IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CIV-2022-070-000609
[2022] NZDC 22381

BETWEEN	LISA MARIE RICHMOND Plaintiff
AND	BRADLEY RAYMOND FLUTEY Defendant

Hearing: On the papers

Appearances: Applicant appears in Person
Respondent appears in Person (via telephone)

Judgment: 29 November 2022

RESERVED DECISION OF JUDGE T R INGRAM

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[1] The plaintiff, Ms Richmond, has applied under the Harmful Digital Communications Act 2015 ("the Act") for orders against the respondent Mr Flutey, that certain digital communications be taken down or disabled, that he cease posting material which breaches the provisions of the Harmful Digital Communications Act, and that he not encourage others to engage in similar communications, and that he publish a correction and an apology.

[2] The background to this matter is that the plaintiff is a registered nurse, and in recent times she has become engaged in various activist endeavours, including protests of various kinds in respect of various objectives at different locations, including a initially protest in Wellington on Parliament grounds, and also in Northland near Marsden Point.

[3] The respondent, Mr Flutey, is also an activist, protesting in support of various causes, also attending the Parliament grounds protest in Wellington, and he has been heavily involved in the Marsden Point protest.

[4] The parties met in Wellington, and they again met again at Marsden Point in April 2022. There has been a falling out between them, and Mr Flutey has used social media to make accusations of various kinds against Ms Richmond. Ms Richmond applied to Netsafe under the Act on 4 August 2022. After investigation Netsafe reported to Ms Richmond that she could proceed with an application to the District Court for orders relating to the content complained of.

[5] The Netsafe assessment was made in relation to three of the communication principles listed in s 6 of the Act, and in particular principle 2 which provides that "a digital communication should not be threatening, intimidating or menacing", principle 5, which provides that "a digital communication should not be used to harass an individual", and principle 6, which provides that "a digital communication should not make a false allegation."

[6] An application was made to the Court, and that application was considered by Judge Smith on 29 August 2022. Interim orders were made under the provision of s 18 of the Act.

[7] The orders directed firstly that:

> Any material posted concerning the applicant, whether it names her directly or indirectly, or reference to her can be inferred, whether posted directly by the defendant or by an associate of the defendant is to be taken down immediately.

[8] Secondly, the Court made an interim order that the defendant cease or refrain from posting any material concerning the applicant through any medium, or material which refers to the applicant directly or indirectly, or infers a reference to the applicant. Thirdly, an interim order was made that the defendant not encourage any other person to engage in similar communications towards the defendant. These interim orders were made on the grounds that the applicant meets the s 12(2) threshold, in that there had been repeated breaches of communication principles 2, 3, 5 and (allegedly) 6, the breaches have caused, and are likely to cause harm to the applicant, and the posts are clearly intended to be offensive and derogatory.

[9] The procedural history of the matter needs to be mentioned. The relevant documentation was served upon the respondent by email pursuant to an order of the Court. At an initial telephone conference for the purposes of ascertaining whether the matter would proceed on the papers, or by means of a hearing, and whether the hearing would require that the evidence be given in the ordinary fashion, telephone contact was made with a man who would only give his name as "Brad", and who categorically refused to identify himself as Bradley Raymond Flutey. The applicant attended in person. The applicant advised me that she recognised the respondent's voice, but I was not prepared on that scant evidence to accept that I was indeed speaking to the respondent, and the telephone conference could therefore proceed no further.

[10] The matter was then adjourned to 9 November 2022, and the respondent, Mr Flutey, was again advised by email that the matter was being dealt with in the civil list in Tauranga Court on 9 November 2022. An email response was received advising that the respondent would not attend, but that he could be contacted on his telephone.

[11] On 9 November, the applicant attended, and after viewing the documentary material available I advised the applicant that I saw no need for any oral evidence or

submissions, and that I would deal with the matter on the papers filed, and I reserved my decision.

[12] The respondent, Mr Flutey, provided a document which is headed "Affidavit of Truth", but the document contained no attestation clause, and did not comply with the Oaths and Declarations Act 1957. He has belatedly filed another affidavit, properly attested, from a Mr Peter Verhoeven, which is addressed below.

[13] The applicant provided affidavit evidence, and in the circumstances of this case, in the absence of the respondent from the Courtroom, I am only prepared to act on sworn evidence. I have accordingly put the respondent's document to one side as not being appropriately attested. The net result is that the material that I have taken into account, apart from the Verhoeven affidavit, comes from the applicant only. The respondent has declined to attend court, as is his right, and he has acted in his own behalf.

[14] The essence of the applicant's complaint is that the respondent has falsely and disparagingly referred to her in several video clips posted on Facebook and Telegram as a "grifter" and that she has obtained donations made for the purposes of advancing the cause of the protesters at Marsden Point, without using that money for the purposes for which it was originally donated.

[15] The respondent also complains that she is referred to in a Facebook post in the following terms:

> There is a whole team of fake activists that get paid through WINZ to fuck up grassroots movements. Lisa Richmond is their grifter, she gets them more money from poor dumb fools and disabled people. Then they piss it all away on drugs and booze.

[16] In another post on HORUS media references are made to other people and it is claimed that:

> They are likely funded by the grifting of Lisa Richmond …

[17] The matters mentioned above establish that the applicant and the respondent have serious divergence of views about a number of things, including the accounting

principles properly applicable to public donations for activist activities, and the rights and responsibilities of activists in relation to particular protests. More than that, in essence, these are allegations of fraud and/or theft.

[18] The legislative background is straight forward. Under s 4 of the Act, "harm" means "serious emotional distress". Section 6 of the Act deals with communication principles, and it relevantly provides:

> Principle 2 – A digital communication should not be threatening intimidating or menacing.
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> Principle 3 – A digital communication should not be grossly offensive to a reasonable person in the position of the effected individual.
>
> Principle 4 – A digital communication should not be indecent or obscene.
>
> Principle 5 – A digital communication should not be used to harass an individual.
>
> Principle 6 – A digital communication should not make a false allegation.

[19] The allegation that the applicant is a "grifter" is an allegation that she is dishonest, and is someone who engages in theft and/or fraud. Such an allegation is grossly defamatory unless properly proven on reliable evidence, which has not been provided from any source. I am satisfied on the affidavit evidence that the applicant is not someone who engages in fraudulent activities or theft. I accept her evidence that any money provided to her as a donation towards protest objectives has been used appropriately, and without any dishonesty. The allegation that she is a "grifter" is false, and is a direct breach of principle 6.

[20] This allegation has been repeated, and I am satisfied both that these repetitive allegations infringe principle 5, having been made to harass the applicant.

[21] A further false and disparaging allegation is made that she had been trespassed from the site occupied by the protesters at Marsden Point. The applicant's evidence was that she has never received a trespass notice from anybody, and that she has spoken to the owners of the land, who confirmed that she has never been trespassed from the property.

[22] Mr Peter Verhoeven's affidavit supports the applicant's claim that she has not been trespassed. His affidavit does not provide any other relevant evidence, nor does it claim that the applicant has engaged in any fraud or theft. In the absence of any evidence to the contrary, the allegation that the applicant had been trespassed from the Marsden Point protest site is clearly false, and in breach of principle 6.

[23] In addition, the respondent has emailed the applicant telling her that:

> If you are spotted at any major actions coming up we will wipe all of you out of it.

[24] That can only be construed as a direct threat to the personal safety of the applicant. That communication is clearly threatening, intimidating and menacing. It is also clearly in breach of principle 2.

[25] I turn to this Court's jurisdiction. Section 12 sets out the threshold for the proceedings and it provides:

> **12 Threshold for proceedings**
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> (1) An applicant referred to in section 11(1)(a), (b), or (c) may not apply for an order under section 18 or 19 in respect of a digital communication unless the Approved Agency has first received a complaint about the communication and had a reasonable opportunity to assess the complaint and decide what action (if any) to take.
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> (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—
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> (a) there has been a threatened serious breach, a serious breach, or a repeated breach of 1 or more communication principles; and
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> (b) the breach has caused or is likely to cause harm to an individual.
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> (3) The court may, on its own initiative, dismiss an application from an applicant referred to in section 11(1)(a), (b), or (c) without a hearing if it considers that the application is frivolous or vexatious, or for any other reason does not meet the threshold in subsection (2).
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> (4) The court may, on its own initiative, dismiss an application under section 11 from the Police if satisfied that, having regard to all the circumstances of the case, the application should be dismissed.

[26] In this case, I am satisfied that Netsafe are an approved agency, Netsafe has dealt with an initial complaint and has advised the applicant that she should apply to the District Court. The s 12(1) jurisdictional hurdle has thus been cleared.

[27] I am satisfied that there have been repeated breaches of more than one of the communication principles, as set out above. The s 12(2)(a) jurisdictional hurdle has thus been cleared.

[28] The applicant is a woman of mature years, who takes considerable pride in her personal reputation and her bone fides within the community generally, and the activist community in particular. To have false allegations made against her honesty and bona fides, which are posted on public forums, and a threat made to her safety in a private email, clearly constitutes harassment, and I am satisfied that these communications have caused her "serious emotional distress", and thereby caused her "harm" within the statutory definition set out above. The s 12(2)(b) jurisdictional hurdle has thus been cleared.

[29] Section 19 provides:

> **19 Orders that may be made by court**
>
> (1) The District Court may, on an application, make 1 or more of the following orders against a defendant:
>
> (a) an order to take down or disable material:
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> (b) an order that the defendant cease or refrain from the conduct concerned:
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> (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:
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> (d) an order that a correction be published:
>
> (e) an order that a right of reply be given to the affected individual:
>
> (f) an order that an apology be published.
>
> (2) The District Court may, on an application, make 1 or more of the following orders against an online content host:

(a) an order to take down or disable public access to material that has been posted or sent:

(b) an order that the identity of the author of an anonymous or pseudonymous communication be released to the court:

(c) an order that a correction be published in any manner that the court specifies in the order:

(d) an order that a right of reply be given to the affected individual in any manner that the court specifies in the order.

(3) The District Court may, on application, make an order against an IPAP that the identity of an anonymous communicator be released to the court.

(4) The court may also do 1 or more of the following:

(a) make a direction applying an order provided for in subsection (1) or (2) to other persons specified in the direction, if there is evidence that those others have been encouraged to engage in harmful digital communications towards the affected individual:

(b) make a declaration that a communication breaches a communication principle:

(c) order that the names of any specified parties be suppressed.

(5) In deciding whether or not to make an order, and the form of an order, the court must take into account the following:

(a) the content of the communication and the level of harm caused or likely to be caused by it:

(b) the purpose of the communicator, in particular whether the communication was intended to cause harm:

(c) the occasion, context, and subject matter of the communication:

(d) the extent to which the communication has spread beyond the original parties to the communication:

(e) the age and vulnerability of the affected individual:

(f) the truth or falsity of the statement:

(g) whether the communication is in the public interest:

(h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:

(i) the conduct of the affected individual or complainant:

(j) the technical and operational practicalities, and the costs, of an order:

(k) the appropriate individual or other person who should be subject to the order.

(6) In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

[30] This case, the circle of people with access to the posts, and with enough interest in these matters to pursue them is relatively small. But there is clearly a community of people minded to engage in activism, and in my view that community should not be left in any doubt that the respondent has stepped well over the bounds of free speech in relation to the applicant.

[31] Freedom of speech is a precious constitutional artefact, but its limits are at least partially proscribed by the provisions of the Act. False allegations, threatening, intimidating, and menacing language are proscribed, and harassment is not permitted.

[32] Before making any orders, I have carefully considered the importance of free speech, and the other rights and responsibilities attaching to individuals under the New Zealand Bill of Rights Act 1990. I am satisfied that in this case the balance of competing rights falls clearly on the side of the applicant.

[33] In assessing whether or not to make orders, and in considering the nature of the orders sought, I have considered the contents of the communications, and the level of harm already suffered by the applicant. I am satisfied that the respondent's purpose in making those communications included intentional damage to the applicant's reputation. The context and subject matter of the communications are matters of interest to the activist community in New Zealand, and the evidence before me establishes that the offending communications have spread well beyond the applicant and respondent, to the wider activist community. I am satisfied that the respondent has made false allegations which would materially damage the applicant's reputation within the activist community, and I am satisfied that there is no public interest in false, and defamatory material being available on the platforms used.

[34] All of the statutory threshold tests being met, I am satisfied that orders under s 19 are justified, and I accordingly make the following orders:

1) All Facebook and Telegram posts made by the respondent Mr Flutey, and which name or identify the applicant, whether directly or by implication, are to be taken down or disabled by the respondent, Mr Flutey.

2) The respondent Mr Flutey shall cease making any further reference to the applicant, whether directly or by implication, in any future posts.

3) The respondent shall not encourage any other person to engage in any similar communications relating to the applicant.

[35] I am not satisfied that any further orders are justified, given the time that has elapsed since these communications were made. Compliance with these orders should suffice to protect the applicant from any repetition of this behaviour.

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Judge TR Ingram
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/11/2022