

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2018] NZHRRT 28

	Reference No. HRRT 068/2016
UNDER	THE PRIVACY ACT 1993
BETWEEN	SIMON COOPER
	PLAINTIFF
AND	HAMILTON PHARMACY 2011 LIMITED
	DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:

Ms AV Twaddle for plaintiff

Ms J Forrest for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **27 June 2018**

DECISION OF CHAIRPERSON ON APPLICATION BY DEFENDANT FOR FURTHER AND BETTER DISCOVERY¹

[1] These proceedings were filed on 11 October 2016. The original defendants were Hamilton Pharmacy 2011 Ltd (Hamilton Pharmacy) and Mr Graham Burnett, one of the four directors of Hamilton Pharmacy. However, by amended statement of claim dated 2 March 2018 Mr Burnett has been removed. The claim against Hamilton Pharmacy remains substantively the same as it was in the original statement of claim.

¹ [This decision is to be cited as *Cooper v Hamilton Pharmacy 2011 Ltd (Discovery)* [2018] NZHRRT 28.]

The application for further discovery

[2] At a case management teleconference convened on 9 November 2017 the parties agreed on informal discovery. See the *Minute* issued on that date at [9] to [16] and [26.1]. However, certain issues remain unresolved. See the later *Minute* dated 26 January 2018.

[3] By application dated 16 February 2018 Hamilton Pharmacy now seeks disclosure of the following documents:

[3.1] Mr Cooper's bank statements for all accounts (including credit cards) during the period of his employment with Hamilton Pharmacy.

[3.2] Mr Cooper's medical and counselling history limited to alcohol and drug use and including his prescription history.

[3.3] Communications between Mr Cooper and the Pharmacy Council.

The facts asserted by Hamilton Pharmacy

[4] Although two case management teleconferences have been held, the parties have not yet been required to file their statements of evidence and no findings of fact have been made by the Tribunal in relation to the competing versions of events. Consequently, on this application for discovery, reference to the "facts" is not to be taken as suggesting those "facts" have been found to be established. The narration is taken from the submissions for Hamilton Pharmacy simply because it is the party seeking discovery.

[5] In support of the application for discovery the following account is provided by Hamilton Pharmacy:

[5.1] Mr Cooper was employed as a pharmacist by Hamilton Pharmacy from 1 January 2013 until he resigned on 27 June 2014.

[5.2] He resigned during an employment investigation. Another employee had admitted stealing money from the pharmacy. She said Mr Cooper was involved in these thefts and that she had banked money into his account. She provided text messages exchanged between them to support this.

[5.3] Other issues arose in the course of the investigation. These included alleged consumption of alcohol at work; frequent absences from the pharmacy (contrary to the Medicines Act 1981, s 42A) and possible misuse of drugs.

[5.4] Mr Cooper resigned part way through the investigation. He did not provide a full response or explanation to the various allegations.

[5.5] Mr Burnett became aware Mr Cooper was applying for a new position in an associated pharmacy. He arranged for a handwritten fax to be sent to other pharmacies in the area stating, inter alia, "do not employ".

[5.6] On 29 July 2014 Mr Burnett notified the Pharmacy Council of his concerns about Mr Cooper.

[5.7] On 2 October 2014 the Pharmacy Council referred the issues to a Professional Conduct Committee and imposed conditions on Mr Cooper's scope of practice. He was required to work from that point under an approved supervisor

and to disclose the fact of the Council's investigation to any employer (if he worked as a pharmacist).

[5.8] Mr Cooper filed a claim in the Employment Relations Authority on 23 October 2014. That claim was withdrawn in 2018.

[5.9] On 15 January 2015 Mr Cooper filed in the High Court a claim against Hamilton Pharmacy and Mr Burnett alleging defamation and malicious falsehood. No hearing date has yet been allocated for the hearing of this claim.

[5.10] On 11 October 2016 Mr Cooper filed the current claim in the Human Rights Review Tribunal.

[5.11] The Professional Conduct Committee had not, as at 16 February 2016 completed its investigation, although it was understood the filing of charges against Mr Cooper in the Health Practitioners Disciplinary Tribunal was believed to be imminent.

The claim by Mr Cooper under the Privacy Act 1993

[6] In these proceedings Mr Cooper alleges Hamilton Pharmacy breached information privacy principles 8 and 11.

[7] Principle 8 provides:

Principle 8

Accuracy, etc, of personal information to be checked before use

An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

One way of framing the issues under this principle is whether Hamilton Pharmacy used Mr Cooper's personal information only after taking such steps as were, in the circumstances, reasonable to ensure that having regard to the purpose for which the information was proposed to be used, the information was accurate, up to date, complete, relevant and not misleading.

[8] The focus is on the information held by Hamilton Pharmacy at the date of disclosure and on the circumstances which existed at that time. The information now sought by Hamilton Pharmacy was not held by it at the time and cannot be factored into its decision-making ex post facto.

[9] Principle 11 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,—

- that the disclosure of the information is one of the purposes in connection with which the
- (a) 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 and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information; 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
- (fa) that the disclosure of the information is necessary to enable an intelligence and security agency to perform any of its functions; 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.

[10] Hamilton Pharmacy pleads reliance on Principle 11(f)(i).

[11] As to the burden of proof, s 87 of the Privacy Act 1993 (PA) 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.

[12] 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].

[13] It can be seen that in the context of Principle 11 it is for Hamilton Pharmacy to establish, on the balance of probabilities, that at the point Mr Cooper's personal information was disclosed, Hamilton Pharmacy believed, on reasonable grounds, that such disclosure was necessary to prevent or lessen a serious threat to public health or public safety.

[14] 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.

[15] The point of greatest significance in the current context is that the belief and the reasonable grounds referred to in Principle 11 must exist at the date of disclosure. It is not possible to advance justifications devised in hindsight.

[16] Once it is understood that Hamilton Pharmacy carries the burden of establishing that the disclosure (or disclosures) fell within the exception provided by principle 11(f)(i) and that the requisite subjective and objective components must be shown to have existed at the date of disclosure, the application for further and better discovery must fail because the documents sought go to the ultimate truth of the allegations made against Mr Cooper, not to what was believed at the time and whether there were then reasonable grounds for that belief. In short, the documents sought by Hamilton Pharmacy are not relevant to the issues raised by Principle 11.

[17] This conclusion will be further explained in relation to each of the three categories of documents sought by Hamilton Pharmacy.

[18] First, it is necessary to list the remedies sought by Mr Cooper as some, but not all require him to prove a causal connection between the alleged interference with his privacy and the remedies sought:

[18.1] A declaration of interference.

[18.2] An order restraining Hamilton Pharmacy from continuing or repeating that interference.

[18.3] Damages for pecuniary loss.

[18.4] Damages for lost income.

[18.5] Damages for humiliation, loss of dignity and injury to feelings.

[18.6] An apology.

[18.7] A training order directed at Hamilton Pharmacy and its directors.

[19] Given the nature of some of these remedies Mr Cooper does not dispute disclosure of the following documents must be made by him:

[19.1] Medical records relating to stress and anxiety after the disclosures.

[19.2] His employment applications, steps taken to obtain employment, work and income since the end of his employment and any study or training undertaken.

[19.3] Details relating to loss, including evidence of gross income for the period July 2014 to the present (including details of benefits received).

[20] Against this background it is possible to return to the further and better discovery sought by Hamilton Pharmacy in relation to liability issues.

The bank statements

[21] Hamilton Pharmacy accepts that the bank statements were not available to it at the date of the alleged disclosures. However, it is submitted the accuracy or otherwise of the claim that Mr Cooper had stolen money is relevant in respect of:

[21.1] The reasons for the disclosures.

[21.2] The public interest defence pleaded by Hamilton Pharmacy.

[21.3] Any assessment of culpability.

[21.4] Any assessment of loss or damage alleged.

[22] As to these submissions, the banking records cannot be relevant to the reasons for the disclosures as the information in those records was not known at the time the disclosures were made. In addition, the principle that an agency must establish that at the time any disclosure is made it possessed the requisite grounds to make the disclosure is not altered when an agency pleads a public interest defence. That is, the pleading of the public interest defence does not require Mr Cooper to disclose material not available to Hamilton Pharmacy at the time of the particular disclosure.

[23] As to the assessment of liability (ie whether there has been an interference with Mr Cooper's privacy in terms of the Privacy Act 1993, s 66), the issue is not whether the allegations made by Hamilton Pharmacy in June and July 2014 are ultimately true. The issues are simply:

[23.1] Whether, in terms of Principle 8, Hamilton Pharmacy used Mr Cooper's personal information only after taking such steps as were, in the circumstances, reasonable to ensure that having regard to the purpose for which the information was proposed to be used, the information was accurate, up to date, complete, relevant and not misleading.

[23.2] Whether, in terms of Principle 11, that at the time any personal information was disclosed, Hamilton Pharmacy believed, on reasonable grounds that such disclosure was necessary to prevent or lessen a serious threat to public health or public safety.

The medical records

[24] The submissions for Hamilton Pharmacy acknowledge Mr Cooper is willing to provide his medical and counselling history as it relates to stress and anxiety subsequent to the disclosures. But Hamilton Pharmacy submits the accuracy of the claim that he was drinking while on duty and (allegedly) involved in the misuse of drugs is relevant. The full medical and counselling history as it relates to alcohol and drugs is claimed to be relevant for the same reasons the bank statements are required. They relate to the reasons for the disclosures, the public interest defence pleaded and any assessment of culpability and damage.

[25] The short point is that the requested information was not information available to Hamilton Pharmacy at the time of the disclosure. Accordingly, it cannot be used to support the decision by Hamilton Pharmacy to make the disclosures. There is also force to the submission by Mr Cooper that Hamilton Pharmacy cannot request discovery of documents to determine whether a defence is available to it or not.

[26] As already stated, the ambit of the inquiry before the Tribunal is confined to whether the terms of Principle 8 and Principle 11 were adhered to before the personal information was disclosed by Hamilton Pharmacy. The only relevance of the medical records is in the context of remedies and the assessment of damages. It is in that context Mr Cooper has agreed to provide his medical and counselling history.

[27] As the medical records may contain sensitive information it is open to Mr Cooper to apply for a confidentiality order under the Human Rights Act 1993, s 107(3) limiting the disclosure and circulation of the discovered records.

Communications with the Pharmacy Council

[28] Mr Cooper alleges the report made by Mr Burnett to the Pharmacy Council was an interference with his privacy. Hamilton Pharmacy admits the notification to the Council and pleads affirmative defences. It is also pleaded that the conditions imposed on Mr Cooper's scope of practice are relevant in the context of the claim by Hamilton Pharmacy that it was acting to protect public safety.

[29] That may be so but after the event information gathered by the Pharmacy Council (whether from Mr Cooper or from third parties) in the course of investigations is not relevant to the Tribunal's inquiry. What Hamilton Pharmacy appears to overlook is that

the focus of Principle 8 is on the steps taken to ensure the accuracy etc of Mr Cooper's personal information and the focus of Principle 11 is on the nature of the subjective belief held and whether there were reasonable grounds for that belief. The actions of the Pharmacy Council, the evidence received by it (including any communication from Mr Cooper) and the findings made are irrelevant. As this Tribunal has emphasised in *Geary*, an explanation devised in hindsight will not satisfy Principle 11.

[30] In the result, while the conditions placed on Mr Cooper's practising certificate may have a potential relevance to the issues of public health and safety and to damages, the investigation by the Pharmacy Council and the outcome of that investigation are not relevant to the issues under the Privacy Act.

General

[31] The submissions for Hamilton Pharmacy note that the discovery sought in this Tribunal has already been the subject of discovery orders in the High Court. The information is therefore in the knowledge of the parties. Hamilton Pharmacy therefore asks the question: On what grounds does Mr Cooper oppose discovery of the documents sought? It is submitted the only reason is that the documents are detrimental to his position.

[32] The allegation that Mr Cooper is opposing discovery because he has something to hide is both unfair and unfounded. It is abundantly clear from the submissions dated 2 March 2018 filed by Ms Twaddle that discovery is opposed because on well-established principle the information sought is not discoverable because it is irrelevant to the issues to be determined. In my view that assessment is entirely correct.

Conclusion

[33] The application by Hamilton Pharmacy for further and better discovery is dismissed.

Directions for future conduct of case

[34] The Secretary is directed to convene a case management teleconference at the earliest opportunity convenient to the Tribunal and to counsel.

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Mr RPG Haines ONZM QC
Chairperson