IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 56**

	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
Mr AJ Harris for defendant
Mr S Hurley for *Hawke's Bay Today* (sam.hurley@hbtoday.co.nz)

DATE OF DECISION: 2 December 2014

DECISION OF TRIBUNAL ON APPLICATION BY MEDIA TO OBTAIN PHOTOGRAPH OF EXHIBIT

The application

[1] In the decision of 27 November 2014 (*Hammond v Credit Union Baywide (In-Court Media Application by Radio New Zealand)* [2014] NZHRRT 55 (27 November 2014) granting the in-court media application by Radio New Zealand subject to conditions, the Chairperson at [11] said:

> **[11]** As to photographing the exhibits produced during the course of the hearing, it is to be noted that Schedule 3, cl 6 stipulates that exhibits must not be photographed without leave of the Tribunal or of the Chairperson. Any application to photograph the exhibits will be addressed if and when made.

[2] During the course of the hearing today, Tuesday 2 December 2014, Mr Sam Hurley of Hawke's Bay Today and New Zealand Media Enterprises (*New Zealand Herald*) has sought permission to publish the screenshot of the cake, the subject of these

proceedings. The application is supported by oral submissions made not only by Mr Hurley but also by Ms Chatterton of the *Dominion Post* and Mr Fowler of Radio New Zealand.

[3] In summary the points made by them are:

> **[3.1]** The need for fair and accurate reporting of the proceedings.
>
> **[3.2]** There is a genuine public interest in the case. Both employees and employers and the public generally have opportunity to learn what conduct is permissible in an employee-employer relationship.
>
> **[3.3]** The public learns and absorbs news not only from the printed or spoken reporting of news, but also from visual images.

[4] Ms Hammond opposes the application, making the following points. Her case is that:

> **[4.1]** When the image of the cake was posted on her Facebook page, she did so knowing that access to her page was restricted to personal friends only.
>
> **[4.2]** That image was downloaded when a screenshot was taken by Ms Alexandra. It is said this was not only without Ms Hammond's permission, but done so through an unwilling junior employee.
>
> **[4.3]** The image was then distributed by Ms Alexandra to at least three human resources firms in the Hastings district with a view to making sure Ms Hammond could not be employed in the financial services industry.
>
> **[4.4]** This has caused Ms Hammond great emotional and financial hardship. It took her ten months before she found employment and even then, by approaching employers directly and not through an employment agency.

The law

[5] The jurisdiction of the Tribunal to make a non-publication order is found in s 107(3) of the Human Rights Act 1993:

> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
>
> (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
>
> (b) **make an order prohibiting the publication of any report or account of the evidence** or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
>
> (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal. [emphasis added]

[6] The general principle is that while the suppression of the names of the parties or of witnesses is at the discretion of the court or tribunal the starting point when considering suppression orders is the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. See *R v Liddell* [1995] 1 NZLR 538 (CA). However, in *Liddell* it was recognised at 547 that the jurisdiction to suppress identity can properly be exercised where the damage caused by publicity would plainly outweigh any genuine public interest. The decision in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) underlines that in determining whether non-publication orders should be granted, the court or tribunal must identify and weigh the interests of both the public and the individual seeking publication. In *Peters v Birnie* [2010] NZAR 494 at [25] Asher J stated that given the paramount principle of open justice, it is necessary for a person seeking

confidentiality orders to point to some public interest such as particular circumstances relating to the privacy of an individual, to justify a departure from the open justice process. A party seeking to justify a confidentiality order will generally have to show specific adverse consequences that are exceptional.

[7] In the present case, we are of the view that specific adverse consequences of an exceptional nature have been established:

> **[7.1]** On the evidence we have heard so far – and we stress that we are at a very early stage of the hearing and have not heard all of the evidence to be called by Ms Hammond and we have not heard any of the evidence to be called by NZCU Baywide – it is clear that publication by NZCU Baywide of the screenshot has caused Ms Hammond stress and emotional harm of a substantial nature. The bringing of these proceedings has been a challenging exercise, fraught with difficulty and stress of its own.
>
> **[7.2]** The Tribunal must be vigilant to ensure that those who believe their human rights – which includes the right to privacy set out in the Privacy Act – have been violated are not discouraged from doing so by permitting unrestricted access to the evidence without proper regard for the need to balance the public right of access against the interests of the individual.
>
> **[7.3]** The public right to know about proceedings before the Tribunal is satisfied in the present case by the fact that the media has had unrestricted access to the hearing, the only impediments being:
>
> - Prohibition on the photographing of witnesses while giving evidence.
> - Reporting of arguments on the challenges of the admissibility of evidence.
>
> **[7.4]** The media are already able to report the appearance of the cake, the wording of the cake and indeed the ingredients of the cake.
>
> **[7.5]** It is relevant that once the image of the cake is released into the public domain via the media, that image will be, to all intents and purposes, indelible. The saying is that a picture is worth a thousand words. In this day and age Ms Hammond is at risk of being forever associated with that image. We must recognise that at the present time there is no clearly established right under New Zealand law to be forgotten.
>
> **[7.6]** This could well have long term consequences to Ms Hammond's future employment and career prospects. As she said, how far does she have to be exposed as the price for challenging the multiple disclosures of the image by NZCU Baywide to employment agencies with a warning that she not be employed. In this respect it is relevant that we take into account that NZCU Baywide formally admits in the statement of reply that it did in this respect breach Information Privacy Principle 11.

[8] For these reasons, no doubt hastily assembled and poorly expressed, we decline the application for the exhibit to be photographed.

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Mr RPG Haines QC	**Ms WV Gilchrist**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**