IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 88
CRC 12/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	CHRISTINE LORRAINE COY Plaintiff
AND	COMMISSIONER OF POLICE Defendant

Hearing: 5 July 2010
(Heard at Wellington)

Appearances: Scott Fairclough, Counsel for Plaintiff (by video conference from Christchurch)
Antoinette Russell and Sally McKechnie, Counsel for Defendant (in Wellington)

Judgment: 8 July 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] There are four preliminary issues for decision in this proceeding which is to go to trial next month.

Psychologists' notes privilege

[2] The first is an important question whether the plaintiff is entitled to assert privilege in a psychologist's notes. In view of the absence of authoritative judgments of any court dealing with issues of privilege in psychologists' records, and more especially since the Evidence Act 2006 affecting this issue came into force, I would have wished ideally to have heard submissions from the professional body of psychologists. This question has, however, arisen only shortly before the trial and requires urgent decision. The issue involves, primarily, these parties but also invokes considerations applicable to other police officers' consultations with and

treatment by psychologists, and even more generally, other patients or clients of psychologists. In these circumstances the decision on this issue should probably be seen as confined principally to the circumstances of these particular parties. That is not least because the relevant events occurred in 2003 and it is at least arguable that the law has changed since then.

[3] Whilst still employed by the Commissioner, but to do with matters that subsequently formed her personal grievances alleging unjustified disadvantage in employment and unjustified constructive dismissal, Ms Coy consulted with and was treated by registered clinical psychologist John Dugdale of Christchurch. This was, however, pursuant to an employee assistance programme operated by the defendant who paid for the consultations and treatments. These were governed by protocols agreed between the defendant and registered psychologist practitioners providing service to police staff under the defendant's "Trauma Policy". Under this policy and said to be the "guiding principle" was "confidential support contact between members of Police and mental health professionals". "Support" was defined as "treatment and/or assessments for the purposes of treatment."

[4] The first "Supporting principle" was that of "Confidentiality" and provided:

> … all information revealed by, and discussed with, police staff seen by a Practitioner is treated in accordance with the provisions of the Code of Ethics of the New Zealand Psychologists Board and the Privacy Act 1993.

[5] The relevant psychologists' Code of Ethics of the NZ Psychological Society, the NZ College of Clinical Psychologists and the NZ Psychologists Board provided relevantly as follows.

[6] Principle 1.6 ("Privacy and Confidentiality") provided:

> Psychologists recognise and promote persons' and people's rights to privacy. They also recognise that there is a duty to disclose to appropriate people real threats to the safety of individuals and the public.
> …
> 1.6.6 Psychologists store, handle, transfer and dispose of all records, both written and unwritten … in a way that attends to needs for privacy and security.
> …

> 1.6.9 Psychologists do not disclose personal information obtained from an individual … without the informed consent of those who provided the information, except in circumstances provided for in 1.6.10.
>
> 1.6.10 Psychologists recognise that there are certain exceptions and/or limitations to non-disclosure of personal information, and particular circumstances where there is a duty to disclose. These are:
> …
> (d) Legal requirements: Where a psychologist is compelled by law to disclose information given by a client …

[7] Also relevant is the Health Information Privacy Code 1994 promulgated under the Privacy Act 1993 (the Privacy Act). Rule 11 of this code prescribes "Limits on Disclosure of Health Information" and, summarised, provides that what is described as "A health agency" must not disclose health information except to the individual concerned or the individual's representative in certain circumstances on the giving of authority by the individual or her representative. There is a specific exemption permitting non-compliance where this is necessary "for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation)".

[8] On occasions Ms Coy conferred with, and was treated by, Mr Dugdale on her own and on other occasions she was accompanied by her husband who participated in the discussions with the psychologist. Mr Dugdale made his own handwritten notes during and immediately following those consultations. In addition, he wrote reports including for the defendant and in reliance upon one of which the plaintiff retired prematurely as a police officer by the process known colloquially as "PERFing". Whilst there is no question of privilege in the reports written and seen by the defendant, Ms Coy resists the Commissioner's wish to inspect and copy Mr Dugdale's notes and, potentially, to use these in evidence at trial.

[9] The tests for disclosure of documents in proceedings in the Employment Court are governed by reg 37 and following of the Employment Court Regulations 2000 (the Regulations). The first criterion is, obviously, that the document or documents sought to be disclosed is or are relevant to issues in the proceedings. There seems to be little doubt about that test being met in this case. Even if relevant, however, the Regulations provide three grounds on which a party may resist disclosure. Two of these are inapplicable. They are legal professional privilege and

self-incrimination. That leaves the third and broadest ground on which the plaintiff must hang her objection, namely that it is injurious to the public interest (to use the Regulations' quaint words) that there be disclosure of these documents to the plaintiff.

[10] Similar issues have arisen previously in this Court although not since the Evidence Act came into effect which altered statutorily the previous common law position.

[11] Mr Dugdale is a registered clinical psychologist possessing relevant qualifications and experience. His expertise for which he was consulted by Ms Coy is allied to the medical discipline of psychiatry but is also distinctly different. By reference to the Evidence Act, however, such distinctions, as used to be significant in privilege questions, no longer are, or at least to the same extent.

[12] The task now facing the Court is to determine in effect whether it is in the public interest to prevent disclosure of such relevant documents in litigation. The discretion exercisable by the Court is a broad one but principled consistency is important. Although proceedings in the Employment Court are not subject to the Evidence Act, the Court has long been guided by both common and statute law on matters of both evidence and disclosure or discovery of documents.

[13] Ms Coy relies on the judgment of this Court in *Gilbert v Attorney General in respect of the Department of Corrections*[1] in which a similar objection to disclosure of psychologists' notes was raised. Reaching its determination, the Court had regard to the then state of the common law and the impact upon that of the relevant Evidence Act. As counsel for the defendant points out, however, the relevant provisions of the Evidence Act have amended significantly a previous position (at least in the courts of general jurisdiction) and it is necessary to take account of those changes in determining the current public interest in privilege of psychologists' notes.

[1] [1998] 3 ERNZ 500.

[14] Following the High Court in *M v L*[2] this Court in *Gilbert* confined the privilege in communications with (and the recording thereof by) medical practitioners and psychologists as applying only to such communications made by a patient who believed that such communication was necessary the practitioner to examine, treat or act for the patient. The then applicable section of the Evidence Amendment Act (No 2) 1980 was s 32 and this Court in *Gilbert* concluded that to require disclosure that was contrary to the provisions of s 32 would be injurious to the public interest, the same test as is now applicable although then under reg 52(3)(c) of the Employment Court Regulations 1991.

[15] The plaintiff in *Gilbert* was entitled to assert medical professional privilege and to resist disclosure of documents or parts of documents consisting of his "protected communications" as defined by then s 32.[3]

[16] Section 32 of the Evidence Act, which was influential in upholding privilege in *Gilbert*, is now inapplicable because such privilege now exists only in respect of criminal proceedings under the general law of evidence. However, this Court must still conduct a similar balancing exercise to that in s 69 of the Evidence Act under reg 44(3)(c) to determine whether disclosure of these documents would be injurious to the public interest.

[17] It is noteworthy that s 69(5) of the Evidence Act provides that a direction preventing disclosure of confidential material can be made under s 69(1) even although the circumstances fall short of establishing a privilege as they must do in civil proceedings. The confidential materials listed in s 69(1) are a confidential communication, any confidential information, and any information that would or might reveal a confidential source of information. Section 69(2) mandates factors to be considered in the exercise of this discretion involving the comparison of various factors to determine if the public interest justifies protection of the confidential material. Section 69 is instructive in the balancing exercise that this Court must carry out under reg 44(3)(c).

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[2] [1997] 3 NZLR 424.
[3] See [1998] 3 ERNZ 500, 514.

[18] The plaintiff has filed a comprehensive affidavit about how Mr Dugdale came to compile his notes that were the subject of the assertion of privilege. She says that on some occasions she attended therapy sessions with Mr Dugdale on her own and on a smaller number of occasions her husband John Langbehn attended parts of sessions with her. In some cases, also, the plaintiff's husband spoke with Mr Dugdale while she was out of the room. The plaintiff says that she was unaware that Mr Dugdale had made notes of these discussions which had come about as a result of a referral of her to Mr Dugdale by a police welfare officer under what was known as the "Police Trauma policy".

[19] The plaintiff says that she regarded her discussions, which were for the purpose of treatment, as being private and in which she felt able to pass on confidential information that would enable Mr Dugdale to treat her "with the express understanding that confidential information would be kept confidential". The plaintiff says that when her husband attended with her, this was at the request of Mr Dugdale. She says that she considered then, and continues to consider, that these therapy sessions were confidential and their contents privileged because the information conveyed to Mr Dugdale was for the purpose of his treatment of her. The plaintiff says that without an assurance in her own mind of confidentiality, she would not have conveyed information to Mr Dugdale or even attended the sessions. She points to a contemporaneous example of declining a request by her area commander in April 2003 for access to her medical records. She says she declined this request and instructed her doctor not to release any information without her express prior approval.

[20] In late July 2003 the plaintiff says that Mike Dodge, the then human resources manager for the police in Christchurch, requested that the plaintiff furnish a report from Mr Dugdale as part of her rehabilitation process. She agreed that this would happen and attended at Mr Dugdale's clinic for this purpose. Mr Dugdale first produced a draft report which was discussed between him and the plaintiff before it was released in final form to the police. This was a report dated 11 August 2003 and was produced to the police on about 15 August 2003. The plaintiff says that this report does not contain any of the confidential discussions that either she or her husband had with Mr Dugdale but rather provided some comment on how her

employer should manage her rehabilitation and offered some insights on how she viewed her treatment by police management.

[21] In late September 2003 the plaintiff submitted her written application for disengagement from the police which required her to nominate two medical practitioners who would provide advice to the employer on the grounds of the application to disengage. Ms Coy nominated as one of the medical practitioners Mr Dugdale and on 20 October 2003 he provided a further report to the police which was, in part, an update of his 11 August 2003 report but with additional focus on the requirements for the disengagement application. The plaintiff says that none of her confidential discussions with Mr Dugdale were referred to in that report. The date on Mr Dugdale's last notes is 23 September 2003, before the plaintiff's disengagement under s 28D(1)(b) of the Police Act 1958 took place in October 2003.

[22] The plaintiff says that if she had been aware that any notes made by the psychologist might have been disclosable she would not have allowed Mr Dugdale to make notes of their confidential discussions and may even have considered seriously not being assessed or treated by him or another psychologist in these circumstances.

[23] The plaintiff gives evidence not only of her particular circumstances and concerns but raises broader issues for other police officers who might be engaged in what she describes as "the compulsory NZPOL trauma policy". She had brought my attention to the positions of employees in other government departments where high stress and risk factors are often encountered and the employees are required or encouraged to attend medical providers under a departmental medical recovery process. The plaintiff says that not only generally, but in such cases in particular, confidence in a patient/medical provider relationship will be impacted upon seriously, as will the efficacy of treatment that is able to be provided, unless there is an assurance that confidential communications with the medical provider will remain confidential and privileged. The plaintiff hints also at what might be the confidentiality concerns of medical professionals generally if communications with them are less than absolutely confidential.

[24] The Evidence Act now only addresses privilege for information obtained by clinical psychologists in criminal proceedings. Even then, the privilege is confined to circumstances where there has been a consultation "for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct." So it must follow that the general law does not now protect as privileged absolutely communications between patient or client and a registered psychologist where the content of those communications arises in civil proceedings.

[25] That is not the end of the matter, however, because, potentially at least, separate considerations may apply to evidence given in a proceeding about such communications on the one hand, and the pre-trial disclosure of documents containing such information on the other. I am faced with the latter situation which is covered by the Employment Court Regulations 2000, albeit very broadly by the catch-all of public interest injury under reg 44(3)(c).

[26] There is authority that s 69 of the Evidence Act covers not only privilege of communications where these might be sought to be disclosed in evidence, but also disclosure or discovery of documents pre-trial. In *R v Stewart*[4] a defendant in a criminal prosecution sought disclosure of the notes of a psychologist who had counselled the complainant. Although the application was refused in that case, Pankhurst J said:

> Although the confidentiality provision, s 69 of the Evidence Act 2006, does not directly cover the position at the inspection/discovery stage, it is still sensible to assess the request for disclosure in light of a confidentiality requirement, if possible.

[27] The Judge in *Stewart* noted the application of s 69 "in a proceeding" and that under s 4 this includes "any interlocutory or other application to a court connected with that proceeding." I agree with that analysis.

[28] I conclude, to use the language of reg 44(3)(c), that it would be injurious to the public interest to require the plaintiff to disclose Mr Dugdale's notes made during Ms Coy's consultations with, and treatment by, him including those notes

[4] HC Christchurch, CRI-2006-009-1151, 17 September 2007.

relating to her husband as related to her consultations and treatment. That is the following reasons.

[29] The police trauma policy and associated protocols and codes referred to in it, pursuant to which the plaintiff was examined and treated by Mr Dugdale, contemplated generally that such events would be confidential between patient and psychologist. Ms Coy's unchallenged evidence of her personal expectation of confidentiality of these communications reinforces that. At the time those communications were undertaken and the notes made, the law governing the position as exemplified in the *Gilbert* case provided an expectation of confidentiality in such communications.

[30] The plaintiff did not consult with, or obtain treatment from, Mr Dugdale for the purpose of litigation then in existence. The purpose of the communications, although perhaps probably not effective in the long term, was to assist in the restoration of the plaintiff's health and wellbeing with a view to restoration of the parties' employment relationship. That Mr Dugdale prepared at least two reports in respect of which no privilege is asserted does not cause his notes recording conversations with the plaintiff to lose that shield of privilege. Those were not reports prepared for the purpose of litigation. Rather, they were reports written, first, with a view to assisting a restoration of a functional employment relationship and, second, in support of the plaintiff's application to disengage.

[31] More generally, I consider that there would be a real risk that if such communications were not to be regarded as confidential, police officers such as the plaintiff would be unlikely to take up the offers of employee assistance under the defendant's trauma and other relevant policies if there was known to be a real risk of subsequent disclosure of intimate communications. This would largely defeat the mutually beneficial purposes of such employee assistance programmes, no less for the Commissioner as employer. For such professional assistance to have the best prospect of success for the mutual benefit of employer and employee, psychologists must be confident that information conveyed to them for the purpose of advice and treatment will be, and will remain, in confidence.

[32] In these respects, it would be injurious to the public interest to have employees receive psychological advice and treatment under employee assistance programmes such as the police trauma policy in this case, if there were to be a real risk of confidential communications not being so protected in subsequent legal proceedings.

[33] For these reasons the plaintiff is entitled to decline to disclose copies of Mr Dugdale's notes relating to her consultations with, and treatment by, him including notes relating to his communications with the plaintiff's husband.

Redaction of performance assessment

[34] The second issue for decision is whether the defendant is entitled to "redact" (that is obscure from view) parts of a document, other parts of which he concedes are disclosable in the proceedings. The document or documents are a written performance assessment or assessments of then Sergeant (now Inspector) Michael Coulter who will be a witness in the proceeding but at the time with which this case is concerned was temporarily the plaintiff's supervisor. Counsel for the defendant says that the redacted portions of Sergeant Coulter's performance assessment deal with matters that are not relevant to this proceeding. The plaintiff suspects (but can put it no higher than this) that the redacted parts of the document or documents refer to matters at issue in the proceeding. Ms Coy wants to see the whole document to either confirm her suspicions or to confirm the defendant's assertion of irrelevance.

[35] Only documents or parts of documents that are relevant to the proceedings are disclosable. Counsel assess relevance in terms of the pleading and have a professional obligation to disclose the documents or parts of documents that are relevant even if they are otherwise inconvenient or disadvantageous to that party's case. That is a professional duty that the law reposes in counsel and trusts them to perform. The corollary of this is that if counsel assures the Court and the other party that documents or parts of documents are not relevant to the proceeding, then the Court will not usually go behind that assurance and second guess counsel.

[36] Sometimes an assertion of irrelevance will be supported by a brief description of the nature of the redacted material and often another party will accept counsel's assurance on that basis. Even more occasionally, the parties may agree to the Court inspecting the document to determine its relevance if that is in doubt.

[37] At the hearing the defendant handed up for my inspection both redacted and unredacted copies of Sergeant Coulter's performance assessments to enable me to determine the relevance of the redacted passages. I have inspected the unredacted copies of the assessments and none of the redacted portions deals with matters relevant to this proceeding. Counsel's assessment of the irrelevance of those passages was correct. The plaintiff is not entitled to inspect, copy, or use at trial any of the redacted portions of these Department of Corrections.

Privacy Commissioner privilege

[38] The third privilege issue for decision now is whether correspondence from the defendant to the Privacy Commissioner, dealing with the plaintiff's request for disclosure of documents under the Privacy Act, is privileged in this proceeding at the behest of the defendant. The plaintiff has disclosed her correspondence with the Privacy Commissioner but the defendant says that privilege attaches to his pursuant to s 96(4) of the Privacy Act. The plaintiff submits that such privilege only attaches to documents in proceedings before the Privacy Commissioner and this narrow and particular statutory privilege does not extend to the same documents in these proceedings governed by the Employment Relations Act 2000 and, in particular, by the disclosure code in the Employment Court Regulations 2000.

[39] Section 96 appears in Part 9 ("Proceedings of Commissioner") in the Privacy Act. It provides materially as follows:

> **Proceedings privileged**
>
> (1) This section applies to—
>
> (a) The Commissioner; and
>
> (b) Every person engaged or employed in connection with the work of the Commissioner.
>
> (2) Subject to subsection (3) of this section,—
>
> (a) Repealed.

(b) No person to whom this section applies shall be required to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to his or her knowledge in the exercise of his or her functions.

(3) Nothing in subsection (2) of this section applies in respect of proceedings for—

(a) An offence against section 78 or section 78A(1) or section 105 or section 105A or section 105B of the Crimes Act 1961; or

(b) The offence of conspiring to commit an offence against section 78 or section 78A(1) or section 105 or section 105A or section 105B of the Crimes Act 1961.

(4) Anything said or any information supplied or any document or thing produced by any person in the course of any inquiry by or proceedings before the Commissioner under this Act shall be privileged in the same manner as if the inquiry or proceedings were proceedings in a court.

(5) For the purposes of clause 3 of Part 2 of Schedule 1 to the Defamation Act 1992, any report made under this Act by the Commissioner shall be deemed to be an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.

[40] Ms McKechnie (who argued all issues for the defendant) referred me to a number of judgments said to be relevant to this question. The first is of an Associate Judge in High Court proceedings in *Bevan-Smith v Reed Publishing (NZ) Limited and Anor.*[5] There is a brief reference to s 96 of the Privacy Act at para [35] of that judgment where the Associate Judge, albeit without analysis, simply stated in relation to a communication for which privilege was claimed by one of the parties with the Privacy Commissioner: "That would seem to be correct in the light of the provisions of s 96 of the Privacy Act 1993. Even if there were relevant documents they would be privileged."

[41] Of similarly limited assistance is a decision of the Human Rights Review Tribunal in *Director of Human Rights Proceedings v Richardson.*[6] At para [64] of that decision the Tribunal said of s 96(4):

> An overview of the section suggests that the word 'privileged' was likely intended as a way of referring to the kind of privilege which (for example) protects witnesses who give evidence in Court proceedings from certain liabilities (for example, in defamation) in respect of what they say. Perhaps it was intended also to signal the idea that documents held by the

[5] HC Auckland, CIV-2003-404-3628, 3 March 2006.
[6] [2005] NZHRRT 36, 21 December 2005.

> Commissioner were intended to be privileged from production for inspection. In any event, … the section does at least make it clear that neither the Commissioner nor her staff can be compelled to give evidence in the Tribunal in respect of anything that has come to her or her knowledge in the exercise of her functions under the Act. It was part of [counsel for the Privacy Commissioner's] argument that this necessarily extends to giving evidence as to what documents the Commissioner may hold in any given matter – so that the Commissioner cannot (on [counsel's] submission) be compelled to file a list of documents, or to give any information as to what documents she does hold in any particular matter.

[42] Section 96(4) extends the requirements under s 116 of the Privacy Act that the Commissioner and her staff must maintain secrecy in relation to all matters coming to their knowledge in exercising their functions. It applies to others and in other circumstances.

[43] Looked at on its own, s 96(4) of the Privacy Act would seem to determine that written advice in issue is the subject of statutory privilege. Subsection (4) must, however, be read in light of the whole statute and, in particular, the remainder of s 96. Section 96(1) confines the application of that section (including subs (4)) to "the Commissioner" and "every person engaged or employed in connection with the work of the Commissioner".

[44] The defendant's communications now in issue were with the Commissioner so that subs (4) is applicable to them. It follows that the communications are privileged statutorily so that it is neither for the defendant to waive that privilege nor for this Court to override the statutory privilege.

[45] For these reasons the defendant's correspondence with the Commissioner about the plaintiff's request for disclosure of documents under the Privacy Act cannot be disclosed because it is privileged by statute.

An advocate/witness

[46] There is another issue between the parties that would normally not warrant decision by a judgment. Because, however, it affects potentially other litigants in other proceedings in the Employment Court and its determination raises an arguable legislative conflict, it may be helpful if it is addressed in this judgment. It concerns

the potential involvement in the hearing, as both a witness (albeit not a principal witness) and as an intended advocate, of Mr Langbehn.

[47] He is the plaintiff's husband who is neither a lawyer nor an employment law advocate in the sense that this term is known in New Zealand, that is someone who practises employment law advocacy for hire and reward either independently or with other advocates or with an employer's or an employee's organisation. Mr Langbehn is very knowledgeable about the plaintiff's case and has been very instrumental in its preparation. As may be seen from an earlier issue dealt with in this judgment, he features also in the psychologist's notes having participated with Ms Coy in counselling sessions.

[48] Mr Fairclough has advised the Court that it is intended that Mr Langbehn will undertake cross-examination of the defendant's witnesses if permitted to do so and will, I infer, act as an active junior counsel might in a trial. The defendant objects to Mr Langbehn's involvement as outlined. He says that Mr Langbehn was very involved in some of the events which will be the subject of controversial evidence at the hearing.

[49] Clause 2 of Schedule 3 to the Employment Relations Act 2000 provides that "Any party to any proceedings before the Court, … may … appear personally; or … be represented … by an officer or member of a union; or … **by an agent**; or … by a barrister or solicitor." (my emphasis) It is notable that the commonly used term "advocate" or "lay advocate" is not used in the legislation. Given that persons such as lay advocates in practice, union officials, officers of companies, and even spouses or partners of parties or their friends, appear in proceedings in this Court, Mr Langbehn must come within the definition of an "agent" in the section. If these circumstances alone prevailed, it would have been difficult for the Court to have prohibited Mr Langbehn's involvement as an agent assisting Mr Fairclough as counsel and participating in the hearing.

[50] The matter is complicated, however, by s 72 of the Evidence Act. First to note, however, is that the definition of "court" in s 4 of the Evidence Act does not embrace the Employment Court. It "includes the Supreme Court, the Court of

Appeal, the High Court, and any District Court" the latter of which expressly includes a family court and a youth court. As this Court has noted before, the apparently deliberate exclusion of the Employment Court from the application of the Evidence Act means that whilst its provisions are not binding, when determining any disputed evidence or associated question, this Court will usually have regard to the provisions of the Evidence Act.

[51] Under the Part 3 heading "Trial process", s 71 starts with the general proposition that in civil proceedings, any person is eligible to give evidence and compellable to give that evidence. Section 71 is, however, subject to s 72 which deals with "Eligibility of Judges, jurors, and counsel". It provides at subs (2): "A person who is acting as a juror or counsel in a proceeding is not eligible to give evidence in that proceeding except with the permission of the Judge." Subsection (3) provides: "In this section, counsel includes an employment advocate."

[52] There is no other reference to employment advocates in the Evidence Act. It may be that the provision was included not to cover the position in the Employment Court but, rather, the unusual circumstances that may arise from time to time in the Court of Appeal (and potentially now also the Supreme Court) where employment advocates are sometimes given leave to appear for parties. Although very rarely, it is conceivable that the Court of Appeal may deal with a case in which there is (or more likely has been) evidence given by a person who may seek also to be heard as an employment advocate. That situation would be covered by s 72 because the Court of Appeal is expressly subject to the Evidence Act.

[53] It is not, however, the position here. I am satisfied that the specific provision in cl 2 of Schedule 3 to the Employment Relations Act trumps the enigmatic reference to an employment advocate being in the same position as counsel in s 72 of the Evidence Act. The latter does not preclude Mr Langbehn from being both a witness and an advocate or agent in this proceeding.

[54] That is not the end of the matter, however, because the Court is nevertheless entitled to control its own procedure, especially where this is not governed expressly by a statutory prohibition such as s 72 of the Evidence Act. For instances where that

power to control representation in hearings is concerned, see cases such as *Wall v Works Civil Construction Ltd*[7] and *Ballylaw Holdings Ltd v Ward.*[8]

[55] I agree with the defendant that Mr Langbehn has been long and deeply involved in the plaintiff's case including during much of the period with which the evidence is going to be concerned before her discharge which she asserts was a constructive dismissal. Although the plaintiff had not intended calling Mr Langbehn as a witness, that position has now changed and she intends him to give rebuttal evidence. His draft brief of evidence has now been disclosed and although the plaintiff has reserved the right not to call him, it is clear from the draft brief of evidence that Mr Langbehn cannot be said to be objective and detached about his wife's situation then or now. That is not at all surprising and, if he were only a witness, would be a relatively common feature of such cases. It is his intended involvement in the proceeding as an additional and active advocate, including the intended cross-examiner of at least some, if not many, of the defendant's witnesses, which gives the defendant cause for concern such that he seeks a direction about the plaintiff's representation in this regard.

[56] The plaintiff has engaged experienced counsel to advise her and to conduct her case. Counsel perform such roles pursuant to professional obligations and under additional unwritten but well known and established duties to the Court as well as to a client. Detachment, objectivity, and these overarching professional obligations of counsel are an important assurance that the Court can have about the preparation and presentation of litigants' cases. Put simply, the trial system could not work in the interests of justice without these safeguards in place or would at least work less well. I have no doubt that Mr Langbehn is confident that he knows of, and will attempt to adhere to, these obligations and limitations. However, I am not sufficiently confident that he can act as counsel would in such important aspects of the trial as cross-examination of witnesses on controversial matters of fact in which he was, if not an active participant, then an influential actor.

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[7] CC16B/01, 23 October 2001.
[8] WEC45/01, 13 November 2001.

[57] It has not lessened that concern to have heard from counsel, Mr Fairclough, that if Mr Langbehn is not permitted to act as an advocate and to cross-examine witnesses, Mr Fairclough's instructions will be withdrawn so that Ms Coy will, in effect, have to represent herself. While, in this respect, the plaintiff's choice of representation by Mr Fairclough is hers, I decline to be swayed by suggestions of this sort. I would urge the plaintiff very seriously to reflect on the consequences of jettisoning experienced counsel very shortly before the start of a lengthy and complex trial.

[58] It was not made clear whether the plaintiff's wish for Mr Langbehn to undertake cross-examination would apply to cross-examination of all of the defendant's witnesses or only some of them. Nor was I told, as a separate issue, whether it is proposed that cross-examination of individual witnesses be undertaken by both Mr Fairclough as counsel and Mr Langbehn as advocate. Even if Mr Langbehn might be permitted to appear as an advocate and to cross-examine, I would not allow the latter to occur. That is a reflection of the common practice that only one of multiple counsel appearing for a party will be permitted to undertake cross-examination of any particular witness except in the most exceptional of circumstances.

[59] The greatest attribute that Mr Langbehn can bring legitimately to the plaintiff's case is his encyclopaedic knowledge of events and documents, issues, and evidence. Mr Langbehn can bring those benefits to bear by sitting beside and assisting the plaintiff's counsel, Mr Fairclough, during the course of the hearing as would knowledgeable junior counsel. But I agree with the defendant that it would cross a proper demarcation line for Mr Langbehn to assume an active role as an advocate akin to that of counsel by engaging in the important forensic role of cross-examination or indeed to lead evidence or to make submissions. In these circumstances there will be no difficulty in Mr Langbehn giving evidence as a witness because he will not be an advocate or counsel in the same proceeding. By giving this direction I should not be taken to either be critical of Mr Langbehn or to demean his information management skills. But while the plaintiff is entitled by statute to choose to be represented by Mr Langbehn as an agent, how he performs

that role is subject to the control of the Court and the terms of this direction define the limits of that agency in the interests of a fair trial and justice.

[60] For these reasons I will not allow Mr Langbehn to act as an advocate for the plaintiff by leading evidence, cross-examining or making submissions.

Next steps

[61] The defendant has signalled an intention to challenge the admissibility of a number of parts of the evidence intended to be called for the plaintiff. It is desirable that such a challenge be disposed of before the hearing begins. Accordingly, those matters will be heard in Court for Chambers in Wellington (with the plaintiff entitled to participate via conference call from Christchurch) at 2.15 pm on Monday 2 August 2010. No later than Monday 26 July 2010 the defendant must file and serve a memorandum identifying the evidence objected to and the grounds of objection. The plaintiff may respond by memorandum filed and served no later than 4 pm on Friday 30 July 2010.

[62] If any other interlocutory issues arise for dispose before trial or further directions or orders are sought, those matters should be dealt with ideally on 2 August 2010.

[63] I confirm the plaintiff's agreement to the use by the defendant and by the Court (with the plaintiff also having access if she wishes) of the defendant's e-Court electronic document management system at trial. I record the defendant's agreement to the plaintiff's ability to use hard copies of documents as well as electronic versions by read only access on the understanding that if the cost to the defendant of the use of this system is sought to be recovered from the plaintiff in due course, there will need to be a comparison with the probable cost of an equivalent non-electronic document management system at trial.

GL Colgan
Chief Judge

Judgment signed at 5.05 pm on Thursday 8 July 2010