(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF PARTIES

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 41**

	Reference No. HRRT 024/2010
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**HIJ**
	PLAINTIFF
AND	**RST**
	FIRST DEFENDANT
AND	**UVW**
	SECOND DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Mr RK Musuku, Member

REPRESENTATION:
Ms A Ting for Plaintiff
Mr G Pollak for Defendants
Mr D Warner for Privacy Commissioner

DATE OF HEARING: 7 and 8 February 2012

DATE OF DECISION: 29 November 2013

DECISION OF TRIBUNAL

Introduction

[1] The plaintiff alleges that the first and second defendants interfered with her privacy. She says that the second defendant did this by disclosing to the first defendant (a former partner) health information about the plaintiff which the second defendant (a registered nurse) had obtained from her employer, a District Health Board (DHB), in breach of the Health Information Privacy Code 1994 (the HIP Code), Rule 11. The first defendant, in turn disclosed that information to the Family Court in the course of proceedings brought by him against the plaintiff and in which the first defendant sought (inter alia), custody orders in relation to the plaintiff's two children.

[2] The central issues in the case are first, whether the first defendant's actions fall outside the information privacy principles by virtue of s 56 of the Privacy Act 1993 (personal information relating to domestic affairs) and second, whether the actions of the second defendant were in breach of Rule 11 of the HIP Code.

Non-disclosure orders

[3] By interim order made on 11 March 2011 under s 107 of the Act the Tribunal prohibited publication of the names of all the parties and of any details which might identify them. That order was made on the grounds that identification of the parties could lead to the identification of the children whose care was the subject of the proceedings in the Family Court.

[4] Having now heard all the evidence we are of the view that the interim order should be made final not only because the identity of the children might be revealed but also because this decision makes reference to sensitive health information about the plaintiff. The terms of that final order follow at the conclusion of this decision.

An apology to the parties

[5] Before the evidence is addressed the long delay in publishing this decision must be acknowledged and an apology offered to the parties. This case was not overlooked. Rather delays regrettably occurred because the Chairperson is a part time appointee to a full time position. Despite best endeavours it has not been possible to publish all decisions timeously.

Description of the parties

[6] By *Minute* dated 11 March 2011 the then Chairperson of the Tribunal directed that the plaintiff be referred to by the letters [HIJ], the first defendant by the letters [RST] and the second defendant by the letters [UVW]. Unfortunately similarity in the letters has led to confusion. In the interests of clarity and simplicity, unless the context otherwise requires we will refer to the parties as follows:

[6.1] The plaintiff (HIJ) = the plaintiff.

[6.2] First defendant (RST) = D1.

[6.3] Second defendant (UVW) = D2.

The parties

[7] At the relevant time the plaintiff was an early childhood teacher. She and D1 were in a 15 year de facto relationship but separated in or about July 2007. The custody

proceedings commenced by D1 in early October 2007 related to the plaintiff's two children.

[8] As mentioned, D2 is a registered nurse who at the relevant time was employed by a DHB. She said that the man she married in 1999 was formerly a boyfriend of the plaintiff. She and her husband, along with the plaintiff and D1, shared a house (with separate bedrooms) for a short while and the two couples frequently socialised together. D2's marriage ended in a separation on 14 March 2007.

[9] After the plaintiff and D1 separated in mid 2007, D1 and D2 later entered into a relationship. This was towards the end of 2007 and they began living together in 2008.

The witnesses heard by the Tribunal

[10] The plaintiff gave evidence on her own behalf and called two health professionals who spoke briefly about the effect on the plaintiff's mental health of the disclosure of her medical information. They also made reference to her distrust of health services. Both D1 and D2 gave evidence.

[11] We do not intend reciting the evidence of the two health professionals as both accepted that their knowledge of the facts is based on what the plaintiff has told them. They cannot speak meaningfully to the credibility of that account.

The evidence given by the plaintiff– overview

[12] It is not practical to provide a comprehensive summary of the evidence given by the plaintiff. An overview only follows.

[13] In July 2007, while the plaintiff was packing her belongings following her separation from D1, she was by approached D1 who told her that he had obtained copies of the plaintiff's medical reports and if the plaintiff did not do what he wanted by not applying for child support and custody, everything would be fine but if the plaintiff chose to cause D1 any trouble, he would make life very difficult for the plaintiff by disclosing her medical records to her employer and to the courts. At first the plaintiff did not take D1 seriously because the plaintiff did not think D1 could access her records. The plaintiff said that she was well aware of her rights as she had in the past accessed her own medical records and was familiar with "the whole formal disclosure process".

[14] D1 then handed her an A4 size envelope which the plaintiff opened and found some of her medical records. She was shocked and could not believe that D1 had obtained the documents without her consent or permission. D1 told her that he had scanned the documents on to his computer which meant he could use them again and again.

[15] Some of the records obtained by D1 were described by the plaintiff as ones that only a medical practitioner would see and use. The plaintiff asked D1 how he had obtained her private medical records and he replied that D2 had obtained them from the DHB. The plaintiff believes that D1 asked D2 to access P's records. The plaintiff said that her whole world crumbled and she felt completely shattered and powerless.

[16] D1, in turn, disclosed the plaintiff's private medical records, without her consent, to the Family Court, the lawyer for the child, the lawyers acting for D1, CYFS, D1's friends and family. The plaintiff also alleges that D1 showed the documents to their eldest daughter who was then about nine years of age.

[17] The plaintiff said that she did not at any time provide D1 with permission to access her medical health records nor did she ever ask D2 to access the files.

[18] The plaintiff also said that at that time she was working at an early childhood centre three to five days a week. She resigned in early 2009 due to the stress of being blackmailed by the threat that her medical records would be disclosed by D1 to the plaintiff's employer.

[19] The account given by D1 and D2 is very different.

The evidence given by D1 – overview

[20] The first defendant said that the plaintiff's mental health has been precarious and is worsened by alcohol, substance abuse and times of stress. She has attempted suicide on numerous occasions. During the course of his fifteen year relationship with her there had been numerous involvements with the Police, social workers and intervention teams. On several occasions the plaintiff has been admitted to various health facilities both as an in-patient and as an out-patient. There have been a number of incidents where the plaintiff has threatened to kill the two children and in one incident had spiked their food and drink with prescription drugs. He says that she has also admitted to her medical practitioners that she has on occasion assaulted the children. In the opinion of D1, the plaintiff is a potential danger to children.

[21] Over the years the plaintiff has had numerous disputes and disagreements with her health providers, particularly in relation to her belief that her health records are out of date, unfair and prejudicial. In the experience of D1, the plaintiff had always been distrustful of health services and over the years has had numerous altercations and disagreements with them. The first defendant had been involved in most of those episodes. He mentioned that on one occasion the plaintiff attempted to destroy her medical records on the premises of a DHB and had consequently been banned from accessing her records except under conditions. Those conditions involved more than two other people being present in case a restraint was needed and she was not allowed to take information away. The first defendant had been involved in typing and making complaints on behalf of the plaintiff, ensuring that the plaintiff attended at medical interviews and had assisted her in carrying out treatment plans. In particular he had assisted her to respond to an Updated Risk/Relapse Plan which was produced as Exhibit A. We refer again to this document shortly.

[22] Having spent many years dealing with the plaintiff's mental health issues, D1 said that the plaintiff's behaviour can, in his opinion, be characterised as falling into three categories. First, stalking behaviour when she becomes fixated on individuals. Often those persons have been medical practitioners. Her harassment has included unsolicited and abusive phone calls, writing letters in her own blood and trespassing. The second category of behaviour is her tendency to attempt suicide and self-harm. The first defendant said that he was aware that there are at least 50 such recorded instances. The third category are potential threats to the children.

[23] The first defendant said that the plaintiff has also made numerous allegations against him to welfare agencies and to the Police, including allegations that D1 has behaved sexually improperly towards the two children. Those allegations have been investigated by both CYFS and the Family Court and established to be unfounded.

[24] In June 2007 the plaintiff attempted suicide in the carpark at her place of work and was admitted to hospital. She subsequently became distressed because the doctors

who had treated her had become aware of her mental history. She believed that one or more of them had commented about her being a risk to children. The plaintiff told D1 that she had heard one of the doctors questioning whether or not the plaintiff's employer knew of her mental health history. The plaintiff was fearful that her employer would become aware of her medical records. The plaintiff regarded those records as being out of date and wanted D1 to assist her to get them changed.

[25] The plaintiff and D1 accordingly invited D2 to come over one evening and they sat around a table and discussed the issues with her. In the presence of D1, the plaintiff asked D2 to access her (the plaintiff's) medical information. The first defendant recalls D2 being reluctant to assist but was prevailed upon by the plaintiff. The plaintiff explained to D2 that she, the plaintiff wanted to know what had been said about her and whether her files recorded that notification had been given to CYFS and to her then employer of what had arisen as a result of the suicide attempt a few weeks earlier. The plaintiff was upset at the possibility that there might be a mandatory notification to the employer. This would jeopardise her employment. The plaintiff had explained to D2 the plaintiff's difficulty getting access to medical records given her past history of attempting to destroy information and her need to make a request through a lawyer.

[26] A few days later, on a visit by D1 to D2's home, he noticed that there was an envelope on the table marked for the attention of the plaintiff. With the consent of D2, D1 delivered the envelope to the plaintiff. In the envelope was Exhibit A. We reproduce in redacted form only the first page:

Updated Risk/Relapse Plan

Review Date 05/04/2006

CURRENT RISK

To Self: [The plaintiff] engages in self harming behaviours in response to painful and difficult emotions such as sadness, loneliness, anger, resentment. She has overdosed on prescribed medications, cut herself and in the past limited her food and fluid intake. She has also stepped in front of traffic in a busy road.

To Others: *Harm to children*

[The plaintiff] has a long history of fantasies of harming children. When her own daughter was an infant she held her hand over her face to suffocate her and held her head under water. She has placed sedatives and sleeping tables [sic] in sweets that she has given to her children and her partner's child.

In the past and again recently she has made a suicide pact intending to kill herself and her daughters.

Harm to adults

[The plaintiff] had a long history of stalking professionals especially women. Behaviours include phoning repeatedly, leaving messages on answer phones, threatening to harm family, sending letters written in her blood, refusing to leave premises at the end of an interview, visiting or getting an accomplice to visit her victim's home.

She has also stepped in front of traffic in a busy road.

Cruelty towards animals

[The plaintiff] has long history of hurting animals especially when she is distressed. Recent history includes killing small kitten.

Sexual Risk: [The plaintiff] has fantasies of sexually abusing young children and infants. She denies having engaged any sexual abuse of children.

...

[27] The plaintiff and D1 noticed that in the left hand margin of this typed page the following handwritten endorsement appears. It is presumed the endorsement was made by one of the medical personnel who attended to the plaintiff on her admission to hospital following the 27 June 2007 suicide attempt:

> Can this be addressed → working as early childhood carer!!

[28] The first defendant and the plaintiff had seen the three page risk assessment before. They had been provided with a draft by the DHB on the occasion that the plaintiff had been assessed. At the following visit the draft had been discussed by the author, the plaintiff and D1 and D1 was helping the plaintiff file a complaint letter about the content of the report, the complaint being that it was out of date. A draft letter had been prepared.

[29] However, the handwritten endorsement was new and had not been seen by either the plaintiff or by D1 prior to D2 obtaining Exhibit A and the envelope being opened by the plaintiff and D1.

[30] The first defendant had a copy of Exhibit A with the plaintiff's consent for the purpose of making the intended complaints.

[31] In late September 2007 or early October 2007 D1 asked D2 to provide him with a further copy of Exhibit A as D1 mistakenly believed that the copy stored on his hard drive had been lost and he needed Exhibit A to draft the complaint letter he was working on. He believed at that time that he still had the consent of the plaintiff. In fact D1 had not lost the "original" and it was discovered on his hard drive a short time later. Nevertheless D2 provided a second copy as requested.

[32] In early October 2007 D1 commenced Family Court proceedings for the care of the two children and on 3 October 2007 swore an affidavit to which he attached some of the plaintiff's medical records and on 17 October 2007 swore a further affidavit attaching Exhibit A (or a part of it). The first defendant explained that his motivation for using Exhibit A in the Family Court was to ensure that the two children were placed in a safe environment. The plaintiff was then emotionally unstable and having been her caregiver he was aware that particular caution was required to protect the two children at that time. He had been told by the plaintiff in September 2007 that he would be seeing the children only once every fortnight and she unilaterally took them out of school. Without his consent she also took their medical records from their doctor to her personal doctor. This was the catalyst for the Family Court intervention.

[33] A few days later, on 25 October 2007, the plaintiff made a telephone complaint to the DHB and followed this up with a written letter of the same date. The complaint was that D2 had accessed and then copied the plaintiff's medical records and provided them to D1. This led to the resignation of D2.

[34] According to the agreed chronology provided to the Tribunal, on 5 November 2007 the Family Court ordered that the children spend the week with the plaintiff and the weekend with D1. On 11 June 2008 the Family Court granted shared care. When in November 2008 the plaintiff threatened D1 with a knife, common assault charges were laid and the plaintiff pleaded guilty. On 14 November 2008 D1 was granted interim day to day care. The plaintiff's access was required to be supervised by her parents. It was not until the end of 2010 that the Family Court proceedings were finalised and the shared care was converted into a final parenting order.

[35] The first defendant says that he only sought Family Court intervention to protect the children. He referred to incidents in which the plaintiff had threatened to kill the children and the incident in which their food had been spiked with prescription drugs. He saw the plaintiff as a potential danger to the children. He told the Tribunal that throughout the Family Court proceedings he always had the full support of counsel for the children. The only reason he raised the plaintiff's mental health issues within the sealed confines of the Family Court was to protect the children. There was no other reason. He believed he could not explain to the Family Court his concerns about the plaintiff and the safety of the children without using the medical evidence.

[36] Neither Exhibit A nor any other medical reports relating to the plaintiff and held by D1 have been distributed by the first defendant. He has never had the intention of breaching the plaintiff's medical confidentiality. He has never distributed the records to anyone. No one, other than those individuals involved in the Family Court proceedings, have seen the first defendant's affidavits. He points out that there is no evidence that anyone other than the Family Court personnel, the Police or lawyers involved have any idea about the plaintiff's psychiatric history and behaviours. Her medical records have not been released to anyone. The sole aim of the first defendant has been to protect the children from the plaintiff's behaviour and conduct arising out of her substance abuse and mental illness. He has never said nor has he ever threatened that he would show anyone the plaintiff's medical records.

The evidence given by D2 – overview

[37] When the second defendant's marriage ended in separation in March 2007 the plaintiff would help D2 mind her (D2's) children and in the early part of March 2007 they discussed the problems each was having in their respective relationships. This grew into providing mutual emotional support for each other. The second defendant says that the separation of the plaintiff and D1 was not related to her relationship with D1 because that relationship only developed at a later point.

[38] In early May 2007, when D2 was attending church, the plaintiff arrived unannounced and without provocation punched D2 in the face. The Police were called but because D2 considered the plaintiff a friend, she decided not to lay charges although she understands that the plaintiff was given a formal warning. When she talked to D1 about the incident D1 began explaining to her the plaintiff's mental health issues of which D2 had been unaware up until that point. Until this May 2007 episode D2 and the plaintiff had maintained a strong friendship.

[39] When in June 2007 D2 learnt that the plaintiff had attempted suicide in the carpark at her place of work D2 visited the plaintiff at her home a few days later in the evening. The second defendant was welcomed by the plaintiff as a friend and the plaintiff seemed to have completely put aside whatever had been troubling her at the time she assaulted D2. The first defendant was also present at that time, helping the plaintiff and assisting with the children.

[40] During the course of that visit the plaintiff prevailed on D2 to obtain for her copies of her medical records. The plaintiff said that she was extremely concerned about her employment as she believed that a referral had been made to CYFS and she was scared that CYFS might intervene to terminate her employment. She asked D2 to obtain copies of her (the plaintiff's) medical records, including in particular a copy of any referral to CYFS that had been made.

[41] The second defendant initially suggested that the plaintiff should obtain the documents through the appropriate channels. However, the plaintiff became increasingly agitated and concerned at the thought she might lose her job. She told D2 of her difficulties and suspicions about her medical records and said she did not trust the DHB. She told D2 that what she had received in the past was incomplete and it took a very long time to get her records updated and corrected. She needed D2 to access the information so she could know exactly what her medical advisers had said about her, particularly whether there was any reference to her employer being notified.

[42] In the end D2 agreed to look at the plaintiff's medical records and to obtain copies of the records as requested. The second defendant now appreciates that in doing so she made a serious error of judgment.

[43] On 6 July 2007 while at work at the DHB, D2 viewed the plaintiff's medical records and on finding the documents requested by the plaintiff, printed them out. These documents are part of the record before the Tribunal as Exhibit A and Exhibit 5.

[44] The print outs made on 6 July 2007 were placed by D2 in a sealed envelope with the plaintiff's name on it and marked "Private and Confidential".

[45] When D1 next visited D2's home a day or so later he noticed the envelope sitting on a table and offered to deliver the envelope to the plaintiff. The second defendant agreed and thought nothing more of it. A few days later D1 passed on the plaintiff's message to D2 that she said "thanks".

[46] In her evidence D2 described three incidents in September 2007 which led her to conclude that the plaintiff's mental health was declining markedly at this time.

[47] On 2 October 2007 D1 called D2 at work and asked her to obtain replacement copies of two documents from the plaintiff's medical file, namely a copy of the Relapse Plan (now part of Exhibit A) and the referral to CYFS (Exhibit 5). The first defendant told D2 that the plaintiff was "okay with that". At that time D1 had told D2 that he (D1) was still helping the plaintiff with her complaint to the DHB. It was the understanding of D2 at the time that D1 was trying to placate the plaintiff regarding her grievances against the DHB and that the reason why he was requesting the information was that he had misplaced copies that the plaintiff had provided to him. As the second defendant believed the consent from the plaintiff still operated and that D1 was acting in her interests, D2 printed further copies of the requested documents.

[48] As to the plaintiff's claim that she did not ask D2 to obtain the records, D2 states that she had no reason to access the plaintiff's medical records in July 2007. She would not have known what to look for without the plaintiff's assistance. In addition there were no custody issues involving the children. She was not having an affair with D1 at the time and was not involved in the marital separation between the plaintiff and D1.

[49] On 26 October 2007 D2 was suspended from employment as a result of the plaintiff's complaint. She was subsequently dismissed, causing considerable distress and financial loss.

[50] The second defendant says that she has only given to the plaintiff that which the plaintiff asked for. The second defendant has not exposed her medical records to anyone and has none of her (the plaintiff's) medical records in her (D2's) possession. She has not retained any medical information whatsoever concerning the plaintiff and does not have any reason to have that information.

[51] On 4 and 5 August 2009 the second defendant appeared before the Health Practitioners Disciplinary Tribunal on one charge of professional misconduct. That charge had 39 sub-particulars. It was alleged that during the period from late June 2007 until late October 2007 D2 inappropriately accessed the health files of the plaintiff. Most, if not all of the particulars relating to October 2007 concern access which the second defendant described as obsessive checking of the plaintiff's file to ensure that the plaintiff was still safe. The second defendant told the Disciplinary Tribunal that she felt a great sense of fear for her children and herself and this was her way of trying to deal with that fear.

[52] In a decision given by the Disciplinary Tribunal on 15 September 2009 D2 was found guilty of professional misconduct for viewing the plaintiff's records and for printing the documents on 6 July 2007. Charges alleging the printing of other documents were found not proven. The Tribunal referred only in passing to the second defendant's "defence" that the material in June/July 2007 was accessed with the consent of the plaintiff and that the access to the material in October 2007 was because the second defendant believed that she had the consent of the plaintiff via D1. The Disciplinary Tribunal stated that this evidence was irrelevant and no finding required because the issue before it was whether there had been an objective breach of professional standards. The reasons possessed by the second defendant were a subjective view of her professional obligations and were not relevant. Even if the plaintiff had requested the records it was a breach of D2's professional obligations to have provided them in the way that she did.

[53] In a separate decision given on 17 November 2009, D2 was censured and suspended for three months. She was also required to complete a programme in ethics and confidentiality. Costs of $5,000 were awarded against her.

[54] For present purposes it is to be noted that the actions to which D2 admitted to before the Disciplinary Tribunal comprised what in some literature is referred to as "employee browsing" as well as disclosure of the plaintiff's health information. The importance of this distinction is explained next.

The enquiry by the Privacy Commissioner and the jurisdiction issue

[55] Some time in 2008 a third party acting for the plaintiff lodged a complaint with the Privacy Commissioner to the effect that D2's disclosure of the documents provided by D1 to the Family Court was a breach of the Privacy Act and of the HIP Code.

[56] The Privacy Commissioner investigated the complaint as a complaint of unauthorised disclosure. This is made clear by the two certificates of investigation issued by the Commissioner on 7 July 2009 and 21 July 2010 respectively. The Privacy Commissioner did not investigate the case as one involving "employee browsing" by D2.

[57] It follows that this Tribunal has jurisdiction only to determine whether a complaint of unauthorised disclosure by D2 to D1 and by D1 to others has been established. The Tribunal has no jurisdiction to enquire into the "browsing" which was largely the subject of the proceedings before the Health Practitioners Disciplinary Tribunal. Our reasons follow.

[58] The effect of s 82 of the Privacy Act 1993 is that an aggrieved individual (ie a plaintiff) is required to establish that the defendant in any proceeding is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the

privacy of the aggrieved individual. Similarly, before an aggrieved individual can bring proceedings before the Tribunal under s 83 the complaint must first have been considered by the Privacy Commissioner as a complaint. See *L v T* (1998) 5 HRNZ 30 (Morris J, A Knowles, GDS Taylor) at 35 and 36; *Steele v Department of Work and Income* [2002] NZHRRT 12; *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45; *Lehmann v Radio Works* [2005] NZHRRT 20 and more recently *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10:

> **82 Proceedings before Human Rights Review Tribunal**
>
> (1) This section applies to any person—
> (a) in respect of whom an investigation has been conducted under this Part in relation to any action alleged to be an interference with the privacy of an individual; or
> (b) in respect of whom a complaint has been made in relation to any such action, where conciliation under section 74 has not resulted in a settlement.
> (2) Subject to subsection (3), civil proceedings before the Human Rights Review Tribunal shall lie at the suit of the Director of Human Rights Proceedings against any person to whom this section applies in respect of any action of that person that is an interference with the privacy of an individual.
> (3) ...
>
> **83 Aggrieved individual may bring proceedings before Human Rights Review Tribunal**
>
> Notwithstanding section 82(2), the aggrieved individual (if any) may himself or herself bring proceedings before the Human Rights Review Tribunal against a person to whom section 82 applies if the aggrieved individual wishes to do so, and—
> (a) the Commissioner or the Director of Human Rights Proceedings is of the opinion that the complaint does not have substance or that the matter ought not to be proceeded with; or
> (b) in a case where the Director of Human Rights Proceedings would be entitled to bring proceedings, the Director of Human Rights Proceedings—
> (i) agrees to the aggrieved individual bringing proceedings; or
> (ii) declines to take proceedings.

[59] To ensure clarity as to what "action alleged" has been investigated by the Privacy Commissioner, the Commissioner issues a Certificate of Investigation particularising the subject of the investigation. It is this certificate which sets the boundary of the Tribunal's jurisdiction.

[60] In the present case, because both certificates from the Privacy Commissioner make it clear that the "action" investigated by the Privacy Commissioner was the D2 disclosure of the documents by copying them and releasing them to D1, the Tribunal has jurisdiction only over "disclosure", not over D2's additional "employee browsing".

[61] In his oral submissions at the hearing, Mr Warner for the Privacy Commissioner emphasised this point. Properly it was not challenged by Ms Ting or by Mr Pollak.

[62] We turn now to our assessment of the evidence and our findings of credibility.

EVIDENCE ASSESSMENT

[63] On virtually all material points the evidence given by the parties is in direct conflict. As to this we are satisfied that the evidence of D1 and D2 is to be preferred to that of the plaintiff. We now explain why.

[64] The first defendant says he commenced proceedings in the Family Court because he held real concerns for the safety of the couple's two children. Objectively, his fears were amply supported by the medical notes which are Exhibit A, particularly the first page of the Updated Risk/Relapse Plan (Review Date 05/04/2006). The medical notes

also reflected what he himself had witnessed and experienced during his 15 years with the plaintiff. Our conclusion is that D1 has not made up the fundamental premise of his evidence, namely that for good reason he at all times acted in the bests interests of the children and used the information for his proceedings in the Family Court only.

[65] The evidence of D1 and D2 was compelling. It also had the ring of truth. The plaintiff had told D1 that she had been confused during her overnight stay in hospital but believed medical personnel had expressed concern that given the content of the Updated Risk/Relapse Plan, the plaintiff's employment as an early childhood carer raised safety issues. The plaintiff rightly surmised that if this information was disclosed to her employer, her employment would be at risk. Because she had in the past tried to destroy her medical records, access to the documentation held by the DHB would be a potentially slow and difficult exercise so the plaintiff prevailed on D2, knowing that she was a registered nurse in the employ of the DHB. It was through her that the plaintiff could gain direct access to the medical records without impediment. The second defendant did as the plaintiff requested and the plaintiff's fears were confirmed when she (the plaintiff) read the handwritten endorsement on the first page of the Updated Risk/Relapse Plan, an endorsement obviously made following her admission to hospital on 27 June 2007. As we have said, the account given by D1 and D2 has the ring of truth to it.

[66] On the other hand, the plaintiff's account had an air of unreality, the plaintiff herself during her evidence seeming to be out of touch with reality. She implicitly asserted that the suicide attempt at her place of work and her medical history were of little or no relevance to the Family Court proceedings, to the circumstances in which her medical records were accessed and to the proceedings before this Tribunal. She steadfastly maintained that the information in Exhibits A and 5 was "out of date". She said it was "unfair" that Exhibit A had been produced to the Tribunal notwithstanding that it is on this document that her case largely rests and notwithstanding that it is difficult to see how the Tribunal could adjudicate on her claim without seeing Exhibits A and 5.

[67] When these issues were explored in cross-examination, the plaintiff was often evasive, failing to address direct questions or deflecting them with inappropriate answers. For example, questioned about the numerous allegations she had made against D1, she was asked if it was correct that CYFS had required her to make all complaints either in writing or by email. She responded "You need to speak to them". Asked if she admitted assaulting D2 outside D2's church and in front of D2's children, the plaintiff did not give a direct answer, replying only "I accept the behaviour was inappropriate" and immediately added that she had not been charged by the Police. She said that she was remorseful. Asked if she had ever apologised to D2, she said that she had when being interviewed by the Police. She had told the Police that she apologised. The plaintiff did not tell D2 that she apologised.

[68] The plaintiff denied being friends with D2 and asserted that she had not known where she lived. But in May 2007, before the plaintiff and D1 separated and long before D1 and D2 entered into a relationship, the plaintiff knew enough about D2 to track her down and to assault her outside D2's church. The plaintiff made no concession to having ever lived in the same house as D2 or to have socialised with D2 and D2's husband who at one point had been in a relationship with the plaintiff. Clearly the plaintiff's relationship with D2 had more to it than the plaintiff would admit. Her failure to be frank on this point illustrates her general lack of candour.

[69] By contrast we found D1 and D2 to be direct and frank in their evidence. The plaintiff, on the other hand, portrayed herself as ever the victim. She blamed the medical profession for compiling medical records which were inaccurate and out of date, D1 for blackmailing her, D2 for divulging her medical records, D1 for using those records in the Family Court to get custody of the children and the Privacy Commissioner for not providing any help to her. The plaintiff was also prone to exaggerate, imagining that her medical records have been widely disseminated by D1 and D2 when there is no evidence to support her allegation. There was no dissemination beyond the Family Court and D1 and D2 have sworn that the information has not been divulged. But the plaintiff nevertheless asserted that after "the disclosure of the records" she did not feel comfortable at being at her daughter's school. She stopped acting as a teacher aide. In addition the plaintiff's mother stopped netball coaching after being told by a teacher that her services were no longer needed. The plaintiff stated:

> While l realised that there may have been other reasons why this happened, I can't help but feel there was some other influence going on.

The implicit assertion that her mother's coaching role was terminated because of the disclosure of the plaintiff's records underlines what we have described as the air of unreality which characterised the plaintiff's evidence.

[70] In these proceedings the plaintiff carries the burden of proof to establish to the civil standard that the basic facts of the case are as asserted by her. She has failed entirely in this endeavour. We have serious misgivings as to the veracity of the plaintiff's evidence and feel unable to rely on it.

[71] Preferring as we do the evidence of D1 and D2 to that of the plaintiff the case falls to be determined on the evidence given by them.

THE CASE AGAINST D1 – ANALYSIS

Principle 11

[72] The plaintiff's case against D1 is that he interfered with her privacy by breaching information privacy Principle 11 thereby causing her significant humiliation, significant loss of dignity and significant injury to feelings. See s 66(1) of the Privacy Act. Principle 11 provides:

> Principle 11
> *Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
> (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; 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
(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.

Burden of proof

[73] Because Principle 11 excepts certain conduct from the prohibition on the disclosure of personal information, s 87 is relevant. It provides:

> **87 Proof of exceptions**
>
> Where, by any provision of the information privacy principles or of this Act or of a code of practice issued under section 46 or section 63, conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.

[74] Applying this provision to Principle 11, it was established in *L v L* HC Auckland AP95-SW01, 31 May 2002, Harrison J at [20] (and see the Tribunal decisions collected in *Harris v Department of Corrections* [2013] NZHRRT 15 (24 April 2013) at [43]) that the sequential steps to be followed are:

> **[74.1]** Has there been a disclosure of personal information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.
>
> **[74.2]** If the Tribunal is satisfied that personal information has been disclosed, the burden shifts to the defendant to establish to the same standard that that disclosure fell within one of the exceptions provided by Principle 11.
>
> **[74.3]** Third, if the Tribunal is satisfied that the personal information was disclosed and that the defendant has not discharged his or her burden of proving one of the exceptions in Principle 11, the Tribunal must then determine whether the disclosure constituted an interference with the individual's privacy as defined in s 66 of the Privacy Act. That is, has the plaintiff established one of the forms of actual or potential harm contemplated by s 66(1)(b). The burden of proof reverts to the plaintiff at this stage.
>
> **[74.4]** Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies identified in s 85 of the Act.

[75] It is not a defence that the interference was unintentional or without negligence on the part of the defendant. See s 85(4) and *L v L* at [13] and [99].

[76] However, before Principle 11 can be addressed it is necessary to take into account the exemption provisions in s 56 of the Act.

THE SECTION 56 EXEMPTION

Personal information relating to domestic affairs – elements

[77] The information privacy principles, including Principle 11, do not apply to the collection or holding by an individual of personal information solely or principally in connection with the individual's personal, family or household affairs:

> **56 Personal information relating to domestic affairs**
> Nothing in the information privacy principles applies in respect of—
> (a) the collection of personal information by an agency that is an individual; or
> (b) personal information that is held by an agency that is an individual,—
> where that personal information is collected or held by that individual solely or principally for the purposes of, or in connection with, that individual's personal, family, or household affairs.

[78] An individual to whom s 56 applies does not have to comply with the information privacy principles and cannot be held liable under the Privacy Act for any breaches of privacy that his or her actions may otherwise cause.

[79] As it is on this provision that D1 relies we address it first. If it does have application the Principle 11 issues fall away entirely.

[80] In his submissions for the Privacy Commissioner, Mr Warner submitted (and we agree) that for an "agency" to bring him or herself within s 56 the following elements must be established:

> **[80.1]** That the agency is an individual.
>
> **[80.2]** That he or she was acting in his or her capacity as an individual when the information was collected, held or used.
>
> **[80.3]** That the information was collected, held, used or disclosed solely or principally for the purposes of, or in connection with, that individual's personal, family, or household affairs.

[81] The first and third elements are uncontroversial as they are explicit on the face of the provision. It is the second element which requires explanation. We turn to this issue shortly.

"Individual"

[82] Section 56 refers to an "agency that is an individual". The term "individual" is defined in s 2(1) of the Act as a natural person:

> *individual* means a natural person, other than a deceased natural person

[83] As submitted by the Privacy Commissioner, natural persons can be agencies and can be liable under the Privacy Act but s 56 provides an exception within the domestic sphere.

"Personal information … collected or held" – whether use and disclosure included

[84] Section 56 deals with personal information that is collected (s 56(a)) and personal information that is held (s 56(b)) by individuals. In *S v P* (1998) 5 HRNZ 610 at 614 the Complaints Review Tribunal decided that the term "collected or held" in s 56 includes the use and disclosure of personal information even though use and disclosure are not specifically referred to in the section:

> Section 56 refers to an individual *collecting* and/or *holding* information. Initially, we wondered whether it also covered *disclosing* information. On this point we accept the submissions of the Privacy Commissioner that the information privacy principles concern *collecting* (principles 1-4) and *holding* (principles 5-11) information. The *protection, use* or *disclosure* of information concern obligations that can only arise if an agency *holds* information. There is therefore no need for s 56 to specifically refer to those obligations because they are covered by the use of the word *hold* in s 56(b). Section 56, therefore, also covers the disclosure of information.

[85] The correctness of this decision was not challenged by the plaintiff.

[86] In agreeing with the ruling in *S v P* we would only add that it is necessarily implicit that one of the reasons, if not the main reason for collecting and holding personal information is so that such information can be used. If, as the Privacy Act provides, the information privacy principles do not apply to the collecting and holding of personal information relating to domestic affairs, it is difficult to see the sense of an interpretation which would have the effect of cancelling the domestic affairs exemption if personal information relating to domestic affairs so collected or held is then used. It is our view that for the exemption to have meaningful effect it must apply not only to the collecting and holding of personal information but also to its use, which includes disclosure. However, such use is governed by the same limits which attach to the collecting and holding of the information. That is, the use or disclosure must be by the individual "solely or principally for the purposes of, or in connection with, that individual's personal, family, or household affairs".

"Personal, family or household affairs"

[87] The Privacy Commissioner submitted that "personal … affairs" must be read narrowly in that such affairs must share characteristics with "family affairs" and "household affairs". The latter two are linked to the domestic sphere of activities and, it was submitted, "personal" must also have this link.

[88] We are not persuaded that the term "personal affairs" must share characteristics with the terms "family affairs" and "household affairs". Separate meaning must be given to each of the terms in the phrase "personal, family or household affairs". While they may overlap the terms are not to be collapsed into one simply because each, loosely speaking, relates to "domestic affairs", the term used in the heading to the section.

[89] But we do not have to decide the point. On the facts of D1's case, no real issue arises as to the meaning of "personal, family or household affairs". Determination of the point must await another case in which the issue arises directly.

Acting in an individual capacity

[90] We return now to the second element to s 56, namely the requirement that the individual be acting in his or her capacity as an individual when the information is collected, held or used.

[91] For the Privacy Commissioner it was submitted that:

> **[91.1]** While s 56 does not expressly stipulate that the individual must be acting in his or her capacity as an individual when the information is collected, held, used or disclosed, the provision should be interpreted in this way to ensure that its operation is consistent with the purpose of the Act which, as stated in the Long Title, is to promote and protect individual privacy.

[91.2] It cannot have been intended that s 56 exclude from the Act the actions of an employee where such person collects personal information from personal information held by his or her employer and then uses such information for his or her own personal purposes.

[92] We agree and are of the view that:

[92.1] The Privacy Act explicitly recognises that an individual may act in more than one capacity. In particular, a distinction is drawn between an individual acting in a personal capacity on the one hand and his or her acting in the capacity of an officer or employee or member of an agency on the other. See ss 3 and 4 of the Act. Section 126, when attributing liability in the context of employees and agents, also places emphasis on the role or capacity in which individuals have acted.

[92.2] Unless s 56 is read in the way contended for by the Privacy Commissioner an employee who engages in the unauthorised collection of personal information held by his or her employer could escape liability for violating the information privacy principles and for interfering with the privacy of individuals by pleading the domestic affairs exemption in s 56. This would undermine the Act and produce an unacceptable state of affairs. Actions claimed to be done for personal reasons would lie outside the protection of the Privacy Act. The individual affected by the privacy breach would have no remedy for the misuse of his or her personal information. That this is an impermissible interpretation of the Act is demonstrated by s 126 which provides in subs (1) and (4) that anything done or omitted by a person as the employee of another person is to be treated as done or omitted not only by the employee, but also by the employer unless the employer can prove that he or she took such steps as were reasonably practicable to prevent the employee from doing that act. The fact that an employer may successfully deploy the defence in s 126(4) does not absolve the employee of the personal liability stipulated by subs (1).

> **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) …
> (3) …
> (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.

[92.3] Accordingly s 56 only applies in cases where the individual collects, holds or uses the personal information in his or her capacity as an individual.

[93] On this analysis s 56 cannot apply to D2 because she accessed the plaintiff's health information in her capacity as an employee of the DHB (albeit contrary to her employer's instructions and in breach of her professional obligations). The position of D1, however, is entirely different, as we shortly discuss.

Whether scope of domestic affairs exemption to be narrowed

[94] For the plaintiff it was submitted that the scope of the s 56 exemption is to be limited. In particular it should have no application where the personal information has been obtained without authority or unlawfully. In such case the information is tainted and collecting, holding or using that information falls outside the intended operation of s 56. If this submission is correct, the actions of D1 would not be covered by the exemption and the information privacy principles would apply in the normal way.

[95] In support of this submission reference was made to the Law Commission Issues Paper *Review of the Law of Privacy: Stage 4* (NZLC IP17, March 2010) at [5.47] to [5.56] where the Law Commission proposed that the s 56 exemption should not apply where information is obtained by misleading or unlawful conduct.

[96] The difficulty with the plaintiff's submission is that it involves reading words into s 56 which are simply not there, a point implicitly recognised by the Law Commission in its proposal that s 56 be amended. However, the provision has not been amended and the Tribunal cannot do that which Parliament has elected not to do.

[97] Furthermore, to read into s 56 the qualification sought by the plaintiff would be impose on the collection of personal information relating to domestic affairs that which s 56 expressly stipulates does not apply, namely the information privacy principles. Perhaps it is as well to refer again to the opening words of the provision:

> Nothing in the information privacy principles applies …

These words are clear and capable of one reading only. So when, for example, Principle 4 stipulates that personal information is not to be collected by an agency by unlawful means, that prohibition does not apply within the domestic affairs exemption. The plaintiff's interpretation, however, would read into the exemption that which has been specifically excluded. The entire section would be rendered meaningless and of no effect.

Whether D1 has established that the exemption in s 56 applies to him

[98] We address now the three elements of s 56 identified and discussed earlier.

[99] As to the first element, it is beyond dispute that D1 is a natural person.

[100] As to the second element, it will be clear from our earlier credibility findings that D1 was acting in his capacity as an individual when the information was collected, held and used and that the second element has been established. We do not repeat all of the evidence and mention only the following:

> **[100.1]** As the partner of the plaintiff, D1 had assisted her over 15 years in her dealings with the Police, social workers and intervention teams. In particular he had assisted the plaintiff to challenge the content of the Updated Risk/Relapse Plan (Exhibit A).
>
> **[100.2]** He and the plaintiff invited D2 to meet with them to discuss the plaintiff's fears regarding what might have been disclosed by the DHB to the plaintiff's employer following the suicide attempt and how D2 might help. He was present when the plaintiff asked D2 to access the plaintiff's medical information and D1 had in the following days delivered to the plaintiff the envelope containing Exhibit A.

[100.3] The envelope had been opened and the contents examined and discussed by the plaintiff with D1. He had her permission to copy the documents to help her submit a complaint about the content and accuracy of the information.

[101] As to the third element, the proceedings commenced by D1 in the Family Court in early October 2007 related to the custody of the couple's two children. D1 was understandably concerned that they be placed in a safe environment following the deterioration in the plaintiff's mental health. Given the content of Exhibit A, particularly the Update Risk/Relapse Plan, it is difficult to see how D1 could have responsibly acted otherwise. We find that the information was collected, held, used and disclosed solely or principally for the purposes of, or in connection with, D1's personal, family or household affairs. In particular, assisting the plaintiff to lodge a complaint and also to support D1's application to the Family Court.

[102] In this connection it is to be noted that in *S v P* disclosure by the wife's lawyer of the terms of an agreement about access to two children was held to be within the s 56 exemption. The agreement concerned a daughter as a member of the wife's household. The arrangement itself was one that the wife had been involved in making. On this basis the Tribunal accepted that had the wife disclosed the access arrangement to the third party (the headmaster of the daughter's school) she would have been protected from breaching the Privacy Act by s 56. Disclosure by the wife's lawyer to the headmaster was therefore also protected.

[103] In these circumstances we have no hesitation in concluding that the third and final element to s 56 has been established in that D1 collected, held and used the personal information solely or principally for the purposes of, or in connection with, his personal, family or household affairs.

Conclusion in relation to D1

[104] All three elements of s 56 having been satisfied, we conclude that D1 has established that none of the information privacy principles were breached by him. It follows that he did not interfere with the privacy of the plaintiff and the proceedings against him must be dismissed.

[105] While it is not necessary for us to make findings in relation to Principle 11, our credibility findings would in any event have led to our concluding that D1 honestly believed on reasonable grounds that disclosure of the information to the Family Court and associated persons was necessary for the conduct of proceedings before the Family Court in terms of Principle 11(e)(iv).

THE CASE AGAINST D2 – ANALYSIS

The HIP Code

[106] The case against D2 rests not on the information privacy principles as such, but on the Health Information Privacy Code 1994 issued by the Privacy Commissioner under s 46 of the Privacy Act. The 12 health information privacy rules replace the information privacy principles with respect to "health information". This term is defined in the HIP Code, cl 4(1):

> 4 APPLICATION OF CODE
> (1) This code applies to the following information or classes of information about an identifiable individual:
> (a) information about the health of that individual, including his or her medical history; or
> (b) information about any disabilities that individual has, or has had; or

(c) information about any health services or disability services that are being provided, or have been provided, to that individual; or
(d) information provided by that individual in connection with the donation, by that individual, of any body part or any bodily substance of that individual or derived from the testing or examination of any body part, or any bodily substance of that individual; or
(e) information about that individual which is collected before or in the course of, and incidental to, the provision of any health service or disability service to that individual.

The effect of the HIP Code

[107] Section 53 of the Act relevantly provides that failure to comply with the HIP Code, even if not otherwise a breach of an information privacy principle, is deemed to be a breach of such principle:

> **53 Effect of code**
>
> Where a code of practice issued under section 46 is in force,—
> (a) the doing of any action that would otherwise be a breach of an information privacy principle shall, for the purposes of Part 8, be deemed not to be a breach of that principle if the action is done in compliance with the code:
> (b) failure to comply with the code, even though that failure is not otherwise a breach of any information privacy principle, shall, for the purposes of Part 8, be deemed to be a breach of an information privacy principle.

[108] Liability for a breach of the HIP Code is personal. This is because s 126(1) of the Act provides that an employee is individually liable for anything done by that person as an employee. In the present case D2 did not dispute that the HIP Code applied to her. This concession was properly made.

[109] The plaintiff alleges that D2 breached Rule 11 of the HIP Code in two respects. First, by disclosing health information about the plaintiff and secondly, by "browsing" the plaintiff's health information. For the reasons earlier explained the Tribunal has no jurisdiction over the "browsing" complaint. The focus of these proceedings is on the disclosure allegation only.

The HIP Code – Rule 11 – limitations on the disclosure of health information

[110] Rule 11 of the HIP Code limits the circumstances in which health information can be disclosed and in this regard the rule is analogous to Principle 11 of the information privacy principles. Rule 11 is too long to repeat here in its entirety and much of it is irrelevant for present purposes. We reproduce only Rule 11(1)(a) and (b). It will be seen that the prohibition on disclosure is not absolute. **Disclosure to** the individual concerned is permitted as is **disclosure authorised by** the individual. But the agency disclosing the information must show a belief, on reasonable grounds, that the disclosure is to the individual or is authorised by the individual:

> Rule 11: LIMITS ON DISCLOSURE OF HEALTH INFORMATION
> (1) A health agency that holds health information must not disclose the information unless the agency believes, on reasonable grounds, that—
> (a) the disclosure is to—
> (i) the individual concerned; or
> (ii) the individual's representative where the individual is dead or is unable to exercise his or her rights under these rules; or
> (b) the disclosure is authorised by—
> (i) the individual concerned; or
> (ii) the individual's representative where the individual is dead or is unable to give his or her authority under this rule; or

[111] The phrase "reasonable grounds" prescribes an objective test. See *L v L* at [76].

[112] Anyone who discloses health information in reliance on Rule 11 carries the onus of proving that such disclosure falls within one or more of the exceptions permitted by the rule. See s 87 of the Act.

[113] Given the shifting of burdens we propose to apply the sequential steps identified in *L v L* discussed earlier. Suitably adapted to Rule 11 of the HIP Code, those steps are:

> **[113.1]** Has there been a disclosure of health information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.
>
> **[113.2]** If the Tribunal is satisfied that health information has been disclosed, the burden shifts to the defendant to establish to the same standard that that disclosure fell within one of the exceptions provided by Rule 11.
>
> **[113.3]** Third, if the Tribunal is satisfied that the personal information was disclosed and that the defendant has not discharged his or her burden of proving one of the exceptions in Rule 11, the Tribunal must then determine whether the disclosure constituted an interference with the individual's privacy as defined in s 66 of the Privacy Act. That is, has the plaintiff established one of the forms of actual or potential harm contemplated by s 66(1)(b). The burden of proof reverts to the plaintiff at this stage.
>
> **[113.4]** Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies identified in s 85 of the Act.

[114] These issues must be addressed in light of the credibility finding we have made in favour of D1 and D2.

Whether there was a disclosure of health information

[115] As to the first step of the enquiry, D2 freely admits that she disclosed health information about the plaintiff in the form of Exhibit A and Exhibit 5 (referral to Child Youth & Family). In closing submissions Ms Ting acknowledged for the plaintiff that these were the records which comprised the health information so disclosed.

[116] We address now the second step of the enquiry.

Whether D2 has established the disclosure was within Rule 11(1)(a) or (b)

[117] For the reasons set out earlier we have accepted D2's account of events. Without reciting her evidence in detail, she has established on the balance of probabilities that:

> **[117.1]** She was asked by the plaintiff to obtain the plaintiff's health information. The first defendant was present when this request was made.
>
> **[117.2]** On 6 July 2007 D2 located Exhibits A and 5, printed them and placed them in a sealed envelope with the plaintiff's name and marked the envelope "Private and Confidential".
>
> **[117.3]** A day or so later, D1 uplifted the envelope and delivered it to the plaintiff. A few days later D1 passed on a message of thanks from the plaintiff.

[118] On these facts we find that D2 believed, on reasonable grounds, that:

> **[118.1]** The disclosure was to the plaintiff as "the individual concerned";

[118.2] The disclosure was authorised by the plaintiff as "the individual concerned".

[119] Addressing now the second and last disclosure which took place on 2 October 2007, D2 has established, on the balance of probabilities, that:

[119.1] She was asked by D1 to obtain replacement copies of Exhibits A and 5 as he had mislaid the 6 July 2007 set.

[119.2] The first defendant told D2 that the plaintiff was "okay with that" and that he (D1) was still helping the plaintiff with her complaint to the DHB.

[119.3] The second defendant believed at the time that the plaintiff's consent still operated and that D1 was acting in her interests.

[120] On these facts we find that D2 believed, on reasonable grounds, that:

[120.1] The 2 October 2007 disclosure was to the plaintiff through D1, a person D2 honestly and reasonably believed to be authorised to receive the information on the plaintiff's behalf.

[120.2] That the disclosure was authorised by the plaintiff.

[121] Whether D2 was possibly given incorrect information by D1 as to whether the original disclosure documents had been lost from his hard drive (the documents were subsequently recovered) is not an issue we need explore. The second defendant had no reason to doubt what D1 told her given the sequence of events surrounding the 6 July 2007 disclosure. An honest belief held reasonably but mistakenly does not cease to be a belief based on reasonable grounds. Looking at the evidence as a whole, we are of the view that there was nothing in the circumstances surrounding the 2 October 2007 disclosure that undermined D2's evidence that she honestly and reasonably believed that the plaintiff's authority was then still continuing.

[122] We accordingly find that D2 has discharged her duty to establish, to the civil standard, that the disclosures made on 6 July 2007 and 2 October 2007 respectively fell within the parameters of the disclosure permitted by Rule 11(1)(a) and (b) of the HIP Code.

[123] In these circumstances there is no need to address the third and fourth of the *L v L* steps.

No interference with the plaintiff's privacy

[124] The Tribunal's jurisdiction to award a remedy under the Privacy Act is only engaged if it is satisfied, on the balance of probabilities, that any action of a defendant is an interference with the privacy of an individual. See s 85(1). In the context of the HIP Code this means that the plaintiff must establish that there has been a failure to comply with the Code. See s 53(b). As no such failure has been established there has been no interference with the plaintiff's privacy as defined in s 66(1) of the Act. It follows that the proceedings against D2 must be dismissed.

CONCLUSION

[125] For the reasons given we are not satisfied on the balance of probabilities that any action of D1 or D2 was in breach of the information privacy principles or the HIP Code

respectively. It follows that the Tribunal has no jurisdiction to grant any of the remedies sought by the plaintiff and her claim is dismissed.

Costs

[126] Costs are reserved. Because the plaintiff is in receipt of legal aid s 45 of the Legal Services Act 2011 applies. If the defendants nevertheless wish to apply for costs, they must file a memorandum within fourteen days of this decision. The submissions by the plaintiff are to be filed within a further fourteen days with a right of reply by the defendants within seven days after that.

FORMAL ORDERS

[127] For the foregoing reasons the decision of the Tribunal is that:

[127.1] The proceedings by the plaintiff are dismissed in relation to both D1 and D2.

[127.2] Costs are reserved.

[127.3] A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the plaintiff or of the defendants or of any child of the plaintiff or defendants. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

[127.4] If any other non-publication orders are to be sought application must be made within fourteen days of this decision. If no such application is made the Secretary can then release this decision for general publication. Until then publication to the parties only is permitted.

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

.....	.....	.....
Mr RPG Haines QC	**Mr GJ Cook JP**	**Mr RK Musuku**
Chairperson	**Member**	**Member**