IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 257
5398115

	BETWEEN	WENDY VOLLMER Applicant
	A N D	THE WOOD LIFE CARE (2007) LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Nicole Ironside, Counsel for Applicant Jeff Goldstein and Linda Ryder, Counsel for Respondent
	On the papers
Submissions Received	14 and 19 November 2012 from Applicant's counsel and later e-mails 19 November from Respondent's counsel and later e-mails
Date of Determination:	23 November 2012

PRELIMINARY DETERMINATION OF THE AUTHORITY

The issues for determination

[1] The substantive hearing of Ms Vollmer's claims relating to an alleged unjustified dismissal will be held on 27, 28 and 29 November 2012. The parties have disclosed certain documents between them and provided those documents to the Authority.

[2] There is disagreement about whether other documents should be disclosed. The applicant's counsel seeks a number of documents which she submits are necessary and relevant to the issues in question in the proceeding. The respondent resists the application for a number of reasons.

[3] For its part the respondent seeks any notes made by Ms Ironside in the process of interviewing Ms Gibson, Ms Mansbridge and Mr Hambrook. Ms Ironside says those notes are privileged and seeks to rely on s.56 of the Evidence Act 2006. Mr Goldstein submits that the Authority is not bound by the Evidence Act 2006 and in any event the notes are not privileged.

[4] I address those issues in this interim determination and I also ask for other evidence that I have identified as relevant and helpful to the Authority in determining the substantive claims.

[5] The issues I need to determine are:

- Whether the Authority has jurisdiction to order discovery of documents;
- Whether the applicant is entitled to the documents it seeks;
- Whether I need to make an order that the non-existence or lack of specific documents needs to be sworn to by the respondent by way of affidavit;
- Whether the respondent is entitled to the notes of Ms Ironside's interviews with Ms Gibson, Ms Mansbridge and Mr Hambrook.

Jurisdiction to order disclosure of documents

[6] There is no formal discovery regime allowing for the mutual disclosure and inspection of documents in the Employment Relations Act 2000 (the Act). However, certain provisions of the Act support the Authority in its role of resolving employment relationship problems.

Role of the Authority

[7] Section 157(1) of the Act provides:

> *The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.*

Powers of the Authority

[8] Section 160(1)(a) of the Act allows the Authority to call for *evidence and information from the parties or from any other person*.

Criteria for ordering disclosure

[9] I intend to apply well known and well established criteria for ordering disclosure:

- Documents will be ordered to be disclosed if they are necessary to the proceedings;
- Documents which are relevant to matters in question in the proceeding will be ordered to be disclosed.

Should relevant and necessary documents be supplied only to the Authority?

[10] The respondent's counsel argues that the provisions of the Act allowing the Authority to investigate and call for evidence and information do not go so far as to mean that the parties need to exchange such documents. The respondent submits that it would be sufficient if the Authority alone had access to the documents.

[11] From time to time there are likely to be documents which are so confidential and/or so sensitive that that course of action may be necessary. However, the Authority is also bound by s.157(2):

> *The Authority must, in carrying out its role, -*
>
> *(a) Comply with the principles of natural justice;*

[12] The basic principles of natural justice required that each party has an opportunity to hear allegations made by the other, has access to evidence the decision-making body will take into account in making its decision, and has an opportunity to have its say. Therefore, except in rare circumstances the Authority will ensure that the parties have the same documents that are before it.

Is the Authority bound by the Evidence Act 2006?

[13] The respondent's counsel submits that the Authority is not bound by the rules of evidence. It is correct that the Authority is entitled to establish the facts and make

a determination according to the substantial merits of the case without regard to technicalities under s.157. It is also correct that s.160(2) allows the Authority to receive and consider evidence which may not be *strictly legal evidence*. However, that does not allow the Authority to discard the rules of evidence.

[14] It is also clear that certain aspects of the rules of evidence are expected to be applied by the Authority. For example, clause 3(1) of Schedule 2 of the Employment Relations Act 2000 provides:

> *(1) Where any party to any matter before the Authority is represented by a person other than a barrister or solicitor, any communications between that party and that person in relation to those proceedings are as privileged as they would have been if that person had been a barrister or solicitor.*

[15] Therefore, the Act clearly contemplates that the Authority will apply the rules of evidence relating to litigation privilege. These rules were originally developed by the common law. However, in New Zealand the Evidence Act 2006 codifies the relevant laws of evidence, to a great extent.

[16] The Authority is not entitled to ignore the rules of evidence and is likely to apply them if, in doing so, they support the role of the Authority set out in s.157 of the Act.

Determination

[17] I have considered the Statement of Problem, the Statement in Reply and the submissions before me about disclosure of certain documents. In arriving at my determination and the orders, I have had regard to the criteria I have outlined for ordering disclosure and have carefully considered the submissions of the parties. I have also had the benefit of conducting an interim hearing and seen the evidence that has already been disclosed. The parties' submissions on the matter of discovery/disclosure of documents are not recorded in full in this interim determination because of the tight timeframe.

Applicant's request for disclosure

QA meeting minutes

[18] The applicant seeks disclosure of copies of the minutes of all QA meetings from July 2007 to the current date. The respondent submits that the minutes of the QA

meetings on 9 and 29 May, 12 June and 10 July 2012 have already been disclosed as they are the ones that are relevant.

[19] In reply, Ms Ironside submits that all the QA meeting minutes requested are relevant to the issue of what the established procedure for recording infections was from the beginning of Ms Vollmer's employment at The Wood. She also submits that the minutes of the QA meetings after Ms Vollmer was suspended are also relevant to the new process implemented by management.

[20] I consider that the minutes of the QA meetings which have not already been disclosed from July 2007 to the current date are necessary to the proceedings and are relevant to a matter or matters in question in the proceeding. Therefore, under s.160(1)(a) of the Act, **I direct the QA meeting minutes to be produced to the Authority and I note that it is in the interests of natural justice that those documents are also provided to the applicant's counsel as soon as possible.**

Minutes of RN/EN meeting minutes

[21] The applicant has requested copies of all RN/EN meetings from and including February 2012 to the current date.

[22] The respondent's counsel queries the relevance of these minutes.

[23] In response, the applicant's counsel submits that the RN/EN meeting minutes are relevant to the respondent's finding on the second allegation against Ms Vollmer. She notes that in Ms Berryman's affidavit of 23 October 2012 she refers to the fact that after the audit there were morning meetings to discuss the audit result and action to be taken. Ms Ironside submits that the minutes are relevant to the issue of the process implemented by management regarding surveillance by all the nurses after Ms Vollmer's suspension.

[24] I consider that the RN/EN meeting minutes for the period requested are useful and will assist me in my investigation and determination. Under s.160(1)(a) of the Act, **I direct the RN/EN meeting minutes are produced to the Authority and I note that it is in the interests of natural justice that those documents are also provided the applicant's counsel as soon as possible.**

Monthly Infection Control Register

[25] The applicant has requested copies of the monthly Infection Control Register from July 2007 to the current date. The respondent's counsel submits that the relevant Infection Control Register has already been provided to the applicant and does not understand why the applicant considers the Register dating back to 2007 is relevant.

[26] In response, the applicant's counsel submits that it is relevant to the applicant's case that information solely on medicated infections was being collated and presented at QA meetings over a lengthy period and that this was an established procedure during the time that she was employed at The Wood.

[27] There is a dispute about that matter. Ms Berryman, in her affidavit, maintained that she did not understand why only infections treated by antibiotics were recorded on the monthly register.

[28] I consider that copies of the monthly Infection Control Register from July 2007 to the current date will be helpful for me in my role of establishing the facts and making a determination in this matter. Under s.160(1)(a) of the Act, **I direct the copies of the Infection Control Register as requested are produced to the Authority and I note that it is in the interests of natural justice that those documents are also provided the applicant's counsel as soon as possible.**

Human Resources Manual

[29] The applicant's counsel has requested the respondent to supply a full copy of the Human Resources Manual. The respondent's counsel submits that the Human Resources Manual is not relevant to the proceedings. They also say that on 29 August 2012 the respondent provided Ms Ironside with a copy of the index of the Human Resources Manual and invited her to indicate what policies she required. She did not request any policies.

[30] In response, Ms Ironside says that she did request scanned copies of all policies and procedures in the Human Resources Manual, but not the forms. However, she only received a copy of one of the policies; being the professional and personal boundaries policy.

[31] The respondent also says that providing all of the policies would be unnecessarily expensive. It notes that the respondent does not rely on any of the policies in the Manual to justify its actions in suspending and dismissing Ms Vollmer.

[32] In response, the applicant's counsel says that she had requested scanned copies of all the policies and procedures in the Manual originally in order to minimise the cost to the respondent of photocopying and postage. She submits that the policies and procedures in the Human Resources Manual are relevant because they form part of the employment contract.

[33] It is certainly arguable that the policies and procedures in the Human Resources Manual, or at least some of them, are relevant and necessary for the Authority to make a full investigation and a fair determination. However, I am not convinced that the full Human Resources Manual is relevant. I have not seen the index to the Manual. Under s.160(1)(a) of the Act, **I direct the respondent to supply the index of the Human Resources Manual to the Authority as soon as possible.**

[34] I also suggest that in the interests of efficiency that Ms Ironside identify the specific policies and procedures in the Manual that she considers are necessary and relevant to these proceedings as soon as possible. I will make any decision needed about those documents at the investigation meeting.

[35] The applicant seeks an order that the respondent confirm by oath that the balance of information that has been requested by the applicant does not exist; apart from that already contained in the documents disclosed so far. The information sought is listed in the applicant's 14 November 2012 application. I use the lettering and numbering used in the application:

> *f.* *Copies of all papers, notes, emails and documents created by any staff and/or any one or more director of The Wood regarding the following decisions:*
>
> *i.* *Decision to raise allegations of serious misconduct against Wendy;*
>
> *ii.* *Decision to suspend Wendy, including all communications between Andrena and Correne and any other staff member on 13 August 2012;*
>
> *iii.* *Decision to appoint Shirley MacKenzie to role of decision-maker;*
>
> *iv.* *Decision that Andrena assume decision making role;*

v. Decision on the findings on the sanction.

g. Copies of all papers, notes, emails and documents created by Shirley MacKenzie as a consequence of her involvement in this matter.

[36] The respondent submitted that there are no documents relating to (f) remaining to be exchanged. It stated that all of the documents under those criteria have already been provided to the applicant. The respondent submitted that s.160 of the Act does not give the Authority jurisdiction to make an order that the respondent declare on oath that the balance of the documents that the applicant wishes to be disclosed do not exist. In particular, the respondent submits that the Authority does not have the power to order that the lack of such information be sworn to prior to the investigation. The respondent also submits that the applicant counsel's cross-examination of the respondent's witnesses and the Authority's questioning of the respondent's witnesses would serve the same purpose.

[37] The applicant's counsel submits that there are practical problems with the process suggested by the respondent of resolving this matter at the investigation meeting. She points out that Shirley MacKenzie is not, at this stage, going to be giving evidence and therefore cannot be cross-examined about any notes that she took at the disciplinary meeting which the respondent says do not exist.

[38] With one exception, that being the evidence of Shirley MacKenzie, I agree with the respondent that the most direct and prudent course for the Authority to discover whether any of the further documents referred to by the applicant in (f) and (g) exist and are relevant is to make those inquiries at the investigation meeting. However, I am concerned that the applicant's counsel submits that Shirley MacKenzie took notes at the disciplinary meeting and these notes appear now not to exist. I urge the respondent's counsel to go back to the respondent and clarify what has happened in relation to these notes. If that is not possible, then it may be that I need to hear the evidence of Shirley MacKenzie in relation to documents surrounding the disciplinary meeting and/or possible existence of documents, in particular emails, between her and Andrena Williams both before and after the disciplinary meeting. It would be preferable for this evidence to be able to be heard and fully considered during the investigation meeting.

Confidentiality

[39] The respondent's counsel submitted that some of the information requested contains details that are personal and confidential to residents and other staff of The Wood and ought not to be disclosed. I accept that this may be the case in relation particularly to some of the minutes of meetings. The documents that I have already ordered to be disclosed must be disclosed. However, in the interests of respecting privacy and confidentiality of the residents and other staff, the respondent may obscure the names of the parties whose private information it needs to protect.

Applicant's counsel's witness interview notes

[40] I understand that the respondent has requested copies of Ms Ironside's interview notes of witnesses and potential witnesses for the proceedings. These witnesses have been named as being Ms Mansbridge, Ms Gibson and Mr Hambrook. Ms Ironside submits that the respondent is not entitled to those notes because they were prepared for an apprehended or actual proceeding and attract privilege under s.56 of the Evidence Act. She also states that in fact the notes are provided already in the form of the typed statements that were provided in the disciplinary meeting which are documents 70, 225, 226 and 227 and also document 72.

[41] The respondent's counsel submits that first; the Authority is not bound by the rules of evidence. Secondly, for s.56 of the Evidence Act to apply it must be shown that the dominant purpose of those interviews was for pending litigation. However, the respondent considers that those interviews were undertaken with the dominant purpose of obtaining statements to support the applicant's explanations in regard to allegations made against her that were to be dealt with in the disciplinary process; and not in regard to litigation.

[42] The applicant's counsel disagrees. She submits that on 14 August 2012 Ms Vollmer raised an unjustified disadvantage grievance and that shows that litigation in relation to the unjustified disadvantage grievance clearly was apprehended at the time. She repeated her submission that counsel's notes are clearly privileged under s.56 of the Evidence Act and in addition suggests that s.54 of the Evidence Act makes the notes privileged.

[43] It is not clear to me why the respondent considers that the notes taken by Ms Ironside are necessary and relevant to the resolution of these proceedings. In

addition, although I am not strictly bound by the provisions of the Evidence Act, I do consider that the common law protection now codified by s.56 is an important privilege to maintain. I am not prepared at this stage to make an order that counsel's notes from the interviews should be disclosed.

Other documents

[44] Another Member is making a determination on whether certain documents and parts of documents should be withheld from me because they are "without prejudice" communications. Until the disputed documents are removed from the files held by the Authority I will not refer to the evidence again. There are two further documents that I consider will be relevant and necessary for me to complete a full and fair investigation. They may already be included in the bundle. However, if they are not under section 160(1) I direct the respondent to supply:

i. the Infection Control Policy in place before August 2012, and

ii. a signed copy of Wendy Vollmer's position description as the Infection Control Co-ordinator, if it exists.

Any other matters

[45] If any other preliminary matters need to be dealt with I will deal with them at the investigation meeting.

[46] Costs are reserved.

Christine Hickey
Member of the Employment Relations Authority