

Reference No. HRRT 035/2015

UNDER THE PRIVACY ACT 1993

BETWEEN DEBORAH WAXMAN

PLAINTIFF

AND JITENDRA PAL

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms LJ Alaeinia, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Dr D Waxman in person

Dr J Pal in person

DATE OF HEARING: 30 and 31 May 2016

DATE OF DECISION: 11 August 2016

DECISION OF TRIBUNAL¹

Introduction

[1] In these proceedings Dr Waxman alleges that without her knowledge and consent her then employers (Dr Jitendra Pal and his wife Dr Promila Pal) recorded telephone calls made by Dr Waxman from their respective surgeries at a time when she was retained as their locum. The defence is that from the very outset of her employment, Dr Waxman was told in explicit terms both surgeries had a policy of automatically recording all inwards and outwards telephone calls on surgery lines. Dr Waxman disputes this claim. Because of the sharp conflict in evidence it will be seen the outcome of this case turns largely on the question whether Dr Waxman has discharged her burden of proof as plaintiff.

¹ [This decision is to be cited as: *Waxman v Pal* [2016] NZHRRT 28.]

Background circumstances

[2] Dr Jitendra Pal, a doctor of medicine, has a sole general practice in Panmure. His wife, Dr Promila Pal, also a doctor of medicine, has a sole general practice in Howick. Dr Waxman, who also is a doctor of medicine, was contracted to act as a locum for both practices so that Dr Pal and his wife could attend to their young children. The arrangement was for Dr Waxman to work half a day each week at each of the Panmure and Howick surgeries. Dr Waxman's employment commenced on the morning of 29 October 2013 at the Panmure surgery.

[3] Both practices are supported by the same computer and management systems. Telecommunication is by VOIP (voice over internet protocol). It is through the VOIP system that all incoming and outgoing calls at the two surgeries are automatically recorded.

[4] On 3 December 2013 Dr Waxman's employment was summarily terminated by Dr Jitendra Pal after he discovered in the Panmure computer system a download folder containing some 600 pages of files relating to persons who were not patients of the two practices. Rather they were clients of Best Doctors, a company which facilitates access to medical specialists who then provide a second opinion and medical advice. Dr Pal concluded that while in attendance at the Panmure and Howick surgeries Dr Waxman had been simultaneously working for Best Doctors. It was not work or research linked to any of the patients of the two surgeries nor was it voluntary work. It was commercial work done in time for which Dr Waxman was already been paid to be locum at the two surgeries.

[5] In the opinion of Dr Jitendra Pal the actions of Dr Waxman negatively impacted on the practices in terms of extra waiting time for patients, inattentiveness to their problems and failure to attend to paperwork such as lab results and ACC queries. He felt patient care had been compromised by Dr Waxman's actions. He was also concerned at the breach of the privacy of the clients of Best Doctors in that their private files were now located on the computer of a third party. The correctness of Dr Pal's conclusions are not an issue the Tribunal is required to determine.

[6] Dr Jitendra Pal sent an email to Dr Waxman asking that she immediately cease working. Dr Waxman emailed back asking for four weeks pay. Dr Pal contended he was entitled to terminate Dr Waxman's employment without notice and without pay.

[7] Dr Waxman took her case to the Disputes Tribunal. In a decision given on 17 February 2014 Dr Jitendra Pal was ordered to pay Dr Waxman \$7,084.00.

[8] Because Dr Jitendra Pal believed the tribunal hearing had taken place in his absence (the originally notified date of hearing was apparently changed) he appealed to the District Court. In support of that appeal he prepared a detailed defence referenced to the Best Doctor documents downloaded on the practice computer and to 22 transcripts of the 27 telephone calls made by Dr Waxman while at the Panmure surgery. By these means Dr Pal intended demonstrating the dismissal was justified and that no award in favour of Dr Waxman should be made. Unfortunately for Dr Pal the appeal was dismissed as the limited permitted grounds of appeal to the District Court from the Disputes Tribunal do not allow a re-litigation of the evidence.

[9] Be that as it may, the significant point for present purposes is that Dr Waxman was served with the appeal papers filed by Dr Jitendra Pal. This occurred on 29 March 2014. On sighting the transcripts she was shocked to discover that her private telephone calls

made from the surgeries had been recorded and that transcripts of those private conversations were in existence. The subject matter of the telephone calls included a pending tax audit, accounting matters, personal financial affairs, her dealings with a motor vehicle dealership and complete details of her credit card. There were also recordings of her discussions with her three young children. Dr Waxman told the Tribunal that the very subject matter of the telephone discussions underlined she was ignorant of the fact that the calls were being recorded. She said the interception and recording of her private affairs had caused intense humiliation and embarrassment. She had to cancel her credit card.

[10] It must be emphasised that in the present proceedings under the Privacy Act the Tribunal is not called on to determine the rights and wrongs of the circumstances in which Dr Waxman's employment was terminated or to question the outcome of the proceedings before the Disputes Tribunal and the District Court.

[11] In these present proceedings under the Privacy Act Dr Waxman alleges there was a breach of information privacy Principles 1 to 4 and 11. By way of remedy she seeks (inter alia) an apology from Dr Jitendra Pal as well as damages of \$4,000 for humiliation, loss of dignity and injury to feelings.

[12] Against this general background it is now possible to address in greater detail the evidence heard by the Tribunal on the question whether Dr Waxman was told all incoming and outgoing telephone calls at the two surgeries were automatically recorded.

The recording of telephone calls – the evidence called by Dr Waxman

[13] Dr Waxman told the Tribunal she is certain that at no time was she ever told by Dr Jitendra Pal or by Dr Promila Pal or by any member of their staff that all incoming and outgoing telephone calls on surgery lines were automatically recorded.

[14] To support her case Dr Waxman intended calling two witnesses to give oral evidence at the hearing. The first witness was Ms ME Midgley who was the nurse at the Panmure surgery from October 2009 to February 2014. In a sworn statement Ms Midgley said she had never been made aware of any policy regarding the monitoring of any or all telephone conversations. Unfortunately Ms Midgley was unable to attend the hearing to give evidence in person owing to the fact she had been scheduled for surgery. At the request of Dr Waxman the Tribunal received in evidence Ms Midgley's sworn statement (a rather brief document) subject to any submissions made by Mr Dr Jitendra Pal as to the weight which could be given to that statement in the absence of an opportunity to cross-examine Ms Midgley and bearing in mind the fact the Tribunal had not had opportunity to assess her demeanour.

[15] The second witness was Ms G Butler who at the relevant time worked as medical receptionist at the Howick practice. In her written statement filed in advance of the hearing she said she was not aware telephone calls were recorded and had never been told by Dr Jitendra Pal, Dr Promila Pal or any other receptionist (particularly, Ms M Wilson-Hoyes) that incoming and outgoing calls were recorded.

[16] While Ms Butler was in attendance when the hearing commenced at 10am on 30 May 2016 she subsequently left the courthouse and returned to work, apparently to deal with an emergency and could not return. In the circumstances the Tribunal agreed to receive her evidence by audio-link, subject to any submissions going to weight. Ms Butler duly gave her evidence by audio-link in line with her written statement and was

cross-examined by Dr Jitendra Pal. The Tribunal did not, however, have the advantage of observing Ms Butler while she gave her evidence.

The recording of telephone calls – the evidence called by Dr Pal

[17] Dr Jitendra Pal and his wife gave evidence. In addition two other witnesses were called for the defence.

[18] Ms C Insley told the Tribunal she worked at the Panmure surgery and occasionally at Howick from 5 April 2011 until she left on 30 August 2013 to live in the South Island. She started as medical receptionist but later became the practice manager. As such she was responsible for ensuring the surgeries met all the guidelines of Cornerstone (described below) and the requirements of various regulatory bodies such as the District Health Board. She was involved in installing the computer system and the VOIP telephone system when at the end of 2011 the surgeries at Panmure and Howick moved premises. At the time three persons worked at Panmure, namely Dr Jitendra Pal, Ms Midgley (part time nurse) and herself (Ms Insley). All three were aware the phone system could and did record all calls and all staff were made aware that the telephones would record all conversations. Ms Insley made sure she communicated this fact to all new staff members as they joined. She is sure Dr Jitendra Pal mentioned the new telephone policy during quiet times in the surgery, perhaps at morning tea when it was common for information of this nature to be passed on. In her view it was clearly understood by all that the recordings would only be listened to in the event of a problem. It can be seen from the dates given earlier in this paragraph that Ms Insley had left the practice prior to Dr Waxman commencing work on 29 October 2013.

[19] Ms M Wilson-Hoyes gave evidence that she worked as a medical receptionist/Reception Manager at the Panmure surgery from 14 August 2013 to 20 February 2015. She orientated Ms G Butler the day before Ms Butler commenced at the Howick surgery and told her that all telephone calls were recorded.

[20] Ms Wilson-Hoyes also told the Tribunal that when on 29 October 2013 Dr Waxman commenced work at the Panmure surgery she (Ms Wilson-Hoyes) told Dr Waxman in clear terms that all incoming and outgoing phone calls on the surgery lines were recorded. On this point Ms Wilson-Hoyes was challenged by Dr Waxman in cross-examination but was not shaken. She had a clear recollection of telling Dr Waxman on this first day that the surgery system recorded all telephone calls.

[21] The evidence of Dr Jitendra Pal was that when Dr Waxman commenced on 29 October 2013 at Panmure he (Dr Pal) gave her a general introduction and after this she was given a full orientation by Ms Wilson-Hoyes. He accepts he did not personally tell Dr Waxman incoming and outgoing calls were automatically recorded. He did, however, point out that office policy and procedure was held on the computer system and in addition hard copy manuals containing the same information were available at both surgeries close to the receptionist workstation. It was his expectation Dr Waxman would familiarise herself with the policy and procedure sections of the e-manual or of its hard copy version.

[22] The telephone call recording policy of the two practices, as set out in both the hard copy and e-versions of the office policy and procedure manual, was in the following terms:

Telephone Call Recording Policy

Panmure Surgery and Selwyn House Medical Centre have a **VOIP-based phone system** that allows users at both locations to appear as extensions. It allows inward calls made to our public phone numbers ... (panmure) and ... (howick) to be diverted to other extensions if one is busy.

All inwards and outwards calls made from the extensions are **automatically recorded and automatically archived** as voice files within our secure email archives. They are held for a period of **five years** after which they are automatically deleted.

The recordings are not accessed on a regular basis. They may be used to investigate compliance with the clinics work ethic requirements, specifically that work phone be not be used for personal communication. They may be used to support the investigation of complaints, to ensure that the clinics comply with regulatory procedures and to provide evidence for any regulatory investigation.

Procedures for managing and releasing call recordings:

1. The recordings shall be stored securely, with access to the recordings controlled and managed by the designated Privacy Officer.
2. Access to the recordings is only allowed to satisfy a clearly defined business need.
3. Browsing and recordings can be done upon a valid documented need by the Privacy Officer only.
4. The Privacy Act allows persons access to information that we hold about them. This includes recorded telephone calls. Therefore, the recordings will be stored in such a way to enable the Privacy Officer to retrieve information relating to one or more individuals as easily as possible.
5. In the case of a request from an external body in connection with the detection or prevention of crime eg the Police, the request should be forwarded to the Privacy Officer who will complete the request for a call recording.

[Emphasis in original]

[23] Dr Promila Pal told the Tribunal that approximately ten days before Dr Waxman commenced work as a locum she met with her at the Howick surgery and provided a detailed introduction to office procedures and the computer system. She emphasised both surgeries were paperless and accredited by Cornerstone, an accreditation programme specifically designed by the Royal New Zealand College of General Practitioners for general practices in New Zealand. It is a combined quality improvement and quality assurance process which allows a practice to measure itself against a defined set of standards.

[24] Dr Pal told the Tribunal that in the course of this meeting a discussion took place about a patient who had wanted a particular form filled in and Dr Waxman had remarked that on occasion patients would say different things to different persons. Dr Pal had responded that in such a case it was always possible to listen to the telephone call to check what the patient had actually said. She told Dr Waxman that all incoming and outgoing calls on surgery lines were recorded.

[25] In answer to questions from the Tribunal Dr Promila Pal said that the purposes served by the recording policy included quality control, checking what a patient or caller may have said during a telephone discussion (and what they had been told by the surgery) and whether (for example) lab results given over the telephone had been accurately conveyed and to the correct person. Dr Pal did give other examples but by and large her description of the purposes fitted that given in the telephone call recording policy namely, supporting the investigation of complaints, ensuring the clinics comply with regulatory procedures and to provide evidence for any regulatory investigation.

[26] Regarding the sworn statement made by Ms Midgley that she was not made aware of any policy regarding the recording of telephone calls Dr Promila Pal said this was not correct. She (Dr Pal) remembered telling Ms Midgley about the recording policy and there was no way Ms Midgley could say she didn't know.

EVIDENCE - ASSESSMENT

[27] As can be seen, the Tribunal heard strikingly different accounts as to whether Dr Waxman was told incoming and outgoing calls at the two surgeries were recorded. Dr Waxman said she was not so told and the Panmure nurse (Ms Midgley) and the Howick receptionist (Ms Butler) said they were not aware of the policy. On the other hand Dr Promila Pal and Ms Wilson-Hoyes both said, in plain terms, they told Dr Waxman at the Howick and Panmure inductions respectively. The evidence of Ms Insley was that Ms Midgley would have known of the policy, having been employed at the Panmure surgery at the time the new system was installed. Thereafter Ms Insley had told all new staff members, as they joined, of the policy. Ms Wilson-Hoyes said she had told Ms Butler of the policy the day before Ms Butler commenced at Howick.

[28] For her part Dr Waxman's evidence was clear and without ambiguity when she said she had never been told of the recording policy. She correctly points to the fact that the very subject matter of the 22 transcripts is suggestive of a person not aware her calls were being recorded. Unfortunately for Dr Waxman her two witnesses were less than helpful. Ms Midgley was unable to attend the hearing and because her evidence has not been tested by cross-examination we attach little weight to it. The evidence of Ms Butler was regrettably given by audio-link, depriving the Tribunal of the opportunity of seeing her in person. Demeanour can play a role in the assessment of the credibility of a witness and the weight to be given to that person's evidence.

[29] By way of contrast the Tribunal had the advantage of seeing and hearing Ms Insley and Ms Wilson-Hoyes give evidence, particularly their response when vigorously challenged by Dr Waxman in cross-examination. We found both witnesses to be clear, careful, precise, persuasive, unrehearsed and without sign of coaching. In responding to Dr Waxman's questions, Ms Wilson-Hoyes in particular was careful to stress she specifically recalled that when orientating Dr Waxman at the Panmure surgery she told Dr Waxman all telephone calls were recorded. .

[30] We turn now to the evidence given by Dr Promila Pal. She also said she told Dr Waxman all telephone calls were recorded. She was able to remember making this comment in the context of an on-site meeting at the Howick surgery when explaining (with apparent pride) the then recent upgrading of the two practices to a paperless environment and to benchmarking against Cornerstone standards. There was also a family connection which assisted Dr Pal remembering the occasion. It was in this context that when Dr Waxman made a remark about patients saying different things at different times Dr Pal had told Dr Waxman that as all incoming and outgoing telephone calls were recorded it would be possible to check what had in fact been said.

[31] It is correct there were some differences in the evidence given by Dr Jitendra Pal and Dr Promila Pal but in context we saw those differences as indicative of the fact Dr Promila Pal and her husband gave their evidence independently of each other and without collaboration.

Conclusion

[32] Overall, Dr Jitendra Pal, his wife, Dr Promila Pal, Ms Insley and Ms Wilson-Hoyes impressed as credible, reliable witnesses. For the reasons given we attach little or no weight to the evidence given by Ms Midgley and Ms Butler. Dr Waxman was a sincere witness but on this point a mistaken witness. We have not to any degree been persuaded to accept the central premise of her case, namely that she was not told incoming and outgoing telephone calls from the surgeries were recorded thereby leading to an interference with her privacy.

THE PRIVACY PRINCIPLES – ANALYSIS

[33] In view of our finding on the central issue in this case the issues raised by the information privacy principles can be addressed in abbreviated form. Dr Waxman alleges breach of Principles 1 to 4 and 11.

[34] Principle 1 requires information to be collected for a lawful purpose connected with a function or activity of the agency and the collection of the information must be necessary for that purpose. On the facts, it is established the information collected through the recording of the telephone calls was information necessary to ensure compliance by the clinics with regulatory procedures, to provide evidence for any regulatory investigation, to investigate complaints, to check what a patient or caller may have said during their telephone discussion and what they may have been told by the doctor, nurse or receptionist, whether test results had been accurately given over the telephone and had been accurately conveyed. There is little doubt the information was collected for lawful purposes connected with the function or activity of the surgeries. On the evidence we have heard Principle 1 was not breached.

[35] Principle 2 stipulates that where an agency collects personal information, the information must be collected directly from the individual concerned. The evidence clearly establishes the information was collected directly from Dr Waxman.

[36] Principle 3 requires that where an agency collects personal information directly from the individual concerned, the agency must take such steps as are, in the circumstances, reasonable to ensure (inter alia) that the individual concerned is aware of the fact that the information is being collected and the purpose for which the information is being collected:

Principle 3

Collection of information from subject

- (1) Where an agency collects personal information directly from the individual concerned, the agency shall take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware of—
 - (a) the fact that the information is being collected; and
 - (b) the purpose for which the information is being collected; and
 - (c) the intended recipients of the information; and
 - (d) the name and address of—
 - (i) the agency that is collecting the information; and
 - (ii) the agency that will hold the information; and
 - (e) if the collection of the information is authorised or required by or under law,—
 - (i) the particular law by or under which the collection of the information is so authorised or required; and
 - (ii) whether or not the supply of the information by that individual is voluntary or mandatory; and
 - (f) the consequences (if any) for that individual if all or any part of the requested information is not provided; and
 - (g) the rights of access to, and correction of, personal information provided by these principles.

- (2) The steps referred to in subclause (1) shall be taken before the information is collected or, if that is not practicable, as soon as practicable after the information is collected.
- (3) An agency is not required to take the steps referred to in subclause (1) in relation to the collection of information from an individual if that agency has taken those steps in relation to the collection, from that individual, of the same information or information of the same kind, on a recent previous occasion.
- (4) It is not necessary for an agency to comply with subclause (1) if the agency believes, on reasonable grounds,—
 - (a) that non-compliance is authorised by the individual concerned; or
 - (b) that non-compliance would not prejudice the interests of the individual concerned; or
 - (c) that non-compliance is necessary—
 - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) for the enforcement of a law imposing a pecuniary penalty; or
 - (iii) for the protection of the public revenue; or
 - (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
 - (d) that compliance would prejudice the purposes of the collection; or
 - (e) that compliance is not reasonably practicable in the circumstances of the particular case; or
 - (f) that the information—
 - (i) will not be used in a form in which the individual concerned is identified; or
 - (ii) will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned.

[37] In the present case we have accepted that Dr Waxman was told the information was being collected. The purpose was self-evident, particularly in light of the observation made by Dr Waxman herself to Dr Promila Pal that patients sometimes said different things to different persons. In any event, it was reasonable that in the context of two small surgeries comprising in each case the doctor, a part-time nurse and a full-time receptionist that an incoming locum would familiarise herself with office policies and procedure, including the telephone call recording policy to which her attention had been drawn. Those policies and procedures were available either in e-format on the computer system or in hard copy at the reception stations. In our opinion the steps taken in the present case by Dr Jitendra Pal, Dr Promila Pal and Ms Wilson-Hoyes were, in the circumstances, reasonable to ensure the requirements of Principle 3 were met.

[38] Principle 4 states that personal information cannot be collected by unlawful means or by means which, in the circumstances, are unfair or which intrude to an unreasonable extent upon the personal affairs of the individual concerned. In the present case nothing unlawful, unfair or unreasonable has been established by Dr Waxman.

[39] Finally, with regard to Principle 11 it is required that personal information shall not be disclosed unless the agency believes on reasonable grounds that one or other of the circumstances listed in paras (a) to (i) apply. In the present case the disclosure occurred for the purpose of the intended appeal to the District Court. That being the case Principle 11(e)(iv) applied:

Principle 11
Limits on disclosure of personal information

An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—

- ...
 - (e) that non-compliance is necessary—
 - ...
 - (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or

Conclusion

[40] For the reasons given we conclude no breach of Principles 1 to 4 and 11 have been established by Dr Waxman. These proceedings must accordingly be dismissed.

COSTS

[41] Where a self-represented party is successful the only form of costs which can be awarded are disbursements, that is out of pocket expenses. In the present case such expenses would include the reasonable travel and accommodation costs incurred by Ms Insley and by Ms Wilson-Hoyes.

[42] If Dr Pal seeks reimbursement for such costs the following timetable is to apply:

[42.1] Dr Jitendra Pal is to file and serve his submissions within 14 days after the date of this decision. The submissions must include invoices or other documentation supporting the particular out of pocket expense for which a claim is made. The submissions for Dr Waxman are to be filed and served within a further 14 days with a right of reply by Dr Pal within seven days after that.

[42.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[42.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Mr RPG Haines QC
Chairperson

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Ms LJ Alaeinia
Member

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Mr BK Neeson JP
Member