

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

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING
PARTICULARS OF APPLICANTS/RESPONDENTS OR PERSONS
PURSUANT TO S 19 HARMFUL DIGITAL COMMUNICATIONS ACT 2015.**

**IN THE DISTRICT COURT
AT NAPIER**

**I TE KŌTI-Ā-ROHE
KI AHURIRI**

**CIV-2021-041-000126
[2021] NZDC 10990**

UNDER THE	HARMFUL DIGITAL COMMUNICATIONS ACT 2015
BETWEEN	[EMILY SYKES] Applicant
AND	[MATILDA NORTH] Respondent

Judgment: 9 June 2021
(On the papers)

**JUDGMENT AND DIRECTIONS OF JUDGE L C ROWE
[On application under the Harmful Digital Communications Act 2015]**

[1] [Emily Sykes] and [Matilda North] both live in [location A]. They were previously in a relationship.

[2] Ms [Sykes] alleges Ms [North] has sent her abusive digital communications on various platforms over the last six months.

[3] Ms [Sykes] has applied for orders under s 19 of the Harmful Digital Communications Act 2015 (HDCA), requiring Ms [North] to:

- (a) cease or refrain from sending further digital communications;

- (b) not encourage anyone else to engage in sending similar communications;
- (c) publish an apology.¹

Preliminary threshold to bring proceedings

[4] The preliminary threshold to bring these proceedings has been met in that:

- (a) Ms [Sykes] is an individual who alleges she has or will suffer harm because of digital communications;² and
- (b) Netsafe has received Ms [Sykes]'s complaint about the communications and has had a reasonable opportunity to assess them and decide what action (if any) to take.³

What is alleged?

[5] The following account arises from allegations in Ms [Sykes]'s affidavit and screenshots which are attached as exhibits.

[6] Ms [Sykes] says the first instance of Ms [North] sending a communication was on [date deleted] 2020. Ms [Sykes] was told that Ms [North] had posted information on a digital platform but deleted it soon afterwards. Ms [Sykes] asked Ms [North]'s family to send her the post, but none of them would show it to her.

[7] Ms [Sykes] says the communications from Ms [North] have continued since then via Facebook, Snapchat and Instagram. Ms [North] has used fake accounts to send digital communications to Ms [Sykes].

[8] Although the messages have been sent through fake accounts or other persons accounts, Ms [Sykes] knows Ms [North] is sending them because of the content of the

¹ Harmful Digital Communications Act 2015, s 19(1)(b), (c) and (f).

² Section 11(1)(a).

³ Section 12(1).

messages, particularly where they refer to other persons and to Ms [North]'s prior relationship with Ms [Sykes].

[9] Ms [Sykes] says messages from these fake accounts have been sent to her, her boyfriend and other friends.

[10] Ms [Sykes] says the messages became worse from [date deleted] when Ms [Sykes] entered a new relationship.

[11] Ms [Sykes] has exhibited messages received on [date deleted] 2021 from the profile of a [name deleted]. Ms [Sykes] recognises the content as coming from Ms [North]. The [date deleted] message reads:

[message redacted]

[12] Ms [Sykes] received Instagram messages on [date deleted] 2021 from the user [deleted]. Again, Ms [Sykes] recognises the content as coming from Ms [North]. The [date deleted] messages read:

[message redacted]

Threatened serious breach, serious breach or repeated breach of communication principles

[13] Ms [Sykes]'s affidavit, and the exhibits attached to it, establish that, on the face of it, Ms [North] has threatened serious breaches, seriously breached or repeatedly breached the following HDCA s 6 communication principles:

- (a) *Principle 2* – A digital communication should not be threatening, intimidating, or menacing;
- (b) *Principle 3* – A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual;
- (c) *Principle 5* – A digital communication should not be used to harass an individual;

- (d) *Principle 9* – A digital communication should not incite or encourage an individual to commit suicide;
- (e) *Principle 10* – A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

[14] The digital communications encourage Ms [Sykes] to commit suicide and threaten to apply force to her to achieve that end.

[15] The communications are personally abusive and undoubtedly offensive.

[16] The author of the [date deleted] communications told Ms [Sykes] that she was not wanted in this country and did not belong here.

Serious emotional distress

[17] Ms [Sykes] describes herself as depressed, having suicidal thoughts and she has sought medical assistance. She has been prescribed medication due to how she has felt from these communications.

[18] A reasonable person in Ms [Sykes]'s position would suffer serious emotional distress from communications of this kind and Ms [Sykes]'s evidence that she has suffered serious emotional distress is completely understandable.

Application to proceed on notice

[19] Ms [Sykes]'s application appears to have been made on notice.

[20] Whether the application was made on notice or without notice, it would be contrary to natural justice to make final orders without giving Ms [North] the opportunity to be heard in response to Ms [Sykes]'s application. The application will therefore proceed on notice to Ms [North].

Interim orders

[21] Interim orders per s 18(1) of the HDCA are, however, required in the terms set out in paragraph [22] pending the hearing, because:

- (a) Taking the s 19(5) HDCA factors into account, there is a serious case to be tried that the digital communications were posted by Ms [North] and breached communication principles in a way that has caused or is likely to cause serious harm to Ms [Sykes], or incite others to do so.
- (b) The balance of convenience favours interim orders being made. If Ms [Sykes]'s allegations are made out, then the digital posts, particularly over a six-month period, are tantamount to serious online bullying and harassment. There is no obvious legitimate reason to engage in such conduct that appears, on its face, to be calculated to cause Ms [Sykes] emotional distress.
- (c) There is no countervailing public interest requiring Ms [North] to post or send digital communications to or about Ms [Sykes].
- (d) Any interference with freedom of expression for Ms [North] is limited in that it prohibits communications about Ms [Sykes] only. If the allegations made by Ms [Sykes] are made out, this would be a justified limitation.
- (e) The interim orders will apply for a limited time until the substantive application is determined.

[22] I make the following interim orders pending final determination of these proceedings:

- (a) Ms [North] is to refrain from posting or sending any digital communication on any platform or medium to Ms [Sykes] or which refers to Ms [Sykes] in any way.

- (b) Ms [North] shall not encourage any other person to send or post digital communications of any kind to Ms [Sykes], or to anyone else referring to, or relating to, Ms [Sykes].

[23] I decline to make it an interim order requiring Ms [North] to publish an apology until she has been given the opportunity of being heard in response to Ms [Sykes]'s allegations.

Directions

[24] This application will be heard in the Napier District Court.

[25] A date and time for the substantive hearing is not presently available. I direct the parties to attend a case management conference at the Napier District Court on [date deleted] 2021 at 10.00 am.

[26] I direct the Registrar to prepare a notice of proceeding in terms of r 17(1)(b) of the Harmful Digital Communications Rules 2016 and issue the notice of proceeding, Ms [Sykes]'s application, supporting affidavit and this decision for service on Ms [North].

[27] If personal service on Ms [North] cannot be effected within 10 days, the Registrar may refer the matter back to me for directions as to substituted service.

[28] The purposes of a case management conference will be for the Court to give directions for trial and mode of hearing, monitor compliance with the directions I make below and identify a trial date. It is a matter for the Napier District Court, but this proceeding seems suitable for a short trial on affidavit evidence.⁴

[29] I make the following further directions:

- (a) If Ms [North] wishes to oppose this application, she must file a notice of opposition and any affidavits in support of her opposition, in the

⁴ District Court Rules 2014, rr 10.3 and 10.4.

Napier District Court by 30 June 2021. Ms [North] must also provide the Registrar with addresses where she will accept service by both post and email.

- (b) If Ms [Sykes] wishes to respond to any evidence filed by or on behalf of Ms [North], she must file any affidavit evidence in response in the Napier District Court by 21 July 2021.
- (c) The Registrar is to serve any documents filed by either party at the addresses for service given by the parties. The Registrar may effect service by sending documents to email addresses provided by the parties for this purpose.

Suppression orders

[30] I make orders that:

- (a) The names of the parties to this proceeding, and of those who have sworn affidavits, are to be suppressed, and not published on any platform or in any way, pending further order of the Court.
- (b) The existence of these proceedings is not to be published, either digitally or in any other forum, pending further order of the Court.

[31] The reasons for making these orders are:

- (a) there is no obvious public interest in this proceeding,
- (b) it would be inappropriate for the parties' names to be published when Ms [North] has not had the opportunity to answer the allegations made by Ms [Sykes],

- (c) it is important none of the digital communications I have referred to are republished, to prevent further harm to Ms [Sykes].

Judge L C Rowe
District Court Judge

Date of authentication: 09/06/2021
In an electronic form, authenticated electronically by Judge Rowe.