

Reference No. HRRT 018/2021

UNDER THE PRIVACY ACT 2020

BETWEEN WILLIAM CARRICK TIMMO

PLAINTIFF

AND ICL NZ LIMITED

FIRST DEFENDANT

AT AUCKLAND

BEFORE:

Ms K Anderson, Deputy Chairperson

Dr SJ Hickey, MNZM Member

Ms SP Stewart, Member

REPRESENTATION:

Mr WC Timmo (in person)

Mr J Cox for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 17 August 2023

DECISION OF TRIBUNAL STRIKING OUT THE CLAIM¹

[1] Mr Timmo's claim is an Information Privacy Principle 6 case (access to personal information). Specifically, Mr Timmo alleges that ICL NZ Ltd interfered with his privacy when it responded to Mr Timmo's requests for his personal information made on 7 August and 8 September 2020.

[2] Mr Timmo complained to the Office of the Privacy Commissioner and, subsequently, on 28 April 2021 filed his claim in the Tribunal.

[3] There has been no action taken by Mr Timmo for an extended period of time. Given this, the Tribunal must determine whether the claim has become an abuse of process and should be struck out under s 115A of the Human Rights Act 1993 (HRA).

¹ [This decision is to be cited as *Timmo v ICL NZ Limited (Strike-Out)* [2023] NZHRRT 23.]

BACKGROUND

[4] The initial case management conference relating to this proceeding was delayed at Mr Timmo's request, for health reasons. The initial case management conference was then convened on 9 August 2021.

[5] At that conference Mr Timmo advised that he was seeking legal representation and indicated that he expected his lawyer would file a notice of appearance in 10 – 15 days' time. Mr Timmo requested that timetable directions for the exchange of evidence not be made at that time but that a conference be convened after his lawyer was instructed. The Tribunal therefore ordered that any notice of appearance by Mr Timmo's legal counsel be filed by 30 August 2021.

[6] No notice of appearance by Mr Timmo's legal counsel was filed by the specified time (or subsequently).

[7] Mr Timmo filed a letter from his GP in late September 2021, which indicated Mr Timmo needed a period of 6 to 8 weeks "to resubmit his claim." That 6-week period expired on 5 November 2021. However, there was no further communication from Mr Timmo after that date.

[8] In a *Minute* dated 25 November 2022, directions were made requiring Mr Timmo to advise the Tribunal and counsel for the defendant by 23 December 2023 whether he intended to continue or discontinue his claim. If he intended to continue his claim, Mr Timmo was required to advise dates he would be available for a case management conference in January 2023.

[9] There was no communication from Mr Timmo in accordance with the November 2022 *Minute*.

[10] In the *Minute* dated 3 April 2023 the Tribunal provided Mr Timmo with a final opportunity to advise whether he wished to continue to prosecute his claim. Mr Timmo's final opportunity was to advise the Tribunal by 26 May 2023 whether he wished to continue or discontinue his claim. The *Minute* advised that failure to do so could result in his claim being struck out for want of prosecution, without further notice, under s 115A of the Human Rights Act (which applies to this claim under s 111 of the Privacy Act 2020).

[11] There was no communication from Mr Timmo in accordance with the April 2023 *Minute*.

JURISDICTION TO STRIKE OUT

[12] Pursuant to HRA, s 115A (which applies to these proceedings under s 111 of the Privacy Act 2020) the Tribunal has a power to strike out proceedings:

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

[13] The Tribunal can strike out a proceeding under HRA, s 115A(1)(d) if it is satisfied it is an abuse of process.

[14] The Tribunal's exercise of the discretion to strike out a proceeding for an abuse of process involves a two-stage test: whether there was an abuse of process; and if so, whether discretion should be exercised to strike out the proceeding, see *Gwizo v Attorney-General* [2002] NZHC 2717 (*Gwizo*).

[15] In *Gwizo*, the High Court noted the Tribunal's strike out jurisdiction under HRA, s 115A is equivalent to the strike out jurisdiction of the High Court under r 15.1 of the High Court Rules, so the principles adopted by the High Court under r 15.1 inform the approach of the Tribunal to strike out decisions. The High Court discussed the jurisdiction to strike out a proceeding under r 15.1 as an abuse of process in two situations as follows:

[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.

[46] A finding that there has been an abuse of process on either of these two grounds does not (in contrast to some of the other grounds for striking out a proceeding) require the defendant to show any prejudice from the plaintiff's failures or inactivity. [Footnotes omitted]

WHETHER THE CLAIM SHOULD BE STRUCK OUT

[16] The issues for the Tribunal are whether Mr Timmo's claim is an abuse of process and, if so, whether it should be struck out under HRA, s 115A(1)(d).

Whether there was an abuse of process

[17] As referred to above, the first issue is whether Mr Timmo's failure to progress his claim is an abuse of process. Relevant to this determination is the situation referred to in *Gwizo*, as set out above.

[18] The Tribunal is of the view that Mr Timmo lacks any intention to progress his claim, given the long period of inactivity by him on this matter. Mr Timmo has not taken any active step in this proceeding since the teleconference on 9 August 2021, 24 months ago. He has failed to comply with any of the directions of the Tribunal and has not sought further time to do so.

[19] Accordingly, the Tribunal is satisfied Mr Timmo's claim is an abuse of process.

[20] Having found Mr Timmo's claim is an abuse of process as he lacks any intention of bringing it to a conclusion in a timely manner the Tribunal considers it is appropriate to exercise its discretion to strike out the claim under HRA, s 115A(1)(d).

[21] 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 Timmo has either lost interest in his claim or is unable to progress it for reasons that have not been explained to the Tribunal. This is evident not only by the long period of inactivity but also by Mr Timmo's

failure to take the recent opportunity offered to him to keep his claim alive. It follows that he lacks any intention to bring the proceeding to a conclusion in a timely way.

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

[23] 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 Timmo has shown no interest in progressing it. As we have said, to leave it extant would be an abuse of the Tribunal's processes.

ORDER

[24] The following order is made:

[24.1] Mr Timmo's claim against ICL NZ Ltd is struck out in its entirety.

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Ms K Anderson
Deputy Chairperson

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Dr SJ Hickey MNZM
Member

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Ms SP Stewart
Member