IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 48**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 009/2019
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**SHANNON WEEN**
	PLAINTIFF
AND	**BETTY'S EMPIRE LIMITED**
	DEFENDANT

AT AUCKLAND

BEFORE:
Ms GJ Goodwin, Deputy Chairperson
Dr SJ Hickey MNZM, Member
Mr IR Nemani, Member

REPRESENTATION:
Ms S Ween in person
Ms M Keil for defendant

DATE OF HEARING: **5 November 2020**

DATE OF DECISION: **17 December 2020**

DECISION OF TRIBUNAL[1]

INTRODUCTION

[1] Ms Shannon Ween made an on-line purchase of shoes from Betty's Empire Limited (Betty's Empire) on 7 November 2018. She requested the shoes be sent to her work address at DJ4U in Mt Roskill, Auckland.

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1 [This decision is to be cited as *Ween v Betty's Empire Ltd* [2020] NZHRRT 48.]

[2] On the same day, a Betty's Empire employee sent Ms Ween's on-line order receipt to her employer.

[3] Ms Ween complained to Betty's Empire's about its disclosure of her information to her employer.

[4] Betty's Empire concedes a breach of information privacy principle (IPP) 11. It says, however, that Ms Ween has failed to show any form of harm sufficient to indicate that her privacy has been interfered with as a result of the breach.

The on-line shopping incident

[5] By way of further background, on 7 November 2018 at 11.52am Ms Ween placed her on-line order with Betty's Empire. Ms Ween entered her work address as the delivery address.

[6] Ms Ween's order was received at a busy time. To help staff responsible for despatching on-line orders, Betty's Empire had seconded staff from other areas of the business. An employee was asked to help with the order despatch, although this was not part of his usual duties. He had, however, been provided with training when he was seconded to that role.

[7] When Ms Ween's order came through with the business details for delivery, the seconded employee realised he knew someone working at DJ4U. Because of this he thought that the delivery address given did not match the one he was personally familiar with. He sent a copy of Ms Ween's invoice, by messenger, to his contact at DJ4U and asked whether the delivery address was correct.

[8] On receipt of the message from the Betty's Empire employee, Ms Ween's employer sent her a message, attaching a picture of the receipt from her on-line purchase. Her employer asked Ms Ween not to shop during work hours. Ms Ween advised her employer that she was on a break.

[9] When Ms Ween found out her employer knew about her on-line shopping she contacted the on-line customer service team at Betty's Empire to complain about the sharing of her order with her employer. Ms Ween cancelled the order and Betty's Empire ordered a courier to uplift the goods from her. Ms Ween was provided with an apology and a full refund.

Subsequent actions of Betty's Empire

[10] Mr Rigden, a director of Betty's Empire, gave evidence that:

> **[10.1]** On 9 November 2018 he called Ms Ween to discuss the issue. He apologised again for the mistake and assured her that steps would be taken to stop it from happening again. He offered Ms Ween a $200 gift voucher as compensation, should she wish to purchase from Betty's Empire again.
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> **[10.2]** In the days following the complaint, Betty's Empire revisited its privacy and information policies incorporated into all employees' contracts.

> **[10.3]** He discussed the incident with the employee who made the disclosure. Mr Rigden said that he explained the severity and consequences of that action and the employee was provided with a written warning.

[11] There is a divergence of view between Mr Rigden and Ms Ween as to how the call of 9 November 2018 between them progressed. Mr Rigden said the conversation ended on a positive note. Ms Ween did not mention the call in her evidence, but as a result of a question from the Tribunal, she acknowledged the call had taken place but said that she definitely did not accept the $200 gift voucher.

MATTERS TO BE DETERMINED BY THE TRIBUNAL

[12] The Tribunal must first determine whether Ms Ween's privacy has been interfered with.

[13] The test for an interference with privacy under the Privacy Act 1993 is two-limbed. In this case it requires both a finding that there has been a breach of IPP 11 and also a finding that Ms Ween has, as a consequence of that breach, suffered one of the forms of harm in s 66(1)(b) of the Privacy Act.

[14] In this case there is an admitted breach of IPP 11. Accordingly, the first limb of the test is satisfied. However, the onus is on Ms Ween to prove the second limb, namely that she has suffered harm of the type described in s 66(1)(b). There must be a causal link between any harm and the breach of IPP 11.

[15] Only if an interference with Ms Ween's privacy is established, will the Tribunal have jurisdiction to consider whether any remedy should be granted.

[16] The relevant provision of the Privacy Act is s 66(1):

> **66 Interference with privacy**
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> (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
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> (a) in relation to that individual,—
> (i) the action breaches an information privacy principle; or
> (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
> (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
> (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
> (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; **and**
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> (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
> (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
> (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
> (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual. [Emphasis added]

STANDARD OF CAUSATION

[17] The causation standard was discussed in *Taylor v Orcon Limited* [2015] NZHRRT 15, (2015) 10 HRNZ 458 at [60] and [61]:

> **[60]** As pointed out by Gaudron J in *Chappel v Hart* (1998) 195 CLR 232, 238 (HCA), questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. In the present context that framework includes the purpose of the Privacy Act which is to "promote and protect individual privacy" and second, the fact that s 66(1) does not require proof that harm has actually occurred, merely that it may occur. Given the difficulties involved in making a forecast about the course of future events and the factors (and interplay of factors) which might bring about or affect that course, the causation standard cannot be set at a level unattainable otherwise than in the most exceptional of cases. Even where harm has occurred it is seldom the outcome of a single cause. Often two or more factors cause the harm and sometimes the amount of their respective contributions cannot be quantified. It would be contrary to the purpose of the Privacy Act were such circumstance to fall outside the s 66(1) definition of interference with privacy. The more so given multiple causes present no difficulty in tort law. See Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [20.2.02]:
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>> Provided we can say that the totality of two or more sources caused an injury, it does not matter that the amount of their respective contributions cannot be quantified. The plaintiff need prove only that a particular source is more than minimal and is a cause in fact.
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> **[61]** Given these factors a plaintiff claiming an interference with privacy must show the defendant's act or omission was a contributing cause in the sense that it constituted a material cause. The concept of materiality denotes that the act or omission must have had (or may have) a real influence on the occurrence (or possible occurrence) of the particular form of harm. The act or omission must make (or may make) more than a de minimis or trivial contribution to the occurrence (or possible occurrence) of the loss. It is not necessary for the cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. No form of words will ultimately provide an automatic answer to what is essentially a broad judgment.

WHETHER MS WEEN'S PRIVACY HAS BEEN INTERFERED WITH

[18] To make the case that her privacy has been interfered with, Ms Ween must satisfy the Tribunal that the breach of IPP 11 by Betty's Empire:

[18.1] Has caused or may cause her loss, detriment, damage or injury; or

[18.2] Has adversely affected or may adversely affect her rights, benefits, privileges, obligations, or interests; or

[18.3] Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to her feelings.

[19] Turning then to the alleged harm Ms Ween says she suffered as a result of the privacy breach, her evidence was that:

[19.1] She wanted to resign;

[19.2] She finds it difficult in her workplace;

[19.3] She is paranoid to shop on-line and retail therapy is no longer a "thing";

[19.4] She experiences "white vision" and tightening of the chest, so that she is unable to breathe;

[19.5] Her doctor has arranged counselling for her; and

[19.6] She is required to take daily medication for anxiety and panic attacks.

[20] The Tribunal does not accept this evidence for the following reasons:

[20.1] The contemporaneous text messages between Ms Ween and her employer on the date the on-line shopping occurred do not display any hurt or humiliation on Ms Ween's part, but rather a degree of amusement. Her employer sends a photo of Ms Ween's on-line shopping order stating, "I see your (sic) being productive at work". This is accompanied by three emojis, two of them showing laughing faces.

[20.2] Rather than embarrassment, Ms Ween's response is to acknowledge that while she has been "snapped", she refers to her employer as buying on-line currency in work hours and also to the fact that she (Ms Ween) is allowed to conduct such transactions in her break. She likewise adds emojis showing laughing faces to her reply.

[20.3] The only admonishment from Ms Ween's employer appears to be a statement that she should not waste further time at work as everyone was "under the pump". Her employer asks Ms Ween not to "fluff around" with personal shopping and housewives' TV shows. Ms Ween's evidence was that the reference to housewives' TV shows was to a previous workplace incident. There do not appear to be any other disciplinary consequences.

[20.4] Ms Ween's evidence is that she stayed with her employer until June 2020, over 17 months after the incident.

[20.5] No documentary evidence (for example bank statements) was put to the Tribunal to support the statement that Ms Ween can no longer shop on-line.

[20.6] Ms Ween refers to having visited her doctor, attending counselling and taking medication for anxiety and panic attacks. No medical evidence was put before the Tribunal. There was nothing linking any doctor's visit to the IPP 11 breach. In response to questions Ms Ween was unable to recall when she visited the doctor. Rather, she said that she tried to manage the matter herself for some time.

[20.7] The evidence relating to attending a doctor was not filed until 3 July 2020. It is difficult to understand why Ms Ween failed to mention this in evidence filed prior to this date.

[21] Given the above the Tribunal is not satisfied, on the balance of probabilities, that the breach by Betty's Empire of IPP 11 has caused Ms Ween harm of the type described in s 66(1)(b) of the Privacy Act. It follows that there has been no interference with Ms Ween's privacy and, accordingly, Ms Ween's case is dismissed. No issue of remedy arises.

PROHIBITION ON PUBLICATION

[22] In its closing submission Betty's Empire seeks a prohibition on publication of its name and the names of its employees (or former employees) in any report or account of this case. It relies on s 107(3) of the Human Rights Act 1993.

[23] Pursuant to ss 107(1) and (3) the Tribunal is under a mandatory duty to hold every hearing in public unless the Tribunal is satisfied it is "desirable" to make an order prohibiting publication of any report or account of the evidence.

[24] In *Waxman v Pal (Application for Non-Publication Orders)* [2017] HZHRRT 4 *(Waxman)* the Tribunal held, on an application for a permanent suppression order, that the applicant must show specific adverse consequences which are sufficient, in the interests of justice, to justify an exception to the fundamental rule of an open justice system. The standard is necessarily a high one. The decision in *Waxman* was summarised in *Director of Proceedings v Smith (Application for Final Non-Publication Orders* [2019] NZHRRT 32 at [71] to [99].

[25] Given that analysis, a final suppression order can be made only where the interests of justice require that the general rule of open justice be departed from and the order is a reasonable limit in terms of the New Zealand Bill of Rights Act 1990. Given this stringent approach, the standard is a high one. The parties seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice.

[26] In this case Betty's Empire has not persuaded the Tribunal that it is appropriate to make any order prohibiting publication of its name or the names of its employees (or former employees).

[27] In this context, it is also to be noted that the Tribunal finds that following the IPP 11 breach, the actions of Betty's Empire were exemplary in dealing with that breach, including taking the steps referred to in [9] to [10].

COSTS

[28] Betty's Empire seeks costs of $6,000 against Ms Ween. In support of this application Betty's Empire cites the remedies Ms Ween seeks. Ms Ween seeks a public warning against Betty's Empire, and "maximum reparation" under New Zealand law. Accordingly, Betty's Empire says that Ms Ween's case has been brought to discredit Betty's Empire rather than to compensate Ms Ween for any significant harm. It says that costs are appropriate because Ms Ween's proceedings have been brought for an improper purpose.

[29] The Tribunal's power to award costs in respect of proceedings under the Privacy Act is conferred by s 85(2) as follows:

> **85 Powers of Human Rights Review Tribunal**
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> (1) …
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> (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.

[30] The discretion to award costs conferred by s 85(2) is broad. The principles to be applied were reviewed by the High Court in *Commissioner of Police v Andrews* [2015] NZHC 745 [2015] 3 NZLR 515 (*Andrews*). A summary of the principles applied in *Andrews* is set out in *Fisher v Foster (Costs)* [2020] NZHRRT 29 at [8] and is adopted in this decision.

[31] Of particular note is that there should be caution about applying the conventional civil costs regime in the Tribunal's jurisdiction and that, ordinarily, the Tribunal should not allow the prospect of an adverse award of costs to discourage a party from bringing proceedings. Essentially, it is important that the Tribunal does not use its discretion to award costs in a manner which might deter lay litigants from the inexpensive and accessible form of justice which is the hallmark and strength of a tribunal; see *Andrews* [61], [62] and [63].

[32] As was noted in *Lohr v Accident Compensation Corporation (Costs)* [2016] NZHRRT 36 (*Lohr*) at [6.7], apart from the Tribunal there is no other forum or mechanism for a plaintiff to test an agency's compliance with the Privacy Act. In this case, the Tribunal was the only forum for Ms Ween to seek a remedy for the admitted breach of IPP 11.

[33] That is not to say that the Tribunal will never award costs against an unsuccessful litigant. Recently, costs were awarded in each of *Apostolakis v Attorney-General No. 3 (Costs)* [2019] NZHRRT 11 (*Apostolakis*) and *Kapiarumala v New Zealand Catholic Bishops Conference (Costs)* [2018] NZHRRT 24 (*Kapiarumala*). However, in each of those cases the circumstances were out of the ordinary. In *Apostolakis*, Mrs Apostolakis' claim was found by the Tribunal to be without merit or justification. In particular, her statement of claim was found to have been incoherent. In *Kapiarumala* the Tribunal determined Mr Kapiarumala had full knowledge his claim lacked merit and had no reasonable prospect of success.

[34] The same cannot be said of Ms Ween's case. Here there was an admitted breach of IPP 11 by Betty's Empire. Ms Ween did not seek to delay or create difficulties for the Tribunal or the defendant. Although the remedies Ms Ween sought were not appropriate, Ms Ween did make arguable submissions, albeit they were not accepted by the Tribunal. The rejection of Ms Ween's arguments by the Tribunal does not mean that costs should be awarded against her. The purpose of a costs order is not to punish an unsuccessful party; see *Lohr* at [6.8.1].

[35] Given [30] to [34] above, our conclusion is that Ms Ween's failure to properly articulate appropriate remedies does not justify an adverse award of costs.

[36] The application for costs is dismissed.

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Ms GJ Goodwin **Deputy Chairperson**	**Dr SJ Hickey MNZM** **Member**	**Mr IR Nemani** **Member**