(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF BOTH PLAINTIFFS
(2) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF FIVE OTHER INDIVIDUALS
(3) ORDER PROHIBITING PUBLICATION OF CERTAIN OTHER PERSONAL INFORMATION
(4) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 24**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 026/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**SARAH GREEN**
	FIRST PLAINTIFF
AND	**JEREMY GREEN**
	SECOND PLAINTIFF
AND	**EASTERN INSTITUTE OF TECHNOLOGY**
	DEFENDANT

AT NAPIER

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms LJ Alaeinia JP, Member
Mr MJM Keefe QSM JP, Member

REPRESENTATION:
Mrs S Green in person and as agent for Jeremy Green
Mr H Kynaston for defendant

DATE OF HEARING: **19 and 20 December 2016; 3 to 7 July 2017**

DATE OF DECISION: **6 July 2020**

(REDACTED) DECISION OF TRIBUNAL[1]

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[1] [This decision is to be cited as: *Green v EIT* [2020] NZHRRT 24. Note publication restrictions. Those restrictions require this decision to be anonymised by the redaction of the true names of the plaintiffs. In substitution the plaintiffs are to be referred to as "Sarah Green" and "Jeremy Green" (not their true names).]

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INTRODUCTION

[1] The first plaintiff, Mrs S Green, is a registered nurse. The second plaintiff (Jeremy) is her son who, at the time of the events in question, was some 19 years of age. He has been diagnosed as having Autistic Spectrum Disorder (ASD) as well as an intellectual disability in the moderate range. He has also developed a co-morbid anxiety disorder.

[2] In 2012 and 2013 Jeremy was a student in the Work and Life Skills Programme at the Eastern Institute of Technology (EIT). In 2014 he was an enrolled student at EIT taking the National Certificate of Computing Level 2.

[3] Because of his disabilities Jeremy needed disability support services to provide equity of access. From January 2014 such support and assistance was provided by Ms Gillett-Jackson who was the Disability Liaison Officer at EIT. When in June 2014 she wrote in support of a funding application for Jeremy to acquire a laptop computer she described him as "a cheerful and hard-working student who is consistently achieving good results".

[4] However, in about early December 2014 Jeremy appears to have had a health crisis, including on campus. Mrs Green was extremely concerned when he did not return home at all one weekend and she did not know where he was. Believing that Ms Gillett-Jackson ought to have contacted her about Jeremy's health, Mrs Green complained both to EIT and to the Health and Disability Commissioner (HDC). The Commissioner, in turn, forwarded the complaint to EIT for comment. Following investigation, EIT by letter dated 17 February 2015 advised the Commissioner EIT had concluded that it had been disappointed at the way in which the situation had been handled by Ms Gillett-Jackson. EIT had found several instances where a different approach could have been used.

[5] Ms Gillett-Jackson was unhappy with the findings made by EIT.

[6] A month later, on 17 March 2015 Ms Gillett-Jackson filed in the District Court an application under the Harassment Act 1997 seeking a restraining order against both Jeremy and Mrs Green. So too did Mr Stephen Connell, an EIT casual employee (and volunteer chaplain) as well as a female EIT student. The allegations made in those proceedings by Ms Gillett-Jackson, Mr Connell and the EIT student have always been firmly denied by Mrs Green and her son. Those allegations were never tested as the proceedings were discontinued on 28 April 2016.

[7] The merits of the application under the Harassment Act are not relevant to the present proceedings under the Privacy Act 1993 (PA). But it is of direct relevance that in support of the restraining order application both Ms Gillett-Jackson and Mr Connell disclosed a large amount of very personal information about Jeremy and his mother, information which had been collected and held by EIT. The fact of disclosure of the information is not in dispute. In this decision we address the consequences which follow under the PA.

The claim under IPP 11

[8] In the present proceedings it is alleged by Jeremy and his mother that EIT's responsibilities under the information privacy principles were engaged by the disclosures made by Ms Gillett-Jackson and Mr Connell to the District Court and to the EIT student

who was a co-applicant. They rely on IPP 11 which prohibits an agency from disclosing personal information held by it unless certain preconditions are met. EIT denies the allegation. At the core of its defence is the contention that Ms Gillett-Jackson and Mr Connell lawfully disclosed the information about Jeremy and his mother in their affidavits in support of the restraining order application. That is, the disclosures were authorised by the Harassment Act and thereby PA, s 7(1). Further, the disclosures were made by Ms Gillett-Jackson and Mr Connell in the reasonable belief this was necessary under IPP 11(e)(iv) for the conduct of the Harassment Act proceedings. Finally, it is contended the applications and the disclosures were made by them in their personal capacity, not "as" employees of EIT in terms of the vicarious liability provisions in PA, s 126(1).

[9] In addition to contending that EIT breached IPP 11, Jeremy and his mother have advanced two additional claims.

The two additional claims

[10] The two additional claims made by Jeremy and his mother are:

> **[10.1]** That in a Facebook discussion on or about 19 December 2014 Ms Gillett-Jackson expressed the opinion that Jeremy had been "silly" in allegedly making persistent calls to a fellow student at EIT in relation to whom it appeared he had developed a crush. His feelings were not reciprocated by that other student.
>
> **[10.2]** When in March 2015 Ms Gillett-Jackson had taken that student to a local Police station to make a complaint against Jeremy, Ms Gillett-Jackson had spoken to the Police about Jeremy and in the course of so doing had disclosed to the Police personal information about him.

[11] In relation to these two claims the case for EIT is that in context, the remark "silly boy" was not a disclosure of personal information about Jeremy and in relation to the second claim, the uncontradicted evidence is that Ms Gillett-Jackson did not at any time during her presence at the Police station say anything about Jeremy or his mother to any Police officer.

Findings in respect of the two additional claims

[12] In the interests of keeping this decision as concise as possible the two additional claims can be shortly disposed of on the facts. Our findings on the evidence are:

> **[12.1]** In the context of the particular Facebook narrative, the description of Jeremy by Ms Gillett-Jackson as a silly boy did not amount to the disclosure or use by Ms Gillett-Jackson of Jeremy's personal information. Rather, she was commenting on information that had been disclosed already by other people in the discussion.
>
> **[12.2]** There is no evidence that on the occasion of the March 2015 visit to the Police station Ms Gillett-Jackson disclosed to the Police any personal information about Jeremy.

[13] In these circumstances the two additional claims are dismissed.

[14] The balance of this decision will address the disclosure and use of the Greens' personal information in the Harassment Act proceedings brought by Ms Gillett-Jackson and Mr Connell and the question whether there is any consequential liability on the part of EIT for any interference with the privacy of Jeremy and/or his mother.

Facilitation of Jeremy's participation in the hearing

[15] Given Jeremy's disabilities, particularly the ASD diagnosis, the Tribunal of its own motion on 16 December 2016 gave a direction under s 80(4) of the Evidence Act 2006 that communication assistance be provided to him at each stage of the hearing.

[16] Such assistance was provided at the hearing on 19 and 20 December 2016, a hearing which resulted in Jeremy being reinstated as second plaintiff. Such assistance was also provided at the substantive hearing itself in the period 3 to 7 July 2017. The Tribunal again places on record the indispensable assistance given at the first and second hearings respectively by Ms Stamatina Bell, Outreach Coordinator, Autism New Zealand and Mr Mark Stephenson, Speech-language therapist and Communication Assistant, Talking Trouble Aotearoa New Zealand.

[17] As a consequence of this assistance we are confident Jeremy was able to participate in each day of the hearing to the fullest of his abilities and that that participation was meaningful.

[18] We address next the issues of name suppression and of delay.

Name suppression

[19] In the present case, as in the proceedings brought in the District Court under the Harassment Act, there has been disclosure of intimate details about Jeremy and his mother, their relationship, his disabilities and the effect those disabilities have had on him and those around him. It was for these reasons interim name suppression for both Jeremy and his mother was granted by the Tribunal in its decision dated 20 December 2016 being *Green and Green v IT (Reinstatement of Second Plaintiff)* [2016] NZHRRT 39. The interim order was in the following terms:

> **[43.1]** Publication of the name or of any details which could lead to the identification of [Jeremy Green] or of his mother Mrs [Sarah Green] is prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[43.2]** Publication of information regarding [Jeremy Green]'s health and disabilities is similarly prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[43.3]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiffs and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.

[20] When the hearing commenced on 3 July 2017 counsel for EIT, in accepting the interim orders would necessarily become final orders, sought name suppression for three EIT students who are referred to in the narrative of evidence, both written and oral, together with two other persons closely associated with them. The application was consented to by Jeremy and Mrs Green. All third parties have significant privacy interests relating to their intimate personal affairs and disabilities. The five persons referred to are [names redacted].

[21] We are satisfied that in terms of *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 at [66] the circumstances of Jeremy and of his mother as well as those of the five named individuals are such that the interests of justice require that the general rule of open justice be departed from.

[22] Consent orders were also sought in relation to the remuneration and bank account details relating to Mrs Green and to Mr Stephen Connell.

[23] Consequently final orders are made that:

> **[23.1]** Publication of the name or of any details which could lead to the identification of Jeremy Green, Sarah Green, [names redacted] is prohibited.
>
> **[23.2]** Publication of information regarding Jeremy Green's health and disabilities is prohibited.
>
> **[23.3]** Publication of details regarding the remuneration of Mrs Green and of Stephen Connell as well as their bank account details is prohibited.
>
> **[23.4]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiffs and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.

Delay

[24] Mrs Green has rightly expressed concern at the long delay in the delivery of this decision. That delay is acknowledged. The reasons were explained by the Chairperson in his *Minute* dated 14 October 2019.

[25] Apology is made to the parties for the delay.

Further submissions

[26] By *Minute* dated 2 June 2020 the Tribunal offered the parties an opportunity to comment on the Tribunal's research material. Further submissions were filed by EIT on 15 June 2020 and by Mrs Green on 22 June 2020. Those submissions have been taken into account in the preparation of this decision.

[27] We address now the remaining claim based on the admitted disclosure by Ms Gillett-Jackson and Mr Connell in the District Court proceedings of extensive personal information relating to Jeremy and his mother.

IPP 11 AND THE RESTRAINING ORDER APPLICATIONS

The application for the restraining order

[28] Before addressing the complaint made by Mrs Green to Mr Oldershaw, Deputy Chief Executive, EIT about the restraining order application made by Ms Gillett-Jackson and Mr Connell it is necessary to first provide brief background information.

[29] On 17 March 2015 Ms Gillett-Jackson, Mr Connell and a student at EIT filed in the District Court an application for a restraining order directed at Jeremy and his mother. Ms Gillett-Jackson gave to the Tribunal the following reasons for taking this step:

[29.1] Jeremy had tried to involve her personally in arguments with his mother and in his desire to be in a personal relationship with another EIT student. Ms Gillett-Jackson saw her job as to provide academic support for students. It was not her job to get involved in their personal or family relationships. He had continued to try to involve Ms Gillett-Jackson despite her asking him several times to stop. This happened also in the evenings and on weekends.

[29.2] Jeremy was also contacting her on her personal cell phone number. It was usual practice to give students private cell phone numbers because EIT did not provide staff with work mobiles. Ms Gillett-Jackson had explained to Jeremy that he should not abuse the fact that he had her personal mobile number. Nevertheless Ms Gillett-Jackson felt that Jeremy had abused his access because he did not stop contacting her.

[29.3] As to Mrs Green, she had continued wanting to talk to Ms Gillett-Jackson about Jeremy even though on numerous occasions Ms Gillett-Jackson had told her (Mrs Green) that she (Ms Gillett-Jackson) did not have Jeremy's permission to speak to her. Ms Gillett-Jackson alleged Mrs Green was demanding, had a violent temper and was making threats against her.

[30] At the direction of a District Court Judge Ms Gillett-Jackson refiled her original affidavit (dated 17 March 2015). She in fact filed two further affidavits sworn on 20 May 2015 and 3 July 2015 respectively. In the context of the present proceedings under the Privacy Act there are few material differences between the May and July affidavits.

The issue of the capacity in which the personal information was disclosed

[31] EIT was not a party to the restraining order applications filed by Ms Gillett-Jackson and by Mr Connell. It was they who swore the affidavits and filed the supporting evidence in which personal information about Jeremy and Mrs Green was disclosed. The principle issue to be determined in these proceedings is whether the disclosure of that information by Ms Gillett-Jackson and by Mr Connell, at a time they were both employees of EIT, resulted in a breach of EIT's obligations under IPP 11.

[32] It is therefore necessary to determine (inter alia) the capacity in which Ms Gillett-Jackson and Mr Connell were acting at the time they came into possession of the personal information about Jeremy and his mother and at the time that information was disclosed in their application to the District Court.

Collection and use – the affidavits filed by Ms Gillett-Jackson in support of the restraining order application

[33] As an institution focused on education it is necessary that EIT collect a range of personal information from students not just at the point of enrolment, but also in the course of each academic year. Because EIT provides disability support services for students with a disability, information about those students, their disabilities, their particular needs and challenges (and also about their families) is necessarily also collected.

[34] Personal information is not required to be held in any particular medium and can include information about an individual held not only in documentary or digital form, but also held in a person's memory, provided that the information is readily retrievable. As to the latter point see for example *L v N* (1997) 3 HRNZ 721 at 727 (CRT).

[35] A printed form issued by Ms Gillett-Jackson with the heading "Guidelines for those students who use study support" assured students who used EIT study support that any information about them would be treated as "strictly confidential" and if at any time they felt their confidentiality had been breached they were to contact Disability Liaison, being Ms Gillett-Jackson:

> **Confidentiality**
>
> Your study support person is expected to treat any information about you as strictly confidential. If at any time you feel that your confidentiality has been breached, please contact the Disability Liaison.

The document provided the contact details for Ms Gillett-Jackson as Disability Liaison.

[36] Jeremy was also given a document, signed by Ms Gillett-Jackson and dated "February 2014", with the heading "Rights and Responsibilities for [Disability] Students". One of the listed responsibilities was for Jeremy to contact Ms Gillett-Jackson if there was a problem of any kind:

> 5. I will contact Cheri Gillett-Jackson, Disability Liaison on [telephone number and extension redacted] if there is a problem of **any kind** (if sessions are not helpful or if assistance is no longer needed). [Emphasis in original]

[37] The need to protect the personal information of disability students in general and of Jeremy in particular is illustrated by the account given by Ms Gillett-Jackson herself of her interview with Jeremy and Mrs Green when they attended her office during the enrolment period in January 2014. The range of personal information collected by her at that time as an EIT employee was extensive. The description which follows is taken from the affidavit sworn by Ms Gillett-Jackson on 20 May 2015 in support of her restraining order application. As mentioned this affidavit is little different to the further affidavit subsequently sworn on 3 July 2015.

[38] The purpose of the interview was to discuss Jeremy's needs and to obtain any information supporting his disability and to assess what services could be provided. In her affidavit Ms Gillett-Jackson recorded she was told by Mrs Green:

> **[38.1]** Jeremy was legally blind and there was some damage to the back of his eyes.
>
> **[38.2]** He had moderate intellectual impairment and would need one on one support.
>
> **[38.3]** He had Asperger's syndrome. Ms Gillett-Jackson commented in her affidavit she learnt from a medical report supplied by Mrs Green that Jeremy's condition was in fact Autism.
>
> **[38.4]** He was illiterate.
>
> **[38.5]** He had behavioural issues, including disruptive and violent behaviours.

[39] In her affidavit Ms Gillett-Jackson explained that because she needed evidence to support what Mrs Green told her, she (Ms Gillett-Jackson) arranged for a literacy test which concluded Jeremy's literacy was modest. She was also provided by Mrs Green with a hospital assessment dated 7 September 2005 regarding Jeremy's autism. She mentioned also Jeremy's vision had been tested in August 2014 and found to be within

the normal range. His short-sightedness and eye damage could be corrected with new glasses.

[40] The 13-page affidavit went on to describe in some detail:

[40.1] The academic support given to Jeremy by the Disability Office during 2014.

[40.2] Until November 2014 Jeremy had displayed acceptable social behaviours for a student with his diagnoses. However, from mid-November 2014 he had approached Ms Gillett-Jackson for advice regarding his growing interest in forming a relationship with another (female) student. That student had not reciprocated Jeremy's feelings. Ms Gillett-Jackson and one of her staff had "spent some time speaking to [Jeremy] about disappointment and how to deal with it".

[40.3] Ms Gillett-Jackson had had the same conversation multiple times with Jeremy and in the week of 24 November 2014 had to call her staff into her office to have a meeting "on how to deal with [Jeremy]'s behaviours". Her instructions to her staff were also relayed to students. Her affidavit narrated:

> Daily visits and phone conversations were taking the form of: "I know that I am not supposed to talk about [name of female student] … but …. I instructed my staff to: Tell him that (a) she was not interested in becoming his girlfriend and (b) that he should stop asking her to date him. If [Jeremy] persisted, whoever he was speaking to was to then tell him to stop talking about [the female student] and they were to walk away from him or hang up the phone. All conversations and visits about his study would continue to be reciprocated. The same instruction was related to students in the area.

[40.4] Ms Gillett-Jackson alleged Jeremy's behaviour did not change and continued even after she had complained to the Police on 29 January 2015. She described how Jeremy would speak to her daily on campus about the female student and how she had to "exit" Jeremy from her office. Jeremy was also calling and texting her on her mobile phone outside work hours. He had been provided with her number for use in her capacity as Disability Liaison.

[40.5] Ms Gillett-Jackson further alleged that during 2014 Jeremy had made repeated attempts to get her to intervene in various domestic issues between him and his mother. Each time Ms Gillett-Jackson had responded that she (Ms Gillett-Jackson) was there to provide academic support for his studies and community meetings that supported his learning. She was not a counsellor or social worker. The interactions were taking large amounts of time away from her work. Nevertheless Jeremy continued to speak to her about his personal problems "every time he was on campus" and also continued to call her on her mobile outside of work.

[40.6] Although Jeremy's formal enrolment at EIT ended on 15 December 2014 further incidents had occurred at EIT from January 2015 to March 2015. Those incidents she described as loitering, following, watching and hindering access:

[40.6.1] On 21 January 2015, although Jeremy had been told by Ms Gillett-Jackson's manager that he was to deal with her (the manager) for all matters relating to his study and not to call Ms Gillett-Jackson, request meetings or to go to the Disability Office, Jeremy kept entering Ms Gillett-Jackson's office with questions about the student he liked and

about his mother. Asked by Ms Gillett-Jackson to leave he did not do so, forcing Ms Gillett-Jackson to leave her office. Jeremy would follow her to the study area outside, still nagging her. Ms Gillett-Jackson would then have to go to a staff-only area to get away. This would happen multiple times before Jeremy left campus.

[40.6.2] On 22 January 2015 Jeremy was again at the Disability Office stopping Ms Gillett-Jackson from working. Once again he was trying to complain about his problems. Ms Gillett-Jackson asked him to leave and to take all matters to her manager. However, Jeremy came back multiple times. Ms Gillett-Jackson had to keep leaving her office to go to a staff only area to get away.

[40.6.3] On 12 March 2015 Jeremy followed Ms Gillett-Jackson and two other people through the EIT library. He also walked past the Disability Office, peering inside, making Ms Gillett-Jackson feel extremely uncomfortable.

[40.6.4] On 5, 11, 12 and 14 March 2015 Jeremy was told he was no longer a student. On these dates he had sat in the main student area outside the Student Association, right in front of the Disability Office. Ms Gillett-Jackson observed him constantly looking into the Disability Office.

[41] It is relevant to record that in her evidence Ms Gillett-Jackson accepted that the information disclosed by her in her proceedings under the Harassment Act was personal information about Jeremy and his mother.

[42] It is further relevant to record that the complaints against Jeremy as summarised by Ms Gillett-Jackson in her affidavit arose out of the fact that in 2014 he was a student at EIT and that she had provided him with support and assistance in her role as Disability Liaison Officer. On the account given by her, both her manager and other staff were well aware of the problems allegedly encountered by Ms Gillett-Jackson and had in fact provided her with assistance from time to time in dealing with him. The overarching point, however, is that most of the incidents described by Ms Gillett-Jackson in her affidavit were incidents which had occurred in her workplace and which, if true, would amount to harassment by a student in the workplace. This had been recognised by Ms Gillett-Jackson by escalating the issues to her manager and by giving instructions to staff how to deal with Jeremy.

[43] Ms Gillett-Jackson's affidavit also set out the background to her application for a restraining order against Mrs Green:

[43.1] During 2014 Mrs Green had intermittently called Ms Gillett-Jackson at work regarding Jeremy's study. Ms Gillett-Jackson had responded she could not speak to Mrs Green without Jeremy's permission and in July 2014 Jeremy had told Ms Gillett-Jackson not to speak to his mother. At the hearing before the Tribunal Ms Gillett-Jackson conceded in cross-examination she had never told Mrs Green her son had withdrawn his consent for his personal information to be disclosed to his mother.

[43.2] The July 2014 "instruction" had been given by Jeremy after he and his mother had had an argument over the phone which had been observed by staff

and students. People in the disability study area had been able to hear both sides of the argument.

[43.3] In the week of 8 December 2014 Mrs Green had telephoned Ms Gillett-Jackson to advise her that Jeremy was not returning from EIT at the times Mrs Green had specified and was instead spending time on campus outside of his supported study times. She asked that Ms Gillett-Jackson stop Jeremy from doing this. Ms Gillett-Jackson had replied no one had complained about Jeremy's presence on campus and that she was unable to prevent a student being on campus socialising with students and staff at any time or to ask for them to leave.

[43.4] When Mrs Green had asked about her son's study Ms Gillett-Jackson had replied she did not have permission to speak to Mrs Green about that subject. On subsequent occasions Mrs Green had left messages about this but Ms Gillett-Jackson had not returned the calls.

[43.5] On 12 December 2014 staff and students at EIT had again witnessed an argument between Jeremy and his mother over the phone. Allegedly Mrs Green had told her son he was locked out of their house. That weekend Jeremy had stayed with other students. The following Friday Mrs Green went to see Ms Gillett-Jackson and one of her staff in Ms Gillett-Jackson's office wanting to know why Ms Gillett-Jackson had not contacted her. Allegedly Mrs Green was shouting, wanting to know the names of the students Jeremy had stayed with over the preceding weekend. Ms Gillett-Jackson had reminded Mrs Green that she (Mrs Green) was in Ms Gillett-Jackson's office and that her son had instructed her not to speak to Mrs Green about him.

[43.6] In late December 2014 Mrs Green had complained to the Health and Disability Commissioner about Facebook posts made by (inter alia) the female student who had rejected Jeremy's interest in her and to which Ms Gillett-Jackson had also contributed. The complaint had also been made to EIT.

[43.7] Mrs Green had also made complaint to EIT regarding the fact Ms Gillett-Jackson had applied for a restraining order against her and Jeremy.

[44] Virtually all of the allegations against Mrs Green related to events on campus or to Ms Gillett-Jackson's role as Disability Liaison, ie in respect of her employment by EIT. The unbroken link between Ms Gillett-Jackson's application for a restraining order against Mrs Green and Mrs Green's complaints to EIT against Ms Gillett-Jackson (in her capacity as employee of EIT) is underlined by the fact that in her 20 May 2015 affidavit Ms Gillett-Jackson deposed she had been called before EIT management 13 times between 22 December 2014 and 8 May 2015 regarding complaints made against her by Mrs Green.

[45] The attachments to Ms Gillett-Jackson's affidavit sworn on 20 May 2015 and filed in support of the restraining order application included a large number of documents held by EIT. Also exhibited were statutory declarations by employees of EIT deposing to events which had occurred on campus:

[45.1] Exhibit A. Email chain passing between Ms Gillett-Jackson and an EIT Work and Life Skills tutor recording Jeremy's behavioural issues as witnessed during his life skills course in 2012 and 2013. The emails were sent to and from EIT email addresses. The emails from Ms Gillett-Jackson were signed off as

"Cheri Gillett-Jackson, Disability Liaison, Information Learning Service, Eastern Institute of Technology".

[45.2] Exhibit B. Email chain passing between Ms Gillett-Jackson and an EIT programme coordinator regarding Jeremy's literacy test.

[45.3] Exhibit C. Statutory declaration dated 10 February 2015 by Ms Sharon Freeman who described herself as "Note Taker at Eastern Institute of Technology" in which she deposed to being present with Jeremy on campus when Jeremy was having an argument with his mother on the phone. She also deposed she had been present when Ms Gillett-Jackson had told Jeremy disability staff were unable to be involved in domestic disputes.

[45.4] Exhibit D. Statutory declaration by Stephen Connell dated 10 February 2015. Mr Connell described himself as "Note Taker and Volunteer Chaplain" at EIT. He deposed to having heard two domestic disputes over the phone between Jeremy and his mother and heard Ms Gillett-Jackson tell Jeremy that staff and other students could not help him in relation to his issues with his mother.

[45.5] Exhibit F. Email dated 30 January 2015 from Ms Gillett-Jackson to her manager (Diane Friis) reporting (for her information) a telephone call received that day from Jeremy. The email was sent on the EIT system and Ms Gillett-Jackson used her Disability Liaison signature block.

[45.6] Exhibit K. The complaint by Mrs Green against Ms Gillett-Jackson which had been sent to the Health and Disability Commissioner and EIT.

[45.7] Exhibit L. Ms Gillett-Jackson's response to the complaint as provided by her to EIT.

[45.8] Exhibit M. An extract from the response by EIT to the Health and Disability Commissioner regarding Mrs Green's complaint.

[45.9] Exhibit N. A copy of one of Mrs Green's complaints to EIT regarding Ms Gillett-Jackson.

[45.10] Exhibit O. Letter dated 15 April 2015 from Mr Mark Oldershaw, Deputy Chief Executive, EIT to Mrs Green responding to her complaints to EIT arising from the restraining order application filed by Ms Gillett-Jackson.

[45.11] Exhibit P. Declaration dated 14 May 2015 by Mathew Dekker, student at EIT reporting what Jeremy had allegedly said to Mr Dekker on an occasion when Mr Dekker was leaving the EIT library.

[45.12] Exhibit Q. Declaration dated 28 May 2015 by Jacob Lorenz, who was employed as a Note Taker by EIT. In this declaration Mr Lorenz reports a comment made by Jeremy at an off-campus venue about Ms Gillett-Jackson.

[46] Again it is to be noted that all of the complaints made by Ms Gillett-Jackson in the restraining order application against Jeremy and his mother were directly related to Ms Gillett-Jackson's role as Disability Officer at EIT and who, in that role had had responsibility for providing disability services to Jeremy. Nearly all events had occurred at EIT itself, as evidenced not only by the narrative given by Ms Gillett-Jackson in her

affidavit filed in the District Court, but also by the 12 exhibits just described. It is also evidenced by the fact that Ms Gillett-Jackson had reported the problem to her manager who had directed that Jeremy deal with her (the manager), not Ms Gillett-Jackson. The only possible exception are the Facebook posts which in the present context are not of any real significance to the central issue namely, the capacity in which Ms Gillett-Jackson disclosed personal information about Jeremy and his mother in the documents she filed in the District Court. In that regard the evidence in the affidavit was about Ms Gillett-Jackson's role as employee of EIT and the risk she allegedly faced, as such employee, of harassment in the workplace by a former student and his mother.

[47] On the facts we are satisfied, on the balance of probabilities, that the disclosure of the Greens' personal information held by EIT was done by Ms Gillett-Jackson as an employee of EIT. For reasons which follow shortly, we reject the claim that the proceedings were brought by Ms Gillett-Jackson in her personal capacity and that the application had nothing to do with her work.

[48] It is necessary to examine first the information disclosed by Stephen Connell in his affidavit filed in the District Court.

Collection and use – the affidavit filed by Stephen Connell in support of the restraining order application

[49] In an affidavit sworn on 20 May 2015 in support of the restraining order application filed by him, Ms Gillett-Jackson and the EIT student, Mr Connell traversed much the same evidence as Ms Gillett-Jackson. An overview follows. It will be seen the personal information of Jeremy and of his mother disclosed by Mr Connell in his affidavit was information collected and used by Mr Connell in his capacity as employee of EIT. He was employed as a Disability Support Worker in the EIT Disabilities Office. He was also a volunteer Chaplain at EIT but at the very beginning of his affidavit emphasised that all of his dealings with Jeremy took place in his capacity as disability support worker for the Disability Office. In 2014 Jeremy attended study times with Mr Connell for two hours during each week to help him with his computer course.

[50] Mr Connell related:

> **[50.1]** In November 2014 Jeremy was becoming obsessed with a female student with whom he wanted to have a relationship. He would repeatedly ask Mr Connell for advice. Mr Connell spoke to his manager (Ms Gillett-Jackson) and was given instructions how to respond.
>
> **[50.2]** He was present when on 19 December 2014 Mrs Green had spoken to Ms Gillett-Jackson about the events of the weekend of 12 to 14 December 2014.
>
> **[50.3]** He had witnessed instances of alleged loitering, following, watching and hindering of access by Jeremy on the EIT campus.
>
> **[50.4]** Jeremy had attempted to contact him by phone and by Facebook.
>
> **[50.5]** It was Mr Connell's opinion that "all staff [at EIT] had tried behaviour modification" when Jeremy spoke to them about his personal issues.
>
> **[50.6]** The argument between Jeremy and his mother which occurred on 12 December 2014 by phone had been overheard by Mr Connell on the campus,

as had a further phone call on 14 December 2014 which, while off-campus, had taken place when Jeremy had been in Mr Connell's motor vehicle.

[50.7] Following a complaint made by Mrs Green, on 8 April 2015 Mr Connell had been called before Mr Oldershaw, Deputy Chief Executive of EIT, to explain his actions on the weekend of 12 to 14 December 2014.

[50.8] Mr Connell annexed a statutory declaration sworn on 20 May 2015 by a student at EIT relating incidents witnessed by her at EIT involving interaction between Mrs Green, Ms Gillett-Jackson and Mr Connell.

[51] Our reading of Mr Connell's affidavit is that his case for a protection order against Jeremy and his mother was based on an allegation he faced a risk of harassment in his capacity as an employee of EIT. As in the case of Ms Gillett-Jackson, we are satisfied that Mr Connell's disclosure of the Greens' personal information held by EIT was done by Mr Connell as an employee of EIT.

The claim that Ms Gillett-Jackson and Mr Connell were acting in a personal capacity

[52] Ms Gillett-Jackson asserted in evidence to the Tribunal that the proceedings under the Harassment Act had been taken in her "personal capacity" and had nothing to do with her employment. While she had advised EIT she, Mr Connell and the student in question were intending to apply for restraining orders, EIT had been given no further information other than that the application "did not relate to work". Ms Gillett-Jackson further told the Tribunal EIT did not have any input into the application; nor did EIT have any knowledge of what evidence the three applicants had included in their case. She had not at any time contacted the Privacy Officer at EIT to explain what she (Ms Gillett-Jackson) intended doing.

[53] We found the "personal capacity" assertion surprising because it has no or very little evidentiary support. Ms Gillett-Jackson had made both her manager and other staff aware of the problems allegedly encountered and indeed many of the events narrated in her affidavit had been witnessed on campus by other students and staff. Jeremy had been instructed to take all his matters to Ms Gillett-Jackson's manager. Nor can it be overlooked that in the leadup to the taking of the proceedings under the Harassment Act Ms Gillett-Jackson had been the subject of multiple complaints to her employer by Mrs Green. Ms Gillett-Jackson had accepted in her District Court affidavits sworn on 20 May 2015 and 3 July 2015 that Mrs Green had made a number of complaints to EIT (her employer) about her (Ms Gillett-Jackson's) alleged conduct as Disability Liaison. She had deposed that she had been "called before EIT management 13 times regarding [Mrs Green's] complaints". The date range given by her for those complaints began in December 2014 and ended in early April 2015. Those complaints had been cited by Ms Gillett-Jackson to the District Court in part justification for applying for the protection order against Mrs Green.

[54] Then there were the earlier complaints made by Mrs Green to EIT about Ms Gillett-Jackson, including the complaint to the Health and Disability Commissioner regarding Ms Gillett-Jackson's alleged conduct. All of these complaints were investigated by EIT as the employer of Ms Gillett-Jackson. That is the overarching point. The written and oral evidence of Mr Oldershaw, Deputy Chief Executive, consistently referred to complaints by Mrs Green as being "against EIT" or as complaints "to EIT" about Ms Gillett-Jackson.

[55] Taking this evidence into account along with the conclusions we have reached in relation to the capacity in which Ms Gillett-Jackson and Mr Connell disclosed the personal information to the District Court, we do not accept the claim:

> **[55.1]** That the proceedings taken by Ms Gillett-Jackson and Mr Connell under the Harassment Act seeking a restraining order against Mrs Green and her son was a personal matter which had nothing to do with their employment.
>
> **[55.2]** That Ms Gillett-Jackson and Mr Connell were entitled to use in those proceedings personal information about the Greens held by EIT and which had only come into their possession as employees of EIT.

[56] We also reject the implicit claim that the domestic affairs exemption in PA, s 56 applied. The personal information about the Greens had not been collected or held by Ms Gillett-Jackson or by Mr Connell "solely or principally for the purposes of, or in connection with, that individual's personal, family, or household affairs".

[57] We are of the clear view the disclosures were made as employees of EIT, albeit without the knowledge or approval of EIT. We illustrate our conclusion by reference to the complaint by Mrs Green to the HDC. It highlights the close link between the employment issues and the District Court proceedings.

The complaint to the HDC

[58] According to the evidence given by Mr Oldershaw, in December 2014 Mrs Green filed a complaint with EIT about Ms Gillett-Jackson. The complaint related to the incident which had occurred on Friday 12 December 2014 and over the weekend offsite.

[59] This investigation appears to have been overtaken when EIT received notice from the HDC that Mrs Green had made a similar complaint to the HDC.

[60] The complaint made to the HDC was investigated by EIT as a complaint that there had been ineffective communication between Ms Gillett-Jackson as Disability Liaison and Jeremy and inappropriate use of social media (Facebook) by Ms Gillett-Jackson at a time when Jeremy was an enrolled student. Following the investigation by EIT (which included interviewing Ms Gillett-Jackson) EIT by letter dated 17 February 2015 advised the Commissioner that (inter alia):

> **[60.1]** Errors of judgment had been made by Ms Gillett-Jackson in handling communication with Jeremy and his mother.
>
> **[60.2]** The failure by Ms Gillett-Jackson to return Mrs Green's phone calls was not accepted EIT practice.
>
> **[60.3]** Communication by Ms Gillett-Jackson with Mrs Green regarding her expectation to be involved in supporting her son with his studies was not satisfactory or of a standard expected by EIT.
>
> **[60.4]** EIT's normal practice is that where staff cannot manage relationships with families, they are to inform their manager so that appropriate steps can be taken to address this. EIT accepted this had not been done "in this situation".

[60.5] Given the differences in view between Ms Gillett-Jackson and Mrs Green regarding Jeremy's ability to make decisions relating to his study, the assessment by Ms Gillett-Jackson should have been reviewed.

[60.6] In the context of the after-hours participation by Ms Gillett-Jackson in the Facebook discussion, EIT expressly acknowledged Disability Liaison staff would sometimes have to provide after-hours advice to students on how to handle difficult situations:

> 12. It is important for the Disability Liaison staff member to provide advice to our students on how to handle difficult situations. This will sometimes occur outside of normal work hours. However, our staff need to be well aware of the perils of using social media for such discussions and the potential for comments to be misconstrued and/or breaches of privacy to occur.

[61] The express recognition that Disability Liaison staff may have to provide advice outside of normal work hours regarding how students can handle difficult situations is relevant to the claim made by Ms Gillett-Jackson in the District Court that it was inappropriate for Jeremy to seek advice from her regarding interpersonal relationships with students and with his mother, particularly when such advice was sought after hours.

[62] The EIT letter to the HDC concluded with a list of findings and actions:

> **FINDINGS and ACTIONS**
>
> 15. EIT is disappointed at the way this situation has been handled and has found several instances where a different approach could have been used.
>
> 16. Communications with Ms [Green] did not meet EIT support service standards of practice.
>
> 17. This situation may have been resolved more quickly if the relationship between Disability Liaison and [Jeremy]'s mother had been managed more effectively.
>
> 18. [Jeremy] was potentially identifiable from the description that was posted to the Facebook page. Therefore Facebook was not an appropriate medium for the discussion that ensued and our Disability Liaison staff member showed poor judgement in joining the Facebook discussion, notwithstanding it being a personal staff member's account.
>
> 19. Protocols in communication will be reviewed and training put in place for the Disability Liaison service to improve relationship management and communication practices in order to provide a better service to our students and their whānau and families.
>
> 20. EIT staff need to be made more aware of the need to use social media appropriately and that it is unacceptable to use such media for discussions where a breach of privacy may occur.
>
> 21. Future communications relating to Ms [Green] and her son's study support with EIT are being managed through the Team Leader Information and Learning Services.
>
> 22. The Manager of Library and Learning Services has discussed these findings with Ms [Green] who was appreciative of their direction.

[63] EIT gave to Ms Gillett-Jackson a copy of the list of Findings and Actions and she, in turn, exhibited that list to her affidavits filed in the District Court.

[64] Asked by the Tribunal whether she accepted the findings, Ms Gillett-Jackson replied that she did have problems with some of them, believing them to be unfair. In her affidavits filed in the District Court Ms Gillett-Jackson said she would be entering into mediation with EIT regarding their response to the HDC.

[65] In our view the employment-related complaints made by Mrs Green against Ms Gillett-Jackson (including the complaint to the HDC) and the citing of them by Ms Gillet-Jackson as evidence of alleged harassment by Mrs Green illustrates the artificiality of the claim by Ms Gillett-Jackson that the District Court proceedings had nothing to do with her job.

The complaint to EIT regarding the restraining order application

[66] It is necessary to now examine EIT's reaction on learning of the restraining order application and the steps it took to ensure its obligations under the Privacy Act were met.

[67] The evidence of Mr Oldershaw, Deputy Chief Executive, EIT, included an account of a meeting he had with Mrs Green at EIT on 26 March 2015 to discuss various complaints by her against Ms Gillett-Jackson. At the meeting Mrs Green told Mr Oldershaw the key issue she wanted him to consider was Ms Gillett-Jackson's application for a restraining order against her and Jeremy. It is to be recalled those proceedings had been filed in the District Court on 17 March 2015.

[68] In Mrs Green's written complaint handed to Mr Oldershaw at the meeting she emphasised neither she nor Jeremy had done anything to warrant the application and believed it was retribution by Ms Gillett-Jackson.

[69] Mr Oldershaw thereupon initiated an investigation. On 2 April 2015 he met with Ms Gillett-Jackson and gave her a copy of Mrs Green's written complaint.

[70] Ms Gillett-Jackson's account of this meeting, as set out in her last two affidavits filed in the restraining proceedings is that when told by Mr Oldershaw that Mrs Green had complained to EIT about the bringing of the proceedings, had wanted them withdrawn and an apology by Ms Gillett-Jackson for having brought the proceedings, Ms Gillett-Jackson had "again advised EIT that I was applying for these orders in my personal capacity".

[71] In her evidence to the Tribunal Ms Gillett-Jackson repeated this claim:

> 32. I also saw the steps that I took in relation to this matter as being in my personal capacity. I took them to protect myself. I advised EIT that we were intending to apply for restraining orders, but that they did not relate to work. EIT did not have any input into our applications, nor did they have any knowledge of what we included.

[72] The account recorded by Mr Oldershaw in his file note was that at the 2 April 2015 meeting Ms Gillett-Jackson was accompanied by a support person in the form of someone from the Allied Staff Union and when told by Mr Oldershaw of the purpose of the meeting, Ms Gillett-Jackson had said that there was nothing to talk through as "this has nothing to do with my job" and that she could not see how the issues raised by the restraining order application had anything to do with her role at EIT and it was therefore not appropriate to discuss things further.

[73] In his evidence Mr Oldershaw stated:

> **[73.1]** Following his meeting with Mrs Green on 26 March 2015 his primary concern, at that stage, was to determine whether the actions of Ms Gillett-Jackson were as an employee of EIT or whether they were in her private

capacity. He did not recall any concerns being raised about privacy either by him or by Ms Gillett-Jackson.

[73.2] On 12 April 2015 Mr Oldershaw met at EIT collectively with Ms Gillett-Jackson and four other persons who were students or staff. While no minute or file note records what was said at the meeting Mr Oldershaw by email of the same date advised Mrs Green he now had "a full picture" of the issues raised by the complaint. No details were given and Mr Oldershaw had not at that stage seen any of the papers filed in the proceedings.

[73.3] On 15 April 2015 Mr Oldershaw sent a letter to Mrs Green advising her that as Ms Gillett-Jackson had applied for the restraining order in her private capacity rather than in her work capacity, he (Mr Oldershaw) was unable to intervene in the matter before the court. Mr Oldershaw's letter was stamped with the word "Confidential" in large letters.

[73.4] Following standard procedure where a complaint is made against a staff member, Mr Oldershaw gave to Ms Gillett-Jackson a copy of his 15 April 2015 letter addressed to Mrs Green. Nothing was said by him to Ms Gillett-Jackson about EIT's obligations under the Privacy Act.

[73.5] It is to be recalled that a copy of the letter was then annexed by Ms Gillett-Jackson as Exhibit O to the affidavit sworn by her on 20 April 2015 and filed in the Harassment Act proceedings. She also annexed a copy of Mrs Green's complaint letter as Exhibit N.

[73.6] In late May 2015 Mrs Green gave to Mr Oldershaw a copy of the documents filed in the District Court by Ms Gillett-Jackson, Mr Connell and the EIT student. Those documents included the affidavits in support. Mr Oldershaw had not asked for the documents. He did, however, advise Mrs Green that after speaking to the EIT HR Director, he wanted Mrs Green's consent to use the documentation to discuss with Ms Gillett-Jackson. We observe this was an unusual request given Ms Gillett-Jackson was a party to the District Court proceedings and author of a number of the documents provided by Mrs Green. In addition, all three persons were making a joint application for the restraining order. Mrs Green responded on the same day (29 May 2015) asking Mr Oldershaw to be specific about what information he was going to use.

[73.7] Mr Oldershaw then decided it was inappropriate for him to have the documents and returned them to Mrs Green. He did, however, first read the documents. In his evidence to the Tribunal he acknowledged that he recognised at this time that a substantial amount of personal information held by EIT about Jeremy and his mother was being used by a staff member in the litigation. Asked if this had caused him to speak to Ms Gillett-Jackson, Mr Oldershaw said it had but the Tribunal was provided with no clear account of when and what was said.

[73.8] By email dated 16 July 2015 Mrs Green complained to Mr Oldershaw that his letter dated 15 April 2015 addressed to Mrs Green (and marked "Confidential") had been used by Ms Gillett-Jackson in an affidavit filed by her in the District Court proceedings. Mrs Green asked how this had been allowed and what had EIT done to stop Ms Gillett-Jackson. Mrs Green said she felt her privacy had been breached and violated.

[73.9] Mr Oldershaw told the Tribunal it was he who had given the letter to Ms Gillett-Jackson but had not at the same time given her any instructions as to the use to which the document could be properly put.

[73.10] Mr Oldershaw asserted that even though Mr Connell had sworn and filed an affidavit in the District Court stating that all of his dealings with Jeremy were in his capacity as a Disability Liaison Officer, it was the view of EIT that Mr Connell applied for the restraining order in his personal capacity. In addition, as with Ms Gillett-Jackson, EIT did not have any input into Mr Connell's application or knowledge of its contents.

Conclusion

[74] By failing to address its responsibilities under the Privacy Act and by its unquestioning acceptance of the assertion that the District Court proceedings had been brought by two employees in their personal capacity, EIT shut its eyes to the evidence. That evidence showed Ms Gillett-Jackson and Mr Connell had in the District Court proceedings disclosed personal information held by EIT about the Greens and that such disclosure had been made by them as employees of EIT who were seeking orders to protect themselves in their workplace as employees of EIT.

EIT's privacy policies

[75] Mr Oldershaw told the Tribunal that EIT takes its privacy obligations seriously:

> 64. EIT takes its privacy obligations very seriously. Before Ms [Green]'s complaints, EIT had various policies and practices in place to ensure compliance with its privacy obligations. For example, EIT had a privacy brochure that covers common breaches, guidance for the appropriate handling, storage and use of personal information, and information about Privacy Officers at EIT. Privacy obligations are also addressed in EIT's Social Media Guidelines and Staff Code of Conduct, which employees are expected to comply with.

[76] The Staff Code of Conduct is held on EIT's hard drive (and is accessible to all staff). It then (and now) contains a statement at para 4.2 that information which staff create or become aware of through their employment at EIT must be used only for EIT purposes and must not be disclosed to any third party:

> **4.2 Privacy and use of personal information and EIT's confidential information**
>
> Staff must ensure that personal information including data relating to other staff or students is collected, stored and used in accordance with relevant privacy and freedom of information legislation (currently the Privacy Act and Official Information Act are the primary legislation in this area).
>
> …
>
> Information which staff create or become aware of through their employment at EIT must be used only for EIT purposes and must not be disclosed to any third party or used for the benefit or gain of the staff member or any third party. Proper records management practices and procedures must be adhered to.

The Code of Conduct goes on to state at para 7 that breaches of the code may constitute misconduct or serious misconduct and lead to disciplinary action. Examples of what may be considered serious misconduct include unauthorised disclosure of confidential information.

[77] We observe that taking privacy responsibilities seriously requires more than having the right information in a policy document or code stored on a hard drive. It requires also (inter alia) proper and diligent inquiry when the agency is on notice that a breach of an information privacy principle has occurred or may occur. As we shortly explain, no such inquiry was made.

[78] It was revealing that Mr Oldershaw told the Tribunal that at no time from the date on which he commenced employment with EIT (16 February 2015) through to the end of July 2016 did he specifically turn his mind to para 4.2 of the Staff Code. He was aware of para 4.2 and did talk it through with the HR Director, but not with Ms Gillett-Jackson. He did not draw her attention to the paragraph.

[79] Ms Gillett-Jackson gave evidence that at no time from the end of January 2015 to the filing of her third affidavit (sworn on 3 July 2015) in the District Court did she consult any policy document put out by EIT and applying to the use of students' personal information. She was aware that personal information was not to be disclosed without permission but had not consulted the information privacy principles or any EIT policy document prior to filing her proceedings because she had been advised by lawyers at a Citizens Advice Bureau that making full disclosure of all the information held by her about Jeremy and his mother was the correct approach as she was using the information in her personal capacity, not as an employee.

The claim that EIT took its obligations under the Privacy Act seriously

[80] Ms Gillett-Jackson's evidence to the Tribunal was that at the end of January 2015 she had told her senior manager (Ms Diane Friis) and EIT's Human Resources Director (Mr Bill Kimberley) that there had been a meeting in EIT time (and on campus) with the Police and a group who had made a complaint to the Police about Jeremy and at which there had been a discussion about applying for a restraining order against Jeremy and his mother. Ms Gillett-Jackson had told Ms Friis and Mr Kimberley she would be applying for such an order. There is no evidence this discussion caused Ms Friis or Mr Kimberley to remind Ms Gillett-Jackson of her privacy obligations under para 4.2 of the Staff Code of Conduct or to cause management to turn their minds to EIT's own responsibilities under the Privacy Act. No inquiry was made as to whether personal information about the Greens held by EIT was to be used in the proceedings.

[81] When Ms Gillett-Jackson asserted that the intended proceedings did not relate to work (when they plainly did relate) EIT management neither challenged nor tested the claim that the application was being made in her personal capacity. The bare fact that an employee was taking proceedings under the Harassment Act against a person who had been a student at EIT for three years (and against his mother) in relation to events which had occurred while he was formally enrolled needed more than silent acquiescence in the self-serving assertion that the proceedings did not relate to Ms Gillett-Jackson's and Mr Connell's work as employees of EIT. Particularly given EIT was then investigating the HDC complaint made by Mrs Green against Ms Gillett-Jackson.

[82] Mr Oldershaw clearly found dealing with Ms Gillett-Jackson challenging. He described his dealings with her as "somewhat difficult conversations". But this cannot excuse the avoidance of inquiry into Ms Gillett-Jackson's obligations under the Staff Code of Conduct and EIT's obligations under the information privacy principles.

[83] The failure by EIT and its management to address EIT's obligations under the Privacy Act can be illustrated in at least three ways.

[84] The first illustration. On 26 March 2015 Mr Oldershaw met with Mrs Green. One of the specific complaints she made against Ms Gillett-Jackson was the institution of the proceedings under the Harassment Act. His file note records Mrs Green explicitly linking those proceedings with the complaint made by Mrs Green to the HDC. According to the file note made by Mr Oldershaw, she described the proceedings as "retribution":

> I met with [Sarah Green] on Thursday 26 March at 9.30am to discuss her complaint and to ascertain further details as needed. I asked her to explain her position, what the key issues of concern are that she has not been able to resolve to date. It was noted at that point that she has previously lodged a complaint with the Disabilities Commissioner and with EIT. This current complaint relates only to the filing of a restraining order with the [police] by Cheri Gillet-Jackson and some EIT students against [Jeremy Green] and [Sarah Green].
>
> **Complaint**
>
> [Sarah] has complained directly to the EIT DCE around the behaviour of EIT staff member Cheri Gillet-Jackson following an application for a restraining order filed with the [police] against [Jeremy Green] and [Sarah Green] (applications not seen by me). A court date to hear the application has been set for 6 May 2015. [Sarah] believes that "Cheri has acted unprofessionally and unethically against her and her son [Jeremy] and in retribution for [Sarah] filing a complaint against Cheri with the Health and Disabilities Commissioner. [Sarah] has requested a written apology from Cheri and a commitment that Cheri will leave [Sarah] and [Jeremy] alone.

[85] Mr Oldershaw's file note further records that the issues raised by Mrs Green "follow[ed] a series of other complaints" previously raised with EIT by her and relating to "an alleged long-term confrontation between Cheri and [Jeremy]".

[86] When Mr Oldershaw met with Ms Gillett-Jackson a few days later on 2 April 2015, she was accompanied by a union representative. After Mr Oldershaw had taken Ms Gillett-Jackson through Mrs Green's four-page written complaint (which included Mrs Green's assertion that the restraining order application was "retribution" for the various complaints made by her in 2014 (when Jeremy was an enrolled student) Mr Oldershaw's file note records Ms Gillett-Jackson responding that there was nothing to talk through as "this has nothing to do with my job". Mr Oldershaw wrote in his file note:

> I met with Cheri and her support person (Allied Staff Union) on the above date and provided her with a summary of the complaint laid with me by [Sarah Green] on behalf of her son [Jeremy]. I talked her through the written complaint and background that I had received from [Sarah] and asked Cheri to comment as to her recollection of the given events and the accuracy of the comment received. I advised Cheri at that point that my objective for this meeting was just to hear her side of the story and I was not going to be making any judgement calls.
>
> Cheri advised me that there was nothing to talk through as "this has nothing to do with my job".
>
> I did advise her that all information that she was prepared to share with me could help clear up the current situation and get clarity around the [Sarah Green] complaint. Cheri again advised that she was not trying to be difficult but could not see how the issues raised had anything to do with her role at EIT and as such she did not feel that it was appropriate to discuss things any further.

[87] Consistent with the evidence given by both Ms Gillett-Jackson and Mr Oldershaw about this meeting, the file note confirms nothing was said to Ms Gillett-Jackson about the privacy obligations in the Staff Code of Conduct and the stipulation that information which staff create or become aware of through their employment at EIT must be used only for EIT purposes and must not be disclosed to any third party. No questions were put by Mr Oldershaw to ascertain whether personal information held by EIT about the Greens would be used in the proceedings. Yet the very circumstances of the application made it inevitable such information was at real risk of being used. EIT was on notice and proper inquiry was required.

[88] The second illustration. Towards the end of May 2015 Mrs Green provided Mr Oldershaw with a copy of the restraining order application filed by Ms Gillett-Jackson, Mr Connell and the student. Mr Oldershaw read the papers but returned them to Mrs Green. On any reading of the documents it would have been clear the affidavits by the two EIT employees (and the exhibited documents) contained a large amount of personal information about Jeremy and his mother, information collected by EIT and its employees while Jeremy was a student, including sensitive medical information.

[89] Yet Mr Oldershaw was unable to identify any occasion on which he had thereafter raised with Ms Gillett-Jackson or with Mr Connell concerns as to the use by these two employees of personal information about the Greens collected and held by EIT. Asked whether he had drawn the attention of Ms Gillett-Jackson to the Staff Code of Conduct or a brochure around the Privacy Act, he said he thought the HR Director may have done this. But there was no recorded instance of this having been done. Certainly Ms Gillett-Jackson made no mention of it in her evidence to the Tribunal.

[90] The Tribunal can find in the evidence no occasion on which EIT directly warned Ms Gillett-Jackson against the use of the Greens' personal information in her "personal" proceedings. At most a general reference only was made to the EIT's privacy policies. Nor is there any direct evidence that EIT management addressed the information privacy principles and the obligations they imposed on EIT.

[91] Even after Mr Oldershaw had received Mrs Green's complaint regarding the misuse of the personal information held by EIT about her and her son and had read the affidavits filed by Ms Gillett-Jackson and Mr Connell, nothing was done by EIT. Mr Oldershaw said this was because by that point the affidavits were before the courts and it was difficult for anything to be done other than institutional reinforcement through training regarding the use of personal information held by EIT. The position consistently taken by EIT was that the action taken by Ms Gillett-Jackson and by Mr Connell was in their private capacity and from this starting point everything else followed. No, or no meaningful consideration was ever given to the responsibilities of EIT under IPP 5 (storage and security of personal information) and IPP 11 (limits on disclosure of personal information).

[92] As a third illustration we refer to the fact that the letter dated 15 April 2015 from Mr Oldershaw to Mrs Green advised her that Mr Oldershaw had concluded he could not intervene in the court proceedings as they had been brought by Ms Gillett-Jackson in her private rather than in her work capacity. Leaving aside the merits of this contention, the letter was addressed to Mrs Green personally, marked in bold letters "Confidential" and does not on its face suggest it has been copied to anyone. Yet without reference to Mrs Green, Mr Oldershaw handed a copy to Ms Gillett-Jackson without any stipulation or caution that the letter was personal information about the Greens and a document in relation to which EIT had statutory responsibilities under the Privacy Act. There was no instruction that the document could not be used unless EIT complied with those responsibilities. Nor did Mr Oldershaw take the opportunity to draw the attention of Ms Gillett-Jackson to the instruction in the Staff Code of Conduct that:

> Information which staff create or become aware of through their employment at EIT must be used only for EIT purposes and must not be disclosed to any third party.

[93] A short time later that letter was both referred to in and exhibited to the affidavit sworn by Ms Gillett-Jackson on 20 May 2017, as was Mrs Green's written complaint to which that letter responded.

[94] When Mrs Green by email dated 16 July 2015 asked Mr Oldershaw how this was allowed and what EIT had done to stop Ms Gillett-Jackson using the information, Mr Oldershaw, having knowledge of the misuse of the information, again responded on 29 July 2015 that:

> As I have advised previously, and we have discussed unfortunately I am not in a position to investigate matters relating to the restraining order or to intervene in a process that is currently before the courts and police.

Conclusion

[95] We do not see in any of these three illustrations conscious awareness by senior management of EIT's responsibilities to Mrs Green and her son under the Privacy Act. It was not a question of intervening in a court or Police process. It was a question of ensuring that EIT complied with its obligations under the information privacy principles. That could be done in a manner consistent with the demands of litigation. But it could not be assumed by EIT management that because a staff member had made a self-serving claim that personal information held by EIT was being used by that staff member in her personal capacity, that EIT had no responsibilities under the Privacy Act regarding the disclosure of that information or to even inquire into what information had been disclosed. On a consistent basis EIT remained passive and it is difficult not to see the force of Mrs Green's comment (in her email dated 29 July 2015) to Mr Oldershaw that EIT had adopted a complacent and dismissive attitude to her serious and substantial concerns regarding the use by two employees (Ms Gillett-Jackson and Mr Connell) of personal information held by EIT about her and her son.

[96] We do not accept the submission EIT took its obligations under the Privacy Act seriously.

[97] It is now possible to address the legal issues.

LEGAL ISSUES

[98] The basic facts are not in dispute. It is accepted by EIT personal information about Jeremy and his mother and held by EIT was disclosed by two of its employees (Ms Gillett-Jackson and Mr Connell) in an application under the Harassment Act for restraining orders against the Greens.

The plaintiffs' claim

[99] The application under the Harassment Act was made by two employees of EIT (and by one student), not by EIT itself. The challenge faced by Jeremy and his mother is that in these present proceedings under the Privacy Act they have chosen to hold accountable EIT alone. They rely on IPP 11 which 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,—
> (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 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.

[100] As EIT was at all relevant times the employer of Ms Gillett-Jackson and Mr Connell, Jeremy and his mother rely also on PA, s 126 which in certain circumstances imposes on an employer liability for acts by an employee. The text of this section follows below.

EIT defences

[101] The closing submissions by EIT were:

> **[101.1]** Ms Gillett-Jackson and Mr Connell lawfully disclosed the information about Jeremy and his mother in their affidavits filed in the District Court. Those disclosures were authorised by the Harassment Act and thereby PA, s 7(1).
>
> **[101.2]** The disclosures were made by Ms Gillett-Jackson and Mr Connell in the reasonable belief this was necessary for the conduct of the restraining order proceedings in terms of the exception in IPP 11(e)(iv).
>
> **[101.3]** The applications and disclosures were made by them in their personal capacity, not "as" employees of EIT in terms of PA, s 126(1).

[102] Because there is a degree of overlap between the defences it is intended to address the last of these points first.

SECTION 126 – THE LIABILITY OF AN EMPLOYER

[103] Section 126 addresses specifically the liability of an employer and of principals. It provides:

126 Liability of employer and principals

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

(2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.
(3) Anything done or omitted by a person as a member of any agency shall, for the purposes of this Act, be treated as done or omitted by that agency as well as by the first-mentioned person, unless it is done or omitted without that agency's express or implied authority, precedent or subsequent.
(4) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she or it took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

[104] On the facts only subs (1) and (4) are relevant.

[105] Subsection (1) imposes vicarious liability on an employer even though the employee acted without the employer's knowledge or approval. However, the provision only operates where the thing done (or omitted) was done (or omitted) by a person "as" the employee of the agency. In the present case the key issue is whether Ms Gillett-Jackson and Mr Connell made the disclosures as employees of EIT (albeit employees acting without the knowledge or approval of EIT).

[106] Subsection (4), however, is worded differently. It draws a distinction between an act done "by" an employee on the one hand and the doing of an act "as" an employee on the other. In both circumstances the employer has a defence if it can be shown the employer took such steps as were reasonably practicable to prevent "the" employee from doing the act, or from doing the acts "as" an employee.

[107] Subsection (4) having drawn a clear and explicit distinction between acts done "by" an employee and acts done "as" an employee, it is not possible for the two circumstances to be conflated.

Whether disclosures were "as" the employee of EIT – section 126(1)

[108] The language of PA, s 126(1) would suggest that the question whether anything has been done or omitted by a person "as" the employee of another person is essentially a question of fact. However, the Tribunal was referred to the "scope of employment" or *Salmond* test. But as observed in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [22.5.01], no single thread of principle runs through decisions in this area and decisions turn on their own facts. Ultimately it is a question of fact and degree whether the act in question was within the scope of employment, albeit carried out without the employer's knowledge or approval. It will be seen we find the connection between the employment of Ms Gillett-Jackson and Mr Connell by EIT and the disclosure by them of the Greens' personal information in the Harassment Act proceedings was sufficiently close to bring it within s 126(1).

[109] In the present case the disclosure of the Greens' personal information held by EIT was an act done by two employees of EIT who had specific duties to Jeremy as an enrolled student with disabilities. A considerable amount (if not most) of the content of the affidavits filed by Ms Gillett-Jackson and Mr Connell in the District Court was personal information gained by them simply because Jeremy was a student at EIT to whom they owed such duties and with whom they had had significant interaction throughout the calendar year 2014.

[110] Mr Connell even explicitly stated in his affidavit filed in the District Court that all of his dealings with Jeremy had taken place in his role as disability support worker for the

Disability Office. It is inescapable that the same must be said in relation to Ms Gillett-Jackson. The claim by her that the restraining order application "did not relate to work" and that the issues had "nothing to do with my job" is an unsupportable pretence. The reality was she and Mr Connell were saying to the District Court that as EIT employees working on the EIT campus they needed a restraining order to protect them from dangers they allegedly faced in their place of work from a former student and his mother as a consequence of their employment responsibilities. On the facts we find there was a close and inextricable connection between their employment duties, the restraining order application and the disclosure by them of the Greens' personal information in support of that application.

[111] The fact that both Ms Gillett-Jackson and Mr Connell had interactions with Jeremy off-campus was not dispositive of whether these interactions were in their private capacity or as employees. As the EIT letter to the HDC recognised, Disability Liaison staff members were expected to provide advice to students on how to handle difficult situations. EIT explicitly acknowledged this would sometimes occur outside of normal work hours.

[112] For these and the further reasons given earlier in this decision at [33] to [65] we find that in terms of PA, s 126(1) the personal information disclosures by Ms Gillett-Jackson and Mr Connell were done in their capacity "as" employees of EIT, not in their personal capacity.

Section 126(4) – whether EIT took such steps as were reasonably practicable

[113] EIT well knew from the complaint made by Mrs Green to the HDC, from its own conclusions reached in the context of that complaint, from the many complaints made by Mrs Green against Ms Gillett-Jackson and from what Ms Gillett-Jackson had told her manager (Ms Friis), that Ms Gillett-Jackson's interactions with Jeremy and his mother related almost exclusively to events on campus and to the employment responsibilities both employees owed to EIT and disability students. It was inescapable that the proceedings in the District Court would relate to those events and that Ms Gillett-Jackson and Mr Connell were claiming they needed the protection of a restraining order to enable them to go about their lawful activities as EIT employees. The failure by EIT to perceive the engagement of its responsibilities under the Privacy Act and the enlivening of its duty to make meaningful inquiry coupled with its unquestioning acceptance of Ms Gillett-Jackson's resistance to scrutiny of her actions under the Harassment Act was at best negligent and can perhaps be more accurately described as a deliberate shutting of the eyes.

[114] Even when Mrs Green provided Mr Oldershaw with a copy of Ms Gillett-Jackson's 20 May 2015 affidavit which annexed a confidential letter sent by Mr Oldershaw to Mrs Green, EIT took no action to address its responsibilities under IPP 5 and IPP 11. Significant interactions between Mr Oldershaw and Ms Gillett-Jackson went unrecorded to the degree that Mr Oldershaw could not point to a specific occasion on which he had addressed with Ms Gillett-Jackson EIT's responsibilities under the information privacy principles or even under the Staff Code of Conduct (that "information which staff create or become aware of through their employment at EIT must be used only for EIT purposes and must not be disclosed to any third party").

[115] Ms Gillett-Jackson said the disclosures were made under legal advice. We doubt whether that was the case as her written statement of evidence made no reference of her receiving such advice. It was mentioned for the first time in her oral evidence to the

Tribunal. However, it is not necessary to determine the issue. Whether advice was given to Ms Gillett-Jackson and Mr Connell and whether such advice was properly informed is not the issue. The focus of these proceedings is on the responsibilities of EIT under the information privacy principles. It was that agency which had collected and then held deeply personal information about Jeremy and his mother. It was the responsibility of EIT under IPP 5 to ensure the information was not disclosed except with its authority and it was EIT's responsibility to make sufficient inquiry to ensure that, in terms of IPP 11, EIT (not Ms Gillett-Jackson and Mr Connell) had reasonable grounds to believe disclosure was necessary for the conduct of proceedings before a court. The unquestioning acceptance by EIT of the untenable assertion by Ms Gillett-Jackson that the restraining order application had nothing to do with work when the circumstances showed the opposite precludes EIT from asserting it held the necessary IPP 11 belief on reasonable grounds.

[116] The circumstances show that EIT knew or had good cause to suspect (not least from the complaints made by Mrs Green) that disclosure of the Greens' personal information had been and continued to be made to the court. EIT made no attempt to address its responsibilities under IPP 5 and IPP 11. There was tacit knowledge or approval. But in the final analysis it is irrelevant whether the disclosures occurred with or without the knowledge or approval of EIT. The vicarious liability imposed by PA, s 126(1) is such that in either circumstance the employer is responsible for the acts of the employee. Here, EIT is legally responsible for the disclosure of personal information by Ms Gillett-Jackson and Mr Connell as employees even though there may have been no knowledge or approval of their actions by EIT.

[117] This is a case in which EIT was on notice personal information held by it regarding a student and his mother was being used in court proceedings brought by two employees and by a student at EIT yet it failed to perceive the engagement of its responsibilities under the Privacy Act. No meaningful inquiry or effort was made to find out what information was intended to be or had been used and to require the two employees to comply with EIT's own staff Code of Conduct, para 4.2. Nor did EIT management meaningfully turn their minds to EIT's responsibilities under IPP 5 and IPP 11.

[118] In the circumstances we find EIT did not take such steps as were reasonably practicable to prevent Ms Gillett-Jackson and Mr Connell from disclosing the Greens' personal information, not even when Mr Oldershaw personally handed to Ms Gillett-Jackson Mr Oldershaw's confidential letter addressed to Mrs Green.

Whether disclosures were "by" an employee of EIT – section 126(4)

[119] The defence allowed by PA, s 126(4) applies also to acts done "by" an employee. For the same reasons we find the disclosures, were made by two employees (Ms Gillett-Jackson and Mr Connell) and that EIT did not take such steps as were reasonably practicable to prevent them from making those disclosures.

[120] The submissions based by EIT on PA, s 126(1) and (4) are accordingly rejected.

[121] We address next the defence based on IPP 11.

THE DEFENCE BASED ON IPP 11

[122] Because IPP 11 is a lengthy provision and because only IPP 11(e)(iv) is relied on, only the relevant parts are replicated here:

> **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,—
> …
> (e) that non-compliance is necessary—
> …
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
> …

[123] The submission for EIT is that Ms Gillett-Jackson and Mr Connell genuinely believed that non-compliance was necessary for the conduct of the District Court proceedings. That belief was primarily based on advice apparently given by a lawyer (or lawyers) at a Citizens Advice Bureau. Reliance is also placed on the rules of court which require that applications to the court be supported by proper grounds and supporting evidence. The Harassment Act itself in s 6(1)(a) recognises the need for the court to be provided with the context of the alleged acts.

[124] The difficulty with these submissions is that because it was EIT which held the personal information, it was EIT which was required to believe, on reasonable grounds, disclosure was necessary for the conduct of the restraining order application. The submission based on the beliefs held by Ms Gillett-Jackson and Mr Connell must accordingly fail. In addition neither Mr Oldershaw as Deputy Chief Executive nor any other member of the EIT management team addressed IPP 11 and not one of them gave evidence that they had formed a belief on reasonable grounds that any of the exceptions to IPP 11 applied, including where disclosure is necessary for the conduct of proceedings before a court. Emphasis was given to the fact EIT had had no input into the application and no knowledge of what had been included.

[125] The alternative argument advanced is that should EIT's primary submission on s 126 be rejected and a finding be made that the actions of Ms Gillett-Jackson and Mr Connell were "as" employees, EIT should be able to rely on any qualifying belief held by those employees in relation to the IPP 11 issues.

[126] In determining whether IPP 11(e)(iv) can be properly interpreted in this way, it is necessary to take into account two fundamental principles of interpretation. First, that one of the objects of the Privacy Act, as recorded in the Long Title, is the promotion and protection of individual privacy and second, that the information privacy principles must be read together, forming as they do a coherent scheme to achieve the stated object of the Act. So while in these proceedings Jeremy and his mother have sought to attach liability via IPP 11, IPP 5 is nevertheless relevant when addressing the claim EIT can rely on the belief by Ms Gillett-Jackson and Mr Connell that they were entitled to use the Greens' personal information in their "personal" proceedings under the Harassment Act. IPP 5 provides:

Principle 5
Storage and security of personal information

An agency that holds personal information shall ensure—
(a) that the information is protected, by such security safeguards as it is reasonable in the circumstances to take, against—
  (i) loss; and
  (ii) access, use, modification, or disclosure, except with the authority of the agency that holds the information; and
  (iii) other misuse; and
(b) that if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information.

[127] On the facts we have found Ms Gillett-Jackson and Mr Connell, as employees of EIT, had access to the personal information held by EIT about Jeremy and his mother. This included information held by Ms Gillett-Jackson and Mr Connell as employees in their capacity as employees. See PA, s 3(1). Their disclosure and use of that information for their own purposes coupled with the failure by EIT to ensure that the information was protected by such security safeguards as were reasonable in the circumstances to take against loss, access, use, modification or disclosure except with the authority of EIT, resulted in EIT being in breach of IPP 5.

[128] Were the submission by EIT to be accepted it would mean that:

> **[128.1]** Where an employee, without authority, takes personal information held by his or her employer and uses that information in personal court proceedings; and
>
> **[128.2]** Where the employer at no stage turns his or her mind to the question whether IPP 11(e)(iv) applies;

the employer can defend his or her own non-compliance with IPP 11 on the basis that the employee believed, on reasonable grounds, disclosure was necessary.

[129] In our view such interpretation of the Privacy Act would not be consistent with the protection of personal information or with the vicarious liability intended by s 126(1). It would enable agencies to evade their explicit obligations under the information privacy principles (here IPP 5 and IPP 11) and make determinative the self-serving assessment of the delinquent employee. The limited defence allowed by s 126(4) would be de facto expanded.

[130] Personal information held by an agency is not a "bank" of information from which an employee can draw for use by that employee in personal litigation brought by that employee against a third party who is a client (or here a student) of the employer. Principle 11 requires the employer not to disclose the information unless he or she believes on reasonable grounds disclosure is "necessary" for the conduct of proceedings. This means the employee wanting to use information held by the employer must provide that employer with sufficient information to enable the employer to make a decision whether it has reasonable grounds to believe non-compliance with IPP 11 is necessary. However, Ms Gillett-Jackson and Mr Connell provided no information and at no point did EIT senior management challenge Ms Gillett-Jackson on her assertion that the proceedings in the District Court were "private" and that the application "did not relate to work". Yet the circumstances demanded that this assertion be challenged and that EIT take positive steps to ensure its responsibilities under the Privacy Act were discharged.

[131] In our view, while it is consistent with the promotion and protection of individual privacy that an employer be vicariously liable for the actions of employees (see for example PA, ss 3, 4 and 126), it is not consistent with that object (or with these provisions) that an employer be able to evade his or her responsibilities by sheltering behind an employee who has, without authority, taken and misused the personal information of another person. Otherwise there would be little or no accountability.

[132] Our interpretation will not have the effect of restricting access to courts and tribunals. IPP 11 and the right of access to courts are not opposites or inconsistent. The interests of the person about whom the information is and those of the employee are balanced by the terms of IPP 11 which explicitly permit disclosure for the conduct of proceedings before any court or tribunal whether they be proceedings that have been commenced or are reasonably in contemplation. But just as the admissibility of evidence in such proceedings is for good reason regulated (for example by the Evidence Act 2006) so too are the circumstances in which personal information can be disclosed. The limitations are clearly justifiable and the threshold modest. All that is required is a belief on the part of the agency, based on reasonable grounds, that non-compliance with IPP 11 is necessary for the conduct of the proceedings. The litigants themselves have long established means of accessing information held by an agency. Those means include discovery (including pre-litigation and non-party discovery) and the use of a witness summons (including a summons duces tecum). Each method will provide the agency with a belief on reasonable grounds non-compliance is necessary for the conduct of proceedings.

[133] Mr Oldershaw asked himself the wrong question. Instead of addressing himself to IPP 11 and whether there were reasonable grounds and whether the necessity test was satisfied, the question asked was whether the information was being used in Ms Gillett-Jackson's and Mr Connell's personal capacity.

[134] We address now the third and final submission made on behalf of EIT.

THE DEFENCE BASED ON SECTION 7 OF THE PRIVACY ACT 1993

[135] Section 7 of the Privacy Act provides:

> **7 Savings**
>
> (1) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available.
> (2) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any other Act of Parliament and that—
> (a) imposes a prohibition or restriction in relation to the availability of personal information; or
> (b) regulates the manner in which personal information may be obtained or made available.
> (3) Nothing in principle 6 or principle 11 derogates from any provision—
> (a) that is contained in any legislative instrument within the meaning of the Legislation Act 2012 made by Order in Council and in force—
> (i) in so far as those principles apply to a department, a Minister, an organisation, or a public sector agency (as defined in paragraph (b) of the definition of that term in section 2(1)) that is established for the purposes of assisting or advising, or performing functions connected with, a department, a Minister, or an organisation, immediately before 1 July 1983; and
> (ii) in so far as those principles apply to a local authority or a public sector agency (as so defined) that is established for the purposes of assisting or advising, or performing functions connected with, a local authority, immediately before 1 March 1988; and

(iii) in so far as those principles apply to any other agency, immediately before 1 July 1993; and

(b) that—

(i) imposes a prohibition or restriction in relation to the availability of personal information; or

(ii) regulates the manner in which personal information may be obtained or made available.

(5) An action is not a breach of any of principles 1 to 5, 7 to 10, and 12 if that action is authorised or required by or under law.

(6) Nothing in principle 7 applies in respect of any information held by the Department of Statistics, where that information was obtained pursuant to the Statistics Act 1975.

(7) Subject to the provisions of Part 7, nothing in any of the information privacy principles shall apply in respect of a public register.

[136] The submission for EIT is that in terms of s 7(1) the disclosure of personal information by Ms Gillett-Jackson and Mr Connell was authorised by the Harassment Act with the result there was no breach of IPP 11 by EIT.

[137] In acknowledgement of the fact that there is no express provision in the Harassment Act which "authorises or requires" personal information to be made available in proceedings under that Act, EIT submits it can be inferred the Act does so authorise or require because an applicant must file an affidavit establishing his or her case. Reference is made to the District Court Rules 2014, r 20.33.

[138] It is important to note, however, that PA, s 7(1) does not have the effect of saying that IPP 11 has no application to the other enactment. It does apply albeit up to the point there is derogation from the other provision. Once the derogation point is arrived at the other enactment prevails. In this context "derogates" means to repeal or abrogate in part or to lessen or impair the other enactment. See *Tapiki and Eru v New Zealand Parole Board* [2019] NZHRRT 5 at [36].

[139] The short answer to the EIT submission is that IPP 11 does not derogate from the Harassment Act or from the District Court Rules and contains specific exemptions from the prima facie ban on disclosure. Those exemptions embrace a large range of circumstances, all of which have direct or potential application where there are court proceedings in train or in contemplation. IPP 11 does, however, impose a minimal level of restriction consistent with the purposes of the Privacy Act and here, the duty to secure personal information. For IPP 11(e)(iv) to apply the agency must believe on reasonable grounds non-compliance is necessary for the conduct of the proceedings. But this is not a derogation just as the provisions of (say) the Evidence Act cannot reasonably be described as derogating from the Harassment Act or from the District Court Rules because the admission of evidence is regulated.

[140] There is the further point that IPP 11 will have no application where a court orders discovery before proceedings are commenced, or after such commencement, non-party discovery, interrogatories or a notice to admit facts or a witness summons. In each case the agency holding the information would, by virtue of such order, have the requisite reasonable grounds to believe non-compliance with IPP 11 was necessary for the conduct of proceedings before the court.

[141] In conclusion the submission for EIT is based on the false premise that the information privacy principles (particularly IPP 11) derogate from the Harassment Act and/or the District Court Rules. The principles do not impede access to the courts and do not derogate from the freedom of parties to conduct litigation.

LIABILITY AND THE QUESTION OF HARM

[142] For the reasons given we do not accept any of the defences raised by EIT and find both on the facts and on the law that it breached IPP 11.

[143] That, however, is not sufficient on its own to establish EIT interfered with the privacy of Jeremy and of his mother. A finding of such interference can only be made if, in terms of PA, s 66(1)(b) the Tribunal is persuaded the breach:

> **[143.1]** has caused, or may cause, loss, detriment, damage, or injury to Jeremy and/or Mrs Green (PA, s 66(1)(b)(i)); or
>
> **[143.2]** has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of Jeremy and/or Mrs Green (PA, s 66(1)(b)(ii)); or
>
> **[143.3]** has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of Jeremy and/or his mother (PA, s 66(1)(b)(iii)).

[144] The causation standard is explained in *Taylor v Orcon Ltd* [2015] NZHRRT 15, (2015) 10 HRNZ 458 at [58] to [61].

[145] To avoid lengthening this decision unnecessarily, we address only the question under s 66(1)(b)(iii) namely, whether the breach of IPP 11 resulted in significant humiliation, significant loss of dignity or significant injury to the feelings of Jeremy and of Mrs Green. Each plaintiff must establish at least one of such forms of harm. We have taken care to exclude from consideration the broad range of complaints made by Jeremy and his mother against EIT, Ms Gillett-Jackson, Mr Connell and other third parties relating to issues beyond IPP 11 and which are not causatively connected to the breach of IPP 11. This includes the "other events" listed in EIT's closing submissions. Nor are the merits of the restraining order application relevant. The assessment must be based on the effect on Mrs Green and on Jeremy of the disclosure of the personal information contained in the affidavits filed by Ms Gillett-Jackson and Mr Connell in the District Court (and thus disclosed to the court and to the parties (which included a student at EIT)).

[146] Because context is everything, it is necessary to briefly re-traverse the circumstances of trust and vulnerability which are at the heart of the harm assessment and the question of "significant". We do so not to pass moral judgment on EIT or its employees but to properly assess the effect on Jeremy and on his mother of the breach of IPP 11.

[147] Both Ms Gillett-Jackson and Mr Connell acknowledged in their affidavits that their knowledge of Jeremy and of his mother was acquired in their capacity as persons who were providing disability support to Jeremy at EIT. It was a form of care and assistance to facilitate equity of access to education. On enrolment he was given a printed document issued by Ms Gillett-Jackson which advised that his study support person was expected to treat any information about him (Jeremy) as "strictly confidential". If at any time he felt that his confidentiality had been breached, he was to contact Disability Liaison, being Ms Gillett-Jackson. The further document issued by Ms Gillett-Jackson with the heading "Rights and Responsibilities for Students" and dated by her "Feb 2014" instructed Jeremy that he was to contact Ms Gillett-Jackson if there was a problem of any kind. He was provided with her cell phone number.

[148] On EIT's own documents Jeremy and his mother were encouraged to trust Ms Gillett-Jackson and Mr Connell. It was also necessary for intimate details about Jeremy to be disclosed to Ms Gillett-Jackson so that his disability needs could be assessed. The importance of the confidentiality of health information will be returned to later in this decision. During 2014 his close dependence on his study support persons and his close proximity to them meant Ms Gillett-Jackson and Mr Connell learnt much of Jeremy's private life, including his relationship with his mother and with other students. He, in turn, looked to them for advice and guidance.

[149] The two affidavits sworn on 20 May 2015 by Ms Gillett-Jackson and Mr Connell accordingly contained personal and extremely private information about Jeremy, his disabilities, his health, his relationship with his mother and with other EIT students. Personal and private telephone conversations between Jeremy and his mother were related in the affidavits, calls made while Jeremy was on campus or on one occasion, while in a motor vehicle being driven by Mr Connell. It is the betrayal of trust and extreme embarrassment which justify the claim by Mrs Green and Jeremy that the requirements of s 66(1)(b)(iii) have been met.

The harm issue – findings in relation to Mrs Green

[150] Having seen and heard Mrs Green give evidence and present her case in person we are satisfied, on the balance of probabilities and to the requisite causation standard, that disclosure in the affidavits of her personal information, including information about Jeremy and the challenges they faced in their necessarily intimate relationship, caused her significant humiliation and significant injury to feelings. With some emphasis she spoke of her anger and humiliation and sense of betrayal. Even Mr Oldershaw in his letter of 15 April 2015 recognised Mrs Green's "angst and worry".

The harm issue – findings in relation to Jeremy

[151] One of the submissions made on behalf of EIT was that while in his oral evidence Jeremy explained his concerns and the impact the different events had had on him, he had not expressed concern about the disclosure of his information in the Harassment Act proceedings.

[152] The first point is that the submission is mistaken. Jeremy did in fact state in evidence that he had experienced feelings of extreme embarrassment, upset and betrayal as a result of the disclosure of his personal information by Mr Connell. While Jeremy referred only to Mr Connell's affidavit, contextually the reference must be taken to include also the disclosures made by Ms Gillett-Jackson. It would be irrational to conclude otherwise. Ms Gillett-Jackson's affidavit contains far more of Jeremy's personal information than Mr Connell's and she was the person who complained most about Jeremy. The second point is that given Jeremy's disabilities it would be unfair to read his evidence as meaning he experienced extreme embarrassment, upset and betrayal as a consequence of the disclosure by Mr Connell but not as a consequence of the disclosure by Ms Gillett-Jackson. We now enlarge on these points.

[153] The Tribunal's assessment of Jeremy's evidence (both oral and documentary) must take into account his specific disabilities:

> **[153.1]** Autism is a developmental disorder. Communication and social difficulties, communication in an inappropriate manner and behavioural difficulties are part of the disorder. People with ASD find processing verbal language

challenging. There can be significant difficulty in social interactions and a heightened level of anxiety can lead to the loss of control and the need to run away.

[153.2] The Tribunal's decision on the reinstatement application (*Green and Green v IT (Reinstatement of Second Plaintiff)* [2016] NZHRRT 39 (20 December 2016) at [14] and [17] makes specific reference to the stress and anxiety exhibited by Jeremy at the hearing on 19 and 20 December 2016, particularly during the course of his evidence. During cross-examination he felt compelled to leave the hearing room for a short period. He similarly left the later substantive hearing for a short period. At both hearings he had the support of very able Communication Assistants and it was demonstrable that without their help the Tribunal would have had great difficulty in conducting and completing the hearing.

[153.3] The 7 September 2005 developmental assessment made by four medical specialists at the Hawkes' Bay District Health Board noted Jeremy presents with language difficulties both in receptive and expressive areas, meaning he has difficulties processing and understanding spoken language as well as difficulties expressing himself and using language. The report further concludes:

> **[153.3.1]** Jeremy has difficulties expressing his thoughts and ideas.
>
> **[153.3.2]** Generally speaking his skills in understanding verbal information, thinking with words and expressing thoughts in words are in the Extremely Low range.
>
> **[153.3.3]** In general, his skills in attention, concentration and mental reasoning are in the Extremely Low Range.
>
> **[153.3.4]** His general cognitive ability is within the Extremely Low range of intellectual functioning and meets the criteria for a diagnosis of a moderate intellectual disability.

[154] While the report was compiled when Jeremy was ten years of age the Tribunal has been provided with no evidence to suggest that in 2014 or at the time of the hearings in 2016 and 2017 his disabilities were substantially different. The behaviour exhibited by him during the course of the initial two day hearing in December 2016 and at the subsequent five day hearing in July 2017 were consistent with the ASD assessment and in fairness to EIT, the diagnosis was not challenged.

[155] Consequently we approach our assessment of Jeremy's evidence regarding humiliation, loss of dignity and injury to feelings on the basis he has ASD as well as an intellectual disability in the moderate range and a co-morbid anxiety disorder. These disabilities mean he has limited capacity to articulate his feelings and an equally limited range of vocabulary with which to express those feelings. There is an inherent danger in challenging his evidence on the basis he did not use the "right" words or phrases to trigger the emotional harm thresholds in PA, s 66(1)(b)(iii). His disabilities cannot be used against him. The Tribunal must recognise that an agency's challenge to the adequacy of a disabled plaintiff's evidence on humiliation, loss of dignity and injury to feelings may contain within it the unarticulated premise that the plaintiff's cognitive, language and other disabilities are not relevant to the assessment of his or her

evidence. This would create a real danger of the disabled being denied access to justice because of their disabilities.

[156] In these circumstances we have considered not only the words used in Jeremy's oral evidence, but also his inability to express himself with the clarity and accuracy a person without disabilities would be expected to display. We did not understand him to be limiting his feelings of extreme embarrassment, upset and betrayal to Mr Connell alone.

[157] There is also good authority that once a breach of an information privacy principle has been established the relevant humiliation and injury to feelings and loss of dignity can be inferred from the circumstances of the breach. See *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 at [67] where the Court of Appeal accepted in relation to the materially indistinguishable provisions of s 57(1)(c) of the Health and Disability Commissioner Act 1994 that even where the person aggrieved is deceased the relevant humiliation, injury to feelings and loss of dignity can be inferred from the circumstances of the breach:

> In terms of the proof of the matters relating to the heads of damage in s 57(1)(a) – (c), we agree that there may be some difficulties in establishing the claim on behalf of the deceased person. However, we do not consider that, for example, the matters referred to in s 57(1)(c) are wholly subjective. Once the breach of the Code is established, the relevant humiliation, injury to feelings and loss of dignity could be inferred from the circumstances of the breach.

[158] Brief though his uncross-examined oral evidence may have been (without objection Jeremy confirmed specific paragraphs in a joint witness statement prepared by his mother) Jeremy did state on oath that he had experienced feelings of extreme embarrassment, upset and betrayal as a result of the disclosure of his personal information by Mr Connell. Allowing for Jeremy's disability stemming from his ASD and further taking into account the context of his evidence, we take his evidence to include also the disclosures by Ms Gillett-Jackson.

[159] There is also the fact that Mrs Green gave evidence of Jeremy's reaction to the disclosure of his personal information by Ms Gillett-Jackson and Mr Connell in terms consistent with Jeremy's own evidence. This opinion evidence is admissible under the Evidence Act 2006, s 24 and the Human Rights Act 1993, s 106(1)(d).

[160] In relation to both Jeremy and his mother it was submitted for EIT that the disclosures were made in the context of proceedings which were treated by the District Court as confidential and there was no hearing because the applications were eventually discontinued. But while disclosure to a large number of persons might, on the facts of a particular case, increase the humiliation, loss of dignity or injury to feelings of a particular plaintiff, widespread dissemination is not a requirement. The focus of s 66(1)(b)(iii) is on the impact on the individual him or herself. The fact of disclosure (even limited disclosure) in circumstances where confidentiality has been promised or is reasonably expected may of itself result in significant humiliation or significant injury to the feelings of the individual, particularly where sensitive medical information has been disclosed as in *Mills v Capital and Coast District Health Board* [2019] NZHRRT 47. Disclosure to just one other person is sufficient to trigger IPP 11 ("shall not disclose the information to a person or body or agency"). Here the detailed disclosure of Jeremy's personal information by Ms Gillett-Jackson and Mr Connell was made to the District Court as well as to the other applicants, one of whom was a student at EIT. That student would certainly not otherwise have had access to the information held by EIT.

[161] We consider next the question whether, in the case of Jeremy, there was also a loss of dignity of a significant kind. The application of the loss of dignity ground in the context of a plaintiff with disabilities was recently addressed in *Marshall v IDEA Services Ltd (HDC Act)* [2020] NZHRRT 9 at [68] to [131]. The plaintiff in that case was disabled to such a degree that he was incapable of subjectively experiencing emotional harm in the form of humiliation and injury to feelings but the Tribunal held the dignity ground applies in such circumstances. The Tribunal further held the dignity ground has application also where the plaintiff, while possessing the capacity to experience such harm, nevertheless has an impaired capacity to communicate that experience.

[162] Here Jeremy's impaired capacity to communicate could well allow a finding to be made that significant loss of dignity has been established but no finding is required as he has already established significant humiliation and significant injury to feelings. The establishment of one form of harm is sufficient. A plaintiff is not required to establish all three.

[163] In the circumstances described we are satisfied, on the balance of probabilities and to the requisite causation standard, that disclosure in the affidavits of Jeremy's personal information caused him significant humiliation and significant injury to feelings.

[164] As both Jeremy and his mother have satisfied the Tribunal to the civil standard that EIT has breached IPP 11 and that that breach has resulted in Jeremy and his mother experiencing significant humiliation and significant injury to feelings, the requirements of s 66(1)(a) and (b) have been satisfied and an interference with privacy has been established.

[165] It is now necessary to address the issue of remedies.

REMEDY

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

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
> (c) damages in accordance with section 88:
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
> (e) such other relief as the Tribunal thinks fit.
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
> (3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).

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

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

88 Damages

(1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
(a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
(b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
(c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

[168] Mrs Green and Jeremy are seeking a declaration of interference and damages. Also sought are various expenses relating to:

[168.1] The conduct of these proceedings.

[168.2] An apology from EIT.

[168.3] The purchase of a padlock, chain and security camera.

[168.4] A legal aid debt incurred by Jeremy in relation to the proceedings under the Harassment Act.

[168.5] Damages for Jeremy arising from his claimed inability to obtain employment because of the allegations made by the EIT student who was a party to the Harassment Act proceedings.

[168.6] Loss of wages for Mrs Green as a result of having to take leave to deal with all matters relating to Jeremy.

[169] We do not intend addressing the last four items as no causative link has been established between the claimed losses (and expenses) and the breach by EIT of IPP 11.

Section 85(4) – conduct of the defendant

[170] Addressing first s 85(4), it is no defence that the interference was unintentional or without negligence, but the Tribunal must nevertheless take the conduct of EIT into account in deciding what, if any, remedy to grant. The purpose is not to pass judgment on moral grounds. It is to better assess the degree of harm that conduct caused to Jeremy and his mother. The point is further explained at [181.1].

[171] The question of an apology. The significance of an apology is addressed in *Williams v Accident Compensation Corporation* [2017] NZHRRT 26 at [38] and [41]. We reproduce only [41]:

[41] The apology cannot "erase" the humiliation, loss of dignity or injury to feelings caused by the interference with privacy. Nor is it a "get out of jail free" card. The question in each case is

> whether and to what degree the emotional harm experienced by the particular plaintiff has been ameliorated. While this is a fact specific inquiry it can be said that ordinarily an apology must be timely, effective and sincere before weight can be given to it. It is not inevitable an apology, even if sincerely and promptly offered, will ameliorate the emotional harm experienced by the plaintiff. Much will depend on who the particular plaintiff is and the particular circumstances of the case.

[172] Jeremy and his mother seek an apology and EIT has offered to apologise in a way that would be meaningful to the Greens. EIT remains willing to apologise and considers in all the circumstances this to be an appropriate remedy. Reference has been made to *L v N* (1997) 3 HRNZ 721 at 729 to 730. Formal orders follow at the end of the decision requiring EIT to provide separate apologies to both Jeremy and to his mother.

[173] EIT further submits it has taken considerable steps in an effort to address the Greens' complaints. Specifically, it is said EIT:

> **[173.1]** Responded appropriately to each of Mrs Green's complaints, taking her complaints seriously and taking steps to investigate and respond to her.
>
> **[173.2]** Engaged personally and directly with Mrs Green through Deputy Chief Executive Mark Oldershaw.
>
> **[173.3]** Addressed Mrs Green's complaints formally with Ms Gillett-Jackson.
>
> **[173.4]** Re-examined its practices relating to student interaction.
>
> **[173.5]** Worked through various concerns it had in relation to the services provided by the Disability Office.
>
> **[173.6]** Amended its Social Media Guidelines and its Code of Conduct.
>
> **[173.7]** Provided training.

[174] Regrettably, however, the conclusion reached by the Tribunal is that while Mr Oldershaw did meet with Mrs Green on more than one occasion, it was clear he neither took her privacy complaints sufficiently seriously nor took meaningful steps to investigate and address her concerns about the use of her and Jeremy's personal information in the District Court.

[175] Senior management's passive and unquestioning acceptance of the assertion by Ms Gillett-Jackson that the court proceedings had nothing to do with her job was surprising, to say the least. Mr Oldershaw did not insist on seeing a copy of the papers filed and when Mrs Green provided the documents at the end of May 2015, he returned them to her after reading them but without taking a copy. He did not at any time clearly and explicitly question Ms Gillett-Jackson about her compliance with the Staff Code of Conduct. Nor did he directly tell her she could not use in her court proceedings information she had collected or had become aware of through her employment at EIT, that the information could be used only for EIT purposes and not disclosed to a third party.

[176] Even when he handed to Ms Gillett-Jackson his "confidential" letter (addressed to Mrs Green) of 15 April 2015 he did not give instruction that because it was personal information about Mrs Green and her son confidentiality had to be respected and the document was not to be disclosed to any third party. When Mrs Green demanded an

explanation for the appearance of the document in the affidavit sworn by Ms Gillett-Jackson on 20 May 2015, nothing meaningful was forthcoming from EIT.

[177] While the offered apology is accepted as genuine it has done little to ameliorate the humiliation and loss of dignity felt by Mrs Green and her son. Nevertheless the apology is taken into account along with the submissions that have been made by EIT.

Declaration

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

[179] On the facts we see nothing that could justify the withholding from Jeremy and his mother of a formal declaration that EIT interfered with their privacy. Such declaration is accordingly made.

Damages for humiliation and injury to feelings

[180] The Tribunal having found for the purpose of establishing liability under s 66(1)(a)(i) and (1)(b)(iii) that Jeremy and Mrs Green suffered significant humiliation and significant injury to their feelings, it follows that humiliation and injury to feelings has also been established for the purpose of awarding damages under s 88(1)(c). See *Director of Human Rights Proceedings v Slater* [2019] NZHRRT 13 at [164]:

> … where, as here, it has been found for the purpose of s 66(1)(b)(iii) there was significant humiliation, significant loss of dignity and significant injury to the feelings of the plaintiff, it follows humiliation, loss of dignity and injury to feelings has been established for the purpose of s 88(1)(c) as this provision does not require that these forms of emotional harm be "significant".

[181] As to the assessment and award of damages for (inter alia) humiliation and injury to feelings, reference is to be made to *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [170] to [177]. We adopt the general principles relating to the award of damages set out in that decision which include:

[181.1] Damages are awarded not to punish a defendant for what he or she has done but to compensate the person aggrieved for the harm suffered. See [170.3]:

> **[170.3]** The award of damages is to compensate for humiliation, loss of dignity and injury to feelings, not to punish the defendant. The conduct of the defendant may, however, exacerbate (or, as the case may be, mitigate) the humiliation, loss of dignity or injury to feelings and therefore be a relevant factor in the assessment of the quantum of damages to be awarded for the humiliation, loss of dignity or injury to feelings.

[181.2] The very nature of the s 88(1)(c) heads of damages means there is a subjective element to their assessment. Not only are the circumstances of humiliation, loss of dignity and injury to feelings fact specific, they also turn on the personality of the aggrieved individual. See [170.5].

[181.3] It is necessary to look at the totality of the injury and the emotional state of the complainant. Injury to feelings often comprises a complex mix of feelings and emotions, which are often hard to compartmentalise and overlap. See *Director of Proceedings v O'Neil* [2001] NZAR 59 at [29] and *Hammond* at [170.7].

[182] In *Hammond* the Tribunal at [176] identified three bands within which damages awarded by the Tribunal range:

> From this general overview it can be seen that awards for humiliation, loss of dignity and injury to feelings are fact-driven and vary widely. At the risk of over-simplification, however, it can be said there are presently three bands. At the less serious end of the scale awards have ranged upwards to $10,000. For more serious cases awards have ranged between $10,000 to about (say) $50,000. For the most serious category of cases it is contemplated awards will be in excess of $50,000. It must be emphasised these bands are simply descriptive. They are not prescriptive. It is not intended they be a bed of Procrustes on which all future awards must be fitted. At most they are a rough guide and cannot abridge the general principles identified earlier in this decision.

[183] In the present case Jeremy's disabilities and limitations made him particularly vulnerable in the event of an unauthorised disclosure of his intimate personal information by persons who had promised to keep that information confidential. As mentioned, this is not a moral judgment on EIT, Ms Gillett-Jackson or Mr Connell. It is an explanation of the nature and degree of harm for which compensatory damages are to be awarded. As stated in *Hammond*, damages under the Privacy Act are not awarded to punish the defendant.

[184] The fact that a substantial amount of the disclosed personal information was information about Jeremy's health (and disabilities) is of additional significance. As this Tribunal recently noted in *Mills v Capital and Coast District Health Board* [2019] NZHRRT 47 at [125], the importance of confidentiality of health information has been repeatedly affirmed at common law and is a principle explicitly recognised by the European Court of Human Rights. See *R (W) v Secretary of State for Health (British Medical Association intervening*) [2015] EWCA Civ 1034, [2016] 1 WLR 698 at 40 which is cited in *Mills* at [125].

[185] The limited audience of disclosure of the personal information contained in the affidavits is a relevant factor but on the facts it is not the size of the circle of persons to whom disclosure was made, it is the humiliation and injury to feelings caused to Jeremy by the use and disclosure of personal information which had been provided under an assurance of confidentiality for the purpose of assisting him in his studies.

[186] Mrs Green has been an indefatigable advocate and defender of her son. She was present at the January 2014 enrolment. It was she who had provided much of Jeremy's personal information to Ms Gillett-Jackson. The breach of the promise of confidentiality applied as much to her as to her son. She has felt keenly the humiliation and injured feelings experienced by him as a consequence of EIT's privacy breaches. Those breaches have also separately caused her humiliation and injured feelings. Intimate details of her relationship with her son and of the difficulties experienced by her bringing him up in the face of his disabilities have been exposed. Her privacy complaints have not been taken seriously by EIT management. Even the letter dated 15 April 2015 from Mr Oldershaw which had been endorsed with a large "Confidential" stamp had immediately been given to Ms Gillett-Jackson and used by her in the District Court proceedings.

[187] Taking into account all the evidence we have heard and our findings of fact in the context of liability under PA, s 66(1)(b)(iii) we are of the view the humiliation and injury to feelings experienced by Jeremy and his mother was subjectively significant. This was made very clear during the five day hearing.

[188] Taking all the circumstances into account and recognising that each case turns on its own particular facts and the subjective experiences of each particular plaintiff, we have concluded the appropriate award of damages is $25,000 for each plaintiff.

FORMAL ORDERS

Jeremy Green

[189] For the foregoing reasons the decision of the Tribunal is that it is satisfied that on the balance of probabilities an action of Eastern Institute of Technology was an interference with the privacy of Jeremy Green and:

> **[189.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the Eastern Institute of Technology interfered with the privacy of Jeremy Green by disclosing personal information about him when it did not believe on reasonable grounds that any of the exceptions listed in Principle 11 of the information privacy principles had application.
>
> **[189.2]** Damages of $25,000 are awarded against the Eastern Institute of Technology under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for humiliation, loss of dignity and injury to the feelings of Jeremy Green.
>
> **[189.3]** An order is made under s 85(1)(d) of the Privacy Act 1993 that within 14 days of the date of this decision the Eastern Institute of Technology provides an apology to Jeremy Green for the interference with his privacy.

Sarah Green

[190] For the foregoing reasons the decision of the Tribunal is that it is satisfied that on the balance of probabilities an action of Eastern Institute of Technology was an interference with the privacy of Sarah Green and:

> **[190.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the Eastern Institute of Technology interfered with the privacy of Sarah Green by disclosing personal information about her when it did not believe on reasonable grounds that any of the exceptions listed in Principle 11 of the information privacy principles had application.
>
> **[190.2]** Damages of $25,000 are awarded against the Eastern Institute of Technology under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for humiliation and injury to the feelings of Sarah Green.
>
> **[190.3]** An order is made under s 85(1)(d) of the Privacy Act 1993 that within 14 days of the date of this decision the Eastern Institute of Technology provides an apology to Sarah Green for the interference with her privacy.

COSTS

[191] Costs are reserved. Because Jeremy and his mother were self-represented the only costs recoverable by them are the disbursements incurred in preparing and presenting their case. If Mrs Green wishes to recover any of those disbursements she should prepare an itemized list and send it to Mr Kynaston to see whether agreement

can be reached on quantum. Unless the parties come to an arrangement on costs the following timetable is to apply:

[191.1] Mrs Green is to file her submissions within 14 days after the date of this decision. Those submissions are to set out, in itemised form, the disbursements incurred by Mrs Green and her son in preparing and presenting their case. The submissions for the Eastern Institute of Technology are to be filed within the 14 days which follow. Mrs Green is to have a right of reply within seven days after that.

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

[191.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

NAME SUPPRESSION

[192] Final orders are made that:

[192.1] Publication of the name or of any details which could lead to the identification of Jeremy Green, Sarah Green, [names redacted] is prohibited.

[192.2] Publication of information regarding Jeremy Green's health and disabilities is prohibited.

[192.3] Publication of details regarding the remuneration of Mrs Green and of Stephen Connell as well as their bank account details is prohibited.

[192.4] There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiffs and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.

.....	.....	.....
Mr RPG Haines ONZM QC	**Ms LJ Alaeinia JP**	**Mr MJM Keefe QSM JP**
Chairperson	**Member**	**Member**