IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 52
WRC 2/10

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

Hearing: 10 May 2010 (by telephone conference call)

Appearances: Peter Chemis, Counsel for Plaintiff
Peter Cranney, Counsel for Defendants

Judgment: 11 May 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This case is the plaintiff's challenge to a determination of the Employment Relations Authority[1] about an employer's good faith obligations to provide information to existing employees who have not succeeded in being appointed to a reduced number of positions in impending redundancy. It is set down for hearing before a full Court only two days hence.

[2] The defendants seek to have disclosed to them in the litigation the documents they say were withheld unlawfully by their employer. The plaintiff objects to

[1] WA1/10, 6 January 2010.

disclosing these documents to the defendants. Although the formal processes under the Employment Court Regulations 2000 (the Regulations) have not been undergone, this application is, in effect, a challenge to objection to disclosure under reg 45. The issues come down to, first, the relevance of the documents and, if they are relevant, the statutory grounds for objecting to disclosure under reg 44(3) which provides:

> The only grounds upon which objections may be based are that the document or class of documents—
> (a) is or are subject to legal professional privilege; or
> (b) if disclosed, would tend to incriminate the objector; or
> (c) if disclosed, would be injurious to the public interest.

[3] There is no question that the documents are subject to legal professional privilege or would tend to incriminate the objector. The documents being relevant, the plaintiff's sole argument for resisting disclosure must turn on whether it would be injurious to the public interest to disclose them.

[4] It is necessary to identify the nature of the proceeding before the Court and, being a challenge, therefore the case in the Authority.

[5] Although I do not have copies of the statements of problem and in reply in the Authority, its determination issued on 6 January 2010 records that the remaining claims of the (now) defendants for determination were for breaches by the employer of s 4(1A) of the Employment Relations Act 2000 (the Act). As the Authority recorded at paragraph [4] of its determination, the defendant's counsel, Mr Cranney, abandoned the remedies originally sought by his clients, orders preventing their dismissal.

[6] The Authority determined that the Vice-Chancellor was in breach of his obligations under s 4(1A)(c) of the Act to the extent that he had not given the defendants the documents which the Authority identified at paragraph [44] of its judgment and which are the documents now at issue between the parties on this question of discovery. The Authority directed the provision of those documents to the defendants.

[7] In resisting disclosure of the documents (other than to the Court and only to counsel for the defendants), Mr Chemis argued that disclosure would give them the

very documents their entitlement to which the substantive case concerns. Counsel submitted that this would defeat the purpose of the proceeding. There are, however, two separate issues. The first is whether the defendants ought to have been given these documents when they requested them before their dismissals for redundancy. That is the question for decision in the substantive proceeding. The second question is both distinct and governed by statute and case law. It is whether, in proceedings to determine whether the employer failed or refused to act in good faith towards employees by refusing to provide them with the documents, their disclosure in preparation for trial can be resisted.

[8] The questions apply different tests. The matter of the documents' disclosure under s 4(1A)(c) of the Act turns on whether, first, they contain confidential information and, second and if so, there is good reason to maintain the confidentiality of that information under s 4(1B) of the Act. The statutory test to be applied to document disclosure under the Regulations is whether the disclosure of the documents would be injurious to the public interest: see reg 44(3)(c).

[9] Next, Mr Chemis submitted that it is unnecessary for the defendants to see the documents to be able to argue for their disclosure, more particularly if their counsel has seen them as the plaintiff concedes should happen. Mr Cranney makes the point, however, that it is invidious and unjust for counsel to be obliged to conceal issues relevant to the litigation from those who are parties to it, and may inhibit counsel from advancing the defendants' case if there are matters on which he cannot take instructions in the usual way.

[10] If only because of the plaintiff's reliance on s 4(1B), the content of the documents is therefore in issue in the proceeding and it is difficult, if not impossible, to see how the Court can determine that issue without inspecting the documents and their contents in the course of which exercise the parties will be entitled to call evidence and make submissions about them. Their disclosure to the defendants is the process by which that is enabled. It is not sufficient for that purpose that the documents may be shown to the Court or even to counsel for the defendants as the plaintiff has proposed.

[11] Mr Chemis submitted that the defendants have not advanced any cogent argument for disclosure and inspection of the documents. That is, however, to misstate the law on disclosure. It is that relevant documents must be disclosed and available for inspection unless there are specific statutory grounds constraining that presumption.

[12] Finally, Mr Chemis relied on the analysis by this Court of privacy principles in the judgment in *Talbot v Air New Zealand Ltd (No 2).*[2] That case related to the disclosure of records created by an employer of communications with individual employees during or connected with contemporaneous collective contract negotiations. The particular aspect of the *Talbot* case relied on was the second question considered, whether the Court has a residual discretion to refuse to order disclosure and the circumstances of its exercise.

[13] In particular, it was argued in that case that the purposes and provisions of the Privacy Act 1993 were relevant considering the then statutory equivalent to the present object clause, reg 37 of the Regulations that provides as follows:

> The object of regulations 40 to 52 is to ensure that, where appropriate, each party to proceedings in the Court has access to the relevant documents of the other parties to those proceedings, it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both.

[14] The Court in *Talbot* concluded at p 222:

> In this case, reference to the Privacy Act must fall within the more general, arguably catch-all category of reg 52(3)(c), that is injury to the public interest. I accept that the content of the Privacy Act 1993 must be a public interest consideration. As I held in *Julian v Air NZ Ltd* [1994] 2 ERNZ 88 this phrase means something that is less than the interests of the whole community but broader than the interests of the immediate parties. The "public interest" in reg 52(3)(c) is the interests of that part of the community involved in negotiating, settling, and performing employment contracts. It clearly includes the interests of other Air New Zealand pilot employees not represented by the plaintiffs or NZALPA.

[15] The Court in *Talbot* examined and applied the relevant parts of the Privacy Act 1993 and its information privacy principles in particular. The Court noted that

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[2] [1994] 2 ERNZ 216.

reg 45 under the 1991 Regulations (the equivalent of reg 37 now) was an objects provision in the sense that it gave guidance to the interpretation of subsequent substantive provisions. The Court held that the regulation creates a presumption that, where appropriate, there is to be access to relevant documents. The exception to that usual necessity for the fair and effective resolution of difference between parties is if such is able to be categorised as unnecessary or undesirable or both. The Court found, at p 224:

> It is therefore a situation, in my view, of the party seeking to be excused from discovery to establish that exception, namely the absence of necessity or the undesirability or both of what is usually to be expected in litigation. …
>
> Although s 6 of the Privacy Act is a relevant factor in the exercise of the Court's discretion as to whether disclosure should be ordered and is indeed a prime reason for restricting the disclosure to documents relating to employees subject to the collective employment contract, it does not in this case override what I find to be the necessity of disclosure to the plaintiffs for the purpose of properly prosecuting their case as pleaded.

[16] It is relevant also, as Mr Cranney noted, that privacy principle 6 creates an exception to the disclosure in litigation of personal information.

[17] I am not satisfied that any residual discretion to refuse disclosure should be exercised in this case. Mr Chemis has conceded that the documents should be supplied to counsel for the defendants. Mr Cranney submitted that his clients should be able to see these documents but accepts that this should be on conditions that I am satisfied will provide a proper balance between the defendants' entitlement to know the case against them (because this is a challenge by the employer), on the one hand, and issues of privacy on the other.

[18] Before setting out those conditions, however, I should refer to reg 51 of the Regulations which establishes statutory conditions of which the defendants will thereby be aware and which will go some way towards protecting the privacy of other individuals on whose behalf the plaintiff has argued this point. Regulation 51 is as follows:

> **51 Conditions of disclosure**
> It is a condition of the disclosure of documents that the integrity and confidentiality of any documents disclosed pursuant to any provision of regulations 40 to 50 or to any notice or order given or made under

such provision must be maintained at all times and for all purposes and, in particular, that—

(a) the party obtaining disclosure must use such documents and their contents for the purposes of the proceeding only and for no other purposes:

(b) if copies of any documents have been made available by any party,—

(i) those copies must be returned to that party within 28 clear days after the conclusion of the proceedings or after the conclusion of any related appeal, whichever is the later; and

(ii) copies of any of those copies must not be retained by the party to whom those copies were made available:

(c) the information contained in any document so disclosed but not used in evidence in the proceeding—

(i) must, to the extent that that information is derived from that document, remain confidential to the party whose document it is or in whose possession it was immediately before it was made available to any other party; and

(ii) must not, to the extent that that information is derived from that document, be disclosed by any person except as may be necessary for the conduct of the proceeding.

[19] For the foregoing reasons the documents must be disclosed to, and may be inspected by, the defendants on the conditions set out in reg 51 and on the additional conditions:

(a) that numbered copies of the documents are to be given to the defendants;

(b) that the numbered copies are to be returned to the plaintiff pursuant to reg 51(b)(i) above;

(c) that no further copies of the numbered copies are to be made by the defendants without the consent of the Court; and

(d) that the numbered copies of the documents are not to be shown by the defendants to persons other than their legal representatives in these proceedings without the consent of the Court.

[20] Costs are reserved on this application.

GL Colgan
Chief Judge

Judgment signed at 10.30 am on Tuesday 11 May 2010