

Reference No. HRRT 035/2017

UNDER THE PRIVACY ACT 2020

BETWEEN KARL NUKU

PLAINTIFF

AND COMMISSIONER OF POLICE

DEFENDANT

AT Wellington

**BEFORE:**

Ms MG Coleman, Deputy Chairperson  
Dr SJ Hickey MNZM, Member  
Ms NJ Baird, Member

**REPRESENTATION:**

Mr K Nuku on his own behalf  
Ms K Laurenson and Mr G Taylor for defendant

**DATE OF HEARING:** On the papers

**DATE OF DECISION:** 19 January 2023

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

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**BACKGROUND**

[1] On 9 June 2016, Mr Nuku made a request under the Privacy Act 1993 (Privacy Act) to the Police for access to a number of Crown and defence exhibits. Police provided some material but withheld other information under s 29 of the Privacy Act, including information relating to one of the witnesses at his trial who has permanent name suppression.

[2] Mr Nuku complained to the Office of the Privacy Commissioner and, subsequently, on 26 June 2017, filed a claim in this Tribunal against the Commissioner of Police (Police).

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<sup>1</sup> [This decision is to be cited as *Nuku v Police (Strike-Out)* [2023] NZHRRT 1.]

Mr Nuku alleged that the Police decision to withhold material was in breach of the Privacy Act. Attached to his claim was correspondence he had with the Office of the Privacy Commissioner that referred to the witness by their real name.

[3] On 18 August 2017, counsel for the defendant filed a memorandum in the Tribunal drawing its attention to the permanent name suppression order made in the High Court. The Tribunal issued an interim non-publication order. See *Nuku v Commissioner of Police (Interim Non-Publication Order)* [2017] NZHRRT 320.

[4] Mr Nuku unsuccessfully appealed the Tribunal's interim order to the High Court. See *Nuku v Police Commissioner* [2018] NZHC 36. Following the High Court decision in which the Court held at [23] that compliance with the non-publication order imposed by Woolford J in that Court was mandatory and operated to prevent the publication of the witness' name, the Tribunal reconsidered the need for its orders. See *Nuku v Police Commissioner (Reconsideration of Non-Publication Order)* [2018] NZHRRT 16.

[5] Since that reconsideration decision, which was issued on 24 April 2018, no further steps to advance the proceeding have been taken by Mr Nuku. Nor did the Tribunal convene a case management conference (as it ordinarily would do) due to its backlog of work, the reasons for which were set out in *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8 at [2].

[6] Given the long period of inactivity, on 29 August 2022 the Tribunal issued a *Minute* directing that Mr Nuku advise the Tribunal in writing by 29 November 2022 if he wished to continue his claim. He did not do so.

[7] On 1 December 2022, the Tribunal issued a further *Minute* indicating that it would consider striking out the claim unless Mr Nuku advised the Tribunal in writing by 22 December 2022 that he wanted to pursue it. No communication was received.

[8] In the same *Minute*, the parties were also invited to comment on the appropriateness of the Tribunal determining the strike out issue on the papers, as is required by the Human Rights Act 1993 (HRA), s 104(4B). Neither party took the opportunity of doing so.

### SHOULD THE CLAIM BE STRUCKOUT?

[9] The Tribunal's power to strike out proceedings is set out in the HRA, s 115A:

**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.

[12] The relevant ground in this instance is s 115A(1)(d).

[13] Recently, in *Gwizo v Attorney-General* [2022] NZHC 2727 (*Gwizo*), the High Court provided guidance to the Tribunal when exercising its discretion to strike out a proceeding for an abuse of process. The Court noted that s 115A is equivalent to the strike out jurisdiction of the High Court under r 15.1 of the High Court Rules, so that the principles adopted by the High Court under r 15.1 inform the approach of the Tribunal to strike out decisions.

[43] The High Court's jurisdiction to strike out a proceeding as an abuse of process is available in several situations. Two are potentially relevant here. Each sets a high threshold.

[44] The first is where there has been a consistent failure to comply with court orders. This will be an abuse of process only where the failure is deliberate. Failures, even repeated ones, and especially where the plaintiff is a lay litigant, will not always be deliberate. They may be a result of ignorance, disorganisation or anxiety. However, a consistent failure in the face of repeated warnings will be regarded as deliberate, particularly where the plaintiff was conscious of the breach and chose to do nothing.

[45] The second is where a plaintiff lacks any intention of bringing the proceeding to a conclusion in a timely way. This may be evidenced by a long period of inactivity. [Footnotes omitted]

[14] The decision to strike out for an abuse of process involves a two-stage test. First, the Tribunal needs to determine whether there has been an abuse of process and, if so, whether it should exercise its decision to strike out the claim. See *Gwizo* at [47].

[15] While the High Court in *Yarrow v Finnigan* (2017) NZHC 1755 at [16] cautioned against courts being too ready to strike out proceedings in cases involving lay litigants, that caution is not apt in this case as it is apparent that Mr Nuku has lost interest in his claim. This is evident not only by the long period of inactivity but also by Mr Nuku's failure to take either of the recent opportunities offered to him to keep the claim alive. It follows that he lacks any intention to bring the proceeding to a conclusion in a timely way.

[16] In those circumstances, we find that to leave this proceeding on foot would amount to an abuse of the Tribunal's processes.

[17] We also determine it is appropriate for the Tribunal to exercise its discretion under s 115A(1)(d) to strike the claim out as Mr Nuku has shown no interest in progressing it. As we have said, to leave it extant would be an abuse of the Tribunal's processes.

### FORMAL ORDER

[18] Mr Nuku's claim against the Commissioner of Police is struck out in its entirety.

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<b>Ms MG Coleman</b>	<b>Dr SJ Hickey MNZM</b>	<b>Ms NJ Baird</b>
<b>Deputy Chairperson</b>	<b>Member</b>	<b>Member</b>