IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 108
ARC 2/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AUCKLAND DISTRICT HEALTH BOARD Plaintiff
AND	KATE BIERRE Defendant

Hearing: By memoranda of submissions filed on 25 May, and 3 and 13 June 2011

Appearances: Michael O'Brien and Nura Taefi, counsel for plaintiff
Helen Cull QC and Richard Fletcher, counsel for defendant

Judgment: 22 August 2011

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] Kate Bierre challenges the admissibility of some of the evidence intended to be called by the Auckland District Health Board in her proceedings alleging breach of contract and unjustified dismissal. To decide those questions it is necessary first to consider the general nature of the proceeding so that the intended evidence can be put in context.

[2] In addition to breach of contract causes of action unaffected by limitations' questions, Ms Bierre claims that she was constructively and unjustifiably dismissed by the Board. It is common ground, however, that Ms Bierre did not raise her personal grievance within the maximum period of 90 days after the alleged constructive dismissal. Therefore Ms Bierre must obtain leave to extend the time for raising the grievance so that it can be considered on its merits. She relies on the statutory exceptional circumstance under s 115(a) of the Employment Relations Act

2000 (the Act) that she had "been so affected or traumatised by the matter giving rise to the grievance that … she was unable to properly consider raising the grievance within the period specified in s 114(1) …".

[3] The Board does not agree that Ms Bierre should be given leave to raise her grievance out of time. So not only must she satisfy in evidence the test set out above, but the Court must be satisfied that the delay in raising her personal grievance was occasioned by this exceptional circumstance and, independently, that it considers it just to give leave to raise the personal grievance after the expiration of that 90 day period: s 114(3) and (4) of the Act.

[4] Both parties seek to put forward medical evidence about Ms Bierre's condition at relevant times. That to be adduced by the defendant is challenged by the plaintiff as inadmissible.

[5] Initially, the questions of admissibility arose in the context of proceedings then before the Employment Relations Authority. The subsequent removal by the Authority of the whole case to this Court for hearing at first instance means that these questions of inadmissibility of evidence must be determined in respect of evidence to be given to the Employment Court.

The relevant law

[6] Evidence admissibility in the Employment Court is governed by s 189 of the Act which provides:

> **189 Equity and good conscience**
>
> (1) In all matters before it, the Court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
>
> (2) The Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[7] As has been noted in other cases, the Court has a very broad discretion to admit or to refuse to admit evidence. The interests of justice in the particular case will be the ultimate determiner. Although the Evidence Act 2006 does not apply to proceedings in the Employment Court, its provisions and other rules of evidence in the courts of general jurisdiction are important guiding factors in determining the admissibility of evidence. So too are other relevant statutory provisions.

[8] Ms Bierre claims to have been dismissed constructively by the Board. That is, although she resigned, she says the circumstances leading to her resignation and, in particular, her treatment by the Board were such that the Court should find that she was dismissed. In effect, because leave to bring the personal grievance cause or causes of action is required, Ms Bierre bears the preliminary onus of establishing the necessary circumstances under ss 114 and 115 of the Act. She will attempt to do so by her own evidence, evidence from a close relative and, significantly for the purpose of this judgment, by the evidence of Susan Harding, a clinical psychologist, which will include opinion evidence about Ms Bierre's mental and emotional health.

[9] Ms Harding's opinion evidence will be based on reading the witness briefs of Ms Bierre and her close relative and on a series of professional consultations with Ms Bierre in 2009 and early 2010. Ms Harding's professional opinion is, in a nutshell, that at relevant times Ms Bierre "was not in a mental state that would have allowed her to consider taking any form of legal action against Auckland DHB." Further, Ms Harding will opine that at relevant times Ms Bierre "was not aware that she could take any legal action against Auckland DHB for what, in my view, was work-related stress and burnout." The Board has now responded to Mr Harding's evidence with its own experts' opinion and other medical and supporting evidence.

The impugned evidence of Stephanie Hlohovsky

[10] The Board intends to call the evidence of Stephanie Hlohovsky, its Nurse Manager for the Paediatric and Congenital Cardiac Service. Ms Bierre objects to the contents of paras 52 and 57 (inclusive) of the intended evidence of Ms Hlohovsky and associated attachments known as exhibits SH-6, SH-7 and SH-8 to her affidavit.

[11] In para 52 Ms Hlohovsky speaks of contacting a Board occupational health nurse by email and outlining to that person what Ms Bierre had told Ms Hlohovsky. The email is known to the parties as exhibit SH-6. The email sets out Ms Hlohovsky's account of Ms Bierre's work history with the Board and of her relevant medical circumstances during that period of employment. The email outlines to the occupational health nurse Ms Hlohovsky's advice to Ms Bierre including Ms Hlohovsky's intention to seek advice from occupational health.

[12] Paragraph 53 is Ms Hlohovsky's response to a comment by Ms Bierre in her brief of evidence that she was unaware why Ms Hlohovsky had suggested to her that she see an occupational health doctor. Ms Hlohovsky's intended evidence is to answer that rhetorical question raised by Ms Bierre including to annex, as intended exhibit SH-7, a copy of Ms Hlohovsky's referral letter to the occupational health doctor, which she will say was sent at the time to Ms Bierre. The referral letter is substantially similar to the email (exhibit SH-6) sent by Ms Hlohovsky to the occupational health nurse, although was dated more than a week later.

[13] Paragraph 54 is intended to address the issue of contact between Ms Bierre and the occupational health doctor (Dr Caroline Allum) and to set out Ms Bierre's account about why she did not keep an appointment with Dr Allum.

[14] Paragraph 55 will say that Ms Bierre telephoned Dr Allum, having changed her mind and made an appointment for a consultation before making a decision about her future employment.

[15] Paragraph 56 relates to Ms Hlohovsky's receipt of an email from Dr Allum following Ms Bierre's appointment with Dr Allum reporting on Ms Bierre's condition and prognosis. Intended exhibit SH-8 is Dr Allum's email to Ms Hlohovsky.

[16] Finally, para 57 of Ms Hlohovsky's intended evidence proposes to relate to discussions between her and Ms Bierre following Ms Bierre's appointment with Dr Allum and, in particular, their discussion about alternative roles within the Board.

[17] Although I received very comprehensive submissions on legal and factual issues, there is, regrettably, no affidavit evidence from which the Court is able to reach some of the conclusions it is invited to make by the parties. So, for example and unlike in *Coy v Commissioner of Police*[1] on which the plaintiff in particular relied, there is no evidence from Ms Bierre as to her expectations of confidentiality in her communications with medical practitioners and others within the Board. In these circumstances, the Court is left to draw inferences from the briefs of evidence and relevant documents that have been filed.

The impugned evidence of Dr Allum

[18] The whole of the intended evidence of Dr Allum contained in an affidavit sworn on 2 December 2010 is objected to. Dr Allum is both a general practitioner and an occupational health doctor employed by the Board to assess its employees who are referred to occupational health by their managers. This is a non-treating assessment facility of the Board, the main role of which is to provide advice about the health of employees in relation to their work and to provide a service to Board managers to assist them to manage employee health and safety issues at work. Employee consent to be the subject of a referral to occupational health and safety is an essential prerequisite of the use of this service.

[19] Essentially Dr Allum's evidence will refer to her conversations with Ms Bierre about a missed appointment and Ms Bierre's advice to Dr Allum about her employment intentions. The evidence will refer also to a further telephone conversation as a result of which Ms Bierre met with Dr Allum. The Board proposes that Dr Allum give evidence about statements made by Ms Bierre regarding those discussions and, in particular, about Ms Bierre's future with the Board.

Relevant background facts

[20] Ms Bierre was employed by the Board as a staff nurse for a period of more than three years until 4 June 2009. In April 2009 she told her manager, Ms Hlohovsky, that she was suffering from "burnout" and was considering resigning.

[1] [2010] NZEmpC 88.

One of the things that Ms Hlohovsky did in response was to advise Ms Bierre that she (Ms Hlohovsky) would seek advice from the Board's Occupational Health Service (OHS). Ms Hlohovsky contacted an OHS nurse on 9 April 2009 seeking advice in relation to Ms Bierre. Ms Hlohovsky did so by email and the content of this advice is the first document (exhibit SH-6) objected to.

[21] On 17 April 2009 Ms Hlohovsky sent Ms Bierre copies of a number of documents including a covering email from Ms Hlohovsky to Ms Bierre, a referral letter from Ms Hlohovsky to OHS, OHS's illness/absence referral form, a functional job description completed by Ms Hlohovsky, and the Board's health assessment consent form. These documents together are the second impugned document known as exhibit SH-7.

[22] In the section of the illness/absence referral form entitled "Reasons for Referral" Ms Hlohovsky referred to the referral letter and also indicated that she sought OHS advice about a number of things including: the likelihood of Ms Bierre's symptoms being wholly or partly work related; Ms Bierre's fitness to work; whether modified hours might be appropriate for Ms Bierre; and whether OHS recommended modifications to Ms Bierre's work, tasks or equipment.

[23] Ms Bierre then signed the OHS consent form which stated:

> Recommendations arising from this assessment will be sent to your employer (ADHB). Only the information required by the workplace will be provided to your Manager and/or the Human Resources Consultant.

[24] The OHS consent form also referred in the following terms to the Privacy Act 1993 and the Health Information Privacy Code 1994 (the HIPC): "Personal information is collected and stored under the guidelines provided by the Privacy Act 1993 and the Health Information Privacy Code 1994."

[25] In the consent declaration form Ms Bierre affirmed, by ticking the appropriate statements, there appears the following:

> I understand that my referral will be dealt with in confidence and that advice given to my employer will be in regards to my fitness to carry out my

> role/job tasks, to guide the vocational rehabilitation process and to maintain my safety, and the safety of others in the workplace.

[26] On 7 May 2009 Ms Bierre attended an appointment with the Board's occupational health doctor, Dr Allum. Dr Allum subsequently emailed Ms Hlohovsky setting out the results of the doctor's assessment of Ms Bierre. This email is the controversial document known as exhibit SH-8.

The Authority's determination challenged

[27] Although this proceeding has now been removed to the Court and the evidence admissibility challenge is to the evidence intended to be presented to the Court, it is nevertheless useful to consider the Authority's determination[2] of the admissibility of the same evidence in that forum that is still, formally, the subject of a challenge.

[28] The Authority decided that Dr Allum had Ms Bierre's express consent to relay some, but not unlimited, information to Ms Hlohovsky. It found that this included information about Ms Bierre's fitness to carry out her role and job tasks but limited to what was required "by the workplace" for the purpose of guiding a vocational rehabilitation process and maintaining her safety and the safety of others in the workplace. The Authority found that the proposed evidence was so limited and was not provided to the Nurse Manager (Ms Hlohovsky) for any purpose other than to guide the vocational rehabilitation process.

[29] Distinguishing the judgment of this Court in *Coy*, the Authority concluded that the proposed evidence fell within the scope of the consent given to its transmission by Dr Allum to Ms Hlohovsky.

[30] The Authority then turned to the question of whether this properly obtained evidence should be disclosed to it. It considered significant that Ms Bierre's claims include allegations that the Board failed in its duty to provide a safe workplace and, in determining that, the Authority would have had to consider what the Board knew or ought to have known about risks to Ms Bierre's health and safety. It found it

[2] AA 523/10, 20 December 2010.

would be incumbent on the Authority to inquire into the steps taken to address any such risks and, central to that, there would be an inquiry by the Authority into Ms Hlohovsky's knowledge of Ms Bierre's fitness to carry out her role and job tasks, the steps Ms Hlohovsky took in relation to Ms Bierre's vocational rehabilitation process, and the steps she took to maintain Ms Bierre's safety.

[31] The Authority concluded that the Board's proposed evidence goes to the heart of these issues and disclosure of it would be necessary for the Authority to investigate Ms Bierre's employment relationship problems. It determined that this was clearly related to the purpose for which consent to disclosure was originally given by Ms Bierre and that it was not open to her to object to inclusion of the proposed evidence in the Authority's investigation of the issues raised by her.

[32] Next, the Authority considered whether the same information should be considered in its investigation of the preliminary limitation issue. It concluded that s 114(4) of the Act required it to exercise a discretion and, in doing so, to consider all relevant issues including the nature and merits of the substantive claims. It concluded that the proposed evidence was relevant to this issue.

[33] The one exception to the Authority's determination of admissibility related to para 15 of Dr Allum's affidavit. The Authority did not accept that Dr Allum qualified, in the legal sense, to be an expert witness able to give opinion evidence about the ultimate issue for the Court. The Authority considered also that Dr Allum's proposed evidence set out in para 15 of her affidavit exceeded the consent that Ms Bierre had given to disclosure of medical information and that this paragraph was inadmissible. The Authority excluded only this one paragraph from the Board's intended evidence.

Submissions for defendant

[34] The application of s 189 of the Act, in cases such as this, is guided by the rules of admissibility of evidence in other courts including, in particular, those set out in statute.

[35] The defendant's objections to the intended evidence are four-fold. First, she says it is evidence of confidential communications between her and a medical practitioner that should be excluded by s 189 and regs 37-44 of the Employment Court Regulations 2000. Second, the defendant says the intended evidence is inadmissible under the HIPC. Next in respect of the evidence of Dr Allum at para 15, the defendant says this is inadmissible because it purports to be evidence given by an expert but that Dr Allum is not competent to give psychological or psychiatric opinion evidence. Finally, the defendant says Dr Allum's evidence should not be heard because, as an employee of the defendant, she has a conflict of interest and cannot be regarded as a reliable independent expert.

Decision – Admissibility of Hlohovsky and Allum evidence

[36] The enactment in 2006 of the Evidence Act removed the need for the establishment of a "special relationship" between, for example, doctor and patient giving rise to an obligation of confidentiality and therefore, potentially, to inadmissibility. Although the Act does not define confidentiality, it does create an overriding discretion to prevent the disclosure of confidential information in proceedings: s 69. An obligation of confidentiality arises where there is a reasonable expectation of confidentiality: *R v X*.[3]

[37] I accept that the proper approach to the determination of admissibility under s 189 is to determine whether a reasonable person in Ms Bierre's position would have reasonably expected the information to be disclosed in the way now proposed by the plaintiff. I have concluded that such a reasonable person could not have expected that the plaintiff (or witnesses to be called by it) would not disclose this information in proceedings such as this.

[38] If I am wrong in that conclusion, and the impugned evidence is, or is based on, information that is confidential in nature, it is appropriate to nevertheless exercise a discretion to admit it in the nature of that contained in s 69(2) of the Evidence Act which is as follows:

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[3] [2010] 2 NZLR 181 at [45].

(2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—

(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or

(b) preventing harm to—

(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or

(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or

(c) maintaining activities that contribute to or rely on the free flow of information.

[39] Section 69(3) gives guidance on the discretionary considerations to be taken into account by a judge under s 69(2) as follows:

(3) When considering whether to give a direction under this section, the Judge must have regard to—

(a) the likely extent of harm that may result from the disclosure of the communication or information; and

(b) the nature of the communication or information and its likely importance in the proceeding; and

(c) the nature of the proceeding; and

(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and

(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

(f) the sensitivity of the evidence, having regard to—

(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and

(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

[40] Finally, s 69(4) provides that a judge may also have regard to any other relevant matters in addition to those set out in subs (3) above.

[41] Following the guidance of s 69, I do not consider that even if the intended evidence may be of confidential information, this confidentiality outweighs the

desirability of the information being before the Court. This will assist it to reach a balanced conclusion about Ms Bierre's mental and emotional state at relevant times to determine whether she was so affected or traumatised by her treatment by the Board that she was unable to properly consider raising her grievance.

[42] I accept that both the Privacy Act and the HIPC should also guide the Court's decision on the admissibility of evidence under s 189. That is consistent with the approach of this Court in other cases (including *Coy*) in which those principles have been examined and engaged.

[43] The Privacy Act and the HIPC do not make inadmissible the documents at issue in this proceeding or fetter the Court's discretion under s 189. That is because the HIPC does not extend to information that is disclosed reasonably as part of a proceeding before a court or tribunal. The HIPC and the Privacy Act both allow what would otherwise be unauthorised use and disclosure of health information, where this is in the conduct of legal proceedings. In particular, principles 10(c)(iv) and 11(e)(iv) of the Privacy Act allow non-compliance in such circumstances.

[44] Rule 10 of the HIPC provides materially:

> (1) A health agency that holds health information obtained in connection with one purpose must not use the information for any other purpose unless the health agency believes, on reasonable grounds,—
>
> …
>
> (b) that the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained; …

[45] Similarly, r 11 provides, in relation to "LIMITS ON DISCLOSURE OF HEALTH INFORMATION":

> (1) A health agency that holds health information must not disclose the information unless the agency believes, on reasonable grounds, that—
>
> …
>
> (c) the disclosure of the information is one of the purposes in connection with which the information was obtained; …

[46] I agree with the plaintiff that disclosure by Ms Bierre of information and advice to the Board was the primary purpose for the collection of the information by it. That is to be contrasted by the hypothetical situation where an employee may consult independently an external third party and provide such information to him or her. In this case, the Board arranged for Ms Bierre to see Dr Allum so that it would be better appraised of her relevant occupational health situation.

The proposed Hlohovsky evidence

[47] I conclude that Ms Bierre could not reasonably have expected that the information that she disclosed to, and is now sought to be provided to this Court by, Ms Hlohovsky, would not be disclosed in the course of legal proceedings such as these. That is for a number of reasons.

[48] First, Ms Bierre has raised a grievance against the Board on grounds, among others, that it did not address her concerns she raised with it via Ms Hlohovsky in 2009, this amounting to unjustified disadvantage in employment and breach of her employment agreement.

[49] Next, in paras 72-77 of Ms Bierre's intended evidence, she discusses her conversations with Ms Hlohovsky in 2009, her referral to the Board's OHS, and her discussions with the Board's occupational health doctor, Dr Allum. In providing this evidence in support of her claim to a personal grievance (and in respect of the necessary preliminary case that she must now establish), Ms Bierre clearly put these matters squarely in issue.

[50] Paragraphs 52-57 of Ms Hlohovsky's intended evidence reply specifically to Ms Bierre's account of events, and I agree that as a matter of justice and procedural fairness, the board is entitled to respond to those matters in evidence as it has proposed.

[51] The merits of Ms Bierre's case will be an important issue for the Court to consider when determining her application to raise a grievance out of time.[4]

[4] *McMillan v Waikanae Holdings (Gisborne) Ltd (t/a McCannics)* (2005) NZELR 402.

Paragraphs 52-57 of Ms Hlohovsky's intended evidence are relevant not only to the central issue whether Ms Bierre was so affected or traumatised that she could not consider raising a grievance, but also to the substantive issue whether the Board provided Ms Bierre with appropriate support in all the circumstances.

The proposed Allum evidence

[52] In relation to the intended evidence of Dr Allum, I accept that Ms Bierre could not have had a reasonable expectation of confidentiality about her communications which are related in Dr Allum's report to the Board about Ms Bierre's fitness to work, not least because she consented explicitly to the information being released to the Board.

[53] Further, there was no traditional doctor-patient relationship between Dr Allum and Ms Bierre so that any public interest in prohibiting a free flow of confidential information between doctor and patient does not apply. The Board's OHS is a non-treating assessment facility whose role is to provide advice to managers in relation to their employees' health and safety at work.

[54] In so concluding, I have had regard to the Medical Council of New Zealand's guidelines for *Non-Treating Doctors Performing Medical Assessments of Patients for Third Parties* which, at para 6, clarifies the role of a non-treating doctor as:

> … to perform a medical assessment and provide an impartial medical opinion. The recipient of the medical opinion is the third party who has employed or contracted the non-treating doctor. As the title indicates, the non-treating doctor does not provide any form of treatment to the patient.

[55] Rule 11(2)(i) of the HIPC allows the disclosure of Dr Allum's information for the conduct of the proceeding and, pursuant to r 11(3), is "disclosure under subrule (2) … only to the extent necessary for the particular purpose." It follows that, pursuant to s 189, a like result is appropriate.

[56] I consider that the judgment of this Court in *Coy* is distinguishable and its reasoning does not support Ms Bierre's case. That is for the following reasons.

[57] First, whereas in *Coy*, the information sought was a request for general disclosure of psychologists' clinical notes, in this case the objection relates to specific and relevant evidence contained in an affidavit. Next, in *Coy*, the Court found that the patient did not know that the notes were to be disclosed whereas in this case the defendant says that Ms Bierre consented to the information being disclosed. Penultimately, the psychologist in *Coy* was external to the employer's organisation and the referral was made pursuant to an employee assistance programme designed to benefit the employee. By contrast in this case, Dr Allum is a Board employee with direct obligations to the employer. Finally, in analysing *Coy*, the purpose of the information is also relevant. The psychologist in *Coy* was providing health and disability services to the patient and the assessment was carried out primarily for the benefit of the patient. The psychologist in *Coy* was not contracted for the purpose of providing a report and the reports initiated were secondary to treatment. In this proceeding, by contrast, Dr Allum was undertaking an assessment for the Board regarding Ms Bierre's fitness for work and for the benefit that was intended to accrue to the Board.

[58] Dr Allum responds to paras 74-76 of Ms Bierre's brief of evidence in which she discusses her appointment with the doctor. I do not accept, as the plaintiff asserts, that there is nothing in paras 74-76 that refers to the detail of the attendance by Ms Bierre with Dr Allum. Ms Bierre makes extensive and detailed reference to what happened and what was said by her to Dr Allum and some reference to what Dr Allum said to her. I agree with the Board that Ms Bierre's evidence appears to seek to rely on her account of her visit to Dr Allum, what was discussed, and the outcome of the visit. In these circumstances, Ms Bierre can have had no reasonable expectation of confidentiality of the information in Dr Allum's evidence.

[59] The information the Board received from Ms Bierre via Dr Allum was for the purpose of assessing her fitness for work. The evidence of Dr Allum is relevant to the issue of whether Ms Bierre was so traumatised by the matter giving rise to the claim for a grievance that she was unable to properly consider raising the grievance in the specific period.

[60] Next, I deal with the objection to what is categorised as opinion evidence from Dr Allum. This is her statement relating to her assessment about whether Ms Bierre displayed signs of anxiety. I accept that although there are some limits to the use to which this evidence can be put, it is within the competence of a general medical practitioner to make an assessment whether a person is displaying signs of anxiety. Indeed, it would be unlikely that a lay person would be precluded from giving such evidence. It is the weight that the evidence will carry in the overall context of the case that is more significant.

[61] Finally, I deal with the defendant's challenge to the admissibility of Dr Allum's intended evidence on the ground that she has a conflict of interest and cannot be regarded as a reliable independent expert. The first point to make is that already determined, that is Dr Allum is not proffered as an expert witness to give opinion evidence about one of the ultimate issues to be decided by the Court. Nor do I consider that even if Dr Allum had what the defendant describes as a conflict of interest upon which she has not elaborated, this should disqualify her from giving evidence. Dr Allum was employed by the Board as an occupational physician to advise it, among other things, about the wellbeing and fitness for work of its employees. In this role, she had an interest in ensuring that she provided objective, expert, and clinically sound professional opinions to the Board. The defendant did not have an interest in Dr Allum's performance of her professional duties that was conflict with the Board. As already noted, she was not the defendant's medical practitioner or in a relationship of confidential advice to, and treatment of, the defendant. Even if the existence of a conflict of interest might have prevented Dr Allum from giving evidence (and I am not persuaded of that), there was no such conflict in this case.

[62] Although subjected to comprehensive challenge by the defendant, I agree with the Authority's conclusions about the admissibility of the Board's intended evidence with one exception. The Board is right that Dr Allum is not promoted as an expert witness in the proceeding, that is as a witness who will give opinion evidence about the issues or one of the issues that the Court has to decide. That is despite the expertise that she doubtless has. Nor do I consider that Dr Allum's proposed evidence in para 15 of her affidavit offends the consent that Ms Bierre gave to

disclosure of medical information. The whole of the brief of the intended evidence of Dr Allum is admissible.

Objection to evidence of Jan Durk de Zoete

[63] Since the foregoing objections were originally lodged in court, the Board has signalled its intention to rely on the expert evidence of another witness, Mr Jan de Zoete. Ms Bierre submits that he, too, has not qualified himself as an expert and that his intended evidence is inadmissible.

[64] Counsel submits that the New Zealand Psychologists Board register indicates that Mr de Zoete was first registered on 24 March 1983, suggesting that this was initially under the provisions of the Psychologists Act 1981 (the Psychologists Act). Counsel submits that s 7 of the Heath Practitioners Competence Assurance Act 2003 (the HPCA Act) prohibits any person from claiming or doing anything that is calculated to suggest that the person practises unless that person is both a practitioner of that kind and holds a current practising certificate as a health practitioner of that kind.

[65] Section 189 of the HPCA Act deems persons registered under the Psychologists Act to be registered under the HPCA Act. Counsel invokes ss 26 and 27 of this Act, prescribing the requirements for obtaining a practice certificate including, among other things, that an applicant is not eligible for a practising certificate if he or she has not held an annual practising certificate of the kind sought by the applicant within three years immediately preceding the date of the application. So, the defendant submits, Mr de Zoete is not currently practising as a clinical psychologist, and he may not be able to obtain a practising certificate. Therefore, the defendant says that he cannot claim to have expertise that is relevant to the evidence that he proposes to put before the Court because he is not currently able to practise as a psychologist.

[66] It follows, the defendant submits, that in terms of the Code of Conduct for Expert Witnesses (the Code)[5] for the High Court (which this Court has adopted), Mr

[5] High Court Rules, Schedule 4.

de Zoete does not have the requisite experience to give expert psychological evidence. Nor, the plaintiff submits, has Mr de Zoete qualified himself to give expert evidence on Ms Bierre's trauma because he has not specified his "scope of practice" in terms of s 8 of the HPCA Act even if he were practising as a psychologist.

[67] Counsel submits that Mr de Zoete is not qualified to opine, as he does from paras 40 to 47 of his affidavit, about Ms Bierre's ability to raise a personal grievance with her employer. Finally, Mr de Zoete's qualification to give evidence is challenged under para 3(g) of the Code in that he has not undertaken any examination or tests and, in particular, of Ms Bierre.

[68] Mr de Zoete's qualifications include a Masters degree in Business Administration, a Diploma in Clinical Psychology, and a Masters degree in Psychology with Honours. He deposes to having worked as a clinical psychologist for about 14 years although does not do so at present. Mr de Zoete is now a private sector management, training and development consultant and although is a registered psychologist, he does not hold a current practising certificate.

[69] I do not accept Ms Bierre's argument that because Mr de Zoete is not practising currently as a clinical psychologist, he cannot thereby have the expertise relevant and necessary to give expert opinion evidence contradicting that of the plaintiff's expert. Although the currency of Mr de Zoete's experience may be the subject of criticism of it, it does not necessarily disqualify him altogether from giving evidence as an expert.

[70] Nor do I accept that Mr de Zoete's affidavit fails to meet the requirements of the Code. The plaintiff, in her submissions, misrepresents the contents of the Code in the sense that counsel submits that they constitute minimum threshold requirements, failure to attain which precludes the witness from giving expert evidence. However, requirements of an intended expert witness to specify the examinations or tests undertaken by the witness do not constitute an absolute barrier to the giving of expert evidence if no tests or examinations have been undertaken. A failure to do so may weaken an expert's evidence but does not preclude that person

from giving any evidence at all. I reject the plaintiff's contentions of non-compliance with the Code by Mr de Zoete.

[71] None of the plaintiff's objections to Mr de Zoete's intended evidence means that it is inadmissible.

Decision - Summary

[72] For the foregoing reasons, I conclude that none of the impugned evidence intended to be led by the defendant is inadmissible.

[73] The defendant is entitled to costs on this application but these will not be fixed until the conclusion of the substantive proceedings before the Court.

[74] The Registrar should now arrange for a further telephone directions conference to timetable to hearing the defendant's application for leave to raise her grievances out of time.

GL Colgan
Chief Judge

Judgment signed at 3.50 pm on Monday 22 August 2011