

Reference No. HRRT 027/2013

UNDER THE PRIVACY ACT 1993

BETWEEN KAREN MAY HAMMOND

PLAINTIFF

AND CREDIT UNION BAYWIDE

DEFENDANT

AT NAPIER

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Ms KM Hammond in person supported by Ms J Gooding as *McKenzie* friend

Mr AJ Harris and Mr GJC Ferguson for defendant

DATE OF HEARING: 1, 2, 3, 4 and 5 December 2014

DATE OF DECISION: 2 March 2015

DECISION OF TRIBUNAL

Introduction

[1] On 31 March 2012 Ms Hammond uploaded to her Facebook page a picture of a cake made by her for a private dinner party held on the evening of 31 March 2012 for a close friend of hers, Ms Jantha Gooding. Both Ms Hammond and Ms Gooding had recently resigned from Credit Union Baywide trading as NZCU Baywide (NZCU Baywide). The party was attended by ten close personal friends, five of whom were current employees of NZCU Baywide.

[2] What would otherwise have been an unexceptional set of circumstances was transformed by two factors. First, the top of the cake had been iced with the words "NZCU FUCK YOU" while the side of the cake bore the word "CUNT". The privacy setting on Ms Hammond's Facebook page meant only those accepted by her as

“friends” had access to the photograph. Second, on NZCU Baywide gaining access to the Facebook page a screenshot of the cake was taken. That screenshot was then distributed to multiple employment agencies in the Hawke’s Bay area by email which, along with contemporaneous phone calls from NZCU Baywide, warned against employing Ms Hammond. At the same time an internal email was sent by the Chief Executive Officer of NZCU Baywide to staff disclosing information about the circumstances in which Ms Hammond had earlier resigned from NZCU Baywide. NZCU Baywide also placed severe pressure on her new employer to terminate her (Ms Hammond’s) employment.

[3] Ms Hammond contends NZCU Baywide breached Information Privacy Principles 1 to 4 and 11. For its part NZCU Baywide denies breaching Principles 1 to 4 but admits breaching Principle 11. That admission relates to the disclosures to the employment agencies and to the internal email sent by the CEO. NZCU Baywide denies, however, there was any consequential interference with Ms Hammond’s privacy.

[4] In broad terms the issue in these proceedings is whether NZCU Baywide breached Principles 1 to 4 and whether, either in relation to those principles or in relation to the admitted breaches of Principle 11, Ms Hammond has established an interference with her privacy as defined in s 66 of the Privacy Act 1993. If such interference is established, the appropriate remedy (or remedies) must then be determined.

[5] It will be seen that our credibility assessment will have a significant bearing on the outcome of this case.

[6] Two preliminary observations are made.

[7] First, while this is the first occasion on which the Tribunal has been required to consider the operation of the Privacy Act in the context of social media, particularly Facebook, application of the information privacy principles in s 6 of the Privacy Act has been a straightforward exercise.

[8] Second, while the circumstances of the case arose in an employment context, the case falls to be determined under the Privacy Act, not under employment law.

Only a summary of evidence given

[9] In addition to giving evidence herself, Ms Hammond called five witnesses. For its part, NZCU Baywide also called five witnesses. The taking of evidence occupied the first four days of the hearing with closing submissions following on the fifth day.

[10] It is not practical to provide a full recitation of the evidence, some of which can now be seen to have been of peripheral relevance. In the account which follows we provide only a brief and necessarily incomplete summary of what was said by each witness. In the interests of presenting a coherent narrative we will where necessary include in the plaintiff’s evidence some of the evidence given by the witnesses for NZCU Baywide. Our credibility assessment and findings of fact follow thereafter.

THE PLAINTIFF’S EVIDENCE

The evidence of Karen Hammond – introduction

[11] For seven years Ms Hammond worked in a bank, rising to the position of senior lender/trainer. Thereafter she was a mortgage broker for some four years and a registered financial service provider, a registration she allowed to lapse subsequent to

the events in question and at a time when she was unemployed and without income to pay the annual registration fee.

[12] On 13 July 2011 Ms Hammond commenced employment at NZCU Baywide as the Team Leader of the Referred Business Unit which had been set up to service a new Easy Drive product, being third party lending via second hand car dealers. Within a short space of time Ms Hammond received favourable comments and commendations from auditors, managers and staff from within different departments and from different towns. Even Mr Grant Porter, the Chief Operating Officer, conceded in cross-examination at the hearing that Ms Hammond was a valuable member of NZCU Baywide.

[13] Nevertheless Ms Hammond soon experienced frustration when she found some members of the executive team, particularly Mr Gavin Earle, Chief Executive Officer, Mr Porter and Ms Julie Baxter (Lending Manager) did not listen to her when she cautioned that in her view NZCU Baywide was at commercial and financial risk for failing to adhere to the Privacy Act. Citing this as an example she said she soon learnt the executive team banded together to ensure their decisions were never questioned. On another occasion when she approached Ms Baxter (the person to whom she reported) and provided a document Ms Hammond had created to ensure the Board could make informed decisions when signing off on loans, Ms Baxter's response was "the Board just do as they are told".

[14] During her time at NZCU Baywide Ms Hammond made numerous friends, one of whom was Jantha Gooding, Manager of Marketing and Communications.

[15] It is necessary at this point to divert to the evidence given by Ms Gooding.

The evidence of Jantha Gooding

[16] Until she left NZCU Baywide in late February 2012, Ms Gooding was the Marketing and Communications Manager. It was at NZCU Baywide that in July 2011 she met Ms Hammond.

[17] Describing the Referred Business Unit, Ms Gooding said it had been set up by Mr Porter and Ms Baxter in what she believed to be an ad hoc manner. Very few processes had been established and existing organisational expertise ignored. As a result the Unit's start up staff were under immense pressure. Ms Gooding cited as an example the absence of processes which led to some new loans not being set up properly which, in turn, resulted in automatic payments for loan repayments not being established. Some Easy Drive customers were consequently going immediately into loan arrears and NZCU Baywide was not collecting repayments. The new Unit seemed to have its own lending policy which resulted in the decline of some applications for loans to buy a new car but when the same members went to the local car dealer the application was approved. She said it was well known within NZCU Baywide that the Unit had never passed an internal operational audit.

[18] Ms Gooding said that Ms Hammond changed all of this within a very short time, creating robust processes for the Unit to minimise risk and also brought the Unit's lending policy into line with NZCU Baywide policy. Under Ms Hammond's leadership the Unit passed its first internal operational audit, only three months after Ms Hammond was installed as its Team Leader.

[19] Ms Gooding and Ms Hammond worked on a number of tasks together and found they shared similar professional standards, work ethics and outlook. Those tasks included developing and producing improved process documents and developing a lead fulfilment process for a lending campaign. Both had similar struggles with their managers not understanding their roles and what they did as Marketing and Communications Manager and Team Leader of a lending unit respectively. Ms Gooding reported to Mr Porter while (as mentioned) Ms Hammond reported to Ms Baxter.

[20] Ms Gooding had also raised concerns with Mr Earle about Mr Porter's behaviour and in particular his relationship with Ms Baxter.

[21] It is not necessary that we detail the other examples given by Ms Gooding in which she, with the best interests of NZCU Baywide in mind, challenged the executive team (particularly Mr Porter) over various issues, processes and decisions.

[22] The outcome was that on 22 February 2012 Ms Gooding was served by Mr Earle with a letter critiquing her professionally and requesting she attend a mediation meeting at which Mr Earle would be supported by Mr Dave Robb from Grow Human Resources Ltd (Grow HR), a human resources company providing advice to employers in the Hawke's Bay district. In his letter Mr Earle asserted he believed there was a "significant and serious employment relationship problem", specifically Ms Gooding's "fundamental lack of trust in the integrity and capability of [her] line manager [Mr Porter]".

[23] This came as a surprise to Ms Gooding, considering she had spent the past 18 months leading a re-branding project not just for NZCU Baywide but also for six other credit unions. There had been challenges but the project had been a success. Staff were more engaged with the NZCU brand than ever before and three months after launch of the new brand, national brand awareness had grown from 25% to 46%.

[24] As requested Ms Gooding attended mediation on 28 February 2012. At that meeting the parties came to a settlement and Ms Gooding resigned.

The evidence of Ms Hammond – the cake and the private party

[25] When Ms Gooding was served with the letter dated 22 February 2012 challenging her professional judgment she turned to Ms Hammond for support. It was a hard time for her as she was the sole breadwinner for her family of five and the likelihood of finding another job at the same level in Hawke's Bay, especially in a timely fashion, was low. She had to consider moving her family to another city just to feed them. Ms Gooding said these were stressful times.

[26] Ms Hammond said Ms Gooding was much liked at NZCU Baywide and many staff did not understand why she chose to summarily depart and become unemployed. As the person who had re-created the NZCU Baywide brand, she was highly respected and Ms Hammond was inundated with staff approaching her wanting to know what had happened and why Ms Gooding had left without saying goodbye.

[27] Together with a group of Ms Gooding's friends and at a time when she herself had resigned from NZCU Baywide, Ms Hammond decided to cheer up Ms Gooding by holding a dinner party attended by close friends and had the idea of making a cake for dessert, using her sense of humour to make Ms Gooding laugh. Ms Hammond made a fruit and chocolate chunk cake and iced the top with the words "NZCU FUCK YOU". On the side of the cake she iced the word "CUNT". She used similar shaped letters to the

NZCU brand which Ms Gooding had created. Whereas NZCU Baywide's brand colour is orange, Ms Gooding chose pink and blue for her lettering.

[28] Ms Hammond then took a photograph of the cake. That photograph she uploaded to her Facebook page. The privacy setting meant only those who had been accepted by Ms Hammond as "friends" had access to the photograph. At the time there were approximately 150 such friends who Ms Hammond knew would share her sense of humour and believed would respect the privacy setting.

[29] The dinner party held on 31 March 2012 was a private occasion attended by a total of ten persons and was held in a private home. The moment Ms Hammond walked in with her cake she regarded her mission complete. For the first time in a long time she saw Ms Gooding laugh. Everybody clapped and loved the cake. In her evidence Ms Hammond said the cake was not only delicious it was also topical and hilarious. She added the wording on the cake was in recognition of the rebranding project led by Ms Gooding and a response to Mr Porter's (and other members of the executive team) actions which she saw as a snub to Ms Gooding and the contribution she had made to NZCU Baywide.

[30] It is necessary now to return to Ms Hammond's earlier resignation from NZCU Baywide and her new employment situation.

Ms Hammond's resignation from NZCU Baywide

[31] Believing she herself had no future at NZCU Baywide Ms Hammond had earlier resigned by letter dated 23 March 2012. Her four weeks notice expired on 20 April 2012. By letter dated 27 March 2012 NZCU Baywide advised Ms Hammond that her letter of resignation had been accepted, that her last day of employment would be Friday 20 April 2012 and that while her last day of work would be 27 March 2012, she would be paid up to and including 20 April 2012. Her final pay, including any outstanding annual leave entitlement together with holiday pay would be paid on 2 April 2012. Ms Hammond did not return to NZCU Baywide after 27 March 2012. Her contract of employment did not contain a garden leave provision nor did she sign a garden leave document.

[32] With the knowledge and consent of NZCU Baywide Ms Hammond had already secured new employment with another Hastings finance firm, FinancePoint, owned and operated by her friend, Mr Rob Tonge. He had confided in Ms Hammond that he had a rare disease which would require ongoing chemotherapy and large doses of steroids which would leave him unable to run the company. It seemed a perfect opportunity for Ms Hammond to help a friend and also to move out of NZCU Baywide. Her first day at FinancePoint was 10 April 2012. The majority of FinancePoint's personal loan business was with NZCU Baywide. When making loan referrals to NZCU Baywide, FinancePoint (inter alia) completed the application for finance and assessed the creditworthiness of the applicant. As mentioned, NZCU Baywide knew that Ms Hammond was leaving to work at FinancePoint and gave express consent. It also knew Ms Hammond's first day at FinancePoint was 10 April 2012.

NZCU Baywide acquires a screenshot of the cake

[33] On 12 April 2012 the executive team at NZCU Baywide became aware of Ms Hammond's cake and that a picture of it had been posted on her Facebook page. Because of the privacy settings they could not, however, gain access to the photograph. To explain the circumstances in which the executive team came into possession of a

screenshot of the Facebook page on which the cake appeared it is necessary at this point to refer to the evidence given by Ms Hayley Edmondson.

[34] At the time Ms Edmondson was 21 years of age and had been at NZCU Baywide for only four months. She was a friend and neighbour of Ms Hammond and it had been through Ms Hammond she had learnt of the position in the NZCU Baywide Contact Centre.

[35] Ms Edmondson did not attend the private party held on 31 March 2012.

[36] At approximately 1pm on 12 April 2012 Ms Edmondson was approached by Louise Alexandra, the Human Resources Manager at NZCU Baywide and asked whether she (Ms Edmondson) was aware of a photograph posted on Facebook by Ms Hammond. When Ms Edmondson replied she was not so aware Ms Alexandra said it was a damaging photograph of a cake which had been made by Ms Hammond. Ms Alexandra told her that Ms Hammond had deleted all her other Baywide “friends” and that Ms Edmondson was the only person who could access the photograph required by Ms Alexandra.

[37] Ms Edmondson told Ms Alexandra that she (Ms Edmondson) would look at Ms Hammond’s Facebook page when she (Ms Edmondson) got home. Ms Alexandra said she needed Ms Edmondson to come upstairs with her immediately to log on to Ms Hammond’s Facebook page so that Ms Alexandra could see the photograph. Ms Alexandra told Ms Edmondson she was “a smart girl” and that by being an employee of NZCU Baywide, by law and policy she had to give up any information she might have. It was part of her contract of employment. Ms Alexandra added she did not want to have to go down “the policy and procedure track”.

[38] Ms Edmondson told Ms Alexandra that she (Ms Edmondson) did not feel comfortable with what she was being asked to do. At this Ms Alexandra became “quite stern and asked me to keep my voice down stating we were having a closed door conversation”.

[39] Feeling under duress Ms Edmondson followed Ms Alexandra to Ms Alexandra’s office and there logged on to her (Ms Edmondson’s) Facebook page and in this way accessed Ms Hammond’s Facebook page. Ms Alexandra then took a screenshot of the cake as it then appeared on Ms Hammond’s Facebook page.

[40] In circumstances to be later described, Ms Alexandra that afternoon telephoned at least four HR agencies in the Hawke’s Bay area to “warn” them against employing Ms Hammond. At the same time those agencies were sent a copy of the screenshot. NZCU Baywide now accepts these communications breached Principle 11 of the information privacy principles.

Ms Edmondson’s concerns

[41] Ms Edmondson told the Tribunal that as a new employee at NZCU Baywide of four months she felt vulnerable and violated as she was not aware of any whistleblower’s policy and was unsure of Ms Alexandra’s intentions. At no stage did she feel comfortable about what she was doing and would have chosen, if not under pressure from Ms Alexandra, to have taken no part in the events. She left Ms Alexandra’s office very upset and immediately called her mother.

[42] The following day, still feeling upset and bullied by the actions of Ms Alexandra, Ms Edmondson consulted with her team leader who agreed what had happened was unfair.

She advised Ms Edmondson to inform her multi-branch manager, Mr Steven Forde, what had happened. At a meeting with Mr Forde it was agreed Ms Edmondson should speak to Ms Alexandra about what had occurred and tell her how she felt. It was further agreed Mr Forde would approach Mr Porter to report what had happened and to convey Ms Edmondson's complaint regarding Ms Alexandra's actions. Mr Forde later reported to Ms Edmondson that Mr Porter had said Ms Edmondson had done nothing wrong and had been obliged under the terms of her contract to provide access to Ms Hammond's Facebook page. When Ms Edmondson spoke directly with Ms Alexandra she told her she was upset at actions she believed were unfair and illegal in that she had been forced to divulge not only her own personal information but also the personal information of a friend under the guise of her responsibilities under the employment contract with NZCU Baywide. Ms Alexandra replied she would ensure no one would find out how or by whom the screenshot had been obtained. Ms Edmondson was then asked to leave Ms Alexandra's office. Later that day the CEO, Mr Gavin Earle spoke to Ms Edmondson at her desk saying that if anyone approached her or asked questions regarding the matter she was not to respond and any enquiry should be referred to Mr Porter.

[43] Ms Edmondson did not allow the matter to rest there and detailed in her evidence her subsequent attempts to have her formal complaint addressed by NZCU Baywide. There had, however, been no action, response, accountability or apology. She left NZCU Baywide as she felt unsafe at work as a consequence of what she perceived to be Baywide's deliberate breaches of her privacy. Her experience at NZCU Baywide left her hurt, humiliated and disappointed due to the fact that the values of the organisation were not in her opinion adhered to by senior management.

[44] In cross-examination Ms Edmondson said when Ms Alexandra spoke of not wanting to go down the "policy and procedure track", Ms Edmondson interpreted this as a threat. Challenged over the fact that in her exit interview Ms Edmondson had made no reference to the matters on which she had given evidence, Ms Edmondson responded the exit interview had been conducted over a cup of coffee in a local cafe by a junior employee and there was "no way I was going to be honest as to my reasons for leaving". She was also concerned NZCU Baywide could contact her new employer and this might affect a decision whether her employment there would continue beyond the 90 day trial period.

The CEO's 13 April 2012 email to NZCU Baywide staff

[45] On 13 April 2012 Mr Earle sent an email to all Baywide staff with the subject line "Karen Hammond and recent posting on Facebook". In this email Mr Earle addressed the Facebook posting which he said had "created talk and discussion amongst some of our teams" and which now required his comment. After briefly describing in words the decoration on the cake Mr Earle gave an overview of the circumstances in which Ms Hammond had left NZCU Baywide and observed that the posting on Facebook had reinforced to Mr Earle that "the decision to let Karen exit Baywide ahead of her notice period was sound and appropriate". He added:

I'm sure you'll agree that we do not want people at Baywide who behave in this manner, or do not align with our values or our organisational culture.

Later in the email Mr Earle acknowledged he was disclosing information about Ms Hammond's departure:

Please appreciate that as an employer, we are often unable to talk about the reasons [for staff leaving] because of privacy considerations, including the Privacy Act. However, given Karen's

public display of her views towards Baywide on Facebook, I felt that it was appropriate for me to respond, and provide you with a little bit more information about her departure.

[46] NZCU Baywide now accepts this email breached Principle 11 of the information privacy principles.

The attempt by NZCU Baywide to secure the termination of Ms Hammond's employment at FinancePoint

[47] On 13 April 2012 Ms Baxter sent to Mr Tonge of FinancePoint an email asking Mr Tonge to meet with Ms Baxter and Mr Porter about a matter of "a human resource nature". Mr Tonge replied the same day reporting that his chemotherapy had been doubled, that he had not been out of bed much in the past three weeks but was feeling positive about employing Ms Hammond who seemed to be adapting well. He asked Ms Baxter to elaborate on the "matter" to which she referred. On 15 April 2012, in an email copied to Mr Porter, Ms Baxter advised the matter was "regarding Karen – some very concerning behaviours which we feel necessary to share with you".

[48] On 17 April 2012 Mr Porter and Ms Baxter spoke to Mr Tonge by teleconference. According to Mr Porter he explained to Mr Tonge there were "issues" with Ms Hammond and that NZCU Baywide did not trust her with loan applications. Mr Tonge was advised he could either do the lending work himself or alternatively he could send the raw data to NZCU Baywide for processing. Mr Tonge was offered financial support to take professional advice regarding Ms Hammond's employment. Mr Porter stated in evidence:

That was intended, in addition to the loan processing support offered by us, to help Rob [Tonge] manage the situation acknowledging that Rob had said that Karen's inability to process loans through Baywide would cause his business some difficulty. We invited Rob to seek advice and consider his options in terms of Karen's employment and specifically in relation to a 90 day trial period.

[49] In essence, Mr Porter advised Mr Tonge that NZCU Baywide would assist Mr Tonge to take advice on the question whether Ms Hammond's employment at FinancePoint could be terminated.

[50] By email dated 20 April 2012 Mr Tonge advised Mr Porter and Ms Baxter that having sought professional advice he had no grounds to take disciplinary action against Ms Hammond or to dismiss her.

[51] Ms Baxter and Mr Porter nevertheless pressed Mr Tonge to "terminate" Ms Hammond's employment. In an email dated 20 April 2012 Ms Baxter and Mr Porter asserted Mr Tonge would be entirely within his rights to "dismiss" Ms Hammond and unless this happened, Baywide would discontinue processing loans for FinancePoint:

Hi Rob:

Thank you for your reply. While we appreciate you seeking legal advice, we are still of the view that you can terminate Karen's employment within the 90 day trial period. Note the following extract from the Department of Labour's website regarding the 90 day period:

"While an employer is not required to provide written reasons for an employee's dismissal, there is an expectation that an employer, acting in good faith, would inform the employee as to why he or she has been dismissed. Any provisions about giving notice in the employment agreement will need to be adhered to."

We also have sought advice from an employment and dispute resolution expert, this being Dave Robb from Grow HR, based in Hastings. His view is that you are entirely within your rights without risk of any repercussions to dismiss Karen under the clauses included within the

90 day trial period. To this end, we invite you to give Dave a ring on 878 5454 who is happy to talk to you at no cost.

Without challenge to this situation Rob, Baywide has no option but to discontinue processing loans for Finance Point while Karen remains a contact or is involved in the submissions of applications to Baywide. The option of forwarding loans via a landing page or some other alternative to Baywide, remains open, without financial disadvantage to you.

We urge you to contact Dave.

Kind regards

[52] By email dated 20 April 2012 Mr Tonge advised Ms Baxter he would speak with Mr Dave Robb of Grow HR. Ms Baxter responded on 24 April 2012 that Baywide would accept applications from FinancePoint provided those applications had “in no way” been processed by Ms Hammond and that she was not to contact Baywide or any employee “by any means of communication” while they were at work. Mr Tonge replied on 26 April 2012 confirming he had instructed Ms Hammond she was to have no contact with NZCU Baywide staff during working hours.

[53] The evidence given by Ms Hammond was that when on 17 April 2012 Mr Tonge told her he had been sent the screen dump of her Facebook page she was horrified. In the following days she observed he became very agitated and extremely unwell. After NZCU Baywide halted business with FinancePoint for three weeks Ms Hammond found her position at FinancePoint had become untenable given the pressure to which Mr Tonge was being subjected by NZCU Baywide and further given she was now unable to do the work for which she had been employed. She reached the conclusion that to protect FinancePoint’s business she would have to resign. This she did in writing on 18 September 2012. In her letter of resignation she advised Mr Tonge she could no longer put him in a position where his business would suffer due to her employment by FinancePoint. She concluded:

As they have already halted business for 3 weeks previously due to my continuing employment, I am fearful that they will cease all dealings with FinancePoint and due to the current lending climate, FinancePoint needs NZCU Baywide’s unsecured lending product. I would never ask or put you in a position where you would have to make a decision in regards to my employment with you for the best interests of your business.

The admitted breaches of privacy – consequences to Ms Hammond

[54] Ms Hammond said that following her resignation from FinancePoint she was unemployed for the following ten months and even now has not been able to find employment in her preferred field, being finance, a field in which she has built up experience. Because NZCU Baywide widely distributed the screenshot to recruitment agencies in the Hawke’s Bay area and advised them Ms Hammond was not to be employed, Ms Hammond applied only for those positions where the employer advertised directly and it was not necessary to submit applications through an agency. She says she was made to endure numerous humiliating occasions when she applied for roles well beneath her skill and experience just to make money to make ends meet. She suffered anxiety wondering whether the prospective employer was aware of NZCU Baywide’s warning against employing her. At each interview employers wanted to know why Ms Hammond, with her qualifications, was applying for a position below those qualifications. When Ms Hammond was finally successful in obtaining employment she was taken on in a receptionist/PA role until August 2014 when she was promoted to Practice Manager. Even then she had the embarrassment of having to inform her employer of the breaches of her privacy now admitted by NZCU Baywide and of the fact that she has a case before the Tribunal. She believes she had no choice but to share

this information as she lives in fear that the NZCU Baywide executive team or one of the HR firms contacted by Ms Alexandra will again pass the information to her employer.

[55] Ms Hammond said relationships very dear to her have been severely affected. The stress has caused significant harm to her family. She and her partner have struggled financially and emotionally. She has suffered the embarrassment, if not humiliation, of having to ask friends and family for money. Her partner had no option but to leave home to find work in another centre. Ms Hammond believes her career in the finance field is in tatters. She explained that going from manager to PA after hard work and study is humiliating, financially crippling and emotionally draining.

[56] We turn now to the evidence of Mr Peter McAuley who at the relevant time was the Chief Financial Officer of NZCU Baywide.

The evidence of Peter McAuley

[57] The witness statement affirmed by Mr McAuley in his evidence is both detailed and lengthy. We do not intend reciting it at length. The main points made by Mr McAuley are summarised.

[58] Mr McAuley began work at NZCU Baywide in January 2010 as the Chief Financial Officer and oversaw the operational duties of the Administrative, IT, Risk and Finance teams. Neither Ms Hammond nor Ms Gooding reported to him.

[59] Mr McAuley was a member of the executive team which included Mr Gavin Earle, Mr Grant Porter and Ms Julie Baxter.

[60] At the start of a meeting in late 2011 Mr Porter, red in the face, stated in an emotional and highly agitated voice that Ms Hammond had to go. Mr McAuley recalls the event because he was shocked at the intensity and vehemence displayed by Mr Porter. Mr Earle appeared unsurprised and condoning of Mr Porter's view.

[61] During the conversation that followed Mr McAuley pointed out that the Easy Drive unit led by Ms Hammond was seeing a rapidly declining loan book and could no longer support a team of three staff. He recommended a financial review be conducted with a view to a possible restructuring which could lead to one or more members of the team being made redundant. While it was agreed there would be a business review of Easy Drive, during following meetings it was repeatedly stated by Mr Porter and Mr Earle that the outcome of that review was to be termination of Ms Hammond's employment. While staff were to be told the process would involve staff feedback Mr Porter and Mr Earle had already agreed on Ms Hammond's removal. To their and Ms Baxter's delight Ms Hammond applied for a position at FinancePoint two weeks before the restructuring programme was to be commenced. Mr McAuley witnessed discussions between Mr Earle and Ms Baxter about the sort of reference to be given to FinancePoint. Mr Earle was eager it should be positive, explaining it would be a better outcome than making Ms Hammond redundant. Mr McAuley does not know why Mr Porter displayed such animosity towards Ms Hammond. But within months of Ms Hammond joining Baywide it was clear that Mr Earle, Mr Porter and Ms Baxter wanted Ms Hammond out of Baywide.

[62] In relation to Ms Gooding, Mr McAuley said that 12 months prior to her departure from NZCU Baywide he had witnessed growing tension between Ms Gooding and Mr Porter. On several occasions Mr Earle and Mr Porter appeared to contradict Ms Gooding's advice on marketing. When this occurred he sensed it was more about ensuring that the ideas were seen to come from Mr Earle or Mr Porter rather than from

Ms Gooding. Afterwards, Mr Earle and Mr Porter would complain about Ms Gooding being obstructive.

[63] Speaking of Ms Hammond's time at NZCU Baywide Mr McAuley said that he never heard a problem about her work. He did witness times when she seemed to know more about the legal and compliance requirements for lending than Mr Earle, Mr Porter and Ms Baxter. He described Ms Hammond as having an open and straight style. Her previous lending industry experience, qualifications (she was the only person at NZCU Baywide who was a qualified financial adviser) and her strong intellect meant at times he witnessed her having to "manage upwards". The clearest example of this was Ms Hammond's efforts to grow the personal lending business. Mr McAuley's observation was that Mr Porter did not want Ms Hammond's ideas to be seen as credible or good as it might leave people wondering why Mr Porter had not thought of them. Compared to other team leaders and managers at NZCU Baywide Mr McAuley found Ms Hammond to be more aware of legal, compliance and procedural issues. Based on conversations with her she also appeared to have a stronger understanding of the financial drivers affecting NZCU Baywide. The ideas Ms Hammond put forward for growing the personal lending book were innovative and well-thought out. Mr McAuley does not know why Mr Earle and Mr Porter did not embrace the ideas or at least explore them as personal lending at Baywide continued to decline.

[64] Mr McAuley described Ms Hammond and Ms Gooding as displaying a level of intellect and business knowledge which in his opinion seemed stronger than their respective managers (Julie Baxter and Grant Porter). They were "both bright and experienced in their respective fields", demonstrating a strong sense of right and wrong together with a genuine desire to improve NZCU Baywide. When these qualities were demonstrated, as with Ms Hammond's and Ms Gooding's ideas to re-engage the car-dealers or to expand the use of "easy" loans, he witnessed Mr Porter exert his authority to shut them down. This would include talking over them or using extreme and illogical examples to contradict their recommendations.

[65] In early April 2012 Mr McAuley was told by staff of a leaving party held the preceding weekend for Ms Gooding. He was led to understand that approximately five people from the NZCU Baywide Hastings office had attended the occasion. This information was given to him in confidence as the three persons who spoke to him worried there might be reprisals if Mr Earle or Mr Porter found out about the party. As the party was outside office hours and about cheering up a friend Mr McAuley saw no need to raise the matter with Mr Earle. He knew Ms Gooding was the only person in her family with a job and she had three children plus a partner to support along with a mortgage. So he was pleased to hear friends had done something for her given the emotional and financial pressure she was under finding another job.

[66] Mr McAuley said he was confused by the hypocrisy over the words iced on the cake. The cake was set out in the new NZCU look. As Marketing Manager Ms Gooding had been the driving force and project manager for the rebranding. That rebranding was her project and Mr McAuley was aware of the challenges she had faced in trying to persuade six other credit unions to agree on one standard. Everyone he had spoken to or heard speaking agreed the rebrand was an enormous step forward and a significant achievement for Ms Gooding.

[67] Mr McAuley said the decoration on the cake was, in his opinion, an ironic statement of how someone who had done so much for NZCU Baywide had been treated. The words on the cake could be broken into two aspects, being the intended message and

secondly, the specific swear words. As to the intended message, Ms Gooding had been passionate about NZCU Baywide and doing the right thing by its members. Her termination had been hard for her and her friends at Baywide to accept. Mr McAuley therefore understood the message being conveyed on the cake was intended to give Ms Gooding strength. As to the use of the particular swear words, he had heard Mr Earle, Mr Porter and Ms Baxter use these words. He had also sat in the lunchroom at NZCU Baywide and heard other staff use these words too. The “F” word was commonly used throughout NZCU Baywide. In this context the swear words and in particular the “C” word on the cake was in his opinion a very personal connection between Ms Hammond and Ms Gooding. He would have been surprised if these two women whom he described as bright and independent had not used swear words. Swearing and blue jokes were very much part of the chemistry he saw between them.

[68] Late in the morning of 12 April 2012 Mr McAuley was called to an urgent meeting with Grant Porter, Julie Baxter and Louise Alexandra. Mr Earle, then in the South Island, participated by teleconference. Mr Porter explained a photograph of a cake made by Ms Hammond for Ms Gooding had appeared on Facebook. The cake had been lettered with offensive words. During what Mr McAuley described as an emotional tirade Mr Porter expressed moral offence at the cake and wanted to tell everyone what an awful person Ms Hammond was. He said NZCU Baywide should let other employers know the sort of person Ms Hammond was so they would not employ her. Mr McAuley also spoke, mentioning he had recently read an article by the Institute of Chartered Accountants of England and Wales about Facebook privacy which had stressed the complexity of privacy issues in this area. He said in his opinion NZCU Baywide ran the risk of receiving adverse media attention. Mr Porter said he did not care as NZCU Baywide was morally right to tell people what Ms Hammond had done.

[69] Mr McAuley asked what the Facebook privacy settings were. Ms Alexandra advised access to Ms Hammond’s Facebook page was restricted to friends only and Ms Alexandra had not been able to see the photograph. Mr McAuley responded the photograph was private, had nothing to do with Baywide and should be ignored lest Ms Hammond’s privacy rights were breached. Mr Porter said somebody could hack into Ms Hammond’s account and get the photograph and it would then be public. Mr McAuley told the Tribunal that because Mr Porter was emotionally excited and talking over everybody the concerns expressed by him (Mr McAuley) did not appear to be heard. He repeated his views about breaching Ms Hammond’s privacy and said legal advice should be obtained before anything was done. Mr Earle agreed with this recommendation and said a copy of the photograph was required. Mr Porter said he would “sort it out” and get a copy of the photograph.

[70] This was the end of Mr McAuley’s involvement in the actions subsequently taken in relation to Ms Hammond and in relation to Ms Edmondson. He was deliberately excluded from future meetings or not given accurate accounts of what had happened. As the person responsible for risk and legal compliance this surprised Mr McAuley but when he raised the subject Mr Earle would initially be defensive and then aggressive.

[71] On 13 April 2012 Mr McAuley received (as did all staff at NZCU Baywide) Mr Earle’s email about Ms Hammond and the posting on Facebook. Mr McAuley was surprised at the appearance of the email as there had been no discussion with the executive team of which he had been aware.

[72] Given that neither Ms Hammond nor Ms Gooding were working at NZCU Baywide when the cake was made or when the events of 12 April 2012 occurred and further

given the cake was to cheer up Ms Gooding and that the photograph was restricted to “friends only” on Facebook, Mr McAuley was of the opinion no commercial or legal reason existed for Mr Earle or Mr Porter to take action against Ms Hammond. The fact that the actions of Mr Earle and Mr Porter were concealed from Mr McAuley leads him to believe they knew that he would question them and if necessary, raise his concerns with the Board.

[73] Mr McAuley also believes the actions taken against Ms Hammond were driven by personal malice. That view is based on what he described as the personal ferocity and aggressiveness he witnessed being displayed by Mr Porter when talking about Ms Hammond.

[74] At a meeting of the executive team following 12 April 2012 Ms Baxter gave an update of how talks with FinancePoint were going with a view to having that company sack Ms Hammond. Ms Baxter reported she was struggling to get agreement from FinancePoint to remove Ms Hammond under the 90 day provision. Mr Earle then suggested NZCU Baywide stop doing business with FinancePoint until Ms Hammond was removed. Ms Baxter appeared uncomfortable with this approach but acknowledged it would apply pressure to FinancePoint. While at the time there was also discussion about the terminal illness of Mr Tonge, this did not seem to be a concern. The focus was on terminating Ms Hammond’s employment with FinancePoint. Mr McAuley said there was no commercial risk to NZCU Baywide as all credit decisions were made by it, not by Ms Hammond. His sense was that the objective was more about hurting Ms Hammond than obtaining any commercial benefit for NZCU Baywide.

[75] In cross-examination Mr McAuley was challenged on a number of key points. In particular it was put to him he did not attend any meeting on 12 April 2012 and that both Mr Earle and Mr Porter would give evidence directly contradicting not only Mr McAuley’s account but also his views and opinions. However, Mr McAuley did not concede to being mistaken on any of the points put to him.

The evidence of Ms Sharon Taylor

[76] Ms Taylor gave evidence of attending a lunch meeting at which an employee of NZCU Baywide told those at the table about the cake and its posting on Ms Hammond’s Facebook page. This employee led everyone to believe (erroneously) that Ms Hammond had been fired from NZCU Baywide as a consequence of this action. Because this evidence is very much on the periphery of the core issues in the case we do not intend addressing it or the evidence called by NZCU Baywide in rebuttal.

THE EVIDENCE FOR NZCU BAYWIDE

[77] NZCU Baywide called five witnesses. In the interests of brevity we will not address the evidence given by Ms KA McKay and of Ms A Mason as their evidence is not directly relevant to the issues we must decide. That being so we provide a summary of the evidence given by Ms Alexandra, Mr Porter and Mr Earle. While a witness statement by Ms Baxter was provided, NZCU Baywide ultimately elected not to call her to give evidence.

The evidence of Louise Alexandra

[78] Ms Alexandra has been the Human Resources Manager at NZCU Baywide since January 2010. She holds a degree in human resources and has worked in the HR field for five years. On 12 April 2012 Ms McKay drew her attention to the fact that a picture of

a cake had appeared on Ms Hammond's Facebook page, the cake being iced with words which Ms McKay found offensive. At Ms Alexandra's request, Ms McKay attempted to access Ms Hammond's Facebook page but could not as she had been "de-friended". Ms Alexandra then reported the circumstances to Mr Porter along with the fact that staff were talking about the Facebook post. Mr Porter said words to the effect that the situation was very concerning. Ms Alexandra told him she would do what she could to get a photograph of the cake.

[79] Ms Alexandra returned to her office and logged onto Facebook through her own Facebook account. She noted an NZCU Baywide employee (Hayley Edmondson) who worked in the contact centre was one of Ms Hammond's Facebook friends.

[80] Ms Alexandra then approached Ms Edmondson and asked that she meet Ms Alexandra in Ms Alexandra's office. There she asked Ms Edmondson if she had seen Ms Hammond's Facebook cake. Ms Edmondson replied she did not know what Ms Alexandra was referring to. Ms Alexandra explained she had been informed by another staff member that Ms Hammond had made a cake iced with Baywide's logo and colours along with swear words. As Ms Hammond had de-friended that staff member Ms Alexandra had been unable to access the photograph. Ms Alexandra went on to say she had looked at Ms Hammond's Facebook friend list and identified that Ms Edmondson was the only NZCU Baywide staff member on that list. Ms Alexandra told Ms Edmondson she wanted to get a copy of the photograph of the cake and NZCU Baywide needed to decide what action, if any, was to be taken against Ms Hammond.

[81] Ms Alexandra further told Ms Edmondson the language on the cake was obscene, very offensive and that it could be defamatory of Baywide. It was not appropriate that the photograph be available on the internet given it was damaging to the image of NZCU Baywide. Ms Alexandra noted staff were already talking about the cake and some staff were upset and angry.

[82] Ms Alexandra asked Ms Edmondson if she could log onto her (Ms Edmondson's) Facebook page on Ms Alexandra's computer and thereby access Ms Hammond's page so a copy of the photograph could be taken. Ms Edmondson replied she did not feel comfortable doing this. Ms Alexandra explained what Ms Hammond had done was wrong, that Baywide did not deserve such abuse and appealed to Ms Edmondson's "leadership skills and good judgment".

[83] Ms Alexandra acknowledges that Ms Edmondson was "hesitant and not particularly forthcoming". Ms Alexandra told Ms Edmondson the situation nevertheless had to be addressed by management with Ms Hammond and that no one need know the photograph had been accessed via Ms Edmondson. Ms Alexandra had to assure Ms Edmondson of this several times. She did not mention anything about contractual or other legal obligations at this time, including NZCU Baywide's Whistle Blower policy. Ms Alexandra denies threatening Ms Edmondson. She simply pleaded with her to do "the right thing".

[84] Ms Edmondson then agreed to do as requested, sat at Ms Alexandra's desk and logged onto Facebook. After Ms Edmondson had gained access to Ms Hammond's Facebook page Ms Alexandra performed the screen print function and pasted the photograph into a blank Word document. She then thanked Ms Edmondson who returned to work.

[85] Ms Alexandra immediately forwarded to Mr Porter a screenshot of the Facebook page (containing a picture of the cake). The email is dated 12 April 2012 and timed at 3:45pm. The email stated:

Hi there

Here you go

What do we want to do with this is the next question ...?

[86] Ms Alexandra then went to Mr Porter's office to discuss the situation. Ms Alexandra felt the cake was a personal attack. Both she and Mr Porter felt NZCU Baywide was being attacked as an organisation and that the information was out in the open. Staff were talking about it and control of the information had been lost with it being on Facebook. They believed the photograph could be readily viewed and easily circulated by Ms Hammond's Facebook friends. They took the view Ms Hammond's termination date as NZCU Baywide employee had not expired and that she was in breach of her employment duties. Ms Alexandra and Mr Porter agreed it was appropriate to address all of these issues.

[87] Ms Alexandra returned to her office and took the following steps:

[87.1] She telephoned a Ms Hayes of the Red Consulting Group, a recruitment agency based in Havelock and operating in the Hawke's Bay district. She told Ms Hayes that NZCU Baywide had a problem with a former employee (Ms Hammond), that Ms Hammond had done something very offensive to NZCU Baywide after leaving its employment and that Ms Alexandra would caution any employer against employing her. That discussion was followed by an email from Ms Alexandra to Red Consulting Group. The email was sent on 12 April 2012 and timed at 4:33pm. The subject line was "Watch list" and the attachment was a screenshot of the cake in question.

[87.2] Ms Alexandra then telephoned Melanie Grieg at Adecco, another recruitment agency which operates not only in the Hawke's Bay area but throughout New Zealand. Ms Alexandra's discussion with Ms Grieg was along the same lines as the discussion with Ms Hayes of Red Consulting Group. The telephone discussion was again followed up by an email (with the screenshot attached) from Ms Alexandra to Ms Grieg dated 12 April 2012 timed at 4:43pm. The subject line was "Further to our conversation". The text of the email read:

Further to our conversation I wanted to send this through to you regarding Karen Hammond. I would advise any employer caution regarding employing her, further to her posting this on Facebook.

[87.3] Ms Alexandra thereafter contacted NZCU Baywide's human resources adviser, Grow HR. There was an initial telephone discussion along the same lines as with Red Consulting Group and Adecco followed by an email sent on 12 April 2012 at 4:55pm. The subject line was "Further to my conversation" and the text of the email was identical to that sent to Adecco. The screenshot was attached.

[87.4] Ms Alexandra then telephoned Ms S Giddens at Able Personnel, another recruitment agency based in Hawke's Bay and operating in Hastings and Napier. The initial telephone call was followed by an email (with the screenshot attached) from Ms Alexandra dated 12 April 2012 timed at 5:01pm with the subject line "Further to conversation". The text read:

Further to our conversation I wanted to send this through to you regarding Karen Hammond. She has a background in banking and mortgage brokering – ex Westpac and Mortgages and More. We did all the checks prior to employing Karen, but it seems this wasn't enough. She simply didn't fit with our culture.

I would advise any employer caution regarding employing her, further to her posting this on Facebook.

[88] In her evidence in chief Ms Alexandra said she understood from her discussions with Mr Porter she was authorised to contact the recruitment agencies as detailed.

[89] On either 12 or 13 April 2012 Ms Alexandra drafted the email subsequently sent to NZCU Baywide employees on 13 April 2012 under the signature of Mr Earle.

[90] Ms Alexandra accepts that at a book club meeting held on the evening of 12 April 2012 she raised “the photograph of the cake”. The issue was at the top of her mind, she felt “personally bruised” by the content of the post and angry that Ms Hammond had done “such a thing”. She added, however, she did not attend the book club evening as an NZCU Baywide representative or in her capacity as an NZCU Baywide employee.

[91] Ms Alexandra acknowledges that on 13 April 2012 Ms Edmondson came to her office and asked to speak with her. Ms Edmondson was visibly upset about the events of the previous day and in particular Ms Alexandra's request that Ms Edmondson log on to her personal Facebook page to get the photograph from Ms Hammond's page. Ms Alexandra told Ms Edmondson she was sorry for making Ms Edmondson feel that way and reassured her that she (Ms Edmondson) had exercised good judgment and a strong sense of right and wrong. Ms Alexandra told Ms Edmondson the photograph had been given to Mr Porter but he did not know from where it had come. Ms Alexandra apologised to Ms Edmondson for upsetting her. Ms Alexandra's intention was simply to do what was right for Baywide. Ms Alexandra denies bullying Ms Edmondson into providing access to the photograph of the cake.

[92] At the time Ms Alexandra believed the photograph was in the public domain and that Ms Hammond was in breach of her employment obligations. Nevertheless she told the Tribunal she accepts the events have proven “a learning experience for me and the Baywide organisation”. She further accepts she could have done things better and has been counselled. If she had the time again she would not have sent the screenshot to the recruitment agencies. Rather she would have approached Ms Hammond directly as “she was after all, still, effectively, on the payroll”. Ms Alexandra also maintains she did not bully or coerce Ms Edmondson in any manner whatsoever but accepts if she had her time again, she would have approached Ms Hammond in the first instance. Similarly she would not have mentioned the Facebook post at the book club evening.

[93] Because of its importance one of the key passages in Ms Alexandra's evidence warrants reproduction in full:

Ms Hammond:

No I'm sorry but you stated that you felt that I was unapproachable and that you were scared of me so you said you could not phone me, yet you found that you could send it out to your employment specialist as well as numerous recruitment agencies with slanderous comments about myself advising people not to employ me and you didn't fear how I'd react to that?

Ms Alexandra:

I don't think I gave great thought to the repercussions, I certainly didn't give thought to the fact that we could end up here ... By handling the situation the way we did it was then essentially up

to Grant [Porter] and Gavin [Earle] and Julie [Baxter] to handle the situation as executive managers, it then allowed me to not have to deal with it.

Ms Hammond:

So were you instructed to do this?

Ms Alexandra:

I was asked by Grant to send the information on to the recruitment agencies.

...

Tribunal:

So what did Grant ask you to send to the agencies?

Ms Alexandra:

Grant asked me to ring the recruitment agencies, he said I had a good relationship with the recruitment agencies in town, that I knew them and that I was to ring them and caution them against employing Karen essentially because of what, because of the cake, and he asked me to send a screenshot to them of the cake so that they could understand what I was talking about.

Ms Hammond:

Did you question Grant? Did you feel at any stage that what you had been asked was wrong?

Ms Alexandra:

Yes.

Ms Hammond:

Did you question Grant?

Ms Alexandra:

Yes.

Ms Hammond:

And the response was just do it?

Ms Alexandra:

I don't recall his words but he said – I can't recall the exact words Karen but he said that I was to do it. I felt uncomfortable about that, I did it anyway under the instruction of a manager.

...

Tribunal:

You then went to his [Mr Porter's] office and had a discussion. In that discussion you were instructed to do certain things. What I'm asking you is, if you can, to relay to us what Mr Porter actually said to you when giving you those instructions. What were his words?

Ms Alexandra:

The first thing he wanted to do was talk to Gavin. I don't recall the exact words but the instruction was to contact the recruitment agencies in Hawke's Bay that I had a good relationship with. The words to the effect were that Hawke's Bay was a small town. There's a small pool of candidates when recruiting and it was important that the recruitment agencies be aware of, I guess the, the – Karen's character, for want of a better word. I don't think that's exactly what he said but that was the inference and we cautioned against employing her because of what had happened with us.

Tribunal:

When you were given that instruction what consequence did you think would follow if you carried out this instruction?

Ms Alexandra:

Look, I'm somewhat embarrassed to say I didn't give too much thought to the consequence. And I regret that ...

...

Tribunal:

We probably need assistance to understand why someone from [your] background [Bachelor's Degree in HR and five years work experience] didn't give thought to the consequences of ringing an employment agency, let alone three, and conveying this information that you were instructed to do and not appreciate the consequences?

Ms Alexandra:

That's fair.

Tribunal:

Surely it was to be understood that in the Hawke's Bay area Ms Hammond was not to be employed?

Ms Alexandra:

That was Grant's intention.

[94] Although there is a degree of repetition we highlight the following points from this extract:

[94.1] Ms Alexandra did not ask Ms Hammond to provide a picture of the cake or to provide a screenshot of the Facebook page because she (Ms Alexandra) was "scared" of Ms Hammond and so went about obtaining the photograph in an indirect way.

[94.2] Mr Porter asked her to telephone the HR agencies to caution them against employing Ms Hammond and to also send them a screenshot of the Facebook page so that they could see what Ms Alexandra's phone call was about. He instructed Ms Alexandra to "do it today". It was Mr Porter's intention that Ms Hammond not find employment.

[94.3] Ms Alexandra did not give "great thought" to the repercussions of her contacting the four HR firms warning them against employing Ms Hammond.

[94.4] Ms Alexandra had felt uncomfortable carrying out Mr Porter's instructions. When she questioned Mr Porter she was told to "do it". This she did, but under instruction. She accepts she thereby caused significant damage to NZCU Baywide.

[94.5] She did not think of challenging Mr Porter or relying on the NZCU Baywide policy "Whistleblowing – Misconduct or Malpractice within the Workplace", a policy which encourages NZCU Baywide employees to report conduct which is illegal, unethical or which may cause loss to NZCU Baywide or be otherwise detrimental to its interests. She had nevertheless cited this policy to Ms Edmondson earlier in the day when persuading her to allow Ms Alexandra to circumvent the privacy settings on Ms Hammond's Facebook.

[94.6] She had not appreciated the gravity of the situation.

[94.7] While asserting she had not felt bullied or threatened, she said that she felt under pressure and compelled to carry out Mr Porter's instruction.

[94.8] On 12 April 2012, noting that Ms Edmondson was hesitant and not particularly forthcoming, Ms Alexandra had not offered Ms Edmondson the option of saying "No" to the request that she access her Facebook page.

[94.9] There was no evidence to suggest Ms Hammond or any of her Facebook "friends" had disseminated the photograph and by its own actions NZCU Baywide had turned events into a "storm in a teacup".

The evidence of Grant Porter

[95] Mr Porter has been Chief Operating Officer at NZCU Baywide since 2006.

[96] In April 2012 it was reported to him by Ms Alexandra that staff were talking about a picture of a cake posted on Ms Hammond's Facebook page. It was believed the cake was iced with words offensive of NZCU Baywide. Mr Porter was told Ms Alexandra would obtain a photograph of the cake. Later that day he received an email from her attaching the photograph and enquiring what was to be done. On examining the photograph Mr Porter reached the view it was offensive to NZCU Baywide as an organisation and that any staff seeing the picture would most likely feel insulted and offended. A short time later Ms Alexandra saw Mr Porter in his office and asked if she could send the document to a HR firm called "Red Consulting". At the time Mr Porter understood the document was in the public domain and had no objection to Ms Alexandra passing it on.

[97] That afternoon Mr Porter and Ms Alexandra had a telephone discussion with Mr Gavin Earle, the CEO, who was then on a business trip to the South Island. Mr McAuley, the Chief Financial Officer, did not participate in this teleconference. Mr Porter explained the content of the Facebook post and reported the advice he had received from Ms Alexandra and Ms Baxter that the photograph was being discussed by staff, a number of whom were disgusted and wondering what Baywide was going to do about it. Mr Earle said he would send an email to all staff and asked Ms Alexandra to prepare a draft.

[98] Mr Porter was aware Ms Hammond had left Baywide to work at FinancePoint, a company with which NZCU Baywide then (and now) has a commercial relationship. Mr Porter was not happy having Ms Hammond involved in any lending applications from FinancePoint as he had now lost trust and confidence in her. He said she was "so openly septic" about NZCU Baywide he could not see how NZCU Baywide could rely on loan applications prepared by her.

[99] Following a discussion with Ms Baxter a telephone conference call was arranged for 17 April 2012 involving Mr Porter, Ms Baxter and Mr Tonge of FinancePoint. In this discussion it was explained to Mr Tonge that Mr Porter and Ms Baxter no longer trusted Ms Hammond. Mr Tonge was advised he could either do the lending work himself or alternatively (given the severity of his ill-health), send the raw data to NZCU Baywide and Baywide would process it. Mr Porter said at no time did he say NZCU Baywide would cut off FinancePoint.

[100] During the conference call of 17 April 2012 Mr Tonge was offered financial support to obtain professional advice about Ms Hammond's employment with FinancePoint. This was intended, in addition to the loan processing support offered by NZCU Baywide,

to help Mr Tonge “manage the situation”, acknowledging that Mr Tonge had said Ms Hammond’s inability to process loans through Baywide would cause FinancePoint real difficulty. Mr Porter and Ms Baxter invited Mr Tonge to seek advice and to consider his options regarding Ms Hammond’s employment and specifically his ability to rely on the 90 day trial period as a means of terminating her employment.

[101] When Mr Tonge reported by email dated 20 April 2012 that independent advice was he could not terminate Ms Hammond’s employment, Mr Porter and Ms Baxter replied the same day, underlining they would not allow Ms Hammond to be involved in referred lending to NZCU Baywide. They reiterated their view that Mr Tonge could “terminate” Ms Hammond’s employment within the 90 day trial period. The text of their email is set out above at para [51].

[102] When the Privacy Commissioner wrote to NZCU Baywide on 27 June 2012 giving notice of Ms Hammond’s complaint Mr Porter was asked by Mr Earle to respond. This he did by way of letter dated 5 July 2012. It is not intended to reproduce the terms of that letter. It is sufficient to note that Mr Porter did not make reference to Ms Alexandra’s contact with the four recruitment agencies on 12 April 2012. Rather he mentioned “a discussion” with a [single] recruitment agency (Red Consulting Group). Mr Porter claims it was not until the first or second week in June 2012 he became aware (through Mr McAuley) that the photograph had been sent to a total of four HR agencies. The letter to the Privacy Commissioner stated:

There was a discussion with a recruitment agency that included Karen and her attitude to potential employers. This discussion lead to the forwarding of the Facebook photo, as forwarded to us, to assist the discussion.

[103] The reference to “as forwarded to us” is a reference to a statement earlier in Mr Porter’s letter that the photograph had been obtained when a staff member forwarded the Facebook photo to management:

The photo was not withdrawn and subsequently a staff member forwarded the Facebook photo to management.

[104] This assertion is less than accurate. Ms Edmondson did not forward the Facebook photo to management. This much is clear from the evidence of both Ms Edmondson and Ms Alexandra.

[105] By email dated 30 July 2012 the investigating officer with the Office of the Privacy Commissioner asked for further details about the circumstances in which the photograph had been provided to FinancePoint and to Red Consulting Group:

I would be grateful if NZCU Baywide could provide me with further details around the circumstances in which:

1. The photograph was provided to Ms Hammond’s current employer; and
2. The photograph was forwarded to Red Consulting Group.

In particular, it would be of assistance if you could explain exactly:

- How, in both cases, the discussion about the photograph came about; and
- Why NZCU Baywide provided the photograph to these two parties.

[106] In a reply dated 21 August 2012 Mr Porter continued to assert the information was not personal information and that Ms Hammond had ceased employment with NZCU Baywide at that time. He further asserted it would have been “an extreme business risk” for NZCU Baywide to accept loan applications generated by Ms Hammond for FinancePoint. The photograph was forwarded to assist NZCU Baywide to explain its

position. Mr Porter again did not disclose that on 12 April 2012 Ms Alexandra had made disclosures to four, not one, recruitment agencies. The relevant extracts of the email to the Privacy Commissioner follow:

...

It may be worth remembering that the information forwarded was not personal information held on file and that Karen had ceased employment with us at this time.

...

Given Karen's attitude to NZCU Baywide it would have been an extreme business risk to accept loan applications generated by Karen for FinancePoint. We explained to the principal that we could not accept applications involving Karen in any aspect. He found it difficult to understand why we felt so strongly. This generated a series of discussions, exasperated by his poor health. This ultimately required us to forward the photo to assist explaining our position.

...

We have a close relationship with Red Consulting Group who work with us in the recruitment area. During one of these discussions Karen's leaving was mentioned which naturally involved discussing the Facebook cake photo which highlighted Karen's attitude to us, her previous employer. For a cake of such an extreme nature, involving obscene language, it's hard to describe in words, which lead to the suggestion of the forwarding the picture to Red Consulting.

[107] In a subsequent email to the Privacy Commissioner dated 13 September 2012 Mr Porter continued to assert the photograph had been "shared" with NZCU Baywide. The true circumstances in which the screenshot was obtained via Ms Edmondson were not disclosed to the Privacy Commissioner.

[108] Mr Porter accepts he "could have done better" in checking that the information he provided to the Privacy Commissioner "was more accurate".

[109] Questioned by Ms Hammond and by the Tribunal Mr Porter further stated:

[109.1] He had no reason to suspect Ms Hammond's integrity. He was unable to quantify the commercial risk Ms Hammond was said to pose to NZCU Baywide.

[109.2] Contrary to the evidence given by Mr McAuley, he (Mr Porter) did not state at a meeting in late 2011 that Ms Hammond "had to go". He did not ask Ms Alexandra to telephone the recruitment agencies in the Hawke's Bay area to caution them against employing Ms Hammond. Nor did he request her to send a screenshot to these agencies. Rather, Ms Alexandra reported to him she had already spoken to Red Consulting Group and asked whether he (Mr Porter) thought she should send them a picture of the cake. He had replied that as the picture was in the public domain he could see no reason why not and that she should go ahead. He did not learn until much later Ms Alexandra had similarly approached three other HR agencies, including Grow HR.

[109.3] Mr Porter denied he had instructed Ms Alexandra that she was "to do it today" [ie contact the HR agencies detailed by Ms Alexandra]. Mr Porter said Ms Alexandra's evidence to the contrary was not correct and he had given no such instruction. He maintained this position when asked to comment on Ms Alexandra's evidence that at the time Mr Porter gave his instructions she felt compelled to carry them out and was under pressure:

Tribunal:

She told us that it was from you that she felt under pressure and compelled to carry out your instruction.

Mr Porter:

There was no instruction from myself.

Tribunal:

She said she felt “compelled to carry out your instruction”.

Mr Porter:

Yes there was no instruction.

[109.4] Mr Porter’s account was that Ms Alexandra had been speaking to Red Consulting Group and had mentioned the cake. She had asked Mr Porter if he minded if she sent the photograph to Red Consulting and Mr Porter had said “No, go for it”.

[109.5] When Mr Porter was asked to comment on the evidence given by Ms Alexandra that it was his (Mr Porter’s) intention that Ms Hammond was not to be able to find employment in the Hawke’s Bay area Mr Porter said that he didn’t think the steps were taken to achieve that end:

Definitely not to stop her being employed, but perhaps they [the HR firms] just might be aware of that and do some different questionings, not about stopping her being employed in Hawke’s Bay, nothing along those lines no.

[109.6] Neither Ms Alexandra nor any other member of the executive team drew his attention to the fact the settings on Ms Hammond’s Facebook page allowed only “friends” to access the photograph. He conceded that on 12 and 13 April 2012 he was not in possession of evidence the photograph had been distributed beyond Ms Hammond’s Facebook page.

[109.7] It was never his intention he and Ms Baxter secure the dismissal of Ms Hammond by FinancePoint.

The evidence of Gavin Earle

[110] Mr Earle has been the Chief Executive Officer at NZCU Baywide since September 2006. Only an abbreviated account of his evidence is given here as he was absent from NZCU Baywide at the relevant time and his involvement in events was largely peripheral.

[111] It was Mr Earle who sent to NZCU Baywide staff the email of 13 April 2012, an email which is now accepted to have been in breach of Principle 11. Mr Earle nevertheless said that NZCU Baywide has always taken privacy and its obligations under the Privacy Act very seriously. He added he had been disgusted and highly offended by the Facebook posting and was concerned about the commercial ramifications for the image of NZCU Baywide. Based on what he had been told by Mr Porter and Ms Baxter he assumed the photograph had been widely disseminated via Facebook.

[112] Mr Earle concluded his evidence by stating NZCU Baywide now accepts “responsibility for its part in this matter”. In particular, NZCU Baywide apologises to Ms Hammond for its disclosures to the four recruitment agencies and for the breach of Principle 11 in relation to the email sent by Mr Earle to staff on 13 April 2012.

[113] Questioned by Ms Hammond and by the Tribunal Mr Earle further stated:

[113.1] He did not find it acceptable that the HR manager had asked a member of staff to sign into her Facebook page. Mistakes were made.

[113.2] In relation to the dealings between Mr Porter and Ms Baxter and Mr Tonge of FinancePoint, Mr Earle accepted NZCU Baywide had no business in advising Mr Tonge whether he had grounds to dismiss Ms Hammond.

[113.3] In relation to Mr Earle's belief that the image of the cake had become a public document he did not learn until much later that Ms Alexandra had not been able to access the photograph and for that reason had had to get Ms Edmondson to open her personal Facebook page at Ms Alexandra's desk.

[113.4] Mr Earle did not become aware of the communications (by telephone and email) between Ms Alexandra and the four HR firms on 12 April 2012 until the investigation was commenced by the Privacy Commissioner.

[113.5] In his view the sending of the emails with the screenshot was unacceptable and that the effect was that it would be difficult for Ms Hammond to seek employment through those agencies.

[113.6] In relation to the email dated 20 April 2012 sent by Ms Baxter and Mr Porter to Mr Tonge, Mr Earle accepted that they (Mr Porter and Ms Baxter) were pressing Mr Tonge strongly to dismiss Ms Hammond or, in their words, to terminate her employment.

[113.7] Mr Earle has never had occasion to suspect or doubt the integrity of Ms Hammond.

[113.8] Now being aware the photograph was not in the public domain in the sense of being available to anyone with access to Facebook and that distribution of the photograph has been entirely and exclusively by NZCU Baywide, he accepted it was irrational to press for Ms Hammond's dismissal from FinancePoint on the supposed basis she was a commercial risk.

[113.9] Asked to explain why there were multiple breaches of Principle 11 when NZCU Baywide claimed it has always taken privacy and its obligations under the Privacy Act very seriously, Mr Earle said that clearly some mistakes had been made and the organisation had learnt from those mistakes. In hindsight, it had been disappointing.

ASSESSMENT OF WITNESSES

[114] Although NZCU Baywide admits breaching the Privacy Act in several respects, it denies there was a breach of Principles 1 to 4. It also denies there was an interference (as defined in s 66 of the Privacy Act) with Ms Hammond's privacy. It is therefore necessary that findings of fact be made both for the purpose of determining liability and if established, for the purpose of determining remedies.

[115] While the concessions made by NZCU Baywide in relation to Principle 11 mean there is some common ground, the two sets of witnesses are largely in conflict with each other. It is unavoidable that credibility findings be made.

[116] With little hesitation we have concluded that where there is a conflict between the evidence given by Ms Hammond and her witnesses and the evidence given by the NZCU witnesses, we prefer the evidence of the former. Without exception we found

them to be sincere and genuine individuals and their evidence unrehearsed, direct and frank. Cross-examination served only to highlight these qualities.

[117] By contrast the evidence given by Ms Alexandra and Mr Porter was both defensive and in disarray. We mention here only the key points:

[117.1] Ms Alexandra said she was told by Mr Porter to telephone the HR agencies to caution them against employing Ms Hammond and to also send to them a screenshot of the Facebook page so they could see what Ms Alexandra's phone call was about. Mr Porter had instructed Ms Alexandra to "do it today". It was Mr Porter's intention that Ms Hammond not be employed. Mr Porter denies giving these instructions to Ms Alexandra. His evidence was that a short time after receiving by email the screenshot from Ms Alexandra he was told by Ms Alexandra she had already spoken to Red Consulting Group about Ms Hammond and the cake and asked Mr Porter whether she could send a picture of the cake. Mr Porter, incorrectly believing the picture to be in the public domain, told her he could see no reason not to. He did not know Ms Alexandra had that afternoon spoken to a further three agencies and had sent to all of them a picture of the cake. He did not learn about these other agencies until later when it was mentioned by Mr McAuley.

[117.2] Ms Alexandra said she had felt uncomfortable carrying out Mr Porter's instructions. When she questioned Mr Porter she was told to "do it". This she did, but under instruction. Mr Porter denies such instruction was given.

[117.3] Whereas Ms Alexandra told the Tribunal she felt under pressure and compelled to carry out Mr Porter's instruction, Mr Porter insisted there had been no instruction from him.

[118] Both Ms Alexandra and Mr Porter unrealistically downplayed and minimised the consequences of their actions. Ms Alexandra asserted she did not give "great thought" to the repercussions of her contacting the four HR firms to warn them against employing Ms Hammond. When the Tribunal expressed scepticism given she was a person with a degree in human resources and had five or six years experience in that field, Ms Alexandra said it had been Mr Porter's intention that Ms Hammond was not to be employed in the Hawke's Bay area. Ms Alexandra also downplayed the pressure she had brought to bear on Ms Edmondson to provide access to Ms Hammond's Facebook page. As a young person with just four months at NZCU Baywide, Ms Edmondson was particularly vulnerable when dealing with the HR Manager. On the account given by Ms Edmondson (which we prefer to that given by Ms Alexandra) we accept Ms Edmondson was subjected to unfair pressure, if not bullied, to give NZCU Baywide access to Ms Hammond's Facebook page. Ms Edmondson was made to feel she had no alternative and that her job was under threat. As conceded by Ms Alexandra, she (Ms Edmondson) was never given the option of saying "No", even though it was obvious to Ms Alexandra that Ms Edmondson was "hesitant and not particularly forthcoming".

[119] For his part Mr Porter denied that information was given by Ms Alexandra to the HR agencies for the purpose of ensuring Ms Hammond would not be able to find employment. However, not only is this evidence directly contradicted by Ms Alexandra, it is inherently implausible that Mr Porter should authorise the passing of the information and photograph to Red Consulting Group without such intent being present. We believe this reinforces our favourable finding of credibility in respect of Mr McAuley and his evidence that at a meeting in late 2011 Mr Porter had said Ms Hammond "had to go"

and that Mr McAuley had been shocked at the intensity and vehemence displayed by Mr Porter.

[120] Mr Porter's dealings with Mr Tonge at FinancePoint provide further evidence of Mr Porter's animosity towards Ms Hammond. Mr Porter (together with Ms Baxter) made it clear to Mr Tonge that NZCU Baywide would not do business with FinancePoint if Ms Hammond was involved in the preparation of loan applications. Mr Tonge, described by Mr Porter as suffering cancer and "in a real bad state" and financially "quite up against it", was placed under enormous pressure to "terminate" Ms Hammond's employment or face keeping her on the payroll, unable to carry out any meaningful tasks. In short, through Mr Porter and Ms Baxter, NZCU Baywide made Ms Hammond's position at FinancePoint untenable. In the circumstances the assertion by Mr Porter that "there was no intention of saying [to FinancePoint] get rid of Karen" is unrealistic in the face of the email correspondence in which it is insisted that Mr Tonge could terminate Ms Hammond's employment by relying on the 90 day trial period clause. We simply do not believe Mr Porter's evidence that "the intent was not to maliciously try and attack Karen, to get rid of her".

[121] The evasion and self-exculpatory reconstruction of events which characterised Mr Porter's evidence to the Tribunal echoed his less than fulsome account of events given to the Privacy Commissioner. Even Mr Porter was eventually driven to concede that he "could have done better" in checking that the information he provided to the Privacy Commissioner "was more accurate".

[122] As to Mr Earle's evidence, he claims he was not aware of the terms of the communications between Mr Porter and Ms Baxter on the one hand and Mr Tonge at FinancePoint on the other. In particular Mr Earle said he was unaware of the attempts by Mr Porter and Ms Baxter to make the employment of Ms Hammond by FinancePoint untenable. Given that Mr Porter and Ms Baxter were members of a small executive team of four persons at NZCU Baywide, we find Mr Earle's assertion surprising to say the least. We similarly found surprising his assertion that it was not until sometime later he learnt the photograph of the cake had only been accessed by NZCU Baywide by using Ms Edmondson to circumvent the privacy setting on Ms Hammond's Facebook page. On Mr Earle's account Mr Porter, Ms Baxter and Ms Alexandra were remarkably economical in what he (Mr Earle) was told about events.

[123] The account given by Mr McAuley is very different. He said that at the teleconference on 12 April 2012 with Mr Earle, Mr Porter had been emotional and wanted to tell everyone what an awful person Ms Hammond was and that NZCU Baywide should let other employers know so that they would not employ her. In the same teleconference Mr McAuley had asked about the privacy settings on Ms Hammond's Facebook page and Ms Alexandra had responded that access was restricted to friends only and that Ms Alexandra had not been able to see the photograph. Mr Porter had said someone should hack into the account to get the photograph and then it would be public. Mr Earle had agreed with this course of action.

[124] Mr McAuley was cross-examined at some length over his recollection of events but his evidence did not change. For the reasons given we are of the view that the evidence of Ms Alexandra and Mr Porter is in sharp conflict and Mr Earle's account of the teleconference implies either that he was misled by Mr Porter and Ms Alexandra or that his account is incomplete. We prefer the account given by Mr McAuley.

[125] Questioned by the Tribunal Mr Earle conceded he did not condone the email dated 20 April 2012 sent by Mr Porter and Ms Baxter to Mr Tonge urging termination of Ms

Hammond's employment by FinancePoint and agreed it was none of NZCU Baywide's business whether Mr Tonge had grounds to dismiss Ms Hammond. He further conceded dissemination of the screenshot of the cake to the four HR agencies had been done without his authority.

[126] Concessions of this kind, had they been made not under questioning by Ms Hammond and by the Tribunal but by Mr Earle in his evidence in chief, may have added an element of sincerity to the apology read by him from his written statement of evidence. But that apology was delivered without any detectable note of sincerity. The Tribunal was struck by the somewhat mechanical manner in which it was given. Nor did it sit comfortably with Mr Earle's assertion that Ms Hammond's position at FinancePoint posed a commercial risk to NZCU Baywide, an assertion made also by Mr Porter. Yet when challenged, both witnesses acknowledged they had never had cause to suspect or doubt Ms Hammond's integrity. Mr Earle was finally driven to concede it had been irrational for NZCU Baywide to press for Ms Hammond's dismissal from FinancePoint on the supposed basis she was a commercial risk.

[127] For the reasons given we conclude the case is to be determined on the facts established by the evidence of Ms Hammond and of her witnesses. The evidence of the witnesses called by NZCU Baywide, on the other hand, is to be treated with caution at best.

[128] We address now the legal issues.

THE LEGAL ISSUES

[129] Although the context of the interferences with privacy alleged by Ms Hammond includes the posting of a picture of a cake on a Facebook page, the application of the information privacy principles is nevertheless a straightforward process. The facts do not call for observations to be made about the application of those principles in the context of social networking sites. Contrast *Senior v Police* [2013] NZFLR 356 (HC) and *Hook v Stream Group (NZ) Pty Ltd* [2013] NZEmpC 188 at [29] to [37]. A further point to be made is that the manner in which the case has been framed by the parties has made it unnecessary for the Tribunal to consider the possible application of the New Zealand Bill of Rights Act 1990, particularly the s 14 protection of "the freedom to seek, receive, and impart information and opinions *of any kind in any form*" [emphasis added].

[130] The legal issues fall into two distinct categories. First, those relating to the alleged breaches of the "collection" principles, being Principles 1 to 4. Second, those relating to the alleged breaches of the "disclosure" principle, being Principle 11. We address the two categories separately.

Whether a breach of the collection principles – Principles 1 to 4

[131] The closing submissions for NZCU Baywide conceded that by downloading a screenshot of the cake from Ms Hammond's Facebook page personal information about Ms Hammond was collected. It was also conceded the screenshot was not obtained directly from Ms Hammond. It was accepted that with Ms Hammond's Facebook page security settings in place, her page was not accessible to the public at large.

[132] However, it was contended (in the context of Principle 1) that the information had been collected for a lawful purpose connected with a function or activity of NZCU Baywide, including the need to protect its commercial reputation and to address

potential misconduct by an employee. It was argued Ms Hammond was on garden leave at the time and owed NZCU Baywide a duty of fidelity.

[133] In relation to Principle 2 it was claimed NZCU Baywide held a belief on reasonable grounds Ms Hammond had authorised the collection of the information. As to Principle 3 it was said NZCU Baywide did not have to comply with the requirement that information be collected directly from Ms Hammond as it held one of the beliefs listed in Principle 3 subcl (4). In relation to Principle 4 the defence was that the information had not been collected by means which were unfair or which intruded to an unreasonable extent on Ms Hammond's personal affairs.

[134] We do not intend exploring these issues for the simple reason that even if all issues are determined in Ms Hammond's favour, her claim under Principles 1 to 4 is nevertheless bound to fail. The reason is that she has not established to the probability standard a causal connection between the alleged breaches of Principles 1 to 4 and the forms of harm listed in s 66(1)(b)(i) to (iii) of the Privacy Act. Unless such causal connection is established, the claim must fail. See *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33] and [34].

[135] In our view this case falls to be determined under Principle 11 alone.

Whether a breach of the disclosure limitation principle – Principle 11

[136] Principle 11 stipulates that personal information should not be disclosed for purposes other than those for which the information was obtained:

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.

[137] As to the burden of proof, s 87 of the Act 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.

[138] The application of Principle 11 was summarised in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [190] as follows:

[190] 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:

[190.1] Has there been a disclosure of personal information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.

[190.2] 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.

[190.3] 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.

[190.4] 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.

[191] 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].

[139] In the present case NZCU Baywide formally concedes that it breached Principle 11 in the following respects:

[139.1] On 12 April 2012 by:

[139.1.1] Telephoning representatives of Red Consulting Group, Able Personnel and Adecco about Ms Hammond's Facebook post.

[139.1.2] Sending an email to each of Able Personnel and Adecco attaching a copy of the Facebook post, along with a caution against employing Ms Hammond.

[139.1.3] Sending an email to Red Consulting Group attaching a copy of the Facebook post.

[139.1.4] Sending an email to Grow HR attaching a copy of the Facebook post; and

[139.2] On 13 April 2012 by the Chief Executive Office (Mr Earle) forwarding an email to NZCU Baywide staff in relation to Ms Hammond's Facebook post, Ms Hammond's resignation from employment at NZCU Baywide and issues arising from that.

[140] It is submitted for NZCU Baywide there was no breach of Principle 11 when Mr Tonge of FinancePoint was cautioned against employing Ms Hammond and when he was provided with a screenshot of the cake. This submission is based on the fact that Mr Tonge had seen the cake on 31 March 2012 prior to it being taken to the private party.

[141] The difficulty with this submission is that the exceptions in Principle 11 do not include the circumstance where the information disclosed is already known to the recipient. The focus of Principle 11 is on the **disclosure** by the **agency**, not on what may or may not already be known by the recipient. It is difficult to see how Principle 11 could provide effective protection against the disclosure of personal information if that protection is made dependent on the state of knowledge (or absence of knowledge) on the part of the receiving agency or person, a state of knowledge which may be of uncertain degree and in any event, difficult to establish. It is unlikely that Parliament intended that the operation of Principle 11 turn on the subjective state of mind of the recipient of the information.

[142] We accordingly conclude that the admitted disclosure to Mr Tonge must be added to the list of breaches already conceded by NZCU Baywide.

[143] There is a question whether the admitted further disclosure by Ms Alexandra at her book club meeting on the evening of 12 April 2012 is to be treated as the actions of NZCU Baywide. In this regard Ms Alexandra has been disowned, the disclosure is said to have been made in her private time at a private meeting.

[144] Regrettable though Ms Alexandra's actions were, we see no need on the facts to determine whether NZCU Baywide is vicariously liable. We doubt whether a finding one way or the other will affect the substantive outcome of this part of the case.

[145] We turn now to the third step in the Principle 11 analysis, that is to a consideration whether the disclosures admitted to by NZCU Baywide as well as the disclosure to Mr Tonge constituted an interference with Ms Hammond's privacy as defined in s 66(1) of the Act. That is, whether Ms Hammond has established one of the forms of actual or potential harm contemplated by s 66(1)(b). The burden of proof rests on her.

Whether an interference with the privacy of Ms Hammond has been established

[146] The term "interference with privacy" is defined in s 66. Only subs (1) is relevant on the facts:

66 Interference with privacy

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

- (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

[147] This provision requires Ms Hammond to establish:

[147.1] That in relation to Ms Hammond an action of NZCU Baywide breached an information privacy principle; **and**

[147.2] In the opinion of the Tribunal the action:

[147.2.1] Has caused or may cause Ms Hammond loss, detriment, damage or injury; or

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

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

[148] As to the first requirement, we find that Principle 11 was breached in the manner conceded by NZCU Baywide and in the manner established by the evidence in relation to Mr Tonge of FinancePoint.

[149] As to the second requirement we find in favour of Ms Hammond that:

[149.1] The disclosures by NZCU Baywide to the HR agencies was done with the express intent of ensuring Ms Hammond would not find employment in the Hawke's Bay area either generally or in the specific field of finance.

[149.2] The disclosure to Mr Tonge was done with the express intent of having Ms Hammond's employment at FinancePoint terminated.

[149.3] The email of 13 April 2012 was sent by Mr Earle to NZCU Baywide employees with the intent of portraying Ms Hammond in a poor light and without making full disclosure of the circumstances in which NZCU Baywide had overcome the privacy settings on her Facebook page and then disseminated the screenshot to four HR firms.

[149.4] A consequence of the actions of NZCU Baywide regarding FinancePoint was that Ms Hammond's position at FinancePoint became untenable and she inevitably felt she had no option but to resign so that Mr Tonge's business could survive the embargo threatened by NZCU Baywide.

[149.5] Ms Hammond was unemployed for the next 10 months and even now has not been able to find employment in her preferred field of finance. Because NZCU Baywide distributed the screenshot to recruitment agencies in the Hawke's Bay area Ms Hammond applied only for those positions where the employer advertised directly and it was not necessary to submit applications through an agency. She was made to endure numerous humiliating occasions when she applied for roles well beneath her skill and experience just to make money to make ends meet. She suffered anxiety wondering whether the prospective employer was aware of the NZCU Baywide warning against employing her. At each interview employers wanted to know why she, with her qualifications, was applying for a position below those qualifications and her experience. When Ms Hammond was finally successful in obtaining employment she was employed in a receptionist/PA role until August 2014 when she was promoted to Practice

Manager. Even then she had the embarrassment of having to inform her employer of the breaches of her privacy now admitted by NZCU Baywide and of the fact she has a case before the Tribunal. She lives in fear the NZCU Baywide executive team or one of the HR firms contacted by Ms Alexandra will again pass information to her employer.

[149.6] Ms Hammond's close relationships have been severely affected and stress has caused significant harm to her family. She and her partner have struggled financially and emotionally. She has suffered the embarrassment, if not humiliation of having to ask friends and family for money. Her partner has had to leave home to find work in another centre. Ms Hammond believes her career in the finance field is in tatters. Her evidence is that going from Manager to PA after hard work and study is humiliating, financially crippling and emotionally draining.

[150] On this evidence we conclude loss, detriment, damage or injury contemplated by s 66(1)(b)(i) has been established on the balance of probabilities. Similarly the evidence establishes that the breaches of Principle 11 have adversely affected, or may adversely affect Ms Hammond's rights, benefits, privileges, obligations or interests in terms of s 66(1)(b)(ii).

[151] While it is not necessary for Ms Hammond to establish each of s 66(1)(b)(i), (ii) and (iii), we address also the question whether she has established significant humiliation, significant loss of dignity or significant injury to feelings in terms of s 66(1)(b)(iii).

[152] As to loss of dignity, we refer to the description given in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53] where Iacobucci J delivering the judgment of the Supreme Court of Canada stated:

53 ... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits... Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued....

[153] As to what is included in "injury to the feelings", it was held in *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [36] that "injury to the feelings" can include conditions such as anxiety and stress. In *Director of Proceedings v O'Neil* [2001] NZAR 59 at [29] injury to feelings was described in the following terms:

[29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[154] Applying these observations we are satisfied on the balance of probabilities that there was significant humiliation, significant loss of dignity and significant injury to the feelings of Ms Hammond.

[155] Although it is implicit in the findings of fact we have made, we make an express finding in relation to s 66(1)(b)(i) to (iii) that the causation element has been amply established.

[156] For all these reasons we conclude that in terms of s 66(1) of the Privacy Act there has been an action by NZCU Baywide which was an interference with the privacy of Ms Hammond.

REMEDY

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

85 Powers of Human Rights Review Tribunal

- (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
 - (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
 - (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
 - (c) damages in accordance with section 88:
 - (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
 - (e) such other relief as the Tribunal thinks fit.
- (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
- (3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).
- (4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

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

88 Damages

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

Section 85(4) – the conduct of the defendant

[159] Addressing first s 85(4), it is no defence that the interference was unintentional or without negligence, but the Tribunal must nevertheless take the conduct of NZCU Baywide into account in deciding what, if any, remedy to grant.

[160] In the present case we see few, if any mitigating circumstances for NZCU Baywide. On the credibility findings we have made the actions of the senior executives, including Mr Porter and Ms Alexandra (but not including Mr McAuley) were shameful.

There was a gross over-reaction to news that Ms Hammond had made a cake for a private party held for Jantha Gooding and had iced that cake with words some might find offensive but which in context commented on the circumstances in which Ms Gooding had been “let go” by NZCU Baywide. Some staff at NZCU Baywide were talking about the cake. Few had seen it. Members of the executive team were unable to access Ms Hammond’s Facebook page so a new and very junior employee (Ms Edmondson) was inappropriately and unreasonably pressured to provide access. The screenshot thereby obtained was almost immediately disseminated to four HR agencies in the Hawke’s Bay area with the intent that Ms Hammond either be unable to obtain employment, or that she find the obtaining of employment difficult. Her existing employer was simultaneously pressured to terminate her employment or face an embargo on referrals prepared by Ms Hammond. This would cripple FinancePoint financially at a time when its owner was known to be seriously ill. Belatedly it was acknowledged at the Tribunal hearing the entire episode was badly handled by NZCU Baywide but that acknowledgement was not made with any enthusiasm and the apology given to Ms Hammond during the course of the evidence was lacking in sincerity. Had Mr Porter’s personal animosity towards Ms Hammond been reined in and had more mature counsel prevailed, NZCU Baywide could have avoided the enormous harm inflicted on Ms Hammond and eventually, upon itself.

[161] It was submitted Ms Hammond did not come before the Tribunal with “clean hands” in that she had owed a duty of fidelity to NZCU Baywide and her allegedly reckless loading of the photograph to her Facebook page had contributed to events.

[162] The point which appears to have been lost on NZCU Baywide is that Principle 11 is about the responsibilities of the agency which has collected the personal information. The restrictions attach to the agency. Principle 11 does not permit (or condone) the disclosure of personal information on the grounds there has been supposed misconduct on the part of the individual.

[163] We do not in any event see any conduct by Ms Hammond which might affect the discretionary grant of a remedy. Together with a group of friends she held a private dinner party with the aim of supporting a close friend who, they believed, had been unfairly forced to resign from NZCU Baywide. The words iced on the cake were intended to give Ms Gooding appreciation and strength. In Ms Hammond’s judgment this was best done by humour. That humour was none the worse for being somewhat direct, if not earthy in nature. In making the submission that Ms Hammond is disentitled to a remedy, NZCU Baywide takes as its focus the words on the cake. The Tribunal, however, must take those words in context. As explained, context establishes there are no grounds for the clean hands submission.

Declaration

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

[165] On the facts we see nothing that could possibly justify the withholding from Ms Hammond of a formal declaration that NZCU Baywide interfered with her privacy and such declaration is accordingly made.

Damages for pecuniary loss

[166] Ms Hammond seeks damages under s 88(1)(a) for pecuniary loss in the sum of \$38,350.00 for lost income in the period from her forced resignation from FinancePoint

to finding a position with her current employer. Quantum being agreed and as the loss was clearly a result of the breaches of Principle 11 by NZCU Baywide, the amount sought is accordingly awarded.

[167] Ms Hammond also seeks an award under s 88(1)(a) in the sum of \$15,543.10 for legal expenses. Again, quantum is not in dispute nor is the fact that Ms Hammond needed to take legal advice in relation to the events described in this decision. In our view these damages have been established and are similarly to be awarded in favour of Ms Hammond.

Damages for loss of benefit

[168] Under s 88(1)(b) of the Act the Tribunal has jurisdiction to award damages for the loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference.

[169] Here Ms Hammond seeks \$16,177.78 for what she describes as career regression. It represents the difference between that which she would have earned at FinancePoint had she not been forced to resign and that which she has earned in her new position. Again, quantum has been agreed. In our view the difference in salary is the loss of a benefit within the contemplation of s 88(1)(b) and the sum is accordingly awarded, there being a direct link between the actions of NZCU Baywide and the loss.

Damages for humiliation, loss of dignity and injury to feelings – some general principles

[170] We turn finally to s 88(1)(c), namely the assessment of damages for humiliation, loss of dignity and injury to feelings. We mention first some general principles (the list is not intended to be exhaustive) before addressing the circumstances of the present case and the particular application of those principles to the facts:

[170.1] There must be a causal connection between the action which is an interference with the privacy of an individual and the damages sought. In appropriate circumstances causation may be assumed or inferred. See *Winter v Jans* at [33] and [34].

[170.2] The aggrieved individual is not required by s 88 to establish all three of the heads of damages referred to in s 88(1)(c). Those heads of damage are to be read disjunctively and it is not to be assumed because one head of damage is established, the others are as well. So in *Winter v Jans* at [36] the High Court, while accepting the evidence established “injury to feelings”, found “humiliation” and “loss of dignity” had not been established. To similar effect see *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 at [41.3] and *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [148].

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

[170.4] Where, as here, it has been found for the purpose of s 66(1)(b)(iii) there was significant humiliation, significant loss of dignity and significant injury to the feelings of the plaintiff, it follows humiliation, loss of dignity and injury to feelings

has been established for the purpose of s 88(1)(c) which does not require that these forms of emotional harm be “significant”.

[170.5] The very nature of the s 88(1)(c) heads of damages means there is a subjective element to their assessment. Not only are the circumstances of humiliation, loss of dignity and injury to feelings fact specific, they also turn on the personality of the aggrieved individual. These challenges were acknowledged in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ1871 at [50] and [51]:

50. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. As Dickson J said in *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452 at 475-476, (cited by this Court in *Heil v Rankin* [2001] QB 272 at 292, paragraph 16) there is no medium of exchange or market for non-pecuniary losses and their monetary evaluation

“... is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.”

51. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

[170.6] As to loss of dignity, we refer to the description given in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53] where Iacobucci J delivering the judgment of the Supreme Court of Canada stated:

53 ... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits... Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued....

[170.7] As to what is included in “injury to the feelings”, it was held in *Winter v Jans* at [36] that “injury to the feelings” can include conditions such as anxiety and stress. In *Director of Proceedings v O’Neil* [2001] NZAR 59 at [29] injury to feelings was described by the High Court in the following terms:

[29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[170.8] The award of damages must be an appropriate response to adequately compensate the aggrieved individual for the humiliation, loss of dignity or injury to

feelings he or she has suffered. See by analogy *Laursen v Proceedings Commissioner* (1998) 5 HRNZ 18 at 26 (Gallen ACJ). To similar effect are the observations made by Elias CJ (dissenting) in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [109]:

[109] With respect to those who think that damages for vindication of right must be “moderate”, I do not think the adjective assists. It can be readily accepted that awards of damages should not be “extravagant”. No award of damages should exceed what fits the case. ... [W]here a plaintiff has suffered injury through denial of a right, he is entitled to Bill of Rights Act compensation for that injury, which may include distress and injured feelings, as well as physical damage. The amount of such damages must be adequate to provide an effective remedy. Without adequate compensation, the breach of right is not vindicated. [Footnote citations omitted]

Although the comments by the Chief Justice were in that case directed to remedies under the New Zealand Bill of Rights Act, the need for the amount of damages to be adequate to provide an effective remedy is a principle of wider application. It is found, for example, in New Zealand’s treaty obligations under the International Covenant on Civil and Political Rights, 1966, Article 2(3) which makes specific reference to a duty to provide “an effective remedy” to persons whose rights (under the Covenant) have been violated. This right has been described as a “key component” of the Covenant. See Joseph and Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford, 2013) at [25.01].

[170.9] It is not required that the Tribunal must always take its lead from the High Court when awarding damages. As pointed out in *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760 at [129], the High Court sits as an appeal court. The Tribunal is dealing with a much higher number of cases. There is no reason why the Tribunal, at first instance, cannot come to the conclusion that the time has come for a recalibration of the level of awards against which there should be some consistency. That view would be informed by the much larger number of cases coming before the Tribunal. It can be then taken on appeal to the High Court.

[171] While the award of damages under s 88(1)(c) is discretionary, we are of the view that the humiliation, loss of dignity and injury to feelings experienced by Ms Hammond is at the serious end of the spectrum and for that reason an award of damages under this heading is both appropriate and necessary. As to quantum, the ceiling to the Tribunal’s jurisdiction is presently \$200,000. See s 92Q of the Human Rights Act 1993 and s 89 of the Privacy Act. We address next previous awards and then the principal factors we have taken into account in Ms Hammond’s case.

Previous awards in relation to emotional harm

[172] We do not intend an exhaustive survey of awards made under s 88(1)(c) of the Privacy Act 1993 for what might loosely be described as emotional harm. For the purpose of the present case a general overview is sufficient.

[173] The majority of cases under the Privacy Act which come before the Tribunal involve breaches of Principle 6 (access to personal information). Over the past three years awards by the Tribunal in that context for humiliation, loss of dignity and injury to feelings have ranged at the less serious end of the spectrum from \$5,000 (eg *Geary v Accident Compensation Corporation* [2013] NZHRRT 34) to \$10,000 (eg *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5). The middle band ranges from approximately \$10,000 upwards. In *Director of Human Rights Proceedings v INS*

Restorations Ltd [2012] NZHRRT 18 an award of \$20,000 was made in circumstances of fraud which exposed the aggrieved person to potentially serious legal liabilities. In its comparable jurisdiction under the Human Rights Act 1993 the Tribunal has in recent times awarded \$25,000 for humiliation, loss of dignity and injury to feelings. The cases are *DML v Montgomery* [2014] NZHRRT 6 and *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51. There have not to date been Principle 6 cases in the higher range of \$50,000 plus.

[174] Principle 11 cases occur less frequently. As at July 2010 there had been ten such cases and in *Z v Commissioner of Police* [2010] NZHRRT 12 (19 July 2010) at [72] it was noted awards then ranged from \$3,000 (in 1999) to \$40,000 (in 2003). Since then awards have been made in two further cases. The first is *Hale v Chester Burt Funeral Home Ltd* [2012] NZHRRT 10 where the award was \$5,000. That, however, was an unusual case in which neither party gave evidence and the \$5,000 sum had been agreed by the parties. The second is *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 where the award was \$15,000. Mr Geary, an informant, was given a guarantee of anonymity and confidentiality. That guarantee notwithstanding, ACC disclosed his identity as an informer and also the information he had provided to ACC. Those circumstances are not comparable to the present.

[175] The 2003 award of \$40,000 for a Principle 11 breach is the highest the Tribunal has made for any category under s 88(1)(c) of the Privacy Act. The case in question is *Hamilton v The Deanery 2000 Ltd* [2003] NZHRRT 28 (20 August 2003). Ms Hamilton, a then well-known public figure in the United Kingdom, had for many years struggled with alcohol addiction. In mid-July 2000 she admitted herself to The Deanery, a private alcohol treatment clinic in Christchurch. When she was discharged in August 2000 she spoke positively of the clinic and there was talk of her being retained to use her high public profile to promote The Deanery. One of the directors wrote a letter in support of her immigration application. However, the relationship soured, the letter was withdrawn and the director informed immigration officials Ms Hamilton was an active drug user. The director subsequently disclosed to a Sunday newspaper that Ms Hamilton had failed to complete the full programme at The Deanery and provided the reporter with Ms Hamilton's address and telephone number. A later publication by a tabloid in the United Kingdom also reported comments by the director about Ms Hamilton, including the fact that The Deanery could not help those who do not help themselves. The Tribunal regarded the multiple disclosures of health information as serious and found the disclosure of Ms Hamilton's contact details had been intended to embarrass. The information provided to the press was known to be information which would be widely disseminated.

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

Quantifying an appropriate award of damages – some principles

[177] While it is desirable that consistency in awards be maintained (*Winter v Jans* at [59]) there are countervailing considerations. To the general principles outlined earlier must be added the following:

[177.1] As recognised in *Winter v Jans* itself at [59], each case is different.

[177.2] There is an inherently subjective element to the assessment of humiliation, loss of dignity and injury to feelings. The maintenance of consistency cannot be permitted to thwart the intention of the provision that the award be specific to the particular aggrieved individual in his or her unique circumstances.

[177.3] Recognition must be given to the fact that as society's and the law's understanding of privacy develops and matures, the perception of what constitutes a "serious" case will evolve and possibly change. We refer, by way of illustration, to developments in tort law marked by *Hosking v Runting* [2005] 1 NZLR 1 (CA) (the tort of invasion of privacy) and *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 and *Faesenkloet v Jenkin* [2014] NZHC 1637 (the tort of intrusion upon seclusion).

[177.4] Damages assessed in 2003 at \$40,000 to mark a "serious" case might, in hindsight, appear in need of adjustment up or down as other fact circumstances arise. Calibrating the spectrum of damages or determining where in a particular band a case is to be situated is not a formulaic or mathematical exercise. Variation must be allowed for as well as recalibration as new insights are gained and new fact circumstances are litigated.

[177.5] Old awards can be misleading unless updated to present day values. For example, an award of \$40,000 in 2003 may have to be adjusted by (say) allowing simple interest at five percent per annum. On this basis the award in *Hamilton v The Deanery* is closer in present day terms to \$66,000.

[178] We turn now to the specific facts in Ms Hammond's case and the submission by NZCU Baywide that the evidence does not establish "the extreme and repeated breaches" present in *Hamilton v The Deanery* and that a low or zero award of damages should be made in favour of Ms Hammond. It will be seen we do not accept this submission.

The particular circumstances of Ms Hammond's case

[179] We do not intend reciting the evidence which has already been traversed at some length or the reasons for our findings of credibility and of fact. In our view those findings make Ms Hammond's case arguably the most serious to have come before the Tribunal to date. The assessment of damages for humiliation, loss of dignity and injury to feelings must give recognition to the particular circumstances. At the risk of repetition, but in the interests of clarity, we highlight the following:

[179.1] The evidence of Mr McAuley (which we accept) was that during Ms Hammond's time at NZCU Baywide he (Mr McAuley) had never heard a problem about her work. He did witness times when she seemed to know more about the legal and compliance requirements of lending than Mr Earle, Mr Porter and Ms Baxter. He described Ms Hammond as having an open and straight style. Her previous lending industry experience, qualifications and strong intellect meant at times she had to "manage upwards". Mr McAuley's observation was that Mr

Porter did not want Ms Hammond's ideas to be seen as credible or good as it might leave people wondering why Mr Porter had not thought of them. The ideas Ms Hammond put forward for growing the personal lending book were innovative and well-thought out. Mr McAuley did not know why Mr Earle and Mr Porter did not embrace the ideas or at least explore them as the personal lending at NZCU Baywide continued to decline.

[179.2] Mr McAuley further described Ms Hammond and Ms Gooding as displaying a level of intellect and business knowledge that in his opinion seemed stronger than their respective managers (Julie Baxter and Grant Porter). They were "both bright and experienced in their respective fields", demonstrating a strong sense of right and wrong together with a genuine desire to improve NZCU Baywide. He witnessed Mr Porter exert his authority to shut them down. This would include talking over them or using extreme and illogical examples to contradict their recommendations.

[179.3] At the start of a meeting in late 2011 Mr McAuley had witnessed Mr Porter stating in an emotional and highly agitated voice that Ms Hammond had to go.

[179.4] Ms Gooding resigned from NZCU Baywide in circumstances which led her and Ms Hammond to believe she (Ms Gooding) had been treated unfairly. As the sole breadwinner for a family of five Ms Gooding faced unemployment. It was a highly stressful time for her.

[179.5] A private dinner party was arranged to express support for Ms Gooding and in that context Ms Hammond made a cake which, while iced with words some would find offensive, was a commentary on how someone who had done so much for NZCU Baywide had been treated unfairly. The message was intended to give Ms Gooding strength.

[179.6] Ms Hammond took care to ensure the photograph of the cake uploaded to her Facebook page could only be accessed by her "friends".

[179.7] Senior management at NZCU Baywide, having been blocked from accessing the photograph, bullied Ms Edmondson into opening her Facebook page while under the supervision of the HR Manager (Ms Alexandra) who then took a screenshot of the cake.

[179.8] Mr Porter, intending that Ms Hammond thereafter not find employment in the Hawke's Bay area either generally or in the specific field of finance, instructed Ms Alexandra to immediately contact no fewer than four HR agencies so that they were all aware of what Ms Hammond had done. Ms Alexandra was also instructed to provide them with a screenshot of the cake. This instruction was carried out with some speed.

[179.9] Mr Porter and Ms Baxter thereafter did their best to secure the termination of Ms Hammond's employment at FinancePoint.

[179.10] As a consequence of the steps taken by the senior management at NZCU Baywide Ms Hammond was left with no reasonable alternative but to resign from FinancePoint. She was unemployed for the next 10 months. She reasonably believed it would be unwise to seek employment through HR agencies and as a consequence could apply only for positions advertised directly

by the employer. The humiliation, loss of dignity and injury to feelings she experienced at the employment interviews has already been described.

[179.11] The apology offered to Ms Hammond in the course of Mr Earle's reading of his statement of evidence was delivered without any detectable note of sincerity.

[180] The context shows that against a background of hostility to Ms Hammond, the making and photographing of the cake led to a sustained campaign by NZCU Baywide to inflict on Ms Hammond as much harm and humiliation as possible by ensuring she could not be employed in the Hawke's Bay area (if not further afield) and to secure her dismissal by her current employer. In these circumstances significant if not severe humiliation, loss of dignity and injury to feelings followed. Causation could hardly be said to be in doubt.

[181] The severity of the circumstances in Ms Hammond's case can be distinguished from those in *Hamilton v The Deanery* by reference to the following:

[181.1] NZCU Baywide could not access the personal information (in the form of the photograph of the cake). It resorted to bullying a young new employee who felt her job would be at risk if she did not, while being supervised by the HR Manager, access her own Facebook page on the HR Manager's PC.

[181.2] A member of the senior management team instructed the HR Manager to repeatedly disseminate the photograph to HR agencies with the specific intent that Ms Hammond thereafter be unable to find employment in the Hawke's Bay area either generally or in the finance field.

[181.3] Through members of its senior management team NZCU Baywide simultaneously brought intolerable pressure on Ms Hammond's new employer to terminate her employment.

[181.4] The entire episode was marked by personal animosity against Ms Hammond and an apparent desire on the part of some or all of the senior management team to exact revenge for what was in truth an act of kindness on the part of Ms Hammond for a close friend.

[181.5] Ms Hammond remained unemployed for the 10 months which followed her enforced resignation from FinancePoint. She cannot find employment in the finance field, is over-qualified for the position she currently holds and both she and her family have suffered enormous stress.

[182] In these circumstances the humiliation, loss of dignity and injury to the feelings of Ms Hammond are of a different order to that experienced by the celebrity in *Hamilton v The Deanery* who at one point had been happy to actively promote the rehabilitation centre.

[183] Looking at the facts as a whole we are of the view that an appropriate sum to adequately compensate Ms Hammond for the severe humiliation, severe loss of dignity and severe injury to feelings inflicted on her is \$98,000. In arriving at this sum we have taken care to focus only on the emotional harm which the actions of NZCU Baywide caused to Ms Hammond and have excluded any element of punishment or disapproval.

Other remedies

[184] In view of the extraordinary circumstances of the case and of the potential for further harm to be inflicted on Ms Hammond we believe further orders are required under s 85(1)(b), (d) and (e) of the Privacy Act:

[184.1] Restraining NZCU Baywide from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference.

[184.2] Requiring NZCU Baywide to remedy the interference by sending to each of the four HR agencies a retraction of the 12 April 2012 warning along with a copy of this decision. NZCU Baywide is to request that the email sent by Ms Alexandra on 12 April 2012 together with the screenshot of the cake (and any copies) be deleted from their records. Written confirmation is to be sought that this request has been complied with and a report provided to the Tribunal and to Ms Hammond detailing the steps taken in compliance with this order and the responses received by NZCU Baywide.

[184.3] The Chief Executive Officer of NZCU Baywide is to forward to all members of NZCU Baywide staff a retraction of Mr Earle's email of 13 April 2012 together with an apology to Ms Hammond. The Tribunal and Ms Hammond are to be provided with a copy of the email.

Training order

[185] Finally, we feel bound to draw attention to the lack of awareness, at senior management level, of the obligations and duties of NZCU Baywide under the Privacy Act. Mr McAuley's caution that privacy issues were raised by the proposed acquisition and dissemination of the photograph of the cake were ignored by other members of the management team. We acknowledge Mr Earle stated in his evidence that NZCU Baywide takes its obligations under the Privacy Act seriously. The short answer, however, is that on 12 and 13 April 2012 there were multiple failings at senior management level, failings which were inexcusable.

[186] Our view is that a training order is necessary to assist and to enable NZCU Baywide to comply with its obligations under the Privacy Act. The mistakes made by NZCU Baywide through its senior management team must not only be remedied but also not repeated. Requiring NZCU Baywide to implement a training programme focused on its responsibilities under the Privacy Act is the most effective means of achieving that end.

[187] We accordingly order that NZCU Baywide, in conjunction with the Privacy Commissioner and at its own expense, provide training to its management staff in relation to their and NZCU Baywide's obligations under the Privacy Act in order to ensure they are aware of those obligations.

Concluding observation

[188] The facts of this case illustrate in dramatic terms the reasons why the information privacy principles were enacted by Parliament in the Privacy Act. The unrestrained use of personal information can cause devastating, if not irreparable harm to an individual. The Act stipulates that unless personal information is collected, stored and disclosed only as permitted by the Act, the holder of the information becomes legally responsible for the consequences. The statutory remedies are both real and effective. In the

present case, had NZCU Baywide paused for a brief moment to consider its obligations under the Privacy Act it would have been deflected from the high-handed and impulsive reaction which has led to the infliction of serious harm not only on Ms Hammond but also on itself, its staff, its image and reputation.

FORMAL ORDERS

[189] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of NZCU Baywide was an interference with the privacy of Ms Hammond and:

[189.1] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that NZCU Baywide interfered with the privacy of Ms Hammond by disclosing personal information about her when NZCU Baywide did not believe, on reasonable grounds, that any of the exceptions listed in Principle 11 of the information privacy principles had application.

[189.2] Damages of \$38,350 are awarded against NZCU Baywide under ss 85(1)(c) and 88(1)(a) of the Privacy Act 1993 for lost income, being a pecuniary loss suffered as a result of the interference.

[189.3] Damages of \$15,543.10 are awarded against NZCU Baywide under ss 85(1)(c) and 88(1)(a) of the Privacy Act 1993 for pecuniary loss in the form of legal expenses.

[189.4] Damages of \$16,177.78 are awarded against NZCU Baywide under ss 85(1)(c) and 88(1)(b) of the Privacy Act 1993 for the loss of a benefit Ms Hammond might reasonably have expected to obtain but for the interference.

[189.5] Damages of \$98,000 are awarded against NZCU Baywide under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for humiliation, loss of dignity and injury to feelings.

[189.6] An order is made under s 85(1)(b), (d) and (e) of the Privacy Act 1993 that NZCU Baywide be restrained from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference.

[189.7] An order is made under s 85(1)(d) and (e) of the Privacy Act 1993 that NZCU Baywide is to send a retraction of the 12 April 2012 warning along with a copy of this decision to Red Consulting Group, Able Personnel, Adecco and Grow HR. NZCU Baywide is to request that the email sent to these agencies by Ms Alexandra on 12 April 2012 and any screenshot of the cake sent by her (and any copy) be deleted from their records. Written confirmation is to be sought from each agency that this request has been complied with. A report is to be provided to the Tribunal and to Ms Hammond detailing the steps taken in compliance with this order and the responses received by NZCU Baywide. Such report is to be provided within 30 days after the date on which this decision is given.

[189.8] An order is made under s 85(1)(d) of the Privacy Act 1993 that the Chief Executive Officer of NZCU Baywide forward to all members of NZCU Baywide staff a retraction of Mr Earle's email of 13 April 2012 together with an apology to Ms Hammond. The Tribunal and Ms Hammond are to be provided with a copy of the email.

[189.9] An order is made under s 85(1)(d) and (e) of the Privacy Act 1993 that NZCU Baywide, in conjunction with the Privacy Commissioner and at its own expense, provide training to its management staff in relation to their and NZCU Baywide's obligations under the Privacy Act 1993 in order to ensure they are aware of these obligations.

COSTS

[190] As a lay litigant Ms Hammond is not entitled to costs, although she may recover disbursements. Essentially, she can recover the expense of photocopying documents for the purpose of these proceedings together with such witness expenses as may have been incurred, including the return airfare and associated expenses for Mr McAuley's trip from Auckland to attend the hearing.

[191] Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[191.1] Ms Hammond is to file particulars of any disbursements claimed within fourteen days after the date of this decision. The submissions for NZCU Baywide are to be filed within a further fourteen days with a right of reply by Ms Hammond within seven days after that.

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

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

.....
Mr RPG Haines QC
Chairperson

.....
Ms WV Gilchrist
Member

.....
Mr BK Neeson JP
Member