

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 2/09
ARC 82/08**

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

AND IN THE MATTER OF challenge to objection to disclosure

BETWEEN RAYMOND CLENDON LEWIS
 Plaintiff

AND HOWICK COLLEGE BOARD OF
 TRUSTEES
 Defendant

Hearing: 5 February 2009
 (Heard at Auckland)

Appearances: Raymond Clendon Lewis, plaintiff
 Richard Harrison, counsel for defendant

Judgment: 9 February 2009

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] The defendant Board has objected to disclose all of the items listed in the plaintiff's notice requiring disclosure, with the exception of Board minutes which dealt with an investigation into the complaint which resulted in the termination of Mr Lewis's employment. The Board objected to the disclosure on the grounds that they were not relevant to the issues before the Court and further that all relevant documentation had been disclosed during the course of the Employment Relations Authority proceedings.

[2] The second ground is not a good basis for objection to disclosure. If documents have already been disclosed during the Authority's investigation, that

does not mean that the recipient of the notice is no longer required to comply with reg 42(3) of the Employment Court Regulations 2000 and to assemble them at a convenient place and to provide a concise and ordered list or index of those documents produced and make that available to the party seeking disclosure (see Reg 42(3)).

[3] Relevance, however, provides a good ground for the refusal to disclose documents requested in the notice requiring disclosure. Relevance is defined in Reg 38(1) as follows:

38 Relevant documents

(1) For the purposes of regulation 37 and regulations 40 to 52, a document is relevant, in the resolution of any proceedings, if it directly or indirectly—

- (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.*

[4] The hearing took the course of examining the list of documents contained in the notice requiring disclosure and determining whether there were any grounds for objecting to produce them on the grounds that they were not relevant as defined. The first section of the list required all Board minutes of meetings during the period 2004 to 2008. Rather than have all those minutes listed and produced for inspection, Mr Lewis was prepared to accept the Board's admission that in the period 2004 to 2006, the minutes contained no references to him which were in any way disadvantageous. Mr Harrison indicated that the Board would be prepared to give that undertaking in writing and therefore disclosure of the minutes in that period was not necessary.

[5] It was accepted by the parties that:

(a) The documents numbered (1) in the notice were all relevant with the exception of:

- (i) the second to last and last documents on page 2 of the notice;
- (ii) the first 3 on page 3;
- (iii) the copy of the new EOTC policy and the documents referred to in the second to last and last unnumbered documents on page 2 of the notice, under the heading document 1.

(b) The documents numbered 3 for the period 2007 to 2008 shall be disclosed.

(c) The documents numbered 4, 5, 9, 15, 16, 22, 27, 28, 29, 34, 36, 37, 44 (with the exception of documents relating to announcements by Mr Dimery and Mrs Simmons about Mr Lewis during 2008), 46, 47, 61, and 75 are not relevant.

(d) All other documentation will be listed and produced for inspection unless they are the subject of legal professional privilege.

[6] The defendant, in turn, sought directions from the Court requiring the plaintiff to identify the witnesses to be called and to establish a process of contacting identified witnesses and a direction that the plaintiff desist from further contact with any student, employee, or board member of Howick College in relation to this challenge, except in terms of the Court's direction.

[7] The directions were supported by an affidavit from Mr Dimery, the Principal of Howick College, setting out examples of communications which Mr Lewis had either circulated to all staff or sent to individual staff members and to the Board Chair of St Kentigan College. The affidavit acknowledged, as did Mr Harrison in his submissions, that Mr Lewis is entitled to call witnesses that will be relevant to his challenge and that some of these may be staff members at Howick College.

[8] Mr Lewis complained that a number of the witnesses he had contacted have declined to either be interviewed or briefed by him. The Court cannot order the witnesses to respond, but the Court can authorise the issue of witness summonses on the application of Mr Lewis, provided the evidence the witnesses are to give is relevant and the summons would not be oppressive.

[9] Clause 6 of the Third Schedule to the Employment Relations Act 2000 provides that, for the purpose of any proceedings before the Court, it may, on the application of any party to the proceedings or on its own volition, issue a summons to any person requiring that person to attend before the Court and give evidence at the hearing of those proceedings. The power to issue a summons may be exercised by the Court or a Judge or by any officer of the Court purporting to act by the direction or with the Authority of the Court or a Judge.

[10] Mr Lewis has been approaching a large number of people, both connected to the Board and outside of the Board. For example, Mr Lewis advised of his intention to subpoena the former Prime Minister, the Right Honourable Helen Clark, to prove that he had written a letter to the Prime Minister, complaining of his treatment by the Board. Clearly such a subpoena would not be necessary to prove that Mr Lewis had written the letter he claimed to have written to her. In these circumstances, I direct that no summons is to be issued, on Mr Lewis's application, unless it has been approved by a Judge of the Court.

[11] However, to assist the parties, we went through the extensive list of witnesses which Mr Lewis indicated he wished to have subpoenaed and I have determined which of those witnesses may be able to give relevant evidence. I have determined that the following persons, under the heading **List A** may be able to give relevant evidence and therefore, on the application of Mr Lewis, I will issue a summons for their attendance. Those persons listed under **List B** I have determined either cannot give relevant evidence on any issues before the Court or are out of New Zealand, and no witness summons is to be issued to them.

List A

[12] Witness summonses can be issued on the plaintiff's application to the following persons:

- Mr HEAYES
- Ms EVANS
- Mrs BRAKE (if she is living in New Zealand)
- Mrs KOP
- Ms OFNER
- Ms JONES
- Ms PLYLER
- Mr Raymond WEBB (unless Mr Harrison advises the plaintiff in writing that he will be calling Mr Webb)
- Ms Diane MILLER-KELLEY
- Ms Ruth HAMMOND
- Mrs WATERHOUSE
- Ms Barbara WARNE

List B

[13] Witness summons will NOT issue against the following persons, either because their evidence is not relevant or because they are not in New Zealand:

- Mr COOK
- Mr HULL
- Mrs FENNER
- Mrs JAFFAR
- Mr ROSOMAN
- Mr WARDLAW
- Mr ANDERSON

- Ms SUNDRUM
- Ms MEFFIN
- Mrs O'REILLY
- The Right Honourable Helen CLARK
- Mr Malcolm BELL
- Ms Karen SEWELL
- Mr Warren PEAT
- Ms Robin WILKINSON
- Mrs June PERRY

[14] Mr Harrison, on behalf of the Board has undertaken to call:

- Mrs SIMEONIDES
- Mr DIMERY
- Mr Wayne JOHNSON
- Mrs Desiree REYNEKE
- Mr David SMITH

And he will consider calling:

- Mr Raymond WEBB

[15] Mr Lewis will call:

- Dr Roger ELLIOT
- Mr Jim WARD

No summonses are necessary for these two witnesses.

[16] Mr Lewis will provide “will say statements” for those witnesses who have declined to be interviewed by him, or to provide him a brief of evidence.

Applications for witness summonses for persons other than those listed in either List A or B will be referred to a Judge before issue.

[17] Mr Lewis sought clarification of the reasons for his dismissal. Mr Harrison pointed out that this is a matter that has already been before the Authority, but he could see no objection to providing Mr Lewis a precise list of the Board's reasons for his dismissal. He has agreed to file and serve a memorandum setting out those reasons on or before, 4pm on Thursday 26 February 2009.

[18] Costs in relation to the hearing of these matters on Thursday 5 February 2009 are reserved, but I note that the hearing commenced at 10am and ran until 1.24pm, including the morning adjournment, recommenced at 2.15pm and ran until 4.05pm, including the afternoon adjournment.

BS Travis
Judge

Judgment signed at 4pm on 9 February 2009