



Express law fast track information for clients

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AAT awards compensation for breach of privacy

For the first time, the Administrative Appeals Tribunal has considered and upheld an application for a review of a determination of the Federal Privacy Commissioner not to award damages for breach of privacy. In a unanimous decision, AAT President Justice Downes and the other members set out the principles relevant to assessment of compensation under the Commonwealth *Privacy Act 1988*. The Tribunal held the complainant was entitled to 'a restrained but not minimal' award of compensation for injury to his feelings and humiliation of \$8,000.

Rummery and Federal Privacy Commissioner and Department of Justice and Community Safety

[2004] AATA 1221 (22 November 2004)

In *Rummery* the applicant sought review of a determination of the Privacy Commissioner as to the amount of compensation. The Privacy Commissioner determined (determination no 5 of 2004) that Mr Rummery's privacy had been interfered with by the ACT Department of Justice and Community Safety (JACS) when personal information concerning his work performance and former employment was disclosed to the Ombudsman's office in the course of an investigation of a complaint made to that office by Mr Rummery. The Privacy Commissioner held that the personal information disclosed was not relevant to the complaint being investigated and said that JACS should apologise. However, the Privacy Commissioner decided that Mr Rummery was not entitled to any financial compensation.

The AAT noted that the Privacy Act specifically provides that compensable loss or damage includes injury to the complainant's feelings and humiliation. The AAT considered the approach to compensation awards under the Commonwealth *Sex Discrimination Act 1984* and in other jurisdictions and decided in the circumstances that an award of \$8,000 should be made. In reaching its decision, the AAT set out the principles that it considered should apply in determining whether financial compensation is appropriate in a particular case:

- where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course;
- awards should be restrained but not minimal;
- in measuring compensation the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute;
- in an appropriate case, aggravated damages may be awarded;

- compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

The claim that disclosure of the personal information was necessary to show that Mr Rummery's complaint to the Ombudsman was frivolous and vexatious, was rejected by the Privacy Commissioner and quoted with approval by the Tribunal. The Tribunal also noted (without taking it into account) that JACS had persisted during evidence before the Tribunal in maintaining that Mr Rummery's conduct was not bona fide and commented that JACS had incurred considerable expense (including a QC) in maintaining that position, a position *that was always doomed to failure*. The Tribunal was critical of the Department's apology saying it *was as limited as it could be and would not convey any real sense of regret to a reasonable reader*.

Agencies should take close note of this decision particularly:

- the large sum of damages awarded (Privacy Commissioner awards for *hurt feelings* have been mostly in the range of \$500 to \$1000);
- the amount of compensation is to reflect the perception and reaction of the complaint to the breach and not the notional reaction of the *reasonable person*; and
- apologies need to be more than mere platitudes as in another case this could influence the quantum of damages awarded.

Text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/aat/2004/1221.html>

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