

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 36
EMPC 233/2022**

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

BETWEEN KIRSTY HILFORD
 Plaintiff

AND BOARD OF TRUSTEES OF WHANGAREI
 BOYS' HIGH SCHOOL
 Defendant

Hearing: 15 December 2022
 (Heard at Whāngarei)

Appearances: A Halse, advocate for plaintiff
 R M Harrison, counsel for defendant

Judgment: 8 March 2023

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mrs Kirsty Hilford has brought a personal grievance against the Board of Trustees of Whangārei Boys High School (WBHS) which is currently under investigation by the Employment Relations Authority.

[2] The de novo challenge brought by Mrs Hilford to the Court concerns whether the Authority was correct to order the destruction of three particular documents held by Mrs Hilford. It did so in an order on 23 June 2022.¹ The Authority took this step

¹ *Hilford v Whangarei Boys High School Board of Trustees* ERA Auckland 3156381, 23 June 2022 (Member Dumbleton).

relying on s 221(d) of the Employment Relations Act 2000 (the Act) which relevantly provides a broad jurisdiction to give directions as are necessary or expedient in the circumstances.

[3] When Mrs Hilford did not confirm that the documents had been destroyed as directed, the Authority issued a compliance order on 6 July 2022.²

[4] On 13 July 2022, Mrs Hilford raised her de novo challenge in this Court. Her representative, Mr Halse, pleaded that the Authority's order to destroy the documents rather than allowing redaction of identifying details was a breach of her right to natural justice under ss 157(2)(a) and 173(1) of the Act, and a breach of her right to justice under s 27 of the New Zealand Bill of Rights Act 1990.

[5] It was also pleaded that the evidence in question was critical to the personal grievance claims which were before the Authority. Mrs Hilford sought remedies that the order be set aside, and that redaction of the students' names and any identifying details be agreed and implemented.

[6] The essence of WBHS' position is that the Authority acted correctly, since the information in question related to the health and welfare of several school students and that Mrs Hilford's natural justice rights were recognised appropriately by a direction that both Mrs Hilford and Mr Halse could apply to the Authority for inspection of the information, which could then impose any conditions that may be necessary for security purposes.³

[7] Believing that at this stage Mrs Hilford had not destroyed the documents as requested, WHBS issued a proceeding seeking a sanction against her for breach of the compliance order.

[8] Prior to the hearing of the challenge, an application for non-publication was made. The application related to three particular documents contained in the bundle of documents which are the subject of the challenge. After hearing the parties, I

² *Hilford v Whangarei Boys High School Board of Trustees* [no citation given] (Member Dumbleton)

³ *Hilford v Whangarei Boys High School Board of Trustees*, above n 1, at [5].

established there was a consensus on this point. I accordingly ordered that the three documents, as well as the names and identifying details of any student of the school, be the subject of a non-publication order.

Brief chronology

[9] Mrs Hilford filed witness statements for the purposes of a 90-day issue which was to be investigated by the Authority on 17 June 2022. Annexed to those statements were documents describing the personal circumstances of certain students at the school. Prior to the investigation meeting, no point was taken as to the confidentiality or otherwise of the documents.

[10] Towards the end of the investigation meeting, Mr Harrison, counsel for WBHS, raised an issue as to whether Mrs Hilford was wrongfully recording the investigation meeting and whether the confidential documents which described the health and personal circumstances of certain students were appropriately possessed by her since as a former employee, she had no legitimate reason to retain them. This request resulted in a fairly strong exchange as to whether or not the documents held by Mrs Hilford should be destroyed.

[11] It may have been the case that in the course of the exchange, a proposal was advanced for Mrs Hilford that the names and identifying details in the documents should be redacted. It is unclear how this issue was treated since it is not referred to in the relevant order of the Authority.

[12] The Authority then issued an order of destruction, stating it was to be complied with immediately. Mrs Hilford was directed to destroy three particular documents. The Authority said it was satisfied the confidentiality interests of the students were paramount. The directions were necessary to protect the information and to prevent any inadvertent breaches of security and privacy. The interests of the school which held this information in trust for parents or guardians should also be protected. The Authority would retain possession and control of the documents and they would be considered by it as it saw fit. Inspection by Mrs Hilford would be permitted on application and as noted, subject to such conditions as may be imposed for security

purposes. Mrs Hilford, or Mr Halse on her behalf, were to confirm to the Authority that the destruction of the documents as ordered had taken place.⁴

[13] Since no confirmation had been given to the Authority as to whether the documents had in fact been destroyed by 5 July 2022, the Authority sent an email to the representatives on that date. Mr Halse was requested to advise whether the orders had been complied with. If not, he was asked to provide an explanation. The email noted that the Authority may consider issuing a compliance order under s 137 of the Act.

[14] On the same day, Mr Halse responded to the Authority, stating that the destruction order was an attempt to derail Mrs Hilford's personal grievance against her former employer. He confirmed Mrs Hilford had no intention of using the documents for any purpose other than to deal with a relevant issue in the relationship problem, namely whether she should have been placed on a higher grade as a Learning Support Assistant at WBHS, given the complexity of the needs of the students she had been dealing with.

[15] Mr Halse stated that Mrs Hilford was willing to redact the names and identifying details of the students identified in the subject documents. He noted that on 8 July 2022, Mrs Hilford would be travelling to the United Kingdom to see her family, and not returning for several weeks. He also said that the threats made to her were inappropriate.

[16] The Authority then considered the matter again. It determined that a compliance order should be issued. Mrs Hilford was required to comply with the destruction order before 8 July 2022.⁵

[17] Mrs Hilford said that immediately on receiving advice of the compliance order, she discussed it with Mr Halse and instructed him to raise a challenge with the Court.

⁴ *Hilford v Whangarei Boys High School Board of Trustees*, above n 1, at [8].

⁵ *Hilford v Whangarei Boys High School Board of Trustees*, above n 2, at [14].

[18] Mrs Hilford then left for overseas, initially for one week in Australia, and then the United Kingdom where she was ill for the first week of her visit. She deleted all the relevant documents from her computer, probably, she says, in the second week of her visit.

[19] As noted earlier, Mr Halse filed Mrs Hilford's challenge on 13 July 2022.

[20] The Authority's preliminary determination on the 90-day issue was issued on 29 August 2022. The Authority found a disadvantage grievance had not been raised within 90 days but that an unjustified dismissal grievance had been raised within 90 days.⁶ An application for leave to challenge the determination was subsequently brought; this has yet to be heard by the Court.

[21] When Mrs Hilford returned from overseas, she proceeded to destroy a hardcopy of one of the documents she possessed. It was the only hardcopy document she had. It was destroyed by burning.

[22] Mrs Hilford told Mr Halse she had taken this step. It appears there was no discussion as to whether the Authority should be informed of any of the steps taken by Mrs Hilford.

[23] Turning to the arrangements for the hearing of the challenge, when Mrs Hilford filed her evidence, she did not state that the subject documents had been destroyed.

[24] Because this clarification was not given, WBHS brought an application for a sanction.

[25] On 12 December 2022, Mr Halse filed a memorandum confirming that Mrs Hilford had destroyed the documents. He appeared to imply that this happened within the timeframe set by the Authority – that is, by 8 July 2022 – but on the evidence given to the Court that was not the case.

⁶ *Hilford v Whangarei Boys High School Board of Trustees* [2022] NZERA 425.

[26] Difficulties then arose with regard to the preparation of a common bundle for the purposes of the challenge which of course required the Court to consider the status of the documents that had been destroyed. Mr Halse wanted the documents which had been attached to Mrs Hilford's original witness statement to be included in the Employment Court bundle, but neither he nor Mrs Hilford had access to them

[27] As a side issue, I record that CultureSafe Limited (in liquidation), was the entity which had, as the Court understands it, been the original conduit for the receiving and sending of Mrs Hilford's relevant documents. At the hearing, there was a suggestion the liquidator of the company had control of the material, but whether this included Mrs Hilford's documents is unknown.

[28] In the witness statement filed by Mrs Hilford in the Court, she referred to relevant documents by a means of a numbering system. It appeared that some of the documents to which she proposed to refer were the documents which had been destroyed.

[29] Mr Harrison, however, was concerned as to whether this was in fact the case, since the numbering system was in some respects different from that which had been adopted in the Authority. He raised this issue with Mr Halse.

[30] Accordingly, on 8 December 2022, Mr Halse wrote to the Authority on behalf of Mrs Hilford, explaining that the subject documents were urgently required for the purposes of the challenge in the Court, and to complete Mrs Hilford's brief of evidence which had been directed for filing on 5 December 2022. He asked the Authority officer to check with the Member with a view to the documents being provided, either to Mr Halse, or directly to the Registry of the Court.

[31] On 9 December 2022, the Authority officer stated that the Member had indicated he was presently on leave and would not attend to matters until he returned. He was expected to be back in the office on 15 December 2022 (this was the date of the hearing of the challenge), and that he would have an urgent two-day investigation meeting to preside over on 15 and 16 December 2022. Accordingly, the documents were not provided by the Authority at that time. Nor were they provided subsequently.

[32] The issue came before me at a telephone directions conference on 13 December 2022. I was able to clarify that Mr Harrison possessed the three particular documents which had been identified in the Authority's determinations. By consent, these were supplied by him to Mr Halse, as a result of which Mrs Hilford was then able to interpolate the correct documentary references into her witness statement.

[33] At the hearing of the challenge, the Court was advised that there were 10 further documents which had been destroyed by Mrs Hilford – she believed this was necessary in light of the destruction order. Mr Harrison no longer possessed these. However, it emerged the Authority would have held, and probably does hold, those documents.

[34] In summary, at the hearing of the challenge Mrs Hilford and Mr Halse held copies of the three subject documents, without objection.

[35] At the hearing, I pointed out that there was now an inconsistency between the position taken by the Authority, and the position taken in the Court. Mrs Hilford and Mr Halse were authorised to hold the documents for the purposes of the challenge, but not for the purposes of the investigation in the Authority.

[36] Mr Harrison responded by stating that the Authority's order bound the parties, so that the documents they now held would have to be destroyed. I indicated it was unlikely that the Authority could by such an order bind the parties for the purposes of a challenge being heard by the Court.

[37] Mr Harrison also submitted that consideration could be given to the destruction of the documents at the conclusion of the hearing of the challenge.

Submissions

[38] A summary of Mrs Hilford's argument is that:

- (a) Natural justice was not observed in respect of a continuing investigation.

- (b) The steps taken by the Authority were excessive and could have been dealt with on the same basis as occurred in the Court – that is, by the making of a non-publication order, and/or redaction of identifying details.
- (c) Mrs Hilford’s ability to prepare properly for the investigation of the personal grievance was compromised, as demonstrated by the unsuccessful attempt to obtain documents from the Authority prior to the hearing of the challenge in the Court.

[39] The summary of WBHS’ argument is that:

- (a) Natural justice was observed.
- (b) A correct balance was struck between observing confidentiality of highly sensitive documents on the one hand and allowing for the possibility of recourse to the documents if relevant at any later stage of the investigation.
- (c) As the evidence at the hearing of the challenge confirmed that Mrs Hilford had destroyed the documents, WBHS no longer sought a sanction against her.

Legal issues

[40] There is no doubt that the Authority has an obligation to observe the principles of natural justice, as expressly stated in ss 157 and 173(1) of the Act.

[41] Several particular legal points, however, required consideration. The first relates to the issue of confidentiality of documents. In *UXK v Talent Propeller Limited* I addressed this issue at some length.⁷ As I indicated in that judgment, guidance on the question of confidentiality of information is provided by s 69 of the Evidence Act 2006 (EA).⁸

⁷ *UXK v Talent Propeller Ltd* [2022] NZEmpC 101, [2022] ERNZ 396.

⁸ At [76]–[88].

[42] The section provides:

69 Overriding discretion as to confidential information

- (1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
 - (a) a confidential communication;
 - (b) any confidential information;
 - (c) any information that would or might reveal a confidential source of information.

- (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
 - (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
 - (b) preventing harm to—
 - (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
 - (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
 - (c) maintaining activities that contribute to or rely on the free flow of information.

- (3) When considering whether to give a direction under this section, the Judge must have regard to—
 - (a) the likely extent of harm that may result from the disclosure of the communication or information; and
 - (b) the nature of the communication or information and its likely importance in the proceeding; and
 - (c) the nature of the proceeding; and
 - (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
 - (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
 - (f) the sensitivity of the evidence, having regard to—
 - (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and

- (ii) the extent to which the information has already been disclosed to other persons; and
 - (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.
- (4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.
- (5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[43] Under s 69(3) of the EA, consideration must be given to a range of factors. In this particular case, those which are of critical importance relate to the availability of means of preventing or restricting public disclosure of the evidence if it is given, and the sensitivity of that information. Under s 69(4), any other relevant matters may be considered. As I will discuss below, the other matter to be considered relates to the natural justice considerations raised for Mrs Hilford.

[44] The second legal point which arises relates to s 179(5) of the Act. The subsection precludes a challenge being brought about the procedure which the Authority has followed, is following, or is intending to follow. This point was not taken at the hearing. A related issue is whether s 188(4) of the Act applies. It describes certain restrictions on the advice or directions that the Court may give to the Authority. I shall also return to these issues later.

[45] The third legal point relates to the fact that the challenge was brought on a de novo basis. The thrust of the case as presented by both parties focused on whether the Authority was right or wrong to have made the orders it did. However, in a challenge such as the present, the focus is not on the merits of the orders made by the Authority; the Court has the obligation to reconsider the issues afresh.

Analysis

[46] The position in summary at the present stage is:

- (a) All relevant documents tendered by Mrs Hilford to the Authority were destroyed by her, including the three particular documents which the Authority had identified.
- (b) By reason of the processes undertaken prior to the hearing of the challenge the position now is:
- There are 10 documents held only by the Authority. Copies of these can therefore be requested by the parties and provided by the Authority unless there is a legal impediment which would preclude such a possibility.
 - Otherwise, both parties now have all the documents in question for preparation purposes, not only for the purposes of the present challenge but also for the further proceeding which has been filed by Mrs Hilford in the Court, wherein she seeks leave to bring a challenge to the determination made by the Authority. This proceeding has yet to be heard.
 - Turning to the position in the Authority, at the date of the hearing in this Court the investigation of the dismissal grievance had yet to be concluded.
 - As things stood at that time, Mrs Hilford and Mr Halse held copies of the relevant subject documents at least for the purposes of the challenge, but not for the purposes of the remaining investigative steps in the Authority.
 - It is accordingly necessary to resolve the question as to whether the order for destruction should stand.

[47] I turn to an assessment under s 69 of the EA. In my view, a fair balancing of natural justice and confidentiality rights can be achieved. Notwithstanding the undoubted importance of maintaining confidentiality of students' names, identifying

details and private information, these factors have to be balanced against the parties' relevant natural justice rights which entitle them to a fair hearing. The mechanism proposed by the Authority did not achieve that balance, as can be seen from the fact that when a proper request was made for the documents to be provided for the purposes of the challenge – if necessary to the Court directly – no appropriate step was taken on behalf of the Authority.

[48] I am also concerned that access to the documents for the purposes of the investigation was only available with leave, which could have implications for legitimate preparation, as well as use at an investigation meeting.

[49] I consider that the effect of the orders made were substantive rather than merely procedural. They had the potential to impact significantly on Mrs Hilford's ability to present her case.⁹ Consequently, s 179(5) of the Act was not applicable. Turning to s 188(4), former Chief Judge Colgan addressed its interface with s 179(5) in *Morgan v Whanganui College Board of Trustees*.¹⁰ In short, if a problem clears the s 179(5) hurdle, any subsequent direction by the Court will not likely engage s 188(4). That is the case here.

[50] In my view, a fair approach is as follows:

- (a) In both the Authority and the Court, there should now be a redaction of all students' names in any documents that may be placed before either body. Similarly, there should be orders of non-publication of names and identifying details, as has been accepted.
- (b) The possibility of destruction of documents held by Mrs Hilford is an issue that can be considered by the Authority and/or the Court in due course, in respect of any documents that have been placed before either body.

⁹ Moreover, the orders to destroy documents could not be regarded as being merely procedural as they did not relate to the manner in which the Authority would conduct its business, but to the property rights of a party.

¹⁰ *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55 at [34]–[39].

- (c) For the purposes of the intended challenge to the determination dismissing the disadvantage grievance, if leave is granted, that relationship problem will likely remain in the Court. Thus, the issue of destruction will, in due course, be for the Court to consider.
- (d) With regard to any documents before the Authority in connection with the dismissal grievance, once a determination on that topic has been issued, and if no challenge is brought by either party, the Authority will be able to consider the issue of destruction after hearing from the parties. If a challenge is brought, however, those documents should be available for consideration by the Court. It would then be the Court's responsibility to consider the issue of destruction at the end of the process, including for the purposes of any subsequent appeal(s).
- (e) The parties may request provision by the Authority of the 10 documents which neither currently possesses, if one or other, or both, consider this is appropriate for the presentation of their case.

[51] Because this judgment replaces the determinations of the Authority, which were subject to challenge, they are of no further effect.

[52] The defendant's application for a sanction is dismissed.

[53] Costs are reserved. If these are unable to be agreed between the parties within 21 days, an application is then to be made. Any response is to be given 21 days thereafter.

B A Corkill
Judge

Judgment signed at 4.15 pm on 8 March 2023