Employment Court of New Zealand

Aarts v Barnados New Zealand [2013] NZEmpC 85 (20 May 2013)

Last Updated: 31 May 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 85

ARC 14/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JOHAN AARTS Plaintiff

AND BARNARDOS NEW ZEALAND First Defendant

AND COMMISSIONER OF NEW ZEALAND POLICE

Second Defendant

AND MINISTRY OF SOCIAL DEVELOPMENT

Third Defendant

AND THE PRIVACY COMMISSIONER Fourth Defendant

AND THE OMBUDSMAN Fifth Defendant

AND MINISTRY OF SOCIAL DEVELOPMENT

Sixth Defendant

AND THE SERIOUS FRAUD OFFICE Seventh Defendant

AND THE DIRECTOR OF HUMAN RIGHTS PROCEEDINGS

Eighth Defendant

AND THE INDEPENDENT POLICE CONDUCT AUTHORITY Ninth Defendant

AND LANCE LAWSON BARRISTERS & SOLICITORS

Tenth Defendant

JOHAN AARTS V BARNARDOS NEW ZEALAND NZEmpC AK [2013] NZEmpC 85 [20 May 2013]

Hearing: 11 and 13 March 2013

And by memoranda filed on 18 and 25 March, 4, 12, 15, 24 and 30

April, and 8 May 2013

(Heard at Auckland and by video link with Wellington)

Appearances: Robert Lee, advocate for plaintiff

No appearance for first defendant (appearance excused)

Sally McKechnie, counsel for second, third and sixth defendants Katrine Evans and Delaney Mes, counsel for fourth defendant (written submissions filed)

John Pohl, advocate for fifth defendant (written submissions filed) Michael Quigg, counsel for seventh defendant (on 11 March 2013) Gillian Service, counsel for eighth defendant (on 11 March 2013) Francis Cooke QC, counsel for ninth defendant (on 11 March 2013) Andrew Schulze, counsel for tenth defendant (on 11 March 2013)

Judgment: 20 May 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The plaintiff 's challenge to the Employment Relations Authority's determination dismissing his claims against the second to tenth defendants (inclusive) is dismissed.

B The plaintiff 's claims against the seventh, eight and ninth defendants having been discontinued by the plaintiff, his claims for penalties against the second, third, fourth, fifth, sixth and tenth defendants are dismissed.

C The plaintiff 's challenge against the Authority's refusal to require the second defendant to produce on summons certain evidential videotape recordings is upheld in part and dismissed in part.

D The plaintiff 's challenge to the Authority's costs awards in favour

of the second to tenth defendants (inclusive) is dismissed.

E The second, third, fourth, fifth, sixth and tenth defendants are entitled to costs against the plaintiff.

REASONS

[1] There are four issues for decision in this challenge by hearing de novo from an interlocutory determination of the Employment Relations Authority.1 They arise from the Authority's following conclusions.

[2] First, the Authority determined that the claims by Johan Aarts for penalties against the Commissioner of Police, the Ministry of Social Development (more correctly the Chief Executive of the Ministry of Social Development), and Lance Lawson, Barristers & Solicitors of Rotorua, were not brought within the statutory time for doing so and were therefore dismissed. This is the first issue that is challenged by Mr Aarts.

[3] Second, the Authority determined that the Privacy Commissioner, the Ombudsman, the Serious Fraud Office (again more correctly the Chief Executive of the Serious Fraud Office), the Director of Human Rights Proceedings, the Independent Police Conduct Authority, and Lance Lawson, Barristers & Solicitors of Rotorua, did not incite, instigate, aid or abet Barnardos New Zealand to breach Mr Aarts's employment agreement and dismissed his claims to this effect against those defendants. The plaintiff's challenge to these determinations by the Authority is the second issue the subject of this case.

[4] Third, the Authority declined to issue a summons requiring the Commissioner of Police to provide Mr Aarts with a copy or copies of specified evidential videotaped interviews. He challenges this determination.

[5] Finally, Mr Aarts challenges the awards of costs made by the Authority in favour of some of the defendants having dismissed the proceedings against them.

[6] Between the two hearing days, the scope of the challenge was reduced significantly when Mr Aarts discontinued his challenges in respect of the seventh

defendant (the Serious Fraud Office), the eighth defendant (the Director of Human

1 [2012] NZERA Auckland 22.

Rights Proceedings), and the ninth defendant (the Independent Police Conduct

Authority). No costs issues arise in respect of those defendants.

[7] That leaves as defendant parties the second defendant (the Commissioner of Police), the third and sixth defendants (the Chief Executive of the Ministry of Social Development), the fourth defendant (the Privacy Commissioner), the fifth defendant (the Ombudsman), and the tenth defendant (Lance Lawson, Barristers & Solicitors) plus, of course, the first defendant (Barnardos New Zealand Inc) which has not participated in this aspect of the case.

[8] To understand the plaintiff's challenge, the following brief background needs

to be explained.

[9] Mr Aarts was employed by Barnardos New Zealand (Barnardos) and claims that he was dismissed unjustifiably by it. Mr Aarts's dismissal came about as a result of communications from Police and the Child Youth & Family Service (CYFS) of the Ministry of Social Development to his employer about complaints allegedly made by children whom he was counselling. These allegations were said to have been made during specialist evidential interviews of the children and recorded on videotapes. Those tapes were and remain in the custody of the Police. Despite his repeated requests of the Commissioner of Police and attempts through other agencies to see the videotapes over the period of almost seven years since his dismissal, Mr Aarts has not been able to do so. He both denies any impropriety in his counselling role and suspects that the interviews of the children did not disclose what was passed on to his employer and resulted in his dismissal.

[10] The merits of his claim that he was dismissed unjustifiably are yet to be investigated by the Employment Relations Authority. Mr Aarts joined the second to tenth defendants as respondents in his Authority personal grievance proceedings against Barnardos. He claimed that, individually or in different combinations, they "conspired" with his employer to dismiss him unjustifiably and otherwise to breach his employment agreement, making them liable for penalties under the Employment Relations Act 2000 (the Act).

[11] The circumstances in which each of the second to tenth defendants was joined to Mr Aarts's claim in the Employment Relations Authority, albeit in some cases several years after it was made against Barnardos, are as follows. The second defendant and the Chief Executive of the Ministry of Social Development (who, for reasons that are not entirely clear, is both the third and sixth defendant) are said to be liable because their representatives misled Barnardos by supplying false information about the allegations against Mr Aarts. The claims against the Privacy Commissioner, the Ombudsman, the Serious Fraud Office, the Director of Human Rights Proceedings, and the Independent Police Conduct Authority all arose out of what Mr Aarts perceived to be the parts those persons or bodies played in frustrating his attempts to see and hear the contents of the evidential videotapes. The claim against the tenth defendant, which was the firm of solicitors engaged by Mr Aarts in anticipation of his dismissal in August 2006 and which raised his personal grievance and sought access to the tapes before its instructions were terminated in late 2006, is based upon an allegation that it collaborated with police officers to ensure that Mr Aarts did not get to see or hear the evidential videotapes.

The law

[12] Section 134 ("Penalties for breach of employment agreement") of the Act provides materially, at subs (2), that every person who incites, instigates, aids, or abets any breach of an employment agreement, is liable to a penalty imposed by the Authority.

[13] Section 135 ("Recovery of penalties") of the Act provides, in subs (5), that an action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of the date when the cause of action first became known to the person bringing the action, or the date when the cause of action should reasonably have become known to the person bringing the action.

[14] Mr Aarts was dismissed by Barnardos with effect from 14 August 2006 on grounds of serious misconduct and his employment agreement with Barnardos ceased as from that date.

[15] Because Mr Aarts's employment with Barnardos ended with his dismissal on

14 August 2006, there could only have been a breach by Barnardos of Mr Aarts's employment agreement on or before that date. For any person other than the employer (or the employee) to be liable for inciting, instigating, aiding or abetting a breach of an employment agreement, there must have been a breach by one of the

parties (ie Barnardos) to the agreement: *Musa v Whanganui District Health Board.*2

Mr Aarts claims that Barnardos breached their employment agreement and the remaining defendants were parties to that breach or those breaches by his employer. Whether a person can aid or bet another's breach only after that other's commission of the breach is an important question, the decision of which is now not essential to Mr Aarts's claims against the defendants other than his employer.

[16] Mr Aarts's statement of claim does not specify clearly the breach or breaches of his employment agreement by Barnardos to which he says the remaining defendants were parties. For the purpose of this challenge I am prepared to accept that the events leading to, and the dismissal itself, may have been or involved a breach or breaches by the employer of express or implied or statutory terms and conditions of his employment. That is not to find, of course, that Barnardos was in breach: that will be determined eventually when the substantive grievance is heard and decided. This assumption is made for the purpose of determining whether the relevant defendants might have been parties to such a breach/breaches if it/they occurred. Mr Lee confirmed at the start of the hearing that the breach by Barnardos, to which others were parties, was its unjustified dismissal of him.

[17] Statutorily, the dismissal of an employee or subjecting an employee to a disadvantage in his or her employment will, if unjustified, amount to a personal grievance. Although the statutory personal grievance is founded more broadly than on breach of contract, breaches of employment contracts may, if they include unjustified dismissals or result in unjustified disadvantages in employment, constitute those personal grievances. So it follows that to disadvantage or to dismiss an employee unjustifiably, may amount to, or at least involve, a breach of the term implied by statute that an employer will not do so. Looked at another way, a

dismissal or unjustified disadvantage in employment may also amount to a breach of

2 [2010] NZEmpC 120; [2010] ERNZ 236.

the longstanding and well recognised implied terms and conditions of trust, confidence and fair dealing between the parties to an employment agreement.

[18] So, for the purposes here of determining whether proceedings against a party should be struck out without an examination of the circumstances on their merits, an unjustified dismissal from, or an unjustified disadvantage in, employment will be assumed to amount to a breach of that agreement.

Aiding or abetting a concluded breach?

[19] The case raises, apparently for the first time in this jurisdiction, the question whether a person can be a party to the breach of an employment agreement which is a concluded and not a continuing breach. More specifically, in terms of Mr Aarts's allegations in this case, can a person be a party to a breach by the employer of the employment agreement (which was the unjustified dismissal of the employee) where the allegation against the party is that the party failed or refused to obtain evidence that the grievant wishes the Authority to consider in his case against the employer?

[20] The four acts specified in s 134(2) of the Act are inciting, instigating, aiding and abetting. There is little doubt that inciting and instigating refer to acts or omissions in the lead-up to or at the time of the breach. Put another way, it cannot be said that the allegations against the remaining defendants in this case, referring to things done or not done after Mr Aarts's dismissal, could amount to incitement or instigation of that dismissal.

[21] That leaves aiding or abetting which are not so clearly acts preparatory to, or involved in, the breach as inciting or instigating.

[22] Bearing in mind the caution that needs to be taken in applying criminal law concepts, it is nevertheless significant that, unlike s 312 of the Crimes Act 1961, the Employment Relations Act does not provide the civil penalty equivalent of the offence of being an accessory after the fact. In criminal law analogy terms, what Mr Aarts has alleged against the remaining defendants about their acts or omissions after

his dismissal, might be categorised as being accessories to the breach after its occurrence, but there is no statutory provision for such liability.

[23] *Black's Law Dictionary*3 defines aiding and abetting as to "assist or facilitate the commission of a crime, or to promote its accomplishment".

[24] *Butterworth's New Zealand Law Dictionary*4 contains the following definition: "To aid is to give actual assistance in the commission of the offence. To abet is to instigate or incite another in the commission of an offence."

[25] It may be that there is a degree of tautology in s 134(2) if abetting means incitement or instigation.

[26] My research indicates an absence of authority on this question: it appears only to have been investigated by the Authority in this case. The Authority concluded that one may be able to aid or abet a breach of an employment agreement after dismissal or other conclusion of the employment where there are ongoing rights and obligations such as dealing with confidential information or restraints on competition. That is clearly so. In the same category would be a breach that continues even after the employment has ended. A hypothetical example might include a contractual obligation to provide a former employee with a job reference. The ongoing refusal by the former employer company to provide such a reference might be aided or abetted by the managing director of the company, making that person potentially liable for a penalty for aiding or abetting the ongoing breach. That is not, of course, the situation here but illustrates the point.

[27] I have already referred briefly to the need for caution in applying too readily criminal law concepts of party liability. That is despite the leading employment law texts in New Zealand encouraging an apparently indiscriminate application of s 66 of the Crimes Act. For example, *Brooker's Employment Law* states:5

...the wording is clearly drawn from s 66 of the Crimes Act 1961. Cases under that section can be referred to by way of analogy. In general, it can be

3 *Black's Law Dictionary* (9th ed, Thomson Reuters, United States) at 81.

4 Peter Spiller *Butterworth's New Zealand Law Dictionary* (7th ed, LexisNexis, Wellington) at 14.

5 At ER134.07.

said that the words will embrace any person who encourages, or in any way assists, any person in the breach of an employment agreement, no matter how slight the degree of participation may have been.

[28] And, similarly, *Mazengarb's Employment Law* notes:6

The concept of inciting, instigating, aiding, or abetting has been interpreted extensively in cases turning on the liability of secondary parties in criminal law (see the commentary on s 66 of the Crimes Act 1961 in Garrow and Turkington, *Criminal Law in New Zealand*, 7th ed, 1991).

[29] In 2008, however, the Court of Appeal cautioned against drawing too heavily on criminal law concepts in *New Zealand Bus Ltd v Commerce Commission.*7 The Court was there dealing with s 83(b) of the Commerce Act 1986 which makes liable to a civil penalty a person who aids, abets, counsels or procures any other person in the acquisition of a business which has the effect of substantially lessening competition. Applying a criminal law standard, s 83(b) would require that accessories know of the essential facts that make up the contravention and intentionally participate in it. The Court of Appeal considered that this would create

practical difficulties under the Commerce Act where the essential facts in competition cases are often less certain and more contentious than in criminal cases. The Court of Appeal noted that "It is true that much of the language of s 83 mirrors the language in s 66 of the Crimes Act 1961, relating to parties to offences" but then stated:

[131] First, is the strict criminal law analogy the correct approach? Generally, the law should only resort to criminal law principles where the particular acts complained of are always harmful to society. But the harm caused by "illegal" acts in competition law terms can be much more ambiguous and parties can "accidentally" breach the statute. ...

[132] Indeed, although it did not give any reasons for this, this Court has already shown real caution about being drawn into a rigid "classification" of the pecuniary penalties provisions in the Act. ... As Cooke P put it in *Port Nelson Ltd v Commerce Commission* [1994] NZCA 528; [1994] 3 NZLR 435 at p 437:

"The proceeding . . . is indeed as the Act says a penalty proceeding. It has some analogy to a criminal proceeding; it has some analogy to a civil proceeding; it has been called a hybrid; but we are content to take the Act's own term, a proceeding for the recovery of pecuniary penalty, and it is true that heavy maximum penalties are provided."

6 At ERA134.9.

7 [2007] NZCA 502; [2008] 3 NZLR 433 (CA).

[30] The Court concluded, ultimately, that given the policy objectives behind competition law being distinct from criminal law, a lower threshold of "dishonest participation" is required for the purposes of the Commerce Act.

[31] Interestingly, however, in a subsequent judgment, although dealing with different legislation, the Court of Appeal took an arguably different approach later that year in *Body Corporate 202254 v Taylor.*8 The civil penalty provisions considered in that case were under s 43(1)(b) of the Fair Trading Act 1986 which makes it an offence to aid, abet, counsel or procure any person in committing an offence under the Act. At [66] the Court of Appeal noted:

Although s 43 addresses civil relief, it is significant that the subsection which directly provides for party liability uses the language of the criminal law, namely "[a]iding, abetting, counselling, or procuring"... And it is perfectly clear that the criminal tests for party liability apply...

[32] Whether a person can aid or abet another to breach an employment agreement when the alleged aider's or abetter's acts or omissions occurred in respect of a concluded and finite breach, is a difficult question. It is not the same as was examined by the Court of Appeal in the *New Zealand Bus* case. It is an essential element of s 134(2) of the Act that the alleged party to the breach is in fact aware of the employment relationship at the time of breach and must have intended

deliberately to interfere with it: *Credit Consultants Debt Services NZ Ltd v Wilson.*9

[33] In this instance, also, and on reflection, I consider it is not only unnecessary but would be inappropriate to determine this interesting but difficult question in this case. That is because breach of time limitations by the plaintiff means that his claims against the remaining second to tenth defendants (inclusive) must be dismissed. I would, therefore, leave open for decision in another case the question whether a person can aid and/or abet, by an act or omission later in time than the breach of an employment agreement, that breach so as to make the aider or abetter liable to a penalty. What I can and do say is that in determining this question, the Court will have to be careful to avoid any slavish adherence to criminal law

concepts, despite the apparent similarities of nomenclature.

8 [2008] NZCA 317; [2009] 2 NZLR 17 (CA).

9 [2007] ERNZ 252.

Time limitations for bringing penalty claims

[34] The 12 month period under s 135(5) of the Act commences either when the cause of action first became known to the person bringing the action, or the date when the cause of action should reasonably have become known to the person bringing the action. The "cause of action" is not, however, in this case, the breach by the employer of the employment agreement. The cause of action under s 134 is the inciting, instigating, aiding or abetting of the breach by someone other than the employer. So it follows that, although Mr Aarts may have known or should reasonably have known of a breach or breaches by his employer by the time of his dismissal on 14 August 2006, he may not have known or should not reasonably have known of the incitement, instigating, aiding or abetting of that breach by another person or persons until a later time. If that is so, the limitation period of 12 months will begin to run from that later time.

[35] Some of the plaintiff's claims are of incitement or instigation (as well as aiding and abetting) the breach. Mr Aarts alleges that staff of both the Commissioner of Police and of the Chief Executive of the Ministry of Social Development, supplied false information to his employer, Barnardos, which led or at least contributed significantly to its dismissal of him. He says that he did not find out, and nor could he reasonably have found out, sooner about these false accounts and their significance to his dismissal, until long after he was dismissed and had undertaken investigations into the events leading to his dismissal, including the obtaining of documentary records from these agencies and from his employer. His case against the other defendants was, and in two instances still is, that they were parties to the breach by doing or failing to do things that they were obliged in law to do at his request or requirement, to assist him in obtaining evidence that his dismissal was unjustified.

Second, third and sixth defendants' time limitations

[36] The following evidence satisfies me on the balance of probabilities that Mr Aarts knew, or should reasonably have known, of his causes of action against the Commissioner of Police and the Chief Executive of the Ministry of Social

Development, by no later than 3 April 2008. The 12 month limitation period under s

135(5), therefore, expired on 4 April 2009. These claims were not, however, made until 18 February 2011, that is about 22 months out of time or, put another way, after a delay of almost twice the same period as he had within which to bring those claims.

[37] As Ms McKechnie pointed out, there are several documents which illustrate both the state of Mr Aarts's knowledge or what he ought reasonably to have known in this regard. There are several key ones upon which counsel relied particularly. The first is an email from his advocate, Mr Lee, to Police on 10 July 2007. In it, Mr Lee wrote, among other things:

3. It seems to us that the Police Officer concerned is the one seeking protection from having his work reviewed and tested.

...

5. ... an individual Police Officer ... has the power to destroy a good

[man's] career by writing an emotive report of questionable quality and accuracy ...

6. Of course, the matter of the Police Officer misinforming the employer about a further pending Police Report relating to the [Y] Children is also an issue ...

[38] Second was a letter dated 30 October 2007 to the Privacy Commissioner from counsel then acting for Mr Aarts. This was a formal letter which asserted that the New Zealand Police "[a]re protecting their own officer who was involved in the initial interview process who has made serious errors in that process."

[39] On 20 February 2007, shortly after Mr Aarts dispensed with the tenth defendant's services and engaged new solicitors, his then counsel wrote to Police (Detective A)10 referring to a copy of the detective's report to Barnardos's Regional Manager. The lawyer's letter said:

You may be aware that the information contained in that report in conjunction with the information you discussed with Ms Knowles on 7 June

2006 has proved sufficient for Barnardos to terminate Mr Aarts employment.

10 Mr Aarts has made serious allegations of improper and even potentially criminal misconduct against this police officer. The officer has not been a witness and has had no opportunity to respond to, or otherwise deal with, these allegations. In these circumstances, I will identify him only by the words "Detective A".

Mr Aarts wishes to view the tapes of the interviews with the children as soon as possible. If he is unable to do this he faces

loss of his career based on a statement made by, in his view, an unreliable child witness from a dysfunctional family.

[40] On 31 October 2007 Mr Aarts's advocate Mr Lee emailed Police stating,

among other things:

Without doubt, Barnardos relied on the Police Report by [Detective A] and even quoted from it during a meeting I attended. Indeed that was the purpose of the meeting to give Mr Aarts an opportunity to respond to it.

[41] Next, among these key documentary indicators of the state of Mr Aarts's knowledge is a letter from him to the Ombudsman dated 11 March 2008. This was the first piece of correspondence from Mr Aarts to the Ombudsman and so outlined the background to his complaint including his dealings with Police and request for copies of the videotaped interviews. In the course of this lengthy letter, Mr Aarts referred to the detective principally responsible for the handling of the video interviews. Mr Aarts's letter included the following passages:

[Detective A] of the Rotorua Police has made a false statement in his report to Barnardos dated June 2006, where he claimed that:

"The Police and Child Youth and Family although do accept that the behaviour is one of criminal [offence], nevertheless, the behaviour or actions described by the girls is believed to be very inappropriate given the circumstances in which they occurred".

...

2. I believe [Detective A[has falsified his report, confident that by not charging me, he believed the Evidence Regulations would deprive me of my right to view the video taped evidence he used against me. See his letters dated 26/9/2006 & 9/3/2007).

...

4. Embarrassing and incriminating contents are not a valid [excuse] for declining an Official Information Request.

[42] On 3 April 2008 Mr Aarts wrote, in a long letter to the Privacy Commissioner, about these matters and in particular about the synopsis of the videotaped conversations that Police had provided to him and to the Privacy Commissioner:

Contrary to your view ***"the synopsis provided by the Police is sufficient for the purposes of principle 6 of the Privacy Act",*** I believe it is **impossible** for the synopsis to be so for the following reasons

1. The synopsis does not include the questions asked by the interviewer (which may have been contrary to accepted interviewing practices). ...

...

I believe the determination by the Police to withhold these tapes from me is explicable only by the contents of the Videotaped Evidential Interviews containing information that may embarrass or incriminate them, which is not a valid reason for declining an application under the Privacy Act.

The fact remains that [Detective A] acted upon the Videotaped Evidential interviews by writing to my employer in June 2006, which led directly to my termination. ...

...

I consider that the Police are withholding from me the Videotaped Evidential interviews that were relied upon by [Detective A] (see paragraph one of

letter dated June 2006 from [Detective A]) when he made a decision to write to my employer in June 2006 and subsequently telephoned them on the 27th July 2006. This affected me by compromising my reputation and standing with my employer, leading directly to my termination.

...

... It also adds weight to my view that the Police have something to hide,

which is contained on the Evidential Video Tapes.

...

Barnardos confidence in me was shaken by [Detective A's] letter dated June

2006 and was finally lost completely as a direct result of [Detective A] contacting Barnardos by telephone on the 27th July 2006 in relation to the 3rd and 4th of the Videotaped Evidential interviews. Action was taken by Barnardos against me on the

word of [Detective A].

In my meeting with Barnardos on the 8th August 2006, Beth Salter read excerpts from a Transcript of the Videotaped Evidential interviews, which she claimed was provided to her by Heather Farr of CYFS. These excerpts, according to the transcripts, are accurate.

To suggest that Barnardos did not rely on the transcripts of the Videotaped Evidential Interviews, the Police report dated June 2006 and the information supplied by [Detective A] verbally on the 27th July 2006 is entirely false. In fact, they are the whole basis of the reasons given for dismissing me.

[43] There is further supporting evidence which Ms McKechnie helpfully summarised in an appendix to her written submissions. These documents, all of which were created in 2007 or 2008, include communications by Mr Aarts himself, his advocate, and his then counsel to Police, the Privacy Commissioner, and the Ombudsman. I will not set out that evidence in detail but it tends to confirm the state of Mr Aarts's knowledge about the involvement of Police and the Ministry of Social Development in the events leading to, and surrounding, his dismissal in 2006.

[44] This evidence satisfies me that, pursuant to s 135, the plaintiff first knew, or should reasonably have known of, his causes of action against the second, third and

sixth defendants no later than on 3 April 2008 and most probably earlier than that date. The 12 month period within which the plaintiff had to bring his claims for penalties expired, at the latest, on 4 April 2009. The claims against these defendants were not made until 18 February 2011, substantially out of time. The plaintiff's causes of action against the second, third and sixth defendants must therefore be dismissed.

The Privacy Commissioner

[45] Mr Aarts's claim against the fourth defendant, the Privacy Commissioner, has not been settled and must be decided. He claims that this defendant incited, instigated, aided or abetted Barnardos in its breach of his employment agreement. The Privacy Commissioner, through counsel, filed written submissions for the Court but did not seek to add to these at the hearing.

[46] The Privacy Commissioner supports the Authority's conclusions in striking out the proceedings against her. She says that she could not have aided or abetted others (and, in particular, Barnardos as Mr Aarts's former employer) to breach his employment agreement.

[47] The Privacy Commissioner's role in these matters was to be the statutory recipient of a complaint of interference with privacy made by Mr Aarts and, subsequently, a complaint against the plaintiff by the mother of the children the subject of the videotaped interviews. The Privacy Commissioner says that her receipt and investigation of these complaints had no connection with Mr Aarts's employment by Barnardos which had ceased almost a year before his complaint was made to the Privacy Commissioner. Mr Aarts's real complaint against the Privacy Commissioner is that she did not make available to him, or require other defendants to make available to him, copies of the videotaped interviews.

[48] Mr Aarts's complaint was made on his behalf by his then solicitor (not the tenth defendant) on or about 6 June 2007. As counsel for the Privacy Commissioner submits, the complaint related to the plaintiff's request to the Police of 19 September

2006 for copies of the evidential videotapes. On 2 August 2007 the Privacy

Commissioner notified the Commissioner of Police about the complaint. During the Privacy Commissioner's investigations, on 24 September 2007, the Police provided Mr Aarts with a synopsis of the content of the videotaped interviews. Subsequently, on 12 May 2008, the Privacy Commissioner concluded her investigation into Mr Aarts's complaint. This was advised by letter to Mr Aarts of that date.

[49] The Privacy Commissioner concluded that the tapes in their entirety were not the plaintiff's personal information. The Privacy Commissioner pointed out that under s 42 of the Privacy Act, it was open to an agency to provide access to information that was contained on videotapes by providing an excerpt or summary of the contents which the Privacy Commissioner was satisfied the Police had done.

[50] The Privacy Commissioner concluded that Mr Aarts's submission that the synopsis was not sufficient (because it did not include the questions asked by the interviewer or reflect the tone of the conversation) was not something that the Privacy Commissioner could deal with because such information was not Mr Aarts's personal information.

[51] The Privacy Commissioner recorded that whilst the Police had initially been prepared to allow Mr Aarts and his legal representative to view the videotapes, that offer had been withdrawn when the plaintiff said that he wished to have two other support people present. The Privacy Commissioner agreed with the Commissioner of Police's stance.

[52] Also in her letter of 12 May 2008 the Privacy Commissioner confirmed that an investigator from her office had viewed

the four videotaped interviews and confirmed that the Police's synopses were an accurate summary of the content of those in relation to Mr Aarts.

[53] In declining to uphold the plaintiff's complaint, the Privacy Commissioner referred to his right to take up her refusal with the Human Rights Review Tribunal. That was Mr Aarts's avenue of challenge if dissatisfied with the Privacy Commissioner's decisions.

[54] The Privacy Commissioner's case is that she was next involved with this matter when a further complaint was made by the plaintiff and transferred from the Office of the Ombudsman. That second complaint by Mr Aarts related to his request on 24 January 2008 to Police for personal information about him relating to the allegations on the videotapes. The Privacy Commissioner's file on that complaint was also closed on 31 July 2008 when, despite having written Mr Aarts, the Privacy Commissioner had received no response from him and assumed he did not wish to pursue the matter. Again, the plaintiff's opportunity to challenge this conclusion lay with the Human Rights Review Tribunal.

[55] The Privacy Commissioner's final involvement in these matters was as the

recipient of a complaint against Mr Aarts by the mother of the children involved on

26 June 2009 to the effect that the plaintiff had disclosed personal information about her children on a website. Mr Aarts was notified of the mother's complaint by telephone on 1 July 2009 and, having formed a final view that Mr Aarts had interfered with the privacy of a mother and her children, the Privacy Commissioner referred the matter to the Director of Human Rights Proceedings on 27 October

2009.

[56] None of the foregoing account of relevant events affecting the Privacy

Commissioner has been disputed by Mr Aarts.

[57] Although the Privacy Commissioner's primary submission is that the Court is without jurisdiction to entertain an application for a penalty against her because her relationship with the plaintiff was not "an employment relationship", I disagree with that categorisation of the legislation's reach. Persons not in an employment relationship may, nevertheless, be parties to a breach of such employment relationship by one of the parties to it.

[58] The Privacy Commissioner is, however, on stronger grounds in submitting that, on the undisputed facts disclosed to the Authority and the Court, she could not be found to have aided or abetted Barnardos's breach of its employment agreement with Mr Aarts by not upholding his complaints against the Commissioner of Police and, in particular, by not ensuring that he was able to view the videotapes. I am

satisfied to the high standard required to strike out such a claim that Mr Aarts cannot succeed against the Privacy Commissioner and I both confirm the correctness of the Employment Relations Authority's decision to strike out the Privacy Commissioner and make an order to the same effect in this Court.

The Ombudsman

[59] The claim against the fifth defendant, the Ombudsman also remains for decision. It is that this defendant incited, instigated, aided or abetted Barnardos in its breach of Mr Aarts's employment agreement. The Ombudsman was content to file written submissions for the Court but did not appear at the hearing. It may be for that reason that no settlement of the litigation was achieved in respect of this defendant.

[60] The foundation for this cause of action is Mr Aarts's claim that in January

2008 (about 18 months after his dismissal) he made a request of the Ministry of Social Development for information pursuant to the Official Information Act 1982. As a result of this, Mr Aarts says he was supplied with five documents, one of which he claims had been edited and reprinted. That was the genesis of Mr Aarts's complaint to the Ombudsman on 11 March 2008. On that date Mr Aarts asked the Ombudsman, pursuant to both the Privacy Act 1993 and the Official Information Act

1982, to direct that he be permitted to view evidential videotaped interviews with children connected with his dismissal in August 2006.

[61] Looking at the merits of Mr Aarts's claim against the Ombudsman, it is very clear that declining to obtain and look at the evidential videotapes was not an act or omission affecting Mr Aarts's dismissal by Barnardos. The Ombudsman was engaged in a statutory process of reviewing, at Mr Aarts's instigation, the authenticity of any document provided to him by the Minister of Social Development under the provisions of the Official Information Act. Mr Aarts's dissatisfaction with the performance of his duties by the Ombudsman cannot extend to liability under the Employment Relations Act.

[62] His claims against the Ombudsman were dismissed correctly by the Authority and his challenge to this part of its

decision must and does fail. For clarity, I confirm that I, too, dismiss the plaintiff's claims against the Ombudsman.

Lance Lawson, Barristers & Solicitors

[63] Dealing finally with the position of Lance Lawson, Barristers & Solicitors (Lance Lawson), this firm of lawyers was engaged by Mr Aarts three days before he was dismissed, for the purpose of giving him legal advice about what he feared would be his impending dismissal. Lance Lawson wrote to Barnardos raising Mr Aarts's personal grievance by letter on 27 October 2006 after he had been dismissed.

[64] Also following his dismissal, Mr Aarts instructed Lance Lawson to assist him to obtain a document relating to his employment but, as a result of a difference of opinion about how his personal grievance should proceed, he terminated the lawyers' instructions. Lance Lawson took appropriate steps to follow Mr Aarts's instructions by requesting copies of the evidential videotapes from Police and then sought properly to refer his claims against Barnardos to mediation. Their instructions were terminated by Mr Aarts shortly thereafter.

[65] Unusually for what amounted, in effect, to a strikeout application but nevertheless with the consent of both the plaintiff and Lance Lawson, I heard extensive evidence about the merits of Mr Aarts's claim including from the lawyer who acted for him at the time (William Lawson). Not only are Mr Aarts's claims against the tenth defendant founded entirely on suspicion, supposition and speculation, but I am also satisfied beyond doubt that they are without foundation. Lance Lawson acted reasonably, in accordance with Mr Aarts's instructions, and in his best interests during the time that the firm was engaged by him. It did not act in collusion with the Police to disadvantage Mr Aarts in any way and particularly in his pursuit of access to the evidential videotapes. On its merits, let alone for limitations reasons, Mr Aarts's claim against Lance Lawson cannot succeed and is dismissed.

[66] Even if this conclusion does not dispose of Mr Aarts's claim against his

former lawyers, I agree with the Authority that it was not brought within the period

of 12 months of his ascertainment, actual or reasonable, of the alleged breach. The claim for a penalty against Lance Lawson was not brought by Mr Aarts until 10 May

2011 when he filed an amended statement of problem in his proceedings in the Authority, joining Lance Lawson for the first time. I agree with the Authority that, pursuant to s 135(5)(a) of the Act, the 12 month limitation period began to run, at the latest, in late December 2006 when Lance Lawson's instructions were withdrawn by Mr Aarts and he engaged new solicitors. As the evidence shows, Mr Aarts dismissed his lawyers because of the same dissatisfaction with their work as he alleges now. The 12 month period expired in late December 2007, and the claims against Lance Lawson were not issued until more than three years later.

[67] So, even if it might be said (as I find it cannot be) that Lance Lawson incited, instigated, aided or abetted any breach of Mr Aarts's employment agreement by Barnardos, his claim was not brought within the statutory time allowed for doing so and must fail.

Summary of challenge to defendants' strikeouts

[68] Mr Aarts's challenge to the Authority's determination striking out, as parties, the second to tenth defendants (inclusive) fails. Because this has been a challenge by hearing de novo, this Court's judgment stands in the place of the Authority's determination. Mr Aarts having discontinued his challenge in respect of the fourth, seventh, eighth and ninth defendants, the plaintiff's claims for penalties against the second, third, fourth, fifth, sixth and tenth defendants are dismissed.

Challenge to ERA's refusal to issue summons for videotapes of interviews

[69] There are two questions raised under this head of the challenge. The first is the correctness of the Authority's reasoning in refusing on legal grounds to direct production to it of the evidential videotapes. The second is whether it should have done so by summonsing a representative of Police to produce those items to the Authority.

[70] The first question is justiciable, the second is not because of s 179(5) of the Act. The Court cannot entertain a challenge to a procedural determination. Whether evidence should, and how it may be provided to the Authority (that is, whether by requiring a person to send it to the Authority or by summonsing someone to an investigation meeting with the documents), is not challengeable. It is a matter for the Authority to determine. The first and justiciable ground of challenge (whether the Authority acted in legal error in exercising its discretion) can, however, and must be dealt with as challenged.

[71] Section 179(5) of the Act prohibits a challenge to a determination or part of a determination about the Authority's procedure, that is the manner in which it conducts its investigations. However, although the Court cannot advise or direct the Authority how to conduct its investigations (including what evidence it should call for and consider), whether it has made an error of law in making such a determination is justiciable. So, in the circumstances of this case, whether the Authority determined correctly that it was prevented in law from calling for a certain piece of evidence is properly the subject of this

challenge, although whether it should have done so as a matter of discretion in its investigative role is not for consideration.

Evidence Regulations 2007

[72] The Authority's first ground for refusing to direct production to it of the videotapes was that the law prohibits it from doing so. That law is now contained in the Evidence Regulations 2007, although it materially replicates its predecessor upon which the Authority relied when determining by Minute on 2 December 2010, that it had no power to order production of the videotapes to it.

[73] Regulation 50 of the Evidence Regulations 2007 revoked the Evidence (Videotaping of Child Complainants) Regulations 1990. The current regulations came into force on 1 August 2007. The transition between the 1990 regulations and the 2007 regulations is dealt with at reg 51 of the 2007 regulations. It provides that a videotape made before the commencement of the 2007 regulations (as in this case) is

deemed to have been made in accordance with the 2007 regulations "for the purposes of any proceedings to which the Act applies".

[74] That is not particularly helpful in this case because the Evidence Act 2006 does not apply to these proceedings, whether in the Employment Relations Authority or in this Court. It is, however, an indication of the limits on the application of the Evidence Regulations 2007 to proceedings governed by the Evidence Act 2006.

[75] It is necessary to examine the structure and content of the regulations. Part 1 of the Evidence Regulations (and by far the majority of those regulations) deals with "Video record evidence in criminal proceeding". Subpart 1 of Part 1 addresses "Recording video evidence" and is not relevant to the determination of the issues in this case. Subpart 2 of Part 1 ("Restrictions on showing, viewing, copying and supplying working copy and master copy") is applicable.

[76] Regulation 20 entitled "Limited purposes for which Police may show working copy" relates, as the heading says, to what are called working copies of videotapes. A "working copy" is defined in reg 16. It is distinguished from what is described as "the master copy" which is defined in reg 15 as either a single video record of an interview or, if two or more video records are made, one of those video records. Regulation 14 provides that there must be at least two video records made of an interview which will be described as the master copy and a working copy or working copies.

[77] Regulation 20 (which relates to working copies rather than to the master copy of an interview) sets out the circumstances in which Police may "show" a working copy. It does so by defining the purposes of such disclosure. These include to seek legal advice, to inform accused persons of the case against them, to allow the witness interviewed to see that record, to allow a transcript of it to be made, and, under reg

20(g) and (h):

(g) to enable any Judge to view it in order to—

(i) determine whether it is admissible in a proceeding; or

(ii) comply with any requirement in an enactment or imposed by a rule of law:

(h) to enable the Commissioner [of Police] or any other member of the

Police to discharge his or her duties under an enactment:

[78] It was reg 20 in particular that the Authority considered prohibited it from calling for these videotapes as evidence.

[79] Regulation 22 permits specifically a Family Court Judge to ask Police for a copy of a video record of a child or other complainant for any of a number of specified purposes.

[80] Subpart 4 of Part 1 of the Evidence Regulations deals with "Retention and destruction of master copy, copies of master copy, working copy, copies of working copy, and lawyer's copy". Regulation 36 defines the meanings of the phrases "destruction date A" and "destruction date B". In this case, where the records have not been used as evidence in a prosecution, destruction date B is applicable and is specified as being "7 years after the date on which a master copy is made." Regulations 40-42 deal with Police retention and destruction obligations.

[81] The Evidence Regulations 2007 were made under the authority of Parliament set out in s 200 of the Evidence Act 2006 and, in particular, under s 200(1)(b) which provides as follows:

the Governor-General may, by Order in Council, make regulations prescribing anything that is required to be prescribed or necessary for carrying this Part into effect.

[82] Part 5 of the Evidence Act addresses rules and regulations. More particularly, s 201 provides materially that:

The Governor-General may, by Order in Council, make regulations—

...

(g) prescribing the uses to which any video records may be put and prohibiting their use for other purposes:

[83] The Authority's reasoning for declining to issue a summons requiring a named or otherwise identified person to provide it with videotaped interviews of children is set out at [70]-[79] of its determination of 18 January 2012.

[84] Its reasoning was two-fold. First, it declined to order the Commissioner of Police to produce on summons the videotaped evidence because the Commissioner was facing a claim for penalty by Mr Aarts. The Authority considered that the Commissioner should not be required to incriminate himself by providing evidence to support a claim for a penalty against him. Second, the Authority appears to have reasoned that to have summonsed a witness to produce these videotaped records would have been contrary to the then applicable Evidence (Videotaping of Child

Complaints) Regulations 1990.11

[85] There are several erroneous assumptions underpinning this reasoning. First, the Authority dismissed, by striking out, the claims for penalties against the Commissioner of Police in the same determination. Thus, the Commissioner was no longer at risk of self-incrimination by producing the records. That position has not changed after this challenge.

[86] Second, and even more fundamentally, the videotaped interview records may be relevant to (and indeed perhaps at the heart of) his personal grievance against his employer, Barnardos. That is not a proceeding for a penalty but a personal grievance in which the Authority is required to conduct a broad inquiry into the justification for dismissal. In this, the contents of the videotaped interviews may be relevant in relation to what Barnardos concluded against Mr Aarts which led it to dismiss him and may well be relevant to the Authority's resolution of Mr Aarts's employment relationship problem (including remedies) if he was dismissed unjustifiably. I use deliberately the word "may" because it will be for the Authority to determine whether the contents of the tapes *are* relevant to its investigation.

[87] There is another complicating and problematic issue which does not appear to have been considered by the Authority. The Evidence Regulations are made under the Evidence Act 2006 which legislation does not bind the Employment Relations Authority. Its specific powers of calling for and considering evidence (under

s 160(2)) are materially the same as those of the Employment Court under s 189,

11 Now the materially identical Evidence Regulations 2007.

which have been held to be informed, but not trumped, by the Evidence Act and, therefore, regulations made under it.12

[88] Section 160(2) of the Employment Relations Act provides that the Authority may take into account such evidence and information as it in equity and good conscience it thinks fit, whether strictly legal evidence or not. Thus s 160(2) may be seen to override the "strictly legal" rules of evidence in the Evidence Act and its regulations. If the [Employment Relations] Act and the Evidence Regulations are in conflict, the provisions of the Act must prevail.

[89] Mr Lee is right in his fundamental argument that the breadth of the Authority's power to call for evidence, which is contained in primary legislation, trumps the narrower statutory prohibitions on the use of such videotapes provided in subordinate legislation. I would add to that broad conclusion that it is especially so where the subordinate legislation (a regulation) is made pursuant to an Act of Parliament (the Evidence Act 2006) which is not applicable to the Employment Relations Authority (or to the Employment Court).

[90] The Authority's reasons for not enforcing its request to Police to send it the evidential videotapes, are set out in a minute issued on 2 December 2010. The Authority accepted the validity of the Police's grounds for refusal being that to do so would contravene the Evidence (Videotaping of Child Complainants) Regulations

1990. The Authority said that it had examined those Regulations in the context of the New Zealand Bill of Rights Act 1990 (NZBORA) and was "satisfied that the Bill of Rights Act 1990 does not override the Evidence (Videotaping of Child Complainants) Regulations 1990." In support, the Authority referred to s 4 of the NZBORA.

[91] The Authority omitted, however, to take into account its own statutory evidential provisions. In addition, although it is unclear why it did so, it placed an undue emphasis on s 4 of the NZBORA which is, if relevant to the consideration, only marginally so. The Authority's correct inquiry ought to have been whether the

Regulations (by then the Evidence Regulations 2007 and not the Evidence

12 See, for instance, *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 at [14].

(Videotaping of Child Complainants) Regulations 1990) overrode or confined the Authority's broad statutory power under s 160(2) of the Act. Had it done so, it ought to have concluded that s 160(2) prevailed and the Evidence Regulations 2007 were

not determinative of the questions at issue in this proceeding.

[92] Without telling or advising the Authority how it should conduct its investigation into Mr Aarts's personal grievance against Barnardos, it is not precluded in law from calling for or requiring production on summons of the videotaped interviews if it considers that the contents of these will be relevant to the matters for determination by it. Mr Aarts may (and doubtless will) wish to re-apply to the Authority in this regard.

Power to direct disclosure in penalty proceedings?

[93] The Authority also considered that it was not empowered to require disclosure of documents by the second, third and sixth defendants by what it described as "the general law of discovery which recognises that a party is entitled to object to the production of documents which might expose that party to any penalty".13 Despite my conclusion that the Authority erroneously decided this point because there was no live penalty proceeding in existence as a result of its same determination, I have dismissed all penalty actions so it is not necessary to decide this point on this challenge. Nevertheless, I offer the following by way of guidance

in deference to the detailed arguments put forward. This difficult issue will, however, be one for another case on another day.

[94] In reaching that result, the Authority acknowledged that its Regulations contain no equivalent to the document disclosure regime in regs 40-52 of the Employment Court Regulations 2000. Importantly, for the purpose of this case, reg

39(2) of the Employment Court Regulations are expressed not to apply "to any action for the recovery of a penalty". The Authority determined that: "This position reflects the quasi-criminal character of penalty proceedings and the principle that

disclosure of documents should not be required to be produced if that might tend to

13 [2012] NZERA Auckland 22 at [77].

incriminate the party who possesses them."14 The Authority referred to the one judgment of this Court in which the disclosure provisions under the Employment Court Regulations have been affected by reg 39(2).15

[95] The Authority also relied on the judgment of the full Court of the Employment Court in *New Zealand Baking Trades Employees Union v Foodtown Supermarkets Ltd*16 where the question of whether a party to proceedings in the Employment Court could be obliged to produce to the other party, for inspection, documents likely to incriminate that party or expose it to penalty of forfeiture.

[96] The Authority went further, however, in ascribing to Parliament an intention in not making the same or a similar provision for the Authority that it did in respect of the Court. At [78] of its determination concluded:

Moreover, I do not consider that Parliament intended the Authority to be able to order discovery in recovery of a penalty, matters which, should the matter have arisen in the Employment Court, the Court would be precluded by virtue of regulation 39(2) from ordering disclosure.

[97] Because I am not deciding the question, I say no more than that I should not be taken to agree necessarily with this conclusion. It is not possible to discern clearly an oversight on the part of Parliament. Further, there are underlying arguable reasons why Parliament may have deliberately legislated in respect of the Court but not for the Authority.

[98] Litigation in the Employment Court is traditional adversarial litigation in which parties gather their evidence and present it to the Court in support of, or in opposition to, their respective cases. The Court's role in disclosure (discovery) and inspection of documents is to enforce the statutory rules and decide disputes between the parties if and when they arise. Disclosure and inspection of relevant documents take place, initially at least and in many cases wholly, between the parties without

intervention by the Court.

14 At [75].

15 *New Zealand Airline Pilots Association Inc v Jetconnect Ltd (No 2)* [2009] ERNZ 207.

16 [1992] 3 ERNZ 305.

[99] By contrast, there is no document disclosure/inspection regime between parties in the Authority. That is because it is an investigative body which determines the evidence that it will consider. It is able to, and does, call for this, whether from parties or others. Documents are disclosed to the Authority, at least in the first instance, rather than to the other party or parties to the litigation. Any decision about distribution to the parties of documents called for by the Authority is that of the Authority itself although, in most cases, as a matter of natural justice, it will ensure that the other party or parties have copies

of what the Authority has been supplied with.

[100] So, while in the Employment Court, no party may be required to give another party seeking a penalty against it any document which may assist that other party to institute and prosecute its penalty proceedings, the position may arguably be different in the Authority. It will be the Authority itself which determines whether, and, if so, how documents supplied to it are to be used including in penalty proceedings. The difference lies in the Authority's control of the process in that forum as opposed to the parties' control of it in the Employment Court.

[101] The Authority is, expressly, not subject to the general laws of evidence: s

160(2) of the Act, which also features in another aspect of this case, provides expressly that it "may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not." So, the Authority's powers under s 160(1)(a), (b), (c), (d) and (f) to "call for evidence and information from the parties or from any other person", to "require the parties or any other person to attend an investigation meeting to give evidence", to "interview any of the parties or any person at any time before, during, or after an investigation meeting", to "fully examine any witness", and to "follow whatever procedure the Authority considers appropriate", are informed by the broad evidential discretions allowed in subs (2).

[102] This is an important and difficult issue but, for the reasons given, not one that needs to be decided in this case. If it does arise in another case (as I imagine it will almost inevitably), the Authority may care to consider its removal as a point of law to the Court for comprehensive argument by a full Court.

Comment

[103] I make the following comments in an effort to assist Mr Aarts and his agent in getting his grievance against Barnardos on for investigation on its merits and to assist (but of course not direct) the Authority to do so. Mr Aarts is in the classic *Catch-22* situation of suspecting that the Commissioner of Police and the Chief Executive of the Ministry of Social Development were parties to his employer's breach of his employment agreement by providing the employer with misleading information or otherwise acting deceitfully in the events that led to what he contends was his unjustified disadvantage in employment and unjustified dismissal from it. Mr Aarts cannot establish more than his suspicion without access to the information including what those persons advised his employer and, by reference to the videotaped interviews, whether that was a fair and accurate account of the material in them. As just noted, there is no statutory provision for pre-trial discovery of documents in the Employment Relations Authority. Indeed, document production is not an adversarial process there at all: rather, the Authority is given a broad discretion about what documents it calls for in its investigation of an employment relationship problem.

[104] There is another relevant consideration affecting whether Mr Aarts should have access to the videotapes of the interviews. The fact and circumstances of the disadvantage and dismissal being not in contention, the onus of establishing justification for its disadvantaging and/or dismissal of him now lies on Barnardos. Whether the employer wishes to make these tapes available to the Authority for the purpose of its investigation is up to Barnardos, but even if it does not, the Authority can itself call for the documents as evidence to enable it to make its decision.

[105] When Mr Aarts was giving evidence at the hearing, I took the opportunity to explore with him whether there might be any other way acceptable to the plaintiff by which his suspicions about the contents of the evidential videotapes might be able to be resolved but without those tapes being viewed by him or his advocate. Mr Aarts was adamant that he would not trust anyone but his advocate, Mr Lee, to truthfully tell him whether the videotapes disclosed the allegations that were passed on to Barnardos which caused him to be dismissed. Those encompassed by Mr Aarts's

distrust included persons such as the Privacy Commissioner and the Ombudsman, but also extended to any Member of the Employment Relations Authority or to any Judge of this Court. I did not detect any suggestion that this was a hasty or ill-considered response and it reflects the depth of distrust and disillusionment of Mr Aarts's perception of the injustices perpetrated against him by all others who had anything to do with this case that he takes this stance.

[106] I would, nevertheless, invite Mr Aarts (and his advocate in whom he has great faith) to reflect on whether they might yet repose trust in someone else to confirm honestly whether Mr Aarts's suspicions about the contents of those evidential videotapes are well founded or not. To do so may provide a way through a difficult situation and to enable his claims against Barnardos to be dealt with at long last.

[107] Having instituted his claims for penalties against some of the defendants out of time and otherwise unlawfully, the appropriate course for Mr Aarts is now to have his personal grievances against Barnardos brought on for investigation by the Authority. What Barnardos was told by these defendants that led or contributed to Mr Aarts's dismissal will be relevant information in the Authority's assessment of the justification for the employer's acts. That information will, therefore, be disclosed to Mr Aarts in the course of the Authority's investigation process. It will be open to the Authority Member to question witnesses about the contents of the video recorded interviews and, if the Member thinks fit, to require production of these to the Authority as part of its investigation. The sensitive contents of these recordings can be protected appropriately by

publication prohibition and other orders that the Authority is empowered to make. These would bind Mr Aarts and his agent as much as anyone else.

The Privacy Commissioner's inspection of the videotapes

[108] It appears that no representative of Barnardos saw or learned any more about the contents of the videotape interviews than was conveyed to Mr Aarts himself. It appears from the evidence that not only representatives of the Police but also of CYFS have seen the videotapes. Somewhat enigmatically, also, it appears that

representatives of the Privacy Commissioner have done likewise although, at the hearing, Ms McKechnie could not identify how that might have been possible lawfully given her stance of submitting that, pursuant to the Evidence Regulations

2007, no other person could be permitted to do so.

[109] This was the subject of memoranda filed after the close of the hearing including, when Ms McKechnie submitted that the Privacy Commissioner's inspection of the evidential videotapes was unlawful, a memorandum from counsel for the Privacy Commissioner to whom an opportunity was extended to respond to the allegation of illegality against her.

[110] Both in reliance on my conclusion of a more restrictive interpretation of the Evidence Regulations than that advanced by counsel for the Commissioner of Police and in reliance on provisions in the Privacy Act identified by the Privacy Commissioner, I am satisfied that the Privacy Commissioner's inspection of the evidential videotapes in the course of determining Mr Aarts's complaint to that office, was not unlawful. I accept the submissions of counsel for the Privacy Commissioner.

[111] Section 95 of the Privacy Act provides materially:

(1) Subject to subsection (2) and to section 94, any person who is bound by the provisions of any enactment to maintain secrecy in relation to, or not to disclose, any matter may be required to supply any information to, or answer any question put by, the Commissioner in relation to that matter, or to produce to the Commissioner any document or thing relating to it, notwithstanding that compliance with that requirement would otherwise be in breach of the obligation of secrecy or non-disclosure.

(2) Compliance with a requirement of the Commissioner (being a requirement made pursuant to subsection (1)) is not a breach of the relevant obligation of secrecy or non-disclosure or of the enactment by which that obligation is imposed.

...

[112] The only exceptions to the immunity granted by subss (1) and (2) which are set out in s 95 of the Privacy Act are not applicable to this case.

[113] However, I accept that s 119 of the Privacy Act displaces the normal rules about public interest immunity in relation to investigations by the Privacy

Commissioner. Accepting, impliedly, that the Privacy Commissioner requested to view the evidential videotape recordings, s 127 of the Privacy Act makes it an offence for any agency, without reasonable excuse, to obstruct, hinder or resist the Privacy Commissioner in the exercise of her powers under the Act, or to refuse or fail to comply with any lawful requirement of the Commissioner.

[114] In these circumstances the Commissioner of Police would have been obliged at law to have provided the evidential videotapes to the Privacy Commissioner and the Commissioner of Police would not have been constrained in doing so by the Evidence Regulations. The explicit provisions of the Privacy Act, as primary legislation, were not subject to the Evidence Regulations.

[115] Although I am obliged to Ms Evans, as counsel for the Privacy Commissioner, for complete submissions, including reference to the obligations of confidentiality of such information as is obtained by the Privacy Commissioner for the purpose of dealing with a complaint to her, it is unnecessary to lengthen this judgment further by examining these. There is no suggestion that the Privacy Commissioner acted improperly in the use she made of the material provided by the Commissioner of Police.

Relevance of the videotapes

[116] Although counsel for the second, third and sixth defendants cannot, and did not, purport to speak for the first defendant (Barnardos), which was excused from the hearing of these matters not concerning it directly, Ms McKechnie nevertheless advanced a submission of irrelevance of the tapes in resisting the suggestion of production of the videotapes by the Commissioner of Police. Even if, as I have determined, the claim for a penalty against the Commissioner must be dismissed, Ms McKechnie submitted on the Commissioner's behalf that he should not be required to produce this evidence for the Authority because it is not relevant to Mr Aarts's personal grievance.

[117] The argument for irrelevance is that if the employer did not see or otherwise have disclosed to it the detail of the allegations in the videotaped interviews, then it

could not have taken this into account in deciding to dismiss Mr Aarts. Rather, and at most, it could be said to have taken account of what it was told by the Police and/or CYFS representatives as to what was said and otherwise portrayed on the videotapes, which information Mr Aarts also had at the relevant times. Thus, the argument goes, even if the Authority were now to be made aware of those contents of the videotapes, they could not affect the question of justification for dismissal because they were not a matter considered by the employer.

[118] On the other hand, there may be two ways in which the contents of those video recordings may be relevant for the purpose of determining Mr Aarts's personal grievance. First, if the evidence discloses that Mr Aarts denied the allegations made against him such as they were and, if the evidence is, in particular, that he may have sought further information from Barnardos or others about those allegations, a fair and reasonable employer might have been expected to have made further inquiries including about the details of the content of the recordings. It might be argued for Mr Aarts in these circumstances that the employer's knowledge of the contents would probably have determined the complaints against him one way or the other. If the children's complaints against Mr Aarts were indeed made on the recordings, as he was told, then this would count in favour of justification for his dismissal. If, in these circumstances, observation of the videotapes did not confirm what was said about them, then this might weaken Barnardos's case of justification for dismissal.

[119] The second potential relevance of the contents of the videotapes goes to remedies if Mr Aarts is found by the Authority to have been dismissed unjustifiably. Although whether or not Mr Aarts did what he is alleged to have done may not be the vital issue in this case (but, rather, the quality of what the employer did and how it did it), broader issues are in play when remedies are considered. For example, s 124 of the Act requires the Authority to reduce remedies if there is culpable contributory conduct by a grievant. The existence and degree of such culpable contributory conduct might be able to be ascertained or at least contributed to from an examination of the video recordings. General principles of compensation require an assessment of a broad range of relevant circumstances including, arguably, what was said about Mr Aarts's conduct.

[120] Finally, in respect of remedies, his reputation is at the heart of Mr Aarts's long-running challenge to his dismissal. He denies doing anything improper and seeks to have what he says is his otherwise good name in the field of counselling restored by a determination or judgment in his favour. Mr Aarts says that this is both a valid function of a personal grievance determination and is, in that sense, remedial and one which will require the Authority to examine the probabilities of the allegations against him.

[121] All that needs to be said in that regard in this judgment is that the best evidence of the content of the videotaped interviews (that is, to be gleaned by seeing and hearing the tapes) cannot be said at this stage to be inadmissible. That is not a sure ground for resisting the disclosure of those documents to the Authority.

[122] I must re-emphasise that these issues have been raised for the assistance of the Authority in what will be the difficult decision that it has to make about whether it should inspect the evidential videotapes and/or whether Mr Aarts and his advocate should be entitled to do so. It should not be thought that my exposition of the issues and the considerations that may have to be weighed by the Authority, is any expression of a view by the Court on their merits. Because it was strongly submitted by counsel for the Commissioner of Police and for the Chief Executive of the Ministry of Social Development that the contents of the videotapes are irrelevant to Mr Aarts's personal grievance and its determination, I go so far only as to conclude that this cannot be said unequivocally to be so at this stage.

The challenge to the Authority's costs' awards

[123] Finally, Mr Aarts challenges the Authority's costs determination17 issued on

8 March 2012 following its substantive determination from which this challenge has been brought.

[124] The Authority awarded costs of $1,500 to each of the Commissioner of Police, the Chief Executive of the Ministry of Social Development and the Director of Human Rights Proceedings. The Authority also awarded disbursements to the

17 [2012] NZERA Auckland 87.

Commissioner of Police of $254.94 for photocopying and courier charges and

$66.79 to the Chief Executive of the Ministry of Social Development for photocopying costs but not for an air fare because of the absence of an invoice for this expenditure.

[125] The challenge is against the Authority's determination affecting the seventh, eighth and ninth defendants and, having been withdrawn or abandoned by Mr Aarts, the costs awards in favour of those defendants in the Authority remain and are unaffected by this challenge. It is, therefore, necessary to consider only the costs awards of the second, third, fourth, fifth, sixth and tenth defendants that remain the subject of Mr Aarts's challenge.

[126] Mr Aarts's case at the hearing, including his advocate's extensive written submissions, do not make any reference to the Authority's costs awards and, in these circumstances, he has failed to establish that they were inappropriate awards.

[127] There is nothing exceptional about these awards and, indeed, they are probably a modest contribution towards the actual legal costs of each of those parties. When looked at through an Employment Relations Authority tariff lens, they are at the very lowest level.

[128] Given the effect of s 183(2) of the Act, I make the same awards of costs as did the Authority in that forum, namely, $1,500 to each of the Commissioner of Police, the Chief Executive of the Ministry of Social Development, and the Director of Human Rights Proceedings. I also allow the Commissioner of Police disbursements of $250.94 and $66.79 to the Chief Executive of the Ministry of Social Development.

Costs on the challenge

[129] These now only affect the second, third, fourth, fifth sixth and tenth defendants, that is those against whom the challenges have not been withdrawn or abandoned.

[130] Each of those defendants is entitled to an award. They will differ because of the differing levels of participation of those parties. At one end are the fourth and fifth defendants who did not participate by counsel at the hearing and, at the other end, the second and third and sixth defendants, who took the burden of the argument throughout the hearing. Although the Privacy Commissioner did not seek costs against Mr Aarts in the Authority, she says that his vexatious pursuit of his claims against her on this challenge entitles her to an award of costs.

[131] The costs to the parties were, unfortunately, exacerbated by a lengthy technology failure in the courtroom at the start of the hearing. That was very regrettable but was not, of course, the responsibility of the plaintiff. Unfortunately, all parties are simply going to have to bear their own costs of representation for the period of that delay which was about two and a half hours. A second day of hearing was required but this was not caused or even added to significantly by the technological delays on the first day. Even if the hearing had started as scheduled on the first day, the case would still have run into a second day although it might, of course, have finished a little earlier on that second day.

[132] Each of the second, third, fourth, fifth, sixth, and tenth defendants may submit memoranda within three weeks of the date of this judgment in support of awards of costs in their favour, with the plaintiff having a similar period of three weeks thereafter to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 11 am on Monday 20 May 2013