

Reference No. HRRT 010/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN HUA XI

First Plaintiff

AND NAIZUO TAO

Second Plaintiff

AND AN LI TAO

Third Plaintiff

AND BODY CORPORATE 198693

Defendant

CONT.

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Deputy Chairperson

Ms NJ Baird, Member

Dr SJ Hickey MNZM, Member

REPRESENTATION:

Mr C McLean for plaintiffs

Mr C Baker for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 21 December 2021

DECISION OF TRIBUNAL ON STRIKE-OUT APPLICATIONS¹

¹ [This decision is to be cited as *Tao v Body Corporate 198693 (Strike-Out Applications)* [2021] NZHRRT 58.]

**UNDER
BETWEEN**

**Reference No. HRRT 023/2018
THE HUMAN RIGHTS ACT 1993**

AN LI TAO

Plaintiff

AND

BODY CORPORATE 198693

First Defendant

AND

**STRATA TITLE ADMINISTRATION
LIMITED**

Second Defendant

AND

DAN LI GE

Third Defendant

BACKGROUND

HRRT 010/18

[1] An Li Tao and her parents Naizuo Tao and Hua Xi at all relevant times owned a property (Unit R) in New Lynn, Auckland and were members of Body Corporate 198693 (the Body Corporate).

[2] On 1 March 2018, Ms Tao, Mr Tao and Ms Xi filed a claim against the Body Corporate alleging that the Body Corporate discriminated against them on the basis of their ethnicity by filing a claim against them in the Tenancy Tribunal to recover unpaid body corporate levies. This is claim HRRT 010/2018.

HRRT 023/18

[3] On 23 May 2018, Ms Tao claimed in HRRT 023/2018 that she was also discriminated against and treated less favourably by the Body Corporate, Strata Title Administration Ltd and Dan Li Ge on the basis of her race and/or ethnicity. The Body Corporate is administered by Strata Title Administration Ltd (Strata). Ms Ge was an employee of Strata at the time of the events giving rise to these claims. Ms Tao alleges she was discriminated against in respect of:

[3.1] The Body Corporate's failure to indemnify Ms Tao when she brought legal proceedings against another Body Corporate member;

[3.2] Ms Ge failing to record the nominations of Mr Yan Li and Ms Tao as chairperson of the Body Corporate and instead only recording the chairperson at the time. It is further alleged the Body Corporate failed to regulate this "unfair behaviour";

[3.3] The Body Corporate's failure to discipline the Body Corporate chairperson when they were alleged to have assaulted Mr Tao.

[4] Ms Tao claims these actions were in breach of s 53 of the Human Rights Act 1993 (HRA).

THE STRIKE OUT APPLICATIONS

[5] On 10 October 2019, the Body Corporate, filed an application to strike out claim HRRT 010/2018 and the Body Corporate, Strata and Ms Ge filed an application seeking orders striking out claim HRRT 023/2018.

[6] In each case, they submit that the claims should be struck out, as all grounds in s 115A of the HRA are made out. Section 115A states:

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.

[7] The key principles the Tribunal must have regard to in considering applications to strike out are well established in case law, including most recently in *Lavender v Attorney-*

General (Strike-Out Application) [2021] NZHRRT 52 (*Lavender*) at [7] to [10] and *Kropelnicki v Wellington City Council (Strike-Out)* [2021] NZHRRT 30 (*Kropelnicki*) at [25] to [34].

[8] The Tribunal's jurisdiction to strike out was also recently considered by the High Court in *Williams v New Zealand Police* [2021] 2 NZLR 292 (*Williams*) at [71] to [76]. The parties have each provided submissions on the relevance of this decision to the Tribunal's determination of this application. While this decision is currently under appeal to the Court of Appeal, it remains a useful current summary of the principles applicable to the strike-out jurisdiction of this Tribunal.

[9] Those principles from *Lavender*, *Kropelnicki* and *Williams* are:

[9.1] The pleaded facts are assumed to be true;

[9.2] A cause of action must be clearly untenable to be struck-out;

[9.3] The jurisdiction to strike out is to be used sparingly and if there is a way in which a defect in a claim or proceeding can be cured, that is preferable;

[9.4] The jurisdiction to strike out is not excluded by the need to decide a difficult question of law;

[9.5] The court should be particularly slow to strike-out a claim in any developing area of law;

[9.6] The fundamental constitutional importance of the right of access to courts and tribunals must be recognised but must be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or an abuse of process.

THE TENANCY TRIBUNAL CLAIM (HRRT 010/2018)

[10] Ms Tao, Ms Xi and Mr Tao claim that the Body Corporate only pursued Tenancy Tribunal action for unpaid levies against unit owners of Chinese ethnicity.

[11] The strike out application relies on all four grounds of strike-out in s 115A but provides no submissions on delay or prejudice the claim may cause, or whether it is frivolous or vexatious or otherwise an abuse of process. Accordingly the Tribunal can only consider the ground of no reasonable cause of action.

[12] The Body Corporate submits that this claim should be struck out, as lawfully authorised statutory debt recovery proceedings against a defaulting unit owner cannot be discriminatory. The Body Corporate filed evidence of what it describes as "numerous Tenancy Tribunal Orders and Judgments" in respect of Ms Tao to support this submission and also submitted one owner they commenced action against was of Indian ethnicity.

[13] However, while a body corporate may be legally entitled to take action against those who do not pay the Body Corporate levy, that does not mean the action cannot be discriminatory if it is applied in a manner that focuses on the ethnicity of the people being pursued, rather than actual liability. An assessment of the veracity or not of these allegations is most appropriately dealt with in a substantive hearing not in an on the papers strike-out hearing.

[14] If the pleaded facts are assumed to be true, there is arguably a reasonable cause of action in this claim, in relation to discrimination in housing because of ethnicity. The Tribunal finds there is therefore a reasonable cause of action disclosed in these facts. Accordingly, there is no justifiable basis upon which the claim could be struck out.

[15] The application to strike out this claim, known as HRRT 010/2018 is dismissed.

THE INDEMNIFICATION CLAIM (HRRT 023/2018)

[16] The first cause of action in HRRT 023/2018, is the claim that Ms Tao was not indemnified by the Body Corporate in respect of legal proceedings brought by her in 2015, because of her ethnicity. The defendants submit this is not a reasonable cause of action as it has already been addressed and dismissed by the High Court and as such should be struck out.

[17] *Tao v Strata Title Administration Ltd & Ors* [2018] NZHC 848 (30 April 2018) records at [18] to [26] that the High Court found there was no justification for the argument that the Body Corporate was required to indemnify Ms Tao in respect of the proceedings in question, as the committee Ms Tao was a member of, was not one entitled to be indemnified by the Body Corporate.

[18] The Tribunal is bound by the determination of the High Court on this point. The matter has already been determined and therefore *res judicata* applies, the matter cannot be determined again by this Tribunal.

[19] This cause of action provides no reasonable cause of action and it is an abuse of process for the Tribunal to be asked to determine a matter that has already been determined by the High Court. The cause of action alleging discrimination on the basis of a failure to indemnify Ms Tao is struck out of claim HRRT 023/2018.

THE CHAIRPERSON CLAIM (HRRT 023/2018)

[20] Ms Tao also claims in HRRT 023/2018 that she was discriminated against in April 2016 by the defendants in respect of nominations for the role of chairperson of the Body Corporate. Ms Tao claims she was nominated for the position of Body Corporate chairperson and she herself nominated Mr Yan Li, but the third defendant did not record their nominations.

[21] The defendants have provided a number of responses to this allegation:

[21.1] The statement of reply records that the nominations were not validly completed so could not be accepted;

[21.2] The strike-out application submits that Mr Yan Li was not a unit owner at the time of the purported nomination so was not legally able to be nominated in accordance with regulation 10(4) of the Unit Titles Regulations 2011; and

[21.3] The reply to the opposition to the strike-out application submits that there was no chairperson vacancy to be filled.

[22] It is not clear to the Tribunal which strike-out ground is being relied on to support the strike out of this cause of action. Nor are there any submissions which address why this cause of action is said to be frivolous or vexatious or may cause delay or prejudice.

[23] The most likely ground appears to be s 115A(1)(a), in that the defendants appear to imply that Ms Tao's allegation is not a reasonable cause of action, given the reference in the submissions to apparent procedural failures.

[24] However, if the pleaded facts are accepted as true, there is a reasonable cause of action if the decision not to record their nominations was based on ethnicity. While some procedural reasons for the nominations not being recorded have been raised by the defendants, these arise from apparent factual differences and in a strike-out determination, the Tribunal must assume the pleaded facts are true. It is also noted there is some factual uncertainty surrounding the date of the Body Corporate meeting in question.

[25] The Tribunal is very mindful denying the right for a claim to be heard by striking it out should be a last resort and used sparingly. The Tribunal is not satisfied in this instance there is an appropriate basis for striking out this cause of action. There is a tenable claim raised that is a reasonable cause of action. There is no indication of abuse of process by Ms Tao in raising this, particularly given the varied reasons advanced to explain the alleged failure to record the nominations and the discrepancy in the relevant dates given by each party concerning this claim.

[26] The application to strike out this cause of action is dismissed.

THE DISCIPLINE CLAIM (HRRT 023/2018)

[27] Ms Tao also claims in HRRT 023/2018 that the Body Corporate failed to take any action against the then Chairperson of the Body Corporate when they allegedly "assaulted" Mr Tao at a Body Corporate meeting on 6 May 2016. The Body Corporate subsequently allowed that chairperson to remain in the role. Ms Tao considers this was discriminatory and was less favourable treatment towards her and her father because of their ethnicity.

[28] The Body Corporate "denied" this allegation in its statement of reply and submitted in the application to strike out that it has no powers of discipline towards its members and accordingly there is no reasonable cause of action. The Body Corporate also noted that it was not involved in the alleged assault and Ms Tao did not identify any statutory power of discipline by the Body Corporate.

[29] While the Tribunal acknowledges no statutory power of discipline has been identified by Ms Tao in her claim, whether or not that is the determinative factor to be considered in this claim is not readily apparent on the current submissions and evidence before the Tribunal.

[30] As already noted above, the Tribunal must not be quick to strike out a claim and must be certain that a claim is clearly untenable before it is struck out. If the pleaded facts were true and the defendants did take no action in respect of an alleged assault because of Mr Tao's ethnicity, then there is a reasonably arguable claim and the Tribunal cannot at this point strike out this claim.

[31] The application to strike out this cause of action is therefore dismissed.

ORDERS

[32] The application to strike out HRRT 010/2018 is dismissed.

[33] The application to strike out HRRT 023/2018 is partially successful:

[33.1] The cause of action alleging discrimination on the basis of a failure to indemnify Ms Tao is struck out;

[33.2] The application to strike out the cause of action alleging discrimination in respect of the chairperson nomination is dismissed;

[33.3] The application to strike out the cause of action alleging a failure to discipline a Body Corporate member is dismissed.

[34] A teleconference will be convened shortly to discuss case management of HRRT 010/2018 and the two causes of action remaining in claim HRRT 023/2018.

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Ms SJ Eyre
Deputy Chairperson

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Ms NJ Baird
Member

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Dr SJ Hickey MNZM
Member