IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 198
EMPC 25/2023
EMPC 111/2023

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	a challenge to objection to disclosure
BETWEEN	CARRINGTON RESORT JADE LP Plaintiff
AND	PAULA KNIGHT Defendant

Hearing: On the papers

Appearances: W Tan, agent for plaintiff
R Mark, counsel for defendant

Judgment: 14 November 2023

INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH
(Challenge to objection to disclosure)

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[1] On 22 December 2022, the Employment Relations Authority determined two personal grievances and a wage arrears claim brought by Paula Knight against her former employer Carrington Resort Jade LP.[1]

[2] Ms Knight was successful. The Authority determined that she was unjustifiably disadvantaged by being suspended from her employment and

[1] *Knight v Carrington Resort Jade LP* [2022] NZERA 692 (Member Gane).

subsequently unjustifiably dismissed. It was also satisfied that Ms Knight was owed wages by Carrington which were calculated and the company was ordered to pay them.

[3] Subsequently, the Authority ordered Carrington to pay Ms Knight the costs of the investigation.[2]

The challenge

[4] Carrington has challenged the Authority's determinations. It has elected to challenge the whole of each determination seeking to set them aside. While the statement of claim pleaded that it was accompanied by an affidavit providing background and other relevant facts, none was filed.[3]

This application

[5] A brief review of the undisputed facts is necessary to place into context the application for disclosure which needs to be resolved.

[6] On 24 October 2020, Ms Knight was employed by Carrington as a winery sales manager.[4]

[7] At a meeting on 17 February 2021, a disagreement occurred between Ms Knight and William Tan. Mr Tan holds the dual position of Chief Executive Officer of Gorges Jade Holdings Ltd and General Manager of Carrington Estate which together comprise Carrington Resort Jade LP. What happened is the subject of significant disagreement.

[8] On 28 February 2021, an incident occurred in Carrington's restaurant where it is said Ms Knight's conduct was unacceptable. Again, circumspection is required because what is alleged to have happened is disputed. Essentially, Ms Knight is said to have behaved unsatisfactorily in raising her concerns about an alleged shortcoming by Carrington in ensuring a licenced manager was on duty when alcohol was available to be sold or supplied to members of the public. Carrington does not accept there was any deficiency in its management of the licenced premises.

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2 *Knight v Carrington Resort Jade LP* [2023] NZERA 80 (Member Gane).

3 Mr Tan subsequently filed affidavits supporting an unsuccessful application for a stay and this challenge to the objection to disclosure but they do not comprise part of the pleadings.

4 *Knight*, above n 1, at [9].

[9] In the mid-morning of 28 February Mr Tan sent an email to Ms Knight suspending her from work because of the events of 17 February 2021.[5] There was an investigation into what happened on 17 and 28 February 2021 and on 18 March 2021, Mr Tan dismissed Ms Knight without notice.[6]

[10] Against that background, Carrington has now sought extensive disclosure from Ms Knight of her medical records. It served on her a notice requiring disclosure under reg 42 of the Employment Court Regulations 2000. The documents sought were extensive and, given the breadth of the notice, it is best understood by setting it out in full. The notice sought:

> 1. The defendant, Paula Knight's full mental health history medical record, including the details of any treatment she may have been given and the total number of times the defendant may have been hospitalised due to her mental illness.
> 2. Full medication prescription history relating to mental health.
> 3. Reported incident reports related to the defendant's mental illness.
> 4. All past and present doctor's notes and advice on the defendant's mental health conditions, and medical recommendations/advice on being employed.

[11] Ms Knight objected on the basis that:

(a) disclosure would be injurious to the public interest because the documents would breach her right to privacy;

(b) disclosure would be injurious to the public interest because the documents would breach the confidentiality of the doctor/patient relationship; and

(c) the documents are not relevant to the challenge.

Challenge to the objection

[12] The objection can only be set aside if it is successfully challenged. On 1 September 2023, Carrington filed a challenge and sought orders:

(a) declaring the objection to be ill-founded; and

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5 At [13].
6 At [18].

(b) directing that the documents or classes of documents sought in the notice be disclosed.

[13] Unusually, the challenge combined the grounds relied on with submissions explaining Carrington's position.

[14] At the heart of the challenge was an assertion that the medical records Carrington wants to have disclosed to it are relevant, the breadth of the request in the notice is proportionate and disclosure will assist in the presentation of its challenge to the substantive determination.

[15] While difficult to glean from the challenge, the assistance Carrington anticipates disclosure will provide appears to be fourfold. First, it asserts that disclosing the documents is relevant to Ms Knight's mental competency at the time of the alleged incidents in February 2021.

[16] Second, that the documents would assist in determining the reliability of Ms Knight's anticipated evidence, because they may go to assessing her ability to accurately recall or perceive events and the credibility and reliability of any statements.

[17] Third, described obliquely as dealing with inconsistencies, Ms Knight has denied being under any impairment while Carrington is confident that she was impaired (presumably meaning on 17 or 28 February or both, although that is not clear from the challenge). This ground maintained that by examining Ms Knight's mental health records the Court would be able to thoroughly evaluate her health status and help "reconcile the discrepancies in her assertions". The alleged discrepancies were not pleaded.

[18] The last ground relied on was Carrington's "constitutional rights", explained by an accompanying statement that it has a legitimate expectation that it could access evidence that may be favourable to its case which includes the records sought in the notice.

The regulations

[19] Before considering the submissions, it is necessary to say a little more about the cumbersome disclosure requirements in the regulations.

[20] Disclosure is provided for in regs 37–52. Under reg 39, regs 40–52 apply to all proceedings in the Court.[7]

[21] Under reg 37, the object of disclosure is to ensure that, where appropriate, each party to a proceeding has access to the relevant documents of the other party. The regulation, however, contains the following potential limitation:

> … it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both.

[22] The first step in the process of seeking disclosure is provided by reg 42. The party seeking it must serve a notice in form 6 on the opposing party. There is a duty to comply with the notice unless objection is taken to doing so.[8]

[23] An objection must specify the document or documents to which it relates and its grounds.[9] The regulations seemingly contain a limitation on the grounds of opposition in reg 44(3). It reads:

> The only grounds upon which objections may be based are that the document or class of documents—
>
> (a) is or are subject to legal professional privilege; or
>
> (b) if disclosed, would tend to incriminate the objector; or
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> (c) if disclosed, would be injurious to the public interest.

[24] There is no definition in the regulations of "the public interest".

[25] Finally, conditions may attach to the disclosure of documents.[10]

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7 The only exemption is where a penalty is being recovered, see reg 39(2).
8 Regulation 43.
9 Regulation 44(2).
10 Regulation 51.

[26] Before a notice for disclosure is effective, however, the material sought must be relevant.[11] A document is relevant if it directly or indirectly:[12]

> (a) supports, or may support, the case of the party who possesses it; or
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> (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 proceeding; or
>
> (d) is referred to in any other relevant document and is itself relevant.

Carrington's submissions

[27] Mr Tan filed submissions which largely mirrored the grounds of the challenge to the notice of objection supplemented by an affidavit. The affidavit provided evidence about what is, presumably, intended to be the thrust of the Carrington's case at the substantive hearing.

[28] Mr Tan's submissions are discursive and difficult to follow but they began with a general statement that disclosure is needed "for justice and [the] protection of rights". It appears this was intended to be a general submission to introduce the balance of Carrington's submissions, because it was followed by a statement that the application "fits all considerable requirements, including relevance, privacy protection, and proportionality".

[29] Mr Tan submitted the documents were relevant because they contain, or may contain, information about Ms Knight's mental state at the time of the alleged incidents on 17 and 28 February. Carrington also considers it may be able to use the disclosure to resolve "strongly–contested allegations". The contested allegations were not pleaded but by inference must be about what happened on 17 and 28 February and in Mr Tan's investigation and decision making.

[30] As to proportionality, which presumably refers to the scope of the disclosure notice and its relationship to the substantive challenge, the submission was that obtaining the information would ensure a fair hearing and the public interest in disclosure outweighs privacy interests in maintaining confidentiality.

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11 Regulation 40(1).
12 Regulation 38(1).

[31] In support of these submissions Mr Tan cited *Coy v Commissioner of Police*, *R v X*, and *Auckland District Health Board v Bierre*.[13]

Defendant's submissions

[32] Mr Mark's submissions amplified the grounds of Ms Knight's opposition.

[33] Turning to the question of relevance, Mr Mark submitted that the records would not support the plaintiff's case. In so far as certain health-related disclosures were made by Ms Knight or on her behalf prior to employment beginning his submission was that:

(a) there was no misrepresentation;

(b) the cases Mr Tan referred to did not assist; and

(c) *O'Boyle v McCue* is a helpful authority.[14]

Analysis

[34] The starting point is to ask if the information sought in the notice is relevant within the meaning of reg 38. Relevance is determined by the pleadings, which define the ambit of the case and the issues to which questions of relevance must be related.[15]

[35] While Mr Tan submitted that the disclosure is relevant, he did not refer to any part of the statement of claim and/or statement of defence that might be supported, proved, disproved, or otherwise potentially weakened by being given access to the documents referred to in the notice.

[36] Carrington's statement of claim consists of 20 numbered paragraphs although the last two of them are in the nature of administrative pleadings, because they contain a request for a full hearing of the entire matter and a statement that the prescribed filing fee was paid.

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13 *Coy v Commissioner of Police* [2010] NZEmpC 88, [2010] ERNZ 199; *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181; and *Auckland District Health Board v Bierre* [2011] NZEmpC 108, (2011) 9 NZELR 120.

14 *O'Boyle v McCue* [2020] NZEmpC 51, [2020] ERNZ 111.

15 *Airways Corp of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA) at [5]; and *van Kleef v Alliance Group Ltd* [2019] NZEmpC 157.

[37] Of the remaining 18 paragraphs there are only two where the pleading might be said to touch on, in some way, issues about Ms Knight's mental health; they are paragraphs [8] and [9].

[38] Paragraph [8] begins with a pleading that Carrington disagreed with and rejected the findings by the Authority. In a sense therefore, this part of the pleading repeats the election made at the beginning of the statement of claim placing in issue the whole of the determination.

[39] Some specificity is provided in the balance of paragraph [8], because Carrington pleaded it was particularly concerned about 26 paragraphs from the determination, which it set out in a list but without any amplification of the issue being taken with each paragraph. Those paragraphs are ones containing findings adverse to it, such as criticisms of the process used to investigate the circumstances leading to Ms Knight's suspension and dismissal. The only part of the pleading in paragraph [8] that might be argued as touching on her health, but only in passing, is where Carrington lists its disagreement with paragraphs [28] and [29] in the determination.

[40] The pleading does not explain why those paragraphs were singled out for inclusion in this list, although a possible inference is because they are critical of Carrington's actions. Those paragraphs read:

> [28] The way in which Mr Tan conducted the disciplinary process, making unsubstantiated allegations about her health intimidated Ms Knight. It left her feeling humiliated.
>
> [29] Although legally represented Ms Knight was not given a reasonable opportunity to respond to Mr Tan's concerns. She was required to respond to verbal allegations without being given the information she needed to be able to do so, amounting to a breach of natural justice requirements. She was not given an opportunity to be heard on the appropriate disciplinary sanction.

[41] A reasonable reading of paragraphs [28] and [29] indicates that the Authority was critical of the way the disciplinary process was handled, because of how allegations were put to Ms Knight and the lack of an opportunity to respond to them. The paragraphs are findings about the adequacy of the process adopted not an evaluation of Ms Knight's mental health. Even a very generous reading of this pleading does not place in issue Ms Knight's mental health at the time she was suspended or dismissed.

[42] Paragraph [9] of the statement of claim is unusual because it does not seem to be directed towards the relief claimed other than, perhaps, supporting the overall claim that the determinations should be set aside. The paragraph begins by referring to paragraph [1] of the determination containing a non-publication order, which was described as "strange". That sentence is followed by a statement that the non-publication order was not sought by Ms Knight and ends with a pleading that she had not maintained she had any mental illness and refused to provide doctors certificates. The statement of defence denies this pleading and says that the non-publication order was sought and is appropriate.

[43] Even read generously paragraph [9] does not assist Carrington's application. It challenges the decision to order non-publication and goes no further.

[44] It is true that Mr Tan's submissions attributed to Ms Knight behaviour he described as unusual or extraordinary but that is not sufficient. For her part, Ms Knight denies behaving in any way capable of being described in those terms but his submission misses the point. The pleadings do not place in issue Ms Knight's mental health relating to the events of February 2021 or the decisions to suspend and dismiss.

[45] What the pleadings are concerned with is establishing Ms Knight acted as alleged, giving rise to grounds for suspension and dismissal, that Carrington adequately investigated those matters, and that the decisions it made were justified within the meaning of s 103A of the Employment Relations Act 2000.

[46] Carrington does not rely on establishing whether Ms Knight's actions (if proved) have some underlying cause; the issue is whether she behaved as alleged not why she did so. It is important to record that Ms Knight denies the behaviour attributed to her in the statement of claim and has not sought to advance as an affirmative defence any matter connected with her mental health.

[47] For completeness, while Ms Knight's health was mentioned to Carrington shortly before she began employment there is no pleading alleging that she misrepresented herself. In the statement of claim the reasons for her suspension and dismissal were not linked to the information known to Carrington before employment began.

[48] It follows that Ms Knight's mental health is not relevant. That analysis means this application fails.

[49] Additionally, the application faced three further hurdles any one of which would have been fatal.

[50] The first hurdle is that the application has the hallmarks of a "fishing" expedition. It is well established that the Court will not order disclosure where an attempt is being made to discover information or documents either as to a new cause of action or circumstances that may or may not support a baseless or speculative claim.[16]

[51] What has been sought in the notice, and the uses to which that material is intended to be put, suggest that Carrington is seeking more than information to support its case. Mr Tan's submissions essentially conceded that he hoped to establish from reviewing any records disclosed to him that they might contain material of potential interest to the Court.

[52] The second hurdle is the breadth of the notice. In *Fox v Hereworth School Trust Board*, the Court emphasised that even if documents are relevant, there is a discretion to refuse unnecessary or undesirable disclosure; whether the disclosure would be oppressive is a matter which is to be considered.[17] I agree.[18]

[53] The information demanded in the notice is in the widest terms possible. It covers an indeterminate length of time seeking everything and anything that may touch on Ms Knight's mental health, advice she may have received, and details of any medication that might have been prescribed.

[54] Carrington has not explained why the net needed to be cast so widely beyond highly generalised comments about assisting with the evaluation of evidence and of its right to a fair hearing. Those matters will not be advanced by disclosure in such terms. In my view what was sought, even if it might have been found to be relevant,

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16 *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 190 (HC) at 196.
17 *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [41].
18 See regs [37]–[38].

is so extensive as to be both unnecessary and undesirable. Without a compelling reason to justify the breadth of such a notice the application would not be granted.

[55] The third hurdle is the public interest submission raised by Mr Tan and Mr Mark but from different perspectives. Both referred to reg 44(3)(c) and s 69 of the Evidence Act 2006. Mr Tan touched on the subject in his analysis of *Coy*. Mr Mark touched on it by submitting that the public interest in Ms Knight's privacy relating to her health records trumped any other public interest.

[56] At face value reg 44(3)(c) appears to restrict the opposition to disclosure to legal professional privilege, the ability to avoid self-incrimination, and where public interest is affected.

[57] Public interest is a concept which is often thought to be a matter involving the Crown's interests rather than the interests of a private individual. However, in *Julian v Air New Zealand Ltd*, the Court referred to the concept of "public interest" in the (repealed) reg 52(3)(c) of the Employment Court Regulations 1991.[19] That regulation was in similar terms to the current reg 44(3)(c). In that case public interest was held to provide protection from disclosure of matters connected with bargaining. A similar view of reg 44(3)(c) was taken in *Lloyd v Museum of New Zealand Te Papa Tongarewa (No 2)*.[20]

[58] Both decisions are not free from doubt, and the Court of Appeal has cautioned against extending categories of class privilege.[21]

[59] The Court in *Coy* considered reg 44(3)(c) and also drew on s 69 of the Evidence Act to reach a conclusion about whether certain medical evidence relating to the treatment of a serving police officer ought to be disclosed. In that case, the Court considered s 69 was instructive in what was described as the balancing exercise under reg 44(3)(c).[22] *Lloyd* involved a similar analytical approach.[23]

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19 *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 88 (EmpC).

20 *Lloyd v Museum of New Zealand Te Papa Tongarewa (No 2)* WC3A/03, WRC 3/02 Travis J and see the discussion of public interest at [29]–[46].

21 See *Kaikorai Service Centre Ltd v First Union Inc* [2018] NZEmpC 83, [2018] ERNZ 258 at [25]–[26]; *New Zealand Nurses Organisation Inc v Te Whatu Ora Health – New Zealand (No 4)* [2023] NZEmpC 92 at [48]; and *M v L* [1999] 1 NZLR 747 (CA).

22 *Coy*, above n 13, at [17].

23 *Lloyd,* above n 20, at [76].

[60] In *O'Boyle v McCue*, the Court also considered the relationship between reg 44(3)(c) and s 69.[24] In that case, the Court took the view that reg 44(3)(c) required a balancing exercise that could be informed by s 69.

[61] I prefer to take a slightly different approach. Notwithstanding that reg 44(3)(c) seemingly limits the grounds of objection it cannot be read, in my view, as precluding considerations under s 69. It follows therefore that there is no need to rely on the potential expansion on public interest in reg 44(3)(c).

[62] Under s 69 a discretion is given to a Judge to deal with certain confidential information by prohibiting its use if that is considered to advance the interests of justice. The considerations required to be taken into account are those in s 69(3). It reads:

> When considering whether to give a direction under this section, the Judge must have regard to—
>
> (a) the likely extent of harm that may result from the disclosure of the communication or information; and
>
> (b) the nature of the communication or information and its likely importance in the proceeding; and
>
> (c) the nature of the proceeding; and
>
> (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
>
> (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
>
> (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.

[63] Had it been necessary to do so I would have applied s 69 and ordered that the disclosure sought not be made. In the assessment factors in s 69(3) those that stand out are the fact that any medical records of the type sought will have come into existence only because of the relationship between Ms Knight and her medical practitioners, involving disclosures and advice which are by their nature confidential

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[24] *O'Boyle*, above n 14, at [33]–[34].

and likely to touch on sensitive matters. There are no countervailing factors in the assessments required under s 69(3) that would support ordering disclosure.

Outcome

[64] The challenge to the notice of objection to the notice of disclosure is unsuccessful and it is dismissed.

[65] Ms Knight is entitled to costs. Given the extensive nature of this application there is no reason for costs to be deferred until after the conclusion of the substantive hearing. The defendant may file costs submissions within 10 working days. The plaintiff has a further 10 working days from the date of the receipt of those submissions to reply.

K G Smith
Judge

Judgment signed at 4.50 pm on 14 November 2023