

IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 33
WRC 5/13

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of applications for disclosure of
documents by a non-party and a challenge
to objection to disclosure of documents

BETWEEN EMMA YUEN SEE FOX
Plaintiff

AND HEREWORTH SCHOOL TRUST
BOARD
Defendant

Hearing: 3 March 2014
(Heard at Wellington)

Appearances: B Scotland, counsel for plaintiff
S J Webster, counsel for defendant
J L Bates, counsel for Abraham Consultants Limited (by video
conference call from Hastings)

Judgment: 4 March 2014

INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE G L COLGAN

- A The defendant's challenge to the plaintiff's objection to the defendant's notice requiring disclosure of documents dated 24 December 2013 succeeds. The plaintiff must comply with that notice within 30 days of the date of this judgment.**
- B Within one week of the date of this judgment, Abraham Consultants Limited will furnish to the Registrar of the Employment Court at Wellington indexed copies of all of the documentary records held by it relating to the plaintiff's complaints to the Police for the purpose of determination of the relevance of these documents and to make any consequential orders for their disclosure.**
- C Within 21 days from the date of delivery of the Court's further interlocutory judgment determining the relevance of documents relating to the plaintiff's police complaints, Abraham Consultants Limited must**

make disclosure on affidavit filed with the Court and served on the plaintiff of documents in its possession, custody or power, by identifying and describing such documents. If any such documents have been, but are no longer, in Abraham Consultants Limited's possession, custody or power, its affidavit is to disclose to the Court and the parties when it parted with such document or documents and what has become of it or them.

D Abraham Consultants Limited is to produce such documents as are in its possession, custody or power and as are required to be disclosed on affidavit, to the plaintiff and the defendant.

E There will be no order for costs on the non-party disclosure application.

F Any question of costs on compliance with this judgment by Abraham Consultants Limited is reserved until final determination of the proceeding.

REASONS

[1] This interlocutory judgment decides two opposed interlocutory applications. The first is the defendant's challenge to the plaintiff's objection to disclose certain documents to the defendant.

[2] The documents that the plaintiff opposes disclosing are documents which are or may be in the possession or control of the plaintiff. They are documented communications between her and any other person which took place in the period between 17 July 2009 and 18 April 2012. They are documents related to information that may have formed the basis of a number of statements which appeared in a series of emails sent anonymously to members of the school community from a source known as aromabadlaughs@hushmail.com. These emails contained adverse allegations about the school, its Board and senior management, and a number of them deal, at least inferentially, with the plaintiff's situation at or otherwise with the school at the relevant time.

[3] Similar information was sought by the defendant in the form of interrogatories but these were refused by the Court in its second interlocutory judgment of 13 December 2013¹ and, more particularly, from [58]-[64].

¹ [2013] NZEmpC 240.

[4] In that judgment the Court accepted that this information is or might be relevant to these proceedings including, in relation to the aromabadlaugh emails sent after Mrs Fox's dismissal, to the nature and extent of any remedies which may follow a finding of unjustified dismissal. Despite the relevance of this information, the Court declined to require Mrs Fox to answer the proposed interrogatories which sought information about oral conversations that she may have had with a number of other people over an extensive period of time. In these circumstances, the Court determined that the proposed interrogatories were oppressive and that the questions about conversations were properly ones for examination of the plaintiff and other witnesses at the hearing.

[5] The defendant now seeks disclosure and inspection of any documents that the plaintiff may possess or over which she has control, essentially dealing with the same issues. Given the Court's conclusion previously that the contents of the aromabadlaugh emails may be relevant to the proceedings, what are the plaintiff's grounds for objecting to the disclosure of other documents related to them?

[6] First, the plaintiff says that to require disclosure of such documents would be oppressive in the same manner as the Court concluded that answering interrogatories based on recollections about conversations with a number of people over an extensive period of time, would have been.

[7] As a fall-back position, the plaintiff says that if to do so would not be oppressive, she objects to disclose any such documentary communications created in the period from 12 January 2010 (the date of her dismissal) to 18 April 2012 because such documents cannot be relevant to the proceeding before the Court.

[8] The matter of the relevance of any documents created in this latter period has already been determined in the Court's second interlocutory judgment. I confirm, independently also, that if the contents of the aromabadlaugh emails created and sent during that period after Mrs Fox's dismissal are attributable to the plaintiff or her husband who was then her representative, then the information provided and the circumstances of its publication by the emails may be relevant to any remedies to which the plaintiff may be entitled.

[9] The plaintiff relies on the judgment of this Court in *Matthes v New Zealand Post Ltd (No 1)*.² This judgment does not really assist the plaintiff, however. It confirms that relevance to the issues pleaded underpins the document disclosure and inspection regime now under the Employment Court Regulations 2000. More particularly, reg 38 provides that documents are relevant if, in the resolution of any proceedings they support or may support, directly or indirectly, the case of the party in possession of them or support or may support the case of the opposing party or may prove or disprove any disputed fact in the proceeding or if they are referred to in any other relevant document and are themselves relevant. If any documents meet that statutory test of relevance, and unless any one or more of the statutory grounds of objection under reg 44(3) exists, then such relevant documents must be disclosed and may be inspected. None of the reg 44(3) grounds for objection has been advanced by the plaintiff in this case.

[10] Next, the plaintiff relies on her affidavit sworn on 18 October 2013 in support of her opposition to the defendant's application for leave to issue interrogatories. She addresses the oppressiveness of any requirement for her to answer the proposed questions and her views about the relevance of the issues against which the Court has already found. Mrs Fox also says that if she was directed by the Court to answer those interrogatories, she would need access to her school email records in relation to the period from July 2009 to 12 January 2010 when she ceased to be employed. If, by this, I infer that there may be relevant documents contained within the school's email system, then unless the plaintiff has other copies of such documents in her own possession or under her own control, any such documents will be under the control of the defendant and so available to it by this means.

[11] It is, however, insufficient to confine the location of such documents to the school's email system. Mrs Fox and/or her husband, who was at relevant times her agent, may have had an email system with another internet service provider by which such communications may have been sent. It would be artificial to confine the scope of disclosure to the school's email system in these circumstances. Any order to be made will include documents in the possession of the plaintiff or her

² [1992] 3 ERNZ 145.

agent, or over which she and he had control, irrespective of the identity of the internet service provider concerned.

[12] In her affidavit of 18 October 2013, Mrs Fox confirms her denial that she had any involvement in the distribution of the aromabadlaughs emails. That is, however, not the same matter as the defendant now seeks to establish by disclosure. It wishes to have disclosed to it any documents in which the plaintiff provided information to another or others which might have formed the basis of the statements made by the creator or creators of the aromabadlaughs emails. So, while the plaintiff has denied, on affidavit, involvement in the creation and distribution of those emails, the defendant's request for documents relates to information that may have been supplied to another or others to enable the creation and distribution of those emails if such documents exist and are in the possession or under the control of the plaintiff.

[13] As a fall-back position, Mr Scotland argued that the plaintiff should only be required to disclose communications relevant to the aromabadlaughs emails which took place during her employment but not any which postdate her dismissal. About half of the aromabadlaughs emails postdate the plaintiff's dismissal. I do not consider that this is a justifiable distinction. Even although it is correct, as the plaintiff submits, that the justification for dismissal must be determined by reference to the circumstances that the defendants knew or ought reasonably to have known at the time of dismissal, subsequent events may be relevant, indeed important, for remedies, and, as in this case, even where reinstatement is not sought.

[14] Although s 124 of the Employment Relations Act 2000 (reduction of remedies for contributory fault) may not be engaged by post-dismissal conduct, remedies generally may be. Further, given the plaintiff's denial of any involvement in the pre-dismissal aromabadlaughs emails, the post-dismissal emails may assist in proving or disproving Mrs Fox's involvement in the pre-dismissal emails. In these circumstances disclosure of any documents held by her, covered by the defendant's 24 December 2013 notice requiring disclosure, is in order.

[15] I am satisfied that the defendant's identification of the nature of the issues in the aromabadlaughs emails in its notice requiring disclosure of 24 December 2013,

will enable the plaintiff to locate any such documents in email systems. Doing so will not be oppressive of the plaintiff in the circumstances of this case.

[16] The defendant's challenge to the plaintiff's objection to disclosure is successful and the plaintiff must comply with the defendant's notice dated 24 December 2013. Given the plaintiff's residence in Western Australia and the possibility that some aspects of the disclosure now required may need to be addressed in an affidavit sworn by her, the plaintiff must comply with the defendant's notice within 30 days after the date of this judgment.

[17] The second matter for interlocutory decision is the opposed application by the plaintiff for disclosure of documents by a non-party, Abraham Consultants Limited (ACL). This is governed by cl 13 of sch 3 to the Employment Relations Act 2000 which, in turn, invokes s 56B of the District Courts Act 1947. This empowers the Court, if it is satisfied that a document or class of documents may be or may have been in the possession, custody or power of a person who is not a party to the proceeding, to order that person to disclose to the Court and to any other prescribed person whether the document or documents are in his or her possession, custody or power. Subsection (c) empowers the Court to order the production of such documents to the Court or to any other prescribed person. Subsection (b) allows the Court, if it is satisfied that a document has been, but is no longer, in that person's possession, custody or power, to require disclosure to the Court and to any other prescribed person when he or she parted with it and what has become of it.

[18] This is an unusual application for non-party disclosure in the sense that it is not one involving an independent and otherwise disinterested person such as a bank, a finance company, or another such record keeper.

[19] ACL is, in effect, the trading entity of Douglas Abraham who was both the Deputy Chair of the defendant Board at times relevant to this proceeding and was appointed by the Board as its agent to investigate matters relating to Mrs Fox. Mr Abraham's and his company's investigations and reports to the Board were material considerations in the plaintiff's dismissal and the actions of Mr Abraham and his company, in those capacities, are said by her to constitute significant elements of the

absence of justification for dismissal. It is true to say, also, that matters affecting Mr Abraham and his company were the subject of some trenchant criticism by the Employment Relations Authority although it nevertheless determined that Mrs Fox's dismissal was justified.

[20] The documents sought by the plaintiff to be disclosed by ACL include, in both electronic and hard copy, documents relating to the plaintiff; communications between ACL and the New Zealand Police relating to the plaintiff; an electronic copy of a document entitled "Authority to Represent" prepared by ACL for the defendant and provided to the plaintiff; and, in particular, all communications between ACL and the defendant from July 2009 to January 2010 relating to the plaintiff. The plaintiff also seeks a direction that if any of the foregoing documents have been, but are not longer in ACL's possession, custody or power, ACL disclose to the Court when it parted with such documents and what has become of them.

[21] ACL opposes the making of these orders against it. It says that the broad category of documents may include irrelevant ones or others which have been made available to the plaintiff already in the course of inter partes disclosure.

[22] While it is correct that only documents relevant to the proceeding need be disclosed, it is difficult to imagine how ACL may have any documents relating to Mrs Fox which are not relevant to the issues in the proceedings between the parties. Although ACL trades as a private investigator, debt collector, and in a number of allied fields, there is no suggestion that it has dealt with Mrs Fox or has had any dealings about her other than those which resulted from the defendant's request to it to undertake investigations into allegations by and against her.

[23] Second, it is not to the point that ACL may have documents, other copies of which have already been made available to Mrs Fox by the defendant from its own records. Such apparently duplicated documents may not always be facsimiles. Given ACL's role in the events that led to Mrs Fox's dismissal, I consider in principle that it should make disclosure of relevant documents that it holds, irrespective of whether the defendant may have other versions of these.

[24] Nevertheless, I record the plaintiff's agreement to provide to counsel for ACL a list of documents which have been provided by the defendant to the plaintiff and which, impliedly, may not need to be provided again by ACL so long as these are in materially identical form to the already provided documents.

[25] Next, ACL objects to disclosing documents because Mrs Fox's request appears to relate to a police investigation sparked by what it describes as an ill-founded complaint by the plaintiff against Mr Abraham personally which was not taken further by the Police. This issue is said not to be one in dispute between the parties in the proceeding as set out in the pleadings. As a fall-back position, ACL is prepared to provide copies of documents in this class to the Court to determine their relevance.

[26] Mr Abraham's role (and that of ACL) who and which carried out the defendant's investigations as its agent is at the heart of the plaintiff's case. The complaint made by the plaintiff to the Police concerned a piece of correspondence that was written by Mr Abraham to Mrs Fox. Although, as the Court has already determined in an earlier interlocutory judgment, this letter will speak for itself, it may nevertheless throw light on Mr Abraham's treatment of the investigation he undertook in respect of Mrs Fox. His independence is a major plank of the plaintiff's case (as may be seen from the Authority's determination). For the purposes of this application, not only are ACL and Mr Abraham indistinguishable in practice but it will be necessary for the Court to examine closely and carefully what Mr Abraham did in relation to Mrs Fox and how he did it.

[27] The document which evidences the authority given by the defendant to Mr Abraham/ACL to represent it in matters involving Mrs Fox, was apparently prepared by ACL and sent to the Board for execution. Mrs Fox alleges that the authority was created electronically on a date later than when it purports to have been created and sent to the Board, so that its execution was backdated. The plaintiff says that if this is confirmed by electronic analysis of the document, this will contribute to her argument that both the defendant and ACL did not act fairly and reasonably towards her in relation to the events that led to her dismissal.

[28] I accept that in these circumstances, an electronic copy of the authority document may be relevant. It would be open to both ACL, which will retain an electronic version of the document, and to Mrs Fox, who will receive an electronic version of the document, to have these analysed forensically if either wishes to do so. On the other hand, I understand that amateur analysis of the properties embedded in the document and its copies may initially reveal the original date of its creation. The provision of an electronic copy from ACL to Mrs Fox's solicitors would, in the first instance at least, involve only the attachment of an electronic version of the document to an email which will require a minimal expenditure of time and cost.

[29] As to Mrs Fox's complaints to the Police and investigation of them involving Mr Abraham/ACL, I understand these to fall into two categories. The first is Mrs Fox's complaint about the allegedly threatening contents of a letter sent to her by Mr Abraham at a relatively early stage of his and the Board's inquiries. The second complaint by Mrs Fox to the Police was about suspected covert surveillance of her by or on behalf of the Board. I understand that ACL holds documented correspondence between the Police and ACL, and vice versa, in relation to both of these complaints but that ACL now disputes the relevance of them in relation to this proceeding.

[30] It is simply not possible to determine that disputed question of relevance without inspecting the documents and an arrangement has been proposed by ACL for dealing with this that I adopt and will set out at the conclusion of this part of the judgment.

[31] In the unusual circumstances of this case relating to the relationship between ACL and Mr Abraham and relating to Mr Abraham's involvement in the proceeding as a member of the defendant Board and as its investigator, I am satisfied that ACL should make disclosure of relevant documents to the Court and to the plaintiff and the defendant pursuant to s 56B of the District Courts Act. ACL is to disclose to the Court and to the parties, on affidavit, whether it holds documents relevant to this proceeding in its possession, custody or power and, if so, to describe such documents. If any such documents have been, but are no longer, in ACL's

possession, custody or power, its affidavit is to disclose to the Court and the parties when it parted with such document or documents and what has become of it or them. Finally, ACL is to produce such documents as are in its possession, custody or power to the plaintiff and the defendant.

[32] Within the period (agreed by counsel for ACL) of one week from the date of this judgment, ACL will furnish to the Registrar of the Employment Court at Wellington indexed copies of all the documentary records held by it relating to the plaintiff's complaints to the Police. The Court will determine the relevance of these documents and will make any consequential orders for their disclosure if they are relevant.

[33] The time for compliance by ACL with these directions (21 days) will begin to run from the date of delivery of the Court's further interlocutory judgment determining the relevance of documents relating to the plaintiff's police complaints.

[34] As in all contentious document disclosure matters, I draw to the attention of all concerned the statutory limitations upon the use of disclosed documents with which the Court expects persons to comply strictly. Regulation 51 makes it a condition of document disclosure that the integrity and confidentiality of any document disclosed must be maintained at all times. In particular, a party obtaining disclosure must use such documents and their contents for the purposes of the proceeding only and for no other purposes. If copies of such documents have been made available, those copies must be returned within 28 clear days after the conclusion of the proceeding or the conclusion of any related appeal. Copies of copies must not be retained by the party to whom those copies were made available. The information contained in any documents so disclosed but not used in evidence in the proceeding must remain confidential to the party whose document it is or in whose possession it was immediately before it was made available to any other party. That information must not be disclosed by any person except as may be necessary for the conduct of the proceeding.

[35] These are serious obligations about which legal advice should be taken by any affected person.

[36] ACL seeks reimbursement of its costs for involvement in this proceeding. Again, whilst it is usual that a non-party, even one required to give disclosure, can expect that its costs will be met by the party seeking disclosure, the particular facts of this case will determine whether costs are awarded and, if so, the extent of such an award.

[37] There are two distinct aspects of costs. The first is the costs incurred by ACL in responding to the plaintiff's application including, principally, the costs of its legal representation leading to and at the hearing. The second element is the costs to ACL of complying with those orders that the Court has made which may, but will not necessarily, involve further activity of counsel.

[38] In the unusual circumstances of this case, I decline to make any orders for costs in favour of ACL on the application and ACL's defence of it. As to costs of compliance with this judgment by ACL, I reserve these costs until final determination of the proceeding.

[39] The Registrar should arrange a further directions conference by telephone about two months hence by which time this judgment should have been given effect to. By that time, also, the Court will expect any further interlocutory applications to have been filed and served. The purpose of that further directions conference will be to timetable the case to a hearing.

[40] Leave is reserved for either party (and for ACL) to make any further applications for orders or directions on reasonable notice within that period of two months from the date of this judgment.

GL Colgan
Chief Judge

Judgment signed at 4.15 pm on Tuesday 4 March 2014