IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 228
ARC 64/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of a challenge to objection to disclosure
BETWEEN	ELGIN EDWARDS Plaintiff
AND	THE BOARD OF TRUSTEES OF BAY OF ISLANDS COLLEGE (FORMERLY JOHN LOCKE, LIMITED STATUTORY MANAGER OF BAY OF ISLANDS COLLEGE AND ORIGINALLY CAROL ANDERSON, LIMITED STATUTORY MANAGER OF BAY OF ISLANDS COLLEGE) Defendant

Hearing:	By written submissions filed on 8, 15, 22 and 28 November 2013
Appearances:	Emily McWatt, counsel for plaintiff Timothy Oldfield, counsel for defendant
Judgment:	5 December 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

A The email letter of 2 April 2013 from Carol Anderson to the New Zealand School Trustees Association and the attached draft letter from Ms Anderson to the plaintiff in response to the plaintiff's letter to Ms Anderson of 28 March 2013, are privileged pursuant to reg 44(3)(c) of the Employment Court Regulations 2000 and the plaintiff's challenge to objection to disclosure of these documents is dismissed.

[1] This interlocutory judgment determines a challenge to objection to disclosure of a document. This is part of a case in which Elgin Edwards challenges the

justification for his dismissal as the Principal of Bay of Islands College (the College). The Employment Relations Authority (the Authority) determined[1] that Mr Edwards was dismissed justifiably. Mr Edwards's challenge to that determination by hearing de novo seeks reinstatement in the position as Principal of the College and other remedies. The challenge is scheduled to go to hearing in mid-March 2014. Although affecting one document (or more correctly one bundle of associated documents), the issues thrown up by the case are important ones for employment law generally and the education sector in particular.

[2] By memorandum filed on 28 November 2013, counsel for the defendant advised that the statutory appointment of Mr Locke as the College's Limited Statutory Manager (LSM) has been terminated. The appropriate defendant is now the Board of Trustees of Bay of Islands College and I make an order, pursuant to s 221(a) of the Employment Relations Act 2000 (the Act), to that effect accordingly.

[3] The defendant objected originally to disclosing a number of documents to the plaintiff but there is now a formal challenge by the plaintiff to that objection in respect of only one set of documents. This includes an email dated 2 April 2013 and attachments to it. The email consists of a request by the then LSM of the College for advice from the New Zealand School Trustees Association (the NZSTA). A copy of the email was sent at the same time to the Chair of the Board of Trustees of the College, Gary Hooson. In addition to what I describe in shorthand as public interest injury privilege,[2] the defendant now also asserts legal professional privilege[3] in respect of these documents. Finally, the defendant says that even if its claim to these two statutory grounds of privilege fails, the Court's equity and good conscience jurisdiction[4] should be used to decline any requirement for disclosure of the documents to the plaintiff.

[4] The Court has requested and has inspected a copy of the documents in question to assist in determining whether they are privileged. I will summarise that assessment later in this judgment. The context in which the documents at issue were

[1] [2013] NZERA Auckland 327.
[2] Employment Court Regulations 2000, reg 44(3)(c).
[3] Employment Court regulations 2000, reg 44(3)(a).
[4] Employment Relations Act 2000, s 189(1).

created is also important in determining whether privilege attaches to them. Taken from the Authority's determination and the other information on affidavits, the following are the relevant circumstances.

[5] Mr Edwards took up his appointment as Principal of the College in January 2010. A new Board of Trustees was elected subsequently which then sought to have the Ministry of Education (the Ministry) appoint an LSM. The Minister of Education did so[5] with effect from January 2012 although the first appointed LSM was replaced by another (Carol Anderson) in late June 2012. Ms Anderson, the second LSM, is described in the Authority's determination as being "an experienced educator as well as being a lawyer".

[6] The Authority's determination records that the deteriorating employment relationship between Mr Edwards and the LSM led to an attempt to deal with matters by mediation during the latter part of 2012 and that there was a further mediation in January 2013. From the start of the academic year in 2013 Ms Anderson put in place a "formal support and guidance action plan" for Mr Edwards. In mid-March 2013 the LSM received a complaint by a member of the school staff about the way in which the complainant had been treated by Mr Edwards. Following a letter Ms Anderson had sent to Mr Edwards in early December 2012 which referred to the possibility of his dismissal, Ms Anderson wrote to him again on 27 March 2013 referring to that earlier letter and other aspects of the deteriorating employment relationship. Her letter set out Ms Anderson's conclusion that there had been a "complete and irreconcilable breakdown in trust and confidence" between the parties. Although offering Mr Edwards "a final opportunity to respond to the above concerns", the letter indicated that, subject to this, the LSM's view was that "[t]he employment relationship now needs to come to an end".

[7] It was in these circumstances that the email of 2 April 2013, the disclosure of which is objected to, was sent by Ms Anderson. The recipient of the email was Eric Woodward who is, and was at the material time, an Industrial and Personnel Adviser with the NZSTA. This is a national body which represents and provides advice to schools. It is an incorporated society and although membership of it is voluntary,

[5] Pursuant to s 78(M) Education Act 1989.

about 91 per cent of all eligible schools in New Zealand are members. Some of the NZSTA's advisers have qualifications in law and others have relevant backgrounds including having been employment mediators and Members of the Employment Relations Authority. Mr Woodward's background includes work as a union official encompassing experience in collective agreement negotiations and the provision of industrial and personnel advice. His role with the NZSTA includes, materially, advising school boards of trustees and principals on their obligations as employers including, in particular, disciplinary inquiries and dismissals affecting school staff.

[8] Although the NZSTA is funded by the Ministry to provide such industrial and personnel advice to schools' boards of trustees, it regards some of those activities as being conducted with it in confidence so that it is not obliged to supply to the Ministry all of the information that the Ministry may wish to have about particular issues with particular schools.

[9] Boards of trustees of schools consist principally of people elected from schools' communities, many of whom have no experience of, or training in, some of the issues with which boards deal as the employers of teachers. The NZSTA is a ready and economically feasible source of specialist education advice including advice about employment issues in schools. It often treats the advice that it gives school boards of trustees on employment issues as confidential to allow a frank and open exchange of views and advice to take place in an attempt to resolve matters which are often sensitive and concern school staff and students.

[10] Mr Woodward had been involved with issues at the College concerning Mr Edwards from as early as 2011. He and NZSTA had been consulted by the College's Board Chair, Mr Hooson. In 2011 Mr Woodward attended a meeting between Mr Edwards and the Board at which the plaintiff was represented by his solicitor and at which point Mr Woodward concluded that "[t]rouble was brewing in the employment relationship". Mr Woodward gives evidence of providing advice about employment issues with Mr Edwards to the College's first LSM who was appointed in 2012. He continued to do so following Ms Anderson's appointment as LSM in mid-2012. Mr Woodward attended the two mediations that were facilitated by the Ministry of Business, Innovation and Employment, and acted as adviser to the LSM

and the Board at those mediations which took place on 16 October 2012 and 21 January 2013. Mr Edwards was again represented by his solicitor on those occasions although the mediations did not resolve the employment issues.

[11] At the time of the email of 2 April 2013 no personal grievance had been raised by Mr Edwards but Mr Woodward is sure that there was then an employment relationship problem between the parties and that must be so. From the correspondence which refers to this it is also clear that Mr Edwards's dismissal was contemplated by the Board and, in that event, Mr Woodward anticipated that the case would move to the Authority. That transpired after Mr Edwards was dismissed on 18 April 2013, proceedings being filed in the Authority less than a week later, in which the plaintiff sought reinstatement.

[12] Mr Woodward's response to the request for advice of 2 April 2013 was conveyed by a telephone call from him to Ms Anderson and there is apparently no documentary record of it held by the defendant.

[13] The NZSTA is the organisation to which many schools (whether by their boards of trustees, principals, LSMs or commissioners) turn for strategic and/or legal advice when employment relationship problems arise. Schools expect that, in return for frank assessments and disclosures of their positions and thinking, those requests and the advice that they receive in response to them will not be disclosed later to others. I accept the defendant's evidence that if schools were aware of the risk of such disclosure, it would have a chilling effect in the sense that they would probably be more cautious about seeking advice and, even if electing to do so, about the level of frankness with which requests are expressed. To determine that documentary records in such transactions are disclosable might also encourage people involved to communicate orally rather than in writing. This might be both impracticable (in the case of a board of trustees, all of the members of which may participate in decision making) and promote inaccuracy of the sort that can be minimised or avoided by written records.

[14] I turn now to the applicable legislative provisions. Omitting reg 44(3)(b) which refers to objector-incrimination, reg 44(3) says:

> 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
> …
> (c) if disclosed, would be injurious to the public interest.

[15] This indicates that it is not open to the Court to expand the express statutory categories of objection so that any privilege asserted in any particular case must fall within one or more of them. There is some case law on public interest injury immunity, both of the Employment Court and from other courts. However, few of those cases include instances where, as here, there is a claim to privilege to a document seeking strategic advice from an organisation that provides a variety of forms of such advice including legal advice, but given by people who are either not practising lawyers or, in many cases, do not have legal training or qualifications.

[16] Just because one expects confidentiality of a communication does not guarantee that this will be maintained in all circumstances. Confidentiality is not necessarily absolute in the sense that a confidential communication cannot be disclosed to anyone else in any circumstances. For example, an expectation or even an assurance of confidentiality cannot override a statutory or other regulatory requirement for disclosure of that confidence. In this case, it is a question for the Court to decide whether, and if so to what extent, information that may have been passed from the LSM to the NZSTA must be disclosed to Mr Edwards in litigation.

[17] Legal professional privilege and public interest injury privilege are separate and distinct circumstances in which a party to litigation is entitled to withhold from disclosure a document that it would otherwise be obliged to disclose. Legal professional privilege exists to preserve the rights and obligations of individual parties, albeit based on a more general principle that access to legal advice should be generally not open to subsequent scrutiny, even in litigation. By contrast, public interest injury privilege is a broader ground in the sense that it seeks to protect the community rather than individual litigants who may benefit from it. It has a higher threshold in the sense that the Court is required to be satisfied that the public interest would be injured if disclosure were to take place. No such test applies to legal professional privilege.

The plaintiff's case for disclosure

[18] The plaintiff's submissions opposing privilege tend to focus on general communication obligations during the employment relationship but that is not what this case is about. Disclosure of documents in litigation has, in this case, arisen only after the employment ended.

[19] The plaintiff's argument for disclosure of this document turns on what he says should be a pervasive approach to dealing with employment relations questions of "openness and transparency". This is said to be generally in the public interest as opposed to "secrecy and withholding information" which are said to be antithetical to that public interest. It is true that legislative provisions such as s 4(1A)(c) of the Act do emphasise the candid exchange of information. In particular, the section requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of the employment of one or more employees, to provide the employee or employees affected with access to information relevant to that question. The plaintiff says the defendant's email to the NZSTA of 2 April 2013 contains information relevant to the continuation of his employment, and so should have been disclosed to him under s 4(1A)(c) at the time, and must be disclosed to him now. Ms McWatt, counsel for the plaintiff, submits that in the absence of disclosure, the public interest cannot be promoted and employment relationships cannot function effectively. The same argument is applied by the plaintiff to the particular role of a LSM appointed to a school as here.

[20] Even if s 4(1A) does apply to the disclosure in subsequent litigation of communications between the employer and her adviser (which I consider it does not), s 4(1B) exempts from that general requirement "confidential information" if there is a good reason to maintain its confidentiality. I conclude that the request for strategic advice in the circumstances of this case constitutes a good reason for the purposes of s 4(1B). Even though such communications are not mentioned in s 4(1C) which sets out examples of good reasons, that is not an exhaustive list.

[21] Next, the plaintiff seeks to draw a distinction between a board of trustees on the one hand, and a LSM appointed under s 78M of the Education Act 1989, on the other. Although the defendant, as a LSM was vested with a range of powers including "all functions, powers and duties of the Board as an employer", Ms McWatt submits that the LSM is a distinct legal entity and quite separate from the Board of Trustees of the College which remains in existence. Although the LSM replaces, in effect, the Board of Trustees for many purposes (including employment issues with staff), the LSM is not a member of the Board (whether ex officio or otherwise) and the Board continues to exist as a legal entity, albeit one with limited powers. Under s 78(M)(4)(a) of the Education Act 1989, the LSM was acting as the Board in the exercise of her statutory function.

[22] Counsel for the plaintiff submits that the NZSTA is an advisory body established to advise Boards of Trustees but not LSMs. That is strictly so in one sense because the NZSTA's constitution does not include any reference to LSMs in its provisions affecting its core functions. These include to "provide to member boards high quality education, advice, services and support in accordance with the National Provision of Services Strategy so that they may be more effective trustees in meeting their responsibilities."

[23] If the plaintiff's submissions seem to accept, at least as a fall back to its primary argument, that the Board of Trustees of the College may have been entitled to have communicated confidentially with the NZSTA on strategic matters, then I agree and in my view that would extend logically to the LSM who takes over its functions as employer on a temporary basis.

[24] Although the plaintiff's submissions have also focused on the particular role of a LSM in a school, I do not think there is any difference in principle whether a documented request to the NZSTA for advice in an employment dispute is made by a LSM or by a board of trustees as employer or even through a school principal as a board's agent. Although I accept that a LSM is neither a member of a board of trustees nor the same legal entity, I am not persuaded by the plaintiff's argument that the NZSTA exists as an advisory body solely to boards of trustees but not to LSMs. Put another way, I consider that the NZSTA is an advisory body to schools, not

simply or narrowly to their boards of trustees but excluding others including LSMs of schools.

[25] The plaintiff seeks to distinguish the judgments of this Court in *Lloyd v Museum of New Zealand Te Papa Tongarewa*[6] and *Woolf v Kelston Girls High School Board of Trustees.*[7] The relationships in each of those cases were between employees and their unions or own professional advisers in each case. Those differences are said to make the judgments distinguishable. I address these cases and another as part of my analysis of the defendant's case.

The defendant's case for non-disclosure

[26] Declaring such communications to be privileged under reg 44(3)(c) in the field of employment relations is not unprecedented. Indeed, one of the precedents involved the employment of a teacher by a school. The Court is not aware that permitting some documentary communications to be privileged in these circumstances, on a case by case basis, has caused difficulties over the last 20 years or so: the scarcity of cases is probably the best testament to that.

[27] In *Woolf*, an employee teacher sought the professional assistance of her union, of which her supervisor or line manager with whom she was in conflict, was also a member. The grievant teacher was concerned that her dealings with the union should be conducted in confidence so that their communications could not be disclosed to that other union member who was a part of the school's management. The union official who received information in confidence from the grievant was not a lawyer although he had experience of day to day employment law matters in his role. As the Court noted:[8]

> … Although the relationship between an employee, his or her union, and the union's paid professional staff is not that of solicitor/client, it nevertheless has many of the attributes of that relationship. Employees pay union dues and, in return, receive industrial and employment law advice as and when these are needed. Employees trust that unions and their field officers will act in the employees' best interests. The relationship is one of trust and

[6] [2003] 2 ERNZ 685.
[7] AC28B/00, 21 July 2000.
[8] At [16].

> confidence. There are justified expectations of confidentiality on the part of employees. …

[28] The employer obtained a brief of the intended evidence of the union official which appeared to disclose advice that the grievant had conveyed to the union in confidence and in the expectation that it would not be released to the employer.

[29] The judgment in *Woolf* examined decisions of other courts, which were recent at the time, addressing claims to privilege in proceedings and, more particularly in relation to disclosure of documents. Following examination of these and of what was then s 35 of the Evidence Amendment (No 2) Act 1980, the Court in *Woolf* said it preferred to consider such questions of privilege on a case by case basis rather than on a class basis. It continued:[9]

> … Circumstances will almost inevitably differ. In this case there are strong arguments for the maintenance of confidentiality unless waived by Ms Woolf. My decision on the facts of this case should not be seen as creating a class of privilege for union officials. As the recent judgment of the Court of Appeal in *M v L* [[1999] 1 NZLR 747] illustrates, there are many difficult problems in a class approach to the matter and that would [be] no less so in respect of union officials in employment law. Each case, including this, must be determined on its own facts. In light of s35, this Court's special evidentiary rules and the expertise of a specialist tribunal in such matters, assist in deciding the question of privilege.

[30] The Court excused the union official from giving evidence about those controversial matters and from producing documents. That was on the ground that to do so would be a breach of a confidence that, having regard to the special relationship existing between him and the union member, he should not be compelled to breach. The Court concluded that it would not be in the public interest to require the union official to make such disclosures and produce relevant documents.

[31] It is difficult to distinguish the underpinning principles in *Woolf* from the present case.

[32] The second relevant judgment of this Court is *Lloyd*. The defendant employer proposed to call at trial the evidence of a former union organiser who had

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[9] At [22].

advised the plaintiff grievant. The organiser had provided the employer with an affidavit annexing correspondence between the organiser and the plaintiff. The Court held that litigation privilege did not apply in the circumstances because the email communications between the union and the plaintiff did not constitute legal advice or otherwise attract legal professional privilege, and because litigation was not in contemplation at the time of the communications.

[33] However, the Court followed the judgment in *Woolf* which it found to be materially indistinguishable from the case before it. The Court concluded that, as a matter of public interest, the documents created in trust and confidence between the grievant and the union official ought not to be disclosed. The Court stated that:[10]

> … The public interest in preserving what were confidential communications, given in the context of communications between a member of a union and the union for the purposes of the seeking and giving of advice on employment relationship problems, is in accordance with the broad principles espoused by the 2000 [Employment Relations] Act, as submitted by Ms Cull. Such communications should be prevented from disclosure and those interests outweigh the interests of justice in having all relevant evidence available at trial in the present case.

And at [45]-[46] in relation to the disclosure of written communications, the Court wrote:

> [45] That has the effect of effectively upholding the objection to disclosure although the realities of the situation are that the documents were disclosed and formed the basis of the … [union official's] evidence and the production of her affidavit. I observe that in *Woolf* Judge Colgan expressed the view that it would be a proper exercise of the discretion under s 35 to excuse the PPTA officer from giving evidence and that he would otherwise be compellable and required to produce documents. For him to produce the documents and information would be a breach by him of confidence, having regard to the special relationship between himself and Ms Woolf, and he should not be compelled to do so.
>
> [46] I find the same reasoning applies to the communications between the plaintiff and [the union official]. …

[34] Finally, in this examination of the case law, the judgment in *Julian* v *Air New Zealand Ltd*[11] is pertinent. That was a case about whether documents should be

[10] At [43].
[11] [1994] 2 ERNZ 88.

declared privileged under the predecessor to the current reg 44(3)(c).[12] The documents concerned collective contract negotiation strategies. The Court began by noting[13] that the public interest test is a strict one and that "… the recognised class of categories should be expanded with circumspection and where the public interest clearly warrants this. See, for example, *D v National Soc for the Prevention of Cruelty to Children* [1977] 1 All ER 589."[14]

[35] The Court determined that public interest privilege should attach in that case only to documents concerning the strategies of the employees and/or their bargaining representative (a union) about matters left unsettled in the prospective contract about which the parties had agreed to negotiate further. The Court noted:

> Although the parties agreed, between themselves, that strategy documents concerning the negotiations for their collective employment contract should not be disclosed, the Court must adopt a principled approach in accordance with the law if asked to decide an associated but distinct question of privilege. What the parties may choose informally may not necessarily represent the law on privilege and should likewise therefore not dictate the answer to the question asked of the Court

[36] Examining the then applicable reg 52(3)(c), the Court concluded that the "public interest":

> … is not the interest of the whole community in all matters, but is clearly intended to be the interests of more than the immediate parties to a particular dispute. The public interest is that of the public or community engaged in bargaining about, negotiating, and settling employment contracts. Such persons have a justified and legitimate interest in their strategies, as evidenced in documents between themselves and between them and their bargaining agents and advisers, being privileged from disclosure in litigation before contracts are settled or negotiations otherwise concluded.

[37] Next, the Court concluded:[15]

> To require disclosure of written detail of negotiation strategies in the course of ongoing or unconcluded negotiations would be to significantly inhibit negotiating processes which, for the most part, produce workable solutions enabling relationships of trust, confidence and fidelity to continue or begin. Such disclosure cannot be in the public interest as I have held this term to encompass.

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[12] Employment Court Regulations 1991, reg 52(3)(c).
[13] At 89.
[14] *Julian v Air New Zealand Ltd*, above n 11, at 89.
[15] At 90.

[38] The Court was, however, unprepared to extend the privilege to such documents beyond the conclusion of negotiations, whether by settlement of a collective contract or by any other effective end to a bargaining relationship. The contents of such documents may, in these circumstances, be important in the determination of other proceedings related to them including, then under s 57 of the Employment Contracts Act 1991, the manner in which such contracts were entered into, in assessing whether they were harsh and oppressive, or were concluded by harsh or oppressive means. So the Court concluded:

> I would not, therefore, allow for public interest privilege other than where the negotiations are still unresolved, whether by settlement of a contract, by the ending of the employment relationship, or otherwise.

[39] I do not consider, however, that the same temporal limitation on privilege as the Court allowed for in *Julian* should apply to this case. Privilege attaching to documents evidencing collective bargaining strategies is not the same as privilege attaching to documents evidencing strategies where there is an employment relationship problem between an individual employee and his or her employer which may potentially result in personal grievance or other litigation. In that aspect, therefore, *Julian* is partially distinguishable from the present situation which is more akin to the *Woolf* and *Lloyd* cases, although the underpinning philosophy in *Julian* is still applicable to his case.

The disputed documents - Decision

[40] The disputed documents consist of an email letter from Ms Anderson to Mr Woodward of the NZSTA copied to the Chair of the Board of Trustees, Mr Hooson, and a number of separate documents attached to the email, each of which will be considered.

[41] Ms Anderson's email seeks Mr Woodward's comments on a proposed course of action consisting of a letter that Ms Anderson proposed to send to Mr Edwards. The attachments included the plaintiff's letter to the LSM dated 28 March 2013 of which I imagine the plaintiff will have a copy already in any event. So too, I imagine, the plaintiff will have a copy of the next attachment which is "Report on Comparison between 2007 and 2011 NCEA results Bay of Islands College" which

was authored by Mr Edwards and his Principal's Nominee in March 2012. Nor can privilege be claimed by the defendant in the remaining documents attached to that email which were not created for the purpose of seeking strategic advice. They are "Staff Survey 2012 – significant changes or swings in the last year", BAY OF ISLANDS COLLEGE LSM and Principal AGENDA 29 October 2012", BAY OF ISLANDS COLLEGE LSM and Principal Minutes 29 and 30 October 2012", "Staff Survey (DRL)", and "Staff Survey 2012 – significant changes or swings in the last year" (two separate versions of this document).

[42] However, the defendant is entitled to resist disclosure of the 2 April 2013 email from Ms Anderson to Mr Woodward and of the draft letter attached to that email addressed to Mr Edwards, being a draft response to his letter to Ms Anderson of 28 March 2013. The plaintiff's challenge to the defendant's objection to the disclosure of those two documents is dismissed.

[43] In these circumstances, the Registrar should now seal all copies of those two documents received by the Court in an envelope to be held separately from the file and, following conclusion of the case and any appeals that may arise from it, those documents should be returned to the defendant's solicitors.

[44] I conclude that the documents in issue are privileged in that their disclosure to the plaintiff would be injurious to the public interest under reg 44(3)(c).

Other claims to privilege

[45] Having determined that some of the documents are privileged under reg 44(3)(c), it is unnecessary to decide the defendant's first alternative argument of legal professional privilege. That would almost certainly have failed under the first of the two heads now constituting that privilege. The request for legal advice (and response to it) was not made of a lawyer or even someone legally qualified to give such advice.

[46] The other sub-species of legal professional privilege, which is sometimes referred to as litigation privilege, requires that the advice sought and given to be in anticipation of litigation. Although this would have been more difficult to have decided, I think it would have been unlikely to have qualified. Although, on 2 April 2013, there was both a serious breakdown in the employment relationship between the parties, and the defendant was contemplating dismissing Mr Edwards, the LSM not only had not done so but had still left open the opportunity to avoid that outcome. It cannot be said, in these circumstances, that litigation by Mr Edwards was sufficiently in prospect that privilege should attach to communications about the defendant's strategy.

[47] In these circumstances, it is not only unnecessary to move to the defendant's final fall-back argument that the Court should use its equity and good conscience jurisdiction to refuse the challenge to objection to disclosure of this document, but it would be inappropriate to do so. Whether a specific regulation made under an Act is deemed to be a part of the Act is not well settled in New Zealand law. Whilst it is clear that subordinate legislation cannot override primary legislation.[16] that is not the issue arising here.

[48] Section 189(1) of the Act (the so-called equity and good conscience jurisdiction) provides materially:

> 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.

[49] To apply s 189(1) in this case, the Court would have to be satisfied that its broad provisions are not inconsistent with the relevant regulation and, in doing so, determine that the regulation is a part of the Act. I would prefer to leave this interesting but difficult question for decision in a case in which it is in issue and is able to be fully argued. In any event, as I have stated, it is unnecessary to determine

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[16] See for example *Chief Executive of the Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73, *New Zealand Air Line Pilots Association Inc v JetConnect* [2009] ERNZ 207, *Heritage Expeditions Ltd v Fraser* [2010] ERNZ 85, *Aarts v Barnardos New Zealand* [2013] NZEmpC 85, and *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165.

whether equity and good conscience assists in the context of this case because the documents are covered by reg 44(3)(c).

GL Colgan
Chief Judge

Judgment signed at 10.15 am on Thursday 5 December 2013