IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 27**

	Reference No. HRRT 028/2013
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**ANGELA EMMA WATSON**
	PLAINTIFF
AND	**CAPITAL AND COAST DISTRICT HEALTH BOARD**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Hon KL Shirley, Member

REPRESENTATION:
Mr AJ McKenzie for plaintiff
Ms AC Whittaker for defendant

DATE OF HEARING:	**16 and 17 February 2015**
DATE OF LAST SUBMISSIONS:	**18 May 2015 (plaintiff) and 18 May 2015 (defendant)**
DATE OF DECISION:	**7 July 2015**

DECISION OF TRIBUNAL

Introduction

[1] Ms Watson is a registered nurse employed by Capital and Coast District Health Board (CCDHB). In October 2011 a complaint of harassment was made against her. Following an investigation which did not conclude until 15 months later in January 2013, no formal disciplinary action was taken against her.

[2] During the investigation Ms Watson on 10 August 2012 made a complaint of harassment against her line manager, Ms Alison Slade, the Charge Nurse Manager of the ward in which Ms Watson worked.

[3] In accordance with the CCDHB Harassment Prevention Policy Ms Slade was provided with a copy of the lengthy and detailed complaint made by Ms Watson together with a 32 page typewritten document recording an interview of Ms Watson by CCDHB officers investigating Ms Watson's complaint. Ms Slade, in time, provided the investigating officers with a 27 page typewritten Response to Complaint dated 14 January 2013. She was also interviewed on 16 January 2013, the interview notes being transcribed and compiled into a 7 page document called "Meeting Notes".

[4] On 24 January 2013 Ms Watson requested access to the Response to Complaint and to the Meeting Notes. By email dated 1 February 2013 that request was declined by the CCDHB on the grounds the documents were confidential. The CCDHB relies on s 29(1)(a) of the Privacy Act 1993 which provides that an agency may refuse to disclose any information requested pursuant to information privacy Principle 6 if the disclosure of the information would involve the unwarranted disclosure of the affairs of another individual.

[5] Ms Watson now challenges that decision.

[6] After the parties had filed their briefs of evidence in these proceedings, the CCDHB on 22 December 2014 disclosed to Ms Watson a redacted copy of the Response to Complaint together with a redacted copy of the Meeting Notes.

[7] The issue in these proceedings is whether the CCDHB in February 2013 properly refused to disclose the requested information on the grounds that disclosure would involve the unwarranted disclosure of the affairs of another individual, namely Ms Slade.

Witnesses called

[8] Ms Watson was the only witness to give evidence in support of her case. For its part, the CCDHB called three witnesses being Ms Slade, Mr Murray French, a self-employed human resource and employee relations consultant who investigated the complaints made by Ms Watson against Ms Slade and finally, Ms Valerie McHardy, a Human Resources Manager for the CCDHB.

Procedure followed at the hearing

[9] As foreshadowed by the Chairperson's *Minute* issued on 4 July 2014, it was inevitable the Tribunal would be required to conduct a closed hearing to view the withheld documents and to receive submissions by the CCDHB which could not be presented in open hearing. The documents in question were filed as a closed bundle of documents not made available to Ms Watson.

[10] Both Mr French and Ms McHardy gave evidence in open hearing. None of their evidence was taken in a closed session although Mr French did make reference to documents in the Closed Bundle.

[11] While most of Ms Slade's evidence was given in open hearing, it was necessary for the Tribunal to receive in closed context the Response to Complaint as well as the Meeting Notes together with Ms Slade's evidence relating to these documents. In the closed hearing Ms Whittaker presented legal submissions which could not be presented in open hearing without compromising the withholding claim. During the closed hearing

both Ms Watson and Mr McKenzie were excluded. However, once the closed evidence and the submissions by Ms Whittaker on the specific content of the closed documents had been heard, Ms Watson and Mr McKenzie returned and the open hearing resumed.

[12] Conscious of the fact that Ms Watson and her counsel had been excluded from a significant aspect of the case, the Tribunal took care to ensure the hearing was closed to the minimum degree required to allow the CCDHB to fully and fairly present its case in support of the refusal decision. To the greatest extent possible the hearing was conducted on an open basis.

Post-hearing submissions

[13] By *Minute* dated 31 March 2015 the parties were given opportunity to make submissions on issues relating to remedies. Those submissions (filed on 18 May 2015) have been received and considered.

The jurisdiction issue

[14] At the commencement of the hearing on 16 February 2015 Ms Whittaker properly drew attention to an issue potentially affecting the jurisdiction of the Tribunal.

[15] During the investigation by the Privacy Commissioner the CCDHB provided the Meeting Notes to the Commissioner. The Response to Complaint was not also provided as the CCDHB mistakenly believed Ms Watson had requested only the Meeting Notes. It was not until Ms Watson's brief of evidence was filed on 7 October 2014 that the error was discovered.

[16] The parties were in agreement that while the Privacy Commissioner had not investigated all documents, there had been no need for him to do so. See in this regard *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [63] and [64].

[17] As we are of the view that *Geary v Accident Compensation Corporation* does indeed dispose of the issue, we are satisfied the Tribunal has jurisdiction to consider Ms Watson's complaint as a complaint relating to both documents, being the Response to Complaint and the Meeting Notes.

Only a summary of evidence given

[18] Ms Watson and the CCDHB have been in dispute over certain employment matters and in July 2014 there was a three day hearing before the Employment Relations Authority (ERA). When these present proceedings under the Privacy Act were heard by the Tribunal on 16 and 17 February 2015 the decision of the ERA had not been given. The ERA determination was subsequently published on 4 May 2015 as *Watson v Capital & Coast District Health Board* [2015] NZERA Wellington 47 and the parties have been able to address submissions on the relevance of that decision to the proceedings before the Tribunal.

[19] The Tribunal was told at the hearing on 16 and 17 February 2015 there was a possibility Ms Slade and Ms Watson may have to work together again, either in the same ward or in the wider hospital and this appears to have been confirmed by the ERA decision.

[20] In these circumstances our examination of the evidence and our findings on that evidence will be confined strictly to that which is relevant to the s 29(1)(a) issue and if liability is established, to the question of remedies. We therefore intend no discourtesy

to the parties if the account of the evidence which follows is less fulsome than they might be expecting. It should be added, however, that little, if anything, turns on credibility.

[21] Before the evidence is summarised we address the CCDHB policy on harassment and the procedure it prescribes for dealing with harassment complaints.

THE CCDHB HARASSMENT PREVENTION POLICY

Section 29(1)(a) – the importance of context

[22] Whether disclosure of personal information would involve the unwarranted disclosure of the affairs of another requires account to be taken of the context in which that information has been collected. Particular attention must be given to the purpose for which the information was collected, held and used. That is, to the greatest degree possible, s 29(1)(a) of the Act must be interpreted and applied in a manner consistent with the information privacy principles set out in s 6 of the Act.

[23] In the present case the "context" is the CCDHB Harassment Prevention Policy. It was under this policy the complaint against Ms Slade was made by Ms Watson and it was this policy which prescribed the procedure to be followed and the degree of confidentiality which could be expected by those involved.

The policy and its purpose

[24] Appropriately, the CCDHB recognises harassment is to be taken seriously and is not to be tolerated. It has a specific policy on harassment, that policy being known as the Harassment Prevention Policy. It opens with the clear statement that:

> Capital and Coast DHB does not, under any circumstances, tolerate harassment in the workplace.

[25] It goes on to state particular attention will be given to procedural fairness when complaints are made and disciplinary action may be taken:

> All complaints of harassment will be treated promptly, seriously, with sensitivity and with particular attention to procedural fairness and natural justice. Where harassment is found to have occurred, Capital and Coast DHB will take the action that is deemed appropriate to the circumstances and will act to ensure that the behaviour is stopped immediately.
>
> Proven cases of harassment against Capital and Coast DHB employees may result in disciplinary action being taken, and in the case of those holding special staff status, the withdrawal of special staff status.

[26] The purpose of the policy document is expressly stated to be to ensure all employees are aware of the CCDHB policy on harassment and to (inter alia) ensure awareness of the procedures in place for the making of a complaint of harassment:

> **Purpose**
>
> To ensure that all employees are aware that Capital and Coast DHB is committed to providing an organisation-wide harassment free workplace, and are aware of the procedures and support in place for those who have cause to submit harassment complaints.

Procedure

[27] After defining the term "harassment" (not relevant here) the policy addresses the procedure to be followed. Three options are referred to: self-help, informal intervention and finally, formal complaint. It is the last which applies in the present case. Under this option the complainant must sign a written complaint and the person accused of

harassment must then be told of the complaint and given an opportunity to answer the allegations. The complainant is then to be given an opportunity to "rebut the defences". The opportunity to rebut is referred to twice in this part of the policy document, underlining the importance of this step.

[28] The procedure for formal complaint warrants reproduction in full given the significance it has to the issues to be determined. For emphasis we have added bolding to certain passages which are of central importance to this case:

> **Formal complaint**
>
> This approach should be used in cases where either an informal approach has not resolved the problem, or the allegations have been serious enough to warrant a formal investigation rather than be dealt with on a self-help or informal basis.
>
> The complainant is to sign a written complaint, prepared by themself or in conjunction with their support person. The complaint will be forwarded to the manager of the person(s) against whom the harassment allegations have been made.
>
> The Manager receiving the complaint should contact Human Resources for assistance and advice on establishing the appropriate process to investigate the complaint.
>
> The investigation will be conducted in accordance with the Capital and Coast DHB Disciplinary Procedures. **Procedural fairness will be paramount**, the rights of the person complained about must be respected, and **confidentiality maintained**:
>
> - to ensure an objective investigation the person hearing the complaint, explanations and other evidence should be as remote from and independent of the involved parties as is practicable in order to hear the complaint impartiality, and act in a culturally appropriate manner
> - **the person accused of harassment must be told of the complaint**
> - each involved party must be given the opportunity to be represented, and given a reasonable opportunity to answer the allegations **and rebut the defences**
> - documentary evidence or records of allegations, defences, **and rebuttals** should be kept, **and the parties should correct this record**, if necessary, and sign as correct (refer below re retention of documentation)
> - decision making should be based only upon the facts established during the investigation and arrived at by logical steps (ie reasonably) and should be written down.
>
> The utmost care must be taken to prevent any disadvantage to the person against whom the complaint has been laid if the complaint has been unable to be substantiated or found to be unwarranted; **and to prevent the complainant being made to suffer in any way for having made the complaint**. [Emphasis added]

[29] It can be seen the policy document is explicit as to the procedure to be followed. While the person complained against must be given the signed written complaint and given an opportunity to answer the allegations, the complainant in turn must have opportunity to rebut any defences. This is consistent with the policy statement that "particular attention [will be given] to procedural fairness and natural justice" and that utmost care must be taken to "prevent the complainant being made to suffer in any way for having made the complaint".

Confidentiality

[30] The Harassment Prevention Policy does not say much about confidentiality. While it states that "any initial approaches" made by a person with a harassment complaint will be treated "in strict confidence" and that the complaint will be "taken no further unless

the complainant agrees", it is implicit that once a formal complaint is made, full disclosure of the allegation will be made to the person complained against and in turn, the complainant will see the response and given an opportunity to rebut any defence. The formal complaint process simply states "confidentiality [must be] maintained":

> Procedural fairness will be paramount, the rights of the person complained about must be respected, **and confidentiality maintained** …

[31] The policy document does not explain what, in this context, confidentiality means or entails. It could hardly mean confidentiality in the sense of withholding from the person complained against what is alleged by the complainant or the withholding from the complainant what the person complained against says in answer to the allegation. Otherwise the right of the person complained against to answer the allegations and the right of the complainant to rebut the defences would be of little utility.

CCDHB evidence relating to the Harassment Prevention Policy

[32] One of the witnesses for the DHB was Ms VL McHardy, who has been a Human Resources Manager at the DHB for the past five years. She was the lead investigator into the complaints made against Ms Watson and is familiar with the Harassment Prevention Policy. She confirmed that where a formal complaint is made under the policy the process outlined in that document is followed in that a copy of the complaint is provided to the person complained against. So in the complaint against Ms Watson, Ms Watson was provided with a copy of all signed statements made by those interviewed and an opportunity given to Ms Watson to review and respond to those statements, including all statements made by Ms Slade.

[33] However, in deviation from the policy, Ms McHardy said the complainant is not provided with the response received from the person complained against so that the complainant can comment on or rebut what that person has said. Asked why the policy was not followed, Ms McHardy replied that was a good question and she hadn't thought about it, adding that normally there isn't anything for the complainant to respond to. Pressed on the point she said the investigation report would usually contain extracts of the response given by the person complained against and that is how the opportunity for the complainant to "rebut the defences" is given.

[34] As to this three observations must be made:

> **[34.1]** If the process described by Ms McHardy is what actually occurs when a complaint of harassment is made, it is not in conformity with the terms of the DHB's approved and published policy.
>
> **[34.2]** For the opportunity to rebut to be an effective one, the complainant must see the full response by the person complained against, not just the potentially decontextualised extracts chosen by the investigator for the purpose of justifying the conclusions reached by the investigator in the investigation report.
>
> **[34.3]** The opportunity to rebut must precede, not follow the investigation report. Before the investigator arrives at a view of the evidence and formulates his or her conclusions and recommendations he or she must hear both sides in the sequence mandated by the policy. The policy makes provision for the complainant to rebut "the defences", not the investigator's report.

[35] On the question of confidentiality Ms McHardy's attention was drawn to the statement in the Harassment Prevention Policy that "confidentiality [be] maintained".

She was asked if there was anything in the policy or elsewhere which explained what in this context confidentiality meant. She answered there was not. She herself understood confidentiality as confidential to the investigation. See her written statement at [19] and [20]:

> At the commencement of and during the course of any investigation, whether an Initial Investigation or a Formal Investigation, everyone is advised of the confidential nature of such proceedings. In particular it is requested that the investigation and anything associated with the investigation is not discussed with anyone other than the investigation team and their representative/support person. People interviewed are advised that their statements (both written and oral) are confidential to the investigation and thereby viewed by the investigation team, the respondent and the decision maker …
>
> The confidential nature of the process is expressly set out in the CCDHB's Harassment Prevention Policy.

[36] This understanding of confidentiality does not address the question of confidentiality as between the complainant and the person complained against. The policy itself requires the complaint to be disclosed to the person complained against. This is only proper. The rules of fairness require nothing less. Thereafter the terms of the policy approved by the CCDHB envisage that in this context the rules of fairness require, in turn, that the complainant see the answer to the complainant's allegations. It follows the "confidentiality" referred to so briefly in the policy is not of a kind which inhibits the sequence of allegation, answer and rebuttal of answer. This is consistent with Ms McHardy's understanding that "confidentiality" is confidentiality about what happens in the complaint process. It is not a representation to the complainant or the person complained about that what each says about the other in the course of a formal investigation will not be disclosed to the other party.

[37] Ms Slade contends her reply to the allegations made by Ms Watson were given "in confidence" and should not be released to Ms Watson as this would amount to a breach of a promised confidentiality and an unwarranted disclosure of her (Ms Slade's) affairs. For the reasons given, no such assurance of confidentiality is given by the Harassment Prevention Policy and as will be seen, no assurance was given by the investigator, Mr French. We now address the evidence.

THE PLAINTIFF'S EVIDENCE

[38] Ms Watson is a registered nurse who has specialised in Paediatrics for most of her working life. After working in a number of prestigious hospitals around the world, in 2009 she commenced employment with the CCDHB as a registered nurse in Ward 18 (later to become Ward 2) of Wellington Hospital which at that time focused on children over 6 years of age.

[39] In October 2011 Ms Watson was advised a complaint of harassment had been made against her. Those complaints were dealt with pursuant to the procedure set out in the Harassment Prevention Policy. The investigation took 15 months. During this time Ms Watson was removed from her paediatric workplace and has been "suspended" without pay since May 2012. At the conclusion of the investigation no disciplinary action was taken.

[40] During the investigation Ms Watson by letter dated 10 August 2012 made a complaint of harassment against her line manager, Alison Slade, the Charge Nurse Manager of Ward 2. In this letter Ms Watson detailed both general and specific issues regarding Ms Slade's alleged conduct and treatment of Ms Watson and other staff in the ward. In essence it was alleged Ms Slade arranged or at least encouraged seven

harassment complaints from other staff against Ms Watson. It was said this action was part of a strategy to remove Ms Watson from her employment in Ward 2. Examples of the alleged conduct included:

- Encouraging staff members to file formal complaints about [Ms Watson] under the Harassment Prevention Policy;
- Disparity in treatment of the investigation of incident reports;
- Disparity in the handling of complaints about staff members;
- Rostering issues and breaches of the MECA including refusal to accommodate shift swaps;
- Sickness management issues;
- Inconsistent enforcement of the uniform policy between favoured and disfavoured staff;
- Emailing issues as opposed to dealing with a person face to face;
- Inconsistent handling of study leave requests by favoured or disfavoured staff members;
- Other inconsistent behaviour towards favoured and disfavoured staff including breach of professional boundaries; and
- PDRP issues.

[41] In her letter Ms Watson stated that while she had raised these issues in her responses to the investigation into her own conduct she was of the view that they had not been investigated in any meaningful sense despite the investigation team stating they would link any of Ms Slade's conduct allegedly affecting Ms Watson's work environment and would interview Ms Watson's witnesses. Instead the investigating team had identified one area only which Ms Watson considered to be narrow in focus. She was critical of what she described as a "desultory investigation".

[42] On 3 and 8 October 2012 Ms Watson was interviewed about her complaint against Ms Slade. That interview was conducted by Mr Murray French, a self-employed human resource and employee relations consultant contracted by the CCDHB to undertake a preliminary enquiry into Ms Watson's complaint. The 32 page Investigation Interview Notes were produced in evidence, as was Mr French's Report dated "March 2013".

[43] Ms Watson's complaint of 10 August 2012 and the subsequent Investigation Interview Notes were provided to Ms Slade. She, in turn, provided to Mr French her Response to Complaint which was 134 paragraphs in length (27 pages plus attachments) and she was interviewed by Mr French on 16 January 2013. The Meeting Notes are seven pages in length.

[44] Ms Watson said the first time she became aware of Ms Slade's Response to Complaint and Meeting Notes was when she received Mr French's March 2013 report in which extracts from the Response to Complaint were set out. In his report Mr French found none of the complaints made by Ms Watson had sufficient substance to require a full investigation. This finding was accepted by the CCDHB but not by Ms Watson.

[45] Subsequently Ms Watson brought proceedings before the ERA in which she claimed (in broad terms):

> **[45.1]** That the investigation into the allegations made against her was unfair.
>
> **[45.2]** The dismissal of her allegations against Ms Slade were unfair.
>
> **[45.3]** That her "suspension" from employment without pay from May 2012 was unlawful.

[46] In her proceedings before the ERA Ms Watson sought access to Ms Slade's Response to Complaint and to the Meeting Notes but was unsuccessful. Her request for access to the documents under the Privacy Act having been declined by the CCDHB,

she was required to participate in the three day ERA hearing without the benefit of access to the documents.

[47] Addressing her endeavour to access the documents under the Privacy Act, Ms Watson told the Tribunal her concern stems from the fact that it is plain from the conclusions reached by Mr French that the information in the documents is unfavourable to her, if not damaging of her both personally and professionally. Being unable to access the documents in their entirety she is unable to assess which part or parts to challenge and to make a request under information privacy Principle 7 that corrections be made. In her evidence she stated:

> The denial of access to this document precludes me from assessing the appropriateness or otherwise of the CCDHB's decision not to investigate matters and further leaves me in the very uncomfortable position that a mere 100 page document (from my immediate line manager) concerning me remains on file with the CCDHB without me having any ability to correct or otherwise explain it.

[48] In her oral evidence she said she felt her credibility and reputation were at risk. She is especially worried she cannot access personal information held by her employer and powerless to determine whether the information is true or false. She wants to clear her name and to provide a written response to the two documents. She also wishes to correct any information which is incorrect. While the report by Mr French contains extracts from the responses by Ms Slade, the context of those extracts is not known and it is the full document Ms Watson wishes to respond to, not just the parts chosen by Mr French to include in his report in justification of the conclusion he reached.

[49] Stressing the need for her to see the documents in their entirety she referred by way of example to the fact that in the ERA proceedings Ms Slade asserted Ms Watson had been paid to leave another hospital. Ms Watson said this allegation is entirely untrue and before the Tribunal Ms Slade accepted that was so. Ms Watson says factually incorrect allegations of this kind can be highly damaging and highlight the need for her to be given access to all of the personal information in the two documents in question so that a request for correction can be made under information privacy Principle 7.

[50] In this regard it should be added Ms McHardy made clear in her evidence that the investigation file is stored electronically by the CCDHB even though the hard copy file is destroyed after 12 months. The electronic file contains all of the information and documents previously held on the hard copy file.

THE DEFENDANT'S EVIDENCE

The evidence of Ms Slade – confidentiality

[51] The primary witness for the CCDHB was Ms Slade. She is the Charge Nurse Manager of Ward 2, a position she has held since 21 March 2011. She is both a registered general nurse and a registered sick children's nurse. She was employed for 14 years at Great Ormond Street Children's Hospital, the leading children's hospital in the UK.

[52] In this account of Ms Slade's evidence we focus on the question whether a promise was made that her Response to Complaint and the Meeting Notes would not be disclosed to Ms Watson.

[53] Speaking of the investigation process itself, Ms Slade said that drawing on what she had learnt in the course of the harassment allegations made against Ms Watson, she

expected that anything said by the complainant or by the person complained against would remain "confidential to the investigation". That is the investigation would not be discussed with anyone but the investigation team. She acknowledged that when she met with Mr French on 22 November 2012 she was given not only a copy of the complaint made by Ms Watson, but also a copy of the Harassment Prevention Policy along with the CCDHB Disciplinary Procedures.

[54] On the question whether an assurance was given to her that anything provided to Mr French would not be disclosed to Ms Watson, the following points emerged from Ms Slade's evidence:

> **[54.1]** In her Response to Complaint dated 14 January 2013 Ms Slade specifically requested the full text of her statement not be provided to Ms Watson and at her interview with Mr French on 16 January 2013 she had repeated this request. Mr French, however, had told her that in the event of Ms Watson making a request for access to the documents the issue would have to be referred to the CCDHB which could seek a legal opinion on whether Ms Watson had a right to the information.
>
> **[54.2]** While Ms Slade endorsed her Response to Complaint to the effect she did not want the statement to be released to Ms Watson, she also recorded in her Response she was happy for Mr French to take extracts from her statement and to quote them in his report.
>
> **[54.3]** In her oral evidence Ms Slade, while confirming she understood that parts of her Response would be provided to Ms Watson by being reproduced in Mr French's report, agreed she had not stipulated which parts of that Response could be so used and which could not. Rather, she had proceeded on the basis that Mr French could use any of the 134 paragraphs he chose to select. The same applied to the Meeting Notes.
>
> **[54.4]** In this context it is necessary to return briefly to the fact that after the parties filed their briefs of evidence in these proceedings before the Tribunal, the CCDHB on 22 December 2014 disclosed to Ms Watson a redacted copy of the Response to Complaint together with a redacted copy of the Meeting Notes. The redactions are extensive and in many cases, puzzling. We refer by way of example to the fact that the first four numbered paragraphs of the Response were redacted in their entirety even though all four of these paragraphs are reproduced verbatim in the brief of evidence for Ms Slade filed by the CCDHB on 28 November 2014. In addition passages which are plainly about Ms Watson have been removed. We here refer by example to paras 35, 45 and 47. When these issues were raised at the hearing the Tribunal was told by Ms Whittaker that the redactions had been made by Ms Whittaker in consultation with one of the HR Managers at the CCDHB. Ms Slade said she had herself only requested one redaction comprising a few sentences which had related to a third party.
>
> **[54.5]** Ms Slade emphasised she felt strongly that her Response to Complaint and the Meeting Notes contained information about her (Ms Slade). The legal significance of this is addressed shortly. We simply note here that Ms Slade told the Tribunal that when drafting her Response to Complaint her methodology was to first set out what Ms Watson said and to then provide her (Ms Slade's) response to the particular allegation. This reinforces the view that the complaint and the response are inextricably linked and that the two documents are also

very much about Ms Watson and whether the complaints she has made against Ms Slade have any foundation.

Findings on confidentiality – Ms Slade's evidence

[55] While Ms Slade requested that the full text of her Response to Complaint not be provided to Ms Watson, she was given no assurance by Mr French that that request would or could be met by the CCDHB. Similarly no such assurance could be inferred from the Harassment Prevention Policy itself. To the contrary, that policy makes specific reference to the complainant being given an opportunity to "rebut the defences". Furthermore, Ms Slade herself said Mr French had her authority to quote any part of her Response in his report. There was no part of her Response he could not use.

[56] Ms Slade felt uncomfortable at the prospect of Ms Watson having access to the full text of the two documents. However, given the context ie that the documents were created for the purpose of the Harassment Prevention Policy inquiry, Ms Slade's "privacy" in the two documents can only be described as very much diminished. In balancing the interests of Ms Watson and those of Ms Slade, this finding is of some significance, a point to which we return later.

[57] First we address the evidence of Mr French on the confidentiality point.

Confidentiality – the evidence of Mr French

[58] It will be recalled Mr French is the self-employed human resource and employee relations consultant who investigated the complaints made by Ms Watson against Ms Slade. As part of the preliminary investigation he held two interviews with Ms Watson to establish details of her complaint against Ms Slade. The first interview occurred on 3 October 2012 and the second on 8 October 2012. On 16 November 2012 the complaint and interview notes were signed off by Ms Watson so they could be provided to Ms Slade.

[59] Ms Slade had already been made aware of the complaint as Mr French had been in communication with her from September 2012. On 22 November 2012 Mr French met with Ms Slade to detail the process to be followed, to outline the complaint and to hand over the various documents including a copy of the Harassment Prevention Policy.

[60] On 14 January 2013 Mr French received Ms Slade's Response to Complaint. Mr French noted that in the first sentence of this 27 page statement Ms Slade had written:

> All this information is supplied in the strictest confidence and should only be considered in relation to my response to the wide complaint filed by Angela Watson.

The statement continued:

> As the complaint is not summarized and the issues that relate to harassment have not been identified, I request that the full text of my statement is not provided to Angela Watson. However, I am happy for you to take extracts of my statements as are relevant to the issue of harassment only.

[61] When Mr French met with Ms Slade on 16 January 2013 Ms Slade stressed she wished her statement to remain confidential and not be provided to Ms Watson. Mr French, however, gave no assurance that the statement would remain confidential and not provided to Ms Watson. The Meeting Notes record the following exchange:

> [Ms Slade] noted the request in her response that the full text of her statement not be provided to Angie Watson. Murray [French] advised that he had considered this request in the context of

> the investigation. He noted that distinct from a person accused of something, who had a clear right to information relating to the complaint about them to allow their explanation, he was unsure what rights Angie Watson had to the information contained in [Ms Slade's] statement. He observed that the Privacy Act did not appear to cover the request made by [Ms Slade], because while this Act did allow information to be withheld if it was "evaluative material" he was not sure the statement made by [Ms Slade] could be defined this way. The DHB was also covered by the Official Information Act and this legislation may give Angie Watson some rights to access. **In short, Murray said he could not be sure [Ms Slade's] wish could be respected**. He proposed that the best way to proceed was to refer any request Angie Watson might make to the DHB who could seek a legal opinion on her rights to the information. [Emphasis added]

In cross-examination Mr French confirmed he had never given an assurance of confidentiality to Ms Slade and had explicitly told Ms Slade that no such undertaking could be given.

[62] In our view it is clear from this recorded exchange that no assurance was given to Ms Slade that her Response to Complaint and the Meeting Notes would not be provided to Ms Watson. To the contrary, both she and Mr French anticipated that it was highly probable Ms Watson would seek access to the documents and in that event, legal advice would have to be taken. Ms Slade did not at any time withdraw her consent to Mr French quoting in his report such extracts of her statements as he wished.

Findings on confidentiality – the evidence of Mr French

[63] The clear and unambiguous evidence is that Mr French expressly disavowed giving any assurance or undertaking to Ms Slade that what was said by Ms Slade in the Response to Complaint and in the Meeting Notes would not be disclosed to Ms Watson.

The evidence of Valerie McHardy

[64] The relevant evidence of Ms McHardy has already been referred to in the earlier discussion of the Harassment Prevention Policy and it is not intended to repeat that evidence.

[65] We address now the legal issues.

THE LEGAL ISSUES

[66] The request by Ms Watson for access to the Response to Complaint and Meeting Notes was made under information privacy Principle 6 which gives a right of access to personal information:

> Principle 6
>
> *Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
> (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
> (b) to have access to that information.
> (2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
> (3) The application of this principle is subject to the provisions of Parts 4 and 5.

[67] Refusal of access is permitted only in the circumstances identified in ss 27 to 29. See s 30:

> **30 Refusal not permitted for any other reason**
>
> Subject to sections 7, 31, and 32, no reasons other than 1 or more of the reasons set out in sections 27 to 29 justifies a refusal to disclose any information requested pursuant to principle 6.

[68] The privacy principles apply only to information that is "personal information". "Personal information" is defined in s 2(1) as:

> *personal information* means information about an identifiable individual; and includes information relating to a death that is maintained by the Registrar-General pursuant to the Births, Deaths, Marriages, and Relationships Registration Act 1995, or any former Act (as defined by the Births, Deaths, Marriages, and Relationships Registration Act 1995)

[69] As observed by the Law Commission in its *Review of the Privacy Act 1993: Review of the Law of Privacy: Stage 4* (NZLC R123, June 2011) at [2.38], this definition is very broad and is not limited to information that is particularly sensitive, intimate or private.

[70] "Information" is not defined in the Act, which appears to be deliberate. Speaking of the forerunner to the present provisions McMullin J in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 402 held that the word denotes "that which informs, instructs, tells or makes aware":

> "Information" is not defined in the [Official Information] Act. From this it may be inferred that the draftsman was prepared to adopt the ordinary dictionary meaning of that word. Information in its ordinary dictionary meaning is that which informs, instructs, tells or makes aware.

[71] "Personal information" includes also opinion, otherwise there would be no need for the Act to provide in s 29(1)(b) and (3) that agencies can refuse requests for access to certain types of "evaluative or opinion material" (particularly in the employment context).

[72] The information need not be exclusively about the individual concerned and the definition cannot be read down so as to exclude information which is about two or more individuals. Indeed s 29(1)(a) itself contemplates that information might be personal information about two or more individuals and that fact may give grounds to withhold all or part of the information. As stated in *Grupen v Director of Human Rights Proceedings* [2012] NZHC 580 (Peters J, BK Neeson JP and RK Musuku) at [33], the provision anticipates personal information may relate to more than one individual. In fairness to the CCDHB, such was not disputed.

[73] Addressing the facts, the information in the harassment complaint made by Ms Watson against Ms Slade was personal information and was as much "about" Ms Watson as it was about Ms Slade. Conversely, in responding to the allegations made by Ms Watson, Ms Slade's Response to Complaint and Meeting Notes were similarly as much about Ms Watson as they were about Ms Slade. This was tacitly acknowledged by Ms Slade herself in authorising Mr French to quote verbatim from any part of the Response or Meeting Notes when compiling his report.

[74] The fact that both Ms Watson and Ms Slade made reference in their documents to third parties does not change the analysis. In alleging that Ms Slade arranged for or encouraged seven complaints from other staff about her, Ms Watson necessarily had to draw those others into her account of her relationship with Ms Slade and to explain why Ms Slade was in breach of the harassment policy. Similarly, in alleging that some staff in the ward were favoured while others (including Ms Watson) were not favoured, it was inevitable these third parties would be referred to in both the complaint and in the Response to Complaint. The fact that third parties were so referred to and discussed in

the complaint and the Response did not make the content of the complaint and the Response any less "personal information" about Ms Watson and Ms Slade.

[75] We therefore conclude the information in the Response to Complaint and in the Meeting Notes was personal information about both Ms Watson and Ms Slade.

[76] In these circumstances there is no need to address the question left open in *Sievwrights v Apostolakis* HC Wellington CIV-2005-485-527, 17 December 2007 and in *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [47] as to the reach of the "personal information" definition.

[77] Having been satisfied the information requested by Ms Watson was "personal information" about Ms Watson, we address next whether the refusal by the CCDHB to disclose the information was properly made in terms of s 29(1)(a) of the Privacy Act. We begin with a brief discussion of the burden of proof before addressing the significance of the belated release of redacted versions of the documents to Ms Watson on 22 December 2014. We then consider s 29(1)(a) itself and analyse the facts relevant to the identified issues. It will be seen in this part of the decision we adopt and apply the approach taken in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (20 September 2013), the correctness of which was not challenged by the parties.

Burden of proof

[78] To establish a breach of Principle 6, a plaintiff must show:

> **[78.1]** He or she made an information privacy request; and
>
> **[78.2]** The agency to whom that request was addressed refused to make information available in response to that request or failed to respond to the request within the time fixed by s 40(1) of the Act.

[79] The Privacy Act creates a strong right to access personal information. The Long Title provides that the legislation is intended to "promote and protect" individual privacy in general accordance with the OECD *Guidelines Concerning the Protection of Privacy and Transborder Flows of Personal Data*. The Explanatory Memorandum appended to those *Guidelines* notes that:

> The right of individuals to access and challenge personal data is generally regarded as perhaps the most important privacy protection safeguard.

Where (as here) the personal information is held by a public sector agency the entitlements conferred on the requester by Principle 6(1) are by virtue of s 11(1) legal rights which are enforceable in a court of law.

[80] The fundamental right of an individual to access personal information held by a public sector agency is reinforced and underlined by:

> **[80.1]** First, s 44 which stipulates that when an information privacy request made by an individual is refused, it is mandatory for the agency to give to the individual (inter alia) the reason for the refusal and for the agency to notify the individual of his or her right, by way of complaint to the Privacy Commissioner, to seek an investigation and review of the refusal.
>
> **[80.2]** Second, s 30 which further provides that, subject to limited exceptions which are not here relevant, no reason other than one or more of the reasons

listed in ss 27, 28 and 29 justifies a refusal to disclose information requested pursuant to Principle 6.

[81] Where an agency relies on any of the withholding grounds in ss 27 to 29 of the Act, the agency has the onus of proving the exception. See s 87:

> **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.

[82] While Ms Watson must satisfy the Tribunal, on the balance of probabilities, that any action of the CCDHB was an interference with her privacy (s 85(1)), it is for the CCDHB to establish, on the balance of probabilities, that the provisions of s 29 on which it relies do indeed apply.

Identifying the relevant point in time

[83] Where an information privacy request is made, the obligation of the agency is to decide within 20 working days "whether the request is to be granted" and to give or post to the individual "notice of the decision on the request". See s 40(1):

> **40 Decisions on requests**
>
> (1) Subject to this Act, the agency to which an information privacy request is made or transferred in accordance with this Act shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that agency,—
> (a) decide whether the request is to be granted and, if it is to be granted, in what manner and, subject to sections 35 and 36, for what charge (if any); and
> (b) give or post to the individual who made the request notice of the decision on the request.
> (2) Where any charge is imposed, the agency may require the whole or part of the charge to be paid in advance.
> (3) Where an information privacy request is made or transferred to a department, the decision on that request shall be made by the chief executive of that department or an officer or employee of that department authorised by that chief executive, unless that request is transferred in accordance with section 39 to another agency.
> (4) Nothing in subsection (3) prevents the chief executive of a department or any officer or employee of a department from consulting a Minister or any other person in relation to the decision that the chief executive or officer or employee proposes to make on any information privacy request made or transferred to the department in accordance with this Act.

[84] It follows that the relevant date on which the agency must have good reason under ss 27 to 29 for refusing access to personal information is the date on which the decision is made whether the request is to be granted.

[85] Provided such good reason exists at the date of the decision on the request, the failure by the agency to offer that reason at the time it communicates its decision on the request does not amount to an interference with the privacy of the individual as defined in s 66 (though it is undoubtedly bad practice). Such interference only occurs if there is both a refusal to make information available in response to the request **and** a determination by the Commissioner, or as the case may be, the Tribunal that there is no proper basis for that decision. See s 66(2)(a)(i) and (b):

> **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.

(2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—
  (a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—
    (i) a refusal to make information available in response to the request; or
    (ii) a decision by which an agency decides, in accordance with section 42 or section 43, in what manner or, in accordance with section 40, for what charge the request is to be granted; or
    (iii) a decision by which an agency imposes conditions on the use, communication, or publication of information made available pursuant to the request; or
    (iv) a decision by which an agency gives a notice under section 32; or
    (v) a decision by which an agency extends any time limit under section 41; or
    (vi) a refusal to correct personal information; and
  (b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.

(3) If, in relation to any information privacy request, any agency fails within the time limit fixed by section 40(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 40(1), that failure shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make available the information to which the request relates.

(4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.

[86] Unless in relation to an information privacy request an interference with the privacy of an individual is established, the Tribunal has no jurisdiction to grant a remedy. See s 85.

[87] In the present case the evidence establishes that the request for access to the personal information was made by Ms Watson on 24 January 2013. The decline followed on 1 February 2013, well within the statutory time limit prescribed by s 40(1). However, the decline decision did not make reference to s 29(1)(a). It merely stated:

> Dear Angela. Further to my previous e mail of 24 January 2013, after careful consideration of your request, we do not consider that it can be met as your complaint is a complaint under the Harassment Prevention Policy. This Policy expressly states that "confidentiality will be maintained".

[88] This omission is, for the reasons given, not of legal significance. The Act requires only that good reason exist at the date of the denial of the request and the failure by the agency to offer that reason at the time does not of itself amount to an interference with the privacy of the individual.

[89] However, because the relevant date on which the agency must have good reason for refusing access to personal information is the date on which the decision is made (here 1 February 2013), the fact that one year and ten months later heavily redacted versions of the requested documents were provided to Ms Watson is not relevant to liability but it is "conduct" which must be taken into account if and when the Tribunal comes to consider the question of remedies. See s 85(4).

Section 29(1)(a) – analysis

[90] Section 29(1)(a) provides:

> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> (a) the disclosure of the information would involve the unwarranted disclosure of the affairs of another individual or of a deceased individual;

[91] This withholding provision has two requirements. First, that the disclosure of the information would disclose the affairs of another person and second, that such disclosure would be unwarranted.

[92] As to the first requirement, it is clear the two documents in question focus on the "affairs" of both Ms Watson and Ms Slade. Disclosure of the documents would disclose the affairs of both.

[93] As to the second, it has been correctly said that particular weight needs to be given to the word "unwarranted". This, together with the use of the phrase "the affairs of another individual" rather than "privacy" appears to narrow the scope of this provision. See Taylor and Roth *Access to Information* (LexisNexis, Wellington, 2011) at [3.5.4]. In our view the term "unwarranted" requires the Principle 6 right of access held by the requester to be weighed against the competing interest recognised in s 29(1)(a). In that exercise consideration must be given to the context in which the information was collected and to the purpose for which the information was collected, held and used. As to how the balance is to be struck in a particular case and a determination made whether disclosure of the information would involve the "unwarranted disclosure" of the affairs of another individual will depend on the circumstances. See *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 22 at [63]. In that decision the Tribunal made reference to some of the considerations which may be relevant when weighing the competing interests. See also *Geary v Accident Compensation Corporation* at [78] to [88].

[94] In the present case the "context" is the CCDHB Harassment Prevention Policy. It was under this policy that the complaint against Ms Slade was made by Ms Watson and it was this policy which prescribed the procedure to be followed and the degree of confidentiality which could be expected by those involved.

[95] Our reasons for deciding that the CCDHB has not proved the s 29(1)(a) exception follow.

[96] First, the legal right of access to personal information conferred by Principle 6 and s 11 of the Act is a strong right. This right is a necessary precondition to the exercise of the entitlement in Principle 7 to request the correction of personal information. The legally enforceable right held by the requester should not be emasculated by refusing to give effect to it. See *Commissioner of Police v Ombudsman* at 389 line 44 per Cooke P. In the present case the information and opinion provided by Ms Slade was potentially of a highly prejudicial nature and could affect Ms Watson's return to work in the ward. At the time Ms Watson sought access to the personal information the harassment

complaint against her was either still in train or had only just been concluded. There were thus compelling reasons in favour of disclosure of the withheld information.

[97] Second, the published Harassment Prevention Policy explicitly stipulated that as the complainant, Ms Watson would have an opportunity to rebut the defences raised by Ms Slade. The information provided by Ms Slade was collected for the express purpose of addressing Ms Watson's complaint. On the face of the policy there could be no expectation on Ms Slade's part the two documents in question would be withheld from Ms Watson. The prescribed procedure was in three stages: allegation, defence and rebuttal. Achievement of the policy objective (non-toleration of harassment in the workplace) required the CCDHB to follow its own policy. This it failed to do when Ms Watson was not given an opportunity to rebut the defence advanced by Ms Slade. When Ms Watson attempted to remedy the omission by requesting the information under the Privacy Act, there was no "interest" justifying departure from the CCDHB's own policy.

[98] Third, Ms Slade herself did not claim there were parts of the two documents which could not be disclosed to Ms Watson via the French report. As mentioned earlier, she was comfortable with any part of her response being quoted by Mr French, who had told her no assurance of confidentiality could be given. Ms Slade's only objection was to the disclosure of the whole response to Ms Watson. As to this:

> **[98.1]** She had been given (in unredacted form) the written allegations made by Ms Watson together with the Watson interview notes. She had full notice of what Ms Watson alleged against her.
>
> **[98.2]** From the outset Ms Slade had been made fully aware of the terms of the Harassment Prevention Policy. In at least two places that policy makes reference to the complainant being given an opportunity to rebut defences.
>
> **[98.3]** For the opportunity to rebut to be an effective one, the complainant must see the full response by the person complained against, not just the potentially decontextualised extracts chosen by the investigator for the purpose of justifying the conclusions already reached by the investigator.
>
> **[98.4]** The opportunity to rebut must precede, not follow the investigation report. Before the investigator arrives at a view of the evidence and formulates his or her conclusions and recommendations he or she must hear both sides in the sequence mandated by the policy. The policy makes provision for the complainant to rebut "the defences", not the downstream investigator's report.

[99] Fourth, there is no evidence that harm would have resulted to Ms Slade had disclosure been made to Ms Watson in January 2013 when the information was first provided to Mr French and when requested by Ms Watson on 24 January 2013.

[100] Fifth, this is not a case in which personal information about two persons has been collected for different purposes over various periods of time, particularly in circumstances which have created an "expectation" of non-disclosure or of partial disclosure only. The information in the present case was collected in the context of a complaint of harassment and in the context of an official policy which made explicit the need not only for the person complained against to be given an opportunity to be heard in her defence but also for the complainant to be able to rebut any defences to the allegation.

[101] For these reasons when weighing the competing interests, we find the interests of Ms Watson decisively outweigh those of Ms Slade. It follows we conclude the CCDHB has failed, by a significant margin, to demonstrate that as at February 2013 the refusal to disclose the information to Ms Watson was justified on the ground that such disclosure would involve the unwarranted disclosure of the affairs of another individual, namely Ms Slade. The refusal to make the information available in response to the request coupled with our opinion that there was no proper basis for that decision means an interference with the privacy of Ms Watson has been established. We accordingly turn to the question of remedy.

REMEDY

[102] 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.

[103] 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

[104] 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 the CCDHB into account in deciding what, if any, remedy to grant.

[105] We accept the decision to refuse release of the information was made in good faith. Nevertheless it was plainly a wrong decision. The CCDHB rightly has a policy to prevent harassment and its procedures explicitly provide not only for a complaint to be given to the person complained against, but for the complainant to be given an opportunity to rebut any defence offered in response to the complaint. The published process was not followed for the simple reason that the CCDHB did not appreciate that that was what its own policy explicitly prescribes. As earlier mentioned, when Ms McHardy was asked why the policy was not followed she replied that that was a good question and that she hadn't thought about it, adding that normally there isn't anything for the complainant to respond to.

[106] We refer to this evidence not to criticise Ms McHardy but to illustrate how the CCDHB inadvertently failed to follow its own processes. That failure led to the erroneous view that it could decline the access request on "confidentiality" grounds. There was little understanding that the expectation of confidentiality referred to in the policy is not of a kind which inhibits the prescribed sequence of allegation, answer and rebuttal.

[107] It was not sufficient that certain extracts from the two documents provided by Ms Slade were reproduced in the French report:

> **[107.1]** For the opportunity to rebut to be an effective one, the complainant must see the full response by the person complained against, not just the potentially decontextualised extracts chosen by the investigator for the purpose of justifying the conclusions reached by the investigator. Mr French reproduced (verbatim) approximately 15 extracts from Ms Slade's Response. Some of those extracts are short, others of some length. But viewed cumulatively, they come nowhere near to reproducing the 134 paragraph Response to Complaint.
>
> **[107.2]** The opportunity to rebut must precede, not follow the investigation report. Before the investigator arrives at a view of the evidence and formulates his or her conclusions and recommendations he or she must hear both sides in the sequence mandated by the policy. The policy makes provision for the complainant to rebut "the defences", not the investigator's report.

[108] The fact that heavily redacted versions of the two documents were provided to Ms Watson in December 2014 after the close of pleadings in this case was in our view a case of "too little, too late". As we have already observed, the redactions are extensive and in many cases, puzzling and have earlier made reference to the example that the first four numbered paragraphs of the Response were redacted in their entirety even though all four paragraphs are reproduced verbatim in Ms Slade's brief of evidence. In addition, passages which are plainly about Ms Watson have been removed (paras 35, 45 and 47). Above all, however, as we have found that the documents should have been released in their entirety to Ms Watson when requested in January 2013 the release of heavily redacted versions nearly two years after the event had little mitigating effect.

Declaration

[109] 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].

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

Damages for pecuniary loss

[111] Ms Watson, who drafted the statement of claim herself, seeks damages under s 88(1)(a) for pecuniary loss in the sum of lost wages. The difficulty, however, is that a causative link must be established between the withholding of the two documents and the lost income. Such link has not been established on the evidence and in fairness, Ms Watson did not contend otherwise. The Tribunal therefore has no jurisdiction to make an award of damages for pecuniary loss.

Damages for loss of benefit

[112] 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.

[113] While s 88(1)(b) was not expressly pleaded by Ms Watson in her self-drafted statement of claim, it is implicit from the context of her claim that her complaint included her inability to utilise the documents in preparing for and conducting the ERA claim. See Part 4, paras 2 and 3 and Part 5, para 1 of the statement of claim. In our view the effect of s 105 of the Human Rights Act 1993 (incorporated into the Privacy Act by s 89 of that Act) requires us to concentrate not on the technicality of the pleadings but on the substantive merits of the case. The issue having been clearly raised both in the statement of claim and on the evidence given at the hearing and the CCDHB having by *Minute* dated 31 March 2015 been given an opportunity to address s 88(1)(b), we are of the view there is no bar to the remedy being considered. In fairness the submissions for the CCDHB dated 18 May 2015 concede as much but contend the Tribunal is for other reasons, without jurisdiction to award damages for loss of benefit.

[114] The CCDHB submission on jurisdiction is that:

> **[114.1]** Ms Watson cannot claim damages for the same thing in two different jurisdictions: the ERA and the Tribunal. The question is which jurisdiction is to prevail.
>
> **[114.2]** Section 161 of the Employment Relations Act 2000 states the ERA has "exclusive jurisdiction to make determinations about employment relationship problems generally", including certain "actions":
>
> > **161 Jurisdiction**
> >
> > (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
> > …
> > (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

…

> **[114.3]** Where damages under the Privacy Act are sought in relation to the failure to give access to documents of potential relevance to an employment dispute, the case becomes an employment relationship problem and falls within the exclusive jurisdiction of the ERA. That is, damages in such a case is for the ERA to consider, not the Tribunal.

[115] If the submission for the CCDHB is to be understood as meaning that damages should not be awarded in circumstances where the plaintiff has already received damages or compensation from a different court or tribunal for the same harm, the proposition is entirely unremarkable and is not challenged in these proceedings.

[116] But it is altogether a different matter if the submission is to be understood as a claim that whenever the application of an information privacy principle arises in the context of an employment relationship, the ERA alone has jurisdiction to determine the application of those principles, to make a finding whether there has been an interference with the privacy of an individual and to award remedies under ss 85 and 88 of the Privacy Act. Such is a startling proposition and no authority has been cited in support.

[117] While s 161(1) of the Employment Relations Act confers on the ERA exclusive jurisdiction to make determinations about "employment relationship problems", such "problems" are not open ended. They are confined to the limited circumstances which fall within the definition of that term in s 5 of the Act:

> ***employment relationship problem*** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

[118] The terms "personal grievance" and "dispute" are further defined but neither definition can possibly be interpreted to include, for example, issues under the Privacy Act in relation to access to personal information of potential relevance to an employment dispute. Nor can the final phrase "any other problem relating to or arising out of an employment relationship" be sensibly construed as including any issue under the Privacy Act.

[119] This is because the Privacy Act and the Employment Relations Act have different objects and purposes. The Employment Relations Act does not address privacy issues. Rather, the object of the Employment Relations Act is to build productive employment relationships. See s 3:

> **3 Object of this Act**
>
> The object of this Act is—
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
> (iii) by promoting collective bargaining; and
> (iv) by protecting the integrity of individual choice; and
> (v) by promoting mediation as the primary problem-solving mechanism; and
> (vi) by reducing the need for judicial intervention; and
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[120] By contrast the object of the Privacy Act is (inter alia) to promote and protect individual privacy. The Long Title provides:

> An Act to promote and protect individual privacy in general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, and, in particular,—
>
> (a) to establish certain principles with respect to—
> (i) the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and
> (ii) access by each individual to information relating to that individual and held by public and private sector agencies; and
> (b) to provide for the appointment of a Privacy Commissioner to investigate complaints about interferences with individual privacy; and
> (c) to provide for matters incidental thereto

[121] It is significant the Employment Relations Act itself does not recognise the claimed overlap with the Privacy Act. Contrast the position where the Employment Relations Act overlaps with the Human Rights Act 1993. Section 112 of the former Act expressly provides that where the circumstances giving rise to a personal grievance by an employee are also such that that employee would be entitled to make a complaint under the Human Rights Act, the employee may pursue one, but not both of the statutory paths. The absence of an analogous provision in relation to interferences with privacy is consistent with the view the view the Privacy Act and Employment Relations Act are not in conflict.

[122] Applying the rule in s 5 of the Interpretation Act 1999 that the meaning of the two statutes is to be ascertained not only from their text but also their purpose, it is inescapable that the two statutes are not in conflict, nor do they overlap. Each is confined to its own subject matter and the jurisdictions remain separate and distinct. The "exclusive jurisdiction" of the ERA is explicitly confined by the opening words of s 161 to "employment relationship problems" and that phrase is not to be interpreted expansively to mean "anything at all which arises in the course of a person's employment". The CCDHB submission would require the Employment Relations Act to be read as impliedly vesting in the ERA and the Employment Court jurisdiction to determine liability and to award remedies under the Privacy Act. By no known orthodox rule of statutory interpretation could such result be brought about.

[123] The ERA itself saw no conflict of jurisdictions. See paras [16] and [34] of the decision:

> [34] Ms Watson wanted me to determine whether the DHB's decision not to conduct a formal investigation (following the preliminary investigation) into Ms Slade was fair and reasonable in all the circumstances. On reflection I am unwilling to determine Ms Watson's concerns about the Slade investigation **where there was a dispute about the provision of information (that may or may not be relevant) which is being decided in an alternative jurisdiction**. Ms Watson is free to return to the Authority to have that matter addressed when her application with the HRRT is determined. [Emphasis added]

[124] The Principle 6 issue not having been addressed or determined by the ERA and no compensation for loss of benefit of the documents having been awarded in the decision given on 4 May 2015, there is no bar to the Tribunal awarding damages for loss of benefit defined as being unable to utilise the documents in the ERA proceedings or to exercise the entitlement under Information Privacy Principle 7 to request correction of the information provided by Ms Slade, or to request there be attached to the information a statement of the correction sought but not made.

[125] In *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 the Tribunal noted awards have been made both by the High Court and the Tribunal where the requested personal information was either required for or could have been deployed in court or tribunal proceedings. See *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274 where the documents were sought for use in proceedings before the Employment Tribunal, *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 and *MacMillan v Department of Corrections* (Decision No. 08/04, HRRT40/03, 16 April 2004). Loss of peace of mind is a provable damage under this heading. See *Winter v Jans* at [45] and [48].

[126] As to the quantum of damages, the awards made by the Tribunal in the period 2010 to 2012 were reviewed in *Director of Human Rights Proceedings v Hamilton* at [86]. Since then in both *Director of Human Rights Proceedings v Grupen* [2010] NZHRRT 22 (upheld on appeal in *Grupen v Director of Human Rights Proceedings* [2012] NZHC 580) and in *Director of Human Rights Proceedings v Hamilton* the awards were $5,000. More recently $5,000 was awarded also in *Director of Human Rights Proceedings v Valli and Hughes* [2014] NZHRRT 58 and in *Director of Human Rights Proceedings v Schubach* [2015] NZHRRT 4. Though it will be necessary to ensure the awards are updated from time to time. See *Taylor v Orcon Ltd* [2015] NZHRRT 15 at [79].

[127] In the present case the two documents were specifically sought for potential use in the ERA proceedings. They are potentially significant documents and could have been helpful to Ms Watson either in the preparatory stages or during the hearing itself. In the ERA decision at [16] and [33] it was noted that access to Ms Slade's statement was then the subject of proceedings before the Tribunal (commenced prior to the application to the ERA) and records that in a telephone case management call the ERA had decided it would be able to assess the working relationship between Ms Watson and Ms Slade without that material. This decision appears to have been made without the documents in question having been sighted by the ERA. No determination was made that the documents would not have been of use to Ms Watson. In the event Ms Watson was required to participate in the three day ERA hearing without the benefit of access to the documents. We are of the view that an award under s 88(1)(b) in the present case is appropriately fixed at $5,000.

Damages for humiliation, loss of dignity and injury to feelings

[128] We turn finally to s 88(1)(c), namely the assessment of damages for humiliation, loss of dignity and injury to feelings.

[129] The principles were recently reviewed in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 (2 March 2015) at [170] and will not be repeated here. It is sufficient to note that this being a case involving an interference with privacy as defined in s 66(2) it is not necessary for Ms Watson to establish the humiliation, loss of dignity or injury to feelings was "significant".

[130] In assessing whether Ms Watson experienced humiliation, loss of dignity or injury to feeling account must be taken not only of the significance of the legal right of access to personal information but also of the significance of the consequences of being denied access to that information. Not only is the individual exposed to the anxiety of not knowing what has been said about him or her, there is no opportunity to check the information for accuracy and to request correction. In this regard Principle 7 of the information privacy principles is the necessary and logical extension of the right of an individual to have access to personal information held by an agency. It is through

Principle 7 that the individual is able to request correction of the information or to request that there be attached to the information a statement of the correction sought but not made:

> Principle 7
>
> *Correction of personal information*
>
> (1) Where an agency holds personal information, the individual concerned shall be entitled—
>
> (a) to request correction of the information; and
>
> (b) to request that there be attached to the information a statement of the correction sought but not made.
>
> (2) An agency that holds personal information shall, if so requested by the individual concerned or on its own initiative, take such steps (if any) to correct that information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading.
>
> (3) Where an agency that holds personal information is not willing to correct that information in accordance with a request by the individual concerned, the agency shall, if so requested by the individual concerned, take such steps (if any) as are reasonable in the circumstances to attach to the information, in such a manner that it will always be read with the information, any statement provided by that individual of the correction sought.
>
> (4) Where the agency has taken steps under subclause (2) or subclause (3), the agency shall, if reasonably practicable, inform each person or body or agency to whom the personal information has been disclosed of those steps.
>
> (5) Where an agency receives a request made pursuant to subclause (1), the agency shall inform the individual concerned of the action taken as a result of the request.

[131] In the present case Ms Watson had been accused of harassment by co-workers in a paediatric ward. She believed the investigation was inadequate in that it did not sufficiently address Ms Watson's belief that the context required Ms Slade's conduct to be also investigated as it was that conduct which allegedly affected Ms Watson's working environment. It was in these circumstances she made her complaint against Ms Slade.

[132] It is not the function of the Tribunal to embark upon an inquiry into the rights and wrongs of the complaint against Ms Watson and the counter-complaint against Ms Slade.

[133] What is relevant is that the Response to Complaint filed by Ms Slade as well as the Meeting Notes contain a substantial amount of potentially damaging personal information about Ms Watson. Bearing in mind that Ms Slade is Ms Watson's line manager and further bearing in mind the medical and professional context in which the two parties work, their qualifications and experience and their workplace responsibilities it was undoubtedly humiliating for Ms Watson not to be given access to what Ms Slade had said about her and injury to feelings followed almost as a matter of course. We are also satisfied there was loss of dignity in the sense spoken of in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53]. As to injury to 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.

Of humiliation, the following was said at [28]:

> [28] Humiliation may involve loss of dignity and certainly will involve injury to feelings of self-worth and self-esteem. Humiliation, we would have thought, would always involve a loss of dignity. A loss of dignity would always have involved in injury to feelings. That would include a feeling of pride in oneself and general contentment. Yet whilst injury to such feelings may involve humiliation that will not always be the case.

[134] As earlier recorded in this decision Ms Watson could deduce from the French report that the information in the two documents was unfavourable to her (Ms Watson), if not damaging both personally and professionally. Being unable to access the documents in their entirety she was unable to assess which part or parts to challenge and to make a request under Principle 7 that corrections be made. She told the Tribunal she felt her credibility and reputation were at risk. She was especially worried she could not access personal information held by her employer and powerless to determine whether the information was true or false. She wants to clear her name and to provide a written response to the two documents.

[135] The fact that a factually incorrect allegation (that Ms Watson had been paid to leave another hospital) was said to have been repeated by Ms Slade when giving evidence in the ERA proceedings illustrates the need to be able to correct information. But for this to be possible access to the information must first be gained. We have no doubt that Ms Watson has experienced humiliation, loss of dignity and injury to feeling.

[136] In our view there is a direct cause and effect relationship between the withholding of the documents and the humiliation, loss of dignity and injury to feelings.

[137] The submissions for the CCDHB draw attention to the fact that in the ERA decision Ms Watson was awarded a total of $9,000 as compensation for humiliation, loss of dignity and injury to feelings associated with her two personal grievance claims. The primary submissions made are:

> **[137.1]** As the investigation was (and remains) confidential, the persons who have knowledge of the contents of the withheld documents are confined to those in the investigation team and to Ms Slade. Therefore there can be no effect on Ms Watson's reputation.
>
> **[137.3]** Ms Watson has already been compensated by the ERA and it is difficult to isolate and assess what, if any, separate humiliation, loss of dignity or injury to feelings has been caused by the interference with Ms Watson's privacy.

[138] As to the first point, the submissions takes too narrow a view of the emotional harm encompassed by "humiliation, loss of dignity and injury to feelings". While such harm can be exacerbated by loss of reputation as may occur where there has been publication to a wide audience, such broad publication is not by any means a pre-requisite to the award of damages for emotional harm. Nor does the emotional harm necessarily turn on loss to reputation alone. In any event, in the employment context publication to a small but nevertheless important group of individuals can be just as damaging as publication to the world at large.

[139] As to the second point, the compensation awarded by the ERA was for:

[139.1] The level of distress caused by the decision of the CCDHB to cease payment of special leave ($2,000). See the ERA decision at [135].

[139.2] Distress, humiliation, loss of dignity and injury to feelings associated with Ms Watson's suspension from Ward 2 on 6 September 2013 ($7,000). See the ERA decision at [140].

[140] Neither of the grounds overlap with this Tribunal's decision that there was an interference with Ms Watson's privacy when Principle 6 was breached or with the finding that humiliation, loss of dignity and injury to feelings followed. The interference was of some significance and deprived Ms Watson of access to information of potential importance. After hearing Ms Watson we are satisfied this led to separate and distinct humiliation, loss of dignity or injury to feelings.

[141] In these circumstances we believe an appropriate response is an award of damages at the lower end of the middle band discussed in *Hammond v Credit Union Baywide* at [173] and that an award of $10,000 should be made. As earlier explained we see few, if any, mitigating factors favouring the CCDHB.

Order that documents be provided

[142] Under s 85(1)(d) of the Act the Tribunal has jurisdiction to order a defendant to perform any acts specified in the order with a view to remedying the interference.

[143] As we have concluded that Ms Slade's Response to Complaint and the Meeting Notes of 16 January 2013 should have been provided to Ms Watson when she first requested access to them under Principle 6, access to those documents must now be given without redaction.

A majority decision

[144] It will be seen the Hon KL Shirley dissents from the majority view. In terms of s 104(3) of the Human Rights Act, the decision of the majority is the decision of the Tribunal and the Tribunal's formal orders are set out below, followed by the separate decision of Mr Shirley.

[145] Our reasons for not sharing Mr Shirley's view are now explained.

[146] First, the underlying premise to the dissent is that Ms Slade's response to the complaint made by Ms Watson was given in confidence and that disclosure of her defence to Ms Watson's allegations would involve an unwarranted disclosure of her (Ms Slade's) affairs. We do not accept this is a tenable view of the evidence. As explained, the context in which Ms Slade provided her Response to Complaint and in which she was interviewed by Mr French was Ms Watson's complaint against her (Ms Slade). That complaint was processed under the CCDHB Harassment Prevention Policy which explicitly mandated a process in which it was clear that what Ms Slade said in defence to the harassment complaint would be disclosed to Ms Watson to enable her to prepare a rebuttal. Furthermore, while Ms Slade asked that her response not be provided to Ms Watson, Mr French explicitly told her no assurance of confidentiality could be given. As we have previously stated, both Ms Slade and Mr French anticipated it was highly probable Ms Watson would seek access to the documents and in that event, legal advice would have to be taken. In any event Ms Slade's position on confidentiality was at best ambiguous in that she gave Mr French authority to reproduce in his report any part of Ms Slade's response. There was no part of the response he could not use and

Ms Slade did not at any time withdraw her consent to Mr French quoting in his report such extracts from her statements as he wished.

[147] Second, the CCDHB failed to follow its own policy by not giving Ms Watson an opportunity to rebut Ms Slade's defence. Such fundamental error leaves little room for the implicit finding in the dissent that the CCDHB processes can be trusted and that in the application of s 29(1)(a) it arrived at a proper conclusion.

[148] Third, we are uneasy at the references in the dissent to the conclusions reached by Mr French and by the Privacy Commissioner. The references suggest possible reliance on those conclusions, or at least the attachment of some weight. The function of the Tribunal, however, is to reach its own independent conclusion on the evidence heard by it. The conclusions reached by others are not in this context relevant.

FORMAL ORDERS

[149] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of the CCDHB was an interference with the privacy of Ms Watson and:

> **[149.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the CCDHB interfered with the privacy of Ms Watson by refusing to make personal information available to her when she requested access to the Response to Complaint filed by Ms Slade and the Meeting Notes of 16 January 2013.
>
> **[149.2]** Damages of $5,000 are awarded against the CCDBH under ss 85(1)(c) and 88(1)(b) of the Privacy Act 1993 for the loss of a benefit Ms Watson might reasonably have expected to obtain but for the interference (access to documents of potential relevance to the employment dispute).
>
> **[149.3]** Damages of $10,000 are awarded against the CCDHB under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for humiliation, loss of dignity and injury to feelings.
>
> **[149.4]** The Response to Complaint and the Meeting Notes of 16 January 2013 are to be provided to Ms Watson (without redaction) within five days after the date on which this decision is given.

COSTS

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

> **[150.1]** Ms Watson is to file her submissions within 14 days after the date of this decision. The submissions for the CCDHB are to be filed within a further 14 days with a right of reply by Ms Watson within 7 days after that.
>
> **[150.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.
>
> **[150.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

....

Mr RPG Haines QC **Mr RK Musuku**
Chairperson **Member**

DISSENTING DECISION OF HON KL SHIRLEY

[151] The plaintiff, Angela Watson, contends that the defendant, Capital Coast District Health Board (CCDHB) has infringed her privacy rights by failing to disclose personal information held by the defendant concerning her.

[152] The Privacy complaint has been considered by the Privacy Commissioner who in a final decision dated 1 October 2013 upheld the decision of CCDHB to withhold information pursuant to Section 29(1)(a) of the Privacy Act.

[153] The proceedings are about two documents relating to Alison Slade, the plaintiff's former Charge Nurse Manager of Wellington Children's Hospital. The two documents were created as part of an initial investigation into a complaint made by the plaintiff against Alison Slade under the CCDHB's Harassment Prevention Policy. The documents are:

> **[153.1]** Response to Complaint filed by Angela Watson to the independent investigator, Murray French from Alison Slade dated 14 February 2014, and
>
> **[153.2]** Notes of a meeting on 16 January between Alison Slade, Murray French and others.

[154] It is my view that the overall context is very important in this case.

[155] The plaintiff, Angela Watson, commenced employment with CCDHB on 2 February 2009 as a registered nurse in the paediatric ward, formerly known as ward 18 but now known as ward 2. As early as April 2010 it seems that ward 18 was experiencing difficulties with unusually high staff turnover, a lack of direction and cohesion and an identified need for a more settled and stable environment (the Mike Hughes Report refers.)

[156] Alison Slade commenced employment with CCDHB in the role of Charge Nurse Manager on 21 March 2011. In early October 2011 the plaintiff was notified by Human Resources that seven co-workers had made complaints against her pursuant to the CCDHB's Harassment and Bullying Policy. The plaintiff was removed from ward 18 by her employer and offered an alternative job in the neo-natal department which she refused to accept. In May 2012 the plaintiff was formally suspended. These matters have been the subject of proceedings before the Employment Relations Authority.

[157] In September 2012 the plaintiff lodged a complaint against Alison Slade under CCDHB's Harassment Policy. This was 10 months after she had received the complaints of seven of her co-workers and nine months after she had last worked on ward 2.

[158] An independent investigator, Murray French was commissioned to review this complaint. In April 2013 he concluded that none of the complaints made in the plaintiff's 97 page document contained sufficient substance to require a full investigation. It was noted that these complaints did not relate to matters covered by the Harassment Policy but were rather Code of Conduct matters.

[159] It is clear that CCDHB has very thorough and prescriptive procedures to address matters relating to staff inter-relationships and strives to maintain fairness and balance within these procedures.

[160] In the case of the HR investigation into complaints against the plaintiff, Angela Watson received written copies of all of the complaints and all witness statements. She was able to respond. The complainants or witnesses did not have an opportunity to rebut Angela Watson's response. The information supplied by Angela Watson in response remained confidential to her and the investigation team.

[161] In responding to the complaint made by Angela Watson against Alison Slade, Ms Slade specifically requested that the full context of her response not be made available to the plaintiff, Angela Watson. Alison Slade felt that the information she provided in response was sensitive to her and did not want her written statement or the meeting notes from the 16 January 2013 given to the plaintiff or to anyone else.

[162] Alison Slade was concerned that the personal information she gave in these documents could be used against her and others, even though it was given in confidence and only in relation to the investigation into the plaintiff's complaint against her.

[163] When viewed in full context I am of the view that CCDHB had good reason for refusing the plaintiff's request for personal information on the grounds that disclosure of the information would involve the unwarranted disclosure of the affairs of another individual.

[164] I agree with the final decision of the Privacy Commissioner dated 1 October 2013 and would dismiss the plaintiff's appeal.

.....
Hon KL Shirley
Member