

Reference No. HRRT 070/2021

UNDER THE PRIVACY ACT 2020

BETWEEN JASON SMITH

PLAINTIFF

AND GENESIS ENERGY LIMITED TRADING AS FRANK ENERGY

DEFENDANT

AT AUCKLAND

BEFORE:

Mr J S Hancock, Deputy Chairperson

Mr MJM Keefe QSM JP, Member

Ms S P Stewart, Member

REPRESENTATION:

Mr J Smith in person

Mr M Morgan in house counsel for the defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 25 August 2023

DECISION OF TRIBUNAL¹

[1] Mr Smith filed his statement of claim in the Tribunal on 10 December 2021. Mr Smith alleges Genesis Energy Limited, trading as Frank Energy (Frank Energy), interfered with his privacy by failing to provide him access to personal information and disclosing his personal information without his authorisation, in breach of Information Privacy Principles (IPPs) 6 and 11 of the Privacy Act 2020.

¹ [This decision is to be cited as *Smith v Genesis Energy Limited (Strike-Out)* [2023] NZHRRT 24]

[2] Frank Energy deny Mr Smith's claim and raise jurisdictional issues.

[3] Since filing his statement of claim, Mr Smith has failed to engage with the Tribunal in order to progress his claim further. The Tribunal must now determine whether Mr Smith's failure to progress his claim has become an abuse of process and should be struck out under s 115A of the Human Rights Act 1993 (HRA).

BACKGROUND

[4] On 14 July 2022, the Tribunal emailed the parties to inform them that a first case management teleconference had been scheduled for 16 August 2022. The purpose of the teleconference was to progress Mr Smith's claim to a hearing, including the arrangement of a timetable for filing the relevant documents.

[5] However, that teleconference was vacated as Mr Smith could not be contacted.

[6] In a *Minute* dated 3 October 2022, the Tribunal noted that it appeared that the mobile telephone and email address supplied by Mr Smith were no longer correct and that it was not aware whether the postal address remains as specified in his statement of claim. Mr Smith was reminded of his obligation to pursue his claim and make his contact details available so that pre-hearing teleconferences could be arranged. The Tribunal directed Mr Smith to supply current details of his postal address, mobile number, and email address by 4 November 2022.

[7] The Tribunal received no response from Mr Smith.

[8] In a *Minute* dated 29 November 2022, the Tribunal again noted that it appeared Mr Smith's contact details were no longer correct. The Tribunal observed that as it had not received any further contact from Mr Smith since he had filed his statement of claim it appeared that he may have abandoned his claim. It was recorded that failure by Mr Smith to provide his contact details placed his claim at risk of being struck out as being an abuse of process. However, the Tribunal gave Mr Smith another opportunity and directed him to provide details of his address for service by 23 December 2022.

[9] The Tribunal received no response from Mr Smith.

[10] In a *Minute* dated 4 May 2023 the Tribunal noted that, should the matter proceed to consideration of whether Mr Smith's claim should be struck out, that it intended to determine the matter on the papers. The Tribunal gave Mr Smith another opportunity to provide details of his address for service and directed him to do so by 26 May 2023. Further directions were made to the parties to file submissions on whether the claim should be struck out.

[11] Frank Energy filed submissions in support of strike out.

[12] The Tribunal received no response from Mr Smith.

[13] In summary, the Tribunal has received no contact from Mr Smith since he filed his statement of claim.

JURISDICTION TO STRIKE OUT

[14] 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

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

[16] 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 (Gwizo)*.²

[17] 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 proceedings. 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

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

Whether there was an abuse of process

[19] The first issue for the Tribunal to determine is whether Mr Smith's failure to progress his claim is an abuse of process. The relevant grounds in this case are the circumstances set out above in *Gwizo* at [45].

² *Gwizo v Attorney-General* [2022] NZHC 2717.

[20] Frank Energy made submissions in support of the claim being struck out on the basis of Mr Smith's lack of engagement in the matter. For completeness, the Tribunal notes Frank Energy's submission that there are also jurisdictional grounds supporting a strike out, regarding the issue of whether Mr Smith had first lodged complaints with the Office of the Privacy Commissioner regarding some of his alleged claims. The Tribunal acknowledges Frank Energy's submission on this issue but does not need to consider it for the purpose of determining whether an abuse of process has occurred.

[21] The Tribunal refers to Mr Smith's long period of inactivity since filing his claim. It has been well over 18 months since Mr Smith filed his claim on 10 December 2021. The Tribunal has heard nothing from him since then and it appears that he may have abandoned his claim.

[22] In these circumstances the Tribunal is satisfied that Mr Smith lacks any intention to bring the proceedings to a conclusion in a timely way. Accordingly, the Tribunal is satisfied Mr Smith's claim is an abuse of process.

Whether the Tribunal should exercise its discretion to strike out Mr Smith's claim

[23] The Tribunal must now consider whether to exercise its discretion to strike out the claim.

[24] Mr Smith is self-represented, and it is important that he is provided with an opportunity to have his claim heard. However, Mr Smith has been provided with ample opportunity to provide his current contact details and pursue his claim.

[25] As the Tribunal has repeatedly emphasised, Mr Smith is obliged to take steps to progress the claim that he has brought. As it currently stands, the matter has been unable to proceed to its first teleconference due to Mr Smith's failure to engage further with the Tribunal.

[26] Having found Mr Smith's claim is an abuse of process due to his lack of any intention of bringing it to a conclusion in a timely manner, in the circumstances the Tribunal considers that it is appropriate to exercise its discretion to strike out the claim under s 115A(1)(d) of the HRA. To leave the claim extant would be an abuse of the Tribunal's processes.

ORDER

[27] The following order is made:

[27.1] This proceeding, being Mr Smith's claim against Genesis Energy Limited (trading as Frank Energy), is struck out in its entirety.

.....
Mr J S Hancock
Deputy Chairperson

.....
Mr MJM Keefe QSM JP
Member

.....
Ms S P Stewart
Member