EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-044-24
[2019] NZDC 261

BETWEEN	RACHEL VIVIEN CUNLIFFE Plaintiff
AND	DAVID CHRISTOPHER MUNROE Defendant

Judgment: 11 January 2019
(On the papers)

DECISION OF JUDGE L C ROWE
[On application for orders under the Harmful Digital Communications Act 2015]

---

[1] The plaintiff, Rachel Cunliffe, and her husband, Regan Cunliffe have been involved in a dispute with the Principal and Board of Trustees of [school deleted] throughout 2018. The details of the dispute do not need to be gone into in this judgment except to note that Mr and Mrs Cunliffe have made several requests of the Board for information under the Official Information Act 1982 and made complaints about the Board and Principal to the Ministry of Education, Office of the Ombudsman, Office of the Privacy Commissioner and the Teaching Council.

[2] The Board co-opted the defendant, David Munroe, to deal with the dispute and address OIA requests on the Board's behalf. There have been several emails exchanged between the Cunliffes and Mr Munroe, and in 10 of Mr Munroe's emails from early November to late December he has asked the Cunliffes for a face to face meeting.

[3] The Cunliffes have declined to have a meeting with Mr Munroe and asked for his requests for a meeting to stop. The Cunliffes say that Mr Munroe's repeated

requests for a meeting amount to unwanted pressure to meet and are tantamount to blackmail that their OIA requests will not be attended to unless there is a meeting.

[4] Mrs Cunliffe says she feels harassed by Mr Munroe's ongoing requests to meet, does not like what she regards as the threatening tone of his emails, and says that the repeated requests to meet have caused her to have nightmares, panic attacks, anxiety and distress.

[5] Mrs Cunliffe complained to Netsafe on 22 December about Mr Munroe's repeated meeting requests and Netsafe decided on 27 December to not take any further action per s 8(4) of the HDCA.

[6] Mrs Cunliffe has applied to this Court without notice for an order per s 19(1)(b) HDCA that Mr Munroe stop requesting a meeting and not do it again.

Preliminary threshold

[7] The preliminary threshold for Mrs Cunliffe to bring these proceedings has been met in that:

(a) Mrs Cunliffe is an individual who alleges that she has, or will, suffer harm as a result of a digital communication;[1] and

(b) The approved agency (Netsafe) has received Mrs Cunliffe's complaint about the communications and had a reasonable opportunity to assess them and decide what action (if any) to take.[2]

Possible remedies

[8] As Mrs Cunliffe has filed the present application without notice to Mr Munroe, the possible outcomes available to me are to:[3]

[1] HDCA s 11(1)(a).
[2] HDCA s 12(1).
[3] Harmful Digital Communications Rules 2016, rule 21(3).

(a) Give any directions necessary, including a direction that the application be dealt with as if made on notice.

(b) Make an interim order that Mr Munroe stop asking for a meeting pending a hearing of the application on notice.

(c) Order Mr Munroe to cease asking the Cunliffes for a meeting without further notice to Mr Munroe.

(d) Dismiss the application.

[9] I consider the appropriate course is to dismiss the application on my own initiative in which case the other possible outcomes do not need to be discussed any further. I will now give my reasons for reaching this conclusion.

Applicable principles to dismiss on the Court's own initiative

[10] Under s 12(3) of the HDCA, the Court may dismiss an application, on its own initiative, without a hearing, if it considers the application is frivolous, vexatious or for any other reason does not meet the threshold in s 12(2).

[11] A frivolous application is one that trifles with the Court's processes. A vexatious application is one where a litigant uses the processes of the Court for an ulterior or improper purpose so as to abuse the Court's processes.[4] I am not prepared, without a further hearing, discussion or evidence to find that the application is frivolous or vexatious.

[12] I am however satisfied that the application does not meet the threshold in s 12(2) of the HDCA.

[4] *Commissioner of Inland Revenue v Chesterfields Preschools Limited* [2013] 2 NZLR 679 at [89]; and *Commerce Commission v Giltrap City Limited* (1997) 11 PRNZ 573 (CA) at p 579.

[13] Section 12(2) of the HDCA provides:

> **12 Threshold for proceedings**
>
> …
>
> (2) In any case, the District Court must not grant an application from an applicant referred to in section 11(1)(a), (b), or (c) for an order under section 18 or 19 unless it is satisfied that—
>
> (a) there has been a threatened serious breach, a serious breach, or a repeated breach of 1 or more communication principles; and
>
> (b) the breach has caused or is likely to cause harm to an individual.
>
> …

[14] While I have the power to dismiss the application without a further hearing, I am required to act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, including observance of the principles of natural justice.[5]

[15] A decision to dismiss without further hearing should also take into account the s 3 purpose of the HDCA to protect persons from harmful digital communications, but also the object of the Harmful Digital Communications Rules,[6] namely to enable proceedings under the HDCA to be brought and dealt with "justly, speedily and inexpensively".

[16] Given that one of the options open to me is to make no interim orders, but direct that the proceeding continue to a hearing on notice, I consider that, to dismiss the application without further hearing at this stage of the proceeding, should happen only if the application is so clearly untenable that it could not possibly succeed. To determine it on any other basis would be inconsistent with observance of the principles of natural justice, the purpose of the HDCA and the objective of the HDC Rules to deal with the proceedings "justly".

---

[5] HDCA, s 6(2)(b) and s 19(6); and New Zealand Bill of Rights Act 1990, s 27(1).
[6] Rule 3.

[17] This approach is consistent with that adopted by the Courts when dealing with an application to strike out proceedings in its civil jurisdiction. The jurisdiction to dismiss without further hearing should occur only in a clear case where the Court is satisfied it has both the material and assistance from the parties required for a definite conclusion.[7] A similar approach was adopted by Judge Harvey in *Cosgrove v Grant* where, at a similar early stage in those proceedings, His Honour dismissed an application without further hearing, saying:[8]

> An enquiry as to whether or not the threshold has been attained in essence requires a consideration as to **whether or not an arguable case has been made out** in terms of whether or not there has been a serious breach or repeated breach of a communications principle and whether or not that breach has been causative or likely causative of harm – serious emotional distress. (my emphasis)

[18] The issue therefore is whether, at this stage, the plaintiff's claim, that there has been a threatened serious breach, a serious breach, or a repeated breach of one or more communications principles and that any breach has caused or is likely to cause harm to the plaintiff, is not arguable, or so clearly untenable that it could not possibly succeed.

Is the plaintiff's claim clearly untenable?

[19] To answer this question I must consider:

(a) The communication principles Mrs Cunliffe alleges have been breached.

(b) Whether it is clearly untenable that there has been a threatened serious breach, serious breach, or repeated breach of those communication principles having regard to the mandatory considerations in s 19(5) of the HDCA.

(c) If there has been a breach, whether it is clearly untenable that it has caused or is likely to cause harm to an individual.

---

[7] *Telecom NZ Limited v Clear Communications Limited* (1997) 6 NZBLC 102,325.
[8] *Cosgrove v Grant*, District Court Christchurch, CIV-2018-009-2772 at [41].

Relevant communication principles

[20] Mrs Cunliffe alleges a breach of principles 2 and 5 from s 6 of the HDCA in that she alleges the requests by Mr Munroe for a meeting are:

(a) Threatening or intimidating; or

(b) Have been used to harass Mr and Mrs Cunliffe.

Application of s 19(5) factors

[21] Factors 19(5)(d) – the extent to which the communication has spread beyond the original parties; (f) – the truth or falsity of the statement; (j) – the technical and operational practicalities, and costs, of an order; and (k) – the appropriate individual who should be subject to an order – are not relevant, or have no bearing on the outcome, and do not need to be further discussed.

[22] **Section 19(5)(a)** – the content of the communications and the level of harm caused or likely to be caused by them:

(a) Each of Mr Munroe's emails requesting a meeting responds to communications from Mr and Mrs Cunliffe in the course of their ongoing dispute with the Board of Trustees.

(b) Each request for a meeting is expressed in moderate and professional language and could not in any sense be regarded as offensive or abusive.

(c) While Mr Munroe on some occasions suggested that compliance with the Cunliffes' OIA requests is contingent on a meeting, this is not made in threatening terms or terms that could reasonably be regarded as a threat. Mr Munroe emphasises on several occasions that, if the Cunliffes are not happy with his approach to their OIA requests, they are entitled to complain (as they have) to the Ombudsman.

(d) While Mrs Cunliffe says the repeated requests for a meeting have caused her distress and nightmares, it could not be said that a reasonable person in Mrs Cunliffe's position would be likely to suffer any harm from such requests, made as they are in the context of efforts to resolve a dispute.

[23] **Section 19(5)(b)** – the purpose of the communicator, in particular whether the communications were intended to cause harm:

(a) It is clear from the tone of Mr Munroe's requests for a meeting, and the context, that his purpose in requesting a meeting is to fulfil the role for which the Board co-opted him, namely to act as a facilitator to resolve the dispute between the Cunliffes and the Board, including their OIA requests. Mr Munroe's communications do not, in any sense, extend beyond the obvious purpose for which he has become involved.

(b) Mr Munroe makes it clear in his emails of 8 November, 13 November and 24 November that many of the Cunliffe's OIA requests relate to non-existent information or information that will be difficult, unwieldy or time consuming for the school to provide, given the sheer volume of the information requested. The Board is entitled to refuse to provide information on these grounds.[9] Before refusing to provide information on these grounds, the Board has a duty to consider whether consulting with the Cunliffes would assist them to make their request in a form that would remove these reasons for refusal.[10] Mr Munroe's requests for a meeting are consistent with his compliance, on behalf of the Board, with the s 18B OIA duty of consultation.

(c) Mr Munroe's requests for a meeting are consistent with standard alternative dispute resolution practices including facilitation of

[9] OIA, s 18(e) and (f).
[10] OIA, s 18B.

processes that enable the parties to work collaboratively towards a resolution.[11]

(d) A Court expects parties to explore resolution of disputes informally, whether by negotiation, consultation, correspondence or discussion, before issuing proceedings.[12] Mr Munroe's requests for a meeting are consistent with this well-established expectation.

[24] **Section 19(5)(c)** – the occasion, context, and subject matter of the communications:

(a) This has largely been dealt with but Mr Munroe's requests for a meeting with the Cunliffes are consistent with good alternative dispute resolution practice and with the Board's obligations, including its obligations under the OIA. Mr Munroe's communications do not, in any sense, stray beyond the occasion or context of the dispute between the Board and the Cunliffes, or legitimate efforts to resolve that dispute.

[25] **Section 19(5)(e)** – the age and vulnerability of the plaintiff:

(a) Mrs Cunliffe gives little information about this but Mrs Cunliffe is plainly a parent and describes her occupation as "web designer". From this information, and the way Mrs Cunliffe has structured her application and affidavit, she is clearly a mature person with a professional background. There is nothing about her circumstances to suggest particular vulnerability.

(b) Mrs Cunliffe does not have any form of relationship with Mr Munroe where it could be said there is an imbalance of power in Mr Munroe's favour.

---

[11] Recommended for example in the helpful paper on this topic, *ADR Process Design: Considerations for ADR Practitioners and Party Advisors* (2006) 27ADRJ 140.
[12] *Morrell v World Solar Limited* [2018] NZHC 518 at [22].

(c) Mrs Cunliffe describes the length and intensity of the dispute with the Board of Trustees as stressful and leading to severe health difficulties for herself, her husband and her children. It is difficult, without further information, to find that the emotional distress Mrs Cunliffe describes from receiving Mr Munroe's requests for a meeting is anything beyond the emotional distress she ascribes to the length, intensity and nature of the dispute itself.

[26] **Section 19(5)(g)** – whether the communications are in the public interest:

(a) Mr Munroe's communications are plainly in the public interest. As already noted, the Court expects parties to explore reasonable opportunities to resolve disputes before resort to Court proceedings or more formal processes. Mr Munroe's requests for a meeting are consistent with good practice in alternative dispute resolution. To discourage such attempts to meet would be contrary to established practice and contrary to the public interest.

(b) The Court is also required to assess these factors consistently with the rights and freedoms contained in the NZBORA, including the right to freedom of expression.[13] Mr Munroe's requests for a meeting are consistent with freedom of expression in the context of legitimate dispute resolution and, in that sense, in the public interest.

[27] **Section 19(5)(h)** – the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:

(a) As already noted, Mr Munroe's conduct does not, at any stage, exceed the bounds of good alternative dispute resolution practice, and the duty placed on the Board to attempt to consult to clarify OIA requests before contemplating refusal of those requests.

[13] NZBORA, s 14.

(b) The first time the Cunliffes suggest they considered Mr Munroe's requests for a meeting to be harmful was Mrs Cunliffe's email to Mr Munroe of 15 December where she said:

"We will not be coerced into meeting under duress in order to receive OIA requests. We view your conditional information release as unlawful."

Subsequent emails to the effect that Mr Munroe's requests were viewed by the Cunliffes as "pressure" and "not good for [Mrs Cunliffe's] mental health" and giving her nightmares, or were "inappropriate" were made to Mr Malins of the Ministry of Education rather than directly to Mr Munroe.

(c) Given the lateness of Mrs Cunliffe's communicated concerns, the nature of them, the fact that the most serious concerns were conveyed to someone other than Mr Munroe, and my clear view that Mr Munroe's communications would not be likely to cause harm to a reasonable person in Mrs Cunliffe's position, it is not surprising that Mr Munroe has not taken steps to "minimise the harm caused".

[28] **Section 19(5)(i)** – the conduct of the plaintiff:

(a) In the context of these communications, and the ongoing nature of the dispute, if Mr Munroe's requests for a meeting were causing emotional distress to Mrs Cunliffe, it would be reasonable for her to convey that directly to Mr Munroe and ask him to make no further requests for a meeting, before it could be seriously suggested his requests amounted to harassment or a repeated breach of relevant communication principles.

(b) It is also clear from the emails exchanged between the Cunliffes and Mr Munroe that the Cunliffes have viewed Mr Munroe's involvement from the outset with suspicion and distrust. There is scant objective

evidence for the Cunliffes' view of Mr Munroe. The basis they rely on, which is whether Mr Munroe was correct to say he was co-opted at a 1 November Board meeting rather than prior to that meeting is, objectively, a semantic difference in expression only, and insufficient to suggest, as the Cunliffes do, that Mr Munroe is dishonest. The Cunliffes' view of Mr Munroe and his requests for a meeting are strongly influenced by the position they have taken in their dispute with the Board rather than on an objective or reasonable assessment of Mr Munroe's intent, which is plainly to explore reasonable avenues to resolve a prolonged dispute.

[29] Applying the above analysis to the communication principles concerned, I find by a considerable margin that:

(a) Mr Munroe's requests for a meeting are neither threatening nor intimidating in terms of principle 2 even where they suggest that the Board's compliance with the Cunliffes' OIA requests is contingent on there being a meeting. The Cunliffes have other reasonable and practical avenues open to them including refusing a meeting, asking that there be no further requests for a meeting and referring the matter to the Ombudsman to determine whether Mr Munroe's and the Board's actions are reasonable.

(b) Mr Munroe has plainly not used his requests for a meeting to harass Mrs Cunliffe. While the word "harass" is not defined in the Act, repeated communications that are legitimately consistent with both the context, and accepted practice, fall well short of being offensive, or a sustained course of conduct over a period of time, by reference to the definition of "harassment" in the Harassment Act 1997.[14] They do not

[14] Adopted as a comparator by the Law Commission in its recommendations, *Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies* (Ministerial Briefing Paper, August 2012, Wellington) at 5.41-5.43; and the types of considerations identified as relevant to the definition of "harassment" by Judge Harvey in *Cosgrove v Grant*, n8, at [57] and [58].

in any sense constitute a threatened serious breach, serious breach or repeated breach of communication principle 5.

[30] I conclude it is clearly untenable that a Court could be satisfied there has been a threatened serious breach, serious breach or repeated breach of the communication principles relied upon by Mrs Cunliffe.

[31] It follows that I do not need to consider whether "the breach" has caused or is likely to cause harm to an individual in terms of s 12(2)(b). There has been no breach. Given the above analysis however I tend to the view that, even if I had found there to be a breach of communication principles, it is difficult on the evidence filed to conclude that the requests for a meeting have caused serious emotional distress, or are likely to lead to serious emotional distress, being the type of harm required to be established under the HDCA.[15]

Outcome

[32] This is an appropriate case for the Court, on its own initiative, to dismiss the application without a hearing. Mrs Cunliffe's application does not meet the threshold required in s 12(2) of the HDCA and, at any further hearing of the matter, could not possibly succeed. I dismiss Mrs Cunliffe's application accordingly.

_____
Judge L C Rowe
District Court Judge

Date of authentication: 11/01/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

[15] *NZ Police v B* [2017] NZHC 526 at [24].