

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 18
ARC 72/13**

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

AND IN THE MATTER of an application for further and better
 disclosure

BETWEEN S
 Plaintiff

AND L
 Defendant

Hearing: By submissions made on 3 and 11 February 2014

Appearances: Y, advocate for plaintiff
 Emily McWatt, counsel for defendant

Judgment: 13 February 2014

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This proceeding is a challenge to the determination¹ of the Employment Relations Authority refusing interim reinstatement in employment pending the plaintiff's claim to that remedy (and others) for unjustified dismissal.

[2] There are two outstanding document disclosure issues upon which agreement has not been able to be reached between the parties which require orders or directions from the Court. They relate to the extent of disclosure by the defendant to the plaintiff.

[3] The first issue is whether the whole content of a recorded telephone call to the defendant, by a person to whom I will refer as "PB", is to be disclosed to the

¹ [2013] NZERA Auckland 331.

plaintiff or whether, as is uncontroversial, only those parts of the call referring to the plaintiff need to be disclosed.

[4] The defendant is a financial services company which employed the plaintiff. PB telephoned another representative of the defendant and, in the course of that call, made allegations about the plaintiff's conduct and also discussed with the defendant's representative PB's own unrelated insurance claim. There are now apparently separate proceedings involving PB, the plaintiff and the plaintiff's advocate, including an application for an harassment order made by the advocate against PB as well as underlying criminal prosecution proceedings against the plaintiff and his advocate. In these circumstances, PB does not want his own financial information disclosed to the plaintiff or the plaintiff's advocate.

[5] On the other hand, the plaintiff's case is that the admittedly relevant information in the documents (the recording of the telephone call and the transcript) can only properly be understood in the context of the whole of the discussion so that this should be disclosed.

[6] To determine the relevance of the disputed part of the documents, the transcript of them has been supplied to the Court by agreement to enable this dispute to be resolved.

[7] Having perused the transcripts of PB's two telephone calls of 4 and 5 March 2013, I consider that the plaintiff is entitled to know of the contents of the whole of those telephone calls and not simply of those parts of them in which he is referred to specifically. The whole gives context to the particular, especially as PB's motives may be in issue. Because of the associated proceedings, however, PB's address disclosed by him at the start of the telephone call on 4 March 2013, and his mobile telephone number recorded towards the end of the telephone call on 4 March should not be disclosed to the plaintiff and may be redacted appropriately from both the sound recording and the typed transcript of those calls.

[8] The second and closely associated question is also one of disclosure of documents although in this instance the defendant invokes reg 51(a) of the

Employment Court Regulations 2000 to resist disclosure of the whole of a document containing information about a person who is a witness in a prosecution against the plaintiff. This person also telephoned the defendant, making allegations against the plaintiff, and left her given name and telephone number which a representative of the defendant wrote down. That original written record has been lost but the information contained in it was transcribed into another record which the defendant has. The plaintiff is on bail awaiting the hearing of criminal charges and a term of the bail (and that of the plaintiff's advocate who is a co-accused) includes a requirement that no witness be contacted, either directly or indirectly, by the accused. The defendant is concerned that if this identifying information is disclosed to the plaintiff, it may make it possible for that term to be breached.

[9] The purpose for which this information is sought by the plaintiff provides a mutually satisfactory remedy for this conundrum. The plaintiff says that the defendant's case in the Employment Relations Authority was that the communication with the defendant by this identified person was in fact said to have been provided anonymously. The plaintiff says that this document will establish that there was no anonymity attaching to the evidence provided to the defendant which, he says, misled by perjury the Authority. The significance of the information is said to be not the identity of the complainant but, rather, the veracity of the defendant's account of events to the Authority.

[10] In these circumstances, therefore, the parties have, by agreement, provided the document to the Court for the purpose of confirming that the recorded information includes a person's given name and a land line (area code 07) telephone number. I now confirm that an email dated 24 January 2014 from Karshnaz Pardiwalla to Katie Sutherland records these details after a statement that "The woman who I refer to in my notes gave me the following details ...". If the plaintiff wishes to take the matter further, there will have to be other evidence and a submission linking that finding to the evidence provided to the Authority if the plaintiff is to establish that the defendant's case misled the Authority intentionally and wrongfully.

[11] To preserve the integrity of non-publication orders made by the District Court, in which the associated criminal trial or trials are still pending, I make an order prohibiting publication of the identities of the plaintiff, the defendant, and of the plaintiff's advocate who will be referred to in the entitling to this judgment respectively as "S", "L" and "Y".

[12] I reserve costs on this interlocutory application.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Thursday 13 February 2014