(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF AGGRIEVED PERSON, HER PARTNER AND HIS MOTHER

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 5**

	Reference No. HRRT 005/2014
UNDER	**SECTION 50 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994**
BETWEEN	**DIRECTOR OF PROCEEDINGS**
	PLAINTIFF
AND	**NATASHA THOMSON**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Dr SJ Hickey MNZM, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Ms N Wills, Director of Proceedings
Ms C Humphrey for defendant

DATE OF DECISION: 27 February 2015

DECISION OF TRIBUNAL

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[1] These proceedings under s 50 of the Health and Disability Commissioner Act 1994 were filed on 4 March 2014.

[2] The parties have since resolved all matters in issue and the Tribunal has now been asked to make a consent declaration. On 17 February 2015 the parties filed:

[2.1] A Consent Memorandum dated 28 October 2014.

[2.2] An Agreed Summary of Facts, a copy of which is annexed and marked "A".

[3] The Consent Memorandum is in the following terms:

MAY IT PLEASE THE TRIBUNAL

1. The plaintiff and defendant have agreed upon a summary of facts on the basis of which the parties seek a declaration in paragraph 2(a) below. A signed copy of the agreed facts is filed with this memorandum. The parties are agreed that it is not necessary for the Tribunal to consider any other evidence for the purpose of making the declaration sought. The parties request that the agreed summary of facts be published by the Tribunal as an addendum to the decision.
2. The plaintiff requests that the Tribunal exercise its jurisdiction in respect of the following matters:
   (a) A declaration pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 ("the Act") that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 ("the Code") in respect of:
      (i) Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill;
      (ii) Right 4(2) by failing to provide services that comply with legal, professional, or other relevant standards; and
      (iii) Right 4(4) by failing to provide services in a manner that minimised the potential harm to, and optimised the quality of life of the aggrieved person.
   (b) The plaintiff seeks a final order prohibiting publication of the name of the aggrieved person in this matter [redacted] and her partner [redacted] and his mother [redacted]. The defendant consents to such final orders being granted.
3. The defendant consents to the Tribunal making the above declaration based on the facts set out in the agreed summary of facts, and the non-publication orders sought in paragraph 2(b).
4. In the statement of claim the plaintiff also sought the following relief on behalf of [redacted]. The claim for damages for [redacted] is withdrawn in light of the Tribunal's decision in *P v Iyengar* [2011] NZHRRT 2 (3 February 2011). The other aspects of the relief claimed by the plaintiff, that being:
   (a) damages pursuant to s 57(1); and
   (b) costs,
   have been resolved between the parties by negotiated agreement.
5. The defendant does not seek any order prohibiting publication of the defendant's name.

[4] Having perused the Agreed Summary of Facts the Tribunal is satisfied on the balance of probabilities that an action of the defendant was in breach of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 and that a declaration should be made in the terms sought by the parties in paragraph 2 of the Consent Memorandum.

DECISION

[5] By consent the decision of the Tribunal is that:

[5.1] A declaration is made pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 that the defendant breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in respect of:

[5.1.1] Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill;

[5.1.2] Right 4(2) by failing to provide services that complied with legal, professional or other relevant standards; and

[5.1.3] Right 4(4) by failing to provide services in a manner that minimised the potential harm to, and optimised the quality of life of the aggrieved person.

[5.2] A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the aggrieved person, her partner and his mother. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

.....	.....	.....
...	...	...
Mr RPG Haines QC	**Dr SJ Hickey MNZM**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**

"A"
This is the Agreed Summary of Facts marked with the latter "A" referred to in the annexed decision of the Tribunal delivered on the 27 February 2015

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

HRRT No. 05/14

UNDER	Section 50 of the Health and Disability Commissioner Act 1994
BETWEEN	**DIRECTOR OF PROCEEDINGS,** designated under the Health and Disability Commissioner Act 1994
	Plaintiff
AND	**NATASHA THOMSON** of Blenheim, Midwife
	Defendant

AGREED SUMMARY OF FACTS

SUMMARY OF FACTS

INTRODUCTION:

1. The plaintiff is the Director of Proceedings, a statutory position created by s 15 of the Health and Disability Commissioner Act 1994 ("The Act"). The aggrieved person is Ms B. The aggrieved person's partner, and father of the baby is referred to as Mr B. Mr B's mother is Mrs P.

2. At all material times the defendant:

   (a) was a community based registered midwife.

   (b) was a healthcare provider within the meaning of s 3 of the Act, and was providing health services to Ms B.

   (c) had been practising as a midwife for approximately nine months, having graduated with a Bachelor of Midwifery in December 2010.

   (d) had approximately 15 midwifery clients in total, and was participating in the Midwifery First Year of Practice Programme. As part of the programme, the defendant had contact with her midwifery first year practice mentor, who lived in Christchurch, on a weekly basis.

   (e) The defendant was also supported by her practice partner.

3. On 28 February 2012 Dr Helen Crampton, Obstetrician and Gynaecologist, complained to the New Zealand Midwifery Council about services provided to Ms B. Dr Crampton's complaint was forwarded to the Health and Disability Commissioner on 5 March 2012.

4. On 9 July 2013 the Health and Disability Commissioner finalised his opinion that the defendant had breached Ms B's rights under the Health and Disability Commissioner (Code of Health and Disability Service Consumers' Rights) Regulations 1996 ("the Code") and in accordance with s 45(2)(f) of the Act, referred the defendant to the plaintiff.

5. On 28 February 2014 pursuant to s 49 the plaintiff issued proceedings before the Human Rights Review Tribunal.

ANTENATAL CARE

6. The defendant first met Ms B at an initial booking visit on 7 July 2011. Ms B was 16 years old and was 10 weeks and four days pregnant with her first child at the time. On 9 September 2011 the defendant recorded in the midwifery notes that she had discussed with Ms B postnatal support groups, such as Parents as First Teachers (PAFT), and the possibility of Ms B attending a parenting group at Barnardos. The defendant also gave Ms B a DVD on breastfeeding and a book containing information for young parents.

7. The defendant informed Ms B that if she attended antenatal classes she may get "looked down on" because of her age. Instead, the defendant offered to teach Ms B everything an antenatal class could teach her. Ms B accordingly did not attend antenatal classes.

8. Ms B and the defendant met regularly on nine further occasions for antenatal visits, the last of which was on 11 January 2012. Ms B's pregnancy continued uneventfully.

9. The defendant did not provide adequate information and ensure that Ms B understood the labour process including a birth plan and how to care for a newborn.

The birth

10. On the morning of 15 January 2012, at about 5am, Ms B woke in pain and went to the toilet, where the mucous plug fell out. She had no idea what it was and so she conducted an internet search and ascertained that this was "the start of the beginning of labour". At that time she was 37 weeks and 4 days' gestation.

11. Ms B returned to bed and tried to sleep, but was unable to do so because of painful contractions. The peaks were 5 to 6 minutes apart. The pain became worse and so at 5:29am Ms B woke Mr B and then rang the defendant. Ms B spoke to the defendant for three minutes during which time she told the defendant "I have really bad tummy pain." She asked the defendant whether her baby was all right and advised the defendant that she was sitting on the toilet, as that was the only position in which she could get any relief. Ms B was very concerned because she did not know whether she was experiencing labour or if

there was something wrong with her baby. The defendant believed Ms B to be in early labour and asked Ms B to call back later in the day and noted that labour may take another four to six hours.

12. By approximately 5:40am the pain had intensified such that Ms B called out to Mr B, who was still in bed, from where she was seated on the toilet. Mr B then telephoned the defendant at 5:44am for a second time and passed the phone to Ms B. Ms B spoke to the defendant for two minutes during which time she told the defendant about the nature of the pain including that the pain was excruciating, and asked what to do**.** The defendant asked Ms B to phone her later on in the day.

13. The defendant recorded in the clinical notes:

"Phone call from [Ms B] to say she was contracting + mucus plug had come away. Advised to breath with contractions, have a shower or bath & ring me when the contractions are 5 mins apart, lasting 60 secs."

14. Mr B called the defendant a third time at 6:11am and told her that Ms B was in a lot of pain, and that he was going to take her to hospital, if the defendant did not attend. Mr B and the defendant spoke for no more than two minutes. The defendant instructed Mr B to call her back once he had timed the contractions for 20 minutes.

15. Mr B then called his mother, Mrs P, who arrived within five minutes of the call. According to Mrs P, when she arrived Ms B was sitting on the toilet and clearly in established labour, with contractions occurring a few minutes apart.

16. Mrs P told Mr B to call the defendant and tell her that she needed to come immediately because Ms B was in labour. Mr B called the defendant for a fourth time at 6:23am and passed the phone to his mother.

17. Mrs P informed the defendant that Ms B was in established labour and that the defendant needed to come immediately. The defendant said that teenage mothers sometimes panic when labour first starts. Mrs P then hung up the telephone and went to check on Ms B. The phone call lasted four minutes.

18. Ms B was having contractions in quick succession at the time. Ms B reached down and felt the baby's head and called out to Mrs P, who looked and saw the baby's head.

19. Mr B called the defendant for the fifth time at 6:27am and told her that the baby was coming, to which the defendant replied that she was on her way. The phone call was no more than one minute.

20. The defendant recorded in the clinical notes at 630:

"Phone call to say [Ms B] can't cope, not consolable & feels like pushing. Advised not to push and to time contractions.

21. The defendant recorded in the clinical notes at 6:31:

"Phone call to say head had been born, ON MY WAY NOW!"

22. Ms B gave birth to the baby at 6.30am, on her hands and knees in the bathroom.

23. Mrs P then wrapped the baby in a towel. Ms B sat holding the baby while waiting for the defendant to arrive.

24. The defendant recorded in the clinical notes that she arrived at 6:36am. She had not brought scissors with her with which to cut the umbilical cord. Mr B found kitchen scissors with which the defendant cut the cord.

25. The defendant then assisted Ms B to the bedroom. She put the baby on Ms B's breast and assessed Ms B's perineum. The defendant informed Ms B there was a tear but said that it was not bad, and referred to it as a "tiny tear". Ms B felt cold and was shaking. The defendant covered Ms B with a blanket and then left the room, saying that she was going to fill in the clinical notes.

26. At approximately 7.30am the defendant returned to the bedroom and asked Ms B whether she felt any pressure, or a pushing feeling. The defendant was assessing whether the placenta was coming away physiologically**.** The defendant assisted Ms B with the delivery of the placenta. With reference to third stage, the midwifery notes state: "Appears complete."

27. The defendant recorded on the Labour and Birth Summary document used for funding purposes that she had attended the birth and was claiming funding for her attendance at the birth.

Postnatal care

28. The defendant reassessed Ms B's perineum at 8.15am. The defendant told Ms B she could see that Ms B had a first degree tear, which included the clitoral hood and was 3cm at the lower vagina. The defendant advised Ms B to be "ladylike", and to keep her legs together and change her pads frequently.

29. At about 9am, the defendant told Ms B that she would be back later in the day and left. The defendant did not talk to Ms B or Mr B about the risk of infection or how to deal with the tear.

30. The defendant returned to check on Ms B at about 3pm that day and found Ms B was breastfeeding the baby. Ms B was finding breastfeeding to be very painful. The defendant did not discuss how to breastfeed or how often to breastfeed with Ms B at that time. Instead, she informed Ms B that the pain was normal and advised Ms B to watch the breastfeeding DVD the defendant had earlier provided. The defendant says that she had previously spent time discussing breastfeeding, including the frequency, latch, and stimulation of the breasts at antenatal appointments with Ms B.

31. The defendant noted that Ms B was having dizzy spells and hot flushes, and advised Ms B to keep up fluid intake and lie down to feed. The defendant did. The defendant did not refer Ms B to a medical practitioner or hospital for examination.

Breastfeeding

32. Over the subsequent three weeks the defendant saw Ms B on ten occasions for post-natal care. Ms B had difficulty breastfeeding and was noted to have cracked and bleeding nipples. Three days after the birth Ms B phoned the defendant for assistance with breastfeeding. Ms B was crying during the telephone conversation and told the defendant that she could not latch the baby. Ms B asked the defendant to come to help her latch the baby. Ms B told the defendant that the baby had not had a feed and was screaming. The defendant advised the

Ms B to express breast milk into a metal spoon and feed the baby with that. The defendant did not offer to visit Ms B or to assist her with help breastfeeding. The defendant did not record the incident in the midwifery notes.

19 On 19 January the defendant recorded in the midwifery notes "breasts comfortable" and "nipples grazed but comfortable". The defendant did not refer Ms B to a lactation specialist or for further breastfeeding support. The defendant recorded in the midwifery notes that Ms B had started to bottle feed expressed breast milk.

33. Ms B's dizziness continued. The defendant showed Ms B how to feed the baby lying down.

Management of perineal tear

34. Ms B was in pain in her perineum to the extent that she could barely walk in the weeks following the birth. The defendant told Ms B to sit on the couch and to walk only when walking to bed. Because of the severity of Ms B's pain, she was unable to sit on the couch and instead sat on a plastic outdoor chair, which she found more comfortable. When Ms B took a step she could feel the tear pull open, and found it to be very painful when urinating. Ms B told the defendant that she had tried to make a funnel to prevent the urine from touching the tear, and said that she could not bear the pain. Ms B tied her thighs together with her dressing gown cord so that she would not pull the wound open when she walked. The defendant asked Ms B what she was doing. Ms B said that she kept feeling that the wound would rip open. The defendant laughed with Ms B about the use of the dressing gown cord, which caused Ms B to fee disparaged.

35. The defendant checked the tear and told Ms B that the tear was "healing fine". Ms B told the defendant that she was in a lot of pain.

36. The defendant recorded on multiple occasions in the postnatal midwifery notes that Ms B was experiencing pain from the tear. The defendant advised Ms B to apply Witchhazel in distilled water to a pad to reduce the inflammation in the labia. The defendant gave Ms B Voltaren and antibiotics (Augmentin) to reduce the risk of infection.

37. The defendant did not at any stage refer Ms B to a medical practitioner to assess the perineal tear.

Prescription of antibiotics and management of puerperal sepsis

38. On 22 January 2012 the defendant recorded that Ms B was "taking Augmentin 1000mg 3 x daily for cover against infection in perineum. Also lump in armpit is a cyst that became infected. GP would also have given the same antibiotics, so happy with plan of 7 days Augmentin." The defendant had prescribed the Augmentin for Ms B. The defendant did not take swabs of Ms B's perineum to check for infection and did not seek medical advice before prescribing Augmentin.

39. Ms B became febrile and faint which was noted by the defendant at a visit on 24 January 2012.

40. The defendant did not take any action to have Ms B assessed by a medical practitioner. A week later on the evening of 8 February 2012 the defendant telephoned Ms B, who advised that she was still in pain and that the lochia was different but not smelling. The defendant visited Ms B the following day and found that she was clammy and cold and had fever and cramps and offensive smelling lochia. The defendant took a swab and prescribed one dose of metronidazole. The defendant recorded in the midwifery notes that the plan was to call Ms B that evening and visit the following morning. The swab taken by the defendant returned a few days later showing Streptococcus Group A (Streptococcus pyogenes).

GP care and hospital admission

41. Ms B had an infection on her finger that had spread to her hand and arm. For this reason, on 10 February she went to the after-hours GP service. While she was at the after-hours GP service, Ms B asked the doctor to check her perineum. The doctor then called an obstetrician, Dr Helen Crampton, to assess Ms B. Ms B was found to have experienced a second degree tear, that is, a tear that extends beyond the fourchette, perineal skin and vaginal mucosa to perineal muscles and fascia, but not the anal sphincter. The tear was more serious than the defendant had initially assessed.

42. Ms B appeared unwell and had an elevated CRP[1] and an elevated white cell count, which indicated infection.

43. After examining Ms B, Dr Crampton organised for her to be admitted to hospital for intravenous antibiotics, examination under anaesthetic (EUA), perineal debridement and reconstruction at Wairau Hospital. The EUA confirmed an infected labial laceration and perineum that had failed to unite, and that a posterior vaginal wall skin flap had scarred onto the raw perineal edges. All infected tissue was excised and a labial and perineal reconstruction was performed.

44. Ms B was discharged from Wairau Hospital on 12 February 2012 on continuing antibiotics.

45. Ms B attempted to re-establish breastfeeding but was unsuccessful. Ms B would have preferred to breastfeed had she had the appropriate support to do so from the time of the baby's birth.

RELEVANT STANDARDS

46. The relevant standards include The New Zealand College of Midwives 'Midwives Handbook for Practice'. In particular, standards one, three, four and five as follows:

> Standard One:
>
> The midwife works in partnership with the woman …
>
> Midwives respond to the social, psychological, physical, emotional, spiritual and cultural needs of women seeking midwifery care, whatever their circumstances, and facilitate opportunities for their expression … Midwives have responsibility to ensure that no action or omission on their part places the woman at risk. Midwives have a professional responsibility to refer to others when they have reached the limits of their expertise.
>
> Standard Three:
>
> The midwife collates and documents comprehensive assessments of the woman and/or baby's health and wellbeing.

[1] C Reactive Protein: the level of CRP rises when there is inflammation in the body.

Standard Four:

The midwife maintains purposeful, on-going, updated records and makes them available to the woman and other relevant persons.

Standard Five:

Midwifery care is planned with the woman.

SERVICE FAILINGS

47. The defendant failed to provide an appropriate standard of care in that she did not:

(a) develop a sufficient birth plan with Ms B;

(b) provide adequate information to Ms B about the labour process and caring for a new-born;

(c) attend the birth of Ms B's baby, when requested to do so and birth was imminent;

(d) adequately examine Ms B for perineal damage;

(e) refer Ms B to a medical practitioner for examination and assessment of Ms B's perineal damage;

(f) have clinical rationale, including test results which may have indicated infection, before she prescribed antibiotics to Ms B;

(g) adequately respond to Ms B's request for assistance with breastfeeding;

(h) appropriately manage Ms B's puerperal sepsis;

(i) appropriately document her care of Ms B.

The Code

48. The Code relevantly provides:

RIGHT 4

Right to services of an appropriate standard.

Every consumer has the right to have services provided with reasonable care and skill.

Every consumer has the right to have services that comply with legal, professional, ethical and other relevant standards.

Every consumer has the right to co-operation among providers to ensure quality and continuity of services.

BREACH – RIGHT 4

49. The defendant accepts that she breached Right 4 of the Code by failing to provide Ms B with services of an appropriate standard, in particular by failing to provide services with reasonable care and skill (Right 4(1)); and/or comply with legal, profession other relevant standards (Right 4(2)); and/or provide services in a manner that minimises the potential harm and optimises the quality of life of Ms B (Right 4(4)).

_____

Director of Proceedings

I, Natasha Thomson agree that the facts set out in this Summary of Facts are true and correct.

Natasha Thomson

Date