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| | Reference No. HRRT 013/2020 |
| UNDER | THE PRIVACY ACT 2020 |
| BETWEEN | ROSIE MORUNGA |
| | PLAINTIFF |
| AND | CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS |
| | DEFENDANT |

AT AUCKLAND

BEFORE:

Mr J S Hancock, Deputy Chairperson

Ms S Kai Fong, Member

Dr N R Swain, Member

REPRESENTATION:

Mr C J Tennet for plaintiff

Mr D P Neild and Ms V N Rea for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 18 September 2023

DECISION OF TRIBUNAL¹

[1] Ms Morunga filed her statement of claim in the Tribunal on 19 March 2020. Ms Morunga alleges that the Department of Corrections (Corrections) interfered with her privacy by not responding to her request for personal information within the required timeframe under the Privacy Act 1993 (PA93) and by withholding certain personal information from her in breach of Information Privacy Principle 6 (IPP6) of the PA93.

¹ [This decision is to be cited as *Morunga v Chief Executive of the Department of Corrections (Strike-Out)* [2023] NZHRRT 28.]

[2] In its statement of reply dated 20 July 2020; Corrections admitted that it had failed to respond to Ms Morunga's request for personal information without undue delay but deny there was any other interference with Ms Morunga's privacy.

[3] However, since filing her claim, Ms Morunga has failed to respond to repeated timetabling directions of the Tribunal. In a *Minute* dated 8 May 2023, the Tribunal provided Ms Morunga with a final opportunity to comply with its timetabling directions or face the possibility that her claim will be struck out as an abuse of process under s 115A (1) (d) of the Human Rights Act 1993 (HRA).

[4] Ms Morunga has not responded to the Tribunal's directions in its *Minute* of 8 May 2023. As a result, the Tribunal must determine whether Ms Morunga's claim has become an abuse of process and should be struck out.

BACKGROUND

[5] The Tribunal held its first teleconference with the parties on 30 September 2020 to agree to a timetable for the steps required to be taken for the proceeding to be ready for a hearing. The issues for determination and a timetable for the proceeding was agreed to by the parties. In a *Minute* dated 30 September 2020 following the teleconference, the Tribunal issued timetable directions to the parties.

[6] However, Ms Morunga did not comply with the first step in the timetable which was to file and serve her evidence by 27 November 2020, nor did she seek any extension to the timetable. Following enquiries from the Tribunal, her lawyer Mr Tennet advised the Tribunal that she had recently had a baby and would be unable to prepare her brief of evidence until the new year.

[7] No further communication was received from Ms Morunga. In a *Minute* dated 19 March 2021, the Tribunal accordingly directed that the timetable be abandoned, and that Ms Morunga file a memorandum by 1 April 2021 setting out a proposed amended timetable.

[8] Ms Morunga did not comply with this direction.

[9] The Tribunal convened a further teleconference on 14 July 2021, so that the parties could agree to an amended timetable. At the teleconference Mr Tennet informed the Tribunal that he had been unable to obtain instructions from Ms Morunga on the matter. In a *Minute* dated 14 July 2021 the Tribunal issued further directions that Mr Tennet file and serve a memorandum of counsel advising whether Ms Morunga wishes to continue with the proceeding and next steps.

[10] Ms Morunga complied with this direction and filed a memorandum of counsel dated 9 September 2021 proposing an updated timetable. At the teleconference that followed on 1 October 2021, the parties agreed on that timetable. In a *Minute* issued that same day, the Tribunal issued new timetable directions to the parties.

[11] Ms Morunga again did not comply with the first step of the timetable which was to file and serve her evidence by 22 October 2021, nor did she respond to a follow up enquiry by the Tribunal.

[12] In a *Minute* dated 4 November 2021, the Tribunal placed Ms Morunga on notice that her claim was at risk of being struck out for failure to progress it. The Tribunal directed that the updated timetable be abandoned and that Ms Morunga file and serve her written statements of evidence by 17 December 2021. No further steps were timetabled beyond that requirement.

[13] The proceeding got back on track for a brief period following this direction. On 25 March 2022 Ms Morunga filed and served her written statement of evidence. A new timetable was agreed to by the parties and recorded by the Tribunal in a *Minute* dated 7 April 2022.

[14] Corrections subsequently sought four extensions to the filing of its written evidence. Ms Morunga did not oppose these extensions. Corrections eventually filed and served its written evidence on 23 September 2022.

[15] This followed a request by Corrections for an extension on 30 August 2022. That same day Mr Tennet informed the Tribunal that the extension was not opposed. This was last time the Tribunal heard from the plaintiff.

[16] In a *Minute* dated 19 December 2022, the Tribunal observed that it was unclear as to whether Ms Morunga still wished to proceed. The Tribunal reminded Ms Morunga that, having brought the claim, she was obliged to progress it. Ms Morunga was also cautioned that her continued failure to meet timetabling directions placed her claim at risk of being struck out. The Tribunal directed her to file and serve the common bundle and any reply evidence by 25 February 2023.

[17] Ms Morunga did not comply with this direction and did not respond to an email from the Tribunal dated 29 March 2023 asking for the common bundle to be filed.

[18] The Tribunal's *Minute* dated 8 May 2023 provided Ms Morunga with a final opportunity to file the common bundle and any reply evidence by 9 June 2023 or risk her claim being struck out as an abuse of process. The parties were also directed to provide submissions on the issue of strike out in the event Ms Morunga was unable to meet her timetable commitments.

[19] Ms Morunga has not complied with these directions and has not responded to the Tribunal further. Corrections has filed submissions in support of the Tribunal striking out the proceedings.

JURISDICTION TO STRIKE-OUT

[20] Pursuant to HRA, s 115A (which applies to these proceedings under s 89 of the PA93) the Tribunal has the 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

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

[22] 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

[23] In *Gwizo*, the High Court confirmed 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 2016. Therefore, 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

[24] The issues for the Tribunal to determine are whether Ms Morunga'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

[25] The first issue is whether Ms Morunga's failure to progress her claim is an abuse of process. The relevant grounds in this case are those set out above in *Gwizo* at [45]. That is, whether Ms Morunga lacks any intention of bringing the proceeding to a conclusion in a timely way.

[26] In submissions in support of Ms Morunga's claim being struck out as an abuse of process, Corrections refer to several recent decisions of the Tribunal striking out proceedings in circumstances where a plaintiff has failed to comply with or respond to repeated timetable directions.³ Corrections submit that, in addition to delay, Ms Morunga's non-compliance with those directions has caused it and the Tribunal to undertake "unnecessary communication and administration" over the course of the proceeding.

[27] Ms Morunga has not responded to the Tribunal's directions providing her with the opportunity to do so. It appears that she may have abandoned her claim.

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

³ Such as *Boyd v Legacy Church and Legal Housing* [2023] NZHRRT 2, *Kropelnicki v Wellington City Council* [2021] NZHRRT 30, *Gwizo v Attorney-General (Strike-Out Application)* [2021] NZHRRT 20; and *Taylor v Department of Corrections* [2020] NZHRRT 42.

[28] The Tribunal refers to Ms Morunga's long period of inactivity since 30 August 2022. She has not taken any steps to progress her claim and has not complied with three specific timetable directions issued by the Tribunal in Minutes since then. We also note Ms Morunga's non-compliance with several timetable directions issued from 30 September 2020 and throughout 2021.

[29] In these circumstances, the Tribunal is satisfied that Ms Morunga lacks any intention to progress her claim to a conclusion in a timely way. Accordingly, we find that her claim is an abuse of process.

Whether the Tribunal should exercise its discretion to strike out Ms Morunga's claim

[30] The Tribunal must now consider whether to exercise its discretion to strike out the claim. In doing so, we have considered the following factors:

[32.1] Ms Morunga's obligation as plaintiff to progress her claim.

[32.2] Any prejudice should the proceeding be struck out.

Ms Morunga's obligation as plaintiff to progress her claim

[31] We note that not all the delays over the course of this proceeding have been Ms Morunga's doing. Between May and September 2022 Corrections sought, and were granted, four extensions to the timeframe for filing its evidence. Ms Morunga did not oppose these extensions.

[32] As Ms Morunga is bringing this proceeding, the obligation is upon her to progress it by meeting her commitments under the timetable she has agreed to, a point that the Tribunal has emphasised to her on several occasions. She has not met this obligation, despite the Tribunal providing her with multiple opportunities to do so, including a final opportunity in its *Minute* of 8 May 2023.

Any prejudice should the proceeding be struck out

[33] A strike-out of the proceeding will have a prejudicial impact upon Ms Morunga by removing her opportunity to have the Tribunal determine the agreed issues, including whether an interference with privacy has occurred and, if so, whether remedies should be awarded.

[34] However, despite Corrections' admission, the Tribunal cannot determine Ms Morunga's claim and the remedies she is seeking if she lacks any intention to progress her proceeding to its conclusion.

[35] Furthermore, the Tribunal has held that failure by a party to comply with an order or direction of the Tribunal causes prejudice to the other party.⁴ In addition, failure by a plaintiff to comply with multiple timetable directions without explanation causes a defendant significant prejudice as it requires the defendant to, repeatedly and for an extended period, remain ready to defend the claim.⁵

⁴ *Taylor v Department of Corrections (Strike Out Application)*, above n 3, at [12].

⁵ At [16].

[36] In this case, Ms Morunga has not responded to the timetable directions of the Tribunal for approximately a year, including a final opportunity to comply.

[37] Having found Ms Morunga's claim to be an abuse of process due to her lack of any intention of bringing it to conclusion in a timely manner, on balance the Tribunal is of the view it is appropriate to exercise its discretion to strike out the claim under s 115A (1) (d) of the HRA. Continuation of the proceeding would amount to an abuse of the Tribunal's processes.

[38] The Tribunal notes that Corrections will not be seeking costs.

ORDER

[39] The following order is made:

[39.1] This proceeding, being Ms Morunga's claim against the Chief Executive of the Department of Corrections, is struck out in its entirety.

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Mr J S Hancock
Deputy Chairperson

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Ms S Kai Fong
Member

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Dr N R Swain
Member