

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 136
EMPC 477/2021**

IN THE MATTER OF proceedings removed from the Employment
Relations Authority

AND IN THE MATTER OF a challenge to objection to disclosure

BETWEEN SIOUXSIE WILES
Plaintiff

AND THE VICE-CHANCELLOR OF THE
UNIVERSITY OF AUCKLAND
Defendant

Hearing: On the papers

Appearances: C W Stewart and D Church, counsel for plaintiff
P M Muir and R Judge, counsel for defendant

Judgment: 23 August 2023

**INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE J C HOLDEN
(Challenge to objection to disclosure)**

[1] As part of her claim against the Vice-Chancellor of the University of Auckland (the University), Associate Professor Wiles says she was “singled out” for alleged non-compliance with the University’s outside activities policy in circumstances where the University has not applied such policy consistently to its other staff. That allegation is denied by the University.

[2] The claim, made in Associate Professor Wiles’s second amended statement of claim, is addressed in her brief of evidence. However, it is fair to say other issues are more dominant.

[3] Andrew Phipps has provided a brief of evidence on behalf of the University. That brief is 71 paragraphs. Towards the end of one paragraph, he says:

We also have previously investigated and cautioned staff who have gone beyond the constraints of law and [University] policy when exercising academic freedom and providing public commentary.

[4] As a result of the proposed evidence of Mr Phipps, Associate Professor Wiles served the University with a notice requiring disclosure of:

Any evidence, including but not limited to: letters, email communications, meeting minutes, notes, or recordings of oral conversations, which support the statement made at paragraph 59 of the Brief of Evidence of Andrew Phipps that: “We also have previously investigated and cautioned staff who have gone beyond the constraints of law and [University] policy when exercising academic freedom and providing public commentary”, dated from the date that is five years prior to the date that the scope of the claim ends, being 24 August 2017.

[5] The University objected to disclosure of the documents sought on the grounds that the information is irrelevant to the proceedings; disclosure of the documents would be injurious to the public interest; and that some of the documents are subject to legal professional privilege.

[6] That led to Associate Professor Wiles challenging the objection to disclosure, with her challenge being on the grounds that the classes of documents referred to in the plaintiff’s notice requiring disclosure are relevant documents, because:

- (a) they relate to an issue which Associate Professor Wiles has specifically pleaded (namely, that she has been “unfairly singled out”) and which the University in itself brought into the proceedings with the statement made in Mr Phipps’s evidence;
- (b) that it is clear that the University was endeavouring to disprove Associate Professor Wiles’s allegation that she had been singled out by the University;
- (c) that the disclosure sought was limited in time, with the five-year timeframe being reasonable.

[7] Associate Professor Wiles disputes that disclosure of the material would be injurious to the public interest or that the vast majority of the material sought could be subject to legal privilege. In summary, Associate Professor Wiles says this is an issue that was clearly relevant to the proceedings and the documents sought should be disclosed to her.

[8] The University proposed a compromise. That proposal was to provide Associate Professor Wiles (and her lead counsel) with an anonymised confidential summary of the evidence/information sought, subject to specific protective orders being made:

- (a) The anonymised confidential summary (the summary) would cover the general nature of the conduct which Mr Phipps understands led the University, previously, to investigate and caution staff who had gone beyond the constraints of law and the University's policy when exercising academic freedom and providing public commentary. The summary would also record whether the relevant staff members were investigated, cautioned, or both. (with the University saying that, as Mr Phipps's affidavit explains, Associate Professor Wiles is not one of those staff).
- (b) The summary would list the general nature of the conduct, and whether the staff were investigated and/or cautioned, for each of those members of staff, with the staff members being described as "A", "B", etc.
- (c) The summary would not address staff, investigations and/or cautions that Mr Phipps does not know of.
- (d) When Associate Professor Wiles and her lead counsel (Ms Stewart), have provided signed personal undertakings to the Court and the University in the form proposed by the University, the University would provide a paper copy of the summary to Ms Stewart.

- (e) Ms Stewart would retain possession of the summary until she returns it to the University (through the University's solicitors), and would not make any copy of the summary or its contents, or permit a copy of the summary or its contents to be made.
- (f) Associate Professor Wiles would be permitted to read the summary under the personal supervision of Ms Stewart but would not be permitted to make any copy of the summary or its contents.
- (g) Associate Professor Wiles and her lawyer would keep the existence and the contents of the summary strictly confidential, and would not make inquiries about the identities or other particulars (eg Faculty or job description) of the staff members referred to in the summary.
- (h) Once the substantive hearing of Associate Professor Wiles's claim has been completed, and any consequential submissions made or filed, Ms Stewart would return the copy of the summary which she received to the University (through the University's solicitors).

[9] The proposed undertaking included that the documents would only be used for the purposes of the proceedings; that any notes would be on paper only, with no copies made and would be kept safe and that the summary and notes would not be disclosed or discussed except between Associate Professor Wiles and her lead counsel.

[10] Associate Professor Wiles accepts that disclosure would be limited to instances Mr Phipps is aware of or has access to. She also accepts that, to the extent any communication is genuinely legally privileged, that material may be withheld. Nevertheless, the parties were unable to agree on a basis for disclosure, hence the need for the Court to determine the matter.

Relevant documents generally discoverable

[11] The starting point is that a party may require an opposing party to disclose documents in their possession, custody or control that are relevant to any disputed matter in the proceedings.¹

[12] A relevant document is one that directly or indirectly:²

- (a) supports, or may support, the case of the party who possesses it; or
- (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
- (c) may prove or disprove any disputed fact in the proceedings; or
- (d) is referred to in any other relevant document and is itself relevant.

[13] The pleadings define the ambit of the proceedings and therefore identify the issues towards which questions of relevance must be related. Within that, relevance should not be looked at narrowly.³

[14] Notwithstanding that overarching principle, the Court retains a discretion to refuse unnecessary or undesirable disclosure. In exercising that discretion, relevant circumstances may include:⁴

- (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.

[15] Also, although s 69 of the Evidence Act 2006 is not binding on the Employment Court, and deals with admissibility rather than disclosure, I accept that it is a touchstone for balancing the interests of protection of confidential information against the need for sufficient disclosure so as not to impede preparation of a party's

¹ Employment Court Regulations 2000, reg 40.

² Regulation 38(1).

³ *Airways Corporation of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA) at [5].

⁴ *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [42]; High Court Rules 2016, r 8.14.

case.⁵ The criteria that apply in s 69(2) of the Evidence Act to the Court's discretion in dealing with confidential information as evidence at trial are useful in testing claims for confidentiality as a ground for restricting access during the inspection process.⁶ Pursuant to that provision, a Judge may give a direction that any one or more communications of a confidential nature not be disclosed if the Judge considers that the public interest in the disclosure in the proceeding or the communication is outweighed by the public interest in:⁷

- (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 ...

[16] Under s 69(3) of the Evidence Act the Court has regard to a number of factors, including:

- (a) the likely extent of harm that may result from the disclosure of the information;
- (b) the nature of the information and its likely importance in the proceeding;
- (c) the nature of the proceeding;
- (d) the availability or possible availability of other means of obtaining evidence of that information;
- (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given;

⁵ *NZX Ltd v Ralec Commodities Pty Ltd* [2015] NZHC 241 at [8]-[14].

⁶ *Trustees Executors Ltd v Fund Managers Canterbury Ltd* [2017] NZHC 2792 at [21].

⁷ Evidence Act 2006, s 69(2).

- (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.

A summary is sufficient

[17] Associate Professor Wiles relies on the judgment of Judge Corkill in *Nel v ASB Bank Ltd*.⁸ In that case, Judge Corkill confirmed that, at trial, the issue of relevance of the material on other situations to the actions taken regarding the aggrieved employee would be a matter of fact and degree, which goes to *weight*. The material would, however, be relevant for the purposes of disclosure. I also accept that disclosure of relevant documents may be ordered despite the confidential nature/expectations of privacy in relation to the information in the documents.⁹ The extent to which such material will need to be disclosed will be a matter of fact, degree and balancing of interests, rights and obligations of the plaintiff, the defendant and affected third parties.

[18] Here, Associate Professor Wiles claims she was singled out for her alleged non-compliance. The University denies that, and Mr Phipps’s evidence is put forward to go some way to prove the University’s denial. The basis for his evidence is relevant to the issue of whether there was an unjustifiable disparity in the treatment of Associate Professor Wiles when compared to other staff.

[19] The confidentiality and privacy that attach to the documents are, however, a consideration when looking at the issue of what, if any, orders may be required to protect the information. Here, the information sought was intended to be confidential as between the employees involved and the University. It is personal information and,

⁸ *Nel v ASB Bank Ltd* [2017] NZEmpC 56, [2017] ERNZ 297 at [81]-[110].

⁹ At [101].

in some if not all cases, will be sensitive for the employees involved. They will have assumed the information would be known only to a few people at the University. They certainly would not have expected Associate Professor Wiles to have become aware of it or given access to it.

[20] There is a public interest in preventing harm to the employees about whom the confidential information was obtained, recorded, or prepared, and in preventing harm to the good faith relationships that exist between those employees and the University. There is also a public interest in protecting the University's relationships with other staff who may be concerned that information given in confidence may nevertheless be disclosed to other staff or more broadly.

[21] Although the information sought is relevant to an issue in the proceedings, that issue must be seen in the context of the case where other more critical issues are raised. Further, the detail of the information contained in the documents sought (letters, email communications, meeting minutes, notes, or recordings of oral conversations) would not seem to be necessary for the preparation of Associate Professor Wiles's case.

[22] In *Nel*, orders were made requiring disclosure of a summary of the information sought, subject to some protections. I consider a similar approach is appropriate here.

[23] The following orders are made:

- (a) Disclosure is to be restricted to circumstances that Mr Phipps is aware of where the University has investigated and cautioned staff who the University considered had gone beyond the constraints of law and University policy when exercising academic freedom and providing public commentary, but confined to the period between 24 August 2017 and 24 August 2022 (inclusive).
- (b) Disclosure should be by way of a document or documents that summarise the circumstances involved and the outcome (if any).

- (c) For the avoidance of doubt, a full set of documents for each particular circumstance is not, at least at this stage, required to be disclosed unless that is necessary to achieve the disclosure that has been ordered.
- (d) The summary document(s) should anonymise the employees involved in the previous incidents.
- (e) Disclosure is to be to Associate Professor Wiles's counsel (both Ms Stewart and Mr Church) and to Associate Professor Wiles only, in the first instance.
- (f) The document or documents as disclosed, are to be considered only by Associate Professor Wiles's counsel and Associate Professor Wiles. They may not be provided to any other person without the leave of the Court.
- (g) Any individual instances to be relied on by Associate Professor Wiles at trial are to be specifically pleaded in an amended statement of claim.

[24] As counsel will be aware, Associate Professor Wiles may only use any document provided for the purposes of the proceeding, and, except for the purposes of the proceeding, must not make it available to any person (unless it has been read out in open Court).¹⁰ This, together with the orders made, avoids the necessity for undertakings.

[25] The University's affidavit listing the documents ordered to be disclosed is to be provided to Associate Professor Wiles within 14 days of the date of this interlocutory judgment, with disclosure of documents to be attended to by providing copies contemporaneously, or at the latest within seven days of that list being provided.

[26] Any third amended statement of claim from Associate Professor Wiles is to be filed and served within a further 14 days.

¹⁰ High Court Rules 2016, r 8.30.

[27] At this stage, an order is made preventing the publication of the information contained in the disclosed summary document(s), and of evidence given in respect of the information contained in those documents. This order continues pending further order of the Court in the expectation that if a party considers ongoing non-publication or other orders are required, appropriate applications will be made at or before the substantive hearing.

[28] Costs are reserved.

J C Holden
Judge

Judgment signed at 4.40 pm on 23 August 2023