

- (1) PERMANENT ORDER PROHIBITING PUBLICATION OF REDACTIONS MADE TO EMAILS DATED 15 APRIL 2016 AND 18 APRIL 2016**
- (2) PERMANENT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND ANY OTHER IDENTIFYING PARTICULARS OF SERVICE USERS OTHER THAN PLAINTIFF**
- (3) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL**

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2019] NZHRRT 53

Reference No. HRRT 029/2018

UNDER THE PRIVACY ACT 1993

BETWEEN EAMON HENNING MARSHALL

Plaintiff

AND IDEA SERVICES LIMITED

Defendant

AT NAPIER

BEFORE:

Mr RPG Haines ONZM QC, Chairperson
Ms GJ Goodwin, Deputy Chairperson
Ms LJ Alaeinia JP, Member
Mr MJM Keefe QSM JP, Member

REPRESENTATION:

Mr GW Marshall as agent for his son
Ms I Reuvecamp for defendant

DATE OF HEARING: 4 December 2019

DATE OF DECISION: 5 December 2019

(OPEN) ORAL DECISION UPHOLDING REDACTIONS MADE BY DEFENDANT¹

¹ [This decision is to be cited as: *Marshall v IDEA Services Ltd (Redactions)* [2019] NZHRRT 53]

The statement of claim

[1] By amended statement of claim dated 15 February 2019 Eamon Marshall has alleged IDEA Services Limited (IDEA Services) breached the Health Information Privacy Code 1994 (HIPC) in two respects:

[1.1] Rule 6 – failure to provide access to personal health information.

[1.2] Rule 8 – failure to check health information before use.

[2] The proceedings were set down to commence at 10am on 4 December 2019.

[3] At 7:39pm on Tuesday 3 December 2019 Mr Marshall (who is representing his son) filed a notice of partial discontinuance the effect of which is that the cause of action under HIPC, r 8 has been discontinued.

[4] In the result, when the hearing commenced on the morning of 4 December 2019, the sole issue left for determination was whether IDEA Services breached HIPC, r 6.

[5] The alleged breach (as articulated in the amended statement of claim dated 15 February 2019) is that IDEA Services redacted parts of two emails before those emails were provided to Mr Marshall in response to a request by him dated 9 November 2017 made in relation to a report completed for IDEA Services by Dr Olive Webb in 2016. The request was for:

A copy of all documentation/communications (internal and external) that IDEA Services has in relation to Dr Webb's assessment being pre/during/post assessment, and her subsequent report.

The documents and their redactions

[6] There are only two documents in issue being:

[6.1] An internal IDEA Services email dated 15 April 2016 timed at 8:29am from Michelle Malcolm to Wendy Rhodes and Tracy Ramsay. This email comprises a single sentence containing twenty six words. Although the email and associated chain was disclosed to Mr Marshall, the entire sentence of twenty six words was deleted.

[6.2] An email dated 18 April 2016 timed at 8:49am from Wendy Rhodes to Dr Olive Webb. Of the six paragraphs, one was deleted in its entirety with the result four lines of script in total were redacted.

[7] IDEA Services made the redactions on the grounds that the withheld information is not health information about Eamon as defined in HIPC, cl 4.

Procedure

[8] The Tribunal has been provided with unredacted copies of both emails so that it can make an independent decision as to whether the withholding ground relied upon by IDEA Services has been made out. Of necessity Mr Marshall has not been provided with the redacted documents and of this he does not complain.

[9] As can be seen from the *Minute* issued by the Chairperson on 23 August 2019 at [44] to [47] it was originally anticipated the Tribunal would hold a closed hearing to

determine the challenge. However, on the morning of 4 December 2019 Ms Reuecamp helpfully advised she was happy to present in open court the justification given by IDEA Services for withholding the redacted portions of the emails as her submissions would not compromise or inadvertently disclose the withheld information. Mr Marshall agreed to the challenge being held in open court.

[10] In open court the broad submission by Ms Reuecamp was that the redacted passages are self-evidently not health information within the meaning of the HIPC.

The submissions by Mr Marshall

[11] Mr Marshall has pointed out that when complaint was made to the Privacy Commissioner about the redactions the Commissioner on 18 July 2018 ruled that IDEA Services had no proper basis for the decision to redact the information. The relevant passage in the letter from the Commissioner stated:

With respect to the request for information under rule 6 we consider some of the information in the emails is personal information about Eamon. We have advised IDEA Services that it had no proper basis for its decision to redact personal information in the emails, and that this constitutes an interference with Eamon's privacy.

[12] While the opinion of the Privacy Commissioner is entitled to respect the following must be taken into account:

[12.1] The investigation process followed by the Privacy Commissioner is inquisitorial and designed to achieve resolution by mediation. The information and material provided by the parties to the Commissioner are not disclosed to the opposite party except to the degree determined by the Commissioner and then, only in précis form.

[12.2] The procedure before the Tribunal, however, is adversarial.

[12.3] The evidence and submissions received by the Tribunal is extensive compared to that received by the Privacy Commissioner.

[12.4] It will be seen from the passage taken from the Commissioner's letter that no reasons have been given by the Commissioner for his conclusion regarding the redactions.

[12.5] The Tribunal is required to reach an independent decision as to whether, on the facts of each particular case, there has been an interference with the plaintiff's privacy.

[13] In the circumstances we attach no weight to the Commissioner's opinion.

[14] The second submission made by Mr Marshall was that as a consequence of the intervention by the Privacy Commissioner IDEA Services released other documentation previously redacted and in these circumstances the continued withholding of the two emails is illogical.

[15] As to this submission Ms Reuecamp has drawn attention to a document in the common bundle, being an email dated 27 July 2018 timed at 4:58pm sent by her to Mr Marshall. This email records that notwithstanding the opinion expressed by the Privacy Commissioner IDEA Services maintained that the redacted documents did not contain

personal information relating to Eamon. Nevertheless, while continuing to maintain that position IDEA Services, in the interests of seeking resolution to the matter, was prepared to disclose the full versions of the emails **with the exception** of the passages which remain redacted down to the present time, being the passages in the emails dated 15 April 2016 timed at 8:29am and 18 April 2016 timed at 8:49am already referred to.

[16] Having seen the text of Ms Reuvecamp's email dated 27 July 2018 we accept that no concession has been made by IDEA Services that any of the redactions originally made were made without proper justification.

The meaning of "health information"

[17] The HIP Code, issued under Part 6 of the Privacy Act 1993, applies to "health information" about an identifiable individual that is held by a "health agency". "Health information", for these purposes, is defined very broadly in clause 4(1) of the HIP Code:

4 APPLICATION OF CODE

- (1) This code applies to the following information or classes of information about an identifiable individual:
 - (a) information about the health of that individual, including his or her medical history; or
 - (b) information about any disabilities that individual has, or has had; or
 - (c) information about any health services or disability services that are being provided, or have been provided, to that individual; or
 - (d) information provided by that individual in connection with the donation, by that individual, of any body part or any bodily substance of that individual or derived from the testing or examination of any body part, or any bodily substance of that individual; or
 - (e) information about that individual which is collected before or in the course of, and incidental to, the provision of any health service or disability service to that individual.

[18] In *Jones v Waitemata District Health Board* [2014] NZHRRT 52 the Tribunal stated:

[35] As observed by John Dawson in "Privacy and Disclosure of Health Information" in Skegg and Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) at [10.2.5], the catch-all provision in clause 4(1)(e), gives "health information" a very broad meaning in this context. It is not limited to information provided to a health professional by a patient. Information about patients collected from other sources is also covered. The information need not even bear directly on a person's health or on health services they have received, provided it concerns an identifiable individual and was collected in the course of, or incidental to, the provision of a health or disability service. In the present case it was not disputed that the information in question is health information.

[19] In determining whether information is "about" a particular individual there must be a relationship or connection that is more than tenuous. See *Taylor v Corrections* [2018] NZHRRT 35 at [84] and [85]. It is also plain that whether information is "about" an identifiable individual will often depend on the context of the particular facts.

Discussion

[20] Conscious that Mr Marshall is a lay litigant and conscious that the Tribunal alone has been provided with access to the redactions, we have scrutinised closely and carefully the redacted passages to see whether the removed information can properly be described as health information about Eamon. Having adjourned to consider the issues we returned to court to request further submissions from Ms Reuvecamp regarding the second email.

[21] Our conclusion is that no matter how generous an interpretation is given to the definition of “health information” as defined in the HIPC, the redacted information is undoubtedly not “health information” as defined in cl 4, particularly subcl (1)(a) and (c).

[22] Before reaching this conclusion we have reminded ourselves that our ruling may well have the effect of bringing these proceedings to an end, there being no other pleaded causes of action. Our conclusion has therefore been arrived at cautiously. Our reasons are separately recorded given those reasons cannot be set out in this decision. That separate decision will be provided to Ms Reuvecamp only to forestall the unintended release of the redacted passages to Mr Marshall.

Conclusion

[23] The redactions made by IDEA Services to the two emails dated 15 April 2016 timed at 8:29am and 18 April 2016 timed at 8:49am respectively have been properly justified. None of the redacted information is health information as defined in HIPC, cl 4. It is therefore information which can be properly withheld from the plaintiff.

[24] The Tribunal will now hear the parties as to the effect of this ruling on the future of the case.

Costs

[25] Costs are reserved.

..... Mr RPG Haines ONZM QC Chairperson Ms GJ Goodwin Deputy Chairperson Ms LJ Alaeinia JP Member Mr MJM Keefe QSM JP Member
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