



New Zealand Employment Relations Authority Decisions

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Jeffries v Department of International Affairs (Wellington) [2016] NZERA 390; [2016] NZERA Wellington 106 (25 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2016] NZERA Wellington 106
5623483

BETWEEN HANNAH JEFFRIES Applicant

AND DEPARTMENT OF INTERNAL AFFAIRS Respondent

Member of Authority: Vicki Campbell

Representatives: Phillip McCabe for Applicant

Steph Dyhrberg for Respondent

Investigation Meeting: On the papers

Determination: 25 August 2016

PRELIMINARY DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. **The application for referral of three questions of law is declined.**
- B. **Costs are reserved.**

Employment relationship problem

[1] Ms Jeffries seeks a referral of three questions of law to the Employment Court under [section 177](#) of the [Employment Relations Act 2000](#) (the Act). The application is opposed by the Department of Internal Affairs (DIA). By consent of the parties this matter is being dealt with as a preliminary matter on the papers currently before the Authority.

[2] As permitted by [s 174E](#) of the Act this determination has not recorded all the submissions received from Ms Jeffries and DIA but has stated findings of fact and

law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[Section 177](#)

[3] [Section 177](#) of the Act states:

Referral of question of law

(1) The Authority may, where a question of law arises during an investigation,—

(a) refer that question of law to the Court for its opinion; and

(b) delay the investigation until it receives the Court's opinion on that question.

(2) Every reference under subsection (1) must be made in the prescribed manner. (3) The Court must provide the Authority with its opinion on the question of law

and the Authority must then continue its investigation in accordance with that opinion.

(4) Subsection (1) does not apply—

(a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.

[4] The Authority is currently investigating an employment relationship problem between Ms Jeffries and DIA. The matter has been set down for investigation over four days, 19 – 22 September 2016 inclusive.

[5] In her statement of problem Ms Jeffries claims one or more conditions of her employment have been affected to her disadvantage by the unjustifiable actions of the DIA. In particular Ms Jeffries claims:

a) DIA has not provided her with a safe work environment since August 2015 and is in breach of its statutory and contractual obligations to her.

b) DIA managers have not impartially administered the written disciplinary/dismissal policies of the DIA.

c) Despite bringing problems to the attention of management no appropriate action was taken.

[6] Before exercising my discretion to refer questions to the Court I must be satisfied the question involves a question of law which requires the opinion of the Court to assist the Authority.

[7] The three questions of law are stated in the application as [verbatim]:

a) Is it lawful for the Department Respondent to rely on the privileged primary medical notes which the Applicant made available on 1 March 2016 to Ms Louise Sinclair, her senior manager and later to solicitor Ms Stephanie Dyhrberg alone, to found the Department's pleadings in paragraphs 2.29 to 2.34 of its Statement of Reply, when these medical notes record a mistaken diagnosis?

b) Is it lawful for the Department Respondent to rely on the privileged primary medical notes containing a mistaken diagnosis to justify its decision directing the Applicant not to resume her duties as an Identity and Passport Officer from 16

May 2016 when the Department had received then and since uncontested medical

advice from Dr Kim Hurst that the Applicant had by 16 May 2016 recovered from the illness causing her to be on Sick Leave from 26 February 2016?

c) Is it lawful for the Department Respondent in terms of the Health and Safety at Work Act 2015's principles of mitigating the risk of workplace hazard and having regard to the central factual issue in the proceedings before the Authority whether the existing disciplinary/dismissal processes have been vitiated by the hazard of workplace bullying from August 2015 to impose, as a condition for the Applicant's return to work, the Department's immediate resumption of these very disciplinary/dismissal processes?

[8] In submissions in reply I have been advised that the medical notes made available on 1 March 2016 did not contain a mistaken diagnosis. At one point in time there was a mistaken diagnosis but this had previously been rectified and is now irrelevant.

Reliance on medical records

[9] Ms Jeffries seeks the opinion of the Court as to whether DIA is able to rely on a limited waiver of privilege in respect to the medical notes which she made available to Ms Sinclair and DIA's legal advisor. In particular Ms Jeffries seeks an opinion as to whether the limited waiver allows DIA to reference the medical notes in its statement in reply.

[10] I was referred to the Privy Council case of *B v Auckland District Law Society*

(*New Zealand*)¹ (ADLS) to support the proposition that Ms Jeffries waiver of

privilege in her medical notes was limited only to her manager and DIA's legal

¹ [2003] UKPC 38; [2004] 1 NZLR 326.

advisor and could not be used by DIA for any purpose including its pleadings in the statement in reply.

[11] The main issue in that case was whether the Law Society was entitled under section 101(3)(d) of the [Law Practitioners Act](#)

[1982](#) to require the firm to produce privileged documents for the purpose of an inquiry into allegations of professional misconduct. The answer turned on whether the [Law Practitioners Act 1982](#), which gives the Law Society power to call for documents from practitioners under investigation, overrides any claim to legal professional privilege which may subsist in them. The matter concerned legally privileged information.

[12] The issue in this case is not about legal privilege but is about medical privilege. Medical privilege has been addressed by the Employment Court on a number of occasions. In *Motor Machinists v Craig* the Court provided guidance for the, then, Employment Tribunal to follow when hearing evidence which may be

subject to a disputed claim of medical privilege.²

[13] The Court stated that medical privilege extends only to communications from the patient and not to what a doctor observed on examination of the patient. From the discussion in that case I have concluded that the Authority must take into account the fact that an applicant is claiming privilege and not in any way allow that privilege to

be breached.³

[14] The Court stated:⁴

Although the rules of evidence are not as strict in the Tribunal as in Courts of ordinary jurisdiction, the Tribunal, when exercising its equity and good conscience jurisdiction to allow in evidence that would not be admissible in a Court of law (by reason of a breach of doctor/patient privilege), should not override a patient's objections or allow his or her doctor to do so.

[15] The Court also addressed the issue of medical privilege in *Gilbert v Attorney- General in respect of the Chief Executive of the Department of Corrections (No 1)*.⁵

² [\[1996\] NZEmpC 225](#); [\[1996\] 2 ERNZ 585](#) at line 34 page 595.

³ Above n 1 at lines 39-47 page 596.

⁴ Above n 1 at line 2 page 597.

⁵ [\[1998\] NZEmpC 200](#); [\[1998\] 3 ERNZ 500](#)

In that case the Court referred to the High Court decision in *M v L6* which drew a distinction between the rules for criminal cases and civil cases as follows:⁷

I consider that a distinction is to be drawn in a civil case where the plaintiff/patient initiates the proceeding. In so doing the plaintiff must be taken to have appreciated, especially in a case such as this, that sensitive personal matters will inevitably be canvassed. Where the information goes to a central issue great care needs to be taken to ensure that the defence gets a fair trial. In this case substantial punitive damages are sought. There are, or may be, issues as to extent of impact or injury ... Without full access to relevant material the defence will be denied the opportunity of investigating, testing and pursuing those lines of inquiry.

[16] The Court went on to hold that the privilege to protected communications is not limited to evidence intended to be given at trial but is applicable to considerations of discovery of documents.⁸

[17] Ms Jeffries confirmed by email that the information she was providing in relation to the medical notes was “*for your eyes only*” and was “*private information which ought not to be circulated*”. In doing this Ms Jeffries was seeking to maintain the confidentiality of the medical notes.

[18] I have reviewed the statement in reply lodged by DIA in these proceedings and am satisfied there has been no disclosure of any confidential medical information and the pleadings contain no inappropriate reference to the medical notes. Specifically:

d) Paragraph 2.29 is a statement of fact that notes were provided in confidence and the notes state that Ms Jeffries suffered from previously undisclosed medical condition(s).

e) Paragraphs 2.30 to 2.34 inclusive relate to correspondence between counsel for each party from 10 March after Ms Jeffries criticised DIA for saying the medical conditions were previously undisclosed.

[19] The statement in reply sets out, as required by the [Employment Relations Authority Regulations 2000](#) the respondent's account of the relevant facts. Form 3 of the Regulations requires the respondent to state those facts fully, fairly, and clearly.

The respondent has met that obligation.

⁶ [\[1997\] NZHC 1847](#); [\[1997\] 3 NZLR 424](#).

⁷ Above n 4 at line 33 page 513.

[20] The respondent, while referencing the fact of the medical notes has not provided the Authority with a copy and as far as I am aware the Authority has not required the production of the notes. It has therefore, maintained the confidentiality of the medical notes.

[21] After Ms Jeffries was cleared to return to work by her general practitioner, DIA wished to seek its own opinion about Ms Jeffries ability to return to work given that the disciplinary process would continue on her return.

[22] I do not agree that a question of law has been posed for answer. What is posed is a question of the application of certain facts to established law.

Reliance on medical notes to justify a decision directing Ms Jeffries not to resume her duties

[23] From the pleadings currently before the Authority, it is apparent that the reason Ms Jeffries has not yet been returned to her duties is due not to the medical notes provided by Ms Jeffries, but to concerns held by DIA about Ms Jeffries fitness to return to work.

[24] Ms Jeffries has been on extended sick leave which Ms Jeffries claims was caused or exacerbated by workplace stress and DIA considered the medical certificate provided by Ms Jeffries did not provide sufficient information about Ms Jeffries condition or any steps to be taken to mitigate any risks upon her return to work.

[25] Whether DIA is justified in withholding its agreement for Ms Jeffries return to work will require an investigation by the Authority into the facts. I do not agree that a question of law has been posed for answer, rather the answer will require the application of certain facts to established law.

Imposition of the resumption of disciplinary processes on return to work and the application of the Health and Safety at Work Act 2015

[26] Whether DIA is justified in resuming the disciplinary processes on Ms Jeffries return to work will be a matter for the Authority to determine after its factual inquiry and does not give rise to a question of law. The Authority regularly investigates allegations of breaches of both implied and express terms of an employment agreement to provide a healthy and safe work environment.

[27] Ms Jeffries claims the new Health and Safety at Work Act 2015 is at issue in that DIA seeks to resume disciplinary processes against her based on her allegations that she was subject to workplace bullying against her temporary team leader. Ms Jeffries claims her allegations warranted an independent investigation and not disciplinary action against the employee raising the complaint.

[28] Further, Ms Jeffries claims she will be subject to an avoidable risk endangering her health whilst waiting for the Authority to determine her case if DIA carries out its intentions in this respect.

[29] The Authority has no jurisdiction under the Health and Safety at Work Act

2015. There is however, a term in Ms Jeffries applicable collective agreement which refers to DIA's Code of Conduct which itself, at page 9 requires DIA to provide a safe and healthy work environment and promote healthy work practices.

[30] Whether DIA is justified in pursuing its disciplinary/dismissal processes on Ms Jeffries return to work will require an investigation by the Authority into the facts. I do not agree that a question of law has been posed for answer rather the answer will require the application of certain facts to established law.

[31] The Authority has been asked on occasion, to intervene and prevent an employer from continuing with a disciplinary process on similar grounds as those set out by Ms Jeffries. The Authority is loathe to intervene in a disciplinary process instigated by an employer because such investigations are within the management prerogative of an employer and should not be interfered with lightly. The question of whether an intervention is necessary is a mixed question of fact and law but is not a question of law requiring an opinion from the Court.

Conclusion

[32] Ms Jeffries application to refer questions to the Employment Court is declined.

Costs

[33] Costs are reserved and will be dealt with following the Authority's substantive determination.

Vicki Campbell

