

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

**ORDER PROHIBITING PUBLICATION OF NAME(S) OR IDENTIFYING
PARTICULARS OF APPLICANT/RESPONDENT UNTIL FINAL
DISPOSITION OF THE APPLICATION PURSUANT TO S 18(2) HARMFUL
DIGITAL COMMUNICATIONS ACT 2015. SEE**

<http://www.legislation.govt.nz/act/public/2015/0063/latest/contents.html>

**IN THE DISTRICT COURT
AT HUTT VALLEY**

**I TE KŌTI-Ā-ROHE
KI TE AWAKAIRANGI**

**CIV 2023-096-191
[2023] NZDC 4693**

UNDER	the Harmful Digital Communications Act 2015
BETWEEN	[NOAH IVES] Applicant
AND	[STELLA IVES] Respondent

Hearing: On the Papers

Judgment: 16 March 2023

**JUDGMENT OF JUDGE K D KELLY
ON A WITHOUT NOTICE APPLICATION UNDER THE HARMFUL
DIGITAL COMMUNICATIONS ACT 2015**

Introduction

[1] The applicant has applied without notice for orders under s 19 of the Harmful Digital Communications Act 2015 (HDCA) requiring the respondent to cease or refrain from sending emails to him or other persons in which the respondent makes accusations of offending by the applicant.¹

¹ HDCA s 19(1)(b)

What is alleged?

[2] The applicant alleges that the respondent has emailed his employer, and other persons, claiming that the applicant raped the respondent, and the applicant's sisters kidnapped the respondent, sometime in [decade deleted].

Background to the communications

[3] The applicant is the respondent's father.

[4] In his application the applicant says that respondent is going through a bitter custody dispute with her ex-husband in relation to the applicant's [young] grandson. The applicant says that the respondent believes that he and his family are siding with her ex-husband in relation to this dispute.

[5] In June 2022 the respondent served a protection order on her ex-husband in which she named the applicant and his sisters as associated respondents. The applicant says this protection order was later struck out by the Family Court. Since then, the applicant says the respondent has been persistently emailing and harassing anyone perceived to be involved in the custody dispute including the presiding judge.

The digital communications

[6] Attached to his supporting affidavit² is an email which the applicant says the respondent sent to his employer. This email reads:

Hi,

My name is [Stella Ives]. I was raped in [decade deleted] by my father [Noah Ives].

I am now progressing criminal charges and will be going public with this to One News, Te Karere, stuff news reporter Nadine Roberts and Fairfax media Jason Brown. After the illegal abduction and trafficking of my child.

My fathers sister kidnapped me in the [decade deleted]. This company has gone to Ministers and Lower Hutt CIB, were I am progressing to police complaints for abduction as a child while living in an illegal brothel shortly before his jail for [offending deleted].

² Rules 11(b) and 12, Harmful Digital Communications Rules 2016 (HDCR)

I applied to execute this publicly at the commencement of our Family Court case.

Thank You

[Stella Ives]

Threshold to bring proceedings

*Has there been a breach of communication principles?*³

[7] Mr [Ives] has complained to Netsafe, the approved agency for the purposes of the HDCA. Included with the application is an email from Netsafe saying that Netsafe has provided advice to the applicant advising him to ensure his employer has blocked the email address in question. I am satisfied that Netsafe has had a reasonable opportunity to assess the complaint and decide what action if any to take.⁴

[8] While Netsafe does not express a view as to which communication principles⁵ may have been breached, I am satisfied that there has been a prima facie breach of communication principle 2 (a digital communication should not be threatening, intimidating, or menacing); and communication principle 5 (a digital communication should not be used to harass an individual). The email also raises the spectre of communication principle 6 being breached (a digital communication should not make a false allegation). While the applicant says that it is true that he was jailed for [offending deleted] in [decade deleted], he says he was released [five years later] and has since turned his life around. Otherwise, the applicant says that the accusations in the email are untrue.

*Has there been harm?*⁶

[9] The applicant is an individual who alleges that he has suffered as a result of the communications posted.

³ HDCA s 12(2)(a)

⁴ HDCA s 12(1)

⁵ HDCA s 6(1)

⁶ HDCA s 12(2)(b)

[10] The term ‘harm’ is expressed in the Act to mean ‘serious emotional distress’.⁷ The expression ‘serious emotional distress’ is not further defined in the Act, however, in a decision of this court Judge Doherty said that:⁸

It is clear from the inclusion of the word ‘serious’ that the intended harm must be more than trivial. Being merely upset or annoyed as a consequence of a digital communication would not be sufficient to invoke the sanction of criminal law. Also I emphasise that the conduct criminalised by the HDCA is harmful conduct. Offensive, morally repugnant or merely upsetting conduct will not suffice. In order to attract a criminal sanction the conduct must go further.

[11] Judge Doherty also said that the word ‘distress’ suggests that the intended harm need not extend as far as mental injury or a recognised psychiatric disorder but it is clear from the inclusion of the word ‘serious’ that the intended harm must be more than trivial.⁹

[12] While that decision was made in the context of criminal proceedings, the meaning of that expression remains the same in the civil context.

[13] In his affidavit in support the applicant says that the constant emails and messages are incredibly stressful particularly as he is going through a [health scare] at the moment.

[14] While the applicant has not provided any evidence speaking to the level of stress he says he is experiencing, I am satisfied that the text message is more than trivial, upsetting or annoying particularly given the relationship between the parties.

Should an order be made?

[15] In deciding whether or not to make an order, and the form of an order, the court must take into account a number of statutory matters.¹⁰ My assessment of these matters is as follows:

⁷ HDCA s 4

⁸ *R v Iyer* [2017] DCR 82 at [51]

⁹ Above n 8, at [54]

¹⁰ HDCA s 19(5)

- (a) *the content of the communication and level of harm caused or likely to be caused by it:* I consider that the content of the communication, alleging serious criminal offending, is likely to create significant harm to the applicant;
- (b) *the purpose of the communicator, in particular whether the communication was intended to cause harm:* I am satisfied that there can be no legitimate purpose in sending the text to the applicant's employer and media and that it is intended to cause the applicant harm;
- (c) *the occasion, context, and subject matter of the communication:* to the extent that the respondent considers that she is the victim of criminal offending the proper course of action is to address these matters to the Police rather than to the applicant's employer and the news media;
- (d) *the extent to which the communication is spread beyond the original parties to the communication:* the communications have extended, or are threatened to extend, beyond the applicant and into the public arena;
- (e) *the age and vulnerability of the affected individual:* Given the nature of the accusations and that the applicant is the father of the respondent, coupled with the applicant dealing with, or having recently dealt with, a [health scare] (albeit unspecified in nature) satisfies me that the applicant is a vulnerable individual for the purposes of the HDCA;
- (f) *the truth or falsity of the statement:* the applicant denies the statements made. This, however, is a matter for the Police to investigate given that the respondent says that she has gone to them;
- (g) *whether the communication is in the public interest:* there appears to be no public interest in the communication – as noted, to the extent that the respondent considers that she is the victim of criminal offending then the appropriate action is to make a complaint with the Police, (which appears to be what the respondent has done);

- (h) *the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:* there is nothing before me that indicates that the defendant has taken any steps to minimise the harm caused;
- (i) *the conduct of the affected individual or complainant:* there is also nothing before me to indicate that the conduct of the applicant is such as to warrant the communication to third parties;
- (j) *the technical and operational technicalities, and the cost, of an order:* there are no technical and operational technicalities in making an order;
- (k) *the appropriate individual or other person to be subject to the order:* there is no other person other than the respondent who should be subject to the order.

[16] On balance I am persuaded that the threshold for making an order is met.

[17] While I am of the view that this matter warrants an order being made, the court must also act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (NZBORA).¹¹ I consider that it would be contrary to NZBORA and natural justice to make final orders without giving the respondent an opportunity to be heard. For that reason I decline to make final orders on a without notice basis and direct that the proceedings are to continue on notice to the respondent.¹²

Interim order

[18] While I do not make final orders, I make the following interim order pending final disposition of this matter:¹³

The respondent is to immediately stop posting and to refrain from posting or sending any digital communications on any social media platform including by email in relation to the applicant.

¹¹ HDCA s 19(6)

¹² Rule 21(3)(a) Harmful Digital Communications Rules 2016

¹³ Rule 21(3)(b) Harmful Digital Communications Rules 2016

[19] I consider this order is required because:

- (a) there is a serious question to be tried as to whether the respondent has deliberately used digital communications to cause serious emotional distress to the applicant;
- (b) the balance of convenience favours making the above orders in that there is no obvious legitimate reason for the email sent by the respondent;
- (c) there is no public interest in the continuation of the type of comments that have been made.

Directions for trial

[20] I direct the parties to attend a judicial conference at the Lower Hutt District Court at a date to be advised by the Registrar.

[21] I direct the Registrar to prepare notice of proceedings under Rule 17(1)(b) of the Harmful Digital Communications Rules 2016 and arrange for the notice of proceeding, application, supporting affidavit and this decision to be served on the respondent.

[22] If personal service is not available to be effected within 10 days, the Registrar may refer the matter back to a Judge for directions for substituted service.

[23] The purpose of the judicial conference is to identify a trial date, and to give any necessary directions as to trial and mode of hearing.

[24] I also make the following directions:

- (a) if the respondent wishes to oppose this application she must file a notice of opposition and any affidavit evidence in support of that opposition with the Court no later than 10 working days after service has been

effected, and notify the Registrar of the address at which she will accept service by post and email;

- (b) if the applicant wishes to respond to any evidence filed he must file any affidavit evidence in response with the Court no later than 5 working days after being served under (a);
- (c) the Registrar is to serve any documents filed by the other party at the address for service given by the parties.

Suppression orders

[25] Pursuant to ss 18(2) and 19(4)(c) of the HDCA¹⁴ I make an order that the names and identifying particulars of the parties and other individuals referred to in this proceeding are to be suppressed.

[26] The reason for making this order is that it would be inappropriate for the identity of the parties and other individuals to be published in any way when the respondent has not had an opportunity to answer the allegations. Further, the suppression order will prevent the publication of information about these proceedings in a way which might cause further harm to the applicant.

K D Kelly
District Court Judge

¹⁴ Rule 21(3)(b) Harmful Digital Communications Rules 2016