

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 5)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 22
5282890**

BETWEEN	JOHAN AARTS Applicant
AND	BARNARDOS NEW ZEALAND First Respondent COMMISSIONER OF NEW ZEALAND POLICE Second Respondent MINISTRY OF SOCIAL DEVELOPMENT Third & Sixth Respondent THE PRIVACY COMMISSIONER Fourth Respondent THE OMBUDSMAN Fifth Respondent THE SERIOUS FRAUD OFFICE Seventh Respondent THE DIRECTOR OF HUMAN RIGHTS PROCEEDINGS Eighth Respondent THE INDEPENDENT POLICE CONDUCT AUTHORITY Ninth Respondent LANCE LAWSON BARRISTERS AND SOLICITORS Tenth Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Robert Lee, Advocate for Applicant Jo Douglas, Counsel for First Respondent Antoinette Russell, Counsel for Second, Third & Sixth Respondents Michael Quigg, Counsel for Fourth and Seventh Respondents David Gee, Advocate for Fifth Respondent Gillian Service, Counsel for Eighth Respondent Allan Galbraith, Advocate for Ninth Respondent G Burt, Counsel for Tenth Respondent
Investigation Meeting:	On the papers
Submissions received:	8 December 2011 from Applicant 23 September 2011 from First, Second, Third, Eighth and

Tenth Respondents
Affidavits filed by Fourth Respondent 23 November 2011, by Fifth Respondent 2 November 2011, by Seventh Respondent 11 November 2011, by Eighth Respondent 2 November 2011, and by Ninth Respondent 8 November 2011.
See paragraph 8 for information on the submissions relating to the other Respondents.

Determination: 18 January 2012

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The Applicant, Mr Johan Aarts, claims that he was unjustifiably dismissed by the First Respondent, Barnados New Zealand (“Barnados”).

[2] Mr Aarts further claims that the Second to Tenth Respondents inclusive should be joined as Respondents to his claim against Barnados as having allegedly and variously conspired to deceive, together or alone, behaved in bad faith, used undue influence, conspired to cover up, falsified a document, and failing to act.

[3] Mr Aarts further seeks an order from the Authority, pursuant to Schedule 2 Clause 5 of the Employment Relations Act 2000 (“the Act”) that the Second Respondent, the Commissioner of New Zealand Police (“the Police”), provide him with a copy of the evidential videotaped interviews held by the Police.

[4] The Second to Tenth Respondents deny the claims set out in paragraph 2 above either on the basis that the claim is made outside the 12 month time limit pursuant to s 135 (2) (5) of the Act, and/or that the Employment Relations Authority has no jurisdiction to address the claims.

Prohibition on publication

[5] **I order that the names of the children counselled by Mr Aarts, and any evidence that could lead to the identification of those children, not be published. The children are to be referred to by initials only, these letters bearing no relationship to their actual names. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Preliminary Note

[6] The substantive matter of whether Barnados unjustifiably dismissed Mr Aarts has yet to be addressed, thus any breach of the agreement is at this time an alleged breach. This determination addresses as a preliminary issue the claims, set out in para [2] above, joining the Second to Tenth Respondents to the action.

[7] Not all the co-joined Respondents have filed submissions; however some of the Respondents made detailed submissions within the Statements in Reply. In the case of the Fifth Respondent, the Ombudsman, and the Ninth Respondent, the Independent Police Conduct Authority (“IPCA”), no Statements in Reply or submissions have been received, although written responses have been made to the Amended Statement of Problem claims.

[8] The Fourth, Fifth, Sixth, Eighth and Ninth Respondents have filed affidavits confirming the dates from which their knowledge of Mr Aarts and of the alleged breach of his employment contract by Barnados commenced.

[9] The Amended Statement of Problem filed by Mr Aarts on 10 May 2011 of itself contains comprehensive submissions on the preliminary issues. Mr Aarts has supplied further submissions in response to the affidavit evidence filed by the Respondents with the Authority.

[10] I propose to address each claim individually, unless the claims concern several of the Respondents as a group.

[11] Mr Aarts has expressed claims within terms which have no application in the Employment Relations Authority e.g. conspiracy. As none of the co-joined Respondents had an employment relationship with Mr Aarts who was employed by Barnados, I shall address these claims as falling under s 134 (2) of the Act relating to inciting, instigating, aiding or abetting a breach of an employment agreement. The remedy available to the applicant successfully bringing a claim pursuant to s 134(2) of the Act is a penalty.

[12] In determining the preliminary issues, my decision to do so based “on the papers” pursuant to s 160(1)(f) of the Act, has been made on the basis that the underlying facts pertaining to the relevant timelines as set out by Mr Aarts in his comprehensive Amended Statement of Problem are not in dispute between the parties. I have also had regard to the requirement that the Authority deliver “*speedy, informal and practical justice to the parties*” pursuant to s 174 of the Act.

Issues

[13] The issues for determination are:

- Whether the Second, Third and Sixth Respondents, Commissioner of New Zealand Police (“the Police”), and the Ministry of Social Development (“MSD”)¹ respectively incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts’s employment agreement.
- Whether the claim that the Police and MSD incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts employment agreement is time-barred thus that Mr Aarts would not be entitled to any remedies.
- Whether the Authority should issue a summons requiring the Police to provide Mr Aarts with a copy of the evidential videotaped interviews.
- Whether the Fourth Respondent, the Privacy Commissioner, incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts employment agreement.
- Whether the Fifth Respondent, the Ombudsman, incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts’s employment agreement.
- Whether the Seventh Respondent, the Serious Fraud Office (“SFO”), incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts’s employment agreement.
- Whether the Eighth Respondent, the Director of Human Rights Proceedings, (“DHRP”) incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts’s employment agreement.
- Whether the Ninth Respondent, IPCA, incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts’s employment agreement.

¹ CYF and MSD merged on 1 July 2006. CYF where used in this determination refers to the Department of Child, Youth and Family Services and MSD’s Child Youth and Family service.

- Whether the Tenth Respondent, Lance Lawson Barristers and Solicitors (“Lance Lawson”), incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts’s employment agreement and whether such a claim is time-barred thus that Mr Aarts would not be entitled to any remedies.

Background Facts

[14] Mr Aarts was dismissed by Barnados on 14 August 2006 for serious misconduct.

[15] In 2004 Mr Aarts and a co-facilitator had facilitated a Family Violence Programme in Tokoroa. One of the facilitators could not attend the sessions on some occasions and Mr Aarts and his co-facilitator had decided that it was appropriate under the programme guidelines for one person to deliver the course for up to 3 children.

[16] During 2004 Mr Aarts had conducted some sessions with the X children in a solo capacity.

[17] In May 2006 there was a complaint made to CYF that Mr Aarts had been acting inappropriately towards some of the children involved in the Family Violence Programme in 2004. It is normal procedure for CYF to work closely with the Police in situations involving allegations of child abuse. CYF had initially interviewed the children involved and then made a referral to the Police.

[18] The Police had investigated these complaints but no criminal charges were made against Mr Aarts. However the Police and CYF made Barnados aware of the allegations made against Mr Aarts.

[19] In July 2006 there was a second referral made to the Police by CYF of disclosures made by two girls of the Y family that Mr Aarts was counselling at that time. Barnados were made aware of this second allegation by the Y children, and on 3 August 2006 there was a meeting held between Barnados and Mr Aarts in connection with the allegation, with a further meeting taking place on 10 August 2006.

[20] At a meeting held on 14 August 2006, Mr Aarts’s employment with Barnados was terminated as confirmed in a letter dated 14 August 2006.

Determination

The Law

[21] Section 134 (2) of the Act is relevant to the issue of inciting, instigating, aiding and abetting:

Section 134 Penalties for breach of employment agreement

(2) Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[22] The wording of s134 (2) is generally accepted as clearly deriving from s 66 of the Crimes Act 1961. A leading commentary on employment law² states of s 134(2)³:

The concept of inciting, instigating, aiding and abetting has been interpreted extensively in cases turning on the liability of secondary parties in criminal law ... In Attorney-General's Reference (No 1 of 1975) [1975] QB 773, Lord Widgery CJ said that the words should be given their ordinary meaning, although their common use as synonyms has led to a tendency to construe the phrase as a whole as connoting every form of actual assistance or encouragement committed before or during the act of the principal (Martyn v Police [1967] NZLR 396, Larkins v Police [1987] 2 NZLR 282 (CA)).

...
The particular knowledge required to be proved against an alleged party to a breach of contract under subs (2) is that the defendant must have known of the contract and deliberately intended to interfere with it, although knowledge of the exact terms is not required; it is sufficient that the defendant "knew of the general contractual situation or practice in a particular field" (Credit Consultants Debt Services NZ Ltd v Wilson Employment Court, Wellington WC 12B/07, 1 May 29007, Judge Shaw)).

[23] In *Musa v Whanganui District Health Board*⁴ the Employment Court observed that for a party to be liable under s 134(2), there must be a breach of an employment agreement by a primary breacher.

[24] If it is determined that a party to an action has incited, instigated, aided or abetted a breach of an employment agreement, a penalty may be awarded pursuant to s 135 of the Act:

² Andrew Gray (ed) *Mazengarb's Employment Law* (loose leaf ed, LexisNexis)

³ Ibid at ERA134.9

⁴ [2010] NZEmpC 120, (2010) 7 NZELR 710 at [66]

S135 Recovery of penalties

(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of –

(a) the date when the cause of action first became known to the person bringing the action, or

(b) the date when the cause of action should reasonably have become known to the person bringing the action.

Discussion

Interpretation of the phrase 'aiding and abetting'

[25] Mr Lee on behalf of Mr Aarts, has submitted that the correct interpretation to be placed on the phrase “*aid or abet*” encompasses the concept of an “*a person who learns of the crime after it is committed and helps the criminal to conceal it*” and thus that the Fourth, Fifth, Seventh, Eight and Ninth Respondents are to be rightly considered as “*Accessories after the fact*” who have provided aid to the First, Second and Third Respondents to conceal the videotaped evidential interviews from Mr Aarts.

[26] I have carefully considered this submission and accept that there are situations in which “aiding and abetting” within the employment relationship context may post-date the termination of the employment relationship on the basis that the relevant employment agreement contains obligations and duties which continue to bind the parties post-termination. The example of an employment agreement containing confidentiality and restraint of trade clauses being a case in point.

[27] However that is not the context in which the present set of facts arises, the relevant alleged breach of the employment agreement is that of the termination itself and not of any clauses which continue to bind the parties post-termination. I consider therefore that the act of “inciting, instigating, aiding or abetting” must arise either before or during the act of Barnados in terminating Mr Aarts’s employment.

Did the Police and the MSD incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts’ employment agreement?

[28] The Police and MSD had made Barnados aware of the allegations which had been made against Mr Aarts in May 2006. In a letter dated 16 November 2006 sent to Mr Aarts’ then legal advisers, Lance Lawson, Barnados stated that:

While the Police and Child Youth and Family Services accepted that the behaviour was not one of criminal offence, they did indicate that nevertheless the behaviour described by the girls is believed to be very inappropriate given the circumstances in which they occurred.

[29] Following this information Barnados stated that it had undertaken a course of action to ensure that no children were put at risk and that Mr Aarts was not exposed to any further risk of complaint.

[30] On 27 July 2006 Barnados were made aware of a second allegation involving Mr Aarts, following which a meeting was held with Mr Aarts on 3 August 2006, with a further meeting taking place on 10 August 2006.

[31] Mr Aarts stated that CYF, who worked closely with the Police on Child Abuse investigations under the CAT/SAT (Child Abuse Team/Sexual Abuse Team) protocol, had provided Barnados with false and misleading information about the evidential videotaped interviews which had been held with the children involved in the allegations against him.

[32] The alleged breach of Mr Aarts' employment agreement by Barnados has not been established, as the substantive matter has yet to be heard by the Authority and the evidence tested. Consequently until such time as and if such a breach has been determined to have occurred, (see paragraphs [22]and [23] above) I am unable to determine the issue of whether the Police and MSD were complicit in such a breach pursuant to s134(2) of the Act.

[33] In these circumstances I consider it appropriate to move to consideration of whether, in the event that a breach by Barnados of Mr Aarts' employment agreement was to be established, the claim that the Police and CYF incited, instigated, aided or abetted the breach is time-barred and whether Mr Aarts would be entitled to any remedy in relation to a claim against the Police and CYF pursuant to s 134(2) of the Act.

Is the claim that the Police and MSD incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts employment agreement time-barred, and would Mr Aarts be entitled to any remedies?

[34] A penalty is the remedy for a breach of s 134(2) of the Act.

[35] Pursuant to s 135 of the Act, Mr Aarts had 12 months in which to commence his action for recovery of a penalty. It is therefore appropriate that I consider this issue as unless Mr Aarts has brought his claim within the statutory time frame, he is time-barred and not entitled to remedies.

[36] Mr Aarts must have brought his action for the recovery of a penalty either within 12 months of becoming aware of the cause of action, or within 12 months of reasonably becoming aware of the cause of action.

[37] Mr Aarts was dismissed by Barnados on 14 August 2006. On 18 February 2011 Mr Aarts filed an amended Statement of Problem in the Authority joining the Police and MSD to his claim on the basis of s 134(2) of the Act.

Within 12 months of the cause of action first becoming known

[38] Mr Aarts stated that on 6 June 2006 Detective Matt McLeod had visited him at his home and advised him that:

- disclosures had been made by children Mr Aarts had been counselling;
- the children had alleged inappropriate behaviour on Mr Aarts' part;
- the matter had been reported to Barnados; and
- no criminal charges would be laid

[39] Detective McLeod had written to Ms Glenys Knowles, Regional Manager Northern Barnados, in June 2006 outlining the detailed disclosures which had been made by the X children, explaining the discussions which he had had with Mr Aarts on his visit to him on 6 June 2006, and concluding towards the end of the letter with the observation that:

The Police and Child Youth and Family accept that the responsibility rests with Barnardo's (sic) New Zealand to take any course of action to assist with ongoing training, and supervision of Johan Aarts to assist in safeguarding himself and Barnardo's from any further allegations of inappropriate behaviour as a result of his work.

[40] On 21 July 2006 there was a meeting between Barnados and Mr Aarts to discuss the allegations and the appropriate action to be taken. Notes from that meeting indicate Ms Jenny Corry, Specialist Advisor CYD Northern, to have been present. Recommendations itemised in the meeting notes include:

“Arrange a meeting with CYF Rotorua to

- a. inform them of our action since the reported accusation and*
- b. determine what their needs are in order for them to feel confident to continue referring.*

[41] On 27 July 2006 Ms Knowles sent an email to Mr Aarts stating: *“Beth advises she has discussed with you the need to cancel any child contact counselling sessions until we can resolve this situation”*.

[42] On 28 July 2006 Ms Beth Salter, Support Manager Barnados Northern Region, emailed Mr Aarts advising him that: *“I am currently waiting to hear back from both CYF and the police so cannot confirm much at the moment”*.

[43] On 3 August 2006 Ms Knowles wrote to Mr Aarts. In that letter Ms Knowles wrote:

As you are aware, Barnados have received notifications of concern regarding your work with children.

The initial concern was based on a video interview regarding the X sisters and the most recent concern arises from another video interview with the Y children.

The interviews were conducted by Child Youth and Family in Rotorua and viewed by the police.

The police have advised us in their letter of June 2008 that although they do not accept that the behaviour is one of criminal offence, nevertheless the behaviour or actions described by the girls is believed to be very inappropriate given the circumstances in which they occurred.....

We are currently waiting a follow up letter from NZ Police regarding the second video. We expect that a similar concern will be expressed.

We are also currently awaiting a full report from Child Youth and Family....

Based on the information we have, the concerns are inappropriate behaviour, which includes closeness, inappropriate touching, offering food/sweets.

[44] On 8 August 2006 Barnados met with Mr Aarts. The notes of that meeting produced in evidence are testified to be a true record as confirmed by the affidavit of Mr Raymond Bloomfield, External Supervisor, and who was present at the meeting.

[45] The notes record that Ms Corry had been invited to the meeting, although she had not attended, and that the purpose of the meeting was: *“to give an opportunity to Johan to respond to the questions raised by the Police and CYF.”*

[46] Although the notes record Ms Salter as explaining that a Police and a CYF report had yet to be prepared, the notes state that Ms Salter: *“did however have a discussion on the*

telephone with Heather Farr of Rotorua CYFS and she was quoting from her notes that she took during that phone conversation.”

[47] The notes also record Mr Robert Lee, Advocate for Mr Aarts, who was present at the meeting on 8 August 2006, referring to “*the Police report*” and the details of that report as referred to by Mr Lee identify the Police report as being the letter of Detective McLeod which was sent to Ms Knowles in June 2006.

[48] On 10 August 2006 Mr Aarts was sent a memorandum from Ms Knowles inviting him to a meeting to be held on 14 August 2006 and stating that the reason for the meeting was to report back to him after having heard his responses at the meeting on 8 August 2006.

[49] The notes of the meeting of 10 August 2006 record that Ms Salter read from the letter dated 14 August 2006. The letter dated 14 August 2006 summarised the pertinent points from the meeting of 8 August 2006, confirmed that Mr Aarts had been informed of: “*a second referral which had been made to the NZ Police from Child Youth and Family where disclosures have been made by two girls that you have been currently counselling.*”, and further advised Mr Aarts of the termination of his employment “*due to the serious nature of the allegations*”.

[50] The notes of the meeting on 14 August 2006 record that Mr Lee advised the meeting that: “*they could expect a Personal Grievance to be brought.*”

[51] On the basis of the evidence as submitted, I find that Mr Aarts at the time of his dismissal on 14 August 2006 was aware that his employment was being terminated on the basis of the allegations which the Police and CYF had provided to Barnados.

[52] Mr Aarts had 12 months in which to bring a claim once he became aware of the cause of action on 14 August 2006, but Aarts’ action for the recovery of a penalty was made on 18 February 2011, more than three and a half years outside the statutory time limit.

Within 12 months of the cause of action reasonably first becoming known

[53] On 27 October 2006 Lance Lawson wrote to Barnados on Mr Aarts’ behalf, raising a personal grievance. In that letter Lance Lawson made several references to the involvement of the Police and CYF:

In May 2006 there was a complaint that Mr Aarts had acted inappropriately towards the X children. CYFS interviewed two of the three children and the police investigated the allegations. ...

On 8 August 2006 a meeting was convened at Mr Aarts request to discuss his concerns about the allegations raised by the X and Y children. ...

Mr Miller described the CYFS interview process in detail. It was clear to Mr Aarts that Barnados were taking any disclosures made at face value without requiring the information to be tested for reliability and accuracy.

[54] On 16 November 2006 Barnados responded to the letter from Lance Lawson. In that letter Barnados, with reference to Mr Aarts' dismissal, refer to Mr Aarts having been aware of the allegations which were being made against him early in June 2006 and state *inter alia* that:

“This was communicated to him after the Police had contacted Barnados to advise that a referral had been made to them from Child Youth and Family Services in relation to disclosures made by three sisters

While the Police and Child Youth and Family Services accepted that the behaviour was not one of criminal offence, they did indicate that nevertheless the behaviour described by the girls is believed to be very inappropriate given the circumstances in which they occurred.

[55] On 20 February 2007 O'Sullivan Clemens Lawyers wrote to the Police advising that they acted for Mr Aarts in the matter of his personal grievance. In that letter which was noted as being for the attention of [Detective] Matt McLeod, O'Sullivan Clemens wrote:

“you may be aware that the information contained in that report in conjunction with the information you discussed with Ms Knowles on 7 June 2006 has proved sufficient for Barnados to terminate Mr Aarts employment”

[56] On 10 April 2007 O'Sullivan Clemens on behalf of Mr Aarts again wrote to the Police, on this occasion the letter was cited as being for the attention of [District Commander] Gary Smith. The letter stated: *“Part of the basis on which Johan was dismissed included a forensic evidential interview with two children whom Johan had counselled some 3 years ago in relation to domestic violence”*.

[57] On 24 September 2007 the Police wrote to O'Sullivan Clemens enclosing a copy of the videotape interview synopses with each of the X and Y children.

[58] On 28 September 2007 O'Sullivan Clemens on behalf of Mr Aarts wrote to the Police, on this occasion for the attention of Mr Rob Jones, Acting Crime Services Manager.

Citing the dismissal of Mr Aarts from Barnados, the letter states: *“Part of the reason for the dismissal was a Police report from Det Matt McLeod to Barnados”*.

[59] On 30 October 2007 O’Sullivan Clemens on behalf of Mr Aarts wrote to the Privacy Commissioner stating that the Police were: *“protecting their own officer who was involved in the initial interview process who has made serious errors in the process”*

[60] On 11 March 2008 Mr Aarts wrote to the Ombudsman explaining that he was a counsellor who had lost his employment with Barnados on 14 August 2006 as: *“a result of a CYFS/Police Investigation into allegations made against me”*.

[61] On 3 April 2008 Mr Aarts had written to the Privacy Commissioner, referring in that letter to the Police involvement in his dismissal, in particular to Detective McLeod’s reliance on the videotaped interviews with the X and Y children when communicating with Barnados in June 2006, alleging that this led: *“directly to my termination.”*

[62] On 12 May 2008 CYF sent Mr Aarts a copy of the Joint CYF/Police Serious Abuse Team/Child Abuse Team Protocol.

[63] On 22 August 2008 Detective Inspector Rob Jones of the Police wrote to Mr Aarts. In that lengthy letter, Detective Inspector Jones informed Mr Aarts that he had telephoned Ms Knowles on 26 October 2007 and that she had informed him that: *“Child, Youth and Family advised they would withdraw using Barnados while (you) remained in Barnados employment such was CYF’s lack of trust in (your) integrity”*.

[64] On 30 September 2008 CYF sent Mr Aarts copies of the forensic interview reports with four children. These reports concluded with the comments that Barnados should be ‘made aware of the statement made by a child’, and of ‘the outcome of a child’s interview’.

[65] On 20 October 2008 a letter was sent to Mr Aarts by the Police, the letter enclosed a copy of a letter sent from Barnados to the Police on 5 November 2007. In the letter dated 5 November 2007 Ms Knowles had written:

Concerns about Johan’s behaviour around children was brought to our attention by Rotorua Police and Children, Young People and their Families Services in Rotorua and nationally....

Barnados did not view those interview tapes as part of our investigation into Johan’s behaviour. We were given information

verbally from both sources and access to a summary review provided by CY&F.

[66] It is my finding that Mr Aarts was aware at the date of his dismissal on 14 August 2006 that allegations provided to Barnados by the Police and CYF had lead to the termination of his employment by Barnados and to the alleged breach of his employment agreement.

[67] However even if I were to accept that that were not the case, which I do not, I find that at the very latest by 20 October 2008 Mr Aarts should reasonably have become aware of the role played by the Police and CYF in the events leading to the termination of his employment.

[68] Mr Aarts had 12 months in which to bring a claim once he became reasonably aware of the cause of action, but even had I accepted, and I do not, that Mr Aarts was only reasonably aware of the cause of action by 20 October 2008, Mr Aarts' action for recovery of a penalty was made on 18 February 2011, more than sixteen months outside the statutory time limit applicable should Mr Aarts have only become aware of the cause of action by 20 October 2008.

[69] I determine that Mr Aarts is time-barred from bringing a claim against the Police and MSD pursuant to s 134(2) and s 135 of the Act, and that Mr Aarts is consequently not entitled to any remedies against the Police and MSD.

Whether the Authority should issue a summons requiring the Police to provide Mr Aarts with the videotaped evidential interviews?

[70] Mr Aarts claims that the Police incited, instigated, aided and abetted Barnados in the alleged breach of his employment agreement by providing Barnados with false and misleading information about the videotaped evidential interviews with the X and Y children, and seeks an order from the Authority for discovery of this evidence.

Evidence Regulations 2007 opposition to order

[71] The Police opposed the issuing of a summons pursuant to clause 5 of sch 2 of the Act on the basis that the Evidence Regulations 2007 prohibited disclosure of the videotaped evidential interviews. The Authority has previously addressed this issue⁵ upholding the Police position in relation to this basis of claim

Recovery of a Penalty opposition to order

⁵ Member's Minute dated 2 December 2010

[72] The Police further oppose disclosure of the videotaped evidential interviews on the basis that discovery is not available in an action for the recovery of a penalty.

[73] Whilst there is no formal discovery process in the Authority corresponding to the mutual disclosure and inspection of documents in the Employment Court, the Authority has the power, pursuant to s160(1)(a) of the Act, in investigating any matter: “*to call for evidence and information from the parties*”. In accordance with cl 5 of sch 2 of the Act the Authority may issue a summons for this purpose.

(5)(2) The summons must be in the prescribed form, and may require the person to produce before the Authority any books, papers, documents, records, or things in that person’s possession or under that person’s control in any way relating to the matter.

[74] The matter before the Authority as it affects the party from whom discovery is sought is the action under s 134(2) of the Act, for which a penalty is the remedy prescribed pursuant to s 135 of the Act.

[75] The disclosure regime as set out under regulations 40-52 of the Employment Court Regulations 2000 does not apply as stated in regulation 39(2),: “*to any action for the recovery of a penalty*”. This position reflects the quasi-criminal character of penalty proceedings and the principle that disclosure of documents should not be required to be produced if that might tend to incriminate the party who possesses them.

[76] In *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd*⁶ the Chief Judge stated:⁷ “*So it follows that where a cause of action (“action”) is for the recovery of a penalty, disclosure is not available.* It is noted that the Chief Judge distinguishes a penalty action from causes of action which are not for the recovery of a penalty.

[77] There is no equivalent to regulation 39(2) in the provisions which the Authority has reliance upon when ordering one party to disclose documents or similar to the other party; however I consider that the Authority jurisdiction is subject to the general law of discovery which recognises that a party is entitled to object to the production of documents which might expose that party to any penalty. In the Employment Court judgment *New Zealand Baking Trades etc Union v Foodtown Supermarkets Limited*⁸ a full Court held:⁹

⁶ [2009] ERNZ 207

⁷ Ibid at para [25]

⁸ [1992] 3 ERNZ 305

⁹ Ibid at 316

... Thus the law recognises that a party is entitled to object to production for inspection of documents which are likely to incriminate that party or expose that party to any penalty or forfeiture
...

[78] Moreover, I do not consider that Parliament intended the Authority to be able to order discovery in recovery of a penalty, matters which, should the matter have arisen in the Employment Court, the Court would be precluded by virtue of regulation 39(2) from ordering disclosure.

[79] I do not find any grounds for issuing a summons for discovery of the evidential videotaped interviews as the claim against the Police is recovery of a penalty under s 134(2) and s 135 of the Act, additionally observing that I have moreover found such a claim to be time-barred.

Claims Against the Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Respondents

[80] As previously observed in paragraph [10] I propose to deal with each claim individually, however I note as relevant in this context that in his submissions Mr Lee states that it is:

... already common ground that the fourth, fifth, seventh, eighth and ninth Respondents came into contact with the Applicant after the breach of his employment contract on 14 August 2006.

Did the Fourth Respondent, the Privacy Commissioner incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement?

[81] The Assistant Privacy Commissioner by way of affidavit evidence and on behalf of the Privacy Commissioner stated that he had first become aware of the events connected with the alleged breach of Mr Aarts' employment agreement with Barnados on 6 June 2007 when Mr Underwood lodged a complaint with the Privacy Commissioner alleging interference with Mr Aarts's privacy.

[82] The complaint made on behalf of Mr Aarts related to a request Mr Aarts had made to the Police for copies of evidential videotaped interviews with the X and Y children. The Privacy Commissioner had investigated the complaint and as a result of the Privacy Commissioner's involvement, the Police had provided Mr Aarts with synopses of the videotaped interviews content.

[83] The Privacy Commissioner had closed Mr Aarts's complaint on 12 May 2008.

[84] In his affidavit evidence the Assistant Privacy Commissioner confirmed that he had become aware that Mr Aarts had been employed by Barnados and that his employment had been terminated on or around 14 August 2006 at the same time as the complaint had been lodged with the Privacy Commissioner, i.e. on 6 June 2007.

[85] To have incited, instigated, abided or abetted Barnados in the alleged breach of Mr Aarts's employment agreement, the Privacy Commissioner must have known of the contract and deliberately intended to interfere with it: *Credit Consultants Debt Services NZ Ltd v Wilson*¹⁰

[86] The alleged breach of Mr Aarts's employment agreement took place on 14 August 2006. Any involvement by the Privacy Commissioner dated from 6 June 2007 when Mr Aarts lodged his complaint.

[87] I find that this involvement which took place almost a year after Mr Aarts's dismissal did not incite, instigate, aid or abet that alleged breach as there is no evidence establishing that the Privacy Commissioner either had knowledge of the employment relationship of Mr Aarts with Barnados, or had any contact with Barnados, either prior to or during the alleged breach of Mr Aarts' employment agreement.

[88] I do not find involvement in the matter by virtue of complaints made by, or about, Mr Aarts in the period 2007 to 2009 fulfils the requirements of s 134(2) of the Act.

[89] I determine that the Privacy Commissioner did not incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement

Did the Fifth Respondent, the Ombudsman, incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement?

[90] In January 2007 Mr Aarts stated that he made an Official Information Act 1982 request to the MSD as a result of which Mr Aarts was supplied with five documents, one of which he claimed had been edited and reprinted. Consequently Mr Aarts had made a complaint to the Ombudsman.

[91] Subsequent to the dismissal of Mr Aarts which took place on 14 August 2006, the Ombudsman became involved with Mr Aarts on 11 March 2008 as a result of requests made

¹⁰ Employment Court, Wellington WC 12B/07, 1 May 2007, Judge Shaw

under both the Privacy Act 1993 and The Official Information Act 1982 to view the videotaped evidential interviews with the children involved in the allegations which ultimately led to Mr Aarts' dismissal.

[92] By way of affidavit evidence the Deputy Ombudsman stated on behalf of the Ombudsman that the records of the Ombudsman revealed no contact or knowledge of, or with, Mr Aarts prior to March 2008.

[93] To have incited, instigated, abided or abetted Barnados in the alleged breach of Mr Aarts's employment agreement, the Ombudsman must have known of the contract and deliberately intended to interfere with it: *Credit Consultants Debt Services NZ Ltd v Wilson*¹¹

[94] The alleged breach of Mr Aarts's employment agreement took place on 14 August 2006. Any involvement by the Ombudsman significantly post-dated the alleged breach.

[95] I find that the later involvement of the Ombudsman did not incite, instigate, aid or abet that breach as there is no evidence establishing that the Ombudsman either had knowledge of the employment relationship of Mr Aarts with Barnados, or had any contact with Barnados, either prior to or during the alleged breach.

[96] I do not find that involvement by the Ombudsman in relation to a complaint made by Mr Aarts in 2008 fulfils the requirements of s 134(2) of the Act.

[97] I determine that the Ombudsman did not incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement

Did the Seventh Respondent, the SFO incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement?

[98] The General Manager Corporate Services of the SFO stated by way of affidavit evidence stated that a 'Johan' had first contacted the SFO by telephone on 7 July 2007. Mr Aarts contends that this person was not him. However Mr Aarts stated that he had submitted a report to the SFO in 2008 detailing various allegations against CYF and the Police and that the SFO had refused to investigate the matter.

[99] In his submissions Mr Aarts does not dispute that the SFO involvement post-dated the termination of his employment agreement on 14 August 2006.

¹¹ Employment Court, Wellington WC 12B/07, 1 May 29007, Judge Shaw

[100] To have incited, instigated, abided or abetted Barnados in the alleged breach of Mr Aarts's employment agreement, the SFO must have known of the contract and deliberately intended to interfere with it: *Credit Consultants Debt Services NZ Ltd v Wilson*¹²

[101] The alleged breach of Mr Aarts's employment agreement took place on 14 August 2006. I find that any involvement by the SFO either in 2007 or two years later in 2008 did not incite, instigate, aid or abet that alleged breach as there is no evidence establishing that the SFO either had knowledge of the employment relationship of Mr Aarts with Barnados, or had any contact with Barnados, either prior to or during the alleged breach.

[102] I do not find a refusal by the SFO to undertake an investigation into the matter in 2008 fulfils the requirements of s 134(2) of the Act.

[103] I determine that the SFO did not incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement

Did the Eighth Respondent, the DHRP, incite, instigate, aid or abet Barnados in the alleged breach of breach Mr Aarts's employment agreement?

[104] The Director of the Office of Human Rights Proceedings stated by way of affidavit evidence that on 27 October 2009 the Privacy Commissioner had referred a complaint from the mother of the X children to the DHRP on the basis that the Privacy Commissioner had formed the view that Mr Aarts had interfered with the privacy of the X family contrary to Privacy Principle 11.

[105] On 3 November 2009 the DHRP had written to Mr Aarts and pursuant to section 82(3) of the Privacy Act 1993 gave Mr Aarts his statutory opportunity to be heard about the referral.

[106] At the time of Mr Aarts lodging his Amended Statement of Problem in the Authority on 10 May 2011, the DHRP had not finalised his decision regarding Mr Aarts' alleged interference with the family's privacy.

[107] To have incited, instigated, abided or abetted Barnados in the alleged breach of Mr Aarts's employment agreement, the DHRP must have known of the contract and deliberately intended to interfere with it: *Credit Consultants Debt Services NZ Ltd v Wilson*¹³

¹² Employment Court, Wellington WC 12B/07, 1 May 29007, Judge Shaw

[108] The DHRP became involved with Mr Aarts as a result of the Privacy Commissioner's referral of the complaint on 27 October 2009. The alleged breach of Mr Aarts's employment agreement took place on 14 August 2006. Any involvement by the DHRP three years later in 2009 I find did not incite, instigate, aid or abet that breach as there is no evidence establishing that the DHRP either had knowledge of the employment relationship of Mr Aarts with Barnados, or had any contact with Barnados, either prior to or during the alleged breach of Mr Aarts' employment agreement.

[109] I do not find that the later involvement of the DHRP as a result of a referred complaint involving Mr Aarts in 2009 fulfils the requirements of s 134(2) of the Act.

[110] I determine that the DHRP did not incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement

Did the Ninth Respondent, the IPCA, incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement?

[111] Mr Aarts stated that the involvement of the IPCA arose as a result of his Amended Statement of Problem lodged with the Authority on 10 May 2011, which amounted to a complaint about the Police and as a result of which the IPCA carried out an investigation.

[112] The IPCA has denied knowledge of any complaint about, or notification by, the Police, or that any investigation had taken place in connection with Mr Aarts.

[113] Mr Allan Galbraith, Member of the IPCA, confirmed by way of affidavit evidence that the IPCA first became aware of Mr Aarts's employment relationship with Barnados on 12 May 2011 by means of receipt of the Statement of Problem signed by Mr Aarts and dated 9 May 2011.

[114] To have incited, instigated, abided or abetted Barnados in the alleged breach of Mr Aarts's employment agreement, the IPCA must have known of the contract and deliberately intended to interfere with it: *Credit Consultants Debt Services NZ Ltd v Wilson*¹⁴

[115] The alleged breach of Mr Aarts's employment agreement took place on 14 August 2006. I find that the IPCA did not incite, instigate, aid or abet that breach as there is no

¹³ Employment Court, Wellington WC 12B/07, 1 May 2007, Judge Shaw

¹⁴ Employment Court, Wellington WC 12B/07, 1 May 2007, Judge Shaw

evidence establishing that the IPCA either had knowledge of the employment relationship of Mr Aarts with Barnados, or had any contact with Barnados either prior to or during the alleged breach of Mr Aarts' employment agreement. Indeed there is no evidence of any involvement in the matter subsequently by the IPCA.

[116] I do not find there to be any grounds in relation to the IPCA fulfilling the requirements of s 134(2) of the Act.

[117] I determine that the IPCA did not incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement

Did the Tenth Respondent, Lance Lawson, incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts' employment agreement?

[118] Mr Aarts stated that he had engaged Lance Lawson on 11 August 2006 to provide him with legal advice and assistance regarding what he regarded as the impending termination of his employment. Lance Lawson was to provide Mr Aarts with legal advice and to instigate a personal grievance on behalf of Mr Aarts against Barnados.

[119] On 11 October and 27 October 2006, Lance Lawson wrote to Barnados on behalf of Mr Aarts raising a personal grievance. I consider this to have been an action to address the alleged breach, and not to incite, instigate, aid or abet it.

[120] Mr Aarts stated that he had instructed Lance Lawson to assist him in gaining access to the videotaped evidential interviews. Lance Lawson stated that it had taken some steps in the matter; however its advice to Mr Aarts was to proceed to mediation without viewing the videotaped evidential interviews.

[121] Mr Aarts stated that he had declined to follow Lance Lawson's advice and had terminated the engagement of its services.

[122] To have incited, instigated, abided or abetted Barnados in the alleged breach of Mr Aarts's employment agreement, Lance Lawson must have known of the contract and deliberately intended to interfere with it: *Credit Consultants Debt Services NZ Ltd v Wilson*¹⁵

[123] The alleged breach of Mr Aarts's employment agreement took place on 14 August 2006. Although Lance Lawson knew from Mr Aarts having instructed it in the matter just

¹⁵ Employment Court, Wellington WC 12B/07, 1 May 29007, Judge Shaw

prior to 14 August 2006 that Mr Aarts apprehended the termination of his employment with Barnados, I find that there is no evidence that Lance Lawson deliberately intended to interfere with Mr Aarts employment agreement with Barnados to Mr Aarts's detriment. On the contrary, Lance Lawson was engaged by Mr Aarts to address the alleged breach on his behalf.

[124] I further find that Lance Lawson's advice to Mr Aarts in the matter of the videotaped evidential interviews which occurred subsequent to the alleged breach, does not constitute inciting, instigation, aiding and abetting of the alleged breach of Mr Aarts' employment agreement by Barnados.

[125] I do not find there to be any grounds in relation to Lance Lawson fulfilling the requirements of s 134(2) of the Act.

[126] I determine that Lance Lawson did not incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts's employment agreement.

[127] However for completeness, I shall proceed to consider whether, if Lance Lawson were to have incited, instigated, aided or abetted Barnados in the alleged breach of Mr Aarts's employment agreement, such a claim would be time-barred.

[128] A penalty is the remedy for a breach of s 134(2) of the Act.

[129] Pursuant to s 135 of the Act, Mr Aarts had 12 months in which to commence his action for recovery of a penalty. It is therefore appropriate that I consider this issue as unless Mr Aarts has brought his claim within the statutory time frame, he is time-barred and not entitled to remedies.

[130] Mr Aarts must have brought his action for the recovery of a penalty either within 12 months of becoming aware of the cause of action, or within 12 months of reasonably becoming aware of the cause of action.

[131] On 10 May 2011 Mr Aarts filed an amended Statement of Problem in the Authority joining, *inter alia*, Lance Lawson to his claims on the basis of s 134 (2) of the Act.

Within 12 months of the cause of action first becoming known

[132] Lance Lawson was first aware of the alleged breach of Mr Aarts's employment agreement by termination of the same on or before 11 August 2006 when instructed by Mr Aarts to act in the matter on his behalf.

[133] On 11 and 27 October 2006 Lance Lawson sent letters to Barnados in connection with Mr Aarts's dismissal by Barnados. The letter dated 27 October 2006 was headed :“**RE – JOHAN AARTS –PERSONAL GRIEVANCE**” and stated:

We have received instructions from Mr Aarts in relation to the termination of his employment with Barnados on 14 August 2006. Mr Aarts was discriminated against during his employment at Barnados and the termination was unjustified. Please consider this letter notice of a personal grievance.

[134] I find that by 27 October 2006 by the latest, Mr Aarts was aware of the cause of action and he then had 12 months in which to bring his claim for a penalty against Lance Lawson. However Mr Aarts did not bring his claim until 10 May 2011 when he filed an amended Statement of Problem in the Authority joining Lance Lawson and claiming recovery of a penalty against it.

Within 12 months of the cause of action reasonably first becoming known

[135] Following its appointment by Mr Aarts, on 11 October 2006 Mr Bill Lawson of Lance Lawson had requested on behalf of Mr Aarts that the Police provide copies of the videotaped evidential interviews.

[136] Lance Lawson stated that the Police had responded by confirming that the video interviews had not been transcribed and declined to release copies of the actual videos.

[137] On 27 October 2006 Lance Lawson had written to Mr Aarts enclosing a copy of the letter from the Police confirming that the video interviews had not been transcribed. Mr Aarts stated that Mr Lawson had advised that he proceed to mediation without viewing the tapes, but that he had insisted that the matter be raised with the Bay of Plenty Police District Commander.

[138] Mr Aarts stated that Mr Lawson had become angry at this point, had insisted that Mr Aarts follow his advice which he had declined to do, and that he had thereupon terminated the contract for legal services with Lance Lawson.

[139] It is my finding that Mr Aarts was aware by 27 October 2006 of the cause of action, however even were I to accept that that were not the case, I find that at the very latest by the end of 2006 after the termination of the contract for legal services with Lance Lawson, Mr Aarts should reasonably have become aware of the role played by Lance Lawson and he then had 12 months in which to bring his claim for a penalty against it.

[140] I determine that Mr Aarts is time-barred from bringing a claim against Lance Lawson pursuant to s 134(2) and s 135 of the Act, and that Mr Aarts is consequently not entitled to any remedies.

Conclusion

[141] In conclusion I summarise my findings as follows:

- In respect of the claim that the Police and MSD incited, instigated, aided and abetted Barnados in the alleged breach of Mr Aarts' employment agreement, I determine that even if such a breach was to be found to have occurred, Mr Aarts' claims under s 134(2) have been brought out of time and Mr Aarts would be entitled to no remedy in respect thereof.
- I make no order for the issuing of a summons for the Police to provide Mr Aarts with a copy of the evidential videotaped interviews.
- I determine that the Privacy Commissioner, the Ombudsman, the SFO, the DHRP, the IPCA and Lance Lawson did not incite, instigate, aid or abet Barnados in the alleged breach of Mr Aarts' employment agreement.
- In respect of the claim that Lance Lawson incited, instigated, aided and abetted Barnados in the alleged breach of Mr Aarts' employment agreement, I determine that even if such a breach was to be found to have occurred, Mr Aarts' claims under s 134(2) have been brought out of time and Mr Aarts would be entitled to no remedy in respect thereof.

[142] A conference call will be arranged shortly to progress the substantive matter.

Costs

[143] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondents may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority