IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 523/10
5317640

	BETWEEN	KATE GAY BIERRE
	AND	AUCKLAND DISTRICT HEALTH BOARD

Member of Authority:	Yvonne Oldfield
Representatives:	H.A. Cull QC and Richard Fletcher for applicant Michael O'Brien and Nura Taefi for respondent
Submissions received:	29 November, 14 December 2010 from Applicant 6 December 2010 from Respondent
Determination:	20 December 2010

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The applicant, Ms Bierre, alleges a personal grievance of constructive dismissal and seeks leave to raise it out of time on the grounds that she was so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising it within the 90 day timeframe required by statute. The question whether leave should be granted is currently before another Member of the Authority for investigation and determination.

[2] Ms Bierre objects to certain evidence being received by that Member in the course of her investigation into whether to grant leave. Auckland District Health Board (ADHB) submits that the material in question is not confidential and should be included in the investigation as a matter of natural justice. The respondent also argues that the probative value of the evidence is key and that the public interest in disclosure outweighs any public interest in preventing disclosure.

[3] Before the 90 day issue (or indeed the substantive issues) can be investigated a determination is required on the preliminary issue of whether the Authority may take the evidence in question into account. The Member concerned has referred that preliminary issue to me and it is the sole matter for determination here.

Issues

[4] The applicant objects to:

i. paragraphs [52] – [57] of the witness statement[1] of Ms Stephanie Hlohovsky and attachments (documents SH 6, 7 and 8) and

ii. the affidavit of Dr Caroline Allum, General Practitioner and Occupational Health doctor for ADHB.

[5] The following summarises the assertions made in this material. Ms Hlohovsky was Ms Bierre's Nurse Manager. She says that in April 2009 Ms Bierre told her that she was thinking of resigning from her position as she felt she was suffering from "burnout." Ms Hlohovsky counselled Ms Bierre not to make any decisions yet and emailed the in-house occupational health and safety service (ADHB Occupational Safety and Health) for advice.

[6] Ms Hlohovsky then arranged the paperwork required for Ms Bierre to be seen by ADHB Occupational Safety and Health. This consisted of an Occupational Health and Safety Illness/Absence Referral Form and a Functional Job Description (both completed by Ms Hlohovsky) and an Occupational Health and Safety Health Assessment Consent form (signed by Ms Bierre.) Accompanied by a covering letter from Ms Hlohovsky, this material was despatched to ADHB Occupational Safety and Health. It was then also copied to Ms Bierre, accompanied by a brief note from Ms Hlohovsky. Ms Hlohovsky's original email to ADHB Occupational Safety and

[1] As is common practice in the Authority this material was not provided in affidavit form. I understand it is proposed to be presented and tested when the Authority convenes an investigation meeting into the matter.

Health is Document SH 6. The remaining items identified here make up document SH 7.

[7] The referral form indicates that the purpose of the referral was for the Nurse Manager to obtain advice on the following matters: Ms Bierre's fitness to work, the likelihood that her symptoms were wholly or partially related to work, and whether changes were recommended to her hours, work, tasks or equipment.

[8] The Occupational Health and Safety Form signed by Ms Bierre contains the following statements:

> *"Recommendations arising from this assessment will be sent to your employer (ADHB). Only the information required by the workplace will be provided to your Manager and/or the Human Resources Consultant…*
>
> *Personal information is collected and stored under the guidelines provided by the Privacy Act 1993 and Health Information Privacy Code 1994…*
>
> and
>
> *I understand that my referral will be dealt with in confidence and that advice given to my employer will be in regards to my fitness to carry out my role/job tasks, to guide the vocational rehabilitation process and to maintain my safety and the safety of others in the workplace."*

[9] Paragraph [54] of Ms Hlohovsky's statement asserts her understanding that Ms Bierre saw Dr Allum (a doctor with ADHB Occupational Safety and Health) in May 2010 after which Dr Allum emailed Ms Hlohovsky about Ms Bierre's progress and readiness to return to her current role and/or other work. Dr Allum's email is document SH 8. Paragraph [57] of Ms Hlohovsky details her follow up discussions with Ms Bierre about alternative positions for Ms Bierre.

[10] Dr Allum is a General Practitioner with a Post-graduate Diploma in Industrial Health. Her witness statement gives a brief overview of the work of ADHB Occupational Safety and Health and provides details of when she was in contact with

Ms Bierre. At paragraph [11] she records the fact that she met with Ms Bierre and goes on (with reference to the witness statement Ms Bierre provided to the Authority):

> *"Although I cannot divulge the specifics of our discussion, I can state that generally speaking, Ms Bierre discussed with me the matters set out in…her statement."*

[11] The applicant asserts evidence objections in four categories:

> i. *"the proposed evidence is confidential being evidence obtained from a doctor-patient relationship and is excluded by section 189 of the ERA and Rules 37 – 44 Employment Court Regulations 2000."*
>
> ii. *The evidence is inadmissible by virtue of the application of the Health Information Privacy Code 1994.*
>
> iii. *The evidence of Dr Allum given at para. 15 purports to be evidence given as an expert, when she is not competent to give psychiatric/psychological evidence.*
>
> iv. *Dr Allum has a conflict of interest, being an employee of ADHB and is inadmissible as a reliable expert witness."*

[12] The respondent rejects all of these arguments. It says that the material is not confidential because (having consented to its use and disclosure) Ms Bierre can have no reasonable expectation of confidence, and because the inclusion of the material in the Authority's investigation is consistent with the intended purpose of disclosure for which consent was given. It notes that:

> *"The documents in question…were documents between the applicant and the respondent, and the evidence being challenged…involves discussions/meetings between the applicant and the respondent's employees."*

[13] In the alternative, should the Authority find that the evidence objected to could be classed as confidential the respondent submits that it should be included in the

evidence as a matter of natural justice and on the basis that the public interest in disclosure outweighs any public interest in preventing disclosure.

[14] The issues for determination here are therefore:

i. what principles are to be applied by the Authority in considering whether evidence should be taken into account in an investigation, and

ii. whether the information objected to here should be excluded from the Authority's consideration of Ms Bierre's employment relationship problem.

(i) The relevant principles

[15] Both parties have given the Authority very comprehensive submissions on this matter. I have been able to establish from those submissions that there is essentially no disagreement on the following points:

i. Section 160(2) of the Employment Relations Act 2000 provides that "*the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not;*"

ii. The Authority's power to receive information is subject to natural justice and the requirement to do nothing inconsistent with the Employment Relations Act, [2] and

iii. In respect of the Authority as well as the Employment Court, the principles and contents of the Evidence Act 2006 will "*affect and guide the exercise of the equity and good conscience test.*" [3]

[2] Metargem v Employment Relations Authority [2003] 2 ERNZ 186.
[3] Maritime Union of New Zealand v TLNZ Ltd [2007] ERNZ 593.

[16] In response to the applicant's arguments (as set out already) the respondent argues that the equity and good conscience jurisdiction is inclusive in nature and designed to broaden the scope of information the Authority may take into account.[4]

[17] The respondent also submits that doctor-patient records are not protected by a general privilege against disclosure[5] making the only potential basis for exclusion that of confidentiality. Where information is found to be confidential, the Authority has a discretion whether or not to order disclosure pursuant to s. 69(2) and s. 69 (3) of the Evidence Act.

[18] As for the Privacy Act 1993 and the Health Information Privacy Code 1994 the Respondent argues that neither applies to information that is reasonably disclosed as part of proceedings before a court or tribunal. It does however note that the Health Information Privacy Code 1994 offers some guidance in determining whether a reasonable expectation of confidentiality exists, with Rule 10 providing that information gathered for one purpose can be used for another where the individual to whom it relates has consented or where it is to be used for a related purpose.

Determination

[19] The respondent's submissions as to the relevant principles to be applied here are accepted in their entirety.

(ii) The objectionable evidence

Ms Hlohovsky's statement, attachments SH 6, 7 and 8, and paragraphs [1] to [14] of Dr Allum's affidavit

[20] I am satisfied that Dr Allum had Ms Bierre's consent to pass certain limited information to Ms Hlohovsky. Ms Bierre did consent to ADHB Occupational Health and Safety advising Ms Hlohovsky as to her fitness to carry out her role and job tasks, provided the advice was limited to what was required "*by the workplace"* for the

[4] United Food and Chemical Workers Union of NZ v Talley [1992] 1 ERNZ at 769
[5] Gill v AG [2010] NZCA 468, 71.

purpose of guiding the vocational rehabilitation process and maintaining her safety and the safety of others in the workplace.

[21] The proposed evidence is limited to information in the category identified and there is no suggestion that it was provided to the nurse manager for any purpose other than to guide the vocational rehabilitation process. The proposed evidence does therefore fall within the scope of this consent. (In this way, the present case is distinguishable for that of *Coy v Commissioner of Police* [2010] NZEMPC 88 where no consent was given to the use of the information in question.)

[22] Having established that Ms Bierre consented to this information being disclosed to Ms Hlohovsky at the time, the next question becomes whether it may now in turn be disclosed to the Authority.

[23] Ms Bierre's substantive employment relationship problem includes allegations that the respondent failed in its duty to provide a safe workplace. In the course of investigating those allegations the Authority must consider what the respondent knew (or should have known) about risks to Ms Bierre's health and safety. It must also inquire into the steps taken to address any such risks. Central to the Authority's investigation, therefore, will be an inquiry into Ms Hlohovsky's knowledge of Ms Bierre's fitness to carry out her role and job tasks, the steps Ms Hlohovsky took in relation to Ms Bierre's vocational rehabilitation process, and the steps she took to maintain Ms Bierre's safety.

[24] The proposed evidence goes to the heart of these issues. Disclosure to the Authority will be necessary for the purpose of the Authority's investigation into the vocational rehabilitation process and steps taken to maintain Ms Bierre's safety. This purpose is clearly related to the purpose for which. consent to disclosure was originally given: to guide that very process. Ms Bierre cannot now object to the inclusion of the proposed evidence in the Authority's investigation of the substantive issues.

[25] The next question is whether this information should be included in the Authority's consideration of the "90 day" issue.

[26] Section 114 (4) provides:

> *"the Authority…may grant leave…if the Authority –*
>
> *(a) is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances …; and*
>
> *(b) considers it just to do so."*

[27] The Authority therefore exercises a discretion when determining whether to grant leave to raise a grievance out of time. The exercise of that discretion requires the Authority to take into consideration all relevant issues including the nature and merits of the allegations made in the substantive matter. The determination of the 90 day issue cannot be entirely divorced from an understanding of the substantive issues. It follows that the proposed evidence is relevant to, and related to, the 90 day issues as well.

[28] In summary, it is accepted that the applicant, Ms Bierre, consented to the disclosure to Ms Hlohovsky of Dr Allum's report (exhibit 8). It is also accepted that it is reasonable for this information, and surrounding explanatory information, to be disclosed as part of proceedings before the Authority given that the information is directly relevant to the questions raised by the applicant's allegations of personal grievance. By association the information also becomes relevant to the 90 day issue.

[29] Ms Hlohovsky's statement, attachments SH 6, 7 and 8, and paragraphs [1] to [14] of Dr Allum's affidavit may all be provided to the Member investigating Ms Bierre's employment relationship problem.

Paragraph [15] of Dr Allum's affidavit

[30] The applicant has noted that the respondent initially described Dr Allum's evidence as "expert evidence." It is the applicant's position that Dr Allum is not competent to give psychological/psychiatric opinion evidence. This is accepted, since from my reading of her evidence, Dr Allum does not purport to do so.

[31] It is also accepted that Dr Allum cannot give "independent" expert evidence even in her own field of expertise, occupational health, given that she advised Ms Hlohovsky in respect of Ms Bierre's health-related employment issues.

[32] Finally, it is accepted that the consent form signed by Ms Bierre is certainly not a waiver of all rights to confidentiality. This point is indeed acknowledged by Dr Allum in her witness statement (as quoted at paragraph [10] above.)

[33] Notwithstanding her comment Dr Allum does however proceed, at paragraph [15] of her affidavit, to make comments which I am satisfied exceed the scope of the consent given and which are not strictly opinion evidence (expert or otherwise.) Paragraph [15] should be treated as confidential and I am not satisfied that the public interest in the disclosure of this paragraph is such as to justify disclosure.

[34] **For all of these reasons, I find that paragraph [15] of Doctor Allum's affidavit should be excluded from evidence.**

Costs

[35] Costs are reserved pending the investigation and determination of the remaining matters before the Authority.

Yvonne Oldfield
Member of the Employment Relations Authority