**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2015] NZHRRT 35**

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| | **Reference No. HRRT 014/2014** |
| **UNDER** | **THE PRIVACY ACT 1993** |
| **BETWEEN** | **DIRECTOR OF HUMAN RIGHTS PROCEEDINGS** |
| | **PLAINTIFF** |
| **AND** | **DAVID JAMES CRAMPTON** |
| | **DEFENDANT** |

**AT WELLINGTON**

**BEFORE:**
**Mr RPG Haines QC, Chairperson**
**Ms WV Gilchrist, Member**
**Mr MJM Keefe JP, Member**

**REPRESENTATION:**
**Mr RW Kee, Director of Human Rights Proceedings with Ms JV Emerson**
**Ms L Caris and Mr J Miller for defendant**

**DATE OF HEARING:** **22, 23 and 24 June 2015**

**DATE OF DECISION:** **29 July 2015**

## DECISION OF TRIBUNAL

### Introduction

**[1]** Mr Crampton is a journalist by occupation. In early 2013 he was a member of the Executive Committee of the Massey University Extramural Students' Society (EXMASS), holding the office of Vice-President.

**[2]** By letter dated 15 March 2013 some of the members of the Executive Committee (including Mr Crampton) sent to the then President of EXMASS (who had held office for only 10 weeks) a "written warning" alleging she was not meeting certain performance

standards. The letter included information about the President of a personal and sensitive nature.

**[3]** A short time later, either in March 2013 or in early April 2013, Mr Crampton provided a copy of the warning letter to a reporter for Massive Magazine, Massey University's student magazine. The President did not become aware of this action until later and did not give her consent to the disclosure.

**[4]** On 16 April 2013 Massive Magazine published an article in print and online in which reference was made to the warning letter and an excerpt from it was quoted.

**[5]** In these proceedings brought pursuant to s 82(2) of the Privacy Act 1993 the Director of Human Rights Proceedings (the Director) alleges Mr Crampton breached information privacy Principle 11 which stipulates that an agency holding personal information must not disclose that information unless the agency believes, on reasonable grounds, one of the listed exceptions applies. The Director's case is that by disclosing the letter Mr Crampton interfered with the privacy of the President and that the Tribunal should grant the various remedies sought in the statement of claim filed on 20 May 2014. Mr Crampton's case is that there was no breach of Principle 11 because in terms of exception (a), he believed, on reasonable grounds, disclosure of the information was directly related to the purposes in connection with which the information was obtained.

**[6]** The primary issues in these proceedings are whether there was a breach of Principle 11 and if so, whether the Director has established an interference with the privacy of the aggrieved individual.

## Points relating to the evidence

**[7]** The Director tendered three witnesses. First, Ms JV Chapman, the President of EXMASS at the time and to whom the written warning was addressed. Second, Mr DL Peirse and third, Dr MRJ Morris. Because Mr Crampton agreed to the evidence of Mr Peirse and Dr Morris being read, only Ms Chapman gave oral evidence. For his part, Mr Crampton gave evidence. He also called two members of the (then) Executive Committee, namely Ms LD O'Dea (who gave evidence via Skype) and Ms MA Ward who gave evidence by way of audio-link.

**[8]** The Director made submissions on the admissibility of a number of documents included in Mr Crampton's bundle of documents. The Tribunal ruled the evidence was admissible under s 106(1)(d) of the Human Rights Act 1993 (incorporated into the Privacy Act by virtue of s 89 of that Act). However, in the final analysis little of assistance has been found in the challenged evidence.

**[9]** It should also be observed that much of the documentary evidence included in Mr Crampton's bundle of documents post-dates the disclosure of the warning letter and for that reason is not relevant. We therefore do not intend referring to this material except to the extent necessary to consider specific matters raised by the parties in relation to the legal issues to be addressed under the Privacy Act. Any other approach would inevitably draw the Tribunal into adjudicating on the internal divisions and politics of the students' society as they were in 2013.

## The two constitutions of EXMASS

**[10]** In the narrative which follows reference will be made to the constitution (rules) of the Massey University Extramural Students' Society Inc. At the relevant time there were two such constitutions. First, the original 1997 constitution registered under the

Incorporated Societies Act 1908 and second, the 2010 constitution which had not been registered at the time of the relevant events. Obviously only the 1997 constitution had legal force but as will be seen, the provisions of the two constitutions relevant to the present case were not materially different.

## THE DIRECTOR'S EVIDENCE

**[11]** As mentioned, the only oral evidence called by the Director was that given by Ms JV Chapman.

**[12]** Ms Chapman told the Tribunal she was President of EXMASS between January 2013 and October 2013, having been elected to that position unopposed.

**[13]** She said Mr Crampton showed animosity towards her from the outset. On the day she was sworn in as President Mr Crampton came down the hallway, said "nice suit" and then proceeded to pour a cup of coffee over her. Ms Chapman has no doubt this was not an accident. She mentioned also a meeting with Mr Crampton in Wellington shortly after she took up her position as President to discuss the year ahead. Mr Crampton told her she had come out of nowhere and did not deserve the job. When Ms Chapman told him that she had also been appointed to the position of Massey University Students Federation Coordinator, he became livid with anger. From that point on Mr Crampton's behaviour towards her became worse and worse. He telephoned her repeatedly and emailed her to the point of what Ms Chapman described as "extreme harassment", often using profanities or making threats. Ms Chapman and her staff received an average of 150 emails a week from Mr Crampton. He also harassed her at home in the evenings and weekends, forcing her to change her telephone numbers twice that year.

**[14]** In addition, Mr Crampton would daily write to and telephone a number of people at the University with complaints about Ms Chapman. She, in turn, received from the Vice-Chancellor, the Assistant Vice-Chancellor, the Registrar and many others complaints about his daily calls.

**[15]** By February 2013 Mr Crampton's behaviour had become so bad Ms Chapman sought legal advice and arranged for a trespass notice to be issued. In about late February or early March 2013 she unsuccessfully attempted to remove him from his position as Vice-President.

**[16]** On 15 March 2013 Ms Chapman received a three page letter headed "Written Warning". It was signed by Linda O'Dea, then a member of the Executive, purportedly on behalf of the EXMASS executive. It contained extensive and serious allegations relating to her performance and actions as President. It is not intended to reproduce the text of the letter here. It is sufficient to note the letter declared that it "serves as a notification you are not meeting the required performance expected as EXMASS President" and went on to detail extensive criticisms including:

> **[16.1]** A list of performance indicators allegedly not met by Ms Chapman;
>
> **[16.2]** A list of actions taken by Ms Chapman which were allegedly unconstitutional;
>
> **[16.3]** A list of sections from the Operations Document which Ms Chapman was alleged to have ignored; and

**[16.4]** Adverse comments about Ms Chapman's reporting skills, spelling and grammar.

**[17]** The letter ended with a list of four recommendations for Ms Chapman to "improve [her] performance within the next four weeks" and concluded with the statement:

> Within the **next four weeks**, we expect to see significant improvement in your performance. Any further incidents of the above nature will result in further action and can result in the Executive calling a Special General Meeting seeking no confidence in your capacity as President. [Emphasis in original]

**[18]** Without doubt the written warning contained personal information about Ms Chapman. In fairness to Mr Crampton, his statement of reply dated 5 June 2015 did not contest this fact.

**[19]** In Ms Chapman's view the written warning had no merit. She had only been in the role of President for 10 weeks and believes a group of friends on the Executive wrote the letter in retaliation for her attempts to get Mr Crampton removed from the Executive.

**[20]** Shortly after she received the written warning Ms Chapman was interviewed by Ms Yvette Morrissey (reporter) and Morgan Browne (editor) of Massive Magazine. Ms Morrissey had a copy of the letter and showed it to Ms Chapman, asking whether she had a response. Asked where she had obtained the letter Ms Morrissey said Mr Crampton had given her the copy.

**[21]** On 12 April 2013 Ms Chapman lodged a complaint with the Privacy Commissioner based on the release by Mr Crampton of the written warning to Ms Morrissey.

**[22]** At about this time Ms Chapman reached the view that neither Mr Crampton nor Ms O'Dea could remain as members of the Executive because, so she believed, they had failed to pay their membership fees. A letter explaining the reason for their "termination" of office was sent on 12 April 2013 to EXMASS members and stakeholders.

**[23]** On 16 April 2013 Massive Magazine published in print and online an article by Ms Morrissey under the heading "Vice-President 'Dismissed'" with the sub-heading "EXMASS In-Fighting Aired on Internet". The article gave extensive reportage to Mr Crampton's views on what was referred to in the article as his "unlawful dumping". The author of the article referred to the warning letter of 15 March 2013 and quoted excerpts from it. We set out only the preambular paragraph which precedes the excerpts:

> MASSIVE obtained a copy of this warning issued to Chapman on March 15. It notes that Chapman had breached several parts of the EXMASS constitution and the Incorporated Societies Act.
>
> It states that …

**[24]** Ms Chapman said her relationship with Mr Crampton deteriorated further from that point. Then on 23 April 2013 he arrived at her office and tried to confiscate her personal belongings. The Police were called and Ms Chapman sought legal advice about obtaining a restraining order under the Harassment Act 1997. A solicitor's letter was sent to Mr Crampton on 23 April 2013 putting him on notice that it was Ms Chapman's intention to apply for such order. In the event no application was in fact lodged because Ms Chapman was advised any order would probably not be granted as there had been only one act of violence in a 12 month period.

**[25]** Describing the impact on her of the written warning being made public, Ms Chapman said she felt humiliated and that her reputation for hard work and ethics had been irrecoverably damaged. Many people assumed the content of the written warning was true because of its official-seeming nature and its publication by the media. As a distance student representative her constituents could only read about her and make their judgment about her competence and service delivery based on what was in the media. There were about 17,000 students off-campus studying from a distance and they would only know about Ms Chapman from what they read. A deluge of emails from students followed. Some were in support but many were irate over what they assumed to be factual information from the article. Ms Chapman found it degrading to receive hate mail from strangers.

**[26]** Ms Chapman also said she lost confidence and felt people were embarrassed to be seen with her and turned against her. The negativity stemming from the publication of the letter made her seem like a liability, not an asset for EXMASS and the University. She noticed a number of people who had previously been pleasant and friendly towards her, such as the lunchroom manager and the person who managed the library, began to avoid her. The Registrar of Massey University told her the article had brought her, EXMASS and the University into disrepute. From that point on their previously positive and friendly working relationship went downhill and never recovered.

**[27]** Ms Chapman said she had worked very hard and studied for years to work herself into a good position. When Mr Crampton gave the written warning to the magazine she felt as if her career was over no matter what she tried to do to salvage it. The letter was all people could talk about. It had gone viral. After the letter was published she suffered from stress and anxiety, had trouble sleeping and sought medical advice.

**[28]** Dr Morris confirmed Ms Chapman consulted him on 12 March 2013 and again on 23 April 2013 complaining of stress and anxiety, including headaches and panic attacks related to her role as President of EXMASS. At the 12 March 2013 consultation she reported she had been harassed by the Vice-President over the preceding two weeks. At the 23 April 2013 consultation reference was made to both Police and lawyers having become involved in her ongoing dispute with the Vice-President. On both occasions Ms Chapman was prescribed medication for anxiety.

**[29]** It is not intended to give a separate account of the evidence given by Mr Peirse as the few matters addressed by him were covered by the formal admissions made by Mr Crampton in his statement of reply.

**[30]** Ms Chapman also gave evidence in response to the witness statement filed by Mr Crampton. That response will be incorporated into the account of Mr Crampton's evidence which follows.

## THE EVIDENCE FOR MR CRAMPTON

**[31]** In his statement of reply dated 5 June 2015 Mr Crampton accepted a number of the key allegations made in the Director's statement of claim. The matters agreed to or accepted by Mr Crampton include:

> **[31.1]** At the relevant time he was an "agency" within the meaning of s 2(1) of the Privacy Act.
>
> **[31.2]** The written warning dated 15 March 2013 contained personal information about Ms Chapman.

**[31.3]** In or about March or April 2013 Mr Crampton provided a copy of the letter to Ms Morrissey and thereby disclosed to Ms Morrissey personal information about Ms Chapman.

**[31.4]** Ms Chapman did not give to Mr Crampton permission to provide a copy of the written warning to Ms Morrissey or to disclose information about its contents to Ms Morrissey or Massive Magazine.

**[32]** The essence of Mr Crampton's defence is that when providing a copy of the written warning to Ms Morrissey, he was acting in his capacity as Vice-President of the EXMASS Executive Committee and in terms of Principle 11(a) he had reasonable grounds to believe the disclosure was directly related to the purposes in connection with which the information was obtained.

**The evidence of Mr Crampton**

**[33]** The evidence given by Mr Crampton in support of his defence was set out in his written statement of evidence and supplemented by oral evidence at the hearing. In the interests of brevity, the following summary is drawn primarily from the written statement of evidence.

**[34]** In early March 2013 the written warning regarding the performance of Ms Chapman as President of EXMASS was drafted by "the EXMASS Executive Committee". Ms Porter drafted the body of the letter with later input from the remaining Executive Committee members, including particularly Ms O'Dea. The intended content of this letter was discussed at a meeting of the Executive on 4 March 2013 (when Ms Chapman was absent) and again on 6 March 2013 (when Ms Chapman was present). The letter, signed by Ms O'Dea on behalf of the Executive Committee was sent to Ms Chapman on 15 March 2013.

**[35]** On 3 April 2013 members of the Executive Committee by letter of that date advised Ms Anne Palmer (Student Support Manager and Advocate) that the EXMASS Executive Committee wished to call a SGM to discuss Ms Chapman's performance in her role as President and to call for a vote of no confidence in this role. This letter was ignored and no SGM was called. Further attempts by members of the Executive to persuade Ms Palmer to call a SGM were equally unsuccessful.

**[36]** In early April Mr Crampton disclosed a copy of the written warning to Ms Morrissey, then a reporter for Massive Magazine and also then a member of the society. Mr Crampton was acting in his capacity as Vice-President of the EXMASS Executive Committee when he took this step. There were two reasons for disclosing the letter to Ms Morrissey:

**[36.1]** She was at the time an active member of the student society and Mr Crampton believed she had the right to be informed about the activities of her elected representative body.

**[36.2]** Should Ms Morrissey decide to use the information when drafting an article on the activities of the Executive Committee, her having the letter would ensure the remaining extramural students would be accurately informed as to what was going on in the Executive Committee.

**[37]** When Mr Crampton disclosed the letter to Ms Morrissey he was aware she could use it for the purpose of publishing an article about the activities of the EXMASS Executive Committee, including Ms Chapman as President.

**[38]** Prior to his disclosing the letter to Ms Morrissey, Mr Crampton's access to the EXMASS Facebook page had been blocked by Ms Chapman, excluding Mr Crampton from using this medium in his own name. In addition he and other members of the Executive Committee had been refused a copy of the society's membership roll, preventing direct communication with the body of students. The Executive therefore had no other means by which they could communicate information about Ms Chapman.

**[39]** By letter dated 8 April 2013 Ms Chapman advised Mr Crampton he was no longer Vice-President as he was not then a member of the society due to the fact he had failed to pay his membership fees. Ms Chapman attempted to remove Ms O'Dea from her position on the Executive Committee on the same day on the same grounds. Mr Crampton and Ms O'Dea say that Ms Chapman's interpretation of the Constitution is an unjustified one and neither were in arrears with their fees. Nevertheless, on 12 April 2013 an announcement was posted on the EXMASS Facebook page advising Mr Crampton and Ms O'Dea had been removed from their positions.

**[40]** After referring to the 16 April 2013 article published by Massive Magazine and in which an excerpt from the written warning appears Mr Crampton detailed in his evidence subsequent developments in the conflict within the Executive Committee. As we do not regard this evidence as helpful in the determination of the central issues in this case the evidence will not be repeated here. It is sufficient to note Mr Crampton strongly disagrees with Ms Chapman's claim she sustained humiliation and reputational damage as a consequence of the written warning being disclosed to Ms Morrissey and reported in the article published on 16 April 2013. Mr Crampton contends any loss of reputation for hard work and ethics was caused by Ms Chapman's own actions, including "sustained behaviour demonstrating a disregard to constitutionality, transparency and openness in communication" in her role as President. Mr Crampton does concede, however, that persons reading the 16 April 2013 article in Massive Magazine would have assumed the information in the written warning was true because of its official-seeming nature and its publication in the media. He contends, however, that the information contained in the written warning was indeed true and reflected the views of the Executive Committee at the time.

**[41]** Mr Crampton argues it was entirely appropriate for the voting student body to be informed about Ms Chapman's performance and the concerns held in relation to her performance as President of EXMASS as it was for that body to decide whether she should remain in office.

**The evidence of Ms Linda O'Dea**

**[42]** At the relevant time (March and April 2013) Ms O'Dea was a member of the Executive Committee. Because her written statement of evidence was (like that for Ms Ward) somewhat unfocussed and discursive, only the essential points made by her are noted here.

**[43]** First, she and three other members of the Executive Committee who held similar concerns relating to Ms Chapman's behaviour decided to write a "letter of censure", being the written warning of 15 March 2013. Because Ms Chapman's reply to that letter was "very abusive" and posted on the EXMASS website, Ms O'Dea and the others involved in drafting the letter decided to approach Massive Magazine's Ms Morrissey with the letter. When Mr Crampton gave a copy of the letter to the magazine he was acting with the agreement of the Executive Committee and was acting in his capacity as Vice-President.

**The evidence of Ms Mandy Ward**

**[44]** Ms Ward was also at the relevant time a member of the Executive Committee. Her evidence was that the Executive Committee needed to communicate with the student membership to let them know what was happening and to notify them of the concerns held in relation to Ms Chapman. However, the EXMASS office staff had been instructed not to allow any communication from the Executive Committee to student members. The Executive Committee was also refused a membership list, preventing direct communication of the issues. Attempts to call a SGM were also thwarted. They had tried, unsuccessfully, to get their communications done by the University.

**[45]** Ms Ward does not recall any discussion about disclosing the written warning. She does member stating her misgivings about going to the media. While it was pointed out to her they had no other way of communicating with the membership and that the student media would be their only other alternative, at that point in time they did not want external media involved. It was decided that Mr Crampton would do a media release to inform student members what was going on.

**The evidence of Ms Chapman in reply**

**[46]** As part of the pre-hearing exchange of written statements Ms Chapman filed a statement in reply to the statements filed by Mr Crampton, Ms O'Dea and Ms Ward. The principal points in reply made by Ms Chapman were:

> **[46.1]** The meeting held in her absence on 4 March 2013 was not a valid meeting of the Executive as only four members were present. For a quorum five members were required.
>
> **[46.2]** Contrary to the assertion by Mr Crampton, at the meeting on 6 March 2013 there had been no discussion of the written warning. The first Ms Chapman knew of the warning was when she received it on 15 March 2013.
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> **[46.3]** It was correct Mr Crampton had been blocked from directly adding items to the President's blog without first being vetted. This followed a number of blogs by him which were controversial and which, in Ms Chapman's opinion, risked bringing the University into disrepute.
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> **[46.4]** Mr Crampton had also been given notice that anything he wished to add to the EXMASS Facebook page would be checked first but he could have bypassed any Facebook restrictions by having postings done by one of the other members of the Executive Committee or by any one of the 900 student members of the Society.
>
> **[46.5]** The EXMASS membership roll had been withheld from Mr Crampton as Ms Chapman considered release of the information would breach privacy and she also held concerns arising from the nature of the correspondence she had received from Mr Crampton. However, members of the Executive still had other means by which they could communicate with society members.
>
> **[46.6]** Ms Chapman believes Mr Crampton's motivation for releasing the letter to Ms Morrissey and Massive Magazine had nothing to do with keeping the voting student body informed. Rather the purpose was to humiliate and harm Ms Chapman and to force her to step down.

## ASSESSMENT OF EVIDENCE

**[47]** It is not the task of the Tribunal to adjudicate on whether the allegations made by the four members of the Executive Committee (Mr Crampton, Ms O'Dea, Ms Ward and Ms Porter) in the written warning were justified by the facts. The Tribunal has jurisdiction to determine only whether information privacy Principle 11 was breached and if so, whether an interference with Ms Chapman's privacy has been established by the evidence. If it has, the Tribunal must then consider whether the remedies sought by the Director are to be granted. To make findings of fact on these issues it will be necessary, however, that we determine the credibility of the evidence we have heard as well as the weight to be given to that evidence.

**[48]** We begin with our assessment of the credibility of the two key witnesses, namely Ms Chapman and Mr Crampton.

### Credibility

**[49]** Whether Ms Chapman had the skill set to adequately discharge the responsibilities of President of EXMASS is not an issue for the Tribunal to determine. We are satisfied, however, she has given a truthful account of her dealings with Mr Crampton and the events which led to the disclosure by Mr Crampton of the warning letter to Ms Morrissey and Massive Magazine. Ms Chapman's evidence was given frankly and if anything, understated the degree of hostility she encountered from Mr Crampton and the consequences of being under siege by his constant emails and telephone calls. Her evidence is supported by surrounding circumstances which include having to issue at least one trespass notice against Mr Crampton at the beginning of March 2013 (Mr Crampton referred to "several" being issued against him), changing her telephone numbers twice and taking legal advice on 23 April 2013 over the possibility of obtaining a restraining order against Mr Crampton under the Harassment Act after Mr Crampton's ill-advised attempt that day to take possession of computer and other equipment situated in Ms Chapman's office. The medical evidence confirms that as early as 12 March 2013 the pressure to which Ms Chapman was being subjected in her role as President, particularly by Mr Crampton, required treatment by way of prescription medication and further medication was prescribed after a consultation on 23 April 2013 itself.

**[50]** Mr Crampton, on the other hand, appeared to relish seeing Ms Chapman having to give evidence and to be cross-examined. When it was his turn to give evidence he conspicuously downplayed his own aggressive actions. For example, when in cross-examination it was put to him he had bombarded Ms Chapman and her staff with an average of 150 emails each week his reply was there had been no bombarding but he had sent Ms Chapman "many" emails. This response, and the manner in which it was delivered, struck the Tribunal as somewhat coy, if not evasive. Mr Crampton was also asked if he agreed he had harassed Ms Anne Palmer, the EXMASS Advocate and Student Services Manager. Reference was made to her letter to Ms Chapman on 4 April 2013 complaining of what she described as Mr Crampton's "harassing and intimidating behaviour" and his constant emails and telephone calls:

> Dear [Ms Chapman]
>
> I am writing to express my serious concerns about the recent behaviour of the Vice-President, Dave Crampton, towards me and the work that I do, since February this year.

> As my employer, I respectfully ask that you, the President, take action immediately in respect of this Vice President, and have him cease his harassing and intimidating behaviour, where he constantly interferes with my work, disrupts the office and meddles in the advocacy work in which I am engaged. My understanding is that the Vice President has a governance role, and is definitely not part of management nor, as he has claimed on more than one occasion to the university and myself, an "advocate". The Vice President's disruptive behaviour is evidenced by the more than a hundred emails and phone calls from him since February this year. He is jeopardising my good standing with the university and with the students to whom my first allegiance lies.
>
> The work that I perform is now under contract with the University via the Massey Palmerston North's Registrar's office, and ultimately the Vice Chancellor. I therefore ask for your intervention, and possibly even by the Registrar and/or Vice Chancellor, if Mr Crampton is not brought into line. I do not wish to escalate this to a more serious employment issue, but will have no choice if his disruptive behaviour does not cease forthwith.

**[51]** Commenting on this letter Mr Crampton did not deny his reported actions but said he had not harassed Ms Palmer. Asked if he accepted she clearly felt harassed, his laconic reply was that "she might have. I don't know". He appeared entirely indifferent to the serious consequences caused by his deliberate and calculated actions.

**[52]** Having seen and heard Mr Crampton give evidence and being cross-examined over a range of matters including his harassment of others, the events of 23 April 2013 and the circumstances in which the warning letter was disclosed by him, our assessment is that he is a person who can see only one point of view (his own), believes he is always right and is quick to take offence. Having little capacity for objectivity his evidence was invariably self-serving and self-justifying. In these circumstances we find little weight can be attached to his account. Where there is a conflict between his evidence and that of Ms Chapman, we prefer the evidence of Ms Chapman.

**The drafting of the warning letter**

**[53]** It is now necessary to address the context in which the warning letter was drafted and then disclosed to Ms Morrissey and Massive Magazine.

**[54]** Some members of the Executive Committee appeared to be almost instantly critical of Ms Chapman upon her taking office in January 2013. In the bundle of documents produced by Mr Crampton there is an email dated 14 February 2013 from him to various persons highly critical of Ms Chapman. By 4 March 2013 a report entitled "Executive Committee Concerns" had been compiled by Ms Porter, a member of the Executive Committee. That report was not produced in evidence and has not been seen by the Tribunal. What is known is that in late February Mr Crampton became aware Ms Porter was drafting the report and on 4 March 2013 four members of the Executive Committee (Mr Crampton, Ms O'Dea, Ms Ward and Ms Porter) met by teleconference to discuss the document. The minutes of that meeting assert a quorum of four was sufficient but this is plainly incorrect. Both the 1997 and 2010 versions of the society rules required a quorum of five. Be that as it may, two significant matters arose out of the meeting of 4 March 2013 which commenced at 8pm and concluded at 10.20pm:

> **[54.1]** It was decided an email was to be sent by Ms O'Dea to Ms Chapman requiring her to provide, by 9am on Wednesday 6 March 2013, 10 specified items of documentation said to be needed for a meeting of the Executive Committee scheduled for Wednesday 6 March 2013. Those items were a full budget for 2013, the 2013 strategic plan, the 2013 January service delivery report, the 2012 final quarter accounts, the 2012 final quarter expense schedule, a statement of the number of current EXMASS members, including advice of the total number of

members who paid in 2013 to the end of February, the follow-up report for the executive meeting on Wednesday, a summary of the general ledger for January 2013, the dollar value of contracts for services so the executive could monitor and guarantee funds could be made available for payment of salaries and finally, an amended agenda for the Wednesday meeting. Ms Chapman was also given a "to do" list comprising seven matters which required (inter alia) a stipulation she "confirm within 24 hours" certain (other) reports would be completed by specified dates. On one view, the directions were so extensive they could not possibly have been complied with within the stipulated 24 hour timeframe. Questioned about this at the hearing Mr Crampton said the information had already been requested "repeatedly". There is no evidence to support this claim but even so, the requirement that the documentation be provided within 24 hours was at the least, somewhat peremptory.

**[54.2]** The meeting discussed the intended content of what eventually became the written warning of 15 March 2013. That is, the gestation period for this letter can be traced to mid to late February 2013 when Ms Chapman had been in office only a few weeks.

**[55]** When the Executive Committee met on 6 March 2013 Ms Chapman was present and a quorum achieved. Ms Chapman says there was no discussion at the meeting of the warning letter and in this regard the minutes confirm her account. Only Ms O'Dea's 4 March 2013 email with the "to do" list is mentioned. In this regard the minutes record Ms Chapman's concern that the criticisms made of her and the instructions given in that email had been made without hearing her side of the story:

> [Ms Chapman] attempts to present her issues with Dave [Crampton] and the reason behind why she tried to appoint a new vice president. Please note: [Ms Chapman] stated that she could not attend their special meeting because she was on Jury Duty and only one side of the issue was addressed, and that was Dave's. When [Ms Chapman] tried to speak to her issues it was stated that there was no point to reiterate what she had to say because they had already heard about it from Dave.
>
> Also note: that [Ms Chapman] was denied a right of reply and the executives did not address her concerns.

**[56]** We accept Ms Chapman's evidence that she was denied a hearing on those allegations discussed at the 6 March 2013 meeting and that the first she knew of the written warning was when she received the letter on 15 March 2013.

**The disclosure of the warning letter to the journalist**

**[57]** It is to be recalled the written warning, delivered only 10 weeks into Ms Chapman's tenure, gave four weeks for "significant improvement". Any "further incidents" would result in further action and could result in the Executive Committee calling a Special General Meeting to seek a vote of no confidence in Ms Chapman's capacity as President.

**[58]** It is necessary at this stage to pause and reflect on the calendar dates involved. The 15th of March 2013 was a Friday. Assuming the four weeks notice comprised working days only, the first day was Monday 18 March 2013 and the last Tuesday 16 April 2013 (Good Friday fell on 29 March 2013 and Easter Monday on 1 April 2013).

**[59]** While the four weeks were still running Mr Crampton took the following steps:

**[59.1]** He gave a copy of the letter to Ms Morrissey in ether late March or early April 2013.

**[59.2]** By email dated 3 April 2013 he advised Ms Palmer "the executive" wished to call a Special General Meeting to discuss Ms Chapman's performance as President "with a vote of no confidence".

**[60]** Both steps were taken prior to Ms Chapman's letters of 8 April 2013 telling Mr Crampton and Ms O'Dea they were not bona fide members of the society. Mr Crampton did not in fact receive his letter and found out about it "later". See his email of 11 April 2013 addressed to Alistair Shaw and Ralph Springett. The 8 April 2013 letter cannot be used as the justification for disclosing the warning letter as disclosure had already happened by 8 April 2013.

**[61]** Mr Crampton argues the warning letter was disclosed to Ms Morrissey because he and other members of the Executive Committee needed to ensure society members were kept informed about what was going on with their elected representative body. We do not accept this claim. First, the claim is incompatible with the express terms of the letter:

> Within the **next four weeks**, we expect to see significant improvement in your performance. Any further incidents of the above nature will result in further action and can result in the Executive calling a Special General Meeting seeking no confidence in your capacity as President.

**[62]** Second, the "warning" was that Ms Chapman had four weeks within which to significantly improve her performance. If that did not happen there could be consequences, including the calling of a SGM where a vote of no confidence could be sought. If not explicit, it was implicit no SGM would be called until after the Executive Committee had reviewed Ms Chapman's performance upon the expiry of the notice period. There was no mention in the minutes of the 4 March 2013 meeting of members of the society being advised of the content of the letter so that they were thereby "informed". Mr Crampton's actions pre-empted the very process he had agreed to.

**[63]** In our view Mr Crampton's claimed justification for disclosing the written warning to Ms Morrissey and Massive Magazine is in these circumstances nothing more than an ex post facto rationalisation.

**[64]** Third, our conclusion is reinforced by Mr Crampton's evidence that Ms Morrissey contacted him out of the blue, that when he provided the letter to Ms Morrissey and Massive Magazine he did not know what they would do with it and that he had no idea the magazine would publish the article in the way they did. As to this it must be remembered Mr Crampton is a journalist by occupation and in addition he claims that when giving the letter to a fellow journalist he intended the student body would be kept informed of what was happening on the Executive. This meant advising the students about the concerns held by some members of the Executive about the President. It is simply far-fetched to say he had no idea the magazine would publish an article in the way it did, the more so given it is apparent from the text of the article that when interviewed by Ms Morrissey, Mr Crampton had a lot to say about Ms Chapman.

**[65]** Fourth, the three members of the Executive who gave evidence at the hearing were at odds over the circumstances in which the letter was given to Ms Morrissey. Mr Crampton's witness statement makes no reference to discussing the disclosure with Ms O'Dea or with any other member of the Executive. He did say in his oral evidence he

had been told when contacted by Ms Morrissey she would be meeting with Ms Chapman on the Friday of that week about the trespass notices and allegations she was bullying staff. Mr Crampton had then sent an email to members of the Executive saying he was not happy speaking to the media, certainly not before Ms Morrissey had interviewed Ms Chapman. He thought his next contact with Ms Morrissey was when he emailed her the warning letter. On this account the person who initiated contact was Ms Morrissey.

**[66]** The evidence of Ms O'Dea was different. She said that after the letter had been sent to Ms Chapman, Ms Chapman had replied in abusive terms posted on the EXMASS website. We observe there is no evidence of this. Ms O'Dea said the Executive Committee concluded they had to do something and the decision was made to approach Massive Magazine's editor, Ms Morrissey, with the letter. On this account it was members of the Executive Committee who initiated contact.

**[67]** Ms Ward, on the other hand, said she did not recall any conversation about disclosing the letter but does remember stating her misgivings about going to the media. She said it was decided Mr Crampton would do a media release to inform members.

**[68]** The accounts given by Mr Crampton, Ms O'Dea and Ms Ward as to the circumstances in which the warning letter was given to Ms Morrissey differ considerably. This reinforces our view Mr Crampton, as well as Ms O'Dea, have reconstructed events to rationalise what was done.

**Conclusion regarding disclosure of warning letter**

**[69]** On our assessment of the evidence the real reason for Mr Crampton disclosing the letter to Ms Morrissey was his personal animosity to Ms Chapman and his wish to inflict on her as much embarrassment and harm as he could. As will be seen, this finding has an important bearing on our decision on the issues of belief and reasonable grounds in the context of Principle 11(a).

**[70]** We address now the legal issues.

## THE LEGAL ISSUES

**[71]** It is to be recalled the statement of reply filed by Mr Crampton makes a number of key concessions including that he was an "agency", that the letter contained personal information about Ms Chapman and that Mr Crampton provided a copy of the letter to Ms Morrissey without Ms Chapman's consent.

**[72]** These concessions were properly made. The term "agency" is defined in s 2(1) of the Act as meaning:

> any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector; and, for the avoidance of doubt, includes a department;

**[73]** "Personal information" is defined in s 2(1) of the Act as meaning "information about an identifiable individual". Whether information is personal information will usually be resolved by a fact-based analysis. See *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 at [55]. In the present case the contents of the warning letter are self-evidently personal information about Ms Chapman. Her performance as President of EXMASS is criticised and there is a list of performance indicators allegedly not met. There is also a list of actions said to be unconstitutional, a list of sections of the Operations Document she has allegedly ignored and adverse comments are made on

(inter alia) her reporting skills. Finally there is a list of improvements required over the following four weeks.

**[74]** It is also clear the information was "held" by Mr Crampton as it was he who admittedly disclosed the letter. The claim that the disclosure was in his capacity as Vice-President is addressed separately.

## The disclosure limitation principle – Principle 11

**[75]** Principle 11 stipulates that personal information should not be disclosed for purposes other than those for which the information was obtained:

> 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,—
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
> (b) that the source of the information is a publicly available publication; or
> (c) that the disclosure is to the individual concerned; or
> (d) that the disclosure is authorised by the individual concerned; or
> (e) 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
> (f) that the disclosure of the information is necessary to prevent or lessen a serious threat (as defined in section 2(1)) to—
> (i) public health or public safety; or
> (ii) the life or health of the individual concerned or another individual; or
> (g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
> (h) that the information—
> (i) is to be used in a form in which the individual concerned is not identified; or
> (ii) is to 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; or
> (i) that the disclosure of the information is in accordance with an authority granted under section 54.

**[76]** As to the burden of proof, s 87 of the Act provides:

> **87 Proof of exceptions**
>
> Where, by any provision of the information privacy principles or of this Act or of a code of practice issued under section 46 or section 63, conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.

**[77]** The application of Principle 11 was summarised in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [190] as follows:

> **[190]** Applying this provision to Principle 11, it was established in *L v L* HC Auckland AP95-SW01, 31 May 2002, Harrison J at [20] (and see the Tribunal decisions collected in *Harris v*

*Department of Corrections* [2013] NZHRRT 15 (24 April 2013) at [43]) that the sequential steps to be followed are:

> **[190.1]** Has there been a disclosure of personal information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.
>
> **[190.2]** If the Tribunal is satisfied that personal information has been disclosed, the burden shifts to the defendant to establish to the same standard that that disclosure fell within one of the exceptions provided by Principle 11.
>
> **[190.3]** Third, if the Tribunal is satisfied that the personal information was disclosed and that the defendant has not discharged his or her burden of proving one of the exceptions in Principle 11, the Tribunal must then determine whether the disclosure constituted an interference with the individual's privacy as defined in s 66 of the Privacy Act. That is, has the plaintiff established one of the forms of actual or potential harm contemplated by [s 66(1)]. The burden of proof reverts to the plaintiff at this stage.
>
> **[190.4]** Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies identified in s 85 of the Act.

**[191]** It is not a defence that the interference was unintentional or without negligence on the part of the defendant. See s 85(4) and *L v L* at [13] and [99].

## Conclusion on first sequential step

**[78]** Given our acceptance of the evidence given by Ms Chapman and further given the concessions made by Mr Crampton in his statement of reply it follows the first of the sequential steps mandated in *L v L* has been established to the probability standard. That is there has been a disclosure of personal information.

**[79]** The central question is whether Mr Crampton has established to the same standard the disclosure fell within the exception provided by Principle 11(a).

## Principle 11(a) – the requirements of the second sequential step

**[80]** It is common ground only the second limb of Principle 11(a) has application to the present case:

> 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,—
>
> (a) that the disclosure of the information … is directly related to the purposes in connection with which the information was obtained.

## The "purpose" issue

**[81]** As submitted by the Director, the purpose of the warning letter was to provide Ms Chapman with comments about her performance as President of EXMASS and to require improvement within a specified timeframe. Mr Crampton confirmed on a number of occasions when giving evidence that this was the purpose of the letter.

**[82]** By contrast, the purposes for which Mr Crampton disclosed the letter were, on his evidence, to keep Ms Morrissey informed and to ensure that other Massey University extramural students remained informed as to what was going on with their elected representative body. It is our view these purposes arose ex post facto in unanticipated circumstances. They came into being after Mr Crampton had been fortuitously

contacted by Ms Morrissey just prior to her planned interview with Ms Chapman. It was only then that it occurred to Mr Crampton the warning letter could be used in other contexts for new purposes. The fortuitous nature of the new purposes is reinforced by the fact disclosure to the media was not discussed by the four members of the Executive Committee prior to the warning letter being sent to Ms Chapman. Even on Ms O'Dea's evidence the alleged decision to approach Ms Morrissey was made after the letter had been sent to Ms Chapman. In these circumstances we find Mr Crampton has not satisfied us to the probability standard disclosure of the information to Ms Morrissey and Massive Magazine was one of the purposes in connection with which the information was obtained.

**Belief on reasonable grounds**

**[83]** Apart from the purpose issue there are the matters of "belief" and "reasonable grounds".

**[84]** For the reasons explained in *Geary v Accident Compensation Corporation* at [201] to [203], the subjective component (the belief) as well as the objective component (the reasonable grounds) in Principle 11 must exist at the date of disclosure. There must be an actual belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice:

> **[201]** Returning to Principle 11, it is to be noted that to escape the statutory prohibition on disclosure of personal information, an agency must establish that at the time of disclosure, it possessed the requisite belief on reasonable grounds:
>
> > 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,….
>
> **[202]** There is a subjective component (the belief) and an objective component (the reasonable grounds). It must be established that both elements existed as at the date of disclosure.
>
> **[203]** The need for reasonable grounds for belief requires the agency to address its mind to the relevant paragraph of Principle 11 on which it intends to rely. See by analogy *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [63]:
>
> > We consider that the need for reasonable grounds for belief in the necessity of disclosure requires the agency concerned to first inspect and assess the material being disclosed. The exception is not engaged where there is a failure to check the contents of the disclosure material before transmission.
>
> There must be an **actual** belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice.

**[85]** Our finding of fact is that at the time the warning letter was drafted and the personal information collected, Mr Crampton did not hold the belief that disclosure of the information to the media in general or Massive Magazine in particular was one of the purposes in connection with which the information was obtained or that it was directly related to the purposes in connection with which the information had been obtained. He confirmed the purpose of the letter was to address performance concerns and to require improvements within a four week period. In our view the opportunity to disclose the letter to Ms Morrissey and Massive Magazine arose fortuitously and well after the letter was written. It was an entirely unforeseen opportunity to embarrass and harm Ms Chapman. At the point of disclosure of the written warning, Mr Crampton gave no thought whatsoever to whether disclosure of the letter was directly related to the purpose for which it had been written. He has therefore failed to establish that at the time of disclosure he held the requisite belief on reasonable grounds.

**"directly related to the purposes"**

**[86]** A further requirement of Principle 11(a) is that disclosure of the information must have been "directly related" to the purposes in connection with which the information was obtained.

**[87]** It is to be noted that the phrase is "directly related", not "directly or indirectly related".

**[88]** In determining the meaning of "directly related to" it is necessary to have regard not only to the text but also to the purpose of the enactment. See s 5 of the Interpretation Act 1999. As to purpose, the explicitly stated purpose of the Privacy Act is to promote and protect individual privacy in accordance with the Recommendation of the Council of the OECD. See the Long Title to the Act.

**[89]** As to the text, the information privacy principles must be read as a coherent whole. Principle 1 is the overarching principle from which all the other information privacy principles flow. That is, personal information cannot be collected by an agency unless the information is collected for a lawful purpose and that collection of the information is necessary for that purpose:

> Principle 1
>
> *Purpose of collection of personal information*
>
> Personal information shall not be collected by any agency unless—
>
> (a) the information is collected for a lawful purpose connected with a function or activity of the agency; and
>
> (b) the collection of the information is necessary for that purpose.

See further *Holmes v Housing New Zealand Corporation* [2014] NZHRRT 54 (3 November 2014) at [70] - [71].

**[90]** The following summary is given in the New Zealand Commission Issues Paper *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, March 2010) at [4.20]:

> The concept of "purpose" of collection is central to the privacy principles. Principle 3(1)(b) provides that, where an agency collects information directly from the individual concerned, it is to take reasonable steps to ensure that the individual is aware of the purpose of collection. Principles 10 and 11 provide that personal information is only to be used or disclosed for the purposes for which it was obtained, or for a directly related purpose. As discussed in chapter 3, "obtaining" appears to include both collecting information and receiving unsolicited information. The word "purpose" also appears in principles 7, 8 and 9, in relation to the accuracy and retention of personal information. Those principles do not refer to the purposes for which the information was collected, however, but rather the "purposes for which the information may lawfully be used" (principles 7 and 9) or the "purpose for which the information is proposed to be used" (principle 8).

**[91]** Bearing in mind the focus in Principles 1, 3, 9, 10 and 11 is on the purpose for which the information was obtained it is entirely understandable that Principle 11(a) limits the circumstances in which a change in purpose is permissible. Read in this way the aim of the phrase "directly related to" is to prevent the introduction of any new purpose which does not have an uninterrupted, immediate relationship to the original lawful purpose(s) which operated at the Principle 1 collection stage. We have considered but rejected reading "directly relating to" as meaning "close" or "substantial". As pointed out by Cooke J in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 137-138:

> "Close" is not necessarily direct; for instance New Zealand has a close interest in many aspects of the Australian economy, but not necessarily a direct one. Similarly there may be a very substantial interest, although it is indirect … "Direct", however, is as already indicated a term markedly different from "substantial" … It is a reasonable inference that the legislature deliberately chose "direct" rather than "substantial" in s 97 so as to place quite a strict limit on the range of persons likely to be affected to whom the Secretary of Trade and Industry or the Secretary of Energy is required to give a reasonable opportunity to make either written or oral submissions.

**[92]** Consistent with the Act's stated purpose of promoting and protecting individual privacy the view we take is that the statutory phrase "is directly related to the purposes in connection with which the information was obtained" was deliberately framed so as to place a strict limit on the circumstances in which a change in purpose or an addition of purpose is permissible. There must be an uninterrupted, immediate relationship to the original purpose.

**[93]** In the present case the purpose of embarrassing or harming Ms Chapman unquestionably falls outside the original purpose (to address performance concerns and require improvement within a few weeks) and so too does the claimed purpose of keeping the student body informed of what was going on. Neither of these purposes can sensibly be said to be "directly related" to the original purpose although they may well have an indirect relationship. Neither of these new purposes have an uninterrupted, immediate relationship to the original lawful purpose. Such is underlined by the fact that there is no evidence either of these purposes were thought of or mentioned at the time the warning letter was drafted and sent. Rather, use of the media in aid of the campaign to depose Ms Chapman was something which only surfaced when Ms Morrissey unexpectedly made contact with Mr Crampton well after the letter had been sent and while the four week period of notice was still running.

**[94]** Our conclusion is that disclosure of the information to Ms Morrissey and Massive Magazine was not directly related to the purpose for which the information was obtained.

**[95]** We now address the relevance of the capacity in which Mr Crampton disclosed the letter to Ms Morrissey and Massive Magazine.

### Whether capacity in which warning letter disclosed relevant

**[96]** Mr Crampton contends he was acting in his capacity as Vice-President of the EXMASS Executive Committee when he provided a copy of the letter to Ms Morrissey.

**[97]** On the evidence we find this contention not proved. First, the letter was discussed, drafted by and sent by a group of four individuals on the Executive Committee who at no point constituted a quorum. Second, there is no evidence of a resolution or decision by the Executive Committee (properly constituted by an appropriate quorum), directing or authorising Mr Crampton to release the letter. Third, Ms Ward gave evidence that she does not recall any conversation about disclosing the letter and indeed had misgivings about going to the media.

**[98]** In any event, the capacity in which Mr Crampton acted is irrelevant to his liability and the Tribunal has no power to determine issues of indemnity or contribution as between individuals. See *EF v Toon* [2003] NZHRRT 15 at [19]. The effect of s 126 of the Privacy Act is that an individual is liable for his or her actions when acting as employee or as agent:

> **126 Liability of employer and principals**

(1) Subject to subsection (4), anything done or omitted by a person as the employee of another person shall, for the purposes of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.

(2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.

(3) Anything done or omitted by a person as a member of any agency shall, for the purposes of this Act, be treated as done or omitted by that agency as well as by the first-mentioned person, unless it is done or omitted without that agency's express or implied authority, precedent or subsequent.

(4) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she or it took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

## Conclusion on second sequential step

**[99]** Given the findings of fact and law which have been made it is concluded Mr Crampton has not established to the balance of probability standard that the admitted disclosure fell within one of the exceptions provided by Principle 11.

**[100]** We turn then to the third sequential step, namely whether the Director has established one of the forms of actual or potential harm contemplated by s 66(1) of the Act.

## Section 66(1) – whether an interference with privacy established – the requirements of the third sequential step

**[101]** Breach of an information privacy principle on its own is insufficient to enliven the Tribunal's jurisdiction to grant a remedy. For an interference with privacy to be established a plaintiff must prove both a breach of such principle and one of the forms of loss or harm enumerated in s 66(1) of the Act. The separate definition in s 66(2) having no application to the facts, only s 66(1) is reproduced here.

**66 Interference with privacy**

(1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
- (a) in relation to that individual,—
  - (i) the action breaches an information privacy principle; or
  - (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
  - (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
  - (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
  - (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
- (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
  - (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
  - (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
  - (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

**[102]** The Director relies on s 66(1)(b)(iii) with the result he must:

**[102.1]** Establish that in relation to Ms Chapman an action of Mr Crampton breached an information privacy principle; **and**

**[102.2]** Persuade the Tribunal to conclude the action resulted in significant humiliation, significant loss of dignity or significant injury to the feelings of Ms Chapman. It is not necessary that all three forms of emotional harm be established. One alone is sufficient.

**[103]** For the reasons earlier explained, the first requirement has been established.

**[104]** As to the second requirement, the meaning of the terms "humiliation", "loss of dignity" and "injury to feelings" was recently considered in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 (2 March 2015) at [152] – [153]. Human dignity includes self-respect and self-worth while injury to feelings can include conditions such as anxiety and stress:

> **[152]** As to loss of dignity, we refer to the description given in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53] where Iacobucci J delivering the judgment of the Supreme Court of Canada stated:
>
> > 53 … Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits… Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued….
>
> **[153]** As to what is included in "injury to the feelings", it was held in *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [36] that "injury to the feelings" can include conditions such as anxiety and stress. In *Director of Proceedings v O'Neil* [2001] NZAR 59 at [29] injury to feelings was described in the following terms:
>
> > [29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

**[105]** Of "humiliation", the following was said in *Director of Proceedings v O'Neil* [2001] NZAR 59 at [28]:

> [28] Humiliation may involve loss of dignity and certainly will involve injury to feelings of self-worth and self-esteem. Humiliation, we would have thought, would always involve a loss of dignity. A loss of dignity would always have involved in injury to feelings. That would include a feeling of pride in oneself and general contentment. Yet whilst injury to such feelings may involve humiliation that will not always be the case.

**[106]** The harm must be "significant" In *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [35] it was said that if "significant" is given its normal dictionary meaning, the impact caused must have been "important" or "notable" or "considerable" for it to have been significant.

**[107]** The Director submits there is no question that Ms Chapman suffered significant harm as a result of Mr Crampton's disclosure of the warning letter to Ms Morrissey and Massive Magazine. Anyone in Ms Chapman's position who had such sensitive personal information disclosed to a journalist and then printed in the media and published on the internet would experience significant harm. We agree with this submission. Having found Ms Chapman a credible witness we accept her evidence she felt "absolutely

humiliated" by the publication of the letter. She said people just assumed the contents were true because of the official-seeming nature of the letter and its publication by the media. She felt her reputation for hard work and ethics had been irrevocably damaged and her personal and professional relationships affected. She lost confidence and felt people were embarrassed to be seen with her. Many turned against her. She was made to feel a liability, not an asset of EXMASS. Previously positive and friendly working relationships went downhill. She found it degrading to receive hate mail from strangers. She suffered from stress and anxiety, had trouble sleeping, sought medical treatment and was prescribed medication.

**[108]** Although the Director need prove only one of the forms of significant harm listed in s 66(1)(b)(iii) we find all three have been established.

**[109]** Next a causal connection between Mr Crampton's action and the harm in s 66(1)(b)(iii) must be proved by the Director. In this regard it is sufficient for him to establish Mr Crampton's action was a contributing cause in the sense that it constituted a material cause. See *Taylor v Orcon Ltd* [2015] NZHRRT 15 at [58] to [64]. On the facts we have found there can be no doubt disclosure of the letter by Mr Crampton was the cause of significant humiliation, significant loss of dignity and significant injury to the feelings of Ms Chapman.

**[110]** Mr Crampton challenged this view of the evidence, contending the contents of the letter were true and in any event, any harm was caused by Ms Chapman's own actions, including sustained behaviour demonstrating a disregard of constitutionality, transparency and other shortcomings described in his evidence. However, whether there was any truth to the allegations in the written warning is irrelevant to the application of Principle 11(a) or to the question whether Ms Chapman suffered any emotional harm. Equally irrelevant are the events which unfolded in later months.

### Conclusion on third sequential step

**[111]** For all these reasons we conclude in terms of s 66(1) of the Privacy Act there was an action of Mr Crampton which was an interference with the privacy of Ms Chapman.

## REMEDY

**[112]** Where the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual it may grant one or more of the remedies allowed by s 85 of the Act:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>  (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
>  (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
>  (c) damages in accordance with section 88:
>  (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
>  (e) such other relief as the Tribunal thinks fit.
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any

other order, or may award costs against the plaintiff, or may decline to award costs against either party.

(3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).

(4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

**[113]** Section 88(1) relevantly provides that damages may be awarded in relation to three specific heads of damage:

**88 Damages**

(1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:

(a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:

(b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:

(c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

**[114]** The Director seeks the following remedies:

**[114.1]** A declaration of interference.

**[114.2]** Damages for emotional harm.

**[114.3]** A training order.

**[114.4]** Costs.

**Section 85(4) – the conduct of the defendant**

**[115]** Section 85(4) provides that while it is no defence that the interference was unintentional or without negligence, the Tribunal must nevertheless take the conduct of the defendant into account in deciding what, if any, remedy to grant.

**[116]** It is difficult to find circumstances which might mitigate the remedies sought by the Director. Mr Crampton is a journalist by occupation. He could have been in little doubt as to the potential consequences of disclosing the letter to a fellow journalist who was about to interview Ms Chapman about her alleged shortcomings and her conduct as President of EXMASS. The more so when it is readily apparent from the 16 April 2013 article written by Ms Morrissey that Mr Crampton was more than forthcoming in providing Ms Morrissey with his own views about Ms Chapman. Mr Crampton knew if he wanted to raise issues relating to Ms Chapman he could have done so without releasing the written warning. Instead his animosity towards Ms Chapman was such that he wished to embarrass and hurt her as much as he could. It was visibly evident at the hearing that that animosity continues. As the Director submitted, Mr Crampton remains unrepentant.

**[117]** It is to be borne in mind, however, that the remedies prescribed by the Privacy Act do not have as their purpose the punishment of the defendant.

**Declaration**

**[118]** While the grant of a declaration is discretionary, declaratory relief should not ordinarily be denied. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108].

**[119]** On the facts we see nothing that could possibly justify the withholding from the Director of a formal declaration that Mr Crampton interfered with Ms Chapman's privacy and such declaration is accordingly made.

**Damages for humiliation, loss of dignity and injury to feelings**

**[120]** We turn now to s 88(1)(c), namely the assessment of damages for humiliation, loss of dignity and injury to feelings.

**[121]** The principles were recently reviewed in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 (2 March 2015) at [170] and will not be repeated. It is sufficient to note that where, as here, it has been found for the purpose of s 66(1)(b)(iii) there was significant humiliation, significant loss of dignity and significant injury to the feelings of the plaintiff, it follows humiliation, loss of dignity and injury to feelings has been established for the purpose of s 88(1)(c) as this provision does not require that these forms of emotional harm be "significant".

**[122]** Bearing in mind the findings we have earlier made on the question of emotional harm in the context of s 66(1), we believe an appropriate response is an award of damages towards the lower end of the middle band discussed in *Hammond v Credit Union Baywide* at [173]. An award of $18,000 is accordingly made for humiliation, loss of dignity and injury to feelings. This is a case in which disclosure of the information entered not only written media but also the internet by virtue of the fact that Massive Magazine has its own website. In fixing this amount we have taken care to exclude any humiliation, loss of dignity or injury to feelings arising from causes other than disclosure of the warning letter.

**Training order**

**[123]** Mr Crampton showed no interest in or awareness of the information privacy principles. Given he is a journalist, this is of concern, as is his demonstrated failure to prevent his personal feelings from trumping his legal obligations under the Privacy Act. It is our view a training order is necessary. At the very least it will reduce Mr Crampton's exposure to the risk of any further breach of the Act.

**[124]** We accordingly make an order pursuant to s 85(1)(e) that Mr Crampton attend, at his own expense, an "Introduction to the Privacy Act" workshop run by the Office of the Privacy Commissioner.

## FORMAL ORDERS

**[125]** For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of Mr Crampton was an interference with the privacy of Ms Chapman and:

> **[125.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Mr Crampton interfered with the privacy of Ms Chapman by disclosing personal information about her when Mr Crampton did not believe, on reasonable grounds,

that the disclosure of the information was directly related to the purposes in connection with which the information had been obtained.

**[125.2]** Damages of $18,000 are awarded against Mr Crampton under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for the humiliation, loss of dignity and injury to feelings experienced by Ms Chapman.

**[125.3]** An order is made under s 85(1)(d) and (e) of the Privacy Act 1993 that Mr Crampton attend, at his own expense, an "Introduction to the Privacy Act" workshop run by the Office of the Privacy Commissioner.

## COSTS

**[126]** Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

**[126.1]** The Director is to file his submissions within 14 days after the date of this decision. The submissions for Mr Crampton are to be filed within a further 14 days with a right of reply by the Director within 7 days after that.

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

**[126.3]** 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** | **Ms WV Gilchrist** | **Mr MJM Keefe JP** |
| **Chairperson** | **Member** | **Member** |