



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2014](#) >> [2014] NZEmpC 44

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Fox v Hereworth School Trust Board [2014] NZEmpC 44 (14 March 2014)

Last Updated: 21 March 2014

IN THE EMPLOYMENT COURT WELLINGTON

[\[2014\] NZEmpC 44](#)

WRC 5/13

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for disclosure of documents by a non-party

BETWEEN EMMA YUEN SEE FOX Plaintiff

AND HEREWORTH SCHOOL TRUST BOARD

Defendant

Hearing: On documents filed on 10 March 2014

Appearances: B Scotland, counsel for plaintiff

S J Webster, counsel for defendant

J L Bates, counsel for Abraham Consultants Limited (non-party) Judgment: 14 March 2014

INTERLOCUTORY JUDGMENT (NO 4) OF CHIEF JUDGE G L COLGAN

[1] In the Court's third interlocutory judgment issued on 4 March 2014¹ I directed that Abraham Consultants Limited (ACL) lodge with the Registrar of the Employment Court its documents affecting Mrs Fox's two police complaints involving ACL and/or Mr Abraham. This was for the purpose of determining the relevance of these documents and, thereby, their disclosability.

[2] Relevance of any particular document to this proceeding is to be assessed by reference to the pleadings between the parties and the determination of the

Employment Relations Authority from which this proceeding is a challenge.²

¹ [\[2014\] NZEmpC 33](#).

² [2013] NZERA Auckland 45.

EMMA YUEN SEE FOX v HEREWORTH SCHOOL TRUST BOARD NZEmpC WELLINGTON [\[2014\] NZEmpC 44](#) [14 March 2014]

[3] The latest pleading for the plaintiff is her second amended statement of claim filed on 17 January 2014. At para 18 the plaintiff alleges that:

Mr Abraham threatened the Plaintiff in his 29 September 2009 letter by stating "... if you elect to discuss these matters externally, you do so at your own peril." This greatly alarmed the Plaintiff.

[4] At paras 34-35 the plaintiff claims:

34 On 25 November 2009 the Plaintiff became aware that the Defendant had questioned parents of children attending the Defendant school as to why they had visited the Plaintiff's residence on the previous day.

35 The Defendant's Headmaster advised that a member of the "school community" had observed the parents at the Plaintiff's residence on 24 November 2009.

[5] The plaintiff claims that the defendant's investigation of complaints against her which was conducted by Mr Abraham was incomplete, not independent, and erroneous. Among the particulars of these allegations is that she was "unjustifiably disadvantaged by Mr Abraham's threat of 29 September 2009" (para 51 of the second amended statement of claim).

[6] The following relevant factual information appears from the Authority's determination.

[7] At an early stage of the Board's investigation of suggestions of misconduct by Mrs Fox, it appointed ACL, the company of its deputy chairperson, to investigate these matters and to report to it. In the course of that investigation, Mr Abraham wrote to Mrs Fox out of concern about actual and/or prospective public disclosure of the issues between the parties. In his letter, Mr Abraham advised Mrs Fox that if she disseminated information publicly about these issues, she would do so at her peril. Mrs Fox reacted adversely to what Mr Abraham had written and to the words and phrases that he used. She regarded his communication as a threat of harm and made a complaint about this to the Police. The Police investigated Mrs Fox's complaint which involved communications with Mr Abraham. It is ACL's copies of correspondence about the police complaint and their relevance that is first for consideration.

[8] The plaintiff has put in issue the conduct of the defendant (through Mr Abraham) towards her in the sending of the letter of 29 September 2009. This is said to constitute an unjustified disadvantage to the plaintiff in her employment. It follows that, amongst other considerations, Mr Abraham's motive in doing so may be relevant and, in turn, information about this from his correspondence with the Police consequent upon Mrs Fox's complaint, will be relevant.

[9] The second set of police complaint documents arose at a later time in the process that led eventually to Mrs Fox's dismissal. Mrs Fox considered that her home had been placed under a form of covert surveillance by or on behalf of the school and complained about this to Police. In the course of the investigation of that complaint, Mr Abraham/ACL came into receipt of correspondence about that complaint because ACL was an investigator acting as the school's agent in the matter of Mrs Fox's employment issues.

[10] As in the case of the earlier letter from Mr Abraham to Mrs Fox, she continues to assert in her pleadings that Mr Abraham's actions contributed to her unjustified dismissal by the Board.

[11] At [94] and following of the Authority's determination, it deals with the events surrounding Mrs Fox's belief that she and her home were placed under surveillance on behalf of the defendant which was one of two factors precipitating her residential move from Hawke's Bay to Northland. Mrs Fox's case is that she believed that the school had become aware of who was coming and going from her residence including two particular parents of a pupil who had been in Mrs Fox's class. The Authority found that the Principal of the school confirmed to those parents on 25 November 2009 his awareness that they had been seen at Mrs Fox's home on the previous day. The Authority noted, however, at [96]:

... there is no evidence that the Authority heard that would suggest that Hereworth School was monitoring Ms Fox's residence; [the Principal's] remark to [the parents] was, in the Authority's opinion, a consequence of a chance observation and nothing more.

[12] Mrs Fox also told the Authority that she had been told by a neighbour that "a suspicious car" had been seen outside Mrs Fox's residence. The plaintiff's case is

that these events, together with the defendant's earlier refusal to apologise in terms acceptable to the plaintiff about Mr Abraham's conduct, precipitated Mrs Fox's move away from Hawke's Bay to Northland on about 1 December 2009.

[13] Unlike the other police complaint made by Mrs Fox, there is nothing, or at least nothing sufficient, on the pleadings or from the Authority's determination to link Mr Abraham or ACL with any surveillance of her home. Her suspicions arise from what she was told by the school's Principal and the hearsay information about a "suspicious vehicle" in the vicinity of the home. In these circumstances the documents held by ACL addressing police inquiries about this complaint cannot alone be said to be relevant to the issues for determination in these proceedings and, therefore, do not need to be disclosed.

[14] Some documents held by ACL cover both complaints. In these cases, if the document is relevant for one purpose, it should be disclosed. That means that a document that deals with the 29 September 2009 letter should be disclosed even although it may also address the surveillance complaint.

[15] I propose to refer categorically to the documents by their page numbers corresponding with the list of them supplied by ACL's solicitors on 10 March 2014. Where I refer to "the Commissioner" this means the Commissioner of Police.

[16] The New Zealand Police job sheets at pages 1-2 of the schedule are relevant and should be disclosed to the plaintiff by ACL.

[17] The document at page 3 of the schedule is relevant and should be disclosed to the plaintiff by ACL.

[18] The document at pages 4-5 of the schedule is relevant and should be disclosed to the plaintiff by ACL.

[19] The document at pages 6-7 of the schedule is relevant and should be disclosed to the plaintiff by ACL.

[20] The document at page 8 of the schedule is a memorandum from

Superintendent Sam Hoyle to Kevin Kelly, Chief Police Legal Adviser dated 7

January 2010. This document may be privileged (the privilege being Superintendent Hoyle's and/or the Commissioner's) in the sense that it is a request for legal advice. Just how this has come into the possession of ACL is not clear and that may indicate a waiver of privilege on the part of Superintendent Hoyle and/or the Commissioner. The memorandum deals with the complaint by Mrs Fox of intimidation of her by Mr Abraham. If the plaintiff wishes to obtain a copy of this document (and following documents which are, on their face, similarly privileged), counsel will need to obtain an express waiver of privilege from the Commissioner of Police to do so, or will need to establish that privilege has already been waived.

[21] The document at pages 9-10 of the schedule being a letter dated 14 January

2010 from Christine McKenzie, Police Legal Adviser, to Superintendent Hoyle is relevant in the sense that it addresses Mrs Fox's complaint to the Police of intimidation by Mr Abraham. The same privilege considerations however apply to this as I have set out in relation to the previous document.

[22] The document at page 11 of the schedule is a copy of a letter from the Minister of Justice to Dr Stephen Fox dated 21 May 2012 which is relevant to the proceeding and is disclosable by ACL to her.

[23] The documents at pages 12-13 of the schedule in the name of Mr Abraham and addressed to the Eastern Policing District of the New Zealand Police and the Police Privacy Officer are formally requesting disclosure of information held in relation to an alleged complaint against Mr Abraham by Dr Stephen Fox. The request is made pursuant to the [Privacy Act 1993](#). These documents are not relevant to the proceeding and do not need to be disclosed to the plaintiff by ACL.

[24] The document at page 14 of the schedule is the Police's pro forma response to Mr Abraham dated 21 September 2012 and is similarly not relevant to the proceeding.

[25] The document at page 15 of the schedule is a covering letter (but not its contents) from the Police to Mr Abraham dated 25 September 2012. I consider that this is likewise not relevant to the proceedings and does not need to be disclosed by ACL.

[26] The document at page 16 of the schedule is a letter from ACL to the Minister of Police dated 26 September 2012 seeking information about a complaint made about Mr Abraham to the Police. The request is made pursuant to the [Privacy Act](#). I consider that this document also is irrelevant to the proceeding and need not be disclosed by ACL.

[27] Finally, the document set out at page 17 of the schedule is a letter from the Office of the Minister of Police to Mr Abraham dated 27 September 2012 referring to his [Privacy Act](#) request to the Police. This is similarly not relevant to the proceeding and need not be disclosed by ACL.

[28] Because it might be said that this is an apparently incomplete document trail, in order to expedite the proceeding, I am inclined to think that any further documentation concerned with Mr Abraham's Privacy Act requests seeking documents of the complaint made against him, are likewise irrelevant to the proceeding.

[29] The court's third interlocutory judgment issued on 4 March 2014 contains subsequent directions to progress the case to a fixture.

GL Colgan
Chief Judge

Judgment signed at 2.30 pm on Friday 14 March 2014

