IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 111
ARC 91/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JAN SUSAN BRACEWELL Plaintiff
AND	RICHMOND SERVICES LIMITED Defendant

Hearing: 26 - 27 May 2014; and by documents filed on 3, 5, 6, 10 and 14 June 2014

Appearances: Dr J Cook, agent for the plaintiff
Ms P Shaw, counsel for the defendant

Judgment: 1 July 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The plaintiff, Ms Jan Bracewell, was from 22 September 2008 until 28 February 2013 a Community Support Worker (CSW) employed by Richmond Services Limited (Richmond), a national provider of health services under contract to various District Health Boards (DHB) and the Ministry of Health. The particular service with which this proceeding is concerned is the provision of supportive accommodation to clients, including clients placed under court orders.

[2] Client A was one such client. Ms Bracewell became very concerned that Client A was being permitted by personnel at Richmond and the relevant DHB[1] to engage in abusive prostitution, causing and having the potential to cause significant

[1] The identity of the DHB and its location were anonymised in an earlier decision of this Court; *Bracewell v Richmond Services Ltd* [2014] NZEmpC 63 at [29]; that anonymisation is maintained in this decision.

harm to her. She was supported in this belief by her advocate and partner, Dr Jane Cook.

[3] Ms Bracewell resigned from her employment with Richmond taking copies of Client A's clinical records. It was her intention to use them to bring complaints against Richmond, and certain DHB personnel, particularly a case manager, Ms C, and a consultant psychiatrist, Dr L. Ms Bracewell believes that she had, and continues to have, a need to retain and use these documents to advance her concerns. Key issues include whether Client A is competent to consent to sexual activity and whether she is a "vulnerable adult" for the purposes of ss 151 and 195 of the Crimes Act 1961.

[4] Richmond was granted orders that Ms Bracewell and her representative return Client A's clinical records in the Employment Relations Authority (the Authority).[2] Ms Bracewell was also ordered to pay costs to Richmond of $3,375.[3]

[5] Subsequently, Ms Bracewell brought a challenge to set aside the Authority's determination. She asserts that she has the lawful right to retain and disclose confidential documents as evidence of possible criminal negligence for the purposes of an independent investigation; she also seeks $40,000 compensation for "stress, anxiety and to cover advocacy costs." In addition, she challenges the costs determination made by the Authority.

[6] For its part, Richmond brought a cross-challenge. It seeks an order that Ms Bracewell return all confidential information to Richmond, and a permanent injunction restraining her from disclosing or using any confidential information. Richmond also seeks a penalty for each breach of the confidentiality clause of the relevant agreement.

The evidence

[7] At the hearing, evidence was led for Richmond from its Chief Executive, Dr B L Disley, who described the nature of the services provided by Richmond in this instance, the employment arrangements for CSW's, and the way in which the

[2] *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 481.
[3] *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 519 [Authority costs determination].

complaints lodged by Ms Bracewell were dealt with. Also called for Richmond was Ms B, a relevant manager from the DHB and its privacy officer. She explained the interface of the DHB with primary care providers such as Richmond, how complaints regarding such primary care providers are dealt with, and her involvement in the particular matters which are the subject of this proceeding. She considered that Client A was safe, and that those who had investigated the complaints in depth were not able to identify any wrong-doing on the part of anyone involved in Client A's care, including Richmond. It is her view that Ms Bracewell does not have any ongoing need to hold or disclose the private and sensitive information of Client A.

[8] For Ms Bracewell, an employment advocate gave evidence as to the support she gave Ms Bracewell with regard to the matters that were concerning her. Also called was a former CSW employed by Richmond who outlined her concerns relating to Client A, similar in nature to those of Ms Bracewell. Finally, Ms Bracewell herself gave evidence outlining in detail the chronology of events. She explained how her concerns developed, and the various disclosures and other steps she subsequently took.

[9] The evidence included a bundle of documents which facilitated an accurate appreciation of the way in which the matter unfolded. All the evidence has been carefully considered and is referred to where necessary.

Legal framework

[10] The relevant terms of employment are contained in a collective agreement where the parties were Richmond New Zealand Trust Limited (apparently the defendant is a successor of that entity) as employer, and the National Union of Public Employees' Inc (NUPE) and the Service and Food Workers' Union Nga Ringa Tota Inc (SFWU) as the union parties. Dr Disley explained that Ms Bracewell was a member of the SFWU and was thus covered by this agreement. The term of the agreement was from the date of ratification until 1 November 2012. As to the position thereafter, since Dr Disley stated that it was the applicable agreement during the period of Ms Bracewell's employment. Given that there is no evidence to the

contrary, I infer that the agreement continued in force under s 53 of the Employment Relations Act 2000 (the Act).

[11] Relevant provisions of the agreement include:

a) That employees would comply with all the employer's policies, rules and procedures; employees had an obligation to ensure that they were familiar with the details of such policies and the effects of any changes.[4]

b) Clause 18 dealt with confidentiality and stated:

> 18.1 During the course of employment, employees may receive and handle knowledge and information which is considered to be confidential. Accordingly, employees will not, either directly or indirectly, use or disclose to any person any information which has or may be acquired during the course of employment with the employer, concerning the employer's operations, business affairs, property or clients.
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> 18.2 This clause will not prevent employees from making appropriate ethical/professional disclosures regarding individual patient clinical status and associated legal issues.
>
> 18.3 This clause applies to all information whether or not it is recorded or memorised and includes information which is, or may be, of use to any competitor of the employer or a competitor of the employer's clients.
>
> 18.4 This restriction will apply throughout an employee's employment with the employer and after the termination of employment without any limit in point of time. However, the restriction will cease to apply to such confidential knowledge or information which may become publicly known without breach of this instruction on the part of the employee.

c) All terms implied by operation of law or incorporated by statute were part of the agreement.[5]

[12] Richmond had three particular policies that were relied on in this proceeding. They are:

[4] Clauses 7.3 and 7.4.
[5] Clause 26.

a) A Privacy of Consumer Information Policy, which reflected the expectations of the Health Information Privacy Code 1994 (the HIPC). Included in the policy is the following important statement:

> Personally identifiable information may not generally be made available to other persons or organisations without the prior written consent of the consumer. There are exceptions to the release of information without consent, the most notable relates to the immediate safety of the consumer or others.
>
> …
>
> A consent (CYFS), form, Consent to Disclose Information, Consent to Release Information is available where release of personal information is requested in the absence of a consumer contract and a consumer is contactable to discuss the request.

The exceptions referred to are those contained in r 11 of the HIPC which is discussed below.

b) An Information Systems Policy, which reinforced the confidentiality of client information.

c) Richmond's Protected Disclosures Policy (the PD Policy), which provided for notification by staff of suspected serious wrongdoing.

Protected Disclosures Act 2000

[13] Before describing the provisions of Richmond's PD Policy, it is necessary to describe the statute under which it was promulgated – the Protected Disclosures Act 2000 (the PD Act).

[14] In 1994, disciplinary action was taken against a psychiatric nurse by his employer who alleged the employee had breached his obligations of confidentiality in disclosing information about the release of a patient in his employer's care to a Member of Parliament. An Independent Ministerial Review was established and found that while New Zealand did not have the problems which had prompted whistle-blowing regimes in other jurisdictions, the degree of protection given to New Zealand employees who disclosed matters of serious wrongdoing outside their organisation was inadequate. The Review accordingly suggested that legislation should be enacted to reduce impediments to employees disclosing information about

serious wrongdoing and to reinforce existing statutory and ethical obligations of probity and integrity over the use of public resources.[6] These recommendations were accepted and the statute was duly enacted in 2000.

[15] A convenient overview of the statute is provided in the following statement of the Court of Appeal in *Reeves v One World Challenge LLC*:[7]

> The Protected Disclosures Act provides that if whistleblowers want to breach confidentiality agreements to expose wrongdoing they must do so via the regime provided for in the Act; only if the requirements of the Act are fulfilled will the whistleblower receive the immunity given by the Act from liability for breaching a confidentiality agreement.

[16] The purpose of the PD Act is to promote the public interest:[8]

a) first by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation; and

b) by protecting employees who make disclosures about serious wrongdoing.

[17] The wrongdoing must pertain to an "organisation". This is a term which is widely defined as including any person or persons whether corporate or incorporate, and whether in the public sector or the private sector.[9]

[18] Disclosure must be made by an employee only in accordance with internal procedures established by and published in the organisation, for receiving and dealing with information about serious wrongdoing.[10] However, the utilisation of internal procedures is subject to two important statutory provisos:

a) The first is s 6 which states:

6 Disclosures to which Act applies

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6 See Protected Disclosures Bill 1996 (208-2) (select committee report) at 1-3. The genesis of the statute is conveniently described in Gehan Gunasekara "Whistle-blowing: New Zealand and UK Solutions to a Common Problem" (2003) 24 Stat.L.R. 39 at 41-42. A detailed review of the operation of the statute was undertaken by Mary Scholtens QC in 2002, which contains a helpful comparative analysis of similar statutes in Australia and the UK: Report to the Minister of Statement Services "Review of the Operation of the Protected Disclosures Act 2000" (12 December 2003) at Appendix 5.

7 *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 (CA) at [66].

8 Section 5.

9 Section 2.

10 Section 7.

(1) An employee of an organisation may disclose information in accordance with this Act if—

(a) the information is about serious wrongdoing in or by that organisation; and

(b) the employee believes on reasonable grounds that the information is true or likely to be true; and

(c) the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and

(d) the employee wishes the disclosure to be protected.

(2) Any disclosure made in accordance with subsection (1) is a protected disclosure of information for the purposes of this Act.

(3) If an employee of an organisation believes on reasonable grounds that the information he or she discloses is about serious wrongdoing in or by that organisation but the belief is mistaken, the information must be treated as complying with subsection (1)(a) for the purposes of the protections conferred by this Act and by section 66(1)(a) of the Human Rights Act 1993.

(4) This section is subject to section 6A.

b) The second is s 6A, which states:

6A Technical failure to comply with or refer to Act

(1) A disclosure of information is not prevented from being a protected disclosure of information for the purposes of this Act merely because—

(a) of a technical failure to comply with sections 7 to 10 if the employee has substantially complied with the requirement in section 6 to disclose the information in accordance with this Act; or

(b) the employee does not expressly refer to the name of this Act when the disclosure is made.

…

(2) This section applies despite anything to the contrary expressed or implied in the relevant internal procedures.

[19] The PD Act confers immunity from civil or criminal proceedings for a person who makes a protected disclosure of information where the proceedings arise by reason of the disclosure.[11] That immunity overrides any other prohibition of or restriction on, the disclosure of any information, whether under an enactment, rule of law or contract. This provision does not override, however, any protection,

[11] Section 18.

privilege, immunity or defence relating to the disclosure of information which might be available, such as a common law public interest defence.[12]

[20] Finally, it should be noted that the PD Act states that the provisions of the Act apply despite any provision to the contrary in any agreement or contract.[13]

Richmond's PD Policy

[21] Richmond's PD Policy is an internal procedure under s 7 of the PD Act. It defines a protected disclosure in the same terms as are prescribed by s 6(1) of the PD Act.[14] It goes on to define serious wrongdoing as:

- An unlawful, corrupt, or irregular use of client or Richmond funds or resources; or
- An act, omission, or course of conduct that constitutes a serious risk to public health, or public safety or the environment; or
- An act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial; or
- An act, omission, or course of conduct that constitutes an offence at law; or
- An act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.

[22] It emphasises that if a staff member makes a disclosure under the policy, he or she must have a reasonable belief of the truth of an allegation and a genuine motivation for making that disclosure. The disclosure is not protected if staff make an allegation knowing it to be false, or otherwise act in bad faith.

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[12] Section 21.
[13] Section 23.
[14] See [18] above.

[23] The structure of the internal procedure is described as involving four sequential steps:

a) Step one is disclosure to a Divisional or General Manager where a staff member wants to make a disclosure of serious wrongdoing.

b) Step two is disclosure to the CEO, or General Manager, Business Services, where a staff member believes on reasonable grounds that a Divisional or General Manager may be involved in alleged serious wrongdoing or that they are not people to whom it is appropriate to make the disclosure because of their relationship or association with a person involved in the alleged wrongdoing.

c) Step three is disclosure to the Chair of the Richmond Board of Directors if the staff member believes on reasonable grounds that the above people are or may be involved in alleged serious wrongdoing, or that they are not people to whom it is appropriate to make the disclosure because of their relationship or association with a person involved in the alleged wrongdoing.

d) Step four is disclosure to an appropriate authority. This step is significant in this case so it is necessary to reproduce it:[15]

> If the staff member believes on reasonable grounds:
>
> - that Richmond's Chair is or may be involved in the serious wrongdoing; or
> - that immediate reference to an outside authority is justified by the urgency of the matter or some other exceptional circumstances: or
> - that there has been no action or recommended action on the matter to which the disclosure relates within 20 working days of the staff member having made the disclosure in accordance with Richmond's internal procedure;
> - the staff member may in these limited circumstances make the disclosure to an "appropriate authority".
>
> The appropriate authorities are:

[15] This provision is based on s 9 of the PD Act which provides for circumstances when an employee or former employee may make a protected disclosure to an outside agency; and s 3 of the PD Act which defines the term "appropriate authority".

- The Commissioner of Police;
- The Controller and Auditor General;
- The Director of the Serious Fraud Office;
- The Inspector General of Intelligence & Security;
- The Parliamentary Commissioner for the Environment;
- The Police Complaints Authority;
- The Solicitor-General;
- The Health & Disability Commissioner.

Please note that if you make your disclosure directly to a Minister of the Crown or Member of Parliament, or to the media, you will not be protected under the Act.

Health Information Privacy Code

[24] As well as relying on the PD Act and the PD Policy, Ms Bracewell relied on two provisions of r 11 of the HIPC. Rule 11 places closely defined limits on the extent to which health information may be disclosed. The starting point of the rule is that an individual's health information must not be disclosed unless certain grounds are made out. But where a health agency believes on reasonable grounds that it is not desirable or practicable to obtain authorisation from the individual concerned, the health agency may disclose information if it is necessary to prevent or lessen a serious and imminent threat either to public health or safety, or to the life and health of the individual concerned,[16] or non-compliance is necessary to avoid prejudice to the maintenance of the law by any public sector agency, including (for present purposes) the investigation of offences.[17]

The confidentiality obligations of the employment agreement

[25] Under cls 18.1 and 18.3 of the collective agreement,[18] employees may not use or disclose any information acquired during the course of employment, whether it is recorded or memorised. This is subject to the proviso in cl 18.2 which provides that employees are not prevented from making appropriate ethical/professional

[16] Rule 11(2)(d).
[17] Rule 11(2)(i).
[18] See para [11] above.

disclosures regarding individual patient clinical status and associated legal issues. The obligations of this clause applied to current and former employees.[19]

[26] Dr Disley considered that cl 18.2 was intended to cover the situation where there is a serious and imminent risk to an individual, such that the employee may have a duty to disclose information in line with the health provisions of the HIPC. It was further contended that the proviso would not apply to a CSW, who is not a health practitioner belonging to a professional body with ethical requirements or obligations. She said that CSWs do not have training and/or are not subject to guidelines and/or do not have support for the purposes of such disclosures.

[27] The words used in cl 18.2 do not reflect these suggested limitations. The collective agreement covers not only CSWs, but also MST therapists and health practitioners.[20] The clause is not limited to categories of employees who are subject to codes of ethics, or to members of a particular profession. The only limitation is that a disclosure must be "appropriate"; and must be "regarding individual patient clinical status and associated legal issues".

[28] However, the provisions of the HIPC may well assist in determining whether any particular disclosure is appropriate, as Richmond's Privacy of Consumer Information Policy recognises.

[29] Independently of those considerations, however, are the protections that arise by reason of the PD Act. Sections 18 and 23 make it clear that the PD Act trumps the restrictions of cl 18.2 of the employment agreement.

[30] In summary, therefore, when assessing any particular disclosure it is necessary first to consider the provisions of Richmond's PD Policy and the PD Act. It is only if there is no protection under those provisions that the ability to disclose under cl 18.2 of the collective agreement becomes relevant; and in that context the provisions of the HIPC may be relevant.

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[19] Clause 18.4
[20] Clause 2.1.

Crimes Act 1961 provisions

[31] Ms Bracewell contends that Client A is a "vulnerable adult" under the Crimes Act. The relevant provisions were introduced in 2011.[21] For present purposes, the key sections are:

a) Section 2 which defines a vulnerable adult for the purposes of ss 151, 195 and 195A. Such a person is one who is "unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person".

b) Section 151 which provides that those who have the actual care or charge of a vulnerable adult who is unable to provide himself or herself with necessaries, are subject to a legal duty:

    (a) To provide that person with necessaries; and
    (b) To take reasonable steps to protect such persons from injury.

c) Section 195, which creates an offence where there is ill treatment or neglect of a child or vulnerable adult; this includes an omission to discharge or perform any legal duty which is likely to cause suffering, injury, adverse effects to health or any mental disorder or disability to a vulnerable adult, if the conduct is a major departure from the standard of care to be expected of a reasonable person.

[32] An issue which will need to be considered further is the question of whether the status held by Client A under the provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1993 (Mental Health Act) means that she is a person who is unable by reason of mental impairment to withdraw herself from the care or charge of another person: that is, whether a Mental Health Act classification in effect deems a subject person to be a vulnerable adult.

[33] A yet further issue arising from these provisions relates to the threshold for an offence under s 195. Whether a relevant Act or omission constitutes a major departure from the standard of care to be expected of a reasonable person is a matter

[21] Crimes Amendment Act (No. 3) 2011, s 4(1); see s 12 of that Act for the transitional provision.

of degree and requires a value judgment as to whether the behaviour "was so bad in all the circumstances as to amount … to a criminal act or omission".[22] As the Court of Appeal has put it, in more traditional language, the Crown must prove not merely negligence but gross negligence.[23]

The facts in the present case

[34] I accept Dr Disley's evidence that the key role for a CSW such as Ms Bracewell was to work with clients to determine what they might need to enable them to live well and identify what other life skills they need. This included supporting them in activities for daily living, through education, employment and socialisation opportunities to live independently.

[35] The job description made no mention of any clinical role, although in a situation where the mental and emotional state of a client was heightened, a CSW could offer and administer medications on an as needed basis. However, clinical care and support was provided externally by the DHB to Richmond by the client's Case Manager and consultant psychiatrist. They had the primary responsibility for the clinical management of clients.

[36] Client A had lived at Richmond's facility since early 2011. Her referral information indicated a diagnosis of schizoid-affective disorder as well as a mild intellectual disability. She had a dysfunctional relationship with her family. From March 2010 she was the subject of a compulsory inpatient treatment order; in March 2011 she was granted leave from hospital by the responsible clinician, during which time she resided at Richmond. On 12 April 2012, a clinical review was conducted under s 76 of the Mental Health Act, which changed her status to a community treatment order pursuant to s 29 of that Act.[24] The mental health assessment that was conducted by her Case Manager prior to the placement recorded that she was vulnerable to exploitation and was suspected of soliciting herself. Some

[22] *R v Adomako* [1995] 1 AC 171 (HL) at 187 per Lord Mackay.
[23] *R v Fenton* [2003] 3 NZLR 439 (CA) at [13].
[24] Ms Bracewell in a memorandum of 14 June 2014 submitted that the clinical review was "falsified", and that Dr L and the DHB "lied" in claiming that Client A's status falls under s 29 of the Mental Health Act. There is simply no evidence to support this contention.

elaboration of her clinical situation was contained in Ms Bracewell's brief of evidence.[25]

[37] In the course of 2011, Ms Bracewell became very concerned about the way in which a new rotational roster system was operating at Richmond, because it compromised ongoing one-to-one contact with clients. She believed that continuity, trust and rapport was thereby lost. She complained about this, and concluded that nothing changed as a result. A year later she lodged another complaint alleging that the Service Delivery Manager was instructing staff to over-record one-to-one contact time with community service clients. An investigation found that practices were being adopted which were not consistent with standard practices, and that over-recording of time had occurred. She lodged a third complaint in September 2012, alleging that there was local incompetence and a lack of respect and concern for staff and clients on the part of local management. Dr Disley, the recently appointed CEO, responded to this concern promptly, recording that it was her understanding a full investigation had been carried out with regard to a particular patient to whom Ms Bracewell had referred, and that as far as ongoing client support was concerned, an acting Divisional Manager would urgently investigate.

[38] In late October 2012, Ms Bracewell learned from another client that Client A had visited a man who resided next to the Richmond facility, and that she was given $30 in exchange for "brutal sex". Initially Ms Bracewell was unsure about this report because of its hearsay nature, but on instruction from the Service Delivery Manager she recorded it in Client A's progress notes. Ms Bracewell understood a second sexual assault occurred a week later; bruising was then detected. Some days later, the Police were contacted by a representative from Richmond, but no steps could be taken by then as the Police considered the report to be too late for them to investigate.

[39] Ms Bracewell herself visited the male neighbour and warned him that if harm occurred to Client A, she would complain to the Police. She remained very concerned because she felt that Client A would not remove herself from a situation which was not in her best interests.

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[25] At paras [6]-[12].

[40] This was also the view of another CSW who gave evidence, and who on one occasion visited the neighbour when Client A was at his residence. She noted that Client A had been drinking and she was seated in a foetal position. She considered the situation to be inappropriate. She encouraged Client A not to drink too much and to come home at a reasonable time. This was met by a very aggressive response from a male occupant such that she did not herself feel safe.

[41] Subsequently, Client A disclosed to the Case Manager, Ms C, that she had in fact been raped by the male neighbour; this was in the context of Ms C taking Client A to a general practitioner because she had contracted a sexually transmitted disease (STD). Some bruising on Client A's neck had also been previously observed. Ms Bracewell understood that Dr L at the DHB acknowledged that these events were a major concern but merely stated that the sexual relationship was possibly not healthy for the client. No relevant entries were made in Client A's progress notes, and the alleged assault(s) were not reported at the time.

[42] One of Ms Bracewell's colleagues raised concerns about this admission. The concern was that the known physical evidence – bruising around Client A's neck and a subsequent STD – tended to confirm that she might well have been raped.

[43] Ms Bracewell stated that as a result of the information that was conveyed to the Divisional Manager, late entries were made in Client A's progress notes referring to Client A's disclosure. An incident report was also completed referring to three alleged assaults. However, the Police were still not contacted.

[44] On 24 January 2013 a telephone conference was convened between relevant Richmond staff and managers to discuss Client A's circumstances. Ms Bracewell considered that insufficient steps were being taken to protect Client A from harm.

[45] Consequently, on 27 January 2013 Ms Bracewell wrote to the CEO complaining again about mismanagement and client neglect. Although she had the circumstances relating to Client A in mind she did not refer specifically to them in her letter. Rather, she said that unless effective changes were implemented at the facility within the next fortnight, she would lodge a complaint with the Chief Ombudsman under the PD Act.

[46] On 1 February 2013, Ms Bracewell complained to the Case Manager, Ms C, stating that she had failed to act in connection with the alleged assaults of Client A. Ms C stated that Client A had the right to have sex with whomsoever she chose, and that by visiting the alleged assailant, Ms Bracewell could have made things worse. In a robust conversation, Ms Bracewell stated that Client A was a very vulnerable adult who was unable to remove herself from a potentially harmful situation.

[47] A few days later, Ms C stated that she had spoken with the consultant psychiatrist, Dr L, who considered Client A was not a vulnerable adult, and reiterated that she could make her own choices with regard to sexual activities. Ms Bracewell was outraged by these responses. There had been a meeting with the Case Manager, staff from Richmond, and Client A's whanau to discuss her health issues and care. However, Ms C instructed Richmond staff that Client A's family were not to be told of the recent alleged assaults or the other health concerns.

[48] Ms Bracewell was very concerned at the absence of counselling, Police intervention, or the trespassing of possible abusers as had occurred in other instances, together with a failure to advise her whanau of the issues. She reported her concerns as to Ms C's reaction to her Service Delivery Manager who suggested that they meet with the Operations Manager to discuss what had occurred. Such a meeting, however, did not occur.

[49] On 5 February 2013, Dr Disley wrote to Ms Bracewell. It is clear that the various concerns raised by Ms Bracewell were being taken seriously. Ms Bracewell was asked to forward copies of notes from the client information system, together with the client incident reports or any other information she had to support her allegations. Dr Disley asked that copies of these notes be forwarded to the Operations Manager and to the Acting Divisional Manager for follow up in the first instance, although she would be maintaining a watching brief.

[50] On about 10 February 2013, Ms Bracewell met Ms B at the DHB to discuss her concerns about Client A, and another patient. Ms Bracewell said she provided some of Client A's documents to Ms B, which she photocopied. In the discussions about Client A, Ms B believed that she agreed with Ms Bracewell that the key issue was whether or not the client was competent to consent to sexual intercourse, an

issue that she undertook to follow up with DHB staff. She also agreed that if the client was a "vulnerable adult" then a crime may have been committed, but to determine this would require an assessment of capacity to consent. Ms Bracewell was also advised to raise the issue with her managers. If she thought Client A was really at risk from continued contact with the male who she said had raped Client A, she should approach the Police. Subsequent to the meeting, Ms Bracewell forwarded to Ms B by email three further documents, including an incident report and two progress notes. Ms B was not overly concerned that Ms Bracewell possessed such documents as she clearly believed the patient was in immediate danger, and Ms Bracewell was still employed by Richmond and involved in the patient's care. She considered that Ms Bracewell was entitled to access the documents.

[51] By 14 February 2013, Ms Bracewell decided neither Richmond nor the DHB were responding adequately. She therefore lodged a complaint with the Police regarding an alleged assault against Client A. She also asserted that Richmond had failed in its duty of care obligations to Client A. She provided the Police with some of Client A's confidential documents.

[52] It was not until 20 February 2013 that Ms Bracewell responded to Dr Disley's letter of 5 February 2013; on that date she provided information regarding the two incidents about which she was concerned, of which one related to Client A. In the course of her letter, she alleged that Client A had been "at least twice sexually assaulted last October/November", and that staff at Richmond and the DHB knew of this soon after. She stated that nothing had been done either to press charges on Client A's behalf or to prevent her from being vulnerable to further assault. She recorded that she had recently sought advice from a DHB lawyer "who stated that a crime had been committed"; and confirmed that she had therefore laid a complaint with the Police. She enclosed with her letter some 50 pages of documentation which she had obtained relating to Client A.

[53] On 21 February 2013 Dr L assessed Client A, apparently as a result of Ms Bracewell raising her concerns with Ms B at the DHB. Dr L found there was no indication that Client A did not understand what it was to consent to sexual

intercourse and that, in his opinion, Client A was not a vulnerable adult under the Crimes Act.

[54] Ms Bracewell learned of this and on 22 February 2013 wrote to the Clinical Director/Director of Area Mental Health Services at the DHB. She detailed her concerns with regard to Client A and asserted that Dr L and Ms C had been "criminally negligent to the point of malpractice", and that she had contacted the Police "to press charges". She demanded that the DHB take steps immediately to intervene and to put Client A in the care of another psychiatrist and case manager so that she could be classed as a vulnerable adult for the purposes of the Crimes Act. Dr Cook co-signed the letter.

[55] At a Richmond staff supervision meeting on 27 February 2013, the Operations Manager and the Service Delivery Manager were asked what was to be done regarding Client A. Ms Bracewell said that the managers responded by stating that Client A had rights and that staff could not prevent her from engaging in sexual activities, and that she could be directed to a prostitutes collective for advice. Later that day, a male person rang Richmond wanting to take Client A out. Ms Bracewell felt that she and her colleagues were now powerless to intervene and that she felt she had to act.

[56] On 28 February 2013, she rang Ms B to enquire what was happening with regard to her complaints to the DHB and the Police. Ms B told her that she herself was now the subject of serious concerns. Ms Bracewell hung up. She did not understand what those concerns were. She concluded that her complaints were not being taken seriously, and that she should resign in order to pursue them. She did so.

[57] Ms Bracewell then wrote a lengthy letter to Client A's aunt regarding her concerns, summarising the information contained in the clinical records which she had assembled. She also attached a copy of her letter of complaint to the DHB. A short time later on 15 March 2013, a member of Client A's whanau told Richmond staff that someone had come to their door handing over "a file" containing information concerning Client A. This was believed to be Ms Bracewell. Although Client A had signed an authority that health information could be provided to members of her whanau, her DHB case manager had specifically informed

Richmond staff that Client A did not consent to information regarding the incidents which had occurred being provided to her family; and this was recorded in the progress notes at Richmond. Richmond accordingly determined that it was necessary to inform Client A that her privacy had been breached and that confidential information had been provided to personnel outside of Richmond. She was distressed upon learning of this.

[58] On 1 March 2013, the Operations Manager from Richmond wrote to Ms Bracewell stating that serious allegations had been made that she had released confidential information about a Richmond client to a third party. Although not stated in the letter from Richmond, the evidence establishes that a verbal complaint had been received from the DHB because the letter to the DHB of 22 February 2013 had been signed not only by Ms Bracewell but by Dr Cook. It was apparent that Dr Cook had accessed the confidential information.

[59] On 6 March 2013, the Divisional Manager of Richmond wrote to Ms Bracewell confirming that her resignation would be accepted. The Manager stated that the issues which had been raised concerning two Richmond clients were being taken seriously and were being investigated. With regard to Client A, it was confirmed that legal advice was being sought as to whether she was a vulnerable adult. It was noted, however, that Client A was able to make fully informed decisions and this had been confirmed by Dr L following his recent assessment. A copy of Richmond's PD Policy was enclosed, which explained the internal procedures which were supposed to be followed if there was a belief that serious wrongdoing had occurred. The Divisional Manager stated that on the information she had, the actions of Richmond employees did not constitute serious wrongdoing, and that, under the policy, she as Divisional Manager should have been given sufficient time to investigate the concerns before confidential client information was provided to third parties.

[60] On 15 March 2013, the Police wrote to Ms Bracewell informing her as to the outcome of their inquiries. A trained child evidential interviewer had spoken to Client A as to whether any sexual assault had occurred. She had been interviewed in an appropriate and non-threatening manner in the presence of a caregiver who was familiar to her. Client A was adamant that no sexual assault had occurred and denied

there had been sexual intercourse. She said that she had in the past gone to the male neighbour's house as he gave her cigarette butts, but that she did not do this anymore as she was aware that he did not want her in his home. Client A made an "important Police promise" to the police officer that she would no longer go to the neighbour's address. She had agreed with the police officer that he was not a nice person. She said she had not been there for some months.

[61] The Police also advised that staff from Richmond were adamant that Client A was capable of making decisions and of understanding the consequences of them. It was their conclusion that without a complaint from the victim or an admission from a suspect or any witnesses, there was no chance of obtaining a conviction for sexual violation.

[62] The Police also confirmed that the action of Richmond staff in reporting the suspected sexual assault to the Police soon after it allegedly occurred, together with their explanations as to the level of care they were providing for Client A suggested they had not breached the obligations arising under s 195 of the Crimes Act. Any omission to perform a legal duty had to be a major departure from the standard of care to be expected of a reasonable person. The Police letter stated that any culpability of Richmond fell well below that threshold.

[63] On 18 March 2013, Ms Bracewell emailed Ms B forwarding what she described as "confidential documents" as evidence of Client A's extreme vulnerability with regard to sexual activities. Ms B responded by informing Ms Bracewell that the DHB was arranging for an external review of Client A's competency. She considered the question was whether Client A lacked capacity so that she would fall within the definition of vulnerable adult.

[64] Ms B said that it was her belief that if Client A was vulnerable in terms of the statute, then a crime had been committed; but an independent assessment had to be obtained. The fact that Client A was under a Compulsory Community Treatment Order did not mean that she lacked capacity or was unable to withdraw herself from harm.

[65] On 19 March 2013, Ms Bracewell and other colleagues met with a journalist who then commenced making enquiries of the DHB and Richmond. It was

Ms Bracewell's evidence that she provided confidential information to the journalist on the proviso that no client would be identified.

[66] On 20 March 2013, the Divisional Manager of Richmond wrote to Ms Bracewell reminding her of her obligations under the employment agreement with Richmond, and indicating Richmond's view that she was not protected either by the PD Act, or its PD Policy. On the same day, Ms Bracewell replied stating:

> Get stuffed, bring it on, under intentional practice and the protected disclosures act, I'm keeping all the evidence. You may not believe it, but I and others believe and I have extensive evidence to show that serious crimes have been and are being committed not only by Richmond, but also by [Client A's] consultant psychiatrist [Dr L], and [the DHB], and I didn't sign up to be party to this. It is time that the public knows about your and their ongoing violations of the Health & Disability Code, and the Crimes Amendment Act. To be diagnosed as mentally disordered and placed under compulsory care and a Compulsory Treatment Order means that [Client A] is, by definition, a vulnerable adult. See you in court.

[67] On 27 March 2013, the Clinical Director/Director of Area Mental Health Services of the DHB acknowledged the letter sent by Ms Bracewell on 26 February 2013, and a further package of notes about a Richmond client received from Ms Bracewell on 15 March 2013. It was stated that there had been breaches of patient rights and privacy, which were taken very seriously and had been reported to Richmond accordingly.

[68] On 9 April 2013, the Detective Sergeant who was in charge of the Police inquiry confirmed to Dr Cook that he had interviewed Dr L and Ms C, and that he was satisfied Richmond had done everything allowed under law to protect Client A. He had further sought a legal opinion on the issue of consent and had determined that she had the capacity to consent. He said it was the opinion of the Police Legal Team that consent could not be aligned to Client A's mental health classification, and that this question was one to be determined by a medical professional. The threshold for offences under either ss 195 or 195A of the Crimes Act was in the nature of gross negligence. He did not consider that this had occurred in the present case.

[69] He then stated that the medical notes which had previously been provided were being returned to the DHB. He considered it was clear from the consent form included in the notes that the Police were not included in the agencies entitled to

receive the notes. He told Ms Bracewell that by emailing documents to the Police there had been a significant breach of Client A's rights. He stated that the Health and Disability Commissioner (HDC) may be an appropriate agency to offer advice.

[70] Also on 9 April 2013 a copy of proceedings issued by Richmond in late March 2013 were served on Ms Bracewell. Richmond was seeking a permanent injunction restraining Ms Bracewell from disclosing any of Richmond's confidential information, including information relating to its clients. A penalty was also sought. Because Ms Bracewell provided a written undertaking to the Authority on 1 May 2013 that she would not use or disclose any of Richmond's confidential information including that relating to clients, and would provide all confidential information to her representative, Richmond did not proceed at that stage with its application for an interim injunction, although the matter then proceeded to mediation, and subsequently a hearing on the papers. Ms Bracewell signed a second document under oath on 12 June 2013 that she had now given the confidential documents to Dr Cook for safe keeping.

[71] On 9 April 2013, Ms Bracewell submitted a complaint to the Chief Ombudsman's office, along with the confidential documents.

[72] On or about 21 May 2013, the DHB obtained an independent opinion from Dr K, a psychiatrist. He considered Client A had the capacity to give consent with regard to sexual activity.

[73] The DHB's position in summary at this point was that Dr L as the responsible Clinician under the Mental Health legislation, Ms C as the Case Manager, District Inspectors and the Area Director of Mental Health Services all considered that the patient was not a vulnerable adult under the Crimes Act. This conclusion was supported by Dr K's opinion.

[74] On 23 May 2013, the Chief Executive of the DHB wrote to Ms Bracewell. He said that the issues which had been raised had been investigated by a number of agencies, none of whom supported the contentions of Ms Bracewell and Dr Cook. He also advised that continued pursuit of the matter was causing distress to Client A and her family.

[75] On 18 June 2013, the Office of the Ombudsman wrote to Ms Bracewell stating that it was not the role of the Ombudsman to consider matters relating to Health and Disability Services. That was the function of the HDC.

[76] On 28 July 2013, Ms Bracewell wrote at length to the Medical Council of New Zealand (MCNZ), lodging a complaint against Dr L and the DHB for what was alleged to be criminal neglect and failure to protect a patient from mental and physical harm. The letter referred to Client A's confidential information. MCNZ advised that such a concern had first to be considered by the HDC to whom it referred the complaint in late September 2013.

[77] The office of the HDC then considered the issues raised, including the independent medical opinion obtained from Dr K. The DHB subsequently advised the HDC that Client A did not support the complaint which had been made, and did not consent to the release of her health information to the Commissioner's office. The Deputy Health and Disability Commissioner accordingly determined on 26 February 2014 that further action was not warranted. She concluded that Client A had been assessed as being competent. She also recorded that by this stage Ms Bracewell did not want her office to assess the complaint in any event. It is apparent from the Deputy Health and Disability Commissioner's decision that Ms Bracewell had provided confidential documentation to the HDC office.

[78] Finally, on 27 March 2014, MCNZ advised Ms Bracewell that its Complaints Triage Team had considered the information which was available regarding Dr L, including the outcome of the HDC's investigation and had decided to take no further action as the concerns had already been fully investigated by the appropriate authorities, namely the Police, the HDC and the DHB.

Evidential issue

[79] Prior to the hearing, an issue was raised as to whether the Court should examine the health records of Client A. On 17 December 2013, the Court granted an order staying the orders of the Authority subject to conditions, one of which was that the confidential documents listed in Appendix A to the Authority's determination and

any copies thereof (including paper and electronic copies) were to be sent to the Registrar of the Employment Court at Auckland, which duly occurred.

[80] In a pre-hearing communication Dr Cook requested that the presiding Judge consider those documents. I directed that, if need be, I would receive submissions on this point at the hearing. In fact neither party pressed such a request, although Ms Bracewell in her evidence implied that it would be desirable to do so. Accordingly I have carefully considered this issue.

[81] Section 69 of the Evidence Act 2006 provides for the exercise of a discretion when a Court must consider an issue as to admissibility of confidential information. That Act does not automatically apply to proceedings in this Court, although its principles can be of assistance and may be applied by analogy.[26] It is appropriate to do so in this instance.

[82] The documents in question include risk assessments, progress notes, incident reports, and a clinical assessment. Dr Disley said they contained very confidential information. It was accepted by Ms Bracewell in cross-examination that this was the case. The information is described as very personal and sensitive. It arose in the course of the provision of care by health professionals and others. There can be no doubt that the documents which Ms Bracewell obtained contain confidential information.

[83] Section 69 provides that confidential information may be disclosed in Court unless the Judge gives a direction under s 69(2) having regard to the factors in s 69(3). Dealing with those factors:

a) *The likely extent of harm that may result from the disclosure of the communication or information:* Dr Disley advised that Client A had not given consent for third parties to access her confidential information, and that there was a risk of irreparable harm being caused to her if she was aware that her private information was provided to third parties. I accept this evidence. The Court must be very conscious of this risk.

[26] Indeed it was considered by this Court with regard to a application to access a document in the possession of the DHB, a non-party: *Bracewell v Richmond Services Ltd* [2014] NZEmpC 63. The leading case with regard to s 69 principles is *R v X* [2009] NZCA 531, [2010] 2 NZLR 181.

b) *The nature of the communication or information and its likely importance in the proceeding:* the information is important, but this factor assumes little weight on the question which arises under s 69, since Ms Bracewell has summarised key points in the documentation in her brief of evidence, and the likely content is apparent from the contextual evidence.

c) *The nature of the proceeding:* the proceeding focuses on the content of the notes, but the issues can be resolved without the Court having to examine the confidential documents.

d) *The availability or possible availability of other means of obtaining evidence of the communication or information:* as already indicated, the key elements of the information have been summarised by Ms Bracewell in her evidence.

e) *The availability of means of preventing or restricting public disclosure of the evidence if the evidence is given:* orders of non-publication could be made in respect of the confidential information.

f) *The sensitivity of the evidence:* there is no doubt that the confidential information is very sensitive.

g) *Society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences:* this ground applies to protect the private health information of Client A, since it relates to an issue which concerns her alleged sexual activities.

[84] I agree with the recent dicta of the Human Rights Review Tribunal, which emphasised the following points as being relevant to the weighing or proportionality exercise mandated by s 69(2):[27]

a) Proper recognition must be given to the principle that all relevant information is disclosable and that a claim to confidentiality should not be lightly upheld.

[27] *Waters v Alpine Energy Ltd* [2014] NZHRRT 8 at [35], [39].

b) The interests to be weighed or assessed under the subsection must be public interests. Private interests are excluded from the assessment exercise except to the extent that those private interests can be elevated into a public interest.

[85] I am satisfied that it is not appropriate for the private information of Client A to be admitted, even for the limited purpose of consideration by the Court. There is a possible risk of harm to Client A were she to be informed this had occurred. There is a possibility that other similar relationships could be affected if it was known that private, sensitive information could be considered by the Court where the subject person is unaware of such a responsibility and if informed would not consent to such a possibility. I am not satisfied that there is a public interest in Client A's information being considered, beyond that which is already able to be considered by the Court. This is not a case where it is necessary for the further information to be admitted in evidence so as properly to resolve the issues before the Court.[28]

Submissions

[86] For the plaintiff it was submitted:

a) Ms Bracewell's complaints and her wish to be able to disclose confidential documents arises because she is concerned that Richmond and relevant DHB personnel have neglected Client A; in particular she believes Client A has been the subject of "multiple rapes", and that the confidential health information of Client A shows that Richmond and DHB personnel have concealed these violations from the Police and other investigative bodies. Ms Bracewell says that her complaints have never focused on Client A's capacity to consent.

b) She asserts that the true position is contained in the confidential documents which have been concealed behind a "deceptive veil of client consent and privacy"; she says that when she realised Richmond was deceiving her, she resigned in order to "protectedly disclose information

[28] This reasoning also applies to the request made by Ms Bracewell after the hearing in her memorandum of 14 June 2014 that the DHB should provide other clinical documents to the Court.

to higher authorities", so as to have it investigated and halt what she believed to be criminal wrongdoing.

c) She submitted that that she acted under a duty to disclose the documents under the Crimes Act, and pursuant to rights she has under the PD Act to report and make protected disclosures to appropriate authorities in order to have wrongdoing investigated.

d) It is her case that she therefore has a lawful right to retain and disclose the confidential documents in support of what she justifiably believes to be criminal wrongdoing; and that this right should continue until her allegations have been "appropriately and openly investigated and addressed" by the Police.

e) It was also submitted that the PD Act makes no reference to whether or not documents used in a disclosure should be returned.

f) Compensation in the sum of $40,000 should be paid.

g) The Authority reached an incorrect conclusion as to costs.

[87] The defendant asserts by way of counter-challenge:

a) No "serious wrongdoing" had occurred in terms of the definition contained in s 3 of the PD Act.

b) Neither the client nor the client's family raised concerns about the care provided; and the issues have been investigated by the DHB, Police and also considered by the HDC and MCNZ. None of these agencies considered there to be any serious wrongdoing or a criminal offence.

c) The plaintiff had not followed Richmond's internal procedures. It is asserted that an internal disclosure was made to the CEO on 20 February 2013, and that the plaintiff did not follow proper procedures by allowing 20 working days to lapse before taking any further step.

d) By 6 March 2013, Ms Bracewell had provided the confidential information of Client A to her partner and to the client's family; and by

19 March 2013 she had made disclosures to the media – none of these disclosures met the requirements of Richmond's internal policy.

e) It was submitted that the PD Act does not provide authorisation for a whistleblower to retain confidential information once disclosures have been made. The purpose of the PD Act is to facilitate disclosures of serious wrongdoing and to protect the disclosure in doing so. Such a disclosure did not require Ms Bracewell to retain or even to disclose the confidential information of Client A. Any appropriate authority could obtain the documents if they were legally entitled to, and if it was necessary for them to do so during the course of an investigation. It was also submitted that disclosures to the HDC and MCNZ were made in breach of undertakings given by the plaintiff to the Authority.

f) Clause 18.2 of the employment agreement did not operate to justify the release of information by Ms Bracewell. The information was highly sensitive and obtained from a client in a situation of trust and confidence; a high threshold should be reached before there could be any appropriate disclosure of that information without that client's consent. Further, a CSW is not a health practitioner and does not belong to a professional body with ethical obligations; nor did she have training or guidelines or support to make such disclosures externally. No attempt was made by Ms Bracewell to seek the consent of the client to take, retain and use her confidential information.

g) In all these circumstances it was submitted that injunctive relief should be granted, and an order of a penalty made.

h) As regards Ms Bracewell's claim for compensation, it was submitted that no personal grievance had been raised or considered by the Authority which would be the only basis upon which compensation could be awarded.

i) As regards Ms Bracewell's challenge in respect of the Authority's order of costs, it was submitted that the Authority had reached a correct conclusion.

The disclosures

[88] Ms Bracewell first escalated her concerns when she wrote to Dr Disley on 27 January 2013. However, no details as to Client A's circumstances were provided. An indication of possible use of the PD Act was given. On 5 February 2013, Dr Disley acknowledged Ms Bracewell's letter of concerns and requested relevant documents.

[89] However, rather than provide those documents to Dr Disley as requested, Ms Bracewell contacted and met with Ms B on about 10 February 2013. She provided her with confidential information relating to Client A. Ms B was herself concerned by the information provided and indicated she would follow up the issue of competency. She also told Ms Bracewell that if she thought Client A was really at risk from continued contact with the male neighbour, she should raise the issue with her managers and approach the Police. Subsequently, Ms Bracewell emailed further documents to Ms B.

[90] Richmond's PD Policy required disclosure initially to the Divisional/General Manager (it appears this had occurred), then disclosure to the CEO (this had been initiated but further information had been requested and not yet provided), and then disclosure to the Chair of the Richmond Board of Directors (this had not occurred at all). Only once those three steps had been undertaken did the policy mandate a disclosure to an "appropriate authority". The PD Policy did not include the DHB as such an authority, but it would qualify under the default provisions of the PD Act particularly if immediate disclosure was justified by reason of urgency, or some other exceptional circumstances.

[91] There was a technical failure to comply with the PD Act because Ms Bracewell had not escalated the matter through the hierarchy of steps referred to in the PD Policy. Nor had she referred to the disclosure as being one under the PD Act. Section 6A of the PD Act states that a disclosure will not lose its protection merely because the employee does not refer to the Act, or there is a technical non-compliance if the employee has substantially complied with the requirement in s 6 to disclose the information in accordance with the PD Act. I find that in broad terms the requirements of ss 6 and 9 of the PD Act were met; that Ms Bracewell

believed on reasonable grounds that she had information about serious wrongdoing within her organisation; and that s 6A operated to relieve the technical non-compliance with the PD Policy. The protections of the PD Act apply to this disclosure.

[92] The next disclosure was to the Police on 14 February 2013. Again, Client A's confidential information was disclosed as well as some of her documents. Although, even at this stage, Ms Bracewell had not provided the information requested to the CEO of Richmond, I find she believed she was entitled to take this step in reliance of the advice given to her by Ms B. Ms B was then contacted by the Police, and as a result, the DHB cooperated with Police inquiries.

[93] Ms Bracewell did not purport to take this step under the PD Policy or PD Act. It was arguably a step that was authorised by the PD Policy, if regarded as an immediate reference to an outside authority on the grounds of urgency or some other exceptional circumstances. The Commissioner of Police was named under the PD Policy as an appropriate authority.

[94] Ms Bracewell held a reasonable belief in the truth of the allegation she was making, particularly as Ms B had agreed with her that if Client A was a vulnerable adult then a crime may have been committed, although this was subject to obtaining an assessment of Client A's capacity to consent. I find Ms Bracewell had a reasonable basis for making the disclosure to the Police. In broad terms, the requirements of ss 6 and 9 of the PD Act were met. There was no reference to the PD Policy or PD Act, but s 6A of the PD Act again applies. The protections of the PD Act apply to this disclosure.

[95] On 20 February 2013, Ms Bracewell wrote in detail to the CEO as requested and provided confidential information relating to Client A. This step was taken at the request of the CEO, and was mandated by the PD Policy. She told the CEO that she had received advice from "a DHB lawyer who stated that a crime had been committed", and that she had laid a complaint with the Police. Ms B had advised her that she should inform her managers of her concerns, and in this letter she acted accordingly and appropriately. In broad terms the requirements of s 6 of the PD Act

were met. Although there was no express reference to the PD Policy, s 6A applies. This disclosure was protected under the PD Act.

[96] The next disclosure was by way of the letter Ms Bracewell and Dr Cook wrote to the Clinical Director/Director of Area Mental Health Services at the DHB on 22 February 2013. Clearly there had been a disclosure by Ms Bracewell to her advocate Dr Cook. By this stage, Ms Bracewell knew that Dr L considered that Client A did not fall within the description of a "vulnerable adult" under the Crimes Act. It appears this assessment was conducted as a result of Ms Bracewell's meeting with Ms B on 10 February 2013. The Police were also investigating. This disclosure was not necessary because the DHB was already aware of the situation following the prior disclosure to Ms B, and as a result of the referral of the situation to the Police. But the essential prerequisites of ss 6 and 9 existed. The technical non-compliance provisions of s 6A again apply. Accordingly, the protections of the PD Act apply to this disclosure.

[97] The next disclosure requiring consideration is that relating to family members following Ms Bracewell's resignation on 28 February 2013. For disclosure to a family member to be protected, Ms Bracewell would have to establish that this step constituted a disclosure to an appropriate authority under the PD Act itself, since family members were not included as appropriate authorities in the PD Policy.

[98] Section 3 of the PD Act contains the definition of "appropriate authority". The term is defined with reference to certain investigative bodies, public sector organisations and private sector bodies comprising members of a particular profession or calling which possess the power to discipline. It is apparent from the examples given that an appropriate authority is intended to be an independent body capable of conducting a formal investigation, if necessary on a confidential basis. Since the bodies are constituted by statute or exercise statutory functions, they are bodies whose processes are likely to be amenable to judicial review. Family members are private individuals without any investigatory functions. They could not qualify under this definition.

[99] Accordingly, neither the PD Policy nor the PD Act applied.

[100] It is therefore necessary to consider whether cl 18.2 of the employment agreement would apply. By this time, Ms Bracewell was no longer an employee and no longer in a professional relationship with Client A. Clause 18.2 permits appropriate ethical or professional disclosures regarding individual patient client status and associated legal issues. It clearly contemplates an ethical or professional disclosure arising from an existing professional relationship with a patient. As a former employee, Ms Bracewell no longer had such a relationship. I conclude she was not entitled to release confidential information to family members pursuant to cl 18.2, in the absence of written consent from the client to do so.

[101] For completeness, I find that the provisions of r 11 of the HIPC could not apply in this situation. The exceptions justifying disclosure of health information under r 11(2) apply to a "health agency". As a former employee Ms Bracewell did not have this status.

[102] Ms Bracewell argued that the generic Health Information Consent Form signed by Client A permitted disclosure of this sensitive information relating to her sexual activity to her family members. This was not information of a kind that was contemplated by the consent form. If there was any doubt on this point, it was resolved by the Case Manager having specifically instructed staff that this information was not to be released. There was no consent authorising the disclosure.

[103] In short, there could be no justification for the disclosure made to family members; doing so was a serious breach of the employment agreement.

[104] In mid-March 2013 Ms Bracewell made a disclosure of Client A's confidential information to a journalist. He then made inquiries of Client A's circumstances from both Richmond and the DHB.

[105] The media does not qualify as an appropriate authority under the Richmond PD Policy – which specifically excluded the media.[29] Nor does the media qualify under the definition of that term in the PD Act, for the reasons outlined above.[30]

[29] At [23] above.
[30] At [98] above.

[106] Since this is clear from the statute itself it is unnecessary to resort to extrinsic materials to discern legislative intent; however I note that the Government Administrative Committee stated in its Report on the Protected Disclosure Bill 1996 that journalists should not be included in the definition of appropriate authority. Ms Scholtens, in her Report which prompted amendments to the PD Act in 2009, declined to recommend that the definition of appropriate authority be expanded to include the news media.[31]

[107] The disclosure to the media is not protected by the PD Act.

[108] Nor could cl 18.2 of the agreement or the provisions of the HIPC apply to permit such a disclosure, for the same reasons as applied to the disclosure made to family members.[32] The disclosure to the media was unauthorised and constituted a further serious breach of the employment agreement. The fact that Client A's identity was anonymised does not mitigate the seriousness of this disclosure. Client A and her family members were kept informed of the breaches of Client A's confidentiality. The breaches no doubt caused distress.

[109] Subsequent disclosures were made by Ms Bracewell to the offices of the Ombudsman, MCNZ and HDC. By this time the matter was before the Authority. The criticism made of Ms Bracewell in respect of these disclosures is that she breached the undertaking she had given to the Authority. Accordingly, I do not need to analyse these disclosures in terms of the PD Policy, the PD Act, the employment agreement or the HIPC.

[110] In seeking relief Richmond primarily relies on the disclosures to Client A's family and to the media. I have found these were not protected by the PD Policy or PD Act, nor justified under cl 18.2 of the employment agreement, nor mandated by r 11 of the HIPC. They amount to serious breaches of the important obligation of confidentiality under cl 18 of the employment agreement.

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[31] See references at above n 6.
[32] At [101]-[103].

Should relief be granted?

[111] The remedies sought by Richmond raise the question as to whether Ms Bracewell should return all confidential information, or be restrained from disclosing or using confidential information given the breaches of the employment agreement which are established.

[112] For the following reasons there is a right to relief:

a) The established breaches are serious.

b) Given the multiple investigations which have now been undertaken, which has included the obtaining of psychiatric advice and legal advice as to whether Client A should be regarded as a vulnerable adult, there are no longer reasonable grounds for concluding that any of the qualifying criteria of s 9 of the PD Act could apply to protect any further disclosure of Client A's confidential information, whether to the Police or otherwise.

c) From 15 March 2013, when the Police wrote to Ms Bracewell, it was clear that Client A stated and would continue to state she had not been sexually assaulted. By 23 May 2013, Ms Bracewell's continued pursuit of the matter was obviously causing distress to her and her family. On 19 November 2013 the Deputy Health and Disability Commissioner was advised that Client A did not consent to the release of her information to the Commissioner. Client A's position has not changed.

d) Once the matter was before the Authority and Ms Bracewell gave an undertaking not to use the documents or disclose Richmond's client information; she did so without seeking release from her undertaking.

[113] Ms Bracewell said that she wishes to provide the confidential documents to the Police. She says the Police had only some of these documents when they considered the matter previously. She considers that the Police should investigate the matter further, because the issue of whether Client A is a vulnerable adult under the Crimes Act has focused only on the issue of her ability to consent to sexual

intercourse, rather than on the question of whether Client A is able to withdraw from a situation which is not in her best interests. She believes that it is essential for the Police to consider all the confidential documents she held[33] for the purposes of that issue. I do not accept these assertions for the following reasons:

a) The Police carefully investigated and considered the matter. They have interviewed Client A, the male neighbour, as well as relevant staff from the DHB and middle management at Richmond. The Police were satisfied that Richmond had done everything allowed by them under law to protect Client A. They were alert to the question of whether Client A was a vulnerable adult. The Police sought opinion on the relevant legal issues, including the issue of consent. They concluded that consent could not be aligned to Client A's mental health classification and must be determined by a medical professional.

   To this point, the Police have taken the view that they should not be in receipt of Client A's confidential records, and indeed returned those which were provided by Ms Bracewell to the DHB since there was no consent for them to possess that information. This Court cannot review the decisions made by the Police.

b) Whether the Police wish to investigate the matter further, obtaining such information as they see fit and by what means they see fit is entirely a matter for them and does not rest on a complaint being advanced by Ms Bracewell. She has already lodged a complaint. The nature of her concerns are well known by the relevant parties, and indeed are evident from this decision.

   There is no express provision which protects a right to make a complaint to the Police under New Zealand law. The closest analogy is found in the right to freedom of expression under the New Zealand Bill of Rights Act 1990 (NZBORA), which refers to the freedom to impart information

[33] Currently held by the Registrar.

and opinions of any kind.[34] However, the NZBORA only applies to bodies in the performance of any public function, power or duty; and even if Richmond were capable of being so described, employment relationships are effectively a non-public function of public bodies and therefore an area in which the NZBORA has no application.[35]

[114] Given Ms Bracewell's failure to respect the confidentiality provisions of the employment agreement and her strident view that she is justified in continuing to raise her views, there is a prospect of further breaches by the release of client information, whether to the Police or to other parties.

Nature of remedies

[115] Richmond seeks an order that Ms Bracewell return confidential information, and injunctive relief restraining her from taking any further steps.

[116] The starting point must be the confidentiality provisions of the employment agreement. Clause 18.4 makes it clear that its positive obligations apply throughout the employee's employment and afterwards without any limit in point of time not to use or disclose confidential information. Given the Court's findings that Ms Bracewell has not observed or complied with the provisions of the employment agreement and that there is a prospect of this recurring, a compliance order directing Ms Bracewell henceforth not to use or disclose confidential information is appropriate.[36]

[117] However, the confidentiality provisions of the employment agreement do not require the return of confidential information where an employee or former employee has such in his or her possession. A compliance order cannot be made in

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[34] Section 14. In *M v M* (2005) 7 HRNZ 971 (HC), a protection order was made against an appellant for unfounded allegations of rape subject to conditions which effectively precluded the appellant from disseminating allegations to any member of the public either orally or in writing. The High Court did not regard freedom of expression and right to justice obligations under NZBORA as absolute – although those rights did in the particular circumstances mean that the plaintiff should have the ability to communicate with counsel, the Police or a counsellor.

[35] See *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, (2013) 11 NZELR 252 at [53]-[55].

[36] The Court has a "derivative jurisdiction" to make such orders as it is satisfied the Authority ought to have made: *Norske Skog Tasman Ltd v Manufacturing and Construction Workers' Union Inc* [2009] ERNZ 342 (EmpC) at [37].

the absence of such a positive obligation. It is therefore appropriate to consider utilising the Court's injunctive jurisdiction to order the return of confidential information held without the consent of the client.

[118] The Authority and, on challenge, the Court, is able to grant an injunction to preserve contractual rights, including rights in the law of employment agreements.[37] The issue here is whether a mandatory injunction should be ordered. The following provides a useful summary of the relevant considerations:[38]

> The Court has power to grant a mandatory injunction to protect contractual rights, either at the trial or on an application. The Court will be reluctant to grant specific performance in any case where continuing supervision by the Court will be needed or whether the exact nature of the obligations to be enforced are difficult to establish. However relief may be granted where there are no other appropriate remedies available. Such a mandatory injunction is similar to an order for specific performance. The grant of an injunction is discretionary and the Court must always have regard to all the circumstances of the case, including the balance of convenience …

[119] I consider that having regard to the serious breaches of confidentiality in respect of sensitive information of a mental health patient, and there being no other appropriate jurisdictional basis for restraining Ms Bracewell from further breaches, it is necessary to grant injunctions as follows:

a) An order of mandatory injunction that Richmond's confidential information in respect of any client is to be returned to it. Because Client A's confidential information is held by the Court, the Registrar is directed to return the sealed envelope of documents to Richmond after 28 days have elapsed following the date of this decision.

b) From the date of this decision, Ms Bracewell and any agent of hers is ordered not to directly or indirectly use or disclose any of Richmond's confidential information, including any information relating to its clients.

c) If she has not already done so, RR[39] is directed to return all confidential information of Richmond, to Richmond.[40]

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[37] *Credit Consultants' Debt Services NZ Ltd v Wilson* [2007] ERNZ 205 (EmpC) at [43]-[47].
[38] *Laws of New Zealand* Equitable Remedies at [443].
[39] RR is the person referred to at Order D of the Authority's determination.
[40] This order repeats a similar order made by the Authority, and is made for the avoidance of doubt since this decision replaces the Authority's decision: s 183(2) of the Employment Relations Act.

[120] A non-publication order is made in respect of any confidential information which has been or is held by Ms Bracewell or any agent of hers; this order will include the confidential information relating to Client A as recorded in Ms Bracewell's brief of evidence and in her submissions; and in the handwritten notes she and her agent made when examining the content of the sealed envelope held by the Court pursuant to leave being granted.

[121] Because the basis and form of orders made by the Court differs from those made by the Authority, the counter-challenge partially succeeds.

Penalty considerations

[122] Richmond also seeks a penalty. It was submitted that this was necessary having regard to the disclosures made to the family even when Ms Bracewell had been advised that Client A did not consent to such, and to the media. It was submitted that the potential damage to patient/doctor relationships and other health practitioners is significant, and that an award towards "the high end of the scale" is appropriate.

[123] In *Xu v McIntosh*, Chief Judge Goddard stated:[41]

> [47] A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default such behaviour is unacceptable or to deter others from it?
>
> [48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate?
>
> …

[124] As already indicated in this decision, there is evidence before the Court that Ms Bracewell's actions caused distress to Client A and to her family. This is unsurprising. Later it was indicated to the Health and Disability Commissioner that Client A did not support the ongoing complaints which Ms Bracewell was raising, or consent to release of her confidential health information to the Commissioner. It is

[41] *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC).

plain that Client A was well aware of Ms Bracewell's continued initiatives, and this will have caused distress.

[125] With regard to the second question posed in the *Xu* decision, it is in the Court's view very important that the Court mark its disapproval of the significant breaches which occurred in this case – both to make it plain to Ms Bracewell that her conduct has been inappropriate and also to deter others that might otherwise make unwarranted disclosures of the confidential information of mental health patients, whether or not those persons are health practitioners. I accept the submission made for Richmond that otherwise there is a potential for harm to relationships with health practitioners or those working in the health field because patients may be reluctant to provide health information if there is a risk of unauthorised disclosure.

[126] With regard to the third question, it is clear the disclosures were deliberate.

[127] Ms Bracewell's belief that serious wrongdoing occurred cannot in the present circumstance justify the significant act of disclosing sensitive and private confidential information to family members without express consent, and the egregious act of initiating publication of this information in the media, even if anonymised.

[128] It is obvious that those steps were beyond the scope and protection of the PD Policy and PD Act. Consequently, it is appropriate to impose a penalty.

[129] However, it should be noted for future reference that disclosures made in accordance with an organisation's internal procedures and the statutory requirements of the PD Act are lawful and will not be met with the kind of sanction which it is necessary to consider on this occasion.

[130] The Court is very concerned that an undertaking given to the Authority has been breached. However, that is an issue of contempt and not an issue where a penalty is appropriate for breach of an employment agreement.

[131] Since Ms Bracewell has been ordered to pay costs in the Authority, and it is possible she will be ordered to pay costs by the Court, a modest penalty is appropriate. The maximum penalty which can be imposed on an individual is

$10,000.[42] In all the circumstances I consider an appropriate penalty is $2,000, which sum Ms Bracewell is to pay to the Court.

The plaintiff's challenges

[132] Ms Bracewell submitted that s 66 of the Human Rights Act 1993 applied. Although she did not spell out the basis for this assertion, she was presumably submitting that by pursuing these proceedings, Richmond was victimising her[43] for having made use of her rights under the PD Act. The findings made earlier are that there have been disclosures that could not be justified under the PD Policy, the PD Act, the employment agreement or the HIPC. Nor was there a relevant consent. For the reasons already fully explored, I do not consider that a contention of victimisation under s 66 is established. Richmond has acted responsibly in seeking to protect Client A's information.

[133] Ms Bracewell's challenge included a claim for compensation in the sum of $40,000 for "… stress, anxiety and to cover advocacy costs …". No personal grievance has been raised with or heard by the Authority; consequently the compensatory provisions of s 123 of the Act are not relevant. There is no other basis for considering such a claim.

[134] It was asserted by Ms Bracewell that the Authority reached an incorrect conclusion as to costs. Richmond submitted that an appropriate order was made.

[135] For the purposes of this aspect of her challenge, Ms Bracewell asserted that Richmond had deliberately "misrepresented the facts and committed extensive perjury in its application for injunction and despite being informed of this perjury the Authority did nothing to address it." There is no evidence whatsoever to suggest that perjury was committed by any witness who gave evidence to the Authority for Richmond. This ground of challenge is misconceived.

[136] In general terms, the challenge raises a question as to whether the quantum of costs which the Authority considered appropriate was justified, although no detailed

[42] Employment Relations Act 2000, s 135(2)(a).
[43] As that term is understood under s 66.

submission in that regard was provided. The Authority Member carefully considered the following issues:[44]

- Should an unsuccessful party be entitled to costs?
- Should there be an award of indemnity costs?
- If not, what is the starting point for assessing costs?
- Are there any factors that warrant adjusting costs?

[137] The Authority properly concluded that the case was not one where an unsuccessful party should be entitled to costs. The Authority determined that the normal rule of costs following the event should apply.[45] I agree.

[138] The Authority also found that an award of indemnity costs is exceptional; and that in this matter neither party's behaviour warranted such a conclusion.[46] I do not regard the circumstances as being so exceptional as to justify an award of indemnity costs.

[139] As regards a starting point for assessing costs, the Authority adopted the notional daily tariff of $3,500.[47] It also found that Richmond's invoice of $5,500 plus GST should be reduced by $2,500, because there was an "unsuccessful" application for an interim injunction.[48] In fact, the interim position was able to be dealt with by undertakings. However, the Authority then adopted the figure of $3,375; apparently GST was calculated at 12.5 per cent rather than 15 per cent.

[140] Finally, the Authority considered whether there were any factors warranting an adjustment of the starting point for assessing costs. After reciting the procedural history, the Authority concluded there was no such basis, and so ordered Ms Bracewell to pay costs to Richmond of $3,375.

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[44] Authority costs determination, above n 3, at [2].
[45] At [5].
[46] At [6]-[7].
[47] At [8].
[48] At [9].

[141] I consider the Authority's reasoning to be persuasive in respect of its assessment of reasonable costs in the sum of $3,000 plus GST. But the correct amount should therefore have been $3,450, inclusive of GST.[49]

[142] Accordingly Ms Bracewell is ordered to pay Richmond costs in the Authority of $3,450.

[143] Ms Bracewell's challenge fails.

Conclusion

[144] A compliance order is made directing Ms Bracewell not to use or disclose Richmond's confidential information; this order is to take effect from the date of this decision.

[145] Injunctions are ordered also to take effect from the date of this decision:

a) An order of mandatory injunction that Richmond's confidential information in respect of any client is to be returned to it. Because Client A's confidential information is held by the Court, the Registrar is directed to return the sealed envelope of documents to Richmond 28 days after the date of this decision.

b) Ms Bracewell and any agent of hers is ordered not to directly or indirectly use or disclose any of Richmond's confidential information, including any information relating to its clients.

c) If she has not already done so, RR is directed to return all confidential information of Richmond, to Richmond.[50]

[146] An order of non-publication is made in respect of any confidential information which has been or is held by Ms Bracewell or any agent of hers; this order will include the confidential information relating to Client A as recorded in Ms Bracewell's brief of evidence and in her submissions; and in the handwritten

[49] At [11]-[17].
[50] Richmond is directed to serve a copy of this decision on RR, if necessary.

notes she and her agent made when examining the content of the sealed envelope held by the Court.

[147] The court file may be searched only with the leave of a Judge.

[148] Ms Bracewell is to pay to the Court a penalty in the sum of $2,000.

[149] Ms Bracewell is to pay Richmond costs in respect of the Authority proceeding in the sum of $3,450, inclusive of GST.

Costs

[150] Costs in this Court generally follow the event. If Richmond wishes to make an application for costs, it is to file such an application and any supporting evidence within 14 days of this decision; Ms Bracewell is to file and serve any submission and evidence in response 14 days thereafter.

B A Corkill
Judge

Judgment signed at 4.00 pm on 1 July 2014