

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 378
5637167 and 5602383

BETWEEN

VICTORIA KIRICHUK
Applicant

A N D

COMMISSIONER OF POLICE
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Hamish Kynaston and Nicola Ridder, Counsel for
Respondent

Investigation Meeting: On the papers

Date of Determination: 7 December 2017

FIRST DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] I held a telephone conference on this matter with the parties' representatives on 20 July last at which a preliminary issue was raised by the advocate for Ms Kirichuk. That issue was whether it was proper for Buddle Findlay to act for the Commissioner and/or whether Ms Nicola Ridder, assisting Counsel for the Commissioner could appear in that capacity.

[2] Both those claims were resisted by Counsel for the respondent and accordingly I directed that there be an exchange of submissions and undertook to deal with the matter as a preliminary issue.

[3] This determination is concerned exclusively with that preliminary issue and proceeds now after this significant delay because in the interim, the Authority was advised that Ms Kirichuk had suffered a decline in her health which made it impossible for her to continue to deal with this matter in the interim. Accordingly, it

seemed appropriate not to progress the work on the file until she was able to deal with the matter. As I am now advised she is well enough to proceed, this determination can now issue.

Submissions for the applicant

[4] Ms Kirichuk maintains, through her then representative Mr Bennett, that neither Buddle Findlay nor Nicola Ridder ought to be able to represent the Commissioner of Police. In relation to the allegation against Buddle Findlay generally, Ms Kirichuk's position is that Buddle Findlay, in addition to representing the Commissioner of Police also represent an Inspector of Police who Ms Kirichuk claims assaulted her and further, it is said that Buddle Findlay act for or have acted for a Russian national who was implicated in one of the bases on which Ms Kirichuk was subjected to disciplinary action by Police and which forms an integral part of one of her personal grievances.

[5] The second and separate allegation made by Ms Kirichuk is that Ms Nicola Ridder cannot act in the proceeding for the Commissioner because Ms Kirichuk seeks to call Ms Ridder as a witness in the prosecution of her personal grievances against Police.

[6] For context, Ms Ridder is now employed as a lawyer with Buddle Findlay who act for the Commissioner but was previously principal legal adviser, employee relations for Police; in effect, Ms Ridder was Police's in-house counsel.

The submissions for the respondent

[7] The Commissioner, in his submissions refers first to Ms Ridder's involvement with Police and with Ms Kirichuk's matter. In essence those submissions record that Ms Ridder has acted exclusively in a professional capacity as counsel, either as an employee of Police with a practising certificate as a barrister and solicitor of the High Court of New Zealand, or in the same capacity as an employee of Buddle Findlay. Her involvement with Ms Kirichuk's employment relationship problem is exclusively one of a counsel advising an employer and the Commissioner makes clear that he would resist any attempt to require Ms Ridder to give evidence and/or to relinquish her involvement as counsel advising the Commissioner.

[8] Turning to the involvement of the law firm Buddle Findlay and the propriety of its involvement as counsel for the Commissioner, Police assert that whether Buddle Findlay may have acted for other parties is neither here nor there and the issue for determination is whether what Police did in response to Ms Kirichuk's behaviour while in the employment was what a fair and reasonable employer could have done in the particular circumstances of that case.

[9] Moreover, Police argue that whether or not Ms Kirichuk seeks to bring proceedings against an Inspector of Police, or not, is irrelevant to the present proceeding; that is a separate matter altogether and in any event, Police assert that Buddle Findlay has not received instructions to act although it did undertake to accept service for the Inspector of Police. In the result, no proceedings have been filed.

Determination

[10] I have not been persuaded that Ms Kirichuk has any basis for opposing the involvement as counsel of either Ms Ridder or Buddle Findlay and accordingly I dismiss her application for orders preventing the involvement of Ms Ridder and/or Buddle Findlay.

[11] Ms Ridder has acted throughout Ms Kirichuk's employment relationship problem as counsel for the employing entity, Police, first as in-house counsel and latterly as part of the employment relations team in the national law firm Buddle Findlay.

[12] There is no possible basis on which Ms Ridder would have any evidence that would be relevant to the employment relationship problem raised by Ms Kirichuk. Ms Ridder has done nothing more than provide a client with professional advice in an employment matter and such advice is always going to be subject to one or other of the two classes of privilege which apply in respect to Court proceedings. Ms Ridder's evidence would be precluded from being able to be heard either because of solicitor/client privilege or because of litigation privilege or both and that avoids entirely the more fundamental question about whether there is anything that Ms Ridder might know which had any probative value at all in respect to the matters that the Authority is required to enquire into.

[13] Based on my analysis of the file and my consideration of the submissions received, I am satisfied that Ms Ridder can tell me nothing that is in way relevant to

the tests I must apply in determining whether Police behaved properly in its dealings with Ms Kirichuk, even assuming that I was able to get any evidence from Ms Ridder which was not subject to one or other of the classes of privilege that I have just referred to.

[14] As to Buddle Findlay itself, it is a truism that all law firms acts for a range of parties and it would be a nonsense if firms were precluded from fulfilling obligations to one client because they might potentially have obligations to another.

[15] Moreover, there is no conclusive evidence that Buddle Findlay have acted or indeed currently act for any party or parties who might have any tangential connection to this matter and even if they do act or have acted, again the issue is not who else this law firm might act for but rather whether Police have behaved properly and in accordance with the law in the way that they have treated Ms Kirichuk. My assessment of that question is not going to be helped by potential evidence that might be available from persons who have no bearing whatever on whether the Commissioner of Police behaved properly as an employer.

[16] Finally, in relation to the allegation that Ms Kirichuk is entitled to resist Buddle Findlay acting for the Commissioner because Buddle Findlay also act for an Inspector of Police who she proposes to bring a private prosecution against, that allegation again raises irrelevant considerations which do not go to the question that I am required to deliberate upon. If, and I say if advisedly, because there are no proceedings filed yet, or apparently in prospect, in relation to this unrelated claim against a senior Police officer, those proceedings were to come on for hearing, they would be quite irrelevant to the Authority's investigation into whether the Commissioner behaved properly towards Ms Kirichuk or not. Moreover, Buddle Findlay do not act for the senior Police officer involved; they simply undertook to accept service on his behalf but service has never been effected.

Costs

[17] The Commissioner seeks costs and is entitled to them as he has been completely successful. I propose to reserve costs at this point and deal with them at the end of the Authority's investigation or at the conclusion of these proceedings in the Authority by other means, whichever comes first.

James Crichton
Chief of the Employment Relations Authority