IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 154
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 enforcement of order against non-party for particular discovery
BETWEEN	EMMA YUEN SEE FOX Plaintiff
AND	HEREWORTH SCHOOL TRUST BOARD Defendant

Hearing:	13 August 2014 (Heard at Wellington)
Appearances:	B Scotland and D Traylor, counsel for plaintiff L Blomfield, counsel for defendant S McKechnie, counsel for the Ministry of Business, Innovation and Employment
Judgment:	20 August 2014

INTERLOCUTORY JUDGMENT (NO 6) OF CHIEF JUDGE G L COLGAN

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[1] This judgment decides the plaintiff's application to enforce, by compliance order, an order made against the Ministry of Business, Innovation and Employment (the Ministry) requiring it, as a non-party, to disclose to the plaintiff a number of documents relevant to her proceeding against the defendant. The Ministry has disclosed already a number of documents to the plaintiff but asserts on various grounds that it should not be required to disclose other documents. These grounds include their irrelevance to the proceedings; legal professional privilege; oppressiveness; the non-existence of the documents; and previous disclosure.

[2] Unusually, because the Ministry is not a party to this proceeding, there has already been very extensive document disclosure by it to the plaintiff. This has been as a result not only of the Court's judgment requiring this in specified terms, but also of the plaintiff's independent strategies which have included formal complaints to the Ministry; an independent investigation instigated by the plaintiff and/or her husband into the plaintiff's dealings with the Napier Mediation Service; complaints to the Prime Minister, to the Solicitor-General and the Privacy Commissioner; and a complaint to, and investigation by, the Ombudsman. The Ministry says that, to this point, between 2,500 and 3,000 documents have been provided to the plaintiff, to her husband or to her counsel. By the Ministry's own estimate, however, only about one per cent of that material (or other material which the Ministry holds but is not agreeable to providing) was created in the time period before 5 November 2009 when the plaintiff declined for the final time to attempt to resolve her employment relationship problem in mediation under the auspices of the Ministry.

Document disclosure generally

[3] This is an appropriate case in which to re-state some fundamental, but sometimes overlooked, truths about the way document disclosure operates in practice and the Court's expectations of parties' representatives and especially of counsel and those they represent. Obtaining disclosure of another party's documents is frequently a very important part of litigation preparation. It is no exaggeration to say that another party's documents, the existence of which is unknown until their production, can dictate the outcome of a case. It is axiomatic that the Court should have the best relevant and admissible evidence about the issues for decision to try to get to the right answer.

[4] The Court does not undertake or even supervise the process of disclosing and producing relevant documents, at least until a point where an impasse has been reached between the parties. Representatives, especially those who practise as counsel, have onerous responsibilities which are sometimes difficult to explain to, and discharge on behalf of, lay litigants, requiring them to ensure and satisfy the Court that all relevant admissible documents have been disclosed if a party has been called upon to do so.

[5] Therefore, an assurance to the Court by counsel, or a statement made on oath or affirmation by a responsible and knowledgeable person filed by counsel that, for example, no such documents exist, or that relevant documents are privileged, or the like, will usually be accepted by the Court. The Court will not go behind such compliance with these ethical obligations to it. The process of litigation can indeed only work on this basis of trust and confidence between Court and Bar and, in turn, depends upon an independent and strong legal profession.

[6] Focusing on the context of this case in which many of the plaintiff's claims to a wide range and extensive number of documents are based on suspicion or innuendo, the Court must and does accept assurances given on affidavit by a Ministerial solicitor, and/or counsel, about such matters. To do otherwise would lengthen and delay inexorably what this judgment will illustrate is an already complex process that must nevertheless lead to the trial of the issues between the parties including on documentary evidence produced.

Background

[7] The essential background to this application is as follows.

[8] Emma Fox was employed by the defendant as a teacher at Hereworth School. Problems arose in that employment relationship which eventually led to Mrs Fox's dismissal. Her claim that she was dismissed unjustifiably is the subject of the proceedings between the plaintiff and the defendant on a challenge by hearing de novo to the determination of the Employment Relations Authority (the Authority) that Mrs Fox was dismissed justifiably.[1]

[9] In the course of the deteriorating employment relationship Mrs Fox twice refused the defendant's proposal to attempt to resolve the parties' differences in mediation to be conducted by the Napier office of the Mediation Service of the then Department of Labour, now the Ministry. The defendant says that these refusals, along with others by Mrs Fox, to engage with her employer are elements of its justification for dismissing her. Further, the defendant says that even if the Court

[1] *Fox v Hereworth School Trust Board* [2013] NZERA Auckland 45.

finds that Mrs Fox was dismissed unjustifiably, any remedies to which she may be entitled should be reduced pursuant to s 124 of the Employment Relations Act 2000 (the Act) because her refusal to attend mediation under the auspices of the Ministry contributed significantly to the circumstances that gave rise to her dismissal.

[10] Mrs Fox says that to the extent that she declined to engage in the mediation proposed by the defendant, she had good reason to do so, which good reason has been subsequently confirmed by some documents already obtained by her from the Ministry. Mrs Fox says, in essence, that she suspected justifiably that she would not be treated fairly in mediation because the Ministry's Mediation Service was biased in favour of the Board and its representatives.

[11] The extent, if any, of any contractual obligation on Mrs Fox to engage in mediation, or to otherwise attempt to resolve her differences with her employer at that stage of their dispute, is unknown, at least to the Court at this point. I assume that there would have been an individual employment agreement between Mrs Fox and the Board or, alternatively, that Mrs Fox may have been subject to a collective agreement. Any such agreement would have had to have contained an employment dispute resolution provision. There is, however, no further statutory obligation attaching to this obligation under ss 54(3)(a)(iii) and 65(2)(a)(vi) in the sense that contracting parties are free to design their own dispute resolution mechanisms. These may, potentially, include a requirement to attend mediation or may be entirely silent on the question. In addition, the defendant may assert that an attempt to resolve the parties' differences in mediation was an element of the statutory good faith obligations that existed between the parties and which Mrs Fox breached.

[12] In any circumstances, Mrs Fox may be able to establish good reason or justification for her actions so that these will not count against her in the decision of her personal grievance.

[13] The defendant does not concede that Mrs Fox was justified at the time in refusing to attend mediation under the auspices of the Ministry. It also says that the only possible justification for doing so emerged ex post facto and so could not have been a legitimate factor in Mrs Fox's refusal to participate in mediation.

[14] The plaintiff has signalled her intention to criticise the Mediation Service's practices, at least in this case if not generally, in advising parties of the issues for discussion, in setting mediation dates, and in the manner in which it engages with parties about mediation generally.

[15] In addition to the pleadings and an extensive knowledge of other interlocutory proceedings including of the original application for non-party disclosure against the Ministry, the Court now has the benefit of the plaintiff's briefs of evidence-in-chief for the impending trial. These include references to issues of mediation. These briefs of evidence (from Mrs Fox and her husband Dr Fox) set out the circumstances in, and the reasons for, which Mrs Fox declined to participate in mediation facilitated by the Ministry. These can be summarised generally as being based on what Mrs and Dr Fox were told by others, read and otherwise knew, or suspected before the opportunities to participate in mediation in Napier were refused. It is noteworthy, also, that there was not an absolute refusal by the plaintiff to participate in mediation: rather, Mrs Fox's refusal was to engage in mediation facilitated by the then Department of Labour's Mediation Service, and in Napier. Mrs Fox's evidence will be that she proposed expressly that mediation be undertaken in Auckland but that this was not agreed to by the defendant and there is no evidence that there was any resistance on Mrs Fox's part to mediation facilitated by any other mediator.

[16] The plaintiff's criticism is particularised principally to a Ministry staff member to whom I will refer as ML. This person was not a person who might have chaired a mediation between the parties and so may have been in a position to influence directly the outcome of that process in practice. ML was an administrative staff member in the Mediation Service's office, whose involvement was in making arrangements for the holding of a mediation to be conducted by a Mediator. ML communicated with the parties or their representatives about whether there would be mediation and, if so, when this might take place.

[17] By reference to the plaintiff's brief of evidence which has now been filed and served, the plaintiff says that after being contacted by the Mediation Service at Napier on 29 October 2009, she was unsure of the nature of the employment

relationship problem that the Board wanted to discuss at mediation. Mrs Fox says that she then had no personal grievance, had made this clear, and that her concerns were about other teachers and were of an educational and "moral" nature. She says that she suspected that the defendant was attempting to use the confidentiality of mediation to "stifle staff concerns about educational standards" at the school.

[18] Dr Fox, the plaintiff's husband, will also give evidence about her refusal to attend mediation.[2] It is anticipated that he will say in evidence:

> 46. … I became aware that concerns had been raised about Mr Abraham having undue influence with the Napier Mediation Services in October 2009. A patient at Hastings Hospital informed me that concerns had been previously raised by others and that *"he (Mr Abraham) had things tied up"*.

[19] By letter dated 29 October 2009 the Board wrote to Mrs Fox as follows: "Consequently, the decision was made by the Board (which excluded Mr Abraham) to request mediation assistance from the Department of Labour Mediation Service."

[20] Dr Fox will give evidence that he considered that this was a deliberate attempt by the defendant not to deal with the plaintiff's educational concerns "in an open and constructive manner". He will say that it was his advice to the plaintiff that the confidential environment of mediation would prevent parent community input into the discussion of educational and moral issues raised with the school by Mrs Fox and would preclude the involvement of "parents [who] would be crucial witnesses to support [the plaintiff's] version of events".

[21] By email dated 29 October 2009 a workplace coordinator at the Napier office of the Department of Labour (ML) wrote to the plaintiff saying, among other things:

> We have been asked by Hereworth School to provide mediation assistance with regard to employment issues the parties have with each other. … To this end mediation will take place on Friday 13 November starting at 9.30 am. Venue confirmations will follow after I speak with you.
>
> Interested parties can prove to be a major hurdle to this process if they are emotionally involved with one party and are not willing to hear the other party fully. We encourage support people's attendance but they are there for that purpose only – to provide support NOT to speak for their party.

[2] Dr Fox's brief of evidence at paras 44-56.

> I need you to phone me at your convenience, but before 2 pm Friday 30 October so that we can discuss this further.

[22] Dr Fox then proposes to give evidence about a subsequent telephone discussion that he had with ML in response to the foregoing email. He will say in response to ML's inquiry why the plaintiff refused to meet with her employer, that he told ML that once the Board had clearly identified "a grievance from their perspective", there would be such a meeting. Dr Fox will say that he advised ML that the reporting of educational concerns, the "deception of parents by other teachers, and moral concerns at the school" did not fall within the definition of an employment relationship problem. Dr Fox will say that he told ML that the plaintiff had identified to her employer misconduct by other employees. He will say that in response to ML's insistence that there was an employment relationship problem within the Mediation Service's jurisdiction, he asked ML to identify the statutory provision which defined "educational and moral concerns" as an employment relationship problem but did not receive an answer that satisfied him. Dr Fox's evidence will be that he questioned ML about the imposition of a mediation date and the voluntary nature of the process. He will say that ML insisted that the plaintiff was obliged legally to attend mediation, that a date had been set, and that this was "not up for discussion".

[23] Dr Fox will say that he then questioned ML about the Mediation Service's relationship with Mr Abraham. He will say that ML told him that Mr Abraham was well known to the Mediation Service and was laudatory of Mr Abraham including attributing to him professional qualifications that Dr Fox says he knew Mr Abraham did not possess.

[24] Dr Fox will give evidence that he spoke to ML about the supposed urgency of the situation and why mediation had to be arranged so promptly given that no independent investigation of the plaintiff's educational concerns had been undertaken. Dr Fox will also say that he told ML that the plaintiff was on maternity leave for a year and was not due back at work until August 2010. He will say that ML advised him that the Board had asked for urgent mediation and that ML considered it to be an urgent matter. Dr Fox will say that when he asked for a copy of any document that the Board had submitted to the Mediation Service about the

employment relationship problem, ML refused to provide this for reasons of "confidentiality". Dr Fox says that he pointed out to ML the following passage in ML's email to the plaintiff: "I require from you a summary of your issues and a timeline of said problems. The more information we get prior to the mediation date the better". He will say that he pointed out to ML that her refusal to provide the Board's account of the issues for mediation was incongruous with that requirement of the plaintiff and that the plaintiff should not be required to attend mediation without knowing its subject matter.

[25] Dr Fox's evidence will be that ML declined to answer further questions emailed by him on 30 October 2009 responding, on 2 November 2009, that:

> After our conversation on Thursday I advised the employer that on behalf of your wife you had declined mediation. I also advised the employer that should they wish to pursue this matter then they should file a request for a direction with the Employment Relations Authority.

[26] Dr Fox will say that the Board's solicitor made a further request for mediation on 6 November 2009 which did disclose the Board's reasons as follows:

> An employment relationship problem has arisen which requires resolution by the parties assisted by an independent mediator. … Details of the employment relationship problem are summarised in the attached letter from Abraham Consultants Limited dated 26 September 2009.

[27] Dr Fox will say that although this report from Abraham Consultants Limited was attached, in his view it alone did not specify any employment relationship problem.

[28] Mrs Fox sought non-party document disclosure against the Ministry which was allowed in a judgment issued on 28 November 2013,[3] the contents of which I will not repeat except to reiterate the nub of the orders made as follows:[4]

> … 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

[3] *Fox v Hereworth School Trust Board* [2013] NZEmpC 219.
[4] At [22].

> November 2009. Further, if the Ministry has any documents relating to the plaintiff's subsequent request to participate in mediation in Auckland, these must also be disclosed.

[29] It is necessary, also, to distinguish between documents created before and after 9 November 2009, being the second and last date on which the plaintiff declined mediation assistance. A substantial amount of the impugned conduct of ML is said to have occurred after 9 November 2009 and included, in particular, the omission to provide relevant documents in response to an Official Information Act request made by Mrs Fox. Counsel for the Ministry submits that such documents cannot be relevant for the purpose of this proceeding in the sense that such events could not have affected the justification for Mrs Fox's refusals to agree to mediation.

[30] The documents or classes of document that Mrs Fox asks the Court to require the Ministry to disclose to her now are set out at para 10(a)-(y) of her interlocutory application dated 16 July 2014. The plaintiff relies on the affidavit of her husband Dr Fox (who was her advocate when the proceedings were in the Authority and has clearly been an adviser to her throughout the history of this matter) sworn on 16 July 2014 and two earlier affidavits in the proceeding, Dr Fox's of 1 October 2013 and Mrs Fox's of 20 September 2013. The Ministry's opposition is supported by an affidavit of a Ministerial solicitor familiar with the Ministry's dealings with Mrs and Dr Fox. There have been comprehensive submissions made by counsel at the hearing.

[31] I will set out first the principles applicable to the grounds on which disclosure is resisted before dealing with the particular documents or classes of documents at issue.

Legal professional privilege generally

[32] Dealing with the Ministry's assertion that some of the documents sought by Mrs Fox are subject to legal professional privilege, I should record that this is a lawful ground on which to resist generally the disclosure of documents which are otherwise relevant.[5] The privilege is not confined to legal advice in relation to, or

[5] Employment Court Regulations 2000, reg 44(3)(a).

other interaction about, the subject matter of the proceeding between the particular parties. As in this case, legal advice provided to a third party for other purposes, albeit associated with the subject matter of the litigation, can likewise be privileged.

[33] Until the morning of the hearing, the case also raised the question whether privilege can attach to legal advice provided by an in-house lawyer who is not a current practising lawyer. The plaintiff claimed that some of the documents for which privilege is asserted fall into this category and, in particular, that some of the Ministry's in-house legal advisers were not currently practising lawyers at the time they provided the advice and that, as a matter of law, legal advice in these circumstances is not privileged. However, the plaintiff has now conceded that those persons then met the definition of "lawyer".

[34] Despite not now having to be decided, I propose to set out my views for the assistance of others in the field affected by this important issue in employment law.

[35] Although, as has been noted repeatedly, the Evidence Act 2006 does not apply to proceedings before this Court, its provisions guide the Court's practice in appropriate cases.[6] That is particularly so when dealing with a common law ground of privilege incorporated statutorily in the Regulations.

[36] A "legal adviser" is defined in s 51(1) of the Evidence Act as a lawyer, a registered patent attorney or an overseas practitioner. A "lawyer" has the meaning given to it by s 6 of the Lawyers and Conveyancers Act 2006 being "a person who holds a current practising certificate as a barrister or as a barrister and solicitor". Privilege applies to a communication (including a document) between a person and a legal adviser if the communication was intended to be confidential and was made "in the course of and for the purposes of … professional legal services".[7]

[37] As the commentary to High Court r 8.25 in *McGechan on Procedure* notes, salaried legal advisers communicating internally with other employees or their employer come within the scope of the privilege provided they have a current

[6] *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14].
[7] Evidence Act 2006, s 54(1).

practising certificate and the communications relate to the provision of professional legal services.[8]

[38] It follows that claims to legal professional privilege in respect of documents to or from persons who were not lawyers holding then current practising certificates as barristers, or barristers and solicitors, would probably fail on that ground.

Relevance generally

[39] No less in non-party disclosure than between parties, this underpins all document disclosure. To be the subject of an order for disclosure, a document must be relevant to the proceeding. Relevance is defined under reg 38(1) of the Regulations by requiring a decision whether a document:

> (a) supports, or may support, the case of the party who possesses it; or
> (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
> (c) may prove or disprove any disputed fact in the proceedings; or
> (d) is referred to in any other relevant document and is itself relevant.

[40] The pleadings define primarily the ambit of the proceedings and therefore the issues to which questions of relevance must relate.[9] The Court must determine more than that there is a possibility of relevance: it must determine the actual existence of relevance (as defined in the Regulations). Authority for this proposition is the judgment in *Air New Zealand Ltd v Kerr*.[10] I agree with the statements of principle also articulated in *Kerr* that a party cannot seek disclosure of a document in order to find out whether it may be relevant and that the Court is entitled to take into account, as a matter of proportionality, the extent to which disclosure may become oppressive and to ensure that the disclosure process is not misused oppressively. Nor should the disclosure process be used to determine whether documents may reveal a new head of claim or cause of action.[11] Finally, I accept also the commonsense that the Court should not order disclosure of documents which do not exist or would be required to

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[8] *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR8.25.06(4)(c)] citing *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405 (HL); and *Commerce Commission v Caltex New Zealand Ltd* HC Auckland CL33/97, 10 December 1998.
[9] *Airways Corporation of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA) at [5].
[10] *Air New Zealand Ltd v Kerr* [2013] NZEmpC 141 at [12].
[11] *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* NZHC 1054 at [34].

be created in order to exist and be disclosed.[12] There may be other litigation strategies that will reach that result, but document disclosure is not one of them.

[41] Even if documents are relevant (as defined), the Court retains a discretion to refuse unnecessary or undesirable disclosure and whether this would be oppressive as a consideration to be taken into account.[13] In determining this balancing exercise, a relevant consideration is also the likely probative value of the documents sought.[14]

[42] Rule 8.14 of the High Court Rules addressing the reasonableness of the scope of a discovery order is relevant in this case by analogy. Relevant circumstances may include:

(a) the nature and complexity of the proceeding; and
(b) the number of documents involved; and
(c) the ease and cost of retrieving a document; and
(d) the significance of any document likely to be found; and
(e) the need for discovery to be proportionate to the subject matter of the proceeding.

[43] I accept, also, that in the case of non-party disclosure of documents dealing with another non-party, interests of privacy of that non-party or other non-party may be a relevant factor in that balancing exercise. A document of little or no probative value, even if relevant, may be exempt from disclosure if to do so would infringe on these privacy interests. This is a matter of fact, degree and balancing of interests, rights and obligations.

[44] As to particular relevance, the Court has already determined that documents held by the Ministry which relate to the plaintiff's refusal to attend mediation, and which were created on or before the date of her second refusal to attend mediation (5 November 2009), are relevant to this proceeding. In addition, the Court has determined that the Ministry documents relating to Mrs Fox's refusals to attend mediation will be relevant and disclosable even if created after 5 November 2009, if they relate to events the subject of the litigation which occurred before 5 November

[12] *George v Auckland Council (No 2)* [2012] NZEmpC 143 at [24].
[13] *Matthes v New Zealand Post Ltd (No 1)* [1992] 3 ERNZ 145 (EmpC) at 150.
[14] *Australian Mutual Provident Society v Architectural Windows Ltd* [1986] 2 NZLR 190 (HC) at 197.

2009.[15] It is the degree of that relativity upon which this application turns essentially.

[45] In the orders made on 28 November 2013 which are set out at [8] of this judgment, the documents to be disclosed were to relate "to the plaintiff and the subject matter of this litigation". The latter is Mrs Fox's personal grievance that she was dismissed unjustifiably. Because of the nature of the defendant's justification, the circumstances in which the plaintiff declined or refused to attend mediation as proposed by the defendant are relevant. So, too, in that context, are the acts or omissions of the Mediation Service and its staff leading up to Mrs Fox's second and final refusal. To the extent that documents created after 9 November 2009 may be disclosable by the Ministry, those must nevertheless bear on the question of Mrs Fox's refusals and her reasons at the relevant times for these.

[46] Although many of the documents identified by the plaintiff may fall within the strictly interpreted terms of the non-party disclosure orders made on 28 November 2013, I think counsel for the Ministry is correct that the request for them now goes too far. That is tested by the answer to the questions that I posed in argument to Mr Scotland as to the probative use to which these documents could be put at the trial. The plaintiff asserts that the documents will further establish, and/or will more soundly establish, the correctness or justification of Mrs Fox's decision not to participate in mediation. I accept that the plaintiff, being faced with the defendant's argument in support of justification that she ought to have participated in mediation, is entitled to establish justification for that refusal. If Mrs Fox was justified in refusing to participate in mediation, then that refusal may not be able to be held against her at the trial either on the question of justification for her dismissal or, if she is found to have been dismissed unjustifiably, in an attempt to reduce any remedies to which she might be entitled.

[47] It may be that by dogged inquiry and probing, the plaintiff has uncovered inappropriate conduct with the Ministry by one or more of its employees. In these circumstances, it is no doubt tempting for Mrs Fox to continue that probing in the hope or expectation that further material will come to light that evidences egregious

[15] *Fox*, above n 3, at [22].

conduct by Ministry staff. But, crucially, that exercise is not relevant to this case which is about the justification for Mrs Fox's treatment by her employer, the School Board.

[48] In these circumstances, I consider that much, if not all, of the further disclosure that Mrs Fox seeks crosses the line between relevance and irrelevance. To allow the plaintiff's application for a compliance order as it is presently framed would engage a number of the statutory balancing factors in the Employment Court Regulations 2000 (the Regulations) which limit disclosure and inspection of documents. These criteria include, under reg 37, that there are circumstances in which access to documents is "unnecessary or undesirable or both".

[49] In terms of reg 38, I consider that most of the documents now sought by the plaintiff fall outside the category of documents that "may prove or disprove any disputed fact in the proceedings …".

Scope of non-party disclosure order

[50] Upon reflection engendered by the plaintiff's application for these orders requiring compliance, I consider either that the scope of the previous order may have been too broad or, if it was not, that it has been interpreted too broadly by the plaintiff.

[51] In these circumstances, I considered the documents in the possession, power or control of the Mediation Service relating both to the employment differences between Mrs Fox and the school and which documents came into existence before the second and final refusal by Mrs Fox to attend mediation, would be relevant to this issue in the case. I added a further category of documents for disclosure being subsequently created documents which referred to those pre-final refusal events.

[52] This is where a difficulty has arisen. I should probably have referred to, or made clearer, that such connection should be a direct as opposed to an indirect connection. So, for example, a document created after 9 November 2009, but which referred directly to events which preceded that date, might be relevant and

disclosable. A document indirectly relevant, in the sense of a connection to a pre-9 November 2009 event or document, would be irrelevant.

Decision – Category (a) documents

[53] The category (a) documentation sought by the plaintiff is described by the plaintiff as "All emails, notes, records and the decision of the further disciplinary investigation led by the Human Resources Department" into a Ministry employee to whom I will refer as ML. The plaintiff says that this material relates to disciplinary action taken in relation to ML as recommended by the Buchanan Report into ML's omission to provide a number of emails requested by the plaintiff. This further investigation was recommended by Mr Buchanan who had been unable to determine whether ML had concealed information deliberately from the plaintiff. The Ministry says that this disciplinary action was the subject of a settlement between the Ministry and ML who remains as one of its employees.

[54] The Ministry says that the plaintiff made the request for the emails which ML omitted to supply to her, on 26 January 2010, that is more than two months after her final refusal to attend mediation, two weeks after the date of her dismissal, and at about the time she raised her grievance. ML's disclosure of some documents, but failure to include relevant emails, was made in February 2010. The Ministry says that in these circumstances ML's omission to provide emails to the plaintiff, even if deliberate and culpable, could not have influenced the plaintiff's decision not to participate in mediation.

[55] In addition to asserting the irrelevance of this material, the Ministry says that to comply with the plaintiff's request would be oppressive. That is because to do so would be to infringe ML's rights to privacy in the employment related disciplinary process.

[56] I accept the Ministry's arguments against production of these documents. The plaintiff has long had copies of the documents that ML omitted to supply in response to her Official Information Act request. The Ministry's documentary material concerning its disciplinary inquiry into the reasons for ML's failure to

include these documents is insufficiently relevant to the cause of action between the parties to warrant production of them by the Ministry. I am inclined, also, to think that the Ministry is right that this would be an oppressive and unwarranted infringement of ML's privacy in all the circumstances. These documents do not have to be produced by the Ministry to the plaintiff.

Decision – Category (b) document

[57] This is described by the plaintiff as "the electronic copy (Word) of the original and amended TMP document". This document is part of a running record or continuous series of diary entries created by Ministry staff in relation to particular mediation files. Summaries of significant events in the lives of those files are recorded sequentially. The plaintiff has received both hard and electronic copies of the majority of her mediation file records and has received a hard copy of the document specified in Category (b). So it is an electronic (MS Word) version of part of this record which is sought.

[58] The Ministry has explained that although a search has been conducted for an electronic version of this document, it has not been able to be found. I am satisfied from the Ministry's affidavit evidence that a sufficient search has been conducted given the significance of an electronic version of the document. Mrs Fox's suspicion is that an electronic version may, when analysed, reveal changes that were made to the document and, she suspects, either to her disadvantage or to the Ministry's advantage. Beyond her suspicion, however, there is no evidence to support this contention.

[59] Because I am satisfied that an electronic version of the document cannot now be located, its disclosure can be taken no further and the plaintiff's application is refused in this regard.

Decision – Category (c) documents

[60] The non-existence of a number of documents is deposed to in Angela Graham's affidavit. First is the documentation claimed under Category (c) referred

to as "the standard email". The Ministry says that in addition to an email sent by ML to the plaintiff on 29 October 2009, no template email of any kind can be found and there is no further "standard email". In any event, the Ministry says that it is unclear how such an email might be relevant to the matters in issue in the proceeding although it concedes that the email that was received by the plaintiff is relevant.

[61] This document is the one the subject of Mrs Fox's application that impresses me as the most relevant and potentially disclosable. I have already referred to the email or emails sent to Mrs Fox after the Board's request for mediation. There is evidence in other documents discovered that the Ministry had a standard or template form of email letter that was sent out to respondents in such circumstances and that this "standard letter" had been seen and approved by both more senior management within the Napier office of the Mediation Service and one of the two local Mediators.

[62] Mrs Fox's response to the emails to her is a relevant issue in the proceeding. She claims to have been targeted by the Mediation Service because of influence exerted on it by the Board's representative. She says that a comparison between the email that she received, and what appears to be a standard or template document sent in these circumstances, will confirm (or not) her allegation of special treatment and thereby confirm her justification for refusing to go to mediation.

[63] The Ministry's case is that there is no template or standard form of document that has been able to be found. However, given the evidence contained in other documents before the Court which tends to the point of existence of such a standard letter, it is surprising if such a template document had not existed.

[64] However, I do not propose to go behind the Ministry's evidence given on oath. There are other ways in which the plaintiff can explore this relevant issue in evidence at trial, especially if electronic or hard copy versions of other Mediation files compiled at about the same time (but in unrelated cases) may tend to throw light on the question of the existence or otherwise of a template. In these circumstances the plaintiff's application is refused.

Decision – Category (d) documents

[65] Next are the documents categorised as (d) being "Advanced Find data sheets of the three forensic email searches" of the emails of persons I will identify as MT, PG and LP who were Ministry staff members. Again, the Ministry asserts that no such documents or information exist. It says that the Advanced Find data sheets held by it relate to the restoration of ML's Outlook email undertaken as part of the Buchanan investigation which led to the Buchanan Report. The Ministry says that these data sheets have been provided to the plaintiff under an Official Information Act request and electronic copies of them were provided to the plaintiff's counsel on 8 July 2014. In addition, the Ministry says that the relevance of this material is unclear.

[66] Next, the Ministry says that this request amounts to an improper fishing expedition. It points out that the plaintiff has previously expressed a view that the Mediation Service and the Ministry undertook a conspiracy to obstruct the course of justice and that the information appears to be sought to support that theory although the Ministry says that even if there was such a conspiracy (which is denied), it is not relevant to the acts or omissions of the parties in this proceeding in late 2009.

[67] Further, the Ministry says that to require a search for such documents would be oppressive. The recreation of ML's Outlook records for a limited period, as part of the Buchanan investigation, cost approximately $5,000 and incurring costs of this and more to satisfy the plaintiff's request would be oppressive. Further, the Ministry points out that it is not a matter of obtaining and disclosing existing documents but, rather, one of creating them which is not the proper subject of document disclosure or discovery.

[68] I agree with the Ministry that the plaintiff's application casts the net too widely altogether. It does appear to be aimed more to support the plaintiff's broad conspiracy to obstruct justice allegations than to provide relevant evidence for her personal grievance against the Board. Although Advanced Find data sheets were created in respect of ML's emails for the purpose of the Buchanan inquiry and report, these both covered a more limited period than for which the plaintiff now claims and

fewer Ministry staff. The Ministry makes the point that the plaintiff already has copies of the Advanced Find data sheets in relation to ML's email from the Buchanan inquiry.

[69] Further, I am satisfied that it would be oppressive to require the Ministry to now provide this electronic information. The cost to it of a much more limited exercise for the Buchanan Report was about $5,000 and I am satisfied that the cost of doing so on an expanded basis would exceed that again and significantly. Despite, as in the cases of other Ministry electronic records which are the subject of the application, the plaintiff being prepared to fund the cost of her own IT experts involved in obtaining this information, I accept that there will still be a significant cost to the Ministry of enabling that to occur.

[70] Further, I accept that this is not simply an exercise of obtaining and disclosing existing documents but that the record which is sought is one that would have to be created. This is not a proper exercise of the document disclosure process.

[71] Finally, I consider that even if the document was created, its relevance to the plaintiff's personal grievance is tangential and would not warrant the order being made. It is, for these reasons, refused.

Decision – Category (e) documents

[72] Next are the documents under category (e). These are said by the plaintiff to be "All communications between the Chief Executive of the Department of Labour/[Ministry] and the Chief of the Employment Relations Authority regarding this matter". The Ministry says that no relevant correspondence has been found despite a comprehensive search of more than 700 emails between those persons. It is difficult to see what might be the relevance of any documentary correspondence, even if it existed, with the Chief of the Authority who and which were not involved in the plaintiff's employment relationship problems with the school before proceedings were filed in the Authority after Mrs Fox's dismissal.

[73] I accept the Ministry's evidence that there has been a comprehensive "manual" search of more than 700 emails between these persons but that none relates to the issues in this litigation. Given the role of the Chief of the Authority in relation to, and at the time of, the proposed and refused mediations, that is not a surprising result. I am satisfied that there are no relevant documents in this category and the application is refused.

Decision – Category (f) documents

[74] Category (f) material is said by the plaintiff to be "All communications between the Department of Labour/Ministry and the Minister's Office regarding this matter". Ms Graham's evidence is that Dr Fox has previously been provided with all communications between the former department and the Ministry on the one hand, and the office of the Minister of Labour on the other, as responses to Official Information Act requests made by or on behalf of the plaintiff. The Ministry's case is that it has taken reasonable steps to ascertain whether any further relevant information exists including searching the Ministry's document management system which holds all communications, briefing papers, notes, and aides memoire to and from the Minister's office. Although Ms Graham deposes to a large amount of correspondence having been found in relation to the numerous Fox complaints and Official Information Act requests, a review of this information has found no relevant material which has not been previously disclosed. Again, the Ministry challenges the relevance of such information in any event.

[75] I accept the Ministry's evidence that its solicitor, Ms Graham, conducted a search of the Ministry's document management system which holds all communications, briefing papers, notes, and aides memoire to and from Ministers' offices. I accept also that the large quantity of correspondence found in relation to Mrs and Dr Fox's numerous complaints and Official Information Act requests have been disclosed. I regard the application as an inappropriate fishing expedition and it is refused.

Decision – Category (g) documents

[76] Next is the documentary material known as Category (g). This is said by the plaintiff to be "a timeline prepared by Mr Gardner for Ms De Rooy". The Ministry's case is that no such documented timeline exists or existed previously and that, in any event, the relevance of such a document, if it existed, would be unclear.

[77] That is a complete answer to the claim. Any such document that may have been prepared (but is not recalled by either of the named persons or has not been able to be found) could only have been prepared for the purpose of answering Mrs and Dr Fox's Official Information Act complaint which is not sufficiently relevant in all the circumstances to the matters in this case. This part of the application is dismissed.

Decision – Category (h) documents

[78] These are described by the plaintiff as: "The documents (hard and electronic copies) on Ms Katherine Stephen's computer that are referred to in Ms Katherine Stephen's email to Ms Tania Turfrey on 12 May 2011, 'PS: Documents are currently sitting in my H Drive – due to possible sensitivity etc'."

[79] The plaintiff's interest has been excited by the reference in the description of these documents to their being possibly sensitive. I am satisfied, however, from the evidence produced for the Ministry and in discussions with counsel, that this was probably Ms Stephen's own risk-averse strategy at work and that what she may have considered were possibly sensitive documents were not so regarded by others. I am satisfied on the evidence that such documents that may have been held formally on the H-drive were disclosed and there is no warrant to undertake a forensic search of that drive to clarify this. This part of the application is refused.

Decision – Category (i) documents

[80] Category (i) documents are said to be "All emails between [ML] and [Stuart] Webster [counsel for the defendant] from November 2009 to November 2010".

[81] The Ministry's case is that all relevant documents so described have been disclosed. Further, reasonable efforts have been made to ascertain whether any others exist including a forensic search of all emails between ML and Mr Webster from November 2009 to November 2010 which disclose the existence of 122 such emails. An assessment of these to find correspondence between those two persons in relation to this matter discloses that all relevant emails have already been provided to the plaintiff. Although the plaintiff claims that an email from Mr Webster to ML dated 4 December 2009 at 12.51 pm had not been disclosed to her by the Ministry, its case is that this email was listed by the plaintiff in the list of documents that she was obliged to provide to the Ministry pursuant to the Court's judgment in November 2013. The Ministry says that this is the reason this email was not disclosed again.

[82] As I noted at the hearing, the plaintiff has, in this instance, a two-fold document disclosure exercise. That is because the defendant's solicitor and counsel has already been obliged to disclose the contents of the defendant's file to the extent that this includes emails between the Ministry's ML and Mr Webster in the stated period and so long as such documents are not privileged.

[83] I accept the Ministry's assurance that it has disclosed all such relevant documents and has made appropriate efforts to ascertain the existence of others although nothing that has not already been disclosed has been found. This aspect of the application is therefore dismissed.

Decision – Category (j) document

[84] This is an electronic copy of an email from the Hon Kate Wilkinson [then Minister of Labour] to Mr Colin Meehan dated 11 October 2010 at 8.36 am. Although a hard copy of this document has been provided to the plaintiff, the Ministry does not have an electronic copy of the document which it received only in hard copy. Any electronic copy of the document is within the power, possession or control of the Minister's office which is separate administratively and constitutionally from the Ministry. The letter relates to a comprehensive complaint made by or on behalf of the plaintiff alleging a conspiracy to obstruct the course of

justice by a number of persons. The allegations concern events that occur principally, if not exclusively, after Mrs Fox's dismissal and only very peripherally to the mediation issues in this case.

[85] On this ground of irrelevance and because the Ministry does not have an electronic copy of this document in its power, possession or control, this part of the plaintiff's application is dismissed.

Decision - Category (m) documents

[86] This is said by the plaintiff to be the "Complete Advanced Find data sheet for [ML's] work email account from September 2009 through to October 2010.

[87] The Ministry says that any relevant documents from the stated period have already been disclosed. In these circumstances, the Ministry says that the plaintiff's request amounts to a fishing expedition and there can be no justifiable basis to have disclosure of ML's emails beyond the period already reconstructed for the Buchanan Report and provided to the plaintiff.

[88] In any event, counsel for the Ministry says that no "Advanced Find data sheet" exists as it has never been created. Ms McKechnie submits that to require the creation of such data would impose oppressive costs on the Ministry as a result of the necessity to engage external providers at significant costs.

[89] This is another example of an unwarranted requirement of the Ministry to create, at significant cost and inconvenience, a document which does not currently exist and has never previously been created. As already noted, ML's emails at relevant times have already been disclosed to the plaintiff through the Buchanan inquiry. I agree with the Ministry that to go further would be to embark on an unwarranted fishing expedition and this part of the application is dismissed.

Decision – Category (n) documents

[90] Category (n) documentation is said by the plaintiff to be the "Complete Advanced Find data sheet for all emails related to these events from September 2009 until July 2014". Again the Ministry says that such information does not exist in documentary form and that the request has no justifiable basis in law. No case for its relevance has been advanced and the Ministry says that it would be oppressive to require such documentation to be created.

[91] This is another application for an Advanced Find data sheet which I am satisfied does not exist in documentary form. The request amounts to a fishing expedition for documents that will not be relevant to the proceedings between the parties and the application is dismissed.

Decision – Category (o) documents

[92] Then there is category (o) information, "Emails between Lesley Haines and the Chief Executive" of the Ministry. Again it is the Ministry's evidence that no such emails exist. That point was said to have been made to the plaintiff as long ago as 2011 when the same material was sought by her under the Official Information Act. As in all similar requests, the Ministry says in any event that the relevance of such material to the matters between the parties is unsubstantiated and the request appears to amount to a fishing expedition.

[93] In the absence of any probative evidence for the plaintiff of the existence of such documents in the face of Ms Graham's affidavit evidence to the contrary, I am not persuaded that it would be appropriate to require disclosure of these documents. Even if, accepting for the moment that the plaintiff is right, such documents do exist, there is no nexus with their relevance to the personal grievance proceeding and I can only conclude that the request is for a fishing expedition which is refused.

Decision – Category (p)-(y) documents

[94] These are single email communications to or from internal Ministry legal advisers including Tanis Turfrey, Director, Legal Business, and George Mason, Acting General Counsel, variously dated between 16 October 2010 and 1 November 2011.

[95] The Ministry's resistance to disclosing the documents in categories (p)-(y) relies on the legal professional privilege in them asserted by it. This is a statutory ground to resist disclosure under reg 44(3)(a) of the Regulations. The Ministry says that the documents with appropriate redactions of privileged contents were provided by the Ministry to the plaintiff on 14 February 2014. It says that the persons involved in this email correspondence were in-house Ministry lawyers, Ms Turfery and Mr Mason.

[96] Not only has Ms Graham deposed to the privileged nature of these communications with departmental lawyers for the purpose of obtaining legal advice, but Crown counsel representing the Ministry at the hearing herself confirmed that analysis, which I am bound to accept. Without waiving privilege, Ms McKechnie indicated that all but two of the documents involved advice on the matters of Official Information Act and similar complaints by Mrs and Dr Fox which I have already found are not sufficiently relevant to this proceeding. It is significant, also, that the plaintiff has had copies of these communications although with the privileged portions of them redacted. An examination of these tends to confirm the privileged nature of the redacted passages.

[97] Finally, and for the sake of completeness, there is nothing in the submission for the plaintiff that communications to and from Ms Turfrey in her role of "managing" the Buchanan inquiry lose thereby their privileged status. In these circumstances I have decided not to look at each of the documents for which privilege is asserted as invited by the plaintiff. I am sufficiently assured of the privileged status of those documents without needing to do so. The plaintiff's application for their disclosure is refused.

Where to from here?

[98] The case has a fixture in the week beginning 15 September 2014, that is about one month hence. As agreed with counsel, there will be a further telephone directions conference with counsel and the trial Judge at 9 am on Tuesday 2 September 2014 to fine-tune any previous directions given. It should go without saying that the time for further interlocutory applications is now well past and it is appropriate to get on with the hearing of Mrs Fox's personal grievance on its merits.

Costs

[99] The Ministry has been almost overwhelmingly successful in opposing orders for further disclosure. Although the costs of the November 2013 application for non-party disclosure were left to lie where they fell, I consider that it was both appropriate for the Ministry to be represented by Crown counsel on this application and that it should be awarded costs. The amount of these will be reserved with the Ministry having leave to apply to fix those costs by memorandum to which the plaintiff may have the period of two months to respond.

[100] As for the defendant's costs on this application, and although I appreciated the courtesy of an appearance and submissions by Ms Blomfield for the Board, I remain of the view as expressed in an earlier telephone conference that it was unnecessary for the defendant to appear and participate at this hearing. I do not propose to make any order for costs in favour of the defendant in these circumstances.

GL Colgan
Chief Judge

Judgment signed at 4 pm on Wednesday 20 August 2014