Employment Court of New Zealand

Smithson v Wellington College Board of Trustees [2020] NZEmpC 204 (24 November 2020)

Last Updated: 27 November 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2020] NZEmpC 204
EMPC 289/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a verification order
BETWEEN	DIANE SMITHSON Plaintiff
AND	WELLINGTON COLLEGE BOARD OF TRUSTEES Defendant

Hearing:	(on the papers)
Appearances:	B Buckett, counsel for plaintiff C Heaton, counsel for defendant
Judgment:	24 November 2020

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for a verification order)

Introduction

[1] This judgment resolves an issue as to whether proper disclosure has been given by the Wellington College Board of Trustees (Wellington College) to Ms Diane Smithson and, if not, whether a verification order should be made.

[2] This question arises in the context of a long-running employment relationship problem. In her de novo challenge, Ms Smithson asserts that she was alienated from her employment at Wellington College following an unfair investigation of a

complaint; and that numerous actions on the part of the employer thereafter disadvantaged her.

[3] Ms Smithson says she took sick leave on 10 June 2015 in a context where she had legitimate unaddressed issues including some of a health and safety nature; and that from 19 June 2015, Wellington College has refused to allow her to return to work.

[4] It is alleged that after raising a disadvantage grievance, there were many subsequent attempts on Ms Smithson's part to

engage in appropriate return-to-work processes, but Wellington College did not participate in these in a fair and reasonable way. She seeks reinstatement and a range of financial remedies.

[5] For its part, Wellington College strongly denies these assertions, saying it acted reasonably at all times, including when addressing the return-to-work issues.

History of disclosure issues

[6] Ms Buckett, counsel for Ms Smithson, submits that the background to the disclosure issues in the Court flow from the fact that provision of documents at the Employment Relations Authority stage was far from satisfactory; and that Wellington College was on notice of these concerns when Ms Smithson filed her challenge.

[7] On 26 September 2019, a comprehensive notice requiring disclosure of 15 categories of documentation was served. In broad terms, those categories related to any communications involving senior staff or Board members about any issues pertaining to Ms Smithson, as raised in the pleadings; they included communications about an investigation conducted by Mr Bruce Murray, about incompatibility issues, and about the possibility of Ms Smithson returning to work.

[8] The notice contained this paragraph:

For the avoidance of doubt, the information requests above do not include (I.e. are in addition to) what has already been provided by the defendant.

[9] The notice was served under reg 42 of the Employment Court Regulations 2000 (the Regulations); the terms of that regulation make it clear that all relevant documents or classes of documents are to be listed or indexed.

[10] In response, counsel for Wellington College, Ms Heaton, filed a "Memorandum of Disclosure". It proceeded on the basis that what had been requested was disclosure of any documents that had not been provided in evidence before the Authority. Ms Heaton referred to each category in the notice requiring disclosure, indicating whether or not Wellington College held any records other than those which had been placed before the Authority. This approach resulted in the disclosure of two documents which were attached to the memorandum. If read together with the notice of disclosure, the contents of the memorandum were clear.

[11] For Ms Smithson, this response was not regarded as satisfactory. In March 2020, an application for a verification order was brought, along with an application for particular discovery.

[12] The primary focus is now on the question of whether a verification order should be made. Included in the application for a verification order was a further list of requested documents, which broadly reflected the original requests. Reference was made to records of discussions and correspondence between relevant principals, senior members of staff, and named members of the Board of Trustees.

[13] The applications were supported by an affidavit from Ms Smithson. In summarising the contents of the affidavit, Ms Buckett says Ms Smithson was of the view that, in light of her knowledge and experience of Wellington College's internal work and processes, it defied logic that:

- There are no reports to the Board from Mr Moses (previous Headmaster) and Mr Fountain (current Principal), given it is indisputable that both individuals feed the Board with information about the defendant's operations, including employment matters, as part of their role.
- There are no Board minutes where the Board discussed incompatibility.

- There does not exist written correspondence or documents of discussions between Mr Fountain and various staff, such as Mr Mau and Ms Maddren prior to the finding of incompatibility.
    - There does not exist written correspondence or documents of discussions between the incumbent Principal Mr Fountain and Mr Moses as the outgoing Headmaster regarding the plaintiff. It beggars belief there was not a comprehensive "hand-over" between the two.
    - The Board instructed [its] lawyer to consider incompatibility some 10 months earlier yet there is no paper trail of inter-Board member discussions regarding incompatibility or any written correspondence or documents of discussion between Mr Moses or Mr Fountain and the Board prior to the letter of 12 June 2018. It simply beggars belief there were no emails between Board Members and to and from Mr Moses or Mr Fountain regarding incompatibility between mid-2017 and mid-2018.

...

[14] Wellington College considered the applications which had been brought to the Court. In due course, two statements were filed on behalf of the College.

[15] First, Mr Gregor Fountain, current Principal and a member of the Board of Trustees, provided an affirmation in which he said he had considered carefully the documents which had been filed, including Ms Smithson's affidavit. He recorded he had also sent them by email to past and present senior members of College staff, and to members of the Board of Trustees which had been identified by Ms Smithson. He had asked each of them to carefully consider the documents, and to send to him and to Ms Heaton any and all documents that had not already been disclosed to Ms Smithson, and which may be relevant to the issues before the Employment Court. He also reviewed whether there could be any such documents which either were or may have been in his possession.

[16] He said that as a result of his inquiries there were only two documents that may not have previously been provided; these were made available to Ms Smithson.

[17] He summarised the result of his enquiries as follows:

a. All relevant Board minutes, including redacted in-committee minutes, had been provided to Ms Smithson.

b. He believed on advice that the parameters of research undertaken by counsel for Wellington College were privileged, as was the nature of advice given to it, and when that advice may have been given.

c. As set out in a letter of 12 June 2018 from the Board to Ms Smithson, through counsel, he had held concerns about the working relationship between the parties, and whether it was tenable for Ms Smithson to return to work. The letter had indicated, however, that prior to making any decision he and the Board wished to meet with Ms Smithson and counsel to hear her views.

d. In summary, the documents sought in Ms Smithson's original notice of disclosure had either already been provided to her, or do not exist.

[18] Second, Mr Roger Moses, a previous Principal, filed an affidavit on the same topic.

[19] After referring to the disclosure documents mentioned above, he said he had considered these in light of what had been explained to him was the College's continuing obligation to disclose to Ms Smithson all non-privileged documents that may be relevant to the issues before the Court.

[20] He confirmed that to the best of his knowledge and belief, there were no documents that could be relevant that had not been disclosed already. He then said:

a. As to discussions with and between Board members; any relevant comments were recorded in the in-committee minutes already disclosed to Ms Smithson.

b. All his correspondence with Mr Murray about the investigation he carried out and his resulting report had been made available to Ms Smithson.

c. There was no written correspondence between him and Mr Fountain that had not been disclosed to Ms Smithson.

d. There was no written correspondence between him and Ms Maddren that had not been disclosed to Ms Smithson.

e. The notes of Mr Murray's investigation, and in particular any meetings or discussions he had a senior staff member, had been disclosed.

f. In summary, he confirmed that the documents in Ms Smithson's original notice of disclosure had either already been provided, or do not exist.

[21] On 5 June 2020, I held a telephone directions conference with counsel. Ms Buckett advised the Court that she was in the course of taking instructions as to the disclosure issues. She said there may be outstanding issues. Counsel agreed that these could be discussed directly between them in the first instance.

[22] I directed that if outstanding issues relating to the application for a verification order had not been resolved by 19 June 2020, Wellington College was to file a notice of opposition and any further evidence.

[23] I went on to set the challenge down for hearing on 14, 15 and 16 December 2020, making appropriate timetabling directions for the fixture.

[24] On 19 June 2020, counsel filed a joint memorandum which suggested that issues relating to disclosure continued to be unresolved. They said that if this was still the case by 17 July 2020, Wellington College would file a notice of opposition and any further evidence by that date. I confirmed this agreement.

[25] On 27 July 2020, Ms Heaton emailed the Court stating there had been correspondence between counsel that day about the possibility of a joint memorandum being filed. That had not been agreed at that point. She said, however, that Wellington College's position was that it did not wish to oppose the making of a verification order. But it had provided the affirmed/sworn statements from Mr Fountain and Mr Moses on behalf of Wellington College and was of the view that these met the requirements of reg 46(3) of the Regulations. This is the regulation which relates to verification orders, to which I shall come shortly.

[26] At a telephone directions conference held on 4 November 2020 to review any outstanding issues with regard to the

upcoming fixture, I was informed that there remained an issue between counsel as to whether a verification order should be made. Ms Heaton repeated that Wellington College had not opposed the application but had filed statements which in substance met the requirements of an affidavit filed pursuant to a verification order. For her part, Ms Buckett said that the statements were not adequate.

[27] The Court was asked to resolve the issue of adequacy. Given the proximity of the hearing, I directed the filing of submissions promptly, which have now been received.1

Discussion

Relevant provisions

[28] Under reg 46 a verification order is described as one which requires a party to disclose, in a sworn or affirmed statement, whether any document or any class of documents specified in a notice requiring disclosure that has not been disclosed in response to the notice:

a. is in the possession, custody or control of the opposing party; and
b. if not, whether any such document or class of documents was ever in the possession, custody or control of the opposing party; and
c. if so, when it was parted with and what became of it.

[29] Regulation 47 provides that a Court may make a verification order if the Court is satisfied "of the probable existence of the document or class of documents" specified in the original notice requiring disclosure.

1 Filed on 11, 16 and 19 November 2020.

[30] Both counsel referred to certain provisions of the High Court Rules 2016 (HCR), as they relate to discovery obligations in that Court. Accordingly, I set out the relevant rules:

8.13 Solicitor's discovery obligations

As soon as practicable after a party becomes bound to comply with a discovery order, the solicitor who acts for the party in the proceeding must take reasonable care to ensure that the party—

(a) understands the party's obligations under the order; and
(b) fulfils those obligations.

8.14 Extent of search
(1) A party must make a reasonable search for documents within the scope of the discovery order.
(2) What amounts to a reasonable search depends on the circumstances, including the following factors:

(a) the nature and complexity of the proceeding; and
(b) the number of documents involved; and
(c) the ease and cost of retrieving a document; and
(d) the significance of any document likely to be found; and
(e) the need for discovery to be proportionate to the subject matter of the proceeding.

8.15 Affidavit of documents
(1) Each party must file and serve an affidavit of documents that complies with this rule, subject to any modifications or directions contained in a discovery order.
(2) In the affidavit of documents, the party must—

(a) refer to the discovery order under which the affidavit is made; and
(b) state that the party understands the party's obligations under the order; and
(c) give particulars of the steps taken to fulfil those obligations; and
(d) state the categories or classes of documents that have not been searched, and the reason or reasons for not searching them; and
(e) list or otherwise identify the documents required to be discovered under the order in a schedule that complies with rule
8.16 and Part 2 of Schedule 9; and
(f) state any restrictions proposed to protect the claimed confidentiality of any document.

(3) The affidavit may be in form G 37.
(4) Each party must file and serve the affidavit of documents within such time as the court directs or, if no direction is made, within 20 working days after the date on which the discovery order is made.

[31] I make the obvious point that these provisions relate to the process which is normally mandatory for a High Court proceeding where each party has to file and serve an affidavit of documents; and that this is often the first opportunity for the parties to undertake formal discovery. These processes obviously differ from the scheme provided by the Regulations which is driven by the parties, and usually arise in the context of a challenge of a determination where it is likely documents have already been provided. The High Court Rules are from time to time applied by this Court via reg 6, but in those circumstances it is necessary to recognise any relevant differences between the two regimes.

The memorandum of disclosure

[32] Ms Buckett submits that the first problem is no list of documents was produced in response to Ms Smithson's notice requiring disclosure. She submitted, in effect, that the defendant's memorandum of disclosure did not satisfy the regulatory requirements.

[33] Regulation 42(3)(a) stipulates that following service of a notice requiring disclosure, the opposing party is to assemble in a convenient place all relevant documents in the opposing party's possession, custody or control, and "make a concise and ordered list or index of those documents".

[34] There is no statutory form for such a list or index.

[35] Ms Heaton submits that, in accordance with reg 43 of the Regulations, the defendant's memorandum complied with the tenor of the notice of disclosure, as required. She says that by September 2019, the dispute and proceedings between the parties had been ongoing for four and a half years. The parties had attended a three- day investigation meeting. There had been a considerable number of relevant documents, a significant proportion of which were correspondence between legal counsel from 2015 onwards.

[36] Moreover, she said, the memorandum was prepared on the basis that the information request excluded documents which had already been provided. Thus, it addressed the question: were there any documents beyond those which had been referred to in evidence before the Authority? The answer was given on a per category basis in a concise way. Two documents only were identified, and these were annexed to the memorandum.

[37] While I agree that it would normally be the case that a list or index would be provided for all documents held by the opposing party which fell into the identified categories (unless there was an objection to doing so), the approach adopted for Wellington College was in the particular circumstances understandable. It is difficult to see why it would have been necessary to list or index a range of documents which had already been provided at the Authority's investigation. Beyond those documents, it was the defendant's position there was very little more to disclose. In these circumstances, the memorandum adequately addressed the categories identified in the memorandum of disclosure.

[38] The only caveat to this conclusion relates to the fact that no express reference was made to privileged documents. It appears the possibility of there being privileged documents was known previously since Ms Smithson had been provided with an invoice of counsel for Wellington College which referred to this possibility. It may have been thought, therefore, that it was unnecessary to refer to such documents. In any event, the issue was specifically addressed subsequently.

The adequacy of the affirmation/affidavit

[39] Ms Buckett argued that issues arose from the statements which were subsequently filed because:

a. the responsibility for disclosure had been delegated to persons who were not solicitors; and
b. each deponent had taken it upon themselves to determine whether documents were or were not relevant.
c. there was no listing of privileged documents that were capable of being referenced, at least as a class of documents.

[40] Ms Heaton submitted a verification order would impose a requirement on a *party* to file a sworn or affirmed statement. The defendant could not be criticised for respecting this requirement. She went on to say:

a. The affirmed and sworn statements in substance meet the requirements of reg 46(3) because each deponent confirmed there are no documents in the various categories of the notice of disclosure that had not been disclosed.
b. In providing those statements, regard was given to HCR r 8.15(2)(a)–(c), as expressly recognised by each deponent.
c. Each of the deponents referred to the documents filed by Ms Smithson, and in particular, her affidavit. That affidavit clearly outlined her concerns, as summarised earlier. What she sought were documents that she believed related to her circumstances which had not already been disclosed. Relevance was hardly in issue because she was seeking any documents which pertained to her circumstances.

[41] The contents of the affirmation/affidavit show a clear understanding of the issues that needed to be addressed, as derived from the formal documents that had been filed on behalf of Ms Smithson, which included her affidavit. I see no

evidence that there has been an unwarranted delegation by counsel of disclosure responsibilities to the parties. Rather, some care has been taken to deal with those concerns. The deponents were obviously directed to the formal requirements they needed to consider. Each statement filed in the Court corroborates the other.

[42] With regard to the question of the listing of privileged documents, I am satisfied this concern was addressed for the College. Ms Smithson referred to her concern about this issue in her affidavit. Mr Fountain responded in his affirmation, indicating that research undertaken by counsel for Wellington College was privileged,

as was the nature of the advice, and when it may have been given. The description of the privileged documents was adequate. A party is not required to make privileged documents available for inspection. I agree such documents could be referred to as a class, as they were, in effect, by Mr Fountain.

Should a verification order now be made?

[43] The final issue I must address is whether there is a basis for making a verification order, in light of the materials that have now been filed.

[44] Ms Smithson believes that in light of her knowledge of the internal processes of Wellington College, it “defies logic” that there are no further documents for disclosure.

[45] I must assess that concern against the specific evidence of Mr Fountain and Mr Moses which outline the steps that have been taken to address the concerns expressed by Ms Smithson in her detailed affidavit. I am satisfied that those steps were appropriate in the circumstances.

[46] In light of their direct evidence, the Court cannot conclude it is probable there are further documents which exist in respect of any of the classes identified in the notice of disclosure, or for that matter the application for a verification order.

[47] Ms Buckett submitted that were the Court to determine that a verification order should not be made, Wellington College should be directed to comply with the requirements of the notice of disclosure.

[48] In fact, an application for a verification order requires consideration of that very question. The evidence of Mr Fountain and Mr Moses focused on the categories described in the notice requiring disclosure. This being the case, it is unnecessary to consider, separately, whether there is a compliance issue.

Result

[49] I dismiss the applications filed for Ms Smithson, and reserve costs.

Judgment signed at 9.45 am on 24 November 2020

B A Corkill Judge
