

Reference No. HRRT 012/2015

UNDER THE PRIVACY ACT 1993

BETWEEN HUNTER CLIFFORD BOYCE

PLAINTIFF

AND WESTPAC NEW ZEALAND LIMITED

DEFENDANT

AT TAUPO

BEFORE:

Rodger Haines QC, Chairperson

Mr MJM Keefe JP, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mr M Bate for plaintiff

Mr MJ Hendriksen and Ms K Verkerk for defendant

DATE OF HEARING: 11 August 2015

DATE OF LAST SUBMISSIONS: 25 August 2015 (defendant) and
8 September 2015 (plaintiff)

DATE OF DECISION: 14 September 2015

DECISION OF TRIBUNAL

Introduction

[1] Mr Boyce is a Chartered Accountant who in July 2012 commenced employment with Stretton and Co Ltd (Strettons), a firm of chartered accountants in Taupo. He was a team or “pod” leader.

[2] In August 2013 Strettons arranged for the Taupo branch of Westpac New Zealand Ltd (Westpac) to issue pre-paid debit cards to four team leaders to be used for business

purposes, particularly rewarding, recognising and motivating team members by way of purchasing coffees or other small items. The cards were in the personal names of the team leaders but the funds were provided by Strettons.

[3] In relation to the pre-paid debit card issued to Mr Boyce, Westpac on 2 September 2013 issued an account summary or statement for the period 5 August 2013 to 2 September 2013 setting out the transactions which had occurred from the time the account was opened on 15 August 2013 to the last transaction on 30 August 2013. This statement was sent to Mr Boyce at his residential address.

[4] Some time in the period between 20 September 2013 and 27 September 2013 the Business Manager of Strettons (Ms NJ McCondach) asked Westpac to provide a copy of the statement for reconciliation purposes and a copy of the statement was so provided to Strettons.

[5] Mr Boyce says Westpac thereby breached information privacy Principle 11 (personal information not to be disclosed except in certain limited circumstances) and Principle 5 (duty to ensure personal information is protected against disclosure).

[6] Westpac contends there was no breach of the information privacy principles because:

[6.1] Disclosure of the information was one of the purposes in connection with which the information was obtained or was directly related to the purposes in connection with which the information was obtained and therefore permitted by Principle 11(a); or

[6.2] Disclosure of the statement was impliedly authorised by Mr Boyce and therefore permitted by Principle 11(d).

[7] In the background to this case there are employment issues between Mr Boyce and Strettons and relationship issues between Mr Boyce and Westpac. Although Mr Bate in opening foreshadowed the possibility of linking the provision by Westpac of the statement of account to these other matters, that link was not established with the result the issues in this case fall to be determined solely on the evidence relating to the circumstances in which the debit card was issued and whether the Tribunal accepts Mr Boyce's contention the card could be used as a personal card.

[8] At the conclusion of the evidence stage of the hearing Mr Bate (who was not instructed by Mr Boyce until the eve of the hearing) sought leave for the parties to file their closing submissions in writing. Mr Hendriksen did not oppose and it was agreed closing submissions for Westpac would be filed by 25 August 2015 and the closing submissions for Mr Boyce filed by 8 September 2015. Those submissions have now been received and have been taken into account in reaching this decision.

THE EVIDENCE

Witnesses heard

[9] Only three witnesses gave evidence at the hearing, being Mr Boyce, Ms McCondach and Mr BW Szpetner who at the time was Bank Manager of the Westpac Taupo Branch.

[10] Because we are of the view the outcome of this case turns on narrow issues, we will not provide a detailed account of all the evidence heard. What follows is a summary of the main points only.

The evidence given by Mr Boyce

[11] Mr Boyce said that as a member of the senior executive team he (and other team leaders) would from time to time pay for work-related expenses and at a later date obtain reimbursement from Strettons. As time went by Ms McCondach decided it would be a good idea were team leaders to have a card of some kind for such expenses. Eventually Strettons decided they would be issued with personal debit cards, the card for Mr Boyce being issued on 14 August 2013. Strettons provided Mr Boyce with a cheque for \$820 payable to Westpac and this cheque was credited to the card at the time it was issued.

[12] Mr Boyce's evidence is that he was told he could spend the money as he saw fit and could even draw the money out and hold it as petty cash if desired. He was further told statements would not be required due to the account being personal, but that any expenses paid for work purposes were to be entered into a dedicated spreadsheet which was to be given to Accounts with any supporting invoices.

[13] The debit card was in Mr Boyce's name and the postal address was his home address. Mr Boyce contends the card was not linked to Strettons in any way and Strettons were not provided with and did not seek any authority to obtain information about it from Westpac.

[14] On 2 September 2013 Mr Boyce completed and filed a spreadsheet showing that on 16 August 2013 he spent \$60 at Robert Harris, Taupo for a team meeting. He says this was the only business transaction for which the debit card was ever used by him. Attached to a printout of the spreadsheet was a copy of the receipt from Robert Harris.

[15] On 2 September 2013 Westpac sent to Mr Boyce a one page account summary showing (inter alia) the deposit of the Strettons cheque for \$820, the \$60 Robert Harris transaction, a cash advance of \$700 on 21 August 2013 and a deposit of \$700 on 30 August 2013.

[16] Mr Boyce complains that some time between 13 September 2013 and 20 September 2013 Westpac released a copy of this statement to Strettons. He says Westpac had no written or verbal authority to release any information about him or any of his accounts. Release of the statement had caused an investigation by Strettons accompanied by various allegations and speculation. In particular Mr Boyce complains the statement was referred to or taken into account on three specific occasions:

[16.1] At a meeting between Mr Boyce and the Managing Director of Strettons on 20 September 2013.

[16.2] At a mediation meeting held on 25 September 2013.

[16.3] At a disciplinary meeting held on 15 October 2013.

[17] Mr Boyce further complains substantial damage flowed from the unauthorised release by Westpac of the debit card statement and in circumstances which do not need to be detailed, Mr Boyce felt compelled to resign from Strettons on 1 October 2014, his last day being 22 December 2014.

[18] By email dated 1 October 2013 Mr Boyce complained to Westpac that release of the statement to Strettons was a major breach of the Privacy Act 1993. In an initial response dated 4 October 2013 Westpac advised the release had occurred "in error" as it had been understood the prepaid card was for business purposes. To mitigate the

“error” Westpac asked Strettons to destroy or return the statement to Westpac. An apology was given to Mr Boyce.

[19] On Mr Boyce lodging a complaint with the Privacy Commissioner the position taken by Westpac was that upon further consideration of the facts, it had reasonable grounds to conclude that disclosure of the statement to Strettons had been authorised by Mr Boyce. Mr Boyce of course disputes this interpretation of the facts.

[20] In cross examination Mr Boyce accepted the purpose of the debit card was to avoid team leaders, after incurring a business-related expense, having to then obtain reimbursement from Strettons. He contended, however, that he and the other team leaders had been told they could use the card as they saw fit and while the card was primarily for business purposes, it was not 100% for those purposes. He believed he was free to put in his own money and when the arrangement expired the card could be used for personal purposes. He did not accept Strettons required not only auditing of the card by way of entries in the spreadsheet but also by way of reconciliation against the card statement. Asked why he believed Strettons would allow their funds to be mingled with private funds, Mr Boyce contended the cheque provided by Strettons to team leaders was a one-off payment.

The evidence given by Westpac

[21] The primary witness for Westpac was Ms MJ McCondach, a Chartered Accountant who, as mentioned, is the Business Manager for Strettons. It was she who in August 2013 was involved in setting up the four pre-paid debit cards through Westpac. She said the cards were issued to Strettons’ team leaders (including Mr Boyce) to be used for business purposes. It was also she who, in September 2013 requested a copy of Mr Boyce’s debit card statement from Westpac for reconciliation purposes and to ensure compliance with the rules put in place by Strettons for the use of funds loaded onto the card.

[22] Ms McCondach explained the staff structure at Strettons is made up of a series of teams known as “hubs” or “pods”. Each pod has a number of team members and is headed by a team leader who is responsible for oversight of his or her team. In early 2013 there were four teams and the team leaders attended meetings with Ms McCondach and the CEO on a fortnightly basis to discuss workflow and other issues as required. At the time Mr Boyce was team leader for the green pod.

[23] At a team leader meeting on 5 April 2013 the question was raised as to whether a system could be put in place to provide team leaders with an annual allowance for rewarding, recognising and motivating their team members by, for example, purchasing coffees. The CEO agreed to discuss the matter with the directors. Strettons did not want to widely issue business cards as the funds for the team leaders were to be used on a “one-off” basis, and it was important to ensure that Strettons retained control over the amounts being used.

[24] At a subsequent team leader meeting on 18 April 2013, team leaders were advised Strettons would organise debit cards for the purpose of providing an annual allowance of \$100 per team member for rewarding, recognising and motivating their team.

[25] Following these discussions Ms McCondach asked a staff member in Accounts to investigate what options might be suitable to meet the needs of Strettons. That person explored a number of potential options with Westpac, one of which involved using pre-

paid debit cards which could be funded annually by a company cheque. It was this proposal which Strettons eventually decided upon.

[26] On 13 August 2013 Ms McCondach instructed Accounts to issue four cheques to Westpac, one for each team leader. In relation to Mr Boyce's pod the instructions were that a cheque for \$820 was to be issued. This amount represented \$100 per staff member in Mr Boyce's team, together with a \$20 bank fee for setting up the account. Team leaders were instructed to visit the Taupo Westpac branch to collect their cards.

[27] On the same day Ms McCondach sent an email to the then Bank Manager, Mr B Szpetner to let him know team leaders would be visiting the branch the next day to pick up their cards.

[28] Ms McCondach said that from an accounting and control perspective it was essential Strettons maintained oversight of the cards to actively account for the use of the funds by the team leaders. There were a number of discussions with the leaders (including Mr Boyce) confirming the purpose for which the funds were to be used and the manner in which team leaders were required to account to Strettons. As mentioned, the cards were funded by Strettons at the rate of \$100 per team member and the funds were intended to reward, recognise and motivate the team or individual members of the team over the year as team leaders considered appropriate. A team leader could decide to organise a single team event utilising the full amount of \$100 per team member or could use the funds progressively (for example by purchasing team coffees or lunches) over the course of the year.

[29] However, no matter which way team leaders decided to use the funds, they were required to account to Strettons for each expenditure. Each month they were required to provide Strettons with the following information:

[29.1] A copy of the bank statement for their card;

[29.2] An analysis of any expenses incurred that month (including the date on which the funds were used, the venue, the names and positions of all team members present and the purpose of the expenditure; and

[29.3] Copies of all relevant receipts for the month.

This information was required for several reasons. First to ensure the expenditure could be correctly accounted for; second as an internal control in terms of maintaining oversight of the cards and third, to ensure the expenditure would be tax deductible.

[30] The requirement to account to Strettons for reconciliation purposes was verbally communicated to the team leaders (including Mr Boyce) on a number of occasions. With the exception of Mr Boyce, all team leaders thereafter provided Strettons with their expenditure information on a monthly basis, including copies of the bank statement for their respective cards.

[31] In mid September 2013 team leaders were required to submit their first accounting to Strettons for use of the funds deposited into their pre-paid card accounts in August 2013. All complied with the exception of Mr Boyce.

[32] Despite numerous requests, Mr Boyce did not provide the requested information. Emails by Ms McCondach and Accounts requesting the information produced nothing so eventually Ms McCondach obtained a copy of the debit card statement from Westpac.

She was subsequently contacted by Westpac and asked to destroy that statement, a request which Ms McCondach complied with.

[33] There is a direct conflict between Ms McCondach and Mr Boyce as to the circumstances in which the debit cards were issued and the instructions given to team leaders as to how they were to account for the expenditure of Strettons funds credited to those cards. Specifically Ms McCondach said that it was incorrect for Mr Boyce to say that team leaders were not required to provide a copy of the bank statement for their card, that team leaders could spend the money as they saw fit and that team leaders could use the cards as their own. As to Mr Boyce's claim that the money could be withdrawn and held as petty cash Ms McCondach said Strettons had a well established system for petty cash and the funds paid into the debit card accounts was not intended to provide an alternative to that system.

[34] In cross-examination Ms McCondach said it had been stressed by her to team leaders that bank statements had to be provided to Strettons on a monthly basis for auditing and reconciliation purposes. When she had contacted Mr Szpetner at Westpac to request a copy of the statement relating to Mr Boyce's debit card she had explained that the copy was required so Strettons could ensure the funds deposited into the account had been used appropriately and also to ensure Strettons had proper oversight of expenditure on the card.

[35] In answer to questions from the Tribunal Ms McCondach said all other team leaders had understood and complied with the instruction that monthly statements for the debit cards be given to Strettons. None of the other three team leaders had shown doubt as to whether the card could only be used for Strettons' purposes, specifically rewarding and motivating their team members.

[36] In his evidence Mr Szpetner confirmed that in August 2013 he had been approached by a representative from Strettons who wanted to discuss a staff reward scheme for Strettons team leaders. It had been explained to him Strettons wanted to be able to control the amounts used by team leaders and did not wish to provide them with an ongoing credit limit. It was in this context it was decided the best option was to issue a debit card to each team leader which would be funded in advance by Strettons for their use. This option would allow Strettons to top up the amounts on the cards as and when required. This arrangement gave Strettons control over the funds being used by team leaders without providing access to an ongoing credit limit.

[37] Mr Szpetner added that at that time Westpac did not have the capability to link an individual pre-paid debit card to one of Strettons' accounts. To issue a pre-paid card to a Stretton team leader the account needed to be held in the team leader's individual name.

[38] Subsequently Mr Szpetner was contacted by telephone by a representative from Strettons and told Strettons had decided to go ahead with the issuing of pre-paid debit cards to each of the four team leaders and an appointment was made for those leaders to come into the branch to pick up their cards. The appointment was for 15 August 2013 and each team leader, including Mr Boyce, visited the branch to pick up their cards. In Mr Boyce's case the account was funded by way of a single cheque from Strettons which was deposited that day.

[39] In his evidence Mr Szpetner produced a file note made by a Westpac employee showing that in Westpac's records the transaction was saved under Strettons' profile.

The evidence – discussion and findings

[40] The outcome of this case will be determined by our finding on the question whether the debit card was in effect Mr Boyce's personal card or whether, while the card was held in his name and with his personal address, it was a card issued by Westpac at the request of and for the purposes of his employment by Strettons.

[41] Our conclusion is that the evidence overwhelmingly establishes the second scenario. Our reasons are based not only on the context in which the card was issued but also on our assessment of the two primary witnesses, being Mr Boyce and Ms McCondach.

[42] We address first the context in which the debit cards were issued.

[43] It is not intended to repeat the evidence in detail but we mention in support of our findings the following:

[43.1] Strettons needed a better system to disburse funds to team leaders who wanted to reward or motivate members of their teams by making small but appreciated expenditure on items such as coffee or lunch.

[43.2] It was Strettons who conducted the discussions with Westpac as to how this could best be done.

[43.3] Opening of the four debit card accounts was initiated and arranged by Strettons. The accounts were put into funds by Strettons by way of a company cheque addressed to Westpac, not the particular team leader. Other than attending the Bank to collect and activate their cards, team leaders were not substantively involved in setting up or funding the account.

[43.4] The account was only held in the team leader's personal name due to an operational constraint in the Bank's system which meant that the debit card could not be linked directly to one of Strettons' accounts.

[43.5] Accountability for use of the funds was always stressed by Ms McCondach to the four team leaders who were specifically instructed that each month they were required to provide the following information.

[43.5.1] A copy of the bank statement for their card;

[43.5.2] An analysis of any expenses incurred that month (including the date on which the funds were used, the venue, the names and positions of all team members present and the purpose of the expenditure; and

[43.5.3] Copies of all relevant receipts for the month.

[43.6] All team leaders (apart from Mr Boyce) understood and complied with these instructions.

[43.7] The prepaid debit card accounts were saved by Westpac under Strettons' profile.

[44] In these circumstances we accept the submission by Westpac that Mr Boyce's assertions in relation to the manner in which the account was established and the level of oversight to be deployed by Strettons is not only inconsistent with the contemporaneous evidence but also defies commercial logic. We should add that it is

surprising, to say the least, that a Chartered Accountant employed by a firm of chartered accountants and holding a debit card issued and funded by his employer for work purposes could credibly assert the debit card could be used for his personal purposes and that the monthly statements could be withheld from his employer.

[45] We address next our assessment of the witnesses.

[46] In our estimation Mr Boyce is an opportunist. That is, having received from Westpac the email acknowledgement dated 4 October 2013 to the effect that release of the statement had been “in error” and having received also a ruling by the Privacy Commissioner (based on much less evidence than that heard by the Tribunal) that Westpac had breached Principles 5 and 11, he has expected financial compensation which at the time of the hearing before us had been nominated as \$100,000 for emotional harm and damage to his career and employment relationships plus \$4,000 for legal fees.

[47] Having seen and heard Mr Boyce give evidence we assess him as a person whose career aspirations at Strettons have been thwarted by circumstances of his own making and the “error” initially admitted to by Westpac encouraged him to seek a windfall financial gain, a gain which will only be within his grasp if he establishes the debit card was, in effect, not only for work purposes but also for his own to use as he saw fit. Only then could he plausibly claim the bank statement could not be provided by Westpac to anyone other than himself.

[48] It is these circumstances, we believe, which explain the noticeably self-serving tone to his evidence and his shutting of the eyes to the overwhelming evidence which establishes that from beginning to end the circumstances permit of only one reasonable conclusion, namely that the card was provided to him for work purposes only and that he was required to account for his spending of Strettons’ money by, inter alia, providing to Strettons bank statements issued in relation to the debit card account.

[49] It will be clear, therefore, that we accept in its entirety the evidence given by Ms McCondach and Mr Szpetner. Ms McCondach was a particularly clear and compelling witness who described exactly the kind of arrangements one would expect to find where a firm of chartered accountants was placing in the hands of certain trusted employees responsibility to spend the firm’s money for the firm’s purposes. It would be astonishing were such firm not to impose conditions requiring documentation which would allow internal oversight over the expenditure, proper accounting for the funds and an audit trail to facilitate the deduction of the expenses for tax purposes.

[50] The legal issues therefore fall to be determined on the basis we prefer the evidence of Ms McCondach and Mr Szpetner to the evidence given by Mr Boyce.

THE LEGAL ISSUES

[51] Westpac does not contest the importance of the information privacy principles or dispute that it made disclosure of the statement to Strettons. It says it is acutely aware of its privacy obligations and is not asserting that it is entitled to provide any employer with personal bank account details of its employees. It contends, however, that on the facts, it believed, on reasonable grounds that Principle 11(a) and Principle 11(d) applied.

[52] Westpac accepts:

[52.1] It is an “agency” as defined in s 2(1) of the Act.

[52.2] The information in the statement was “personal information” about Mr Boyce in terms of s 2(1) of the Act.

[52.3] The effect of s 87 of the Act is that Westpac has the burden of establishing the disclosure fell within either Principle 11(a) or 11(d) or both.

[53] We turn now to Principle 11.

The disclosure limitation principle – Principle 11

[54] 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.

[55] 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

[56] As it is common ground personal information about Mr Boyce was disclosed by Westpac to Strettons 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.

[57] The question is whether Westpac has established to the same standard the disclosure fell within the exception provided by Principle 11(a) or by Principle 11(d) or both.

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

[58] Principle 11(a) has two limbs. The first requires an inquiry into whether disclosure of the information was one of the purposes in connection with which the information was obtained. The second requires inquiry into whether disclosure of the information was directly related to the purposes in connection with 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.

It is not necessary for an agency to satisfy both limbs. One alone is sufficient.

[59] Addressing the first limb (disclosure of the information was one of the purposes in connection with which the information was obtained), a bank statement generated by a bank (here Westpac) ordinarily sets out the name and address of the account holder, the account number and records the transactions which have taken place within a specified time period. The primary purpose is to maintain a record of financial transactions for future reference, including the preparation by the account holder (and others) of accounting records including reconciliations and tax returns. In the present case the account holder (Mr Boyce) was not the sole audience for whom the information was collected. That audience included Strettons as well. In these circumstances we find Westpac has satisfied us to the probability standard that disclosure to Strettons was one of the purposes in connection with which the information was obtained.

[60] In the alternative we are of the view disclosure of the information was directly related to the purposes in connection with which the information was obtained. In this

regard we adopt what was said in *Director of Human Rights Proceedings v Crampton* [2015] NZHRRT 35 (29 July 2015) at [86] to [92] as to the meaning of the phrase “directly related to the purposes”. There must be an uninterrupted, immediate relationship to the original purpose. In the present case the account having been opened by Strettons for Strettons’ own business purposes (albeit in the name of Mr Boyce) it is clear disclosure of the information in the statement was directly related to the purposes in connection with which the information was obtained.

Belief on reasonable grounds

[61] It is now necessary to address the matters of “belief” and “reasonable grounds”.

[62] 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.

[63] With regard to the subjective component we accept the submission for Westpac that it believed the four accounts were established by, paid for and funded by Strettons to be used by their team leaders for business purposes. This is confirmed by the email dated 4 October 2013 sent by Westpac to Mr Boyce in which the author advised the statement had been provided to Strettons “on the understanding that the account was for business purposes”.

[64] With regard to the objective component, the account having been opened by and funded by Strettons, it was reasonable for Westpac to believe the account was established for Strettons’ business purposes. The discussion between Westpac and Strettons permits of no other conclusion. In particular, when Ms McCondach contacted Mr Szpetner to request a copy of the statement for Mr Boyce’s card she told him the statement was required so Strettons could ensure that its funds credited to the account were being used appropriately and as intended. In short, Strettons needed to maintain oversight of the way its money was being spent.

[65] We accept the submission for Westpac that in these circumstances it was reasonable for Westpac to believe (as it did) disclosure of the statement to Strettons was

directly connected to the purpose for which the information in the statement had been obtained. There was an uninterrupted, immediate relationship between disclosure of the statement to Strettons and the purpose in connection with which the information had been obtained. Gaining access to the statement was the only way Strettons could effectively monitor the account and audit the way in which it was used.

Conclusion on second sequential step – Principle 11(a)

[66] It follows Westpac has proved to the civil standard disclosure of the statement to Strettons did not breach Principle 11.

Principle 11(d) – the requirements of the second sequential step

[67] Principle 11(d) provides:

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,—

...

(d) that the disclosure is authorised by the individual concerned;

...

[68] The authorisation referred to in Principle 11(d) can be either explicit or implicit, depending on the context. See *L v L* AP95-SW01, Auckland Registry, 26 April 2002 at [76] and *Boyle v Manurewa RSA Inc* [2003] NZHRRT 16. In the latter case the Tribunal at [68] said that for there to be implied authorisation there must be sufficient evidential foundation from which it can be inferred the individual concerned understood and accepted that his or her personal information would be provided to a third party.

[69] On the facts the evidence is clear and unambiguous. Westpac was possessed of the following information from which it could reasonably be inferred Mr Boyce understood and accepted his personal information would be provided to Strettons. The evidence given by Mr Szpetner establishes:

[69.1] All discussions which preceded the issue of the four debit cards were between Strettons and Westpac. In those discussions Westpac was told the cards were to be issued for work purposes, specifically to facilitate a staff reward scheme.

[69.2] It was explained to Mr Szpetner Strettons wanted to be able to control the amounts being used by team leaders and did not wish to provide them with an ongoing credit limit. It was in this context it was decided the best option was to issue a debit card to each team leader which would be funded in advance by Strettons for their use. This arrangement gave Strettons control over the funds without providing access to an ongoing credit limit.

[69.3] The only reason why the cards were not linked to a Strettons account was because Westpac did not have the capability of linking an individual pre-paid debit card to one of Strettons' accounts.

[69.4] The accounts were funded by way of a cheque drawn on a Strettons account.

[69.5] Strettons made the appointment for the team leaders to uplift their cards.

[69.6] In Westpac's records the transaction was saved under Strettons' profile.

[69.7] Mr Boyce was a Chartered Accountant employed by a firm of chartered accountants. It was reasonable for Westpac to infer that holding as he did a debit card issued and funded by his employer for work purposes, Mr Boyce could not credibly claim the card could be used for his personal purposes and that the monthly statements could be withheld from his employer.

[70] Given the foregoing there was more than sufficient evidential foundation from which Westpac could infer (and did infer) Mr Boyce understood and accepted his personal information in the form of the bank statements relating to the debit card could and would be provided to Strettons.

[71] Equally there were more than sufficient grounds for Westpac to hold the belief (as it did) on reasonable grounds that the disclosure was authorised by Mr Boyce.

Conclusion on second sequential step – Principle 11(d)

[72] Our conclusion is that Westpac has established to the civil standard a second "exception" in terms of s 87 of the Act and that disclosure of the statement to Strettons did not breach Principle 11.

CONCLUSION

[73] No breach of an information privacy principle having been established Mr Boyce has failed to prove an interference with his privacy as defined in s 66(1) of the Privacy Act 1993. The proceedings are accordingly dismissed.

COSTS

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

[74.1] Westpac is to file its submissions within fourteen days after the date of this decision. The submissions for Mr Boyce are to be filed within a further fourteen days with a right of reply by Westpac within seven days after that.

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

[74.3] 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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Mr MJM Keefe JP
Member

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Mr BK Neeson JP
Member