IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 37
WRC 2/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VICE-CHANCELLOR OF MASSEY UNIVERSITY Plaintiff
AND	MARTIN WRIGLEY First Defendant
AND	TERRY KELLY Second Defendant

Hearing:	13 May 2010 (Heard at Wellington)
Court:	Chief Judge G L Colgan Judge B S Travis Judge A A Couch
Counsel:	Peter Chemis & Andrea Pazin, counsel for the plaintiff Peter Cranney & Anthea Connor, counsel for the defendants Katrine Evans and Dawn Swan, counsel for the Privacy Commissioner as intervenor
Judgment:	18 April 2011

JUDGMENT OF THE FULL COURT

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[1] This case involves the interpretation and application of the principles of good faith imposed on parties to employment relationships by s 4 of the Employment Relations Act 2000 ("the Act") and, in particular, the requirements of that duty introduced by the 2004 amendment to the Act as s 4(1A).

[2] These are issues of very wide application and fundamental importance in employment law. Although they arise in this case in the context of selection for

redundancy, they apply equally in other cases in which employment is at risk, including serious disciplinary cases.

[3] On 30 June 2009, following consultation, the plaintiff advised relevant staff of its decision to restructure part of Massey University's operations. This resulted in competition between existing staff for a reduced number of positions and a selection process to decide who should be retained. In the course of that process, the defendants sought information relating to themselves and to other people involved in it. This raised questions about the relationship between the rights and obligations of the parties under s 4 of the Act and the privacy rights and obligations of persons generally, including under the Privacy Act 1993. To assist us in resolving those aspects of the matter, we invited the Privacy Commissioner to express her views on the individual privacy issues raised by this case. She instructed counsel to appear and make submissions. We thank the Privacy Commissioner for her involvement and acknowledge the assistance we have derived from the submissions made on her behalf.

[4] This matter has its origins in a series of claims by the defendants that, in the course of the selection process, the plaintiff failed to disclose information he was required to provide to them under the obligation of good faith imposed by s 4(1A) of the Act. This claim was investigated by the Authority which upheld one part of the defendants' claim and dismissed the remainder.[1] The plaintiff challenged the whole of that determination and the matter proceeded before the Court by way of a hearing de novo.

Facts

[5] The parties provided us with an agreed statement of facts, to which was attached a number of key documents. This was very helpful and the statement is the source of much of the summary of facts which follows.

[1] WA 1/10, 6 January 2010.

[6] The defendants were employed as senior lecturers in the Institute of Natural Resources ("the Institute") in the College of Sciences at Massey University ("Massey"). They were located at Massey's Palmerston North campus.

[7] In April 2009, Massey consulted staff of the Institute about a proposal for restructuring. On 30 June 2009, potentially affected staff were told that Massey intended to proceed with an amended version of the proposal which would result in fewer academic positions within the Institute. Existing positions were to be disestablished and a smaller number of new positions created. Those new positions were to be filled using what was described as a "contestable reconfirmation process". This meant that existing staff would have to apply and be interviewed for selection.

[8] Mr Wrigley was one of two candidates for a single position of senior lecturer in landscape management. Dr Kelly was one of four candidates for three positions as senior lecturers in agricultural systems.

[9] At a meeting on 2 July 2009, candidates were told the proposed selection criteria and composition of the selection panels. They were given time to consider and comment on them but no feedback was received by Massey.

[10] In an email dated 13 July 2009, candidates were told that questions to be asked at the interviews would include certain topics.

[11] There were three selection panels. Each was chaired by Professor Peter Kemp, the head of the Institute. A member of Massey's human resources staff, Kathryn Tulitt, was also on each panel. The other two members of each panel were chosen with regard to the positions they were to deal with. In each case, they were members of Massey's academic staff.

[12] Prior to conducting the interviews, each panel met to discuss the process. They were provided with information about the process, the position and the candidates. This included an interview sheet to complete for each candidate, which contained groups of questions in each of four categories. Panel members were to record the candidates' response to each question and to score them on a scale of

0 to 5. There was also an individual assessment sheet for each candidate. This was in the form of a matrix listing the four categories in which questions had been asked and an additional category of "curriculum vitae", which was to contain the overall assessment of each panel member of that candidate in each category and comments. It also provided for a "consensus" assessment of the candidate in each category.

[13] For the appointments to each type of position, Professor Kemp also had a sheet on which to record a summary of the ratings of each candidate by the selection panel. This was to be used as a basis for the final selections.

[14] The panel members, to varying degrees, expressed a level of unease about their involvement in the selection process to Professor Kemp. They were colleagues of the candidates or otherwise knew them well and were concerned about being involved in decisions that might lead to job losses. The panel members sought information from Professor Kemp in advance of the interviews about how the comments they made during the selection process would be used by Massey. In particular, they wanted to know whether the unsuccessful candidates would have access to the specific comments each of the selection panel members had made as part of the process. They sought reassurance that this would not occur, as they were concerned about the effect that release of this information could have on their relationships with both the successful and unsuccessful candidates. They thought that there was a real risk that any comments released could easily be taken out of context.

[15] In response to their concerns, Professor Kemp told them that Massey considered they were assisting in an evaluative process that was confidential. As such, Massey did not intend to release the comments made by panel members during the selection process and they were informed that it was not normal Massey process to release such comments. Because the union representing the staff (the Tertiary Education Union) had already indicated to Massey that it would be seeking the information generated in the selection process, Professor Kemp told the panel members to exercise caution in the event the university was required by law to release this material.

[16] The information provided to panel members at the start of the selection process included a memorandum prepared by David Ingram, a Human Resources Advisor. Under the heading "The Selection Process", it said:

> It is essential that you record clear, legible answers on your interview sheets given that you may have to refer back to them or have them disclosed to the candidate if the selection outcome is challenged. You must also be careful what you record to ensure your comments do not show bias.

[17] The interviews were conducted as planned. In each case, the candidates were asked the questions on the interview sheet. Panel members made notes of the candidates' answers and of their own comments. They scored the candidates on each question and those scores were collated onto the individual assessment form for each candidate. The average of those scores for each candidate was then calculated and discussed by the panel until a consensus score for each category was reached. No notes were made of those discussions.

[18] Professor Kemp then transferred the scores for each candidate to the comparison sheet for the position concerned. In each case, the defendants had the lowest scores amongst the candidates for the positions they sought and, on that basis, they were not recommended for appointment.

[19] Following the panel deliberations, Professor Kemp met with Ms Tulitt. They prepared separate feedback for the unsuccessful candidates, the defendants, in the form of a series of bullet points. Those documents were compiled with the aid of notes Professor Kemp had made during the interviews of his impressions of how the candidates responded to the questions.

[20] Professor Kemp and Ms Tulitt then met with each of the defendants and, based on the bullet points, told them why the selection panel had not recommended their appointment.

[21] The meeting with Mr Wrigley took place on 28 July 2009. At this meeting, he was provided with a typed version of the individual assessment sheet showing the scores of the panel members but not identifying which panel member had given which score. The sheet also showed the consensus scores given and the total but no

comments were recorded. Mr Wrigley was invited to make comments on the panel's recommendation that he not be appointed and he did so on 4 August 2009.

[22] A similar meeting was held with Dr Kelly on 20 July 2009. He was shown a typed version of his individual assessment form at that meeting but declined to accept a copy until 27 July 2009 when a subsequent meeting was held with him. Dr Kelly responded the following day, 28 July 2009.

[23] The defendants' responses were considered by Professor Kemp who decided that they contained nothing to warrant any change to the panels' recommendations.

[24] The final decision about appointments to the new positions in the Institute was to be made by Professor Robert Anderson, the Pro Vice-Chancellor for the College of Sciences at Massey. After receiving the response from each defendant, Professor Kemp wrote to Professor Anderson. Those letters identified the candidate or candidates recommended for appointment by the panel in each case, a high level summary of the reasons for the recommendations and some brief comments about the defendants as the candidates not recommended. Enclosed with the letters were the candidate comparison sheets and the responses from the defendants.

[25] Through their union, each of the defendants wrote to Professor Anderson raising objections about the selection process. In each case, there was a broad complaint that Massey had failed to comply with s 4(1A)(c) of the Act by not providing them with all of the information relevant to the decision about their future employment. The letters asked for that information to be provided and an opportunity to comment on it before final decisions were made.

[26] Professor Anderson replied to each of those letters. He recorded his view that he should accept the panels' recommendations but offered the defendants a further opportunity to make comments before he made his final decision.

[27] There followed discussions between the parties' representatives about the provision of further information. This resulted in Professor Anderson giving each defendant copies of the selection panel's recommendations with the names and

comments relating to other candidates blanked out. The defendants were given time to consider these documents and an opportunity to then make further comment but neither did so.

[28] Professor Anderson wrote to Mr Wrigley on 31 August 2009 and to Dr Kelly on 30 September 2009, informing them of his final decision that they not be appointed to the positions for which they had applied. As a result, their employment was terminated by Massey on grounds of redundancy. Mr Wrigley's employment ended on 30 November 2009. Dr Kelly's employment ended in March 2010.

[29] At the time Professor Anderson made his final decision, each of the defendants had the following information:

(a) The job description for the position he applied for.

(b) The selection criteria.

(c) The subject matter of the questions that would be asked at the interviews.

(d) The composition of the interview panel.

(e) The identities of the other candidates for that position and their roles within the university.

(f) What he learned at his interview from the specific questions asked and the emphasis placed on matters by the interview panel.

(g) Feedback through Professor Kemp and Ms Tulitt about why the selection panel had not recommended him for appointment.

(h) His individual assessment sheet setting out how the selection panel had scored him for each of the groups of questions put to him at his interview.

(i) The selection panel's recommendation to the decision maker omitting information about other candidates.

[30] At that time, each defendant did not have any of the following information:

(a) The interview sheets completed by each panel member for each of the candidates who applied for the same position as he did.

(b) The individual assessment sheets for the successful candidate or candidates.

(c) The candidate comparison sheet prepared by Professor Kemp.

(d) The information about the successful candidate or candidates contained in the panel recommendation to Professor Anderson.

(e) The handwritten notes made by Professor Kemp in the course of the interview which were later used to compile the bullet points for discussion with him by Professor Kemp and Ms Tulitt.

(f) A memorandum provided to the members of the selection panels by David Ingram, a human resources advisor to Massey, at the beginning of the selection process.

(g) Information in the minds of the selection panel members and Professor Anderson which had not been committed to writing including:

(i) The selection panel members' views derived from reading the candidates' curricula vitae such as their relative strengths and weaknesses, their suitability for the position and their ranking.

(ii) The selection panel members' assessment of the performance of each candidate during the interview and the impact of this on their views of the candidates' strengths and weaknesses, their ranking and their suitability for appointment.

(iii) The content of the discussion by selection panel members which led to the consensus scores.

(iv) Professor Kemp's views of each defendant's comments following the feedback meeting and the reasons why he did not alter the selection panel's recommendation.

(v) Professor Anderson's view of those comments by each defendant and of the selection panel's recommendation.

[31] In addition to the agreed summary of facts, we were also provided with four affidavits. One was sworn by Mr Wrigley and provided greater detail of certain aspects of the sequence of events summarised above. A similar affidavit was sworn by Professor Kemp. We have read those two affidavits but little of their content needs to be recorded.

[32] The other two affidavits were filed on behalf of the plaintiff and were sworn by Angela van Welie, who is the plaintiff's employment relations manager and Bede Francis Ashby, a human resources consultant involved in recruitment. Ms van Welie described the process usually adopted by Massey in selection of staff and exhibited copies of guidelines and advice given to managers engaged in this process. Mr Francis-Ashby described the process his organisation uses in recruiting staff for clients and expressed opinions about the significance of confidentiality in various parts of the recruitment process. To the extent we need to refer to this evidence, we will do so in our discussion of the issues.

[33] In an interlocutory judgment given by the Chief Judge on 11 May 2010,[2] he directed that the documents listed as (a) to (f) in paragraph [30] above, which were described collectively as the "disputed documentation", be disclosed by the plaintiff to the defendants for the purposes of this litigation. He found that disclosure was necessary to enable the Court to decide whether the plaintiff was justified in not providing the defendants access to these documents in the course of the selection process and that the defendants were entitled to access them for the purpose of providing evidence and submissions about them.

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[2] *Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 52.

Legislation

[34] One of the key provisions of the Act is s 4, the following parts of which are at the heart of this case:

> **4 Parties to employment relationship to deal with each other in good faith**
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> (1) The parties to an employment relationship specified in subsection (2)—
> (a) must deal with each other in good faith; and
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.
>
> (1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.
>
> (1C) For the purpose of subsection (1B), **good reason** includes—
> (a) complying with statutory requirements to maintain confidentiality:
> (b) protecting the privacy of natural persons:
> (c) protecting the commercial position of an employer from being unreasonably prejudiced.

[35] The parties were in an "employment relationship" as defined in s 4(2) and were therefore bound to deal with each other in good faith as provided for in the subsections set out above.

Issues

[36] The defendants' claim is based principally on s 4(1A)(c) of the Act. As the selection process carried out by Massey had the potential to bring the defendants' employment to an end, the plaintiff properly accepts that this provision applied.

[37] Section 4(1A)(c) requires the employer to give affected employees access to certain information and an opportunity to comment on that information before any final decision is made affecting their employment. It is common ground that the defendants were provided with the information described in paragraph [29] above. The defendants claim that they were also entitled to access the following additional information:

(a) The reasons why it was considered appropriate to dismiss them in preference to the other candidates who were not dismissed.

(b) Any facts or opinions relied upon in making the decision.

(c) The reasons way the various scores were allocated to them.

(d) The scores allocated to other candidates and the reasons why they were so allocated.

(e) Any relevant facts or opinions relied on by the selection panel or any other person involved in the dismissal.

(f) Any negative opinions formed and relied upon in the selection process.

(g) The information in the documents referred to in paragraph [30] (a) to (f) above, being the documents created in the course of the selection process to which the defendants were not given access.

[38] The plaintiff's position is that Massey was not obliged to give the defendants access to any of that additional information and that it fully discharged its statutory duty by disclosing the information it did.

[39] In relation to the selection decisions Massey proposed to make in this case, the essential issues are:

(a) The nature and extent of information covered by the expression "information, relevant to the continuation of the employees' employment, about the decision".

(b) Whether any of that information was "confidential information" for the purposes of s 4(1B).

(c) Whether there was "good reason to maintain the confidentiality of the information" for the purposes of s 4(1B) as informed by s 4(1C).

[40] There is an immediate and obvious problem associated with providing specific answers to those questions in this case. In order to decide whether any particular information was relevant, it is necessary to know its content. Equally, in order to decide whether it was confidential information and whether there was good reason to maintain that confidentiality, it is necessary to know the circumstances in which the information was acquired by the employer and the potential consequences of giving employees access to it. Of the categories of information described in paragraph [37], to which the defendants say they were entitled to access, we only know the content of the disputed documentation referred to in (g).

[41] In this judgment, we have expressed preliminary views about the defendants' claim in respect of the disputed documentation. In doing so, however, we are conscious that there may be other evidence or submissions the parties may wish the Court to consider regarding those documents in light of the general construction we place on the legislation. With respect to the information in categories (a) to (f) of paragraph [37], we have expressed generalised views as to the relevance of each category and whether it was likely to have been confidential but we are unable to

reach any final view on question (c) in paragraph [39]. Leave is therefore reserved for any party to seek a further decision with respect to any particular information or category of information.

Principles of statutory construction

[42] Resolution of these issues requires the interpretation and application of s 4(1A)(c), s 4(1B) and s 4(1C) of the Act. In carrying out that task, we are guided by s 5 of the Interpretation Act 1999:

> **5 Ascertaining meaning of legislation**
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> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
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> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[43] In applying that provision, we have regard to what Tipping J said in *Commerce Commission v Fonterra Co-operative Group Ltd*:[3]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross--checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
> ...
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> [24] Where, as here, the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

[44] We also recognise that our role in this case is not to focus narrowly on the meaning of particular words but rather to give practical effect to the legislation in accordance with both the words used and the purpose of the legislation.[4] At the

[3] [2007] NZSC 36, [2007] 3 NZLR 767.
[4] See the judgment of the majority of the Supreme Court in *Air Nelson Ltd v New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc* [2010] NZSC 53, [2010] 3 NZLR

same time, we are conscious that the general principles developed in this case must be readily applicable to the broad range of circumstances in which s 4(1A)(c) applies.

Section 4(1A)(c)

[45] The meaning of s 4(1A)(c) is not entirely clear from its text. It turns very largely on the meaning given to the word "relevant". Counsel for the parties both took a purposive approach to this question.

[46] Section 4 is in Part 1 of the Act headed "Key Provisions". By creating and, to an extent, defining the obligation of good faith, s 4 plays a central role in achieving the overall object of the Act set out in s 3 and, more specifically, the objects in s 3(a):

> **3 Object of this Act**
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> 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—
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> (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
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> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
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> (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
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> (vi) by reducing the need for judicial intervention; …

[47] What is immediately apparent in s 3(a) is the strong and fundamental emphasis on good faith as the principal means of achieving successful employment relationships. This supports an interpretation of the specific obligations in s 4 which minimises the likelihood of employment relationship problems developing. In general, that is more likely to be achieved by giving timely and ample access to relevant information. More informed employee involvement will promote better decision making by employers and greater understanding by employees of the

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433 at [19] and [23].

decisions finally made. That will avoid or reduce the sense of grievance which may otherwise result and thereby reduce the incidence of personal grievances and other employment relationship problems.[5]

[48] Recognition of the inequality of power in employment relationships is also directly relevant. When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.

[49] These broad objects are reinforced by the more general provisions in s 4. As an aspect of the duty of good faith, s 4(1A)(b) "requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative". The obligations imposed by s 4(1A)(c) amplify that general requirement in the specific circumstances in which it applies. It follows that the obligation to provide access to "information, relevant to the continuation of the employees' employment" must be discharged in a manner which is active, constructive, responsive and communicative.

[50] Bearing these objects and broad obligations in mind, we turn to the submissions of counsel.

[51] Mr Chemis, for the plaintiff, acknowledged that the purpose of s 4(1A)(c) is to enable employees to be fairly and adequately informed about the basis for a decision which may adversely affect their employment and to have an opportunity to comment in a meaningful way before that decision is made. In that context, he suggested two possible interpretations of s 4(1A)(c). The first is that all information which might be discoverable in litigation must be provided unless it falls within the exception in s 4(1B). The second interpretation he identified is that the employer

[5] This issue was identified by Judge Travis in *Nee Nee v TLNZ Auckland Ltd* [2006] ERNZ 95 at [87].

must only provide information sufficient to fairly and adequately inform the employees about what is being proposed and which enables them to respond meaningfully.

[52] Mr Chemis submitted that, in applying s 4(1A)(c), both the Court and the Authority have implicitly preferred the second of these two interpretations. In particular, he relied on the decision in *Simpsons Farms Ltd v Aberhart*,[6] where the Chief Judge adopted the consultation principles enunciated by the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand*,[7] now strengthened and required by s 4 in redundancy cases. Mr Chemis relied, in particular, on the following two principles derived from *Aberhart*:

- Employees must know what is proposed before they can be expected to give their view.
- Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so.

Mr Chemis submitted this was the correct approach and suggested that, had Parliament intended the first interpretation to have applied, it would have used more specific language.

[53] Mr Chemis reinforced this submission by considering what he said would be the practical consequences of the first interpretation, which he likened to a process of discovery in litigation. He submitted that this would be unduly burdensome and could disadvantage employees if essential information were obscured by large volumes of information which was peripherally relevant but of no practical value.

[54] Mr Cranney, for the defendants, characterised s 4(1A)(c) as a "natural justice provision". He submitted that "the core right is the opportunity to comment – the access to information is facilitative so as to ensure that the opportunity to comment is real". He cited a number of decisions of the Court, which he submitted, were consistent with that approach.[8]

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[6] [2006] ERNZ 825 at [62].
[7] [1993] 1 NZLR 671 (CA).
[8] *Nee Nee v TLNZ Auckland Ltd* [2006] ERNZ 95; *X v Auckland District Health Board* [2007] ERNZ 66; *Harris v Charter Trucks Ltd* CRC 8/06, 11 September 2007; *Sefo v Sealord Shellfish Ltd* [2008]

[55] We accept Mr Cranney's submission. The purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer. Giving effect to that purpose requires an interpretation of s 4(1A)(c) much closer to the first alternative identified by Mr Chemis than to the second one which he urged us to adopt. It is not, however, of the same nature or necessarily as extensive as the process of document disclosure in litigation.

[56] One of difficulties we perceive in Mr Chemis' submissions is that providing employees with the limited amount of information he suggested may enable them to understand the employer's proposal but may not give them the information necessary to recognise and develop alternative proposals. Equally, adopting a relatively narrow approach to what is relevant may exclude information which militates against the employer's proposal. In most cases, information that is "relevant to the continuation of the employees' employment" will include a good deal more than the information the employer relies on for the proposal for change. Power does not confer insight or wisdom. Fully informed employees may have ideas of equal or greater merit than those of their employers.

[57] If the parties act in good faith, as the statute obliges them to, the practical difficulties suggested by Mr Chemis ought not to occur. An employer who swamps its employees with marginally relevant information will not be acting constructively as it is required to do by s 4(1A)(b). Between parties acting in good faith, the process of providing access to information may also be a dynamic one. An employer will normally take the initiative by providing employees with the information it thinks is most relevant and helpful. If employees request access to further information, the employer will then provide that to the extent it is relevant to the decision the employer proposes to make.

[58] Mr Chemis expressed concern that such a process, involving the employer providing access to information generated in successive stages of a selection process could become never ending. He questioned whether the legislation contemplated an

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ERNZ 178; *Allen v Transpacific Industries Group Ltd (t/a Mediasmart Ltd)* (2009) 6 NZELR 530.

employer who, after receiving comment from an employee on information initially supplied, was then obliged to provide the employee with access to what the employer thought about the employee's comments and an opportunity to comment on that information. If so, the employer and employee could end up in a circular process which continued as long as the employee chose to comment. We think this is a valid concern but that it ought not to be a significant problem in practice. In most cases, there will be little or no additional relevant information to be provided after the first or second such request. For the employee to persist in seeking further information would then be vexatious and inconsistent with the mutual obligation of good faith.

[59] Returning to Mr Chemis' concern that the obligation to provide access to all relevant information may be oppressive, we think that, in appropriate cases, "access" to information may be given in ways other than by providing full copies of source documents. As an example of how this might be done in practice, s 42(1) of the Privacy Act 1993 provides alternative means of satisfying requests for information under that statute which may equally satisfy the requirements for access to information under s 4(1A)(c):

> 42 **Documents**
>
> (1) Where the information in respect of which an information privacy request is made by any individual is comprised in a document, that information may be made available in one or more of the following ways:
>
> (a) by giving the individual a reasonable opportunity to inspect the document; or
>
> (b) by providing the individual with a copy of the document; or
>
> (c) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, by making arrangements for the individual to hear or view those sounds or visual images; or
>
> (d) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, by providing the individual with a written transcript of the words recorded or contained in the document; or
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> (e) by giving an excerpt or summary of the contents; or
>
> (f) by furnishing oral information about its contents.

[60] This range of alternatives would need to be subject to conditions analogous to those imposed by s 42(2) of the Privacy Act. Access to the information should be

provided in the way requested by the employee unless to do so would be impractical or unduly burdensome to the employer.

[61] Where the information concerned is not contained in a document, access to that information may reasonably be provided in other ways, such as telling the employee orally what the information is. In each case, the appropriate means of providing access to relevant information will depend on the nature of the information, the volume of it and the circumstances of both the employer and the employee. What will be acceptable and consistent with the statute is a means of access which enables the employee to fully comprehend the information and retain it for sufficient time to enable him or her to formulate any comment on it.

[62] On this issue, we conclude that there is no reason to restrict the normal meaning of the word "relevant" in s 4(1A)(c). What is within the scope of s 4(1A)(c) in any given case will, however, depend on the particular circumstances of the case. The starting point must be the nature of the decision which the employer proposes to make. For example, if the employer has restructured its business and is deciding whether an employee whose position is disestablished is suitable for an alternative position, what will be relevant is information relating to that person's attributes and to the new position. On the other hand, if the employer is downsizing and selecting employees for dismissal on grounds of redundancy, the process is likely to be a comparative one and information about the other candidates will also be relevant. In both cases, the perceptions and opinions of those involved in the process leading to a decision will be relevant.

[63] Although it was not in dispute between the parties, we comment briefly on the nature of information potentially within the scope of s 4(1A)(c). It must include not only information which is written down or otherwise recorded but also information in the minds of people. Otherwise, if any relevant information was not recorded, the purpose of the legislation would be defeated. In this regard, we note the reluctance of the Authority in this case to "reach into the minds of the selection panel members".[9] The fact that information is not recorded and held only in the

[9] At [45].

minds of persons may make it more difficult to retrieve and less certain in its accuracy but does not affect whether it is relevant for the purposes of s 4(1A)(c).

[64] Applying this construction of s 4(1A)(c) to the documents in this case, we find that all of the disputed documentation was "relevant to the continuation of the employees' employment" and that, subject to s 4(1B) and (1C), it should have been provided to the defendants to give them an opportunity to comment on that information before the decision to dismiss them was made. We also find that, to the extent that such information existed, each of the categories of information in paragraph [37] (a) to (f) was similarly relevant.

Sections 4(1B) and 4(1C)

Meaning of s 4(1B)

[65] The general obligation imposed by s 4(1A)(c) is subject to the exception in s 4(1B). An employer is not required to provide access to "confidential information if there is good reason to maintain the confidentiality of the information."

[66] The first issue raised by this subsection is the meaning of the expression "confidential information". Mr Chemis submitted that there was no reason to depart from the ordinary meaning of the words used, reflected in their dictionary definition of private matters or secrets conveyed with mutual trust. He submitted further, that this meaning was consistent with the concepts of confidentiality in common law and equity, in particular, breach of confidence and invasion of privacy cases.

[67] We broadly accept that submission. For the purposes of s 4(1B), information should be regarded as "confidential information" if it is provided in circumstances where there is a mutual understanding of secrecy. That understanding may be express or implied from the circumstances.

Findings on Confidentiality

[68] Applying that construction to the facts of this case, the evidence suggesting that the information sought by the defendants was confidential came from three witnesses who were not required for cross-examination.

[69] Professor Kemp's evidence was that, in response to their concerns, he told the members of the selection panels that Massey regarded them as assisting in an evaluative process which it considered to be confidential, that the university did not intend to give access to their comments and that it was not a normal process for the university to do so. Professor Kemp then went on to say that, for completeness, he told the interviewers that the defendants' union had indicated to Massey that it would be seeking information regarding the selection process. Therefore despite the assurance that he had given to the panel members and the university's view that it did not have to release the confidential evaluative material, he told the panel members to exercise caution in the event that the university was required by law to release this material.

[70] In his oral submissions, Mr Cranney relied on this second aspect of Professor Kemp's evidence to submit that it indicated Massey was well aware of a potential obligation to provide access to the views of members of the selection panel and that this information was therefore not confidential. Mr Cranney also relied on the statement in the memorandum sent to the selection panels on 14 July 2009 set out in para [16] above.

[71] The fact that Massey recognised the possibility of a challenge to the selection process and that this may raise questions about whether candidates should be given access to information provided by the panel members, does not alter the essential nature of that information. In light of the assurances given by Professor Kemp to the panel members, we find that their individual assessment sheets, the candidate comparison sheets for each selection process, their recommendations to Professor Anderson and the handwritten notes taken by Professor Kemp, were all confidential. They dealt with private matters and the information they contained was conveyed on

the understanding that the defendants would not have access to it unless ordered by the Court. In short, there was a mutual understanding of secrecy.

[72] Those considerations did not apply to the 14 July memorandum. It contained extensive and detailed information about the selection process and was undoubtedly relevant. It was not expressed to be in confidence and the fact that it also contained a warning to the selection panels about the potential for challenges and advice about reducing the risk to Massey from such challenges did not make it confidential. That document did not have the essential nature of confidentiality and, given it was relevant, we think access to it ought to have been provided.

[73] Turning to the other categories of information in subparagraphs (a) to (f) of paragraph [37], the evidence supports a finding that much of that information would also have been confidential, at least to the extent that it comprised information conveyed to Massey by the panel members in the course of the selection process.

[74] In reaching these preliminary conclusions, we have also had regard to the evidence of Mr Francis-Ashby whom we accept is an expert in the field of recruitment processes. His evidence was that confidentiality is a fundamental concept that underpins the recruitment and selection industry and that, while often implicit, there is an expectation in the market that recruitment and selection processes will be and must be considered confidential. He said this was an expectation shared by all participants in such processes including applicants, recruiters and those making selection decisions. He deposed that, if candidates and employers could not be assured of the confidentiality of the process, including their personal information being kept confidential, then the process would not operate effectively. He gave evidence that his experience was that candidates expected their information would not be shared with other candidates with whom they were competing for a position. He also stated that interviewers had an expectation that their personal notes from interviews and discussions about particular candidates and comparison of candidates, would be kept confidential. This very general evidence was consistent with the specific evidence relating to this case given by Professor Kemp and with the view we have reached about the confidentiality of information in this case. We have taken it into account, subject to the qualification that it is based

on a wide range of selection processes, including many which are not subject to the duty of good faith in s 4 of the Act.

[75] The second and far more challenging issue raised by s 4(1B) is the meaning and scope of the expression "good reason to maintain the confidentiality of the information." Section 4(1C) prescribes three specific circumstances which will constitute "good reason" and we examine those in turn. As s 4(1C) says that good reason "includes" these three circumstances, it is clear they are not intended to be exhaustive and we also discuss what other circumstances may amount to "good reason".

Section 4(1C) generally

[76] Before considering the particular examples of "good reason" provided in (a) to (c) of s 4(1C), it is important to consider the general nature and effect of the subsection.

[77] In the course of argument, counsel for the parties accepted the proposition that s 4(1C) establishes absolute criteria, so that the existence of any one of the purposes set out in paragraphs (a) to (c) of s 4(1C) satisfies the requirement in s 4(1B) that there be "good reason to maintain the confidentiality of the information" and therefore provides an exception to the obligation under s 4(1A)(c) to provide access to all relevant information. In this sense, counsel accepted that, while the general requirement for "good reason" in s 4(1B) required competing considerations to be balanced, the existence of any of the criteria in s 4(1C) involved no such balancing process.

[78] Having regard simply to the meaning of the words used, there is obvious support for this proposition in the text of s 4(1C). As we have noted earlier, however, the meaning of an enactment must be established from its text and in light of its purpose.

[79] Considering the purpose of this part of the legislation, comprising s 4(1A)(c), s 4(1B) and s 4(1C), we do not think this purely text based construction can be right.

Our view is based on the implications of applying this interpretation to s 4(1C)(b). To do so would mean that even the slightest privacy interest of a natural person in relevant confidential information, would constitute good reason to withhold access to that information. That would be so, regardless of the extent to which that information would usefully inform employees and therefore regardless of the extent to which withholding that information would deprive employees of a full and proper opportunity to have input into decisions about the continuation of their employment.

[80] An example may help to illustrate the point. An employer reducing the size of its workforce may need to select employees for redundancy. That process may simply involve supervisors expressing opinions about individual employees to senior management. Those opinions are obviously relevant to the continuation of affected employees' employment. They may or may not be accurate or fair. They would certainly be information the employees may wish to comment on prior to a decision being made. If those opinions are given and received in confidence, they will be "confidential information" for the purposes of s 4(1B). Such opinions will also involve privacy issues in the sense that who said what about whom includes personal information about the supervisors and the employees. Thus it could properly be said that withholding the information would protect "the privacy of natural persons". Applying an absolute construction to s 4(1C) would therefore mean that the employer could withhold all of the information, totally defeating the purpose of s 4(1A)(c).

[81] We conclude that the only meaning to be given to the opening words of s 4(1C) which is consistent with its purpose is that what follows in subparagraphs (a) to (c) are examples of the types of consideration which may constitute "good reason". If confidentiality of any particular relevant information is to be maintained, there must be sufficiently good reason to do so. In any particular case, whether a sufficiently good reason exists will require consideration of the likely effects of giving access to the information and those of maintaining confidentiality. How serious those effects are likely to be and how likely they are to occur, will be important. Equally, the employer must consider means of reducing possible adverse effects and restrict access to information only to the extent necessary to reduce the adverse effects of sharing that information to a level which no longer constitutes a

sufficiently good reason to maintain confidentiality of the remaining information. We deal with these factors further in our discussion of s 4(1C)(b).

Section 4(1C)(a) - statutory requirements to maintain confidentiality

[82] The scope of s 4(1C)(a) is difficult to discern. There are few statutes which include an explicit requirement to "maintain confidentiality" and, in most cases, they include an exception where disclosure is required by law. Mr Chemis informed us that, in the Select Committee Report on the bill which led to the insertion of s 4(1C) into the Act, the majority spoke of "complying with statutory obligations such as the Securities Markets Act 1988."[10] That statute does not require any person to "maintain confidentiality" in those words but does require persons having "inside information" not to disclose it in certain circumstances.[11] That suggests that s 4(1C)(a) is intended to include statutory obligations of secrecy however they are expressed. A substantial number of statutes contain such provisions but almost all relate to specific types of information most unlikely to be "relevant" under s 4(1A)(c). A typical example is the obligation on employees of the Inland Revenue Department not to disclose information about taxpayers.[12]

[83] The statutes dealing with information most likely to be relevant under s 4(1A)(c) are the Privacy Act 1993 and the Official Information Act 1982.

[84] The only provision of the Privacy Act which contains a requirement for an agency holding personal information not to disclose information, is principle 11 in s 6 which then sets out the exceptions. That principle is, however, expressly subject to s 7(1):

> 7 **Savings**
>
> (1) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available.

[10] Employment Relations Law Reform Bill 2003 (92-2) (select committee report) at 4.
[11] Now s 8D of the Securities Markets Act.
[12] Tax Administration Act 1994, s 6.

[85] The Official Information Act contains no requirement that information not be disclosed. It also contains, in s 52(3)(a), a savings provision in very similar words to that in s 7 of the Privacy Act set out above.

[86] Both the Privacy Act[13] and the Official Information Act[14] contain provisions permitting requests for information to be refused on various grounds. Mr Chemis submitted that these were relevant under s 4(1C)(a). We do not accept that submission. Those provisions confer a discretion not to disclose information, albeit setting out a list of matters which constitute good reasons not to disclose. A discretion is not a "requirement" for the purposes of s 4(1C)(a). Further, we consider s 4(1A)(c) is a statutory provision which both authorises and requires personal information to be made available. Therefore the specific provisions in the Privacy Act and the Official Information Act have no application to the Employment Relations Act.

[87] Overall, we find that s 4(1C)(a) has no application in this case but make two general observations about its construction. The term "maintain confidentiality" is intended to include not only statutory provisions expressed in those words but also provisions to that effect. Use of the word "requirements" in s 4(1C)(a) limits its application to provisions which are mandatory.

Section 4(1C)(b) – protecting the privacy of natural persons

[88] Subparagraph (b) of s 4(1C) deems "protecting the privacy of natural persons" to be a "good reason" to maintain the confidentiality of information which is "relevant" under s 4(1A)(c). The meaning of this provision was addressed in detail by counsel for the parties and was the primary focus of the submissions made by Ms Evans on behalf of the Privacy Commissioner. As those submissions demonstrated, understanding and applying the concept of privacy has proved difficult for courts and tribunals throughout the world.

[13] Section 29.
[14] Section 9.

[89] The Act does not define or otherwise explain the intended meaning of the expression "protecting the privacy of natural persons". The context of the expression in the linked provisions of s 4(1C), s 4(1B) and s 4(1A)(c), however, leads us to the conclusion that the "privacy" concerned must be information privacy rather than spatial privacy.

[90] Building on that assumption, Mr Chemis and Ms Evans developed arguments based on the provisions of the Privacy Act and the Official Information Act. Both statutes are concerned with the management of information, including information about individuals. Under s 9(2)(a) of the Official Information Act, one of the reasons for withholding official information is that it is necessary to "protect the privacy of natural persons". Although the Privacy Act does not use any similar form of words, its long title declares that it is "An Act to promote and protect individual privacy" and is concerned with establishing principles relating to the use and access of "information relating to individuals".

[91] While both counsel acknowledged that there is nothing in the Act to connect s 4(1C)(b) with other legislation, they submitted that Parliament must be presumed to have had existing legislation in mind when using closely connected terminology.

[92] They both submitted that this presumption was supported by policy considerations. Mr Chemis referred to the substantial body of jurisprudence which has been developed around the Privacy Act and the Official Information Act and submitted:

> There are no obvious policy reasons why Parliament would have wanted to depart, in an employment setting, from the treatment of these concepts and the requirements to balance interests.
>
> Parliament cannot have intended to create a separate body of privacy law jurisprudence and practice around one aspect of employment law (i.e. decisions that may affect continuation of employment).

[93] Ms Evans submitted that:

> ... if there are no compelling policy reasons for section 4(1C)(b) to carry a different meaning from that under privacy law, it is desirable, in the interests of certainty, for "the privacy of natural persons" to be interpreted consistently with the Privacy Act and the Official Information Act.

[94] On that foundation, Ms Evans built a series of submissions which were adopted or supported by Mr Chemis. The essence of these submissions was that, in interpreting and applying s 4(1C)(b), we should adopt the principles embodied in the Privacy Act. Ms Evans then submitted that the comparable provisions of the Official Information Act produced a similar result.

[95] Mr Cranney criticised this approach. He submitted that it addressed an irrelevant issue, being whether access to the information sought could be refused under the Privacy Act. Mr Cranney emphasised the differences in purpose and approach of the two pieces of legislation. The Privacy Act is concerned with personal information and starts with a presumption of non-disclosure whereas s 4(1A)(c) of the Act is concerned with information generally and its antithetical purpose is to ensure appropriate disclosure in the interests of natural justice. Mr Cranney submitted that we should apply the words of subsections (1A) to (1C) of s 4 according to their meaning and in the context of the Act "rather than importing tests from another jurisdiction."

[96] Applying s 5 of the Interpretation Act, Mr Cranney is undoubtedly correct in this last submission. There is also considerable force in his other submissions. Focussing on s 4(1C)(b), however, we are sure that Parliament did not use the expression "protecting the privacy of natural persons" by chance. That being so, the meaning of the expression may be usefully informed by the meaning attached to comparable terminology in other legislation with a similar purpose.

[97] Counsel were unable to refer us to any decided case in which the meaning of the expression "protecting the privacy of natural persons" or any other similar phrase has been expressly considered in the context of other legislation and we have not found any. We must therefore take what guidance we can from the substantive provisions of other legislation.

[98] The two key principles of the Privacy Act controlling access to personal information are principles 6 and 11, set out in s 6. Principle 6 deals with access by persons to information about themselves. Principle 11 deals with access to personal information about other people.

[99] The scheme of principle 6 is that people should have access to their own personal information unless there is good reason not to disclose it. What constitutes good reason to refuse a request for information covered by principle 6 is defined in ss 27 to 29. These sections are in Part 4 of the Privacy Act which is headed "Good reasons for refusing access to personal information". This heading resonates to some extent with s 4(1B) which refers to "good reason to maintain the confidentiality of the information". On the other hand, s 4(1B) is concerned solely with "confidential information" whereas Part 4 of the Privacy Act applies to all personal information, whether or not it was communicated in confidence. The Privacy Act contains only one provision dealing specifically with confidential information. That is s 29(1)(b) which provides:

> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> (a) ...
> (b) the disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise—
> (i) which was made to the person who supplied the information; and
> (ii) which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence;

[100] The difficulty in gaining assistance from the provisions of Part 4 of the Privacy Act is that they are permissive rather than directive. They describe circumstances in which an agency holding personal information "may refuse to disclose" it and give no guidance to the exercise of that discretion. This may be contrasted with s 4(1A) to (1C) which create an absolute obligation to disclose and exceptions to that obligation. These provisions of the Act are not discretionary.

[101] It is also a feature of the Privacy Act that access to personal information by the individual concerned is subject to a discretion not to disclose. Sections 27, 28 and 29 set out numerous grounds on which that discretion may properly be exercised and it was these provisions which were the subject of much of Ms Evans' submissions. Under s 4(1A)(c) of the Act, access to relevant information must be provided and there is no discretion to do otherwise except as provided for in subsection (1B). While that includes "protecting the privacy of natural persons", it is

difficult to imagine circumstances in which this would provide good reason to refuse an employee access to relevant information about himself or herself.

[102] The starting point under principle 11 is that personal information should not be disclosed to persons other than the individual concerned. Its purpose, therefore, is to limit access to information rather than to facilitate it. This is fundamentally inconsistent with the purpose of s 4(1A) to (1C) of the Act, where the starting point is that access to relevant information must be provided.

[103] Overall, while the Privacy Act defines concepts which are useful for the analysis of privacy considerations under the Act and assists in identifying where privacy interests lie, the differences in purpose and structure of the two pieces of legislation make it inappropriate to uncritically apply the jurisprudence developed under the Privacy Act to the interpretation and application of s 4(1A) to (1C). They may, however, be useful by analogy.

[104] The purposes of the Official Information Act are set out in s 4 which is headed "Purposes" and includes the following provisions:

> (b) to provide for proper access by each person to official information relating to that person:
>
> (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

[105] Consistent with those purposes, s 9 of the Official Information Act provides:

> 9 **Other reasons for withholding official information**
>
> (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
>
> (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
>
> (a) protect the privacy of natural persons, including that of deceased natural persons:
>
> ...

[106] The use of the expression "protect the privacy of natural persons" obviously resonates with the wording of s 4(1C)(b) of the Act. The purpose of the Official

Information Act to provide for proper access by each person to official information relating to that person also accords closely with the purpose of s 4(1A) to (1C) of the Act. The role of the public interest in applying the provisions is, however, distinctly different. Under the Official Information Act, the public interest may require the disclosure of information which otherwise might be properly withheld. Under s 4(1B) of the Act, it may be arguable in appropriate cases that the public interest is a good reason to maintain the confidentiality of information and thereby justify it being withheld. Thus, while the process under s 9(2)(a) of the Official Information Act requires balancing privacy interests against the public interest, the process under s 4(1B) of the Act may involve both privacy interests and the public interest militating against providing access to relevant information.

[107] Any assistance we might gain from the jurisprudence developed around s 9(2)(a) of the Official Information Act is subject to the same difficulty as the provisions of the Privacy Act in that it also confers a discretion rather than being directory. This difficulty is increased by s 29B of the Official Information Act which requires the Ombudsman investigating any complaint about the operation of s 9(2)(a) to consult the Privacy Commissioner. We were told by Ms Evans that the Privacy Commissioner's approach to what is "necessary to protect the privacy of natural persons" under s 9(2)(a) mirrors the factors that are taken into consideration under s 29(1)(a) of the Privacy Act which concerns unwarranted disclosure of the affairs of another individual. For the reasons we have given, we think that the principles developed and applied under these provisions can only be of limited value in interpreting and applying s 4(1A) to (1C) of the Act.

[108] Informed, to a limited extent, by the provisions of the Privacy Act and the Official Information Act, we turn now to consider other factors relevant to the construction of s 4(1C)(b). As a statutory example of what constitutes "good reason to maintain the confidentiality of the information" for the purposes of s 4(1B), it must be construed in the context of s 4(1B) and in the context of the fundamental purpose of s 4(1A)(c), that is to enable employees to have a full and effective opportunity for input into decisions affecting the future of their employment.

[109] In the course of argument, counsel all referred to three types of information in which there may be privacy interests: information relating solely to one affected employee, information solely relating to other persons and "mixed" information relating to both an affected employee and one or more other persons. We find this a convenient and useful means of considering the differing privacy interests.

[110] There will be very few, if any, circumstances in which there is good reason to maintain confidentiality of relevant information in which only one employee has a privacy interest. If the employer has obtained that information in confidence from another person, that person may also have a privacy interest in it. If the information is based on the employer's own observations, it will not have been obtained in confidence and s 4(1B) will not apply. If information has been provided to the employer in confidence by the employee involved, it is difficult to see how there could possibly be any reason, let alone a good reason, to deny the affected employee access to it. No issues of this nature arise in this case.

[111] The second category, involving information solely about other individuals, obviously has privacy implications. The curricula vitae of the other candidates in this case would have contained such information. The privacy implications of the third category of mixed information are equally obvious, being the privacy interests of the person the information is about and of the person who provided that information. An example of the third category in this case is the opinions of the panel members which we have found were given in confidence.

[112] In this case, we have found that all of the disputed documents contained relevant confidential information bar the 14 July 2009 memorandum which was relevant but not confidential. By its nature, this information was subject to privacy interests in the second and third categories. It follows that keeping it secret would have protected the privacy of the individuals involved. Applying s 4(1C)(b), therefore, there were privacy issues to be considered in deciding whether there was good reason to maintain confidentiality of the information. We examine the nature and significance of those interests further in our discussion of the overall application of s 4(1B) to this case.

Section (1C)(c) – protecting the commercial position of an employer

[113] This example of "good reason" was not relied on by the parties and we did not receive any submissions on its scope. We therefore decline to express any views other than to note that it is qualified by its own terms to information which would "unreasonably prejudice" the commercial position of the employer. It is most likely to be relevant where an employer is considering dismissing staff for economic reasons.

Other considerations which may constitute "good reason"

[114] We accept Mr Chemis' submission that the examples of good reasons provided in s 4(1C) are not exhaustive. Mr Chemis submitted that there may well be other practical or policy reasons for maintaining the confidentiality of information. He cited *Auckland City Council v New Zealand Public Service Association Inc*[15] where the Court of Appeal held, in relation to good faith that:[16]

> What is practicable in the exigencies of particular business operations and workplaces must be kept in mind.

[115] As we have noted earlier, Mr Chemis submitted that requiring all relevant information to be disclosed could create an unwieldy, time consuming and impracticable process. Where this was so, he submitted that it would contribute to there being good reason to withhold access to some or all of that information. We do not accept that submission in this context. Access to information may only be denied in respect of confidential information and then only to the extent that there is good reason to maintain confidentiality. Whether or not it is impractical to provide access to information does not relate to confidentiality.

[116] Mr Chemis was on much stronger ground in terms of s 4(1B) in two of his other submissions. First, he submitted that any construction of s 4(1B) which required an employer to disclose the confidential opinions of selection panel members would make people reluctant to be panel members or to express their

[15] [2004] 2 NZLR 10, [2003] 2 ERNZ 386 (CA).
[16] At [24].

opinions candidly. The closer the established relationship between the candidates and the panel members, the more pronounced this problem was likely to be. Mr Chemis suggested that this may be particularly important in the public sector where there is a statutory requirement to appoint the person who is best suited to the position.[17]

[117] We accept that this may be a factor to be taken into account in deciding in any case whether there is good reason to maintain the confidentiality of the panel members' opinions. However, given the likely importance of such opinions to the employer's decision, the consequences of withholding that information from the affected employees are likely to be serious.

[118] Mr Chemis' second significant submission in this regard was that providing employees with access to opinions about them could lead to bad feeling in the workplace, particularly where the opinions were expressed by colleagues or managers. He relied on the majority report of the Transport and Industrial Relations Select Committee which said that what is now s 4(1C) was intended to address concerns that the requirement to provide access to information could, amongst other things, "have a destabilising effect on workplace relations".[18] Again, we think this is a relevant factor to be taken into account but its significance will depend on the particular circumstances of the case.

[119] Mr Chemis also identified the potential for disparity between candidates where both internal and external applicants are seeking the same position. The internal candidates may have access to information about the selection process and an opportunity to comment on it, neither of which is available as of right to the external candidates. He submitted that this may deter external candidates from applying for positions advertised in such a way and that this was contrary to public policy. While we acknowledge that such disparity may occur, it would be an obvious consequence of the legislation and was presumably accepted by Parliament as such. It is a fundamental part of the legislative scheme embodied in the Act and in other legislation that many rights and obligations arise out of the employment relationship

[17] State Sector Act 1988, s 60.
[18] At 4.

which make the position of an incumbent employee different to that of an external candidate for employment. We think there will be few cases in which this factor may properly have weight in determining whether there is good reason to deny affected employees access to relevant information.

[120] In response, Mr Cranney submitted that, to the extent the factors identified by Mr Chemis may be significant in particular cases, they will be heavily outweighed by the requirements of natural justice and public policy. He pointed to the long established principle that an employee ought not to be dismissed on the basis of undisclosed criticism or without a proper opportunity to answer any criticism.

[121] Enlarging on this, Mr Cranney submitted more generally that whether there is a good reason for maintaining the confidentiality of information is essentially a matter of fairness. He observed that every employer who dismisses an employee ought to be able to justify that dismissal in the terms required by s 103A of the Act, which applies the standard of a fair and reasonable employer. He submitted that by applying the principle of fairness, an employer will know whether a good reason to withhold exists.

[122] We broadly agree that fairness is a very useful guide but, other than what we have already said by way of comment on Mr Chemis' submissions, we refrain from expressing any other general views. We are mindful of what the Supreme Court said in *Air Nelson*, that the interpretation of words in a statute is not about finding meaning in an abstract sense but about "recognising the nature and scope" of the particular words "in particular cases. That is, the issue is not one of construction but one of application."[19] On that note, we turn to the application of s 4(1B) to the facts of this case.

Findings on Disputed Documents

[123] Dealing with the disputed documents and on the facts of this case, we note that s 4(1B) applies only to confidential information and therefore cannot apply to the 14 July memorandum. The rest of the disputed documentation all fed directly

[19] At [19].

into the decision by Massey to prefer other candidates to the defendants and therefore led to the decision to dismiss them. As such, that information was highly relevant to the continuation of their employment and was the very sort of information that, pursuant to s 4(1A)(c), ought to have been accessible to them for comment.

[124] As we have noted earlier, there were privacy interests in much of this information, both those of the persons to whom the information related and those of the panel members who made assessments and gave opinions. Providing affected employees with access to that information would therefore have compromised the privacy of those persons.

[125] In this case, however, the panel members were warned that their comments may have to be disclosed and they certainly would be compellable witnesses if the matter proceeded to an Authority investigation or to a Court hearing.

[126] We accept that the other candidates provided information in their interviews in the expectation of confidentiality but the identity of the candidates in this case was common knowledge and, again, they would be compellable witnesses. In the circumstances of other cases, curricula vitae may contain private information, for examples the names of referees and the contents of their references in which there might be a justifiable privacy interest. Such information may, however, not be relevant to the continuation of employment of other job applicants, in which cases issues of the privacy in such information will not arise. As to whether this may mean different standards of treatment of 'external' candidates as opposed to 'internal' ones such as the defendants, this issue is not for consideration in this case. We make no comment on it and prefer to deal with it in a case in which it arises as a real issue on particular facts.

[127] We also find in the present circumstances that the potential adverse effects on privacy of providing access to the disputed documents in this case were not great. The persons involved were all professional academics, experienced at expressing opinions and well-used to differences of opinion with their colleagues. There appears to have been nothing in the information of an intensely personal nature in

the sense that access to it would have caused serious embarrassment. Again, in other appropriate cases, these may well be good grounds to withhold such information. Of itself, we do not find that protection of the privacy of those people involved in the selection process was a sufficiently good reason to maintain confidentiality of the information. As we noted in para [81], an employer should attempt to reduce the good reason for withholding, for example by judicious redaction of documents so that these may be disclosed to the extent reasonably possible.

[128] In addition to the privacy interests, we accept that there were other potential adverse consequences of providing the affected employees with access to all of that information. These include the two factors identified by Mr Chemis that we have discussed above. In this case, however, but we do not think that the likelihood and seriousness of those consequences were such as to constitute good reason for maintaining confidentiality of the disputed documents, even in combination with the protection of privacy. Our preliminary view, therefore, is that Massey ought to have provided the defendants with access to all of the disputed documents.

[129] A factor we have taken into account in reaching this conclusion is that employers have other obligations to provide employees with access to information. One we have already mentioned is that a fair and reasonable employer will not rely on information adverse to an employee to dismiss him or her without making that information available to the employee for comment. That obligation is part of the wider duty of good faith embodied in s 4 of the Act and particularised in the 2004 amendments.

[130] Another overlapping obligation is in s 120 of the Act which requires an employer to provide a statement in writing of the reasons for an employee's dismissal upon request. If such material must be provided after a dismissal, we think there would need to be very good reason indeed why it should not be provided before the decision to dismiss is made, thereby giving the affected employee an opportunity to comment, as required by s 4(1A)(c)(ii). We note, however, that s 120 only requires the provision of reasons and does not extend to disclosure of all information relevant to the dismissal.

[131] Mr Cranney made the much wider point that, if a dismissal gives rise to a personal grievance which is lodged with the Employment Relations Authority or which ends up before the Court, the employer will be obliged to make disclosure of all information relevant to the decision to dismiss, subject only to very limited exceptions.[20] As already noted, such disclosure occurred in this case. Consistent with this, Mr Cranney drew our attention to one of the exceptions to the presumption of non-disclosure in principle 11 of the Privacy Act:

> (e) that non-compliance is necessary—
>
> ...
>
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation)

[132] Mr Cranney then asked the rhetorical question why an employer who would be obliged to disclose in personal grievance proceedings all relevant information after dismissing an employee, should not disclose it in the course of the decision-making process and thereby give the employee an opportunity to say why he or she ought not to be dismissed. In this regard, it is significant that one of the primary objects of the Act is "reducing the need for judicial intervention" through the promotion of good faith.[21]

[133] In our view, these considerations strongly support a wide interpretation and application of the obligation imposed by s 4(1A)(c), as qualified by s 4(1B), to provide access to information relevant to the continuation of employees' employment.

Conclusions

[134] In summary, our conclusions in principle relating to the particular issues in this case are:

(a) All of the disputed documents contained relevant information for the purposes of s 4(1A)(c)(i).

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[20] See Employment Court Regulations 2000, reg 44(3).
[21] See s 3(a) of the Act set out above at [46] and, in particular, s 3(a)(vi).

(b) By its nature, most of the other information sought by the defendants was similarly relevant.

(c) Information in the memorandum dated 14 July 2009 prepared by Mr Ingram was not confidential information for the purposes of s 4(1B).

(d) All other disputed documents recorded confidential information for the purposes of s 4(1B).

(e) The evidence supports a finding that much of the other information sought by the defendants would also have been confidential for the purposes of s 4(1B).

(f) For the purposes of s 4(1B), there was not good reason to maintain the confidentiality of any of the disputed documents.

(g) We reiterate that no final conclusion on the 'good reason' issue is possible with regard to the information in paragraph [37] a-f at this stage and without, if necessary, a further hearing.

[135] Leave is reserved for any party to seek a final decision with respect to any particular information or category of information as indicated in paragraph [41] of this judgment. If any such application is made, the parties will have an opportunity to provide further evidence and/or submissions and a decision will be given as a matter of priority by a single judge.

Costs

[136] Given the fundamental nature of the issues, the potentially wide application of this decision and the representation of the defendants by their union, this case has many of the attributes of a test case in which it may be appropriate for the parties to bear their own costs. It may also be that the case is not concluded if one or more parties seek a final decision regarding particular information. We therefore reserve costs with leave for an application to be made after the parties have considered their positions in light of this judgment. We expect, however, that if no further steps have

been taken in this proceeding after 40 working days, any application for costs will be made within 20 working days.

Judge B S Travis
for the full Court

Judgment signed at 2.15pm on 18 April 2011