IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2022] NZEmpC 128
EMPC 73/2022

IN THE MATTER OF	an application for a judicial review
AND IN THE MATTER	of an application for a strike out of proceedings
AND IN THE MATTER	of a challenge to objection to disclosure
BETWEEN	ADRIAANUS WILFRED STRAAYER Plaintiff
AND	EMPLOYMENT RELATIONS AUTHORITY First Defendant
AND	WORKSAFE NEW ZEALAND Second Defendant

Hearing: On the papers

Appearances: A Straayer in person
No appearance for the first defendant, by leave
G Cain and K Alexander, counsel for second defendant

Judgment: 19 July 2022

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Challenge to objection to disclosure)

Background

[1] Mr Straayer issued a notice requiring disclosure of a Legal Services Order (LSO) between WorkSafe New Zealand (WorkSafe) and Dentons Kensington Swan (DKS) dated February 2019. The LSO covered legal services in relation to the plaintiffs' employment dispute.

[2] Subsequently, WorkSafe served and filed an objection to disclosure under reg 44(3) of the Employment Court Regulations 2000 (the Regulations) asserting that the document is subject to legal professional privilege.

[3] In response, Mr Straayer brought a challenge to the objection. This judgment resolves the challenge.

[4] The proceeding in which this issue arises is an application for judicial review brought by Mr Straayer against the Employment Relations Authority and WorkSafe; inter alia, Mr Straayer asserts that declarations should be made that DKS was not legally engaged to represent WorkSafe, that it has not carried out instructions issued by WorkSafe or a person with a delegated authority from WorkSafe, and that the Authority has acted on representations that have not been authorised by WorkSafe. WorkSafe disputes each of these allegations.

[5] Mr Straayer says that the LSO is a key document because it will show whether DKS had been legally engaged by WorkSafe and/or by a person with the required delegated authority from its Board to engage and instruct external legal representatives. Mr Straayer also says that WorkSafe has advised that this is the engagement document that authorises DKS to act as its legal representative in matters relating to Mr Straayer's personal grievance of September 2018.

[6] For its part, WorkSafe says the document is confidential, was made in the course of and for the purpose of providing legal services, and thus is subject to legal professional privilege.

Application for strike out

[7] After the application for judicial review was brought, WorkSafe brought an application for strike out on the ground that there is no available jurisdiction under the Employment Relations Act 2000 to hear it.

[8] The application for strike out will be resolved using a two-stage approach.

[9] First, the Court will focus on the statutory provisions which define the scope of the Court's jurisdiction to judicially review determinations of the Authority to determine whether the allegations raised are justiciable in the circumstances. The hearing has been scheduled for 10 August 2022.

[10] Second, subject to the outcome of the resolution of that issue, the Court may need to determine a further question as to whether an asserted breach of natural justice falls within the scope of the Court's jurisdiction with regard to judicial review.

[11] For the purposes of the hearing for the first stage of the application for strike out, a timetable was established for the filing of affidavits and an agreed bundle of documents. Following discussion with Mr Straayer and Mr Cain, counsel for WorkSafe, I directed that the bundle was to contain communications referred to in the statement of claim and the statement of defence, along with any other agreed documents. Three volumes of documents were filed under that direction.

[12] However, it appears that when agreeing the contents of the bundle, Mr Straayer wished to include the LSO of February 2019. In an email sent by Mr Straayer to Mr Cain on 23 June 2022, which was copied to the Court, he acknowledged that the bundle of documents was meant only to be relevant to the strike out application, but since the bundle included "dozens of documents that are not relevant, I thought you were including everything now". On that basis, he said the LSO should be in the bundle.

[13] Mr Straayer has expressly referred to the LSO of February 2019 in his statement of claim. He referred to it in support of an allegation that Worksafe's method of engaging the services of DKS was ultra vires.[1] This particular allegation is denied by WorkSafe.[2]

[14] As a result, although the bundle of documents as filed would appear to contain many documents which will be of no assistance in resolving the legal issues at the first stage of the application for strike out, there appears to have been a faithful adherence

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1 Application for Judicial Review and Declaration of Legal Rights, 4 March 2022, at [79].
2 At [66] and [79].

to the agreed direction that communications referred to in the pleadings would be included.

[15] Under that formulation, the 2019 LSO would, subject to any issues of privilege, fall for inclusion. In these circumstances, I consider it fair to resolve the privilege issue now.

Applicable principles

[16] Regulation 44 of the Regulations provides that one of the grounds for raising objection to disclosure is that of legal professional privilege. This term encapsulates solicitor client privilege, which is described in s 54 of the Evidence Act 2006 (the EA). It relevantly states:

> **54 Privilege for communications with legal advisers**
>
> (1) A person who requests or 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 requesting or obtaining professional legal services from the legal adviser; or
>
> (ii) the legal adviser giving such services to the person.
>
> ...

[17] The section requires two factors to be considered – confidentiality, and then whether the communication was made in the course of, and for the purpose of, the obtaining or provision of legal services.

[18] It is also necessary to consider waiver in this case. Section 65 of the EA deals with that topic. It provides:

> **65 Waiver**
>
> (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
>
> (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or

document in circumstances that are inconsistent with a claim of confidentiality.

(3) A person who has a privilege waives the privilege if the person—

(a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or

(b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.

...

[19] The section clarifies that waiver may occur either expressly or by implication. A privilege will be waived when the privilege-holder has done what amounts to a knowing and voluntary abandonment of the rights otherwise possessed by the privilege-holder.

[20] Section 65 requires a focus on " the privileged communication, information, opinion or document". Thus, privilege cannot in general be waived across a whole class of documents.[3]

[21] Although the provisions of the EA are not expressly stated to be applicable to this Court, they form an instructive guide as to the exercise of its powers regarding the admissibility of evidence.[4]

[22] A further legal point relates to the question of whether the Court should exercise its power under reg 45(2) of the Regulations to inspect the document.

[23] The Court of Appeal has made it clear that inspection should never occur "as a matter of automatic practice".[5] The Court should typically be in "real doubt" before doing so.[6]

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3 *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [57].

4 *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14].

5 *General Accident Fire and Life Assurance Corp Ltd v Elite Apparel Ltd* [1987] 1 NZLR 129 (CA) at 133.

6 *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 599.

[24] In short, inspection is an option of last resort for the obvious reason that it is generally undesirable for a judicial officer who is considering a case to be provided with information by one party, which has not been seen by the other.

[25] I do not consider that this is a case of last resort where inspection should occur, I have not therefore viewed the document although it was provided to the Registrar for that purpose by WorkSafe.

Analysis

[26] I deal first with the elements of s 54 of the EA. It is not disputed that the document was made in the course of and for the purpose of obtaining professional legal services from a legal advisor. What is in dispute is whether the communication was intended to be confidential, and if so, remains confidential.

[27] Mr Straayer submitted that the particular LSO is no longer confidential. He says WorkSafe has disclosed that it exists, as well as the period it covers, when it was signed, who it was signed by, and that it recovers deliverables in relation to the employment dispute.

[28] These factors identify and confirm the existence and provenance of the document. Those details are not confidential. However, the rest of the document remains confidential, a fact which is evident from the contested request for disclosure and the claim for privilege.

[29] Mr Straayer made a further point to the effect that all of the events that occurred in the running of WorkSafe's case in the Authority reveal the legal advice which DKS must have provided to WorkSafe. I infer that it is asserted confidentiality was thereby lost. However, these factors do not necessarily reflect whatever privileged legal advice may have been included in the LSO. Decisions as to the position to be taken at the Authority's investigation may have been developed via other methods of communication. I am not prepared to infer that whatever happened in the litigation after February 2019 was referred to in the LSO of that date.

[30] Next, Mr Straayer submits that it is not possible to claim that a LSO is a confidential document because the document is simply a standard service provider contract with a government agency and is subject to release under the Official Information Act 1992 (OIA).

[31] Mr Cain, in his submission, states that the document has previously been requested via the OIA and the Privacy Act 1993 and has been withheld. Further, to date the Ombudsman has not taken a different view to that of WorkSafe. I place to one side the pros and cons of release under the OIA since that may involve considerations which differ from those I am required to assess.

[32] Mr Straayer also submitted that a LSO can never be a confidential document. He relies on a judgment of the First-tier Tribunal (Tax Chamber) of the United Kingdom: *Behague v The Commissioner for Her Majesty's Revenue and Customs*.[7]

[33] In that decision, it was held that most of a client care letter from a solicitor's firm to a client on a tax matter was not subject to legal advice privilege as the letter simply set out the terms on which the firm would act.[8]

[34] This is a judgment from another jurisdiction, decided under common law principles.

[35] In *Dixon v Kingsley*, Kós J considered the application of s 54 of the EA to fee notes issued by a client's legal advisor.[9] He observed that the section is more wide-ranging than the common law position.[10] I respectfully agree.

[36] That being so, it is appropriate to apply the statutory test in s 54, rather than common law. I am not assisted by the reasoning which was adopted in *Behague*.

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7 *Behague v The Commissioner for Her Majesty's Revenue and Customs* [2013] UKFTT 596 (TC).
8 At [22]–[28].
9 *Dixon v Kingsley* [2015] NZHC 2044.
10 At [43].

[37] I have, however, considered the possibility of redacting any legal advice, a step which is sometimes taken in New Zealand where there is a clear delineation between both privileged and non-privileged material.[11]

[38] Mr Cain acknowledged that such an approach can occur, but says that to do so in this instance would result in most of the document being redacted, with the balance being of limited utility since it would relate to "administrative information" only. That concession appears to suggest there are some parts of the document which are not privileged, albeit parts which in the submission of counsel are minor and unlikely to be of assistance. Whether that is the case may fall for determination at a later stage. I have concluded that the interests of justice require disclosure now of the non-privileged content, subject to any issues of waiver. I now turn to that topic.

[39] Mr Straayer submitted that several other LSOs had been disclosed by WorkSafe, which meant the Court should conclude there is a waiver of privilege for any apparently privileged material in the 2019 document.

[40] As noted earlier, the focus must be on the particular document. There is no evidence of any waiver of privileged material in that document.

[41] Finally, Mr Straayer asserts that, in effect, because it is claimed WorkSafe employees instructing DKS do not have delegated authority to do so, the claim of legal professional privilege now made via DKS is not shown to have been properly authorised.

[42] This is the very issue which would fall for consideration were it to be concluded the Court has jurisdiction to consider the judicial review claims. It is premature to conclude that DKS either was not, or is not, properly instructed by WorkSafe. At this stage, the Court is entitled to assume that there is a valid appointment for the purposes of the present proceeding before the Court.

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11 *NZ Iron Sands Holdings Ltd v Toward Industries Ltd* [2019] NZZHC 1416 at [30].

Result

[43] Privileged content in the 2019 LSO is to be redacted. Non-privileged content is to be disclosed. For the foregoing reasons, WorkSafe's objection to disclosure is in part ill-founded.

[44] I reserve costs, the timetabling of which I will deal with at a later stage if necessary.

B A Corkill
Judge

Judgment signed at 2.30 pm on 19 July 2022