradicted by his own communications with the Tribunal, reinforces that view.

**[44.3]** The same reasons, coupled with his failure to file any submissions opposing the striking out of this claim and his failure to advance his complaint before the HRC, demonstrate a lack of intent to conscientiously progress his claim.

**[45]** In short, Mr Kropelnicki's non-compliance with the directions of the Tribunal and his failure to progress his claim both amount to an abuse of the Tribunal's processes. The

criteria for strike-out set out in 115A(1)(d) of the HRA has been met by a wide margin. The claim is struck out.

**[46]** Having reached this decision, it is unnecessary to consider whether the kind of prejudice specifically advanced by the Council, which relates to an impairment of its ability to bring evidence, may also provide a basis for striking out this proceeding.

### **COSTS**

**[47]** The Council has not sought costs. In any event, there would appear to be little utility in making such an order given Mr Kropelnicki resides overseas. No order for costs is made.

### **ORDER**

**[48]** The following order is made:

**[48.1]** Mr Kropelnicki's claim against Wellington City Council is struck out in its entirety.

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**Ms MG Coleman**  
**Deputy Chairperson**

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**Ms WV Gilchrist**  
**Member**

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**Dr NR Swain**  
**Member**