IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 219
WRC 5/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for non-party document disclosure
BETWEEN	EMMA YUEN SEE FOX Plaintiff
AND	HEREWORTH SCHOOL TRUST BOARD Defendant

Hearing:	21 November 2013 (Heard at Wellington)
Appearances:	Blair Scotland, counsel for plaintiff Stuart Webster, counsel for defendant Saar Cohen-Ronen, counsel for Ministry of Business, Innovation and Employment (non-party)
Judgment:	28 November 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This judgment decides one of a number of pre-trial issues before Emma Fox's challenge to the determination[1] of the Employment Relations Authority dismissing her claims can be heard by hearing de novo. Mrs Fox seeks orders for disclosure and inspection of documents in the possession or under the control of a non-party to the proceeding, the Ministry of Business, Innovation and Employment (the Ministry). That application has not been opposed by the Ministry, at least to the extent that it is now pursued by the plaintiff. However, the Ministry does not wish to disclose documents to Mrs Fox without a court order to do so and submits that some of the

[1] [2013] NZERA Auckland 45.

documents she seeks are privileged and so cannot be disclosed to her, at least at this time.

[2] It was planned that the Court would hear and deal with a number of other pre-trial applications for disclosure of documents by the parties, for non-party disclosure, for orders that computer systems be forensically analysed, and for leave to deliver interrogatories. However, for a variety of reasons, these other applications were not able to be concluded. A belated application for an order to disclose and allow inspection of documents against another non-party had only recently been served and the time for a response was still running. In respect of the other applications set down for hearing, the defendant filed several affidavits on the morning of the hearing about which the plaintiff has not been able to give instructions to her counsel and which may alter significantly the nature and breadth of the applications before the Court. Mrs Fox now lives in Western Australia and her application for partial adjournment of the hearing was reasonable in all the circumstances. Although much of the generic argument about these issues was heard, those other applications will need to be dealt with in a further interlocutory judgment or judgments in due course. This one, therefore, deals with the application against the Ministry.

[3] The following brief background is necessary to understand the application affecting the Ministry. Until her dismissal by the defendant in January 2010, Mrs Fox was a teacher at Hereworth School in Hawke's Bay. After the parties' relationship deteriorated, the Board proposed, on two occasions, that the issues between them should be the subject of a mediation organised by the Mediation Service of the former Department of Labour (the Department) through its Napier office. The Department has now been subsumed into the Ministry which maintains responsibility for these mediation services.

[4] Mrs Fox refused to agree to mediation arranged by the Napier office of the Mediation Service because she considered that it would not act impartially between the parties. In particular, as I understand the plaintiff's concerns, these arose from the nature of the relationship between the Napier office of the Mediation Service and the Board's then agent dealing with the parties' employment relationship issues, Mr

Doug Abraham (who was also the Vice Chairman of the Trust Board), and his firm, Abraham Consultants Limited (ACL).

[5] Mrs Fox's subsequent proposal to the Board that the parties participate in a mediation organised by the Mediation Service, but in Auckland, was declined by the Board.

[6] These events, forming part of a broader history of conflict between the parties, are relevant to Mrs Fox's personal grievance claims that she was disadvantaged in her employment and then dismissed unjustifiably. They are relevant in two respects. First, the defendant says that one element of its justification for dismissing Mrs Fox was that she refused to participate in discussions and otherwise engage with her employer including by refusing to attend mediation. Second, the Board says that even if it is found to have disadvantaged and/or dismissed Mrs Fox unjustifiably, her contributory conduct, by refusing to engage in mediation, should reduce the remedies to which she would otherwise be entitled, pursuant to s 124 of the Employment Relations Act 2000 (the Act).

[7] Mrs Fox says that her refusals to engage with the Board in mediation were justifiable in all the circumstances and her beliefs or suspicions about the Mediation Service's partiality, or lack of independence between the parties, were reasonable and justifiable in the following unusual circumstances.

[8] As a result of a complaint by Mrs Fox and/or her husband to the Ministry and to the Minister of Labour, an investigation was undertaken by an experienced Deputy Secretary of another division of the then Department into Mrs and Dr Fox's allegations of the Napier office's partiality and bias against her or in favour of the Board and its representative. This investigation produced a detailed report (the Buchanan Report) which, in summary, found that there had been instances of unprofessional behaviour by Mediation Service staff in dealing with the Fox/Hereworth School matter. The Buchanan Report also contained criticism of the plaintiff and, particularly, of her husband in their dealings with the Mediation Service which, it concluded, mitigated some of the unprofessional conduct of one particular employee of the Department who dealt with them and with the Board's

representatives. The Buchanan Report also identified other failings within the then Department's Mediation Service.

[9] The Buchanan Report uncovered numerous Departmental documents which were disclosed to Mrs and Dr Fox. These, and the Buchanan Report itself, have encouraged Mrs Fox to seek further documents from the Ministry that she suspects it has withheld or otherwise not yet disclosed to her.

[10] The issue for the Court at trial will be the reasonableness of, or other justification for, the plaintiff's beliefs or suspicions at the time or times when those decisions to refuse to participate in mediation were made by the plaintiff. It is not yet clear what Mrs Fox claims informed her decisions. Logically, documents that came into existence after those decisions were made by her and affecting matters that post-date her decisions cannot be called in aid by her and so will not be relevant to the issues for decision by the Court.

[11] It is clear from the affidavit evidence that the plaintiff has already filed that she has a significant number of Ministry documents relating to her employer's dealings with the Ministry about matters at issue in this case. However, it is at least possible that she does not have all documents even within the class to which I consider she is entitled.

[12] The position is complicated because of an ongoing inquiry by an Ombudsman into the Ministry's conduct of its investigation into Mrs and Dr Fox's complaint. That Ombudsman's inquiry has been generated as a result of a further complaint by Mrs Fox or Dr Fox. Mr Cohen-Ronen submits that the documents which the Ministry has supplied to the Ombudsman in connection with her investigation are privileged and, therefore, should be exempt from disclosure by the Ministry in this proceeding under reg 44(3)(c) of the Employment Court Regulations 2000 (the Regulations). Mr Cohen-Ronen relied, in support of that contention which I was told has not been the subject of consideration by the courts previously, on s 26(3) of the Ombudsmen Act 1975. This specifies that documents supplied to, and held by, the Ombudsman in circumstances such as these, are "privileged".

[13] Counsel was unable to assist the Court by advising when the Ombudsman's investigation might be concluded although Mr Cohen-Ronen told me that the documents had been sent to the Office of the Ombudsman, as part of the Ministry's comprehensive response to the Fox complaint, in October 2013. Counsel submitted that to require the Ministry to now reveal those documents, the disclosure of which the Ombudsman is considering, would defeat the Official Information Act 1982 process and, I infer, would run the risk of conflicting findings by this Court and of the Ombudsman about whether such documents should be disclosed to Mrs Fox.

[14] Although Mr Cohen-Ronen submitted that the documents currently the subject of an Ombudsman's inquiry or investigation should be classed as privileged under reg 44(3)(c) (public interest injury immunity), I do not agree that the public interest would be injured in a way that should be prevented by immunity, if those documents were to be disclosed to the plaintiff. This is the only conceivable ground under the Regulations for resisting disclosure of relevant documents and the same test should apply to the non-party process under cl 13 of sch 3 to the Act and, thereby, s 56B of the District Courts Act 1947. The Court cannot uphold an objection to disclosure on any other ground.

[15] The purposes of an Ombudsman investigation or inquiry pursuant to the Ombudsmen Act, the Official Information Act and the Privacy Act 1993 (under one or more of which I understand Mrs and Dr Fox have complained) is quite different to the process of disclosure of relevant documents in litigation between parties, even although one of those parties may be the same in each instance.

[16] In litigation, the document disclosure process attempts to ensure that the existence and content of documents relevant to the litigation are made known to the other party or parties who do not possess or control those documents. The ultimate purpose of this disclosure process is to ensure that the Court has all the relevant material before arriving at a judgment.

[17] There is a regulatory regime governing the use to which disclosed documents can be put by a party. Regulation 51 of the Employment Court Regulations 2000 provides that it is a condition of the disclosure of documents that their integrity and

confidentiality (if applicable) must be maintained at all times and for all purposes. The regulation provides, particularly, that documents disclosed can only be used for the purposes of the proceeding, that copies of documents made must be returned at the conclusion of the proceedings, and that copies may not be retained. If information contained in a disclosed document is not used in evidence in the proceeding, such information must remain confidential and may not be disclosed. These conditions are not always well-known to litigants or even sometimes to their representatives, but they do provide significant constraints on the misuse, and even what might otherwise be the legitimate use, of documents obtained on disclosure and their contents.

[18] By contrast, information (as opposed to documents) obtained by someone under the provisions of the Official Information Act need have no connection to that person or relevance to any litigation. Similarly, there are no statutory constraints upon the use which any person may make of information obtained by use of the Official Information Act and, indeed, in many instances the whole purpose of using that legislation to obtain information is to disseminate it more widely. Similarly, although perhaps ironically, information obtained likewise under the Privacy Act can be disseminated by the person whom it is about, with that person's consent and, in some instances at least, such information is also probably obtained for the purpose of wider dissemination.

[19] I do not consider that s 26(3) of the Ombudsmen Act assists the Ministry in resisting disclosure of documents which may be the subject of a current inquiry by, or proceeding before, an Ombudsman for that reason alone. The intended scope of s 26(3) must be interpreted in light of the statute generally and of the balance of s 26 in particular. The "privilege" referred to is a privilege exempting an Ombudsman and others associated with the Ombudsmen from being prosecuted in criminal proceedings or sued in civil proceedings in respect of anything that such persons may do or report or say in the course of the exercise or the intended exercise of the Ombudsmen functions under several specified Acts. That privilege does not attach if it can be shown that what has been done or reported or said has been in bad faith. The privilege extends, under s 26(1)(b), to the protection of Ombudsmen and their staff against being called to give evidence in any court or other proceedings of a

judicial nature, in respect of anything coming to their knowledge in the exercise of their functions under those Acts. There are, under subs (2), some statutory exceptions but those are not applicable in this case.

[20] The privilege under subs (3) is the same privilege as would attach to things said or to documents in court proceedings. It is not a ground for resisting production of a document in a discovery process in other proceedings and/or in another court, that the document is the subject of other proceedings. So, in my conclusion, just because there are documents which have been supplied to an Ombudsman by the Ministry and are being considered as part of an inquiry by, or proceedings before, an Ombudsman, these cannot be withheld under the disclosure provisions of legislation governing the practice and procedure of the Employment Court. Disclosure is not sought against an Ombudsman but, rather, against the Ministry which has the possession and control of the documents despite copies of them having been handed to an Ombudsman.

[21] That approach to the interpretation and application of s 26(3) of the Ombudsmen Act is consistent with the judgment of the High Court in *Paice v Attorney-General.*[2] As to an objection by the defendant to the disclosure of the defendant's documents held by an Ombudsman, the High Court agreed that s 26(3) of the Ombudsmen Act had no application to the statutory litigation discovery process because it dealt with the particular protection appropriate to occasions of privilege for the purposes of defamation.

[22] For the foregoing reasons, I make an order that the Chief Executive of the Ministry of Business, Innovation and Employment shall disclose to the plaintiff all documents in his possession or under his control relating to the plaintiff and the subject matter of this litigation, which were created on or before the date of the plaintiff's second refusal to attend mediation, or, if created after that date, relate to events preceding it. By reference to the Authority's determination, this date is 5 November 2009.[3] Further, if the Ministry has any documents relating to the

[2] [1986] NZLR 257.
[3] At [69].

plaintiff's subsequent request to participate in mediation in Auckland, these must also be disclosed.

[23] It is possible, as a result of her participation in the inquiry that led to the Buchanan Report, and as a result of other document disclosure processes, that the plaintiff already has most, if not all, of the documents to which I have determined she is entitled from the Ministry. If that is the case, then it would be unreasonable to require it to disclose these documents again. To determine whether that is so, counsel for the plaintiff should now provide counsel for the Ministry with a comprehensive list of the documents that the plaintiff already has within the parameters that I have set out above. The Ministry will not be required to disclose such documents afresh. If, however, there are any other documents which the Ministry possesses or over which it has control which fall within those parameters and which are not already in the plaintiff's possession, then it is those documents which must be disclosed to the plaintiff.

[24] The time within which the Ministry must disclose the documents identified in this judgment is to be the period of 20 working days after receipt by counsel for the Ministry of the list of documents that the plaintiff already has.

[25] Although, usually, the party seeking non-party disclosure would be expected to meet the costs of it and the application for it, in the unusual if not unique circumstances of this case, I consider that the Ministry should meet its own costs of opposing the application and of effecting the disclosure ordered.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Thursday 28 November 2013