(1) ORDER PROHIBITING PUBLICATION OF ALL INFORMATION RELATING TO PLAINTIFF'S MEDICAL CIRCUMSTANCES

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 7**

I TE TARAIPIUNARA MANA TANGATA

Reference No. HRRT 047/2016

UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**KIM DOTCOM**
	Plaintiff
AND	**CROWN LAW OFFICE**
	First Defendant

CONT.

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms GJ Goodwin, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr SL Cogan for plaintiff
Ms V Casey QC and Ms A Lawson for defendants

DATE OF HEARING: **17 December 2021**

DATE OF DECISION: **15 February 2022**

DECISION OF TRIBUNAL ON ISSUE OF DAMAGES REMITTED BY COURT OF APPEAL[1]

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[1] [This decision is to be cited as: *Dotcom v Crown Law Office (Damages)* [2022] NZHRRT 7. Note publication restrictions.]

AND	**ATTORNEY-GENERAL** **Second Defendant**
AND	**DEPARTMENT OF THE PRIME MINISTER AND CABINET** **Third Defendant**
AND	**IMMIGRATION NEW ZEALAND** **Fourth Defendant**
AND	**MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT** **Fifth Defendant**
AND	**MINISTRY OF FOREIGN AFFAIRS AND TRADE** **Sixth Defendant**
AND	**MINISTRY OF JUSTICE** **Seventh Defendant**
AND	**NEW ZEALAND POLICE** **Eighth Defendant**

[1] This proceeding has been remitted to the Tribunal by the Court of Appeal for reconsideration of the issue of damages in respect of the interference with Mr Dotcom's privacy by the wrongful transfer of his information privacy requests. See *Dotcom v Attorney-General* [2020] NZCA 551, (2020) 12 HRNZ 314 at [113].

THE CONTEXT

[2] The circumstances of this case have been set out at length in the Tribunal's original decision delivered on 26 March 2018 (*Dotcom v Crown Law Office* [2018] NZHRRT 7, (2018) 11 HRNZ 420) (the original decision).

[3] For present purposes it is sufficient to record that in July 2015 Mr Dotcom sent an information privacy request to all 28 Ministers of the Crown and nearly every government department (the agencies). Nearly all the requests were transferred by those agencies to the Attorney-General.

[4] On 5 August 2015 the Solicitor-General provided a response on behalf of the Attorney-General in which the requests were declined on the stated ground that, in terms of the (then) Privacy Act 1993 (PA 1993), s 29(1)(j) the requests were vexatious and included information which was trivial. The Solicitor-General also advised that insufficient reasons for urgency had been provided.

[5] The primary issues before the Tribunal were first, whether the transfers were permitted by PA 1993, s 39(b)(ii) and second, whether in terms of PA 1993, s 66(2)(b) there was no proper basis for the decline decision.

[6] As summarised by the Court of Appeal at [5], the Tribunal concluded:

> **[6.1]** The Attorney-General was not the lawful transferee of the requests because the information to which the requests related was not more closely connected with the functions or activities of the Attorney-General than were those of the transferring agencies.
>
> **[6.2]** The decline of the urgency request did not justify declining the information privacy requests themselves on the grounds of vexatiousness.

[7] The appeal by the defendants to the High Court was allowed in *Attorney-General v Dotcom* [2018] NZHC 2564, [2019] 2 NZLR 277, that Court concluding at [239] that there was a proper and lawful purpose for the transfer of the requests and that, because of the insistence that all 52 requests were required to be responded to urgently on the ground that the information sought was relevant to the eligibility proceedings, they were vexatious.

[8] Pursuant to leave two questions of law were thereafter submitted to the Court of Appeal for determination:

> **[8.1]** *Question 1:* Can a request for personal information under the Privacy Act be transferred by the recipient to another agency where the request seeks urgency and the basis for the urgency request is not a matter that the recipient is able to sensibly assess but the agency to which the request is transferred is the only agency able to properly evaluate the claimed basis for the urgency?

[8.2] *Question 2:* Is a request for urgency under s 37 of the Privacy Act a relevant factor for an agency in determining whether to refuse a request for personal information under s 29(1)(j) of that Act?

[9] In relation to Question 1 the Court of Appeal at [107] held that the transfers of Mr Dotcom's information privacy requests to the Attorney-General were invalid and, on the face of it, an interference with Mr Dotcom's privacy.

[10] In relation to Question 2, the Court of Appeal at [108] held that a refusal to respond to Mr Dotcom's requests on the grounds that they were vexatious would not be supportable on the basis of the reasons given by the Solicitor-General in his letters of 5 and 31 August 2015. The defendants, however, contended the decision to decline could be justified for reasons different from those which were proffered at the time. This issue could not be addressed by the Court of Appeal given the confined nature of the appeal.

[11] Consequently, while Question 1 was resolved in favour of Mr Dotcom, Question 2 could not be finally resolved and the appeal in relation to that part of the case was dismissed.

[12] Mr Dotcom submitted to the Court of Appeal that the Tribunal's decision on the issue of interference with his privacy should be reinstated and the question of damages remitted to the High Court for determination. The Court of Appeal, however, at [109] and [110] resolved to remit the issue of damages to the Tribunal for reconsideration in the light of the Court's judgment:

> [109] Mr Mansfield submitted that the appropriate course was for the Tribunal's decision on the issue of interference with Mr Dotcom's privacy to be reinstated and the question of damages to be remitted to the High Court for determination. However the Tribunal's decision on the transfer issue was based on the different argument then advanced on behalf of the Crown that the transfer was for the obtaining of legal advice as well as the co-ordination of the Crown's response.
>
> [110] We consider that the appropriate order is to allow the appeal from the High Court judgment to the extent reflected in our answers to the two approved questions. The issue of damages should be remitted to the Tribunal for reconsideration in the light of this judgment.

[13] The result of the appeal was described by the Court of Appeal in the following terms:

> **Result**
>
> [111] We answer the questions in this way:
>
> > "*Question 1:* Can a request for personal information under the Privacy Act be transferred by the recipient to another agency where the request seeks urgency and the basis for the urgency request is not a matter that the recipient is able to sensibly assess but the agency to which the request is transferred is the only agency able to properly evaluate the claimed basis for urgency?
> >
> > No. A transfer of an information privacy request under s 39(b)(ii) is permissible only if the person dealing with the request believes the information to which the request relates to be more closely connected with the functions or activities of the transferee agency. The fact that a requestor seeks urgent treatment of an information request, whether or not in the same document as the request, does not comprise part of the information to which the information request relates.
> >
> > *Question 2:* Is a request for urgency under s 37 of the Privacy Act a relevant factor for an agency in determining whether to refuse a request for personal information under s 29(1)(j) of that Act?

> Yes, it may be a relevant factor. Although the mere fact of a request for urgency would not of itself generally be a proper basis for a finding of vexatiousness, we cannot exclude the possibility of there being circumstances where an inference of vexatiousness could be drawn from a request for urgency. Examples of such circumstances might include a grossly excessive number of requests for urgency or reasons given for urgency that are not credible. All will depend on the context in which the request for urgency is made."

[112] The appeal is allowed to the extent reflected in the answers to the approved questions.

[113] The proceeding is remitted to the Human Rights Review Tribunal for reconsideration of the issue of damages in respect of the interference with the appellant's privacy by the wrongful transfer of the appellant's information privacy requests.

[14] Against this background it can be seen that the issue of damages to be determined by the Tribunal is not "at large" and as if it were being addressed for the first time as part of the original hearing in April and May 2017.

[15] Because the parties could not, at the original hearing in 2017 have anticipated the terms of the judgment given by the Court of Appeal in November 2020, the Tribunal afforded the parties an opportunity to call further evidence. See the Chairperson's *Minute* dated 9 February 2021 at [6] to [13]. The Tribunal was subsequently advised none of the parties would file new briefs of evidence. See the subsequent *Minute* dated 22 March 2021 at [1].

THE CONSTRAINTS ON THE TRIBUNAL

[16] The primary constraints on the Tribunal are:

[16.1] The Court of Appeal remitted back to the Tribunal consideration of damages **relating to the transfers** (not the refusal).

[16.2] The fact that the transfers did not meet the requirements of the Privacy Act did not make them void, as if they had not occurred. See *Martin v Ryan* [1990] 2 NZLR 209 at 236 and *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475. In the latter case the Supreme Court at [535] stated:

> Many cases have established that a decision of an administrative decision-maker or a court that is subject to judicial review is treated as valid unless and until it is set aside by a court of competent jurisdiction. There is no reason to depart from that approach here. [Footnote citations omitted]

In the present case the Court of Appeal did not purport to set aside the transfer decisions, rather it determined they were wrongful (as not meeting the requirements of the Act) and remitted the question of damages back to the Tribunal.

[16.3] As no party has, subsequent to the original hearing in 2017, produced further evidence relevant to the question of damages, the Tribunal's reconsideration of the issue of damages is confined to the evidence heard at that original hearing.

[16.4] The Tribunal is bound by the finding of the High Court that there was a proper basis to decline the requests, namely that the requests were vexatious. This remains the case even though the Court of Appeal at [108] noted that a refusal to respond to Mr Dotcom's requests on the grounds that they were vexatious would not be supportable on the basis of the reasons given by the Solicitor-General in his letters of 5 and 31 August 2015.

SUMMARY OF SUBMISSIONS FOR MR DOTCOM

[17] The essential point made by Mr Dotcom is that the decision to transfer the July 2015 requests to the Attorney-General (who, as the Central Authority in the extradition proceedings was the opposing party to Mr Dotcom in the eligibility proceeding) and the decision to decline those requests denied Mr Dotcom a fair hearing in the eligibility proceeding.

[18] The only opportunity to put any information obtained pursuant to the requests before the extradition proceeding was in the District Court or in the judicial review. However, to the extent any information was released under the requests, it was not released until the statutory appeal and judicial review appeal had already been heard by the Court of Appeal.

[19] Mr Dotcom submits the loss of a fair eligibility hearing is the lost benefit for which damages should be awarded by the Tribunal. The loss was suffered, at the latest, by the time the eligibility hearing in the District Court concluded without receipt of the requested information. Mr Dotcom further submits he is not required to show that the information, if disclosed, would have had a material impact on the eligibility proceeding. In the alternative it is submitted the information was potentially relevant simply because it was held by the New Zealand authorities and because the withholding grounds referred to the security and defence of New Zealand and to the prejudice to the entrusting of information to the government of New Zealand.

[20] On the question of loss of dignity or injury to feelings, Mr Dotcom relies on the Tribunal's original finding at [254] that relevant to the assessment of damages under this head is the unfounded stigmatisation of the requests as vexatious and the unfounded assertion the requests were not genuine because they were intended to disrupt the extradition hearing. As to the criticism that Mr Dotcom did not give direct evidence regarding his loss of dignity or injury to feelings, reliance is placed on the Tribunal's original ruling that such elements can be inferred from the circumstances.

SUMMARY OF SUBMISSIONS FOR DEFENDANTS

[21] The primary factual submission made by the defendants is that there is no evidence that the transfer of the requests caused any harm to Mr Dotcom. In particular there is no evidence this resulted in him losing a benefit in the extradition proceedings or that it caused him any loss of dignity or injury to feelings.

[22] Other points made by the defendants include:

> **[22.1]** The interference with privacy caused by the wrongful transfer of the privacy requests as found by the Court of Appeal is unconnected with the fact the requests were declined as vexatious.
>
> **[22.2]** As to Mr Dotcom's claim of breach of natural justice and a loss of fair trial rights, the Tribunal has no jurisdiction to rule whether or not Mr Dotcom has had a fair hearing in his eligibility proceeding. That is a matter for the extradition courts and it would be an abuse of process for the issue to be considered in parallel by the Tribunal.
>
> **[22.3]** The interference with privacy that is before the Tribunal relates to the transfer of the requests, not their decline.

[22.4] It is no longer necessary to speculate on whether the claimed lost benefit was one that might reasonably have been expected to accrue. Given the passage of time and the events following the Tribunal's original decision (the agencies had proceeded to comply with the declined requests, as directed by the Tribunal and further requests were made and other requests could have been made) Mr Dotcom can be expected to point to the documents that he says he should have been able to access earlier and demonstrate how those specific documents may potentially have made a difference to his extradition hearing. Mr Dotcom has brought forward no such evidence even though the Tribunal gave him the opportunity to do so. Mr Dotcom has therefore not discharged his evidential burden.

DISCUSSION

[23] The constraints on the scope of the appeal to the Court of Appeal and the limited terms of the remittal preclude the Tribunal from relying on its earlier findings regarding the assessment of damages.

[24] The decision of the Court of Appeal requires the Tribunal to reconsider the issue of damages in respect of the interference with Mr Dotcom's privacy by the wrongful transfer of his information privacy requests. The Tribunal is not able to assess damages for the decline of the requests or the characterisation of them as vexatious even though the Court of Appeal held at [108] that a refusal to respond to Mr Dotcom's requests on the grounds that they were vexatious would not be supportable on the basis of the reasons given by the Solicitor-General in his letters of 5 and 31 August 2015.

Loss of benefit

[25] Any loss of benefit must be causally linked to the wrongful transfer.

[26] Mr Dotcom submits the loss of benefit is the loss of opportunity to use the information in the eligibility hearing and subsequent appeal.

[27] The fundamental stumbling block is that as the defendants submit, this is no longer a case in which it is necessary to speculate whether the claimed loss of benefit might reasonably have been expected to accrue. In the intervening three plus years information has been provided by the agencies but even though given the opportunity to do so, Mr Dotcom has failed to identify any specific document which might potentially have made a difference to his extradition hearing.

[28] Section 88(1)(b) of the Privacy Act 1993 (now PA 2020, s 103(1)(c)) may set a low threshold of proof, but a plaintiff must nevertheless cross that threshold by establishing that the claimed loss of benefit was one the aggrieved individual "might reasonably have been expected to obtain but for the interference".

[29] Mr Dotcom submits potential relevance is not required to be established beyond the fact that the information was personal information about him and was held by the domestic agencies involved in the extradition process. Relevance to the extradition hearing can also be inferred from the primary grounds on which significant amounts of information continue to be withheld, namely that the disclosure of the information would be likely to prejudice the security of New Zealand or to prejudice the entrusting of information to the government of New Zealand.

[30] In our view this submission is framed in terms so wide that no such inference can be reasonably drawn.

[31] In any event the submission, if accepted, carries the danger of the Tribunal being drawn into the abuse of process argument already determined against Mr Dotcom by the senior courts.

[32] The loss of benefit claim accordingly fails by reason of an absence of evidence.

Loss of dignity and injury to feelings

[33] In its original assessment of damages for loss of dignity or injury to feelings the Tribunal at [254] expressly took into account the characterisation of the requests as vexatious and that they were intended to disrupt the extradition hearing:

> [254] In determining the appropriate award of damages we do not intend reciting again the particular circumstances of Mr Dotcom's case. Briefly, they include the unfounded stigmatisation of his requests as vexatious and the equally unfounded assertion that the requests were not genuine because they were intended to disrupt the extradition hearing. Mr Dotcom's very genuine pursuit of the truth and his fully justified desire for a fair hearing had taken him first to the Supreme Court and then to the High Court. In both fora he had been told, in effect, to use the Privacy Act by addressing information privacy requests to the relevant state agencies. When he did so, the requests were without justification characterised as not genuine, vexatious and intended to disrupt the extradition hearing. The resulting loss of dignity and injury to feelings was substantial and for these reasons the upper end of the middle band in *Hammond* applies.

[34] By contrast the scope of the Tribunal's present inquiry into damages has been considerably narrowed by the terms of the Court of Appeal decision. The issues previously determined "at large" by the Tribunal in its original decision are now confined to whether Mr Dotcom has established by his evidence given in early 2017 that the wrongful transfer of his information privacy requests caused loss of dignity or injury to his feelings.

[35] At the original hearing Mr Dotcom's evidence did not address this issue directly. Indeed his evidence did not explicitly address any loss of dignity or injury to feelings. However, the Tribunal found at [245] and [246] that loss of dignity and injury to feelings could be inferred. Such inference was justified by (inter alia) reference to the unjustified allegation that his requests were vexatious, not genuine and intended to disrupt the extradition hearing. See the text of [254] set out above as well as the earlier passage at [249]:

> [249] Then the Crown submitted it would not be legitimate to award damages against an agency "to compensate a person for injury to feelings arising from their own unproven conspiracy theories (even if genuinely held)". As we hope will be clear, we find that Mr Dotcom has established loss of dignity and injury to feelings and that such loss and injury are causally connected to the interference with his privacy. They are also causally connected to the grounds on which his request for personal information was refused. The unjustified allegation that his requests were vexatious, not genuine and intended to disrupt the extradition hearing contained a real sting. Unsurprisingly, loss of dignity and injury to feelings followed. In addition a litigant's desire to pursue the truth and to secure a fair hearing is not, without good reason, to be cynically dismissed. The compensation to be awarded to Mr Dotcom has nothing to do with the alleged "unproven conspiracy theories".

[36] However, the unfounded allegations of vexatiousness and attempting to obstruct the extradition hearing are no longer available to be taken into account by the Tribunal because of the limited nature of the Court of Appeal decision at [106] and [108] and the terms in which the damages assessment has been remitted to the Tribunal for reconsideration.

[37] Consequently all that is left are:

> **[37.1]** The finding by the Court of Appeal at [107] that the transfers to the Attorney-General were invalid and an interference with Mr Dotcom's privacy. This also was the conclusion reached by the Tribunal in its original decision at [91.2] and [104.2].
>
> **[37.2]** The further finding by the Court of Appeal at [108] that a refusal to respond to Mr Dotcom's requests on the grounds that they were vexatious would not be supportable on the basis of the reasons given by the Solicitor-General in his letters of 5 and 31 August 2015.

[38] The highest Mr Dotcom can put his case is that, as concluded by the Tribunal in its original decision at [105], the Attorney-General had no authority, as transferee, to refuse to disclose the requested information.

[39] However, as the refusal to disclose has not been set aside, it remains a decision valid in law and of full effect. As such it cannot support an award of damages.

[40] Complexity of this kind was simply not anticipated when Mr Dotcom gave his evidence at the original hearing in April 2017. Understandably, his evidence did not address the point. But following the remittal to the Tribunal he was given the opportunity to file further evidence in light of the Court of Appeal decision but did not take the opportunity to do so. In these circumstances we find he has not discharged his burden of proof to establish that the wrongful transfer of his information privacy requests caused loss of dignity or injury to his feelings. Consequently no damages can be awarded in relation to those two forms of harm.

Conclusion

[41] No award of damages is made in favour of Mr Dotcom for loss of benefit or loss of dignity or injury to feelings.

THE HIGH COURT DECISION

[42] Because Mr Dotcom's claim fails for lack of evidence, there is no need to address in detail the obiter and non-binding passages in the High Court decision which refer to the damages award made in the Tribunal's original decision. We do, however, respond to three points.

[43] First, the statement by the High Court that there was no evidence Mr Dotcom had suffered loss of dignity or injury to feelings because (as the High Court reasoned at [239]) it would be difficult to infer that "a person of ordinary fortitude" would have suffered significant loss of dignity or injury to feelings "let alone a person of the obvious fortitude of Mr Dotcom".

[44] However, jurisdiction to award damages under PA 1993, s 88(1) and PA 2020, s 103(1)(c) is premised on the humiliation, loss of dignity or injury to feelings experienced by the aggrieved individual, not on the experiences of "a person of ordinary fortitude", however such characteristic might be defined.

[45] Second, the High Court at [232] also suggested (obiter) that an inference as to humiliation, loss of dignity or injury to feelings can be drawn in only "limited cases". However, the decision in *Marks v Director of Health and Disability Proceedings* [2009]

NZCA 151, [2009] 3 NZLR 108 at [64] to [67] was a case under the Health and Disability Commissioner Act 1994 which confers on the Tribunal jurisdiction to award damages for humiliation, loss of dignity and injury to feelings in almost identical terms to the jurisdiction conferred under the Privacy Act. The Court of Appeal was prepared to infer the relevant humiliation, injury to feelings and loss of dignity from the circumstances of the breach even though the person whose rights had been breached had died. There is no suggestion in this judgment that inferences regarding humiliation, loss of dignity or injury to feelings can be drawn in only limited cases.

[46] This is consistent with the fact that in analogous tort jurisdictions inferences are routinely drawn regarding non-pecuniary damage including pain and suffering in personal injury claims, deprivation of liberty in false imprisonment claims and injury to feelings in discrimination claims. See James Edelman (ed) *McGregor on Damages* (20th ed, Sweet & Maxwell, London, 2018) at [52-008]. The following concurring exposition has been taken from the text by Dr Jason Varuhas *Damages and Human Rights* (Hart, Oxford, 2016) at 70:

> Consequential non-pecuniary losses, such as distress, humiliation, anxiety or frustration, are not inherent in the rights-violation [of a tort actionable per se], and may or may not be suffered in consequence of a wrong. Damages here respond to the actual effects of the tort on the specific claimant: such loss is not assessed objectively, but by examining the 'degree of distress suffered by the claimant'. The court may have before it direct evidence of the claimant's distress, such as a medical report or witness statements. More typical, however, is that the court does not have such a 'solid evidential foundation' upon which to base assessment, as it would for financial loss. The courts will therefore engage seriously with the factual matrix in order to identify any features from which it could reasonably be *inferred* that greater or lesser distress was suffered. [Emphasis in original. Footnote citations omitted.]

[47] Third, the High Court at [228] suggested that "higher awards" should generally be supported by evidence from third parties who have had the opportunity to observe the impact on the claimant. Such approach, however, would be an unjustifiable limit on the Tribunal's broad discretion to receive evidence which might assist it to deal effectively with the matter before it (Human Rights Act 1993, s 106) and to draw reasonable inferences from that evidence. In the passage quoted in the preceding paragraph Dr Varuhas explicitly acknowledges that the "more typical" scenario is that a court will not have third party evidence. For that reason it is more a question of determining what inferences can be reasonably drawn from the factual matrix.

CONCLUSION

[48] The decision of the Tribunal on the issue of damages remitted by the Court of Appeal is that no damages are awarded to Mr Dotcom.

[49] Costs are reserved.

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Mr RPG Haines ONZM QC	**Ms GJ Goodwin**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**