

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**CC 18/09  
CRC 15/09**

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

BETWEEN                SUSAN JANE GREY  
Plaintiff

AND                      DIRECTOR-GENERAL OF  
CONSERVATION  
Defendant

Hearing:                3 November 2009 (by teleconference)

Appearances: M Ritchie, Counsel for Plaintiff  
H P Kynaston, Counsel for Defendant

Judgment:             5 November 2009

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**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN**

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[1] There are three interlocutory document disclosure issues that need to be determined as part of the preparation of this case for hearing to be set down in April or May 2010. It is necessary to outline briefly the nature of the proceeding to determine these including necessary questions of document relevance.

[2] Susan Grey challenges by hearing de novo the determination of the Employment Relations Authority finding that she was dismissed justifiably from her employment as a solicitor with the Department of Conservation. In her statement of claim, which defines the issues for decision by the Court and, thereby, the relevance of documents, Ms Grey alleges that she was disadvantaged unjustifiably in her employment on 26 August 2008 and, subsequently, dismissed unjustifiably from it on 15 September 2008. To use the language of the statutory tests in s103A of the Employment Relations Act 2000 (“the Act”), Ms Grey says that the Director-General as her employer did not do what a fair and reasonable employer would have done in all the circumstances at the time (the “what”) and did not act towards her as

a fair and reasonable employer would have done again in all the circumstances at the relevant time (“the how”)<sup>1</sup>.

[3] While employed by the defendant, Ms Grey was also permitted to continue and complete unfinished proceedings from her former legal practice. One of these proceedings, in which she was the solicitor on the record for the plaintiff, was between a company known as Saxmere Co Ltd which, together with others, had brought proceedings against the Wool Board Disestablishment Co Ltd. On an appeal from the Court of Appeal to the Supreme Court, Ms Grey purported to add the Attorney-General as a new party to the proceeding. That came to the notice of the Solicitor-General whose communication about it to the defendant began the chain of events that led eventually to Ms Grey’s dismissal for having an unresolved conflict of interest between her roles as a departmental solicitor and as solicitor on the record in proceedings against the Attorney-General.

[4] The first documents that Ms Grey asks to be disclosed are “*All advice, file notes etc recording communications between the Director-General, and his human resources team...*”. Counsel for the defendant assures the Court that there are no such documents other than those which have already been disclosed to the plaintiff. Such an assurance from counsel is usually determinative of a matter such as this. However, if the plaintiff has information suggesting otherwise, she may make an interlocutory application to the Court on notice, in which event the defendant will need to supply confirmation of his position on affidavit.

[5] The next document or documents sought are “*The Gallup poll analysis of staff satisfaction with DOC’s management for 2008 and 2009 with a breakdown showing the satisfaction of staff in the Nelson, Marlborough Conservancy*”.

[6] The plaintiff’s claim to these documents was effectively abandoned, at least using the document disclosure regime under the Employment Court Regulations 2000 (“the regulations”). Although not conceding the point, Ms Ritchie accepted realistically that she did not have a strong argument that evidence of a poll of staff satisfaction with the department’s management could be said to be relevant to the

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<sup>1</sup> *Air New Zealand Ltd v V* AC 14/09, 3 June 2009 at para [109]

issues that the Court must decide. That was a proper concession and I did not need to hear from Mr Kynaston in opposition. Ms Grey has elected to try to obtain this information by other means. Even if she does, there may still be evidential issues of relevance at trial.

[7] The third category of documents sought is more complex. It is for “*Copies of all invoices received by DOC from Crown law for advice on or relating to the alleged conflict, employment process and waiver of privilege.*”

[8] One of the issues in the proceeding in this Court involves when and how the Attorney-General ceased to be named as a party in the Saxmere litigation in the Supreme Court, the knowledge of both the Solicitor-General and the defendant of that status, and its effect upon the decision to dismiss Ms Grey.

[9] The following are the pleadings affecting this claim. At paragraph 42 of the statement of claim under a heading “*The Employer’s Failure to act in Good Faith*” the plaintiff asserts:

*The defendant did not disclose he had obtained an opinion regarding the alleged conflict of interest and was relying on that opinion to support the view he had already reached that the plaintiff had a conflict of interest.*

[10] However, I do not understand this allegation to relate to the application for disclosure. The legal opinion that the defendant obtained and which has been disclosed to the plaintiff (including, I assume, its date) is that of Bruce Corkill QC. It is not the same as legal advice from the Crown Law Office which is the object of the application for disclosure. The Corkill opinion was released to Ms Grey, albeit some time after its receipt, and privilege in it has been waived.

[11] At paragraphs 69 and following of the statement of claim (under a heading “*Particulars of Claim*”) the plaintiff asserts:

69. *From 3 September 2008 the defendant sought legal advice from the Solicitor-General, from some of his staff at Crown law and from Mr Corkill QC.*

70. *On 10 September the defendant received legal advice from his agent, Mr Corkill QC. This provided some analysis of the alleged conflict. This opinion was withheld from the plaintiff in breach of s4 of the*

*Act and despite the plaintiff's repeated requests for more information and the defendant's repeated view that the plaintiff did not seem to understand the "fundamental conflict" that the defendant was alleging existed.*

71. *The advice from the defendant's agent Mr Corkill QC was deficient, misleading and deceptive because:
  - a) *it failed to consider or apply the relevant legislation (the State Sector Act 1988 Sections 59 and 69*
  - b) *the Lawyers and Conveyancers Act 2006 s4, 10, 11 and 12);*
  - c) *it failed to address relevant terms of the plaintiff's Employment Agreement;*
  - d) *it failed to identify or apply the correct legal test for conflict of interest, and*
  - e) *it failed to ascertain or apply all the relevant facts before drawing its conclusions.**
  
72. *On 11 September 2008 the Solicitor-General advised the Supreme Court that "the Attorney-General has no legal interest in this proceeding, and should not have been named as a respondent." The plaintiff's clients agreed that the Attorney-General's name should be removed from the proceedings.*
  
73. *Neither the Solicitor-General nor his staff (who were advising the defendant regarding the employment matter) communicated this to the defendant. The defendant was aware this matter was being raised by Crown law but the defendant did not check whether there had been any change in the facts that would affect his intention to dismiss the plaintiff because the Attorney General was listed on the proceedings.*

[12] The defendant's pleading in response to these assertions is as follows:

69. *The defendant admits that from 3 September he sought legal advice from Crown Law (which is privileged), and that he sought legal advice from Mr Corkill as above (over which privilege has been waived). The defendant otherwise denies paragraph 69.*
  
70. *The defendant admits that on 10 September he received legal advice from Mr Corkill but denies that Mr Corkill is his agent. The defendant otherwise denies paragraph 70, and repeats paragraph 23, which sets out the reasons why Mr Corkill's opinion was not provided to the plaintiff at the time.*
  
71. *The defendant denies paragraph 71, which alleges that Mr Corkill's advice was deficient, misleading and deceptive. He further says that, irrespective of whether the advice was correct, it was reasonable for him to rely on it.*
  
72. *The defendant admits that on 11 September, the Solicitor-General advised the Supreme Court in a memorandum of counsel that "the Attorney-General has no legal interest in this proceeding, and should not have been named as a respondent". The defendant has no*

*knowledge of and therefore denies that the plaintiff's clients agreed that the Attorney-General should be removed as a party.*

73. *The defendant admits that neither the Solicitor-General nor his staff communicated the information regarding the Attorney-General's status to the defendant. The defendant otherwise denies paragraph 73 and says that all of the information he received – including that from the plaintiff – was to the effect that the Attorney-General was a party. He had no reason or obligation to “check” the Attorney-General's status.*

[13] I do not reiterate paragraph 23 (referred to in paragraph 70 of the statement of defence above) because this relates to another issue, the timing of the release of the Corkill opinion to the plaintiff.

[14] Further, at paragraph 77 of the statement of claim, Ms Grey alleges:

77. *The process leading to the termination of the plaintiff's employment was unfair. The plaintiff's previously exemplary employment was terminated:*

...  
(i) *at a time when the Attorney-General was known by the defendant's agent not to be a party to the Supreme Court proceedings, so the original grounds for the alleged conflict had ceased to exist.*

[15] The plaintiff's fourth cause of action is said to be breach of the Fair Trading Act 1986. It asserts:

*In breach of Section 12 of the Fair Trading Act 1986 the Defendant, his employees, advisors and agents engaged in conduct that was misleading and deceptive in relation to the plaintiff's employment. In particular the defendant alleged that:*

...  
c) *represented to the plaintiff and to her manager Mr Clifton that he had legal advice from the Solicitor-General and was treating that advice as conclusive when in fact he had only an “off the cuff” oral view of the Solicitor-General that the defendant knew was formed without reference to the plaintiff's Employment Agreement, the State Sector Act 1988 or the Auditor-General's Guidance for public entities on Managing of Conflicts in Public Entities.*

[16] And at paragraphs 6.3 and 6.4:

- 6.3 *By email dated 29 August 2008 the defendant represented to the plaintiff that:*  
a) *he had been advised by the Solicitor-General that “in his opinion there is a conflict of interest;*

- b) *if the plaintiff withdrew the Attorney-General as a party, the Attorney-General will in all likelihood make an application to intervene because the issue, involving judicial conflict of interest raised in this case, is a matter of significant public importance and justifies the Attorney-General's intervention and*
- c) *The plaintiff's obligation was to "avoid any conflict of interest, not just conflict with her work for DOC"*

6.4 *This advice was misleading and deceptive in relation to the employee's employment because the plaintiff did not in fact have a conflict of interest; and the Attorney-General was not and was legally incapable of being a party to the Supreme Court proceedings.*

[17] In response, the defendant, although admitting that he asked the Solicitor-General on 27 August 2008 whether he was clear there was a conflict of interest issue nevertheless *"denies that the Solicitor-General was acting as his agent and in this context was not acting as his advisor."* The defendant denies paragraph 6.4 and says that the representations he made were not misleading and deceptive.

[18] The defendant reiterates his pleading that he neither sought, nor was given, advice from the Solicitor-General and/or the Crown Law Office about the status of the Attorney-General in the Saxmere proceedings at any time relevant to Ms Grey's dismissal.

[19] These matters may be the subject of evidence at the hearing, including from the Director-General himself. However, it is also correct, as Ms Ritchie points out, that a party is entitled to pre-trial disclosure of documents that are or may be relevant to the issues. The Authority's determination records that the Solicitor-General gave evidence in that forum before the plaintiff agreed to discontinue her claim against him as a nominated party. That said, I understand that the defendant does not necessarily intend to call the Solicitor-General as a witness on the challenge in this Court. So it may be that if the information which the plaintiff seeks is relevant and discoverable but not disclosed, it may not be able to be obtained from witnesses if disclosure of it is not provided in advance of the trial.

[20] In these circumstances the plaintiff seeks to have disclosed to her, and to inspect, the invoices for advice or other relevant legal services provided by the Crown Law Office (of which the Solicitor-General is of course the head) to the

Director-General of Conservation. The plaintiff says that, by reference to dates and narrations, she may be able to ascertain the dates and subject-matter of advice to the Director-General about the Attorney-General's role in the Saxmere litigation.

[21] While the bare fact of seeking and obtaining legal advice is not, in this case, one over which privilege is asserted, the content of the advice sought and obtained is. Ms Ritchie concedes properly that she would not be entitled to the full detail of the latter but says that information about the date or dates on which legal advice was sought and provided, and the broad subject-matter of that advice, is not so privileged.

[22] On the basis of the pleadings set out above, I assume for the purposes of this judgment that the information in the Crown Law invoices is or may be relevant to Ms Grey's claims. I find, however, that it is the subject of legal professional privilege which the Director-General asserts so that its disclosure to the plaintiff can be resisted lawfully. That is for the following reasons.

[23] Regulation 44(3)(a) of the regulations states that a party is entitled to resist disclosure of a document or class of documents that is or are subject to legal professional privilege. The nature of the privilege is now codified in s54 of the Evidence Act 2006 and although that Act is not binding on this Court, where it deals with a statutory principle, I conclude it is applicable. Section 54(1) provides:

**54 Privilege for communications with legal advisers**

(1) *A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—*

(a) *intended to be confidential; and*

(b) *made in the course of and for the purpose of—*

(i) *the person obtaining professional legal services from the legal adviser; or*

(ii) *the legal adviser giving such services to the person.*

[24] This now codifies long established common law. The defendant obtained professional legal services from the Crown Law Office. The invoices fall within the category of "*any communication between the person and the legal adviser*". The

invoices were intended to be confidential as between client and legal adviser. The invoices were documents made in the course of and for the purpose of the obtaining of professional legal services from the Crown Law Office or, alternatively, for the purpose of Crown Law giving such services to the Director-General. Although the mere fact of taking legal advice may or may not be privileged, such detail as the subject-matter of the legal advice and when it was given are privileged communications including, as here, when recorded in documents.

[25] Other directions to hearing have been given in a minute issued after the call-over.

[26] Costs on this disputed disclosure question are reserved.

GL Colgan  
Chief Judge

Judgment signed at 2.45 pm on Thursday 5 November 2009