

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2013] NZEmpC 240
WRC 5/13**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER of various interlocutory applications

BETWEEN EMMA YUEN SEE FOX
 Plaintiff

AND HEREWORTH SCHOOL TRUST
 BOARD
 Defendant

Hearing: 21 November 2013
 and by written memoranda filed on 21 November and 5
 December 2013
 (Heard at Wellington)

Appearances: Blair Scotland, counsel for plaintiff
 Stuart Webster, counsel for defendant

Judgment: 13 December 2013

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

[1] This interlocutory judgment determines numerous pre-trial issues before Emma Fox's challenge to the determination of the Employment Relations Authority dismissing her claims¹ can be heard by hearing de novo. In their order of filing, these interlocutory applications include:

- an order requiring the defendant to answer interrogatories;
- an order that property under the control of the defendant be made available to the plaintiff for inspection and forensic examination;

¹ [2013] NZERA Auckland 45.

- various applications by the plaintiff for further and better disclosure of documents by the defendant;
- applications by the plaintiff for particular document disclosure against non-parties;
- an application by the defendant that the plaintiff answer interrogatories;
- an application by the defendant for an order that the plaintiff's husband Stephen Fox (Dr Fox) answer interrogatories.

[2] On the morning of the hearing on 21 November 2013 the defendant filed and served a number of affidavits and other documents affecting the issues for hearing on that day. Mrs Fox now resides in Western Australia and, unsurprisingly, Mr Scotland had not been able to obtain her instructions in respect of those documents which he had first seen on the previous afternoon. The hearing time that day was used to deal with a discrete issue of non-party disclosure which has subsequently been decided in the first interlocutory judgment issued on 28 November 2013.² Counsel were also able to use the hearing to put forward the various arguments in support of, and in opposition to, the applications to enable them to be decided subsequently as this judgment now does. The plaintiff was allowed until 6 December 2013 to respond to the developments evidenced by the defendant's affidavits and other information and Mrs Fox has now done so.

[3] These opposed applications must be decided in the context of the proceedings gleaned by a consideration of the challenged determination of the Authority, the parties' operative statements of claim and defence, and some affidavit evidence now filed. The following synopsis is broader than was summarised in the first interlocutory judgment between the parties relating to non-party document disclosure.

² [2013] NZEmpC 219.

[4] Until her dismissal in January 2010, Mrs Fox had been employed at Hereworth School in Hawke's Bay as a junior school classroom teacher since the beginning of the 2008 school year. In mid-2009 issues arose about Mrs Fox's reporting to parents about their sons' grading and progress. These matters escalated and the school's headmaster engaged a consultant (who was also the Vice-Chairman of the Board) to investigate the issues. After the consultant's report was issued, the parties' employment relationship deteriorated further despite efforts to facilitate discussions with a view to resolving those differences. In mid-November 2009 Mrs Fox was warned formally by the Board that she had misconducted herself seriously in her employment and, following her failure or refusal to attend another Board meeting on 18 December 2009, she was dismissed on 12 January 2010.

[5] Mrs Fox claims that she was dismissed unjustifiably in terms of s 103A of the Employment Relations Act 2000 (the Act) as it was then (the so-called "would" test). The Authority determined that, despite some unfairness and error on the part of the employer, Mrs Fox was dismissed justifiably.

[6] The grounds for the plaintiff's challenge are set out in her first amended statement of claim filed on 26 April 2013. Her grievances are that she was both disadvantaged unjustifiably during her employment by the defendant and was dismissed unjustifiably. One of the issues for decision concerns Mrs Fox's refusal to engage in discussion with the Board including going to mediation. The Court has already summarised this issue in the previous interlocutory judgment. Another issue that has arisen concerns the circulation among parents at the school of anonymous emails about Mrs Fox's situation and the school generally. The Board suspects that Mrs Fox was behind, or at least connected with, the sending of these emails, but she denies this. The case also raises issues about a visit of parents to the plaintiff's home and her allegation, arising out of the prompt reporting of that visit to the headmaster, that the school put her home under surveillance.

[7] In her challenge, Mrs Fox seeks remedies including compensation for lost past and future earnings and compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Interrogatories in the Employment Court

[8] This information gathering and refinement process (interrogatory delivery) is not commonly resorted to, but is nevertheless available in appropriate cases in this Court. Pursuant to reg 6(2)(a)(ii) of the Employment Court Regulations 2000 (the Regulations) the relevant High Court Rules are applicable. These are set out in sub-pt 2 of pt 8 of the High Court Rules. Relevant rules include r 8.36(3) by which any orders of the Court must prevent unnecessary or oppressive interrogatories, or unnecessary answers to interrogatories. Among the grounds for objecting to answer interrogatories under r 8.40 is, at (1)(d), “that the sole object of the interrogatory is to ascertain the names of witnesses”. Interrogatories are also required to be relevant in terms of the case between the parties³ and should not be vexatious or oppressive.⁴

The plaintiff’s application for leave to deliver interrogatories

[9] The proposed interrogatories that Mrs Fox seeks to have the school answer, are as follows in the plaintiff’s notice dated 25 September 2013:

- 6.1 What is the name of the member of the Hereworth School community who observed the Plaintiff’s residence on 24 November 2009 and then advised the Defendant and/or its employees of this?
- 6.2 On what dates were the Board Minutes between July 2009 and January 2010 that mention the Plaintiff, created?
- 6.3 Do the Board Minutes between July 2009 and January 2010 that mention the Plaintiff accurately capture everything that was said at those meetings regarding the Plaintiff, and if not, what information is missing?
- 6.4 Which Hereworth School records were allegedly missing as referred to at paragraph 43 of the Defendant’s letter to the Plaintiff dated 21 December 2009? What are the student names, year group, assessment type and date on these allegedly missing records?
- 6.5 What is the name of the Hereworth School staff member who required the records referred to at paragraph 6.4 above, as noted at paragraph 45 of the of the Defendant’s letter to the Plaintiff dated 21 December 2009?

³ Rule 8.40(1)(a).

⁴ Rule 8.40(1)(b).

[10] As to interrogatory 6.1, the defendant declines to identify the member of the school staff (thereby narrowing the category of persons specified as the school “community”) but confirms that this person reported to the school’s headmaster that parents of a pupil had been seen in or around the plaintiff’s home on or about 24 November 2009. Mrs Fox wants this person’s name so he or she can be called as a witness by the plaintiff to give evidence about the circumstances in which this observation and report were made.

[11] High Court r 8.40 precludes this interrogatory for reasons set out in [8] above. I should, however, add a note of caution that this may be only a temporary setback for the plaintiff. If the plaintiff insists on pursuing this issue at trial, it is likely that she will ask one or more of the defendant’s witnesses to identify that person which will achieve, for the plaintiff, the same objective as she now has. Without determining the issue of relevance or admissibility if this is taken at trial, if the matter of the defendant’s good faith conduct towards the plaintiff is in issue, it is possible that another witness will be required to disclose the informant’s identity. In these circumstances, the defendant may wish to consider whether it should call that person to give evidence at the trial to enable that potential witness to be properly briefed, to have the protection of counsel and the other protections that the law provides to witnesses.

[12] Next is proposed interrogatory 6.2. Although the defendant has now provided the dates of creation of meeting minutes prepared by Lisa Lee, the Board’s Executive Assistant, Mrs Fox seeks the same information in respect of minutes of meetings which were not kept by Ms Lee but by another representative of the Board. That these are legitimate questions has already been acknowledged by the defendant in supplying the information it has. The question as it relates to other meeting minutes should now be answered by affidavit to be filed and served by Monday 3 February 2014.

[13] As to interrogatory 6.3 above, both the common sense and now the evidential answer is that the Board minutes do not capture accurately everything that was said about the plaintiff at those meetings. The minute taker at some of the meetings has filed an affidavit deposing to her minute taking procedures at Board meetings. Her

original handwritten notes from which the minutes were created subsequently are apparently no longer available. Although witnesses who were present can be asked at trial about their recollections of what was said at those meetings, the proposed interrogatory would be both oppressive and would achieve little, if anything, in terms of the issues for trial. I do not allow it.

[14] As to interrogatory 6.4 above, these records have now been identified by affidavit and the interrogatory is no longer necessary.

[15] Finally, as to interrogatory 6.5 above, the staff member has now been identified by affidavit and this interrogatory is no longer necessary.

Plaintiff's application for inspection and forensic examination of defendant's property

[16] The particulars, taken from the plaintiff's interlocutory application filed on 25 September 2013 are as follows:

1. The Plaintiff, Emma Fox, applies to the Court for an order that the following property in the control of the Defendant be made available for inspection and forensic examination:
 - a. Copies of the minutes of meetings of the Defendant board from July 2009 to January 2010, in electronic form ("the documents"); and
 - b. Hereworth School's computer hard drive and filing system ("the property") for the purposes of obtaining evidence that electronic and hard copies of the Plaintiffs "student information" (including student reports, assessments and parent communications) ("the relevant information") as noted at paragraphs 8(b) and 11(k) of Abraham Consultants Limited's letter of 26 September 2009, was on the school computer hard drive and hard copies were left at the school by the Plaintiff when her employment was terminated on 12 January 2010.
2. In relation to (1)(a) above, the Plaintiff seeks that the order for inspection be made on the following terms:
 - a. The Defendant will transmit electronic copies of the documents to a computer forensic expert, nominated by the Plaintiff and approved by the Court, for inspection.
 - b. The computer forensic expert will be provided with instructions to produce a report regarding the electronic copies of the documents. The report will describe when they were created and whether they were materially altered at a subsequent date from the date they were initially created.

- c. The report is to be made to the Registrar of the Employment Court at Wellington with copies to counsel for the parties.
3. In relation to 1(b) above, the Plaintiff seeks that the order for inspection be made on the following terms:
- a. The Plaintiff will provide the Defendant with an undertaking as to damages in relation to the inspection process.
 - b. The Defendant will make the property available to a computer forensic expert, nominated by the Plaintiff and approved by the Court, for cloning and/or inspection as required.
 - c. The computer forensic expert will consult with the Plaintiff's solicitors and the Defendant's solicitors in regard to what documents on the property may include the relevant information.
 - d. In the first instance, and subject to paragraphs (e) to (h) below, neither the computer forensic expert nor the Plaintiff's solicitors will discuss or disclose to the Plaintiff any emails or documents found during the inspection process.
 - e. The Plaintiff's solicitors will, with the computer forensic expert's technical assistance, prepare a supplemental affidavit of relevant documents arising out of the inspection.
 - f. The Plaintiff will inspect any documents that are relevant and over which the Defendant claims neither privilege nor confidentiality.
 - g. The Plaintiff and the Defendant will discuss any restrictions to be proposed over the inspection of documents that are relevant and confidential.
 - h. Any clones of any computers or devices obtained by the computer forensic expert will be kept in safe custody by the computer forensic expert until the discovery and inspection process is complete, after which the clones of the computers and devices will be returned to the Defendant.
 - I. The costs of the computer forensic expert will be met by the Plaintiff in the first instance.
 - j. The computer forensic expert will be provided with instructions to produce a report about the presence or otherwise of the relevant information on the property. The report is to be made to the Registrar of the Employment Court at Wellington with copies to counsel for the parties.

[17] The plaintiff relies on r 9.34 of the High Court Rules in seeking the foregoing orders from the Court. This Court's regulations do not make provision for such orders but reg 6(2)(a)(ii) of the Regulations allows the Court to have recourse to the High Court's practice in appropriate cases.

[18] Following the affidavits filed on 21 November 2013, the scope of the plaintiff's application for forensic electronic inspection of property has been reduced somewhat. The property listed under para 1(b) above is now no longer the subject of

the application. The minutes of all Board meetings from July 2009 to January 2010 are sought in electronic (Microsoft Word) format and I understand that the defendant does not oppose providing these electronic records and that it is relatively easy for it to do so. So the minutes of all meetings of the defendant Board between July 2009 and January 2010 (inclusive) which deal in any part with Mrs Fox and these proceedings must be made available by the defendant to the plaintiff in electronic form no later than Monday 3 February 2014.

Further and better disclosure – The Anglican Diocese of Waiapu

[19] The plaintiff seeks to have the defendant make further and better disclosure of “all communications (in both electronic and hard copy) between the defendant and its parent body, the Anglican Diocese of Waiapu, with regard to the plaintiff and matters associated with her”. Despite the denial by Ms Lee that there is any correspondence in the school’s records between it and the Diocese which is relevant to issues in this litigation, Mrs Fox has found and produced to the Court an email from the Diocesan Registrar dated 16 December 2009 to Dr Fox about these issues. Materially, that email from the Registrar says:

Following on from my previous verbal advice to you I can confirm the Diocesan Trusts Board (DTB) discussed the material you submitted at its meeting on 26 November. Subsequently it has been in dialogue with the Hereworth School Trust Board and has been advised of the actions taken to date and the proposed process to resolve the issue with your wife.

[20] Although Mrs Fox asserts that correspondence in the form of documents must, therefore, exist and be held by the Board, the email is equivocal about whether that is so. It speaks of the Diocesan Trust Board having been “in dialogue with the Hereworth School Trust Board”. Faced with a denial on affidavit of the existence of any such documentation and an equivocal reference to the nature of communications from the Diocesan Registrar’s email, I am not prepared to make any direction for further and better disclosure against the defendant on what is in any event not a central matter in the proceeding.

Further and better disclosure – Ministry of Education

[21] Ms Lee says that she has reviewed the Board's records and can find no relevant communication between it and the Ministry of Education concerning Mrs Fox apart from material relating to the New Zealand Teachers Council and the mandatory reporting to that body following Mrs Fox's dismissal. I deal with the New Zealand Teachers Council subsequently.

[22] Mrs Fox points to a letter dated 4 March 2010 from the defendant's solicitors to Mrs and Dr Fox in which there is a reference (at para 3) to the defendant having provided a response to the Ministry of Education. The solicitors' letter sought to persuade Mrs and Dr Fox to stop disparaging the school and the headmaster, saying that some of their comments were defamatory and pointing out that these exposed them to the risk of a civil claim in damages. The letter set out examples of that conduct including what it said was a complaint by Mrs Fox to the Minister of Education alleging breach of the Education Act 1989 by Hereworth in respect of matters not the subject of her dismissal or this proceeding. The sentence which Mrs Fox says establishes that there must be correspondence between the Board and the Minister of Education states: "Apart from the allegations being untrue, it has involved the school in unnecessary extra work in responding to the Ministry of Education."

[23] Although that is evidence tending to suggest that there was correspondence between the Board and the Ministry of Education about Mrs Fox, it could not have been correspondence that is relevant to the issues in this case which is about the justification for Mrs Fox's dismissal. If it exists, this correspondence was generated after the dismissal. Mrs Fox is not seeking reinstatement and, as I understand its defence, the Board is not seeking to rely on post-dismissal conduct by Mrs Fox to either justify its dismissal of her or to affect any remedies to which she might be entitled. If the Board were to do so, such correspondence would be relevant but its latest statement of defence does not plead this and it will not be entitled to put that issue forward. In these circumstances, I do not require the defendant to provide further and better disclosure of correspondence that it had with the Ministry of Education.

Further and better disclosure - Communications with New Zealand Teachers Council

[24] Ms Lee's affidavit confirms that the defendant has documentation relating to a complaint made to the Council by Mrs Fox against three named Hereworth staff and the mandatory reporting of the plaintiff's dismissal under the Education Act. Ms Lee's evidence is that all of this has previously been provided to Mrs Fox pursuant to an Official Information Act 1982 request by the plaintiff to the New Zealand Teachers Council.

[25] Mrs Fox's response concedes that although she has had some documentation from the New Zealand Teachers Council pursuant to an Official Information Act request, she does not appear to have a number of other documents which she has either specified or the existence of which tends to be established by other documents which she has produced.

[26] On the basis of the information set out in Mrs Fox's affidavit of 4 December 2013 at paras 11-12, I consider that the defendant should now make further and better disclosure of all of the relevant documentation which it possesses or over which it has control in relation to the New Zealand Teachers Council and Mrs Fox. That is not to say that I reject Ms Lee's evidence but her belief that Mrs Fox has obtained such documents directly from the Teachers Council by an Official Information Act request is not sufficient disclosure in litigation in light of the evidence adduced by Mrs Fox in her affidavit.

[27] The defendant is, therefore, directed to provide to the plaintiff copies of all such documents in the possession or under the control of the Board. To allow for any further interlocutory contest about this further and better disclosure, this must be done no later than Monday 3 February 2014.

Further and better disclosure - Benchmarking policy

[28] Mrs Fox seeks paper and electronic copies of the school's benchmarking policy which was referred to in para 9 of the letter of 26 September 2009 sent to her

by the school's agent, Abraham Consultants Limited (ACL), and which is connected to the reasons for her dismissal.

[29] In this lengthy and detailed letter, the school's consultant or agent refers to one of the issues raised by Mrs Fox that she had based her "benchmarks" (I assume for grading students) on those of other schools where she had worked. The Board's response was that "... the school has established its own benchmarks and the appropriate procedure for adjusting or increasing those benchmarks ...".

[30] Although Mrs Fox complains that the affidavit of Shirley Cameron does not address this policy, para 8 of Mrs Cameron's affidavit of 20 November 2013 refers to the topic as part of Mrs Cameron's disclosure of the documents evidencing the school's student grading system which was referred to at para 7(d) of the ACL letter of 26 September 2009. The reference to para 7(d) is to a statement by the school that "... the system for grading students has been set and in practice at the school for the past 5 years ...".

[31] Mrs Cameron's affidavit addresses this issue at paras 3-8 (inclusive). Although there are references to Ministry of Education expectations, Mrs Cameron also deposes to the absence of written policies although some standardised school forms are exhibited in her affidavit.

[32] In my assessment, the disclosure given in Mrs Cameron's affidavit is sufficient to answer the plaintiff's request. She may pursue issues arising out of this in evidence at the hearing. No further document disclosure is warranted.

Further and better disclosure - Staff emails

[33] The plaintiff seeks disclosure of "All communications between Hereworth School senior management and staff regarding the Plaintiff from July 2009 through to January 2010 inclusive in both electronic and hard copies." The relevance of these documents is said by the plaintiff to be a demonstration of the persons with whom the defendant was discussing matters relating to her employment. It will also assist the Court in determining that what is clearly an important issue for the defendant, the identity of the person or persons who sent or contributed to the

sending of anonymous emails to the school's parent community, which the defendant attributes to Mrs Fox but which she denies.

[34] Sean Feltoe, the school's IT Officer, gives evidence that such emails were sent through an exchange server located at the school site. Mr Feltoe's evidence is that approximately two years ago this exchange server was "deleted" and the information on it "was migrated to the Cloud" with emails for staff members being provided on a gmail platform using "Google for Education". As I understand these matters, "the Cloud" is shorthand for an anonymous mass-storage server which might, potentially, be located anywhere on earth but almost certainly not above it. Mr Feltoe's evidence is that under these new arrangements, he is only able to create, delete, or suspend email accounts although, if he is "absolutely required to gain access to an individual staff member's email account", he can do so. Mr Feltoe's evidence is that school staff use the school's email system for both professional/work purposes and personal communications. He says that it is difficult to define what is controlled by the school and what are personal communications in these circumstances.

[35] Mrs Fox's response is to note that Mr Feltoe appears to have accessed her emails to Mrs Cameron. She continues to seek disclosure of "all emails sent between the Defendant and its staff, and between its staff and any third parties that mention me." Mrs Fox says she believes she is entitled to this because it is her personal information.

[36] Whether information is personal or not is not the test for disclosure of documents in litigation. Those tests include, first, relevance and whether any of the statutory privileges apply, although none is asserted in this case. There are also overriding discretionary considerations available to the Court including the reasonableness in all the circumstances of requiring disclosure of documents.

[37] Given that it will be incumbent on the defendant to establish on the balance of probabilities that Mrs Fox was either the author of, or otherwise the source of, information contained in the anonymous emails, the best that she may be able to achieve by this application for further and better disclosure will be to show that other

people also had the information disclosed in those anonymous emails at the time they were sent, thus reducing the probability that it was the plaintiff who was behind the anonymous emails.

[38] Although these records are all historic and were moved to a 'Cloud' storage facility, I do not understand Mr Feltoe to say that they are unobtainable. I assume that these records can be searched expeditiously by the use of key words or phrases, one of which would obviously be the plaintiff's name. The class of documents must, however, be restricted to electronic and hard copy communication documents concerning the plaintiff sent by Hereworth School's "senior management" (however that class may be defined which may have to be the subject of agreement between counsel) to the school's staff from July 2009 to January 2010. Mrs Fox is entitled to further and better disclosure in these restricted terms. Because retrieval of these documents may take time, they are to be disclosed to the plaintiff by Monday 17 February 2014.

Further and better disclosure - Board meeting minutes

[39] The plaintiff seeks to have disclosure (in both hard and electronic copy) of all Board minutes of the defendant in which she was discussed. Ms Lee who, in addition to being the Board's Executive Assistant, was also its minute taker, has deposed to such copies being available. However, she identifies problems of disclosure of personal information and what she says is "other information prohibited from disclosure under contract".

[40] She does not elaborate on what this means. It is difficult, without more, to understand how a 'contract' could trump a statutory obligation to provide disclosure of relevant documents in litigation. Ms Lee has provided the creation dates for the minutes of four Board meetings in 2009 and 2010. Mrs Fox, however, identifies a number of other dates on which she says extraordinary Board meetings were held to which Ms Lee does not refer in her affidavit. These include on 9 October 2009, 23 November 2009, 7 December 2009, 18 December 2009 and 12 January 2010.

[41] The plaintiff is entitled to the dates of the creation of the minutes for these other meetings in the same way that the defendant has provided those separate dates for meetings, the minutes of which it has identified. The plaintiff is also entitled to disclosure of the minutes of these other meetings or other documents in relation to them so far as they relate to issues in this proceeding. This disclosure must be made to the plaintiff by Monday 3 February 2014.

Further and better disclosure - Documented communications with school community

[42] The plaintiff seeks disclosure of:

All communications (in both electronic and hard copy) between the Defendant (and/or the Defendant's solicitors on the Defendant's behalf and/or the Defendant's teaching staff) and the parent community of Hereworth School regarding the Plaintiff, associated matters and/or anonymous e-mails from "aromabadlaughs".

[43] Ms Lee deposes to the school not having access to the personal emails of Board members or its teaching staff which the plaintiff seems now to accept. Mrs Fox does, however, seek disclosure of the documents that Ms Lee refers to at para 15 of her affidavit. Disclosure of these must be effected by the defendant to the plaintiff no later than Monday 3 February 2014. For clarity, I confirm that such disclosure should include all communications between the defendant and its management on the one hand, and the Hereworth School parent community on the other, referring to or otherwise affecting the plaintiff, for the period from July 2009 to January 2010 (inclusive) in both hard copy and electronic format.

Further and better disclosure - Documents held by current or former Board members

[44] Since the hearing on 21 November 2013 the plaintiff has reflected on the logistical difficulties of seeking non-party disclosure against all former members of the Board and has elected to do so only in respect of one such person (who may be the only surviving Board member) and who is also now the Board Chair. An application for non-party disclosure has been made in respect of this person and will have to be dealt with in due course.

Further and better disclosure - Police documents

[45] This is a request that affects both the defendant and, potentially at least, ACL. In that latter regard, the plaintiff's application for non-party disclosure has still to be considered so that my decision now relates only to documents that the defendant and its solicitors hold. It is very likely, however, that if such documents are not disclosable by the defendant, they will be similarly immune from disclosure by ACL.

[46] The Police became involved in these issues on two occasions. The first followed Mrs Fox's complaint to the Police about what she said was a threat that had been made to her by Mr Abraham. This was his written advice to Mrs Fox that if she continued to make public aspects of the dispute with the school, she would do so at her peril. Mrs Fox's complaint to the Police about what she categorised as this criminal threat did not lead to any prosecution or similar outcome.

[47] The second Police involvement in the case occurred when Mrs Fox alleged that the Board was responsible for placing her home under surveillance following the incident with the visiting parents outlined earlier in this judgment. Again, such inquiries as the Police made did not result in a prosecution or other sanction which may have been consistent with it determining that there had been an offence committed. Mrs Fox has some correspondence with Police about these issues but suspects that there will be written documentation that the defendant or its solicitors hold of which she is not aware.

[48] I consider that the Police issues just summarised are not relevant to the proceedings between these parties. What Mr Abraham wrote to Mrs Fox is not in dispute. Rather, it is the significance in employment law of that statement in all the circumstances that is controversial and the Court will not be assisted in knowing what the Police may have made of it and why a decision may have been made not to take any action on it.

[49] Similarly, the involvement of the Police in the alleged surveillance events as a result of Mrs Fox's complaint is not a relevant issue in determining whether she was disadvantaged and/or dismissed unjustifiably by the defendant. The Court will

not be assisted by knowing what inquiries the Police made and the reasons for the apparent decision not to take any action on Mrs Fox's complaint. While the events concerning the observation of visitors to the Fox home may be relevant, the Police's involvement in them will not be.

[50] These applications for further and better discovery are therefore declined.

Further and better disclosure - Other documents

[51] The plaintiff seeks disclosure (in both hard copy and electronic format) of any documents relating to the statements contained at paras 39-42 of the letter of the defendant's solicitors to the plaintiff dated 21 December 2009 alleging that she had arranged for a colleague to request information (comprising various reports) through another member of the teaching staff when she was not entitled to that information. If such documentation exists, it meets the test of relevance and should be disclosed in these formats by midday on Monday 3 February 2014.

Further and better disclosure – ACL documents – Legal professional privilege

[52] The defendant objects to disclosing "Communications between Doug Abraham and Hereworth" on the ground that these are subject to legal professional privilege. Mr Abraham and/or his company, ACL, are not lawyers or in the business of providing professional legal advice to clients. That claim to legal professional privilege is not upheld.

Further and better disclosure – Public interest injury privilege

[53] In respect of the balance of the defendant's objections to disclosure of documents (Board minutes, communications between Board members, communications between senior management and staff, and communications between Hereworth and the parent community), the defendant invokes the public interest injury privilege pursuant to reg 44(3)(c) of the Regulations. In particular, it says that disclosing these documents would breach "the privacy interests of natural persons". In the absence of what would need to be compelling evidence that

disclosure of these documents would be injurious to the public interest, and because legitimate privacy concerns can be accommodated, this assertion of privilege also fails.

Documents held by defendant's solicitors

[54] Some of the plaintiff's applications involve communications to and from the defendant's solicitors Sainsbury Logan & Williams. It should be sufficient that I hold that any relevant documents not subject to privilege which the defendant's solicitors have in relation to this case are documents under the control of the defendant itself, and so must be disclosed by it as if the documents were in the possession of the defendant.

Non-statutory grounds for resisting disclosure

[55] I make the following observations about the litigation process generally. The defendant's concerns about the privacy of individuals named or otherwise referred to in documents which are relevant to the proceeding, is not itself a ground to object to the disclosure of those documents to the plaintiff. There are strict controls on the use and misuse of documents disclosed under the Regulations, and any person misusing a document required to be disclosed would be subject to sanction by this Court⁵. It is always open to parties, through counsel, to agree about limitations on disclosure, but if such agreement cannot be reached, the law does allow for the Court to direct that disclosure be on conditions such as that the documents will be seen only by certain people, that portions of documents may be redacted, that documents will not be copied, and the like.

Document disclosure by non-parties

[56] The Court has already dealt with one of these applications in respect of the Ministry of Business, Innovation and Employment.

⁵ See regs 51 & 52 of the Regulations respectively.

[57] There are two further applications by the plaintiff for non-party disclosure with which the Court has yet to deal. If they are opposed by either the non-parties or by the defendant, the hearing of those opposed applications will not be able to take place until at least February or even March 2014. In these circumstances, I urge the plaintiff to attempt to persuade those non-parties to make voluntary disclosure of documents to obviate the delays and costs of another hearing.

Defendant's application for interrogatories of plaintiff

[58] These are set out in the defendant's notice to the plaintiff to answer interrogatories dated 30 September 2013. It asks the Court to order Mrs Fox to answer the following questions.

- 5.1 Have you supplied any information at any time prior to 18 April 2012 relating to your dismissal or the investigation and disciplinary process leading up to your dismissal to any person other than your spouse, the New Zealand Teachers Council, the (then) Department of Labour, Office of the Ombudsmen, New Zealand Privacy Commissioner, British Columbia College of Teachers, New Zealand Police, the Anglican Church in Aotearoa New Zealand and Polynesia or your legal advisor(s)?
- 5.2 If the answer to question 5.1 is "yes", then say to whom ("recipient") and if to an entity (corporate or un-incorporated), then the name of that entity.
- 5.3 For each recipient:
 - (i) What information was disclosed?
 - (ii) When was that information disclosed?
 - (iii) In what form was the information disclosed (for example, verbally, by handing a document to the person or entity, scanning and emailing, sending by facsimile or otherwise reproducing that information for the recipient)?
- 5.4 In particular, have you ever shared with any person other than your spouse or legal advisor(s), the following specific information in the context of the *aromabadlaughs@hushmail.com* emails (all of which are contained in exhibits E1 to E13 of Ross Scrymgeour's Witness Statement ("RSWS") dated 27 April 2012 and filed in the Employment Relations Authority (Wellington) under file number 343966):
 - (i) The identity of the teacher who was allegedly the subject of investigation [RSWS E2 page 49];

- (ii) The issue over Doug Abraham’s authority to act [RSWS E3 page 51];
- (iii) The multiple occasions upon which the Board was told by Emma that this was not an “employment relationship matter” [RSWS E3 page 53];
- (iv) Reference to the teacher being named as “her” when dealing with “her concerns” [RSWS E4 page 64];
- (v) That Simon Beamish and Doug Abraham had been “excluded” from any proposed meetings with the Foxes and that the New Zealand Police were investigating the alleged “stalking” of the Levetts [RSWS E45 page 66];
- (vi) Teachers Council involvement, racist comments complaint [RSWS E5 page 67];
- (vii) Intimidation allegation [RSWS E6 page 69];
- (viii) The Board was “moving to dismiss” TA [RSWS E6 page 70];
- (ix) The fact of dismissal [RSWS E7 page 71];
- (x) The letter from Hereworth’s Solicitor sent to Emma Fox and that Doug Abraham had allegedly been stalking “TA” [RSWS E10 page 75].

5.5 If the answer to any of the interrogatories 5.4 (i) to 5.4 (x) is “yes” then for each disclosure:

- (i) The identity of the person (“recipient”) to whom it was disclosed and if to an entity corporate or un-incorporate then the name of the entity?; and
- (ii) What information was disclosed?; and
- (iii) When was that information disclosed?; and
- (iv) In what form was the information disclosed (for example verbally, by handing a document to the person or entity, scanning and emailing, sending by facsimile or otherwise reproducing that information for the recipient)?

[59] The purpose of these interrogatories is for the defendant to attempt to discover who was the author of the anonymous emails or who supplied information to the author of the anonymous emails with a view to seeking to persuade the Court that that person was the defendant. Its case is that this was Mrs Fox. The plaintiff has denied on oath that she was the author or the supplier of information to the author of the emails. The defendant was not able to persuade the Authority that Mrs Fox was culpable in this regard. If the Board is able to persuade the Court of Mrs Fox’s culpability, it will submit that if she is able to establish that her dismissal was

unjustified, any remedies to which she may be entitled should be reduced because of such conduct. In that sense, the authorship or any material contribution to the authorship of the anonymous emails by the plaintiff is an issue that is relevant in the proceeding.

[60] The plaintiff's opposition to the defendant's application requiring her to answer interrogatories is that the questions and their answers are not relevant to the proceeding before the Court. Even if they are, the plaintiff says that the interrogatories are oppressive and vexatious and should be disallowed for that reason. I do not accept the plaintiff's irrelevance argument. Her alternative submission is, however, stronger.

[61] Mrs Fox submits that the interrogatories relate to communications which took place after her dismissal on 12 January 2010 so that the answers to them cannot be relevant to the primary issue before the Court, that is whether she was dismissed unjustifiably. That submission is not right, at least completely. Most of the emails were sent and received during the second half of 2009 before she was dismissed, although some extend to 18 April 2012.

[62] Next, the plaintiff submits that it would be unreasonable to require her to answer the interrogatories because they cover a long period of time and it is likely in all the circumstances that she spoke with many people about what were significant events in her life. The plaintiff submits that it would be extremely onerous, time consuming, and ultimately of little if any value to the Court to have to list all the people to whom she may have spoken about these matters by name and provide information of those communications. The plaintiff reiterates her previous evidence and that of her husband that they had no involvement in the anonymous emails and do not know who was responsible.

[63] I consider that, as presently framed, the proposed interrogatories of the plaintiff are oppressive. Their purpose is to seek to assist the defendant to identify whether the plaintiff was the author or provided information to the author of the anonymous emails.

[64] The questions are properly ones for examination of the plaintiff and other witnesses at the hearing if the defendant seeks to pursue these issues in the same way.⁶ I disallow the interrogatories posed by the defendant for answer by the plaintiff.

Application for order that Dr Fox answer interrogatories

[65] The defendant's notice to the plaintiff to answer interrogatories dated 30 September 2013 also purports to require the plaintiff's husband, Dr Fox, to answer the same interrogatories as are sought to be posed to her. Although Dr Fox was the plaintiff's agent who represented her in the Authority and has clearly been active in his representation and support of Mrs Fox, he is not a party to the proceeding. It is likely that he will be a witness, especially now that Mrs Fox is represented by counsel.

[66] There is, however, no provision in law that someone who may be a witness in a proceeding, or a party's spouse, can be obliged to answer interrogatories. Rule 8.34 of the High Court Rules makes it clear that it is only a party that may be interrogated. The application in respect of Dr Fox is misconceived and is dismissed.

Progress from here

[67] As already noted, there are two non-party document disclosure applications still to be dealt with. Once the attitude of both non-parties to these applications is known, the Registrar should convene a telephone directions conference call in February 2014 with counsel for the parties and the non-parties' representatives to determine how those applications are to be addressed. Assuming compliance with the directions given in this interlocutory judgment and its immediate predecessor, and with any further directions in relation to non-party disclosure, the Registry should arrange a further telephone directions conference in March 2014 to re-timetable the challenge to a fixture.

⁶ *Dodds v Smith* (1991) 4 PRNZ 117 (HC).

[68] I reserve costs on the various applications dealt with in this judgment.

GL Colgan
Chief Judge

Judgment signed at 10.30 am on Friday 13 December 2013