Employment Court of New Zealand

O'Boyle v McCue [2020] NZEmpC 51 (28 April 2020)

Last Updated: 4 May 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2020] NZEmpC 51
EMPC 464/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of a challenge to objection to disclosure
AND IN THE MATTER	of an application for leave to amend statement of claim
BETWEEN	LYNETTE SALLY O'BOYLE Plaintiff
AND	O'BOYLE LAW LIMITED Second Plaintiff
AND	JANIS MARY MCCUE Defendant

Hearing:	(on the papers)
Appearances:	C W Stewart, counsel for plaintiffs D Grindle, counsel for defendant
Judgment:	28 April 2020

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Challenge to objection to disclosure; application for leave to amend statement of claim)

Introduction

[1] Two related issues require resolution for the purposes of an upcoming fixture.

[2] The first concerns a challenge to an objection to disclose medical records. The second is an application for leave to amend a statement of claim so that issues which

it is asserted may arise from the medical records can be raised as an aspect of the plaintiff's case.

Background

[3] The context is a challenge to a determination of the Employment Relations Authority.1

[4] The Authority gave a succinct summary of the relationship problem which was before it, as follows:

> [1] On 4 October 2018 Janis McCue resigned from her role as a legal secretary to Lynnette O'Boyle, a lawyer specialising in family law matters. Ms McCue had not been at work since 25 September. She had walked out of the office that day after a discussion with Ms O'Boyle over Ms McCue's holiday entitlements got out of hand. Ms McCue said Ms O'Boyle had used words to the effect that she could leave if she did not like what she was hearing, so Ms McCue had left.
> [2] Their difference of views escalated through texts, emails and letters exchanged during the remainder of that day and over the following days. This included Ms O'Boyle demanding Ms McCue return to work, Ms McCue refusing, Ms O'Boyle sending Ms McCue a written warning for taking unauthorised leave and Ms McCue providing, through her solicitor, a medical certificate issued by her doctor on 1 October 2018. The certificate said Ms McCue was "experiencing work-related stress" so had been unable to work since 26 September but "should be able to return to work once the issues are resolved".
> [3] Ms McCue did not return to work. Instead her lawyers wrote to Ms O'Boyle on 4 October 2018. The letter tendered Ms McCue's immediate resignation and raised a personal grievance on the grounds of unjustified disadvantage and constructive dismissal. She proposed mediation but this did not resolve the matter and Ms McCue lodged an application in the Authority. She sought orders for payments of arrears due for holiday and other leave entitlements and for personal grievance remedies of lost wages and distress compensation. Ms McCue also asked for penalties to be imposed on Ms O'Boyle for failing to provide her with a written employment agreement and for failing to keep accurate holiday and leave records.
>
> [4] Ms O'Boyle's statement in reply accepted she "could have handled the

... situation in a more conciliatory and less emotionally-charged manner" but said this had occurred during a period of some significant commercial and personal stress.

[5] Ms O'Boyle also raised the issue of whether she was, in her personal capacity, Ms McCue's employer or whether the employment relationship was with O'Boyle Law Limited, a company in which Ms O'Boyle was the sole

1 *McCue v O'Boyle Law Ltd* [2019] NZERA 648 (Member Arthur).

shareholder and director. However Ms O'Boyle conceded this point during the Authority investigation. She accepted she employed Ms McCue in her personal capacity in 2014. No formalities were agreed and completed to transfer the employment relationship to the company after it was registered in 2016. Ms O'Boyle remained personally liable for obligations arising from her employment relationship with Ms McCue.

[6] However Ms O'Boyle firmly denied that her efforts to keep pay and leave records were inadequate or that the circumstances arising from the dispute with Ms McCue over her entitlements amounted to a constructive dismissal.

[5] After considering the evidence, the Authority determined:

a. That Ms McCue was unjustifiably disadvantaged by the failure of her employer, Ms O'Boyle, to provide a written employment agreement and to keep compliant holiday and leave records.
b. Ms McCue's employment ended as a result of breaches of her terms of employment by Ms O'Boyle that amounted to a constructive dismissal.
c. In settlement of Ms McCue's personal grievances for unjustified disadvantage and unjustified dismissal, Ms O'Boyle was ordered to pay compensation for lost remuneration, and for loss of dignity and injury to feelings; these awards total $29,625.
d. She was also ordered to make payments for unpaid public holidays, bereavement leave, and annual leave totalling $10,350, as well as interest.
e. Finally, Ms O'Boyle was ordered to pay $4,000.00 as a penalty for the failure to provide a written employment agreement and to keep compliant holiday and leave records.

[6] Subsequently, Ms O'Boyle and O'Boyle Law Ltd brought a challenge to the Authority's determination, on a de novo basis; this means there will be a rehearing of the matter.

[7] The statement of claim pleads the background circumstances of the employment relationship, emphasising that there was a high degree of mutual good will between the parties. It is acknowledged that after Ms McCue resigned some leave payments were due, and it is confirmed that these amounts have now been paid.

[8] The plaintiffs allege that Ms McCue left her employment on her own initiative and was not constructively dismissed. They say Ms O'Boyle began to rely more heavily on Ms McCue to run her practice from an administrative perspective, due to her personal circumstances; and that at the same time, Ms McCue was also experiencing difficulties in her personal life

which appeared to affect her work. She was also trying to complete part-time studies for a Legal Executive qualification.

[9] Then, reference is made to the sequence of events which commenced on 18 September 2018, when Ms O'Boyle sought to arrange a meeting with Ms McCue to discuss end-of-year leave and opening hours, as well as other leave issues. The statement of claim traces the sequence of events which it is asserted then followed. Eventually a letter was sent by Ms McCue's lawyer on 2 October 2018 to advise that she was on sick leave due to work-related stress; attached was a medical certificate to that effect. It is pleaded that the medical certificate was of an "indefinite nature", stating that the defendant "should be able to return to work once all issues are resolved".

[10] The statement of claim states that Ms O'Boyle responded by saying she did not accept the sick leave was genuine having regard to the contents of the medical certificate; she therefore required Ms McCue to return to work the following day. Further exchanges followed, culminating in advice being given by Ms McCue's lawyers on 4 October 2018 that she had resigned with immediate effect and that she had been constructively dismissed.

[11] The statement of defence filed for Ms McCue emphasises that there had been multiple breaches of minimum standards; and that she was constructively dismissed as a result of her employer's failure to remedy the numerous procedural and other breaches of the Employment Relations Act 2000 (the Act) and the Holidays Act 2003.

Background

[12] On 24 February 2020, I convened a telephone directions conference with the parties, timetabling pre-hearing matters and setting the case down for hearing on 28 and 29 May 2020. At that conference, counsel for the plaintiff, Ms Stewart, advised that there was one disclosure issue which would, if necessary, be the subject of formal process under the Employment Court Regulations 2000 (the Regulations).

[13] On 27 February 2020, a notice was served by the plaintiffs requiring the defendant to provide disclosure of the following categories of documents:

> (a) Any medical records including medical certificates, records of visits, and diagnoses (if any) pertaining to or concerning the defendant, in relation to depression, anxiety, and/or any other mental illness in the 12- month period prior to the date of her resignation of her employment from the plaintiff parties (being 25 September 2018), whether from doctors, counsellors, psychologists, or psychiatrists.
> (b) Any prescriptions, or repeats of prescriptions, for any prescription medication for depression, anxiety, or other mental illness for which the defendant has been prescribed in [the] 12-month period prior to the date of her resignation of her employment from the plaintiff parties (being 25 September 2018).

[14] On 5 March 2020, the defendant served an objection to disclosure under reg 44(3)(c) of the Regulations, stating it would be injurious to the public interest for disclosure to occur because:

a) The documents requested may include protected communications made to registered medical practitioners by a patient who believed that the communication was necessary to enable the practitioner to examine, treat or act for the patient.

a. The plaintiff had not pleaded any issue relating to the defendant's work performance or that she was impaired by any mental illness.
b. Provision of the documents sought (if any) would unnecessarily prolong proceedings because without interpretation by a duly qualified medical expert they would have no probative value.

c. The documents requested were not relevant to the proceedings in that:
    - they did not support the plaintiff's case.
    - they do not prove or disprove any disputed fact in the proceeding;
    - they do not relate to any assertion pleaded in the plaintiff's statement of claim; and
    - the disclosure of the documents sought is both unnecessary and undesirable.

[15] On 10 March 2020, the plaintiffs filed a challenge to the objection to disclosure on these grounds:

a. The documents were relevant and could support the plaintiffs' case that the defendant was not constructively dismissed.
b. Reference was made to an accompanying affidavit from Ms O'Boyle who said that the plaintiffs had until recently been unaware Ms McCue had been on medication, or that she had been suffering from any form of mental illness during the course of her employment; and they were unaware of these facts at the time of the Authority's hearing.

c. The medical issue had not been specifically pleaded, because the plaintiffs had only recently become aware of it.

d. There was no longer a statutory principle of medical privilege which would preclude disclosure.
e. The medical records would not require interpretation by a duly qualified medical expert as had been asserted. The

records sought would have probative value and would be relevant to the challenge that Ms McCue had been constructively dismissed.

f. The disclosure of Ms McCue's medical records would not unnecessarily prolong the proceedings; nor would disclosure be unnecessary or undesirable.
g. It is well established that the concept of relevance is a wide, not narrow one; the present challenge was not an applicant fishing to discover a new cause of action, or a baseless, or speculative cause of action. The documents sought would be directly relevant.
h. Any concerns about the sensitivity of medical material and protected communications could be dealt with by the making of protective orders.

[16] At the same time, the application for leave to file an amended statement of claim was filed. The plaintiffs wish to enlarge the assertion that Ms McCue had left her employment at her own initiative and had not been constructively dismissed, with the addition of this sentence:

At the time of her resignation, the defendant was dealing with numerous issues in her personal life unrelated to her work, and was suffering from mental health concerns, for which she was taking anti-anxiety medication, all of which individually or cumulatively influenced her decision to resign.

[17] Counsel for Ms McCue filed a memorandum confirming she maintained her objection to the requested disclosure, as previously advised. The application for the grant of leave was also opposed on the basis that, at the telephone directions conference, no indication had been given to the Court or the defendant that an application to amend the statement of claim would be sought.

[18] The parties filed affidavits with regard to the foregoing issues.

[19] Ms O'Boyle stated in summary that she had, in mid-December 2019, discovered some blister-packs of a medication which she had located at the back of a drawer where Ms McCue had kept personal belongings. A Google search of the name of the medication revealed, she said, that the medication is prescribed to treat generalised anxiety disorders and other similar mental illnesses. She also discovered

a medical certificate of late April 2018, which stated Ms McCue should stop her studies for medical reasons and which referred to an unspecified medical "condition".

[20] From this she drew the inference that Ms McCue had been suffering mental health concerns while she was in her employment of which she had no knowledge; and that she had been taking anti-anxiety medication, "during the entire time that [Ms McCue] worked for me". She went on to state that it appeared Ms McCue may have been suffering from mental health concerns unbeknown to her at the time she resigned and that this may have influenced her decision to resign. If so, that would tend to support her claim that Ms McCue was not constructively dismissed and had resigned of her own initiative.

[21] Ms O'Boyle said that this belief was endorsed by information provided to her by a former client of the firm who had recently told her Ms McCue had said on several occasions she was struggling to cope with numerous pressures in her personal life which was affecting her work, and that she was considering resigning; and that there had also been a discussion about Ms McCue seeking medical help for anxiety issues. Ms O'Boyle said she would be calling the former client as a witness at the hearing.

[22] In her affidavit, Ms McCue said that she resented being forced to go through her medical records for the period of a year prior to her resignation. She also objected to having lawyers and Ms O'Boyle see that information because her records contained reference to personal matters which had no relevance to her employment, nor to the concerns raised by Ms O'Boyle, which she said were unfounded. She explained that information had been provided to her doctor about her personal circumstances so he could make a diagnosis. Had she known that her employer might try and use it against her, she would have been reluctant to provide this information to her doctor.

[23] She went on to state that she was concerned Ms O'Boyle would not maintain confidentiality with regard to the information contained in her medical records, providing evidence which she said showed there had been previous instances where Ms O'Boyle had spread rumours about her.

[24] Then Ms McCue stated that the stress she was under at the time of her resignation had been caused by Ms O'Boyle; it was not caused by her personal or financial circumstances. She annexed copies of contemporaneous emails which she had sent to Ms O'Boyle to that effect, and the medical certificate she had provided in early October 2018, which stated she had experienced workplace stress.

[25] Ms McCue then responded to the evidence given by Ms O'Boyle about the medications. She agreed she had been prescribed a particular form of medication in late April 2018, which was given to assist her concentration when studying for

an exam. She took it for less than a week, found she did not like it, and asked to be taken off it. She did not use the medication after that time and said the blister-packs found by Ms O'Boyle were likely to be the medication she was prescribed and had discarded.

[26] She also referred an alternative form of anti-depressant which was prescribed soon after, in early May 2018, but which she also took for less than a week. She denied she had taken any anti-depressants or other medication in relation to a mental illness for at least four months prior to her resignation. She said that the last time she consulted a doctor regarding anxiety was on 2 May 2018.

[27] She stated that the fact Ms O'Boyle had recently spoken to a former client about her personal circumstances supported her view Ms O'Boyle was willing to breach her privacy. She said she had not seen or spoken to that particular client since she left Ms O'Boyle's employment in August 2018.

[28] Ms McCue said that the documents sought were not relevant to the matters under inquiry. She said that she had been treated poorly by her employer who had refused to answer her concerns about annual leave; she had been disciplined without prior consultation; there had been a refusal to accept a legitimate medical certificate; it had been claimed Ms McCue was absent from work without authority; and a threat to dismiss her had been made. She said that she had been bullied by Ms O'Boyle, and the present application was a continuation of that conduct. She confirmed the only source of stress in her life when she resigned was that caused by Ms O'Boyle.

[29] Counsel helpfully provided submissions to support the positions of their respective clients, as described earlier. I shall refer to these where relevant, below.

The legal framework

[30] The key issue raised for Ms McCue is that disclosure of medical records would be injurious to the public interest, this being a ground of objection for disclosure under reg 44(3)(c).

[31] Both counsel referred to several cases where issues of this kind were considered. It is first necessary to comment on the legal context within which each was considered.

[32] The first in time is *Gilbert v Attorney-General of the Department of Corrections (No 1)*.2 There, the Court considered the concept of medical privilege as it existed at the time under s 32 of the Evidence Amendment Act (No 2) 1980 (EAA). However, that section was repealed when the Evidence Act 2006 (the EA) was enacted.

[33] Next was *Coy v Commissioner of Police.* This was a decision which also considered privacy issues with regard to medical records for disclosure purposes. Chief Judge Colgan, as he was then, noted that, in light of the repeal of s 32 of the EAA, s 69 of the EA relating to confidentiality now provided the relevant guidance.3 He noted that, while proceedings in the Employment Court are not subject to the EA, the Court had long been guided by common and statute law on matters of both evidence and disclosure or discovery of documents.4 Thus, in determining whether under reg 44(3)(c) disclosure of documents would be injurious to the public interest, a balancing exercise similar to that which is required by s 69 of the EA would be appropriate.

2. *Gilbert v Attorney-General in Respect of the Chief Executive of the Department of Corrections (No 1)* [1998] NZEmpC 200; [1998] 3 ERNZ 500 (EmpC).

3 *Coy v Commissioner of Police* [2010] NZEmpC 88, [2010] ERNZ 199 at [16].

4 At [12].

[34] I agree with this conclusion. Since the section is central to the disclosure issue in this case, I reproduce it in full:

69 Overriding discretion as to confidential information

(1) A **direction under this section** is a direction that any 1 or more of the following not be disclosed in a proceeding:

(a) a confidential communication:
(b) any confidential information:
(c) any information that would or might reveal a confidential source of information.

(2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—

(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
(b) preventing harm to—
(i) the particular relationship in the course of which the confidential communication or confidential information

was made, obtained, recorded, or prepared; or
(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
(c) maintaining activities that contribute to or rely on the free flow of information.

(3) 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.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.
(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[35] In *R v X*, the Court of Appeal discussed the scope of s 69 in detail.5 It emphasised that confidential information may be disclosed in court unless the judge gives a direction under s 69(2) having regard to the factors in s 69(3).6 It is also clear from the judgment that what is required is an evaluation of public interest factors rather than private interest factors; the latter are relevant only if they can be elevated to public interest matters.

[36] I also note there is authority that s 69 covers not only communications where these might be sought to be disclosed in evidence, but also disclosure or discovery of documents at the pre-hearing stage. In *R v Stewart*, a defendant was charged with numerous sexual offences.7 Before the trial, the defendant applied for disclosure of the files of a psychologist who had counselled the complainant. Disclosure was also sought of the file of a lawyer who had been retained by the complainant to pursue a civil claim against the defendant arising out of the offending.

[37] In the course of refusing both applications for disclosure, Panckhurst J stated that, although s 69 did not directly cover the position at the inspection or discovery stage, it seemed sensible to assess the request for disclosure in light of the confidentiality requirements, if possible.8 I respectfully agree.

[38] I turn to the factual scenarios referred to in the cases cited by counsel.

[39] In *Gilbert*, the plaintiff, suffering poor health, had alleged there was a causative link between the treatment he received from his employer at work, and his medical problems.9 He agreed to provide some, but not all, of the documents which had been

5 *R v X* [2009] NZCA 531, [2010] 2 NZLR 181.

6 At [70].

7 *R v PMS* HC Christchurch CRI-206-009-001151, 17 September 2007.

8 At [20].

9 *Gilbert*, above n 2.

listed as relating to his health. The Court found that, since the plaintiff had alleged the defendant was responsible for his health problems, he was obliged to disclose his medical records except in so far as he was entitled to invoke medical privilege under s 32 of the EAA.10 The case differs from this one given the particular onus which the plaintiff carried in that case, and because a different statutory regime applied.

[40] In *Coy*, the Court concluded it would be injurious to the public interest to require the plaintiff to disclose notes made by a psychologist in the context of an employee-assistance programme operated by police for staff who had applied to disengage.11 Again, the factual context of that case is quite different from the present circumstances.

[41] In *Auckland District Health Board v Bierre*, the Court had to resolve an admissibility issue concerning the plaintiff's

medical records, where leave was sought to raise a personal grievance outside the 90-day time limit.12 On that occasion, the Court concluded s 69 justified the admission of these records, since they would assist in reaching a balanced conclusion about the applicant's mental and emotional state at the relevant times to determine whether, under s 115 of the Act, the applicant had been so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising it within the necessary time frame.13 Since she carried the onus of establishing that proposition, it was appropriate for the content of her records to be before the Court.

[42] It is evident from these cases that the assessment which is now to be made in light of the guidance in s 69 is necessarily fact specific. None of the cases to which I have been referred are sufficiently close in their factual circumstances to the present one, as to be a relevant comparator.

[43] I have also considered the general legal principles which regulate disclosure under the Regulations, as outlined, for example, in *Van Kleef v Alliance Group Ltd*.14 These are not controversial in the present case.

10 At 541.

11 *Coy*, above n 3.

12 *Auckland District Health Board v Bierre* [2011] NZEmpC 108, (2011) 9 NZELR.

13 At [41].

14 *Van Kleef v Alliance Group Ltd* [2019] NZEmpC 157 at [15]—[21].

Analysis

[44] The thrust of Ms McCue's objection to disclosure of her medical records is that disclosure would breach her privacy; she says these were created in a confidential doctor/patient relationship. This is obviously the case.

[45] Acknowledging that the medical records are confidential, the question then becomes whether the Court should exercise its discretion to override that confidentiality. For the plaintiffs, it is submitted that this is justified because the documents sought are potentially relevant to an issue that could arise: that Ms McCue was suffering from mental health concerns for which she was taking anti-anxiety medication.

[46] I begin by considering the s 69(3) factors which are relevant in this case. The application has been brought on the basis of speculation that, as Ms O'Boyle put it, Ms McCue was taking anti-anxiety medication during the entire time she worked for her; that she may have been suffering from mental health concerns for which she had been prescribed medication unbeknown to Ms O'Boyle; and that, at the time she resigned, Ms McCue's medical condition may have influenced her decision to do so.

[47] These concerns, however, have to be evaluated against Ms McCue's own evidence, as set out earlier. She says she took the first form of medication to assist her with concentration in studying for an exam. The medication did not assist her, and she ceased taking it. This evidence is consistent with the fact that Ms O'Boyle subsequently found the unused blister-packs amongst Ms McCue's personal effects.

[48] That Ms McCue was having difficulties with her studies is confirmed by the contemporaneous medical certificate also found by Ms O'Boyle. The content of the doctor's note is consistent with Ms McCue's own evidence that she was having difficulty in concentrating on her studies, for which she had requested medication.

[49] It is plausible that she was prescribed two anti-depressants, neither of which assisted her, and that this form of treatment did not continue.

[50] Ms McCue also said that the last time she consulted a doctor regarding anxiety was on 2 May 2018.

[51] I have no reason to doubt the accuracy of Ms McCue's evidence since it is credible and confirmed in some essentials by external evidence.

[52] The clear inference to be drawn from that evidence is that the relevant consultations and prescribing of anti-anxiety medication took place several months prior to the resignation and that its use was limited.

[53] Also relevant and plausible is Ms McCue's evidence that her records refer to information about family matters that are personal to her, provided for diagnosis purposes. She says that, if she had known they would subsequently be used in an employment context, she would not have made those disclosures to her doctor.

[54] Against the public interest in disclosure of information that has only a tenuous, if any, link to the circumstances of the dismissal, must be weighed the public interest in preventing harm to this and other doctor/patient relationships: this is the balancing exercise required by s 69(2).

[55] The importance of confidentiality in such a therapeutic relationship is hardly controversial. The duty of medical confidentiality goes back to the Hippocratic Oath, complied between 460 and 300 BC.15 Ethical codes state information disclosed in a doctor/patient relationship are confidential to the utmost degree.16 Legislative enactments confirm this. The Health Information Privacy Code, particularly r 11, reinforces the fact that the circumstances in which a health provider may release confidential information are to be very strictly controlled. The Health Act 1956 is a statute containing provisions which confirm the presumption that confidentiality and privacy of health information is paramount and should only be released in the particular circumstances where the threshold for doing so meets prescribed tests.17

15. Graeme Laurie, Shawn Harmon and Edward Dove *Mason and McCall-Smith's Law and Medical Ethics* (2nd ed, Butterworths, 1987) at Appendix A.
16. Sylvia Bell and Warren Brookbanks *Mental Health Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2017) at ch 41.15.2.6.

17 Health Act 1956, s 22B – 22H.

There are also many common law cases where expectations of confidentiality in a medical professional relationship have been upheld, on contractual or fiduciary grounds.18

[56] The rationale for these protections is also uncontroversial. A doctor/patient relationship is one of trust and confidence. In that context, a patient is accordingly free to make full and frank disclosure of information to enable proper diagnosis and treatment.19

[57] In the end, I am satisfied that any public interest in disclosure is far outweighed by the public interest in maintaining the confidentiality of the doctor/patient relationship, both for Ms McCue herself for whom this was understandably a concern, and for other relationships of the same kind.

[58] In case I am incorrect in this conclusion, I refer to the relevance argument raised for the plaintiff. Given Ms McCue's evidence as described earlier, I am not satisfied that her medical records would likely contain details that could be relevant to the circumstances giving rise to her resignation. Information about the use of anxiety medication is too remote in time from the events giving rise to the resignation.

[59] I also note that, the medical certificate produced by Ms McCue of 1 October 2018 does not refer to an underlying or ongoing condition. It refers to workplace stress. That assessment is consistent with the matters referred to in Ms McCue's email of 25 September 2018.

[60] Although I accept the concept of relevance is broad in scope, as emphasised for the plaintiffs, in light of these circumstances I am not persuaded that Ms McCue's medical records would assist the Court in resolving the issues which existed at the time of her resignation.

18 Peter Skegg and Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) at ch 30.11.1; John Katz *Laws of New Zealand* Intellectual Property Confidential Information (online ed) at [34]; Bell and Brookbanks, above n 16, at ch 41.15.1.

19 Bell and Brookbanks, above n 16, at ch 41.15.1.

[61] The objection raised as to disclosure by the defendant is accordingly valid and is upheld.

[62] There remains the question of whether the statement of claim should be amended as sought.

[63] Once a case has been set down, as here, there is a threshold for the amendment of a pleading. It is necessary to "surmount the three formidable hurdles" of showing that permitting amendment would be in the interests of justice; would not significantly prejudice other parties; and would not cause significant delay: *Elders Pastoral Ltd v Marr*.20 It is the first of these factors that is particularly relevant here.

[64] The application to amend was brought, it would seem, to deal with a submission made for Ms McCue that mental health issues were not pleaded; it was therefore argued for the defendant that the medical records could not be said to be relevant to a pleaded issue.

[65] I have accepted Ms McCue's evidence as to the prescribing and limited use of anti-anxiety medication. Against that background, I am not persuaded that an amendment asserting Ms McCue suffered from mental health concerns for which she was taking anti-anxiety medication at the time of her dismissal has merit. On the evidence before the Court, it is inappropriate to permit an amendment to that effect at this late stage.

[66] However, I must also take into account the plaintiffs wish to call a witness who had discussions with Ms McCue as to the pressures she was suffering, and whether these impacted on her work and/or her decision to resign. I assume it is this evidence which has given rise to that part of the application to amend which refers to the fact Ms McCue was dealing with

numerous issues in her personal life which influenced her decision to resign.

20 *Elders Pastoral Ltd v Marr* [1987] NZCA 18; (1987) 2 PRNZ 383 (CA) at 385.

[67] However, that particular assertion is specifically referred to elsewhere in the statement of claim.21 There is accordingly no need for an amendment which is to the same effect.

Outcome

[68] I dismiss both applications.

[69] The plaintiffs are to pay costs to the defendant on a Category 2, Band B basis.

B A Corkill Judge

Judgment signed at 1.00 pm on 28 April 2020

21 Statement of claim at para 23.
