# Employment Court of New Zealand



## Bracewell v Richmond Services Limited [2014] NZEmpC 63 (8 May 2014)

Last Updated: 20 May 2014

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2014] NZEmpC 63**

**ARC 91/13**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER | of an application for non-party disclosure |
| BETWEEN | JAN SUSAN BRACEWELL Plaintiff |
| AND | RICHMOND SERVICES LIMITED Defendant |

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| Hearing: | By memoranda of written submissions filed on 17, 27 and 31 March and 3, 4, 8, 11, 14, 15 and 28 April 2014 |
| Appearances: | Dr J Cook, agent for plaintiff<br>P Shaw, counsel for defendant<br>G, counsel for a District Health Board (non-party) (anonymised pursuant to [29] of this judgment) |
| Judgment: | 8 May 2014 |

**INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN**

[1] The plaintiff wishes to obtain access to a document or documents in the possession of [a District Health Board]1 (the Board),2 a non-party, which she says are relevant to her proceedings. Jan Bracewell's challenge to the determination of the Employment Relations Authority (the Authority) requiring her to return copies of medical records of a client of the defendant, is set down for hearing in late May

2014.3 The defendant and the Board oppose disclosure of the documents to the

plaintiff.

1 Anonymised pursuant to [29] of this judgment.

2 Consistently with the orders for non-publication in *Bracewell v Richmond Services Ltd* [2013] NZEmpC 245 at [28], this District Health Board cannot be identified.

3 *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 481.



[2] Ms Bracewell is concerned that a client in the care of the defendant (client A) has been permitted to engage in abusive prostitution by the defendant, members of its senior management and a registered medical practitioner (L). The plaintiff and her advocate, Dr

Cook, assert that this has damaged, and unless prevented, will continue to damage, client A, both physically and psychologically. The plaintiff 's complaints about this situation to the Police and to the relevant District Health Board have not brought about the results desired by Ms Bracewell and Dr Cook. There are other complaints by them which have not yet been resolved.

[3] Ms Bracewell resigned from her employment with the defendant and took with her copies of a number of client A's medical records that the plaintiff says are both relevant to her complaints of misconduct against the defendant, its managerial personnel and L, and which, if returned to the defendant, will be destroyed or compromised to cover up those wrongdoings. The defendant has brought proceedings based on the parties' employment agreement, seeking the return to it of these medical records.

[4] Ms Bracewell asserts that she is not only entitled in, but required by, law to retain these medical records to establish either the commission of a criminal offence by the defendant and/or individual persons associated with it or professional misconduct by it or such others. It is the plaintiff's case that a psychiatrist engaged by the Board (L), assessed client A as competent to consent to sexual activity and that she is not a vulnerable person in terms of s 195 of the Crimes Act 1961.

[5] Ms Bracewell's grounds for seeking access to another medical report on client A requested by and provided to the Board are that the contents of this second psychiatrist's report will support her defences to the defendant's claims for injunctive or compliance orders for the return to it of client A's medical records. That is the context in which the present application for non-party disclosure and inspection must be determined.

[6] The documents Ms Bracewell wishes to see and, potentially, use at the hearing are said to be records of an assessment of client A by a psychiatrist, whom I will refer to as "K", engaged by the Board. Ms Bracewell says that she has become

aware of the existence of such documents only recently as a result of a statement she says was made to her by the Deputy Health and Disability Commissioner. That statement was that the Chief Executive Officer of the Board reported to the Deputy Commissioner that a second assessment of client A's competency (to consent to sexual activity including prostitution), was carried out. The Board has confirmed the existence of this documentary material. The defendant, by counsel, also denies knowledge of the content of K's report on client A and only became aware of its existence very recently.

[7] The Board opposes its production to and inspection by the plaintiff on grounds that it is private and confidential health information about a person (client A) who is not a party to the proceeding. Client A has not consented to its disclosure and is said to have only agreed to be examined and reported on, on condition that the information would only be shared by another psychiatrist.

[8] The defendant also opposes the plaintiff's application on essentially the same

grounds as does the Board.

[9] Ms Bracewell's fundamental concern in pursuing this case is said to be that the defendant has failed in its duty to client A by permitting her to engage in sexual activity to which she cannot truly consent because of her vulnerable state.

[10] The first test to be applied to any disputed question of document disclosure (including disclosure by non-parties) is relevance to the proceeding. In the course of preparing this judgment until 28 April 2014, when the defendant filed a further memorandum together with two signed briefs of the evidence of its witnesses to be presented at trial, I had considered the document to be irrelevant to the case as pleaded. That preliminary view had, however, to be reconsidered because of those documents filed on that day by the defendant.

[11] One of the defendant's witnesses at trial will be [G]4 who is the Board's General Manager of Governance and Quality. [G] has also acted in this interlocutory application as counsel for the Board responding to, and opposing, the plaintiff's

application for disclosure of this document. [G's] signed brief of evidence refers to the examination of client A which is recorded in the document the plaintiff seeks, so that it is at least arguable that the defendant concedes its relevance to the proceeding. Nevertheless, the memorandum of counsel for the defendant filed on 28 April 2014 refers to the defendant's earlier submissions filed on 15 April 2014, including the defendant's submission then that the document is not relevant to the proceeding. At that earlier time, counsel for the defendant advised the Court that it did not intend to rely on the document.

[12] Despite this apparently implicit acceptance of relevance of the issue, if not the document, by the defendant, it is ultimately for the Court to determine whether a document is or is not relevant to the proceedings. This is to be assessed from the pleadings, the Authority's determination which is challenged, and in light of other interlocutory steps taken to date.

[13] Whilst the defendant may intend that its witness, [G], refers to client A's examination by K, that can really only be justified as general background information but which is not relevant to the true issues between the parties. K's report (which is one step removed from the reference to K's examination of client A) is, therefore in my assessment, irrelevant to the matters at issue.

[14] For that reason alone, I would refuse the application for non-party disclosure.

I should, nevertheless, deal with the Board's other grounds for resisting disclosure.

[15] Pursuant to cl 13 of sch 3 to the Employment Relations Act 2000 (the Act) this Court has the same power to make any order in relation to non-party discovery that a District Court may make under s 56B of the District Courts Act 1947. Subclause (2) confirms that every such application "is to be dealt with in accordance with the regulations made under this Act." As was recently confirmed in *Matsuoka v*

*LSG Sky Chefs Ltd*,5 the Employment Court Regulations 2000 (the Regulations) and,

in particular for the purposes of this case, reg 44 apply to such applications.

[16] If a party to litigation is entitled to object to disclosure and inspection on the grounds set out in reg 44(3), it is logical and appropriate that a non-party should have the same rights or protections in the same proceedings as a party subject to reg

44. One of the grounds of objection (under reg 44(3)(c)) is that disclosure would be

"injurious to the public interest".

[17] The Evidence Act 2006 (which does not apply to proceedings in this Court although the content of which guides the Court in its determination of analogous issues) provides a discretion to resist disclosure and inspection of documents for the purpose of protecting confidential information. This arises under s 69 of the Evidence Act which states:

**69 Overriding discretion as to confidential information**

(1) A direction under this section is a direction that any 1 or more of the

following not be disclosed in a proceeding: (a) a confidential communication:

(b) any confidential information:

(c) any information that would or might reveal a confidential source of information.

(2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding

of the communication or information is outweighed by the public interest in—

(a) preventing harm to a person by whom, about whom, or on

whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or

(b) preventing harm to—

(i) the particular relationship in the course of which the confidential communication or confidential

information was made, obtained, recorded, or prepared; or

(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or

(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the

Judge must have regard to—

(a) the likely extent of harm that may result from the disclosure of the communication or information; and

(b) the nature of the communication or information and its likely

importance in the proceeding; and

(c) the nature of the proceeding; and

(d) the availability or possible availability of other means of obtaining evidence of the communication or information;

and

(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

(f) the sensitivity of the evidence, having regard to—

(i) the time that has elapsed since the communication was made or the information was compiled or

prepared; and

(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of

offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a

communication or information not be disclosed whether or not the communication or information is privileged by another provision

of

this subpart or would, except for a limitation or restriction imposed

by this subpart, be privileged.

[18] There are some useful precedents in judgments about the disclosure of medical records.

[19] In *W v Counties Manukau Health Ltd*6 the High Court made an order for non- party discovery under the predecessor to what is now r 8.21 of the High Court Rules. The relevant documents included a medical file of a hospital patient. W alleged that she had been abused sexually by the patient as a consequence of the defendant's failure to supervise the patient after his release from a psychiatric hospital. The Court held that the documents were relevant to the proceeding and ordered their disclosure although on condition that there were to be restrictions on the persons who might inspect the documents for the purpose of the proceeding.

[20] In *Long v Attorney-General*7 the plaintiffs claimed that they had been given contaminated blood transfusions. The plaintiffs sought disclosure of records held by a non-party (the body which provided the blood) seeking access to blood donor registration forms held by those parties to enable the plaintiffs to contact the donors. Among the grounds of objection by this discovery by the non-party were that production of the documents was not necessary and the information contained in them was protected by medical privilege, privacy, and public interest.

[21] The High Court found that there was no medical privilege because the non- party was not in a doctor-patient relationship with the donors.

6 *W v Counties Manukau Health Ltd* [1997] 10 PRNZ 525 (HC).

7 *Long v Attorney-General* [1999] NZHC 1681; [1999] 14 PRNZ 560 (HC).

[22] As to whether the non-party could resist disclosure on the grounds of public interest immunity, the Court held:8

[20] ... The general rule as to public interest immunity is that information must be disclosed unless the public interest in preserving the confidentiality claimed, outweighs the public interest in ensuring that relevant information is before the Court. Where a confidential relationship exists and disclosure would be in breach of some ethical or social value involving the public interest, the Court has a discretion to uphold a refusal to disclose relevant evidence if it considers that on balance the public interest would be better served by excluding it.

[23] The High Court concluded that since there was no confidential relationship in the circumstances of this case, there could not be a claim for public interest immunity. Alternatively, the Court held that even if there had been a confidential relationship, the public interest in maintaining confidentiality was outweighed by the public interest in ensuring the Court's ability to get to the truth.

[24] These two cases can be distinguished from the current facts. The relationship between client A and K is protected by medical privilege because client A was assessed as a patient of K who is a registered medical practitioner. I also consider that the public interest in maintaining confidentiality between a patient and her medical practitioner outweighs the public interest in disclosing this information to third parties for the purpose of resolving an employment dispute between Ms Bracewell and the defendant.

[25] So I consider that it would be injurious to the public interest to require the Board to disclose to the plaintiff a report obtained by it from a medical practitioner in respect of a person whose consent to examination and analysis was given only and strictly on conditions. These were that the resulting information would not be made available to anyone other than a specified registered medical practitioner and not, by strong implication, to the plaintiff or to this Court in these proceedings. Even if the document is relevant to the proceeding as I have concluded it is not, it is not disclosable under reg 44(3)(c) of the Regulations.

[26] For the foregoing reasons I decline to direct non-party disclosure by the Board of the K medical report on client A. If the use of the document by the defendant at trial is to be an issue, that will be for the presiding judge to decide. This judgment relates to its pre-trial disclosure.

[27] The Board is entitled to costs on Ms Bracewell's unsuccessful application and, as a non-party, to its actual and reasonable costs. I note in this regard that it was represented by an in-house lawyer (who will also be a witness for the defendant).

[28] The Board may submit a memorandum in support of its position on costs within seven days of the date of this judgment, with the plaintiff having the period of seven days after service of that memorandum upon her to respond by memorandum. I am not minded to allow the defendant costs on this application in view of its current intention to refer to the circumstances that gave rise to the K medical report in its evidence at trial.

[29] Although the original version of this judgment, which will go to the parties and the non-party, will identify the location of the defendant's facility and the identity of counsel for the Board, copies of the judgment for distribution to others will anonymise these details consistently with orders for non-publication made by

the Court in its first interlocutory judgment.9

GL Colgan
Chief Judge

Judgment signed at 11 am on Thursday 8 May 2014