IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 34**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 007/2015
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**JANINE SAX**
	PLAINTIFF
AND	**COMMISSIONER OF POLICE**
	DEFENDANT

IN WELLINGTON

BEFORE:
Ms MG Coleman, Deputy Chairperson
Dr SJ Hickey MNZM, Member
Ms S Stewart, Member

REPRESENTATION:
Ms J Sax in person
Mr R May for defendant

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

DATE OF DECISION: **31 August 2022**

DECISION OF TRIBUNAL STRIKING OUT CLAIM-PRIVACY[1]

INTRODUCTION

[1] In January 2015 Janine Sax filed a claim under the Privacy Act 1993 (Privacy Act) in the Human Rights Review Tribunal (Tribunal) claiming there had been an interference with her privacy by the New Zealand Police (Police).

[2] The alleged privacy breaches occurred as early as 2011.

[1] [This decision is to be cited as *Sax v Commissioner of Police (Strike-Out – Privacy)* [2022] NZHRRT 34.]

[3] On 23 June 2017, Police applied to have this proceeding struck out on the grounds that Ms Sax has failed to:

[3.1] Prosecute her proceedings to trial and judgment; and

[3.2] Explain, when required, the reasons for the prolonged non-compliance with timetable orders.

[4] Regrettably there has been a delay in determining the application due to the backlog of work in the Tribunal, which has arisen for the reasons set out in *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8 at [2].

[5] On 6 July 2022, a *Minute* was issued which advised the parties the Tribunal was now in a position to determine the application and invited any comment either party wished to make about whether it was appropriate for the Tribunal to exercise its power under s 104 of the HRA to determine the application on the papers. Any comments were to be received by 5 August 2022. Neither party filed any views on this issue.

[6] The Tribunal has determined it is appropriate for the application to be determined in this way.

[7] This claim was originally filed under the Privacy Act. On 1 December 2020 that Act was repealed and replaced by the Privacy Act 2020. The transitional provisions in Privacy Act 2020 Schedule 1, Part 1, cl 9(1) provide that these proceedings must be continued and completed under the 2020 Act. However, that does not alter the relevant legal rights and obligations in force at the time the actions subject to this claim were taken.

BACKGROUND

Filing of claim and response

[8] The alleged privacy breaches largely relate to actions by Police in 2011 and the earlier part of 2012. Ms Sax complains that personal information held by Police was inaccurate and that the failure of Police to correct that information and to publish it breached Information Privacy Principles (IPPs) 2 to 11.

[9] The Office of the Privacy Commissioner (OPC) investigated a series of requests for personal information by Ms Sax to Police from November 2012 to July 2013. Its intervention was regarding alleged breaches of IPP 6 and the investigation was focussed on ensuring that Police had provided Ms Sax with all personal information she was entitled.

[10] On 14 November 2014, OPC wrote to Ms Sax indicating that it considered she had been provided with all personal information to which she was entitled and provided her with an opportunity to comment.

[11] On 19 December 2014, following receipt and review of her comments, OPC wrote to Police advising it had closed its file. It formed a view that further action by the Office was not appropriate given Ms Sax's numerous requests for personal information largely relating to the same event. The response from Police was considered reasonable in the circumstances.

[12] On 22 December 2014, OPC issued a certificate of investigation. The matters investigated related to Ms Sax's access request to Police involving IPP 6. The certificate recorded that all information held had been released and information not about Ms Sax appropriately withheld. A decision to not investigate further was made and advised to Ms Sax.

[13] On 24 February 2015 Police wrote to the Tribunal advising that it did not intend to file a statement of reply in relation to the allegations made at that stage. In that letter Police referred to the Privacy Commissioner's views advised to Police in the 19 December 2014 letter, and that further requests by Ms Sax for personal information made between 18 November 2014 and 13 February 2015 were intended to harass Police and were considered vexatious.

[14] On 2 April 2015 the Commissioner of Police filed a statement of reply.

[15] On 3 June 2015 the Tribunal issued a decision in which the Tribunal held that the original Police letter of 24 February 2015 was the statement of reply or, in the alternative, granted leave to file a statement of reply out of time.

[16] On 9 June 2015 the Tribunal was service with a notice of appeal against that decision and on 23 July 2015 the Tribunal stayed proceedings pending the outcome of the High Court appeal.

[17] On 30 November 2015 the Tribunal was advised that the High Court appeal had been discontinued and on 23 December 2015 the stay was lifted.

Name suppression sought

[18] In the meantime, on 3 June 2015 Ms Sax filed a memorandum in which she sought anonymity. On 12 June 2015 Ms Sax filed submissions supporting her application for name suppression and on 23 June 2015 Ms Sax also filed an affidavit in support of that application.

[19] Police did not object to name suppression being granted and on 3 July 2015 the Tribunal issued interim orders prohibiting publication of her name, occupation or any other details which may lead to the identification of Ms Sax as the plaintiff in the proceeding.

[20] On 21 July 2015 the Chairperson of the Tribunal issued a *Minute* regarding Ms Sax's failure in her submissions or affidavit to draw the Tribunal's attention to the Court of Appeal judgment in *Sax v Simpson* [2015] NZCA 222, in which it declined name suppression in defamation proceedings. That judgment was delivered on 9 June 2015, three days prior to Ms Sax filing her submissions in support of her application for anonymity in the Tribunal. In the *Minute*, the Chairperson indicated the interim orders made may need to be revisited. A timetable was set requiring Ms Sax to file information in relation to why there had been no disclosure. The Chairperson also required Ms Sax to provide details of other proceedings, including appeals, in which name suppression had been sought by her and the outcome of those applications.

[21] A teleconference was held on 31 July 2015 to discuss the name suppression issue. Ms Sax subsequently emailed the Tribunal to request an adjournment in order to seek legal advice. The matter was adjourned until 28 August 2015.

[22] At the teleconference held on 28 August 2015 the matter was further adjourned until 23 October 2015. In the *Minute* issued following the 28 August 2015 teleconference the Chairperson indicated that whether Ms Sax was legally aided or not, a timetable was likely to be set at the next teleconference.

[23] On 20 October 2015 Ms Sax requested the Tribunal set the timetable and excuse appearances at the teleconference scheduled for 23 October 2015. Police consented to this request.

[24] In a *Minute* dated 21 October 2015 timetable directions were made in relation to the non-publication orders sought by Ms Sax.

[25] Initial submissions were filed by both parties in accordance with the timetable. In her submissions Ms Sax provided details of a number of proceedings in which she had been unsuccessful at gaining name suppression.

[26] On 30 November 2015 Ms Sax sought an extension in which to file reply submissions, and also sought an oral hearing of the non-publication issue.

[27] On 23 December 2015 a timetable extension for the filing of reply submissions until 15 January 2016 was granted to Ms Sax.

Health issues delayed compliance with timetable

[28] On 11 January 2016 and again on 15 January 2016 Ms Sax advised that her health had deteriorated, and she was unable to file her evidence and submissions. She was directed to file a medical certificate indicating the length of extension that she required.

[29] On 22 January 2016 Ms Sax filed a medical certificate stating she would not be well enough to progress the proceeding for three months and that her health would be reviewed at that time.

[30] On 9 March 2016 Ms Sax filed a further medical certificate which indicated she would remain unfit to participate for a minimum of six months.

[31] On 31 March 2016 the Chairperson issued a further *Minute* granting the six-month pause in the proceeding, with the timetabling of further steps in the proceeding postponed until 7 September 2016. The Chairperson said that it was understandable that Ms Sax may want a pause for health reasons but also said that proceedings cannot be postponed indefinitely. Ms Sax was directed to file an updating memorandum no later than 14 September 2016. No memorandum was filed by Ms Sax.

[32] On 16 May 2017 the Chairperson issued a *Minute* directing Ms Sax to file a memorandum and supporting evidence as to why the timetable directions set out in the 31 March 2016 *Minute* had not been complied with. In the *Minute* the Chairperson said that if that direction was not complied with, then Police may apply for an order dismissing the proceedings for want of prosecution.

[33] On 2 June 2017 Ms Sax filed a further medical certificate stating she had been unable to participate in court proceedings since September 2015.

[34] On 23 June 2017 Police applied to dismiss the proceedings for want of prosecution. In the memorandum in support of the application Police stated that if the Tribunal was provisionally inclined to accept the medical evidence it should seek further details.

[35] On 7 August 2017 the Chairperson issued a further *Minute*. He expressed surprise at how little information had been contained in the medical certificate and said that there was a need for some certainty as to whether Ms Sax would be able to participate in proceedings. Ms Sax was directed to file more particularised medical evidence along with medical advice as to whether she would be fit to take part in the proceeding within six months.

[36] On 29 August 2017 a further medical certificate was filed. In that certificate Ms Sax's doctor doubted whether Ms Sax would be able to participate within six months.

[37] On 19 September 2017 Police filed a memorandum repeating its request for the proceeding to be dismissed for want of prosecution.

[38] Nothing further has been filed by Ms Sax who has not taken any further steps in this proceeding.

JURISDICTION TO STRIKE OUT

[39] Against that background, the question for the Tribunal is whether the proceeding should be struck out.

[40] The Tribunal has always had a wide discretionary power to strike out or dismiss a proceeding brought before it. See *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005 at [45]-[48].

[41] The Tribunal now has an express power to strike out proceedings which is set out 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.

[42] 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.

[43] Section 115A mirrors r 15.1 of the High Court Rules 2016 which permits the High Court to strike out all or part of a pleading if it is an abuse of process. The jurisdiction is to be used sparingly. See *Williams v Police* [2021] NZHC 808 (2021) 12 HRNZ at [73]-[76], [87].

[44] An abuse of process can arise when a party consistently fails to comply with timetabling orders or when a party fails to pursue the litigation in a timely way so as to bring the Tribunal's processes into disrepute: see *Yarrow v Finnigan* (2017) NZHC 1755 (*Yarrow*) at [11]–[14], [16]. Nevertheless, as the Court in *Yarrow* noted, the power to strike out must be used lightly 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.

[45] Also relevant to the exercise of the Tribunal's power is s 105 of the HRA which requires the Tribunal to act according to substantial merits of the case without regard to technicalities. However, that section 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 as the passage above from *Yarrow* makes plain. The principles embodied in s 105 must be balanced against the desirability of freeing defendants from litigation which amounts to an abuse of process. See *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 at [31].

[46] There have been a number of recent cases in this Tribunal where a failure to comply with timetable orders or to progress the proceeding has resulted in the claim being struck out.

[47] 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 to file an amended statement of claim. The Tribunal said his failures meant the proceedings had become an abuse of process and the claim was struck out under s 115A(1)(d). See *Gwizo* at [34]–[43].

[48] Similarly, in *Kropelnicki v Wellington City Council* [2021] NZHRRT 30 (*Kropelnicki*) the Tribunal held that a persistent failure to comply with timetable directions and to progress his claim over a two-year period, amounted to an abuse of its processes. As in this case, Mr Kropelnicki claimed discrimination on grounds of disability. The Tribunal held that he was entitled to reasonable accommodation of any impairment. It also held that as a lay litigant he was entitled to some latitude, but that latitude did not extend so far as to permit the continuation of claims where there was no real likelihood it would be brought to a conclusion in the near future. See *Kropelnicki* at [40]-[45].

SHOULD THE CLAIM BE STRUCK OUT?

[49] The issue to be determined is whether Ms Sax's failure to progress her claim, means it should be struck out under s 115A(1)(d) as an abuse of process.

[50] In our view it should be.

[51] As is evident from the background and chronology outlined above:

[51.1] The matters which form the basis of the claim took place as early as 2011. The claim itself was filed in January 2015 but no substantive steps have been taken on the file since December 2015 and it has not progressed beyond the filing of the statement of claim and the statement of reply.

[51.2] Ms Sax did not respond to the 19 September 2017 memorandum from Police requesting a decision be made in its application to dismiss the proceeding, meaning it is unclear whether she objected to the application at that point in time. Further, Ms Sax has not, at any point since then, advised that she is in a position to progress her claim.

[52] In reaching this decision, we acknowledge that some accommodation of Ms Sax's health is required. However, in our view, the accommodation granted was reasonable in the circumstances:

> **[52.1]** The proceedings had been paused for medical reasons from January 2016 onwards and, as of August 2017, her doctor doubted she would be well enough to proceed within six months.
>
> **[52.2]** This meant that Ms Sax would have been unable to progress the matter for over two years with no certainty of her health improving sufficiently even after a further six-month pause for matters to continue.

[53] To leave the proceeding on foot in those circumstances would have amounted to an abuse of the Tribunal's processes. The fact that no steps have been taken by Ms Sax since then to enliven her claim reinforces that view.

[54] The criteria for strike-out under s 115A(1)(d) of the HRA has therefore been met.

INTERIM NAME SUPPRESSION DISCHARGED

[55] Having determined the proceeding should be struck out, we also need to determine whether the interim non-publication orders made by the Tribunal on 3 July 2015 should be made final or lifted.

[56] In our view it is appropriate to lift the interim orders made. To do otherwise would be inconsistent with the principles of open justice.

Non-publication orders and open justice principles

[57] The centrality of the principle of open justice was referred to by the Supreme Court in *Erceg v Erceg* [2016] NZSC 135 in the following way:

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language. (Footnotes omitted).

[58] In *Erceg*, the Supreme Court held (at [13]) that the party seeking to justify a confidentiality order must show specific adverse circumstances that are exceptional. It referred (at [14]) to the description by Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 142-143 of the need for a "stringent" standard to justify a departure from the fundamental rule which was in the following terms:

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: … A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the

greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

[59] These principles are given statutory effect in s 107 of the HRA which provides that every hearing of the Tribunal must be held in public unless it is desirable for the hearing to be held in private or for a non-publication order to be made:

> **107 Sittings to be held in public except in special circumstances**
>
> (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
>
> (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
>
> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
>
> (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
>
> (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
>
> (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.

[60] In *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4, the Tribunal expressly considered the application of *Erceg* to the jurisdiction of the Tribunal under s 107 of the HRA. At [63] it held that the principles articulated in *Erceg* were "strikingly" congruent with the statutory language of s 107. Applying those principles, the Tribunal summarised the approach to s 107 as follows:

> [66] In summary … the following principle points (they are not intended to be exhaustive) should be kept in mind when interpreting and applying s 107(1) and (3) of the Human Rights Act. It is these points which will assist the determination whether the Tribunal is satisfied that it is "desirable" to make a suppression order:
>
> [66.1] The stipulation in s 107(1) that every hearing of the Tribunal be held in public is an express acknowledgement of the principle of open justice, a principle fundamental to the common law system of civil and criminal justice. The principle means not only that judicial proceedings should be held in open court, accessible to the public, but also media representatives should be free to provide fair and accurate reports of what occurs in court.
>
> [66.2] There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. This is recognised by s 107(1), (2) and (3) of the Act.
>
> [66.3] The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one.
>
> [66.4] In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:
>
> [66.4.1] whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.
>
> [66.4.2] whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.

> [66.4.3] whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

[61] We now turn to apply these principles to the facts of this case.

Application of principles to facts of this case

[62] As already noted, on 3 June 2015 Ms Sax sought anonymisation of her and her ex-husband's names. In submissions subsequently filed she claimed that publication of her name would cause her physical and psychological harm and would cause undue harm to her reputation and career. Ms Sax also relied on the fact that interim name suppression had been granted in a criminal matter and that non-publication orders had been made in the Family Court in relation to matters that would be relied on.

[63] Police did not oppose the application and two orders were made by the Chairperson on an interim basis on 3 July 2015. The first prevented the publication of name, occupation or any other details in the proceeding which may lead to the identification of the plaintiff in the proceeding pending further order of the Tribunal or Chairperson, and the second prevented the file being searched without leave of the Tribunal or Chairperson.

[64] In neither her application nor in her supporting affidavit did Ms Sax mention that on 9 June 2015 the Court of Appeal in *Sax v Simpson* [2015] NZCA 222 dismissed an appeal against an unsuccessful application for name suppression in the High Court in relation to defamation proceedings brought by her against her ex-husband.

[65] The failure to advise the Tribunal of the recent Court of Appeal decision dismissing her appeal led to a further *Minute* of the Tribunal on 21 July 2015. In that *Minute*, the Chairperson noted that circumstances of those proceedings appear to have arisen out of the same factual matrix as those in the proceeding before the Tribunal. A timetable for the filing of further submissions was set following which the Tribunal indicated it would consider whether the interim order should be discharged.

[66] In accordance with the timetable, submissions were filed by Ms Sax on 27 October 2015. In her submissions Ms Sax listed a number of decisions in which she had been unsuccessful in her attempts to gain name suppression. These included: *Sax v Simpson* [2015] NZSC 51, *Sax v Simpson* [2015] NZSC 144, *Sax v Simpson* CA 112/2015 (Minute of Cooper J) and *Sax v Simpson* [2015] NZCA 362 in addition to the judgment in *Sax v Simpson* [2015] NZCA 222 referred to at [20] and [64] above.

[67] Police opposed the continuation of the non-publication orders and on 20 November 2015 filed submissions in opposition to the interim orders remaining in place.

[68] On 30 November 2015 Ms Sax sought an extension of time in which to file her reply submissions and an extension of time was granted until 15 January 2016. It was at that point that Ms Sax's health appeared to have deteriorated as outlined at [28] to [38] above and nothing further has been filed by her.

[69] In our view the interim orders should be discharged. We are not persuaded that the consequences for Ms Sax meets the stringent standard required to depart from open justice principles.

[70] The fact that a decision contains personal health information does not on its own justify name suppression. The requirement to show that adverse consequences are

exceptional remains. See *Jones v Waitemata District Health Board* [2014] NZHRRT 52 at [50].

[71] Nor does the fact that Ms Sax's health issues may be exacerbated by further proceedings mean the threshold for non-publication is met for the reasons given by the Court of Appeal in *Sax v Simpson* [2015] NZCA 222 at [12]:

> Ms Sax has stressed the impact that publication will have or has had on her life – she submits that, among other consequences, her salary and other forms of remuneration such as sponsorship agreements have been decreased, that a stress-related condition has been worsened and that she has suffered emotional harm. We do not accept that these consequences are sufficiently out of the ordinary to justify suppression, or that they are remediable by the orders Ms Sax seeks; on her own evidence the damage has already been done.

[72] In this case, as in *Sax v Simpson* [2015] NZCA 222, the consequences for Ms Sax are not sufficiently out of the ordinary so as to displace the open justice principle. Further, as the Court of Appeal also noted in that case at [9], the restrictions on publication that apply to Family Court proceedings do not apply when the same factual context is relied on in proceedings in other courts. That applies equally to claims in this Tribunal.

[73] Finally, any reference to private health information or other private information in this decision is confined. For that reason also, there is no proper basis to depart from the open justice principles identified above.

COSTS

[74] No application for costs has been made and it is our view that costs are not appropriate in this case.

ORDERS

[75] The following orders are made:

[75.1] The proceeding *Sax v Commissioner of Police* HRRT 007/2015 is struck out in its entirety.

[75.2] The interim orders contained in the *Minute* of 3 July 2015 are discharged.

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Ms MG Coleman **Deputy Chairperson**	**Dr SJ Hickey MNZM,** **Member**	**Ms S Stewart,** **Member**