IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 153
5628962

	BETWEEN	ROBYN McGOWAN Applicant
	A N D	SOUTHERN DISTRICT HEALTH BOARD Respondent

Member of Authority:	Helen Doyle
Representatives:	Mary-Jane Thomas, Counsel for Applicant Janet Copeland, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	12 August 2016, from the Applicant 26 August 2016 from the Respondent
Date of Determination:	12 September 2016

DETERMINATION OF THE AUTHORITY ON AN APPLICATION TO REMOVE MATTER TO THE EMPLOYMENT COURT

A The application for removal of this matter or part thereof to the Employment Court is declined.

B Costs are reserved.

Employment relationship problem

[1] This is an application to remove part of, or the entire matter, to the Employment Court for hearing and determination. The applicant relies on the grounds in s 178(2)(a) and (d) of the Employment Relations Act 2000 (the Act).

[2] The application is opposed by the respondent on the basis that none of the criteria for removal set out at s 178 of the Act is established by the application.

Removal to the Court

[3] The Authority may, on the application of a party to a matter, order the removal of it or any part of it to the Employment Court without investigating it under s 178 of the Act if, under s 178(2):

(a) An important question of law is likely to arise in the matter other than incidentally; or

(b) The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or

(c) The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.

Important question of law

[4] After the statement of problem and statement in reply were lodged in this matter Ms Thomas made an application seeking that the Authority call for relevant information under s 160 and 161 of the Employment Relations Act (2000) (the Act). Three classes of documents were referred to by the applicant. The first was documents relating to the admission of patient X on a specified day, the second relating to admissions of the same patient on any date prior to the specified date and the final class of documents relating to any directions given by the respondent to the applicant on a specified date. Disclosure was sought in the context of a claim that the respondent has failed to provide a safe workplace for the applicant.

[5] Ms Copeland lodged a notice of opposition to the application in respect of the first two classes of documents sought on the basis that the information was confidential. The respondent consented to a direction that it provide the Authority with documents relating to any directions given to the applicant on the date specified.

[6] On 18 July 2016 the Authority issued a Minute advising that it would hear from counsel about the disclosure request by way of telephone conference but the parties were referred to mediation in the ongoing employment relationship. The Authority noted in its Minute by way of preliminary view before the telephone

conference the notes relating to patient X are confidential. Further it stated in its Minute that it will need as part of its investigation to establish whether the respondent took all practicable and reasonable steps in light of its knowledge of patient X to ensure the applicant's safety on the day in question.

[7] Ms Thomas advised on 19 July 2016 that she intended to apply for the matter to be removed to the Employment Court and that it was probably not worth setting a date for mediation. The Authority agreed to await the application for removal and then re-assess mediation.

[8] By agreement with counsel the removal application was dealt with on the papers and submissions received.

[9] Ms Thomas submits that a key issue exists between the parties about disclosure of patient records of a third party who is not connected except incidentally with the substantive proceeding. She submits that this matter raises an important issue of law with wide ranging consequences for the holders of confidential patient information and should be decided by the Employment Court. It is the position of the applicant that the Employment Court and not the Authority has power to order disclosure in the circumstances of this matter.

[10] The application for removal on its face is for part of the employment relationship problem only but in the final paragraph of her submissions Ms Thomas states that it is in the interests of saving time and costs that the whole matter should be removed and it would be unjust that that not occur.

[11] Ms Copeland submits that the ability for the Authority to call for and assess information would mean that it could adequately deal with the issues in front of it regarding the confidential information. She submits that the issue as to whether confidential patient notes should be disclosed does not give rise to any question of law but rather whether it is appropriate for the Authority or the Court to exercise its discretion in respect of the information at issue.

[12] Ms Copeland referred to the obligations of the respondent under the Privacy Act 1993 and the Health Information Privacy Code 1994 (the HIPC) promulgated under s 46 of that Act including to keep information it holds about that patient confidential. She refers to three Employment Court judgments; *Gilbert v. Attorney-*

General[1], *Coy v Commissioner of Police*[2], and *Auckland District Health Board v Bierre*[3] in which there has been consideration about disclosure of medical information. She submits that the decisions demonstrate that the admissibility of confidential health information is discretionary and does not raise a question of law but is to be determined on the matters before the Authority or Court.

[13] I do not find as Ms Thomas submits that the Authority could not in any circumstance ask for confidential health information under s 160(1)(a) of the Act as part of its investigation. If it was to do so I find that it would be guided on the issue of admissibility by the provisions of the Evidence Act 2006, although they are not binding on the Authority, the Privacy Act and HIPC.

[14] Rule 11 of the HIPC places limits on the disclosure of health information and provides that a health agency such as the respondent must not disclose the information unless on reasonable grounds it believes that the disclosure is to the individual concerned or the individual's representative where the person is dead or unable to give authority. As Ms Copeland submits there is an exemption in Rule 11 (i) where non-compliance is necessary for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation).

[15] There is guidance to the Authority from the judgments of the Employment Court about the admissibility of health information. For example in *Bierre*[4] Chief Judge Colgan referred to the overriding discretion to prevent the disclosure of confidential information in proceedings in s 69 of the Evidence Act but the exercise of discretion to admit confidential information contained in s 69(2) of the Evidence Act in circumstances where the Judge considers the public interest in disclosure outweighs the harm to a person or relationship on whose behalf the confidential information was obtained. The Chief Judge then refers to the guidance in s 69(3) in the Evidence Act of the discretionary considerations to be taken into account under s 69(2).

[16] I agree with Ms Copeland that the judgments of the Employment Court referred to can be distinguished from this matter because the confidential information in this case relates to a third party whereas in the judgments the information related to

[1] [1998] 3 ERNZ 500
[2] [2010] NZEmpC 88, [2010] ERNZ 1998
[3] [2011] NZEmpC 108, (2011) 9 NZELR 1
[4] Ibid at [36]

the claimants. That may be a novel and interesting point but the Employment Court confirms the issue of admissibility of health/medical information involves discretionary considerations and I am not satisfied that an important question of law arises simply because the health information is about a third party.

[17] The Chief Judge stated in *Bierre*[5] that the Privacy Act and HIPC do not extend to information disclosed reasonably as part of a proceeding before a court or tribunal because they both allow what would otherwise be unauthorised use and disclosure of health information where this is in the conduct of legal proceedings.

[18] For all the above reasons I am not satisfied that the first ground relied on for the application for removal that an important question of law is likely to arise other than incidentally in the matter is made out.

The Authority's discretion to remove

[19] The Authority is required under this ground to consider whether it should exercise its discretion and otherwise remove the matter to the Court. Ms Thomas submits that disclosure of confidential patient records is necessary for the proper resolution of the matter and such information should be disclosed before mediation.

[20] A letter from the respondent's Human Resources Manager (Operations) dated 16 May 2016 is attached to the statement of problem and answers some of Ms Thomas's questions. The manager responds with general reference to a comprehensive physical and mental health assessment undertaken by clinical staff at the material time and states in that letter there were no hazards identified as a result to staff including the potential for what did actually occur.

[21] That has not satisfied the applicant but the Authority is not at a point where it can properly assess what information it may need to see as part of its investigation. There may well be other ways for the Authority to obtain the information it needs without seeking the confidential patient information.

[22] The Authority usually investigates personal grievances in the first instance under the Employment Relations Act 2000. This is an ongoing employment relationship problem which the Authority gives priority to whenever possible.

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[5] Ibid at [43]

[23] I am not minded under s 178(2)(d) of the Act to exercise my discretion and remove this matter in part or in its entirety to the Employment Court. The matter will remain for investigation in the Authority.

Mediation

[24] The parties should attend mediation as soon as possible and Ms Thomas should advise the Authority of the outcome of that in due course.

Costs

[25] I reserve the issue of costs to be considered after determination of the substantive matter.

Helen Doyle
Member of the Employment Relations Authority