Employment Court of New Zealand

Fox v Hereworth School Trust Board [2014] NZEmpC 64 (8 May 2014)

Last Updated: 20 May 2014

IN THE EMPLOYMENT COURT WELLINGTON

[2014] NZEmpC 64

WRC 5/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for disclosure of documents
BETWEEN	EMMA YUEN SEE FOX Plaintiff
AND	HEREWORTH SCHOOL TRUST BOARD Defendant

Hearing:	By memoranda filed on 17 and 31 March and 11 and 14 April 2014
Appearances:	B Scotland, counsel for plaintiff S J Webster, counsel for defendant
Judgment:	8 May 2014

INTERLOCUTORY JUDGMENT (NO 5) OF CHIEF JUDGE G L COLGAN

A The defendant is not required to disclose to the plaintiff the contents of the documents known to the parties as A14.27, A14.28, A14.30, A14.53 and A14.77.

B The defendant's notes made by its legal adviser of its meetings of 18

December 2009 and 12 January 2010 affecting the plaintiff 's employment must be disclosed to the plaintiff although any parts of those notes consisting of legal advice to the defendant may be redacted.

C Costs are reserved.

EMMA YUEN SEE FOX v HEREWORTH SCHOOL TRUST BOARD NZEmpC WELLINGTON [2014] NZEmpC 64 [8 May 2014]

REASONS

[1] This interlocutory judgment deals with contested arguments about the privilege of some relevant documents in this litigation.

[2] In the Court's second interlocutory judgment issued on 13 December 2013,

the defendant was directed to disclose all meeting notes relevant to the proceeding.1

The defendant has withheld notes of its meetings on 18 December 2009 and

12 January 2010 asserting that the notes of these meetings are the subject of legal professional privilege. The meetings dealt with the matter of the plaintiff's employment and the Board's decisions leading to her dismissal. The notes were made by counsel for the defendant (Mr Webster) who attended those meetings in his capacity as legal adviser to the Board. It appears that Mr Webster's notes are the only written record of those meetings. The plaintiff asserts that in all the relevant circumstances, the defendant is not entitled to assert privilege in these records and invites the Court to peruse them to determine the question of privilege. The plaintiff appears to concede that if the notes contain reference to legal advice given to the Board by Mr Webster in the course of otherwise non-privileged discussions, the parts relating to the legal advice can be redacted from the notes.

[3] In response to the defendant's contention that this litigation was reasonably within its contemplation at the time of those meetings, the plaintiff rejects that contention, saying that her personal grievance was not raised with the Board until

18 January 2010.

[4] Further, the plaintiff complains that the defendant wrongfully refused to disclose other relevant documents on grounds of legal professional privilege. These documents and other communications are set out in a table at para 10 of Mr Scotland's memorandum of 17 March 2014. They are all emails between Board members created between 8 October and 3 December 2009.

[5] In relation to this series of emails for which privilege has been claimed by the defendant, Mr Webster advises the Court that two of these documents (numbered

1 *Fox v Hereworth School Trust Board* [2013] NZEmpC 240 at [41].

A14.124 and A14.125) being emails from Board member Andrew Thomas to himself both on 8 October 2009 have already been disclosed to the plaintiff. The defendant says, however, that the balance of these email documents are privileged. The defendant also opposes the plaintiff's proposal that these documents should be provided to the Court to determine the matter of privilege.

[6] Mr Webster submits that "there may have been some confusion in and around the sender and receiver details that has led to the plaintiff's objection". Counsel explains that, in compiling his documents for the purpose of disclosure, Mr Andrew Thomas (who was, in 2009, a Board member and is now its Chair) accessed on his home computer a file containing all of the emails relevant to the plaintiff. Counsel has explained that many of these were copies of emails Mr Thomas had obtained from other Board members and other sources during the various stages of what is described as "the disciplinary process" in respect of Mrs Fox. Counsel points out that Mr Thomas was not, at the relevant time, directly involved on the subcommittee that dealt with Mrs Fox although he was a Board member of the defendant throughout and was entitled to and did receive information and updates about what was going on. Counsel explains that despite the description of each of the documents contained in the defendant's document list, the relevant content of each email is different because it contains, within the email itself, another email communication between representatives of the defendant and its legal adviser.

[7] In relation to document A14.27, this is said to be an email forwarding a message from a Jock Mackintosh to the defendant's solicitors commenting on draft correspondence. Mr Webster submits that this is covered by non-litigious legal professional privilege because it involved advice on the content of a communication in connection with the plaintiff. In this regard, counsel submits that it is unnecessary in these circumstances for there to be a need for a proceeding or anticipated proceeding because the document is part of a legal advice communication.

[8] Document A14.28 is said to be an email from Mr Thomas to Tom Hamilton (another Board member) containing within it an email string comprising an exchange between members of the Board and its solicitors and is similarly covered by non- litigious legal professional privilege.

[9] Document A14.30 is said to be an email from Mr Hamilton to Mr Thomas containing within it an email exchange between members of the Board and its solicitors and is likewise covered by non-litigious legal professional privilege.

[10] Penultimately, document A14.53 is an email from Andrew and Juliet Thomas to Andrew Thomas (shifting the original email from one email address to another) containing within it an email exchange between members of the Board and its solicitors and is similarly covered by non-litigious legal professional privilege.

[11] Finally, document A14.77 is an email from Mr Hamilton to Mr Thomas containing within it an email exchange between members of the Board and its solicitors and is similarly covered by non-litigious legal professional privilege.

[12] The Court can and does rely upon such assertions by counsel as to matters of legal professional privilege and accepts those assertions in the absence of any contrary evidence or assertion. In these circumstances, the defendant is not required to disclose those email documents numbered A14.27, A14.28, A14.30, A14.53 and A14.77 to the plaintiff.

[13] I deal next with Mr Webster's meeting notes. He (as counsel) invites the Court to determine the question of privilege by analogy with s 56 of the Evidence Act 2006 which provides as follows:

56 Privilege for preparatory materials for proceedings

(1) Subsection (2) applies to a communication or information only if the

communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the proceeding).

(2) A person (the party) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect

of—

(a) a communication between the party and any other person:

(b) a communication between the party's legal adviser and any

other person:

(c) information compiled or prepared by the party or the party's

legal adviser:

(d) information compiled or prepared at the request of the party,

or the party's legal adviser, by any other person.

(3) If the proceeding is under, or to be under, Part 2 of the Children, Young Persons, and Their Families Act 1989 or the Care of Children Act 2004 (other than a criminal proceeding under that Part or that Act), a Judge may, if satisfied that it is in the best interests of the

child to do so, determine that subsection (2) does not apply in respect of any communication or information that the Judge specifies.

[14] The defendant submits that the documents should be held to be privileged because the defendant was, at the time of those meetings, being "constantly and consistently challenged by the plaintiff in respect of each step taken and it was made clear that if the Board proceeded with its disciplinary action then the matter would end up in the 'employment relations court'." This quotation was taken from an email by Dr Stephen Fox, who was then the plaintiff's advocate, to Mr Webster on

16 December 2009. So, the defendant submits, when the notes of the meetings were generated, the current proceedings were in contemplation by the plaintiff and this fact had been communicated to the defendant in unequivocal terms by the plaintiff's agent. So, it follows, the defendant submits, that the legal adviser's notes were in the nature of notes for the purpose of proceedings that were apprehended and comprised "information compiled or prepared by the party or the party's legal adviser" in terms of s 56(2)(c) of the Evidence Act.

[15] The defendant accepts that this Court is not subject to the Evidence Act 2006 and that such questions are governed by s 189 of the Employment Relations Act

2000.2 However, Mr Webster submits, following *Cruickshank v Chief Executive of*

Unitec Institute of Technology, that "... although admissibility is governed by s 189(2) of the [Employment Relations] Act, relevant sections of the Evidence Act may guide the Court in its approach".3

[16] Mr Webster submits that the circumstances are analogous to the facts in *Saunders v Campbell* where a plaintiff, on the advice of her solicitor, had maintained notebook records during a period in which relations between the plaintiff and her employer were strained and litigation was apprehended by the plaintiff and her

solicitor.4

[17] The plaintiff says that other disclosed documents and the Authority's

determination confirm that following the 18 December 2009 meeting, the defendant

2 *Burtton v Talley's Group Ltd* [2010] NZEmpC 118 at [3].

3 *Cruickshank v Chief Executive of Unitec Institute of Technology* [2012] NZEmpC 33 at [7].

4 *Saunders v Campbell* [1987] NZHC 353; (1987) 2 PRNZ 101 (HC).

reached a preliminary view that the plaintiff was guilty of serious misconduct and that the appropriate sanction for this would be her dismissal. That decision was not, however, taken until the defendant met again on 12 January 2010 after which meeting the decision to dismiss was confirmed.5

[18] Mr Scotland notes that the plaintiff was invited to attend the 18 December

2009 meeting but did not do so. Counsel submits that had Mrs Fox attended the meeting as she was invited to, she would have been able to hear the discussion and to make her own notes of it. Counsel submits that as a result of her non-attendance, "she has been left in the dark as to what was said about her at that meeting". I would have to say, however, and without knowing the contents of the record of the meeting, that it would have been very unlikely that any legal advice conveyed by Mr Webster to the Board at those meetings would have been given, or at least conveyed in the same way, in the presence of Mrs Fox. The most likely scenario in those circumstances would have seen the Board seeking and taking legal advice in the absence of others including the plaintiff.

[19] In these circumstances the plaintiff submits that it cannot be said that the

"dominant purpose" of preparing the notes of the 18 December 2009 and 12 January

2010 meetings was to prepare for a proceeding or an apprehended proceeding. Mr Scotland submits that the dominant purpose of

preparing the notes was instead to record the contents and outcomes of the two disciplinary meetings affecting vitally Mrs Fox, and that privilege therefore cannot attach to these notes or at least to all of them.

[20] Alternatively, counsel for the plaintiff argues that the defendant could not have been said to have had, on 18 December 2009 or 12 January 2010, reasonable grounds for contemplating becoming a party to a proceeding. Counsel invokes the judgment of the Court of Appeal in *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* where it was said that:6

...privilege can only arise when litigation is pending or contemplated and that will be only so where the party regards litigation as probable."

5 Refer paras 39, 40 and 45 of the plaintiff 's second amended statement of claim.

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

[21] That matter has been addressed more recently by the High Court in *Fresh Direct Ltd v J M Batten and Associates* where it was stated that "a mere vague apprehension of litigation was not sufficient".7

[22] Further, Mr Scotland makes the following points. First, as noted already, the

plaintiff's personal grievance was not raised with the defendant until 18 January

2010. Next, despite asserting that it was "being constantly and consistently challenged by the Plaintiff", privilege is only claimed in respect of the notes of these two particular meetings and not of any previous meeting in which apprehension of such challenges must logically be said to have been present also. Mr Scotland submits that Dr Fox's 16 December 2009 email is insufficient to establish reasonable grounds for contemplating a proceeding, particularly given the writer's clear indication that whether litigation would eventually be required was dependent upon the path to be taken by the defendant.

[23] Next, counsel submits that the Court should exercise its jurisdiction under s

189 of the Employment Relations Act (equity and good conscience) to order disclosure of the notes of the two meetings. That is because: their purpose was to discuss the plaintiff's future employment; the discussions resulted in the termination of the plaintiff 's employment; the plaintiff would have been entitled to have made her own notes at the meetings had she attended; and finally, without access to the notes, the plaintiff's ability to advance her case will be diminished significantly.

[24] Next, counsel submits that even if some parts of the notes concerned the preparation for an apprehended proceeding, the meetings were the subject of express advice to Mrs Fox that they were disciplinary and, in this regard, her attendance was invited. In these circumstances, counsel submits, it is very likely that not all of what was recorded in the notes can reasonably be said to relate to preparing for an apprehended proceeding. Thus, Mr Scotland submits, redaction of those parts of the notes relating strictly to legal advice about an apprehended proceeding will be

sufficient to protect the defendant's proper rights of privilege.

7 *Fresh Direct Ltd v J M Batten and Associates* [2009] NZHC 2430; (2009) 20 PRNZ 126 (HC) at [48].

[25] The plaintiff distinguishes the *Saunders* case relied on by the defendant in the following way. Mr Scotland submits that whereas in *Saunders* the plaintiff maintained a notebook on the instructions of her solicitor, in this case the defendant's legal adviser prepared a record in the form of notes of the meeting. Next, Mr Scotland submitted that in *Saunders* the dominant purpose of maintaining the notebook was to prepare for apprehended litigation but that there was no other purpose in doing so. That is to be contrasted with the present case where, it is submitted, the purpose of preparing the notes was to record the outcome of a disciplinary hearings in which Mrs Fox was invited to participate but did not. Finally, it is said that in *Saunders* it was intended that the notebook in that case would form the basis of the plaintiff's brief of evidence, whereas there is no such direct connection between Mr Webster's notes and the present proceedings.

[26] The predominant purpose of the meetings was to consider what is described as the disciplinary process affecting Mrs Fox as the defendant's employee. Each of the meetings was made known in advance to Mrs Fox and her attendance was invited. What was discussed at those meetings is likely to have been very material to the question of justification for her dismissal. Except to the extent that the Board's solicitor may have provided it with legal advice in the course of those meetings, no privilege attaches to the records of the meeting because they were made by the lawyer.

[27] Even if regard is to be had to s 56 of the Evidence Act as I consider appropriate, it does not assist the defendant. That is because the notes record communications or information made, received, compiled, or prepared, but not for the dominant purpose of preparing for a proceeding or an apprehended proceeding. Assuming, in the defendant's favour that at the time of the two meetings it could be said that there was an apprehended proceeding, the dominant purpose of the meetings about which the notes were made was to determine allegations of serious misconduct against Mrs Fox and the outcome of those determinations. Apprehended proceedings were, at best, an ancillary purpose of the meetings.

[28] Assuming, by analogy with subs (2) of s 56 of the Evidence Act, that the

Board contemplated on reasonable grounds becoming a party to proceedings brought

by Mrs Fox, the statutory privilege would extend, in the circumstances of this case, to information compiled or prepared by the Board's legal adviser. That would, however, apply only to information about the apprehended proceeding and cannot extend to the

communications which passed between the participants at those meetings on the subject matter for which they were called, namely to assess whether Mrs Fox had seriously misconducted herself in employment and, if so, the consequence of that serious misconduct.

[29] Nor do I accept that the circumstances in this case are analogous to those in *Saunders.* Although there is a superficially attractive similarity between the cases I consider they are distinguishable in the following circumstances. When the plaintiff in *Saunders* consulted a lawyer about the serious dysfunctional relationship between herself and her employer that even then appeared likely to bring about the litigation which subsequently occurred, the lawyer advised the plaintiff to keep notes of various events so as to create a record for the purposes of litigation. The High Court accepted that the contents of the plaintiff's notes would form the basis of her brief of evidence from which her solicitor would make litigation decisions. The High Court followed the early judgment of *Southwark & Vauxhall Water Co v Quick* where it

was stated by Cotton LJ:8

The object of the rule and the principle of the rule is that a person should not be in any way fettered in communicating with his solicitor, and that must necessarily involve that he is not to be fettered in preparing documents to be communicated to his solicitor.

[30] In these circumstances, the High Court found that the plaintiff's notes were

privileged communications between solicitor and client.

[31] That is very different to the circumstances in this case. Here, at meetings which the plaintiff was invited to attend but did not, the solicitor kept notes of what transpired at the meeting. The predominant purpose of the meetings was to hear from the plaintiff in response to allegations of serious misconduct by her and, at the second meeting, to hear from the plaintiff about the consequences of the defendant's conclusion of serious misconduct. Correspondence disclosed between the parties

and produced to the Authority, together with its determination, reveal that decisions

8 *Southwark & Vauxhall Water Co v Quick* [1878] UKLawRpKQB 22; (1978) 3 QBD 315 (CA) at 323.

were taken by the Board affecting Mrs Fox's employment at those two meetings. The notes made by the solicitor are unlikely to have been in the nature of a record of events for the purpose of anticipated litigation, at least principally.

[32] I decline to uphold the defendant's blanket claim to privilege in the notes made of the two meetings of the Board of 18 December 2009 and 12 January 2010. If there are portions of those notes recording legal advice provided by Mr Webster to the Board on those occasions, then the privilege that attaches to such advice can be protected properly by redacting from the notes of those meetings made by counsel, those portions of them containing that advice.

[33] Finally, because it has been referred to in the defendant's submissions in reply filed on 14 April 2014, although not for the subject of any application currently before the Court, I simply mention Mr Webster's expressed concern about compliance by the plaintiff with disclosure requested of her. Counsel refers to the Court's interlocutory judgment of 4 March 2014 in which Mrs Fox was required to disclose all communications (in both electronic and hard copy form) in terms of the

formal request of her dated 24 December 2013.9 Mr Webster advises the Court that

although a series of hard copies of documents has been provided to the defendant, its request for electronic copies of the material has not been satisfied and there are a number of other respects in which the defendant takes issue with the adequacy of the plaintiff's disclosure. Rather than take this matter further, however, I simply note that the parties will no doubt wish not to delay the current tentative hearing dates so that the defendant should apply formally if this position cannot be resolved between counsel informally. Mr Webster advises that he will not be returning from leave until

21 May 2014 although I would hope that other counsel who would be expected to have responsibility for the file should be able to deal with any interlocutory

application that may be required in the meantime.

9 *Fox v Hereworth School Trust Board (No 4)* [2014] NZEmpC 44.

[34] I reserve costs on this interlocutory application noting that each party has been successful in part.

GL Colgan

Chief Judge

Judgment signed at 4 pm on Thursday 8 May 2014