Judgment Number: WC 19/99
File Number: WEC 116/98

IN THE EMPLOYMENT COURT
WELLINGTON REGISTRY

IN THE MATTER of an application for an injunction

BETWEEN Raymond David Russell

Plaintiff

AND Wanganui City College

Defendant

Court: Goddard CJ

Hearing: Wellington
15 February 1999

Appearances: M P Reed QC and P A Morten, Counsel for Plaintiff
J G Miles QC and N B Taylor, Counsel for Defendant

Judgment: 22 April 1999

JUDGMENT OF THE CHIEF JUDGE

As previously arranged, I held a hearing on 15 February 1999 to revisit the question whether the injunction should continue restraining the defendant employer from pursuing its investigation of the plaintiff employee's conduct in employment by reason of the fact that that conduct, or the principal aspects of it, is or are also the subject of a complaint to the Police by the Ministry of Education. The Ministry is not the plaintiff's employer as such, but it does fund his salary and exercises various other responsibilities in relation to the college. It will be recalled that, in my judgment of 17 November 1998 (judgment number WC72/98), I held that the defendant board of trustees could not properly proceed with its disciplinary inquiry, which included requiring answers from the plaintiff, but that it should be restrained from doing so in the meantime because such inquiries cut across the Police investigation and interfered with the plaintiff's right to the due process of the criminal law. I made an order restraining the defendant from taking any further step in pursuance of its communication of its intentions to take disciplinary action against the plaintiff.

At the time of the making of this order the complaint to the Police had been freshly made and it was not known what the Police would make of it, although it was known that it

was not seen by the Police at Wanganui as a high priority investigation. Present information, so far as available, appears to indicate that inquiries are still incomplete and, indeed, may not even have begun. It was with such possibilities in mind that I limited the duration of the order when I made it and included in it provision for its review after a reasonable time.

I have now had the benefit of argument from learned counsel as well as of evidence bringing the position up to date. The college now has a new principal and he is naturally keen to put his own stamp on the running of the college. In addition, the chairperson of the board of trustees, Mr Gibson, has resigned and has been replaced by Ms A H Bunn. Both she and the principal are keen to dispose of the outstanding issues and put the college back on an even keel. In saying this, they display no hostility towards the plaintiff but, on the contrary, have entrusted him with preparing the 1 March roll return. It is this return in respect of previous years - prepared by the plaintiff but signed off by others - that I understand to have prompted the Ministry's complaint to the Police. The Ministry wants the plaintiff to be charged with fraud in respect of his part in preparing the roll return.

It is fair to say that the plaintiff is also anxious to deal with the matter but has been advised that it is unsafe for him to do so because of the risk to his right to silence in connection with the potential criminal proceedings against him.

The defendant is against any continuation of the restriction upon its ability to proceed. Mr Miles argued that, having received a complaint from the Ministry, the defendant is under a duty to investigate it. In investigating it, it is under a duty to be fair to the plaintiff. It can discharge that duty of fairness, it argues, by giving him an opportunity to admit or deny the complaint and to offer such explanation or rebuttal as he may wish. At this stage, the defendant has sought to do so by inviting the plaintiff to answer 38 questions and by notifying him of a number of allegations against him. Many of these questions do not on their face relate to his participation in the preparation of the rolls which it is understood form the subject-matter of the Ministry's complaint to the Police, although neither of the parties before the Court has seen the actual complaint. It is accepted, however, that the questions which correspond with the likely subject-matter of the complaint - the plaintiff's part in the preparation of seemingly inaccurate roll returns - is the gravamen of the questions and allegations, and that it would be unhelpful to the defendant to be permitted to deal only with questions and allegations that do not touch upon these matters because, of course, the plaintiff's conduct as an employee has to be looked at as a whole and in the round.

The plaintiff is, as I have said, anxious to progress the matter. He feels that it has been hanging over his head for far too long. However, he has been advised in the way I have mentioned, and Mr Reed has submitted that this is the only advice that could have been given responsibly. The concern is about prejudicing his position as an accused person if he comes to be accused by the Police of any crime. This is an important consideration. Section 25 of the New Zealand Bill of Rights Act 1990 makes it clear that everyone who is charged with an offence has certain minimum rights, including the right not to be compelled to be a witness or to confess guilt. What is more, under s23, even earlier in the process, a person who is arrested or detained for any offence or suspected offence has the right to refrain from making any statement and to be informed of that right.

Read literally, these provisions seem to apply only to the conduct of the Police in relation to the treatment of suspects. However, it has generally been recognised that a person who is at the same time the defendant in civil proceedings covering much the same ground could be prejudiced in that person's defence of criminal proceedings by giving evidence in the civil proceedings but would be unlikely to be able to defend those civil proceedings successfully without giving evidence. In that sense the defendant in such proceedings is, if not forced, at least driven to giving evidence and that evidence, once given publicly in a court, will then be available to the prosecutor of the criminal charge.

Mr Miles referred to high-sounding statements in some of the cases along the lines that presumably, if the defendant gives evidence in the civil case, he or she will tell the truth and no one is ever harmed by the truth. But I think the better view is that put forward by Mr Reed, that at the heart of our system of criminal justice is the principle that everyone is presumed innocent until proved guilty and is not required to contribute to that proof. He or she may not lie to the court but is under no obligation to volunteer the truth. The prior hearing of the civil case covering the same ground might, however, result in the truth being volunteered. For purposes of illustration, one could borrow and adapt the facts of an early classic employment law case, *Auckland City Council v Hennessey* [1982] ACJ 699, (1982) ERNZ Sel Cas 4 (CA). These facts were that a car park attendant left his booth to "remonstrate" with two motor cyclists who were executing manoeuvres in his car park at speed. Attempts to restrain them led to blows being aimed though none may have actually connected. One could imagine the motor cyclists making a complaint of assault to the Police and also commencing a civil action for damages. To resist the civil action, the car park attendant would almost certainly have to give evidence. Although arguably that would

be his decision for which he should take responsibility, I think that is a somewhat harsh view.

I have deliberately taken as an example a situation in which the same person is a defendant in both criminal proceedings and in a civil action. What if the person in question is a plaintiff in a civil action? Let us say that the motor cyclists, still righteously indignant, went to the newspaper which, after such inquiry as it thought adequate, publicised their plight and implicated the car park attendant as their assailant, and he brought an action claiming damages for defamation, let us say against the newspaper only. In that case it could be said that it was the plaintiff's choice to bring the libel action and so he ought to take the consequences of the possible need to give evidence and to be cross-examined before the criminal case is heard. If the defamation action were brought not against the newspaper but against the newspaper's complainants, the aggrieved motor cyclists, that circumstance might be seen to introduce an additional complication because the complainants would have some interest in promoting the prosecution and thus tactically forcing the car park attendant into giving evidence before the prosecution.

It is possible to think of a third situation which is different again. It would have to be assumed that the motor cyclists complained also to the car park attendant's employer (as probably happened in the actual case) and the employer then embarked upon an inquiry. Could the car park attendant insist that the inquiry be suspended until after the prosecution?

It is important not to lose sight of the fact that Mr Miles also relied on the point that in the decided cases (as well as in the examples that I have given) a criminal prosecution had been launched and its hearing was reasonably imminent. In the present case that is not so. It is possible that there may never be a prosecution. It is equally possible that the inquiry will suddenly gather momentum and a prosecution will follow in short order. I do not think it proper to draw any inference about the future of a situation concerning which I have no reliable information except that there has been no arrest and the plaintiff has not been spoken to by the Police nor, it seems, has anyone else other than those who complained to the Police on behalf of the Ministry of Education.

It is unduly simplistic to say that, merely because there is as yet no prosecution, the rules I mentioned at the beginning of this judgment can be disregarded. Those rules are intended to establish some basic principles of fundamental human rights: if a person who has been arrested on a firm belief in that person's guilt or detained on suspicion of guilt may not be put under pressure to answer questions that might inculpate him or her, then surely

that safeguard is at least as important where criminal proceedings are only a likelihood as opposed to a certainty.

This is recognised by the common law rule, not mentioned in the hearing before me, that no one is obliged to answer a question even when giving evidence on oath, the answer to which might incriminate that person. However, "incriminate" means what it says and this privilege is not available to avoid civil liability: see Evidence Act 1908 s8A in relation to courts as defined in that Act. I bear that important distinction in mind as I proceed.

There is another right that must not be lost sight of. It is an employer's right to require from its employees, especially those in positions of high trust such as the plaintiff as deputy principal, to account for their stewardship of their duties. Such an inquiry is not a disciplinary proceeding, although it may lead to one, and become a part of it. In this case, however, the process is already disciplinary. An employer is, of course, bound to carry out this kind of process in its own interests and in the interests of other employees, and sometimes, as here, in the public interest. Mr Miles argued strongly that there is nothing in the right to silence rules that requires the defendant to be prevented from carrying out this process and that it is entirely up to the plaintiff whether he will participate in it. All the defendant is required to do, he argued, is give him an opportunity to influence the outcome and this it has done. To this might be added that no doubt, if concerned that any answer might incriminate him, the plaintiff could decline to answer his employer's questions on that ground. That would not prevent the employer, where the plaintiff refuses to participate at all or refuses to answer particular questions, from drawing its own conclusions from the evidence of such people as have answered or as have made allegations. That argument is, however, met by the reproach that it is unfair to the plaintiff to put him in that position when he has the potential of a criminal prosecution hanging over his head, and where he is caught on the horns of a dilemma – if he answers, his answers may be used against him in the prosecution either as original evidence or as ammunition in cross-examination. If he declines to answer in whole or in part, and especially if he declines to answer on the ground that his answer may incriminate him, his employer will draw its own conclusions so that he will lose his job even if he is innocent of all wrongdoing and even if he is never convicted of any offence against the law.

However, it is a dilemma also for the defendant for it cannot proceed to disciplinary sanctions without giving the plaintiff a fair hearing, yet it is being told by the plaintiff that it may not give him a fair hearing for other, independent, reasons.

I do not think that either party can be blamed for this situation. It may be thought unfortunate that the Ministry made a complaint to the Police after the defendant board of trustees had declined its invitation to do so. It seems to me that the plaintiff is entitled, as a minimum, to be protected against the use by the Ministry of anything that emerges in the disciplinary inquiry for purposes not connected with the inquiry such as bolstering its complaint to the Police.

I have also been assisted in my consideration of these questions by the discussion contained in chapter 6 of the Law Commission's Preliminary Paper 25 entitled "The Privilege Against Self-Incrimination" of September 1996 (NZLC PP25). From it and from the authorities cited by counsel, I draw the following propositions as being established:

1. Paragraph 1 of NZLC PP25 states:

> *WE CANNOT BE REQUIRED by the State to provide information which may expose us to criminal liability. That is the essence of the privilege against self-incrimination, ...*

2. The common law privilege so described is not limited to judicial proceedings but restricts all agencies (at any rate, of the State) engaged in interrogation, whether sworn or unsworn: NZLC PP25 ch 1, and *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 at 402 where Cooke J (as he then was) said:

> *I respectfully agree with the majority view now prevailing in Australia that the privilege against self-incrimination is capable of applying outside Court proceedings. The common law privilege favours the liberty of the citizen, and, if a Court is not satisfied that a statutory power of questioning was meant to exclude the privilege, it is in accordance with the spirit of the common law to allow the privilege.*

3. Compulsion may be (and has been) said to exist not only when there is coercion but also when there are constraints falling short of that but the privilege does not apply in situations in which the person is *"a wholly voluntary participant"*: NZLC PP25 paras 29-31. (I accept that the necessary element of constraint amounting to compulsion exists in the intended disciplinary process.)
4. For the privilege to be available there must be a real and appreciable, as opposed to a merely imaginary or fanciful, peril: *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461. (In this case that is so, by virtue of the complaint from the Ministry.)
5. The privilege benefits not only the guilty but allows the innocent to be left alone until the appropriate time for repelling an accusation.

6. The privilege is recognised in the Employment Court Regulations 1991 as to disclosure of documents: see reg 52(3)(b).

7. It is possible for courts having control over both criminal and civil processes to accommodate the privilege and other interests as well:

   (a) in *AT&T Istel Ltd v Tully* [1993] AC 45, [1992] 3 All ER 523 the House of Lords ordered compliance with a Mareva injunction which provided that no disclosure made as a result could be included in evidence in any prosecution for offences disclosed;

   (b) in *Busby* the Court of Appeal imposed a similar restriction and also required, as a condition of the order, that the applicant for it should give appropriate undertakings.

8. In arriving at this result, the Court of Appeal invoked its own previous judgment in *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961. I was counsel for the newspaper in that case and remember it well, despite the lapse of time. The Court of Appeal in that case accepted that the law of evidence is a Judge-made law which could from time to time be modified or relaxed when necessary. Examples of such activity are given in *Busby* at pp472-3, and at 473 Cooke J (as he then was) spoke of *"... some moderate development of law or practice ..."* with the Court, so far as it reasonably can, aiming *"at giving the just answer to the present question"* which, he said, was not hard to see.

With that approach in mind I have conferred with the other Judges of this Court in accordance with the process referred to in the judgment of Colgan J in *Deka NZ Ltd v Singh* [1992] 1 ERNZ 645 at 657 (with the approval of all the Judges much greater in number than they are now):

> *The foregoing parts of this judgment have been circulated in draft to all of the other Judges of the Employment Court. I am authorised by the Chief Judge and the other Judges to say that the reasons which I have set out for declining to admit new evidence and as to the approach which this Court takes to appeals meet with their approval. This is a course which, although unusual in this Court or its predecessors, has nevertheless been adopted from time to time in the courts of ordinary jurisdiction and especially in matters of procedure. See, for example, the judgment of the Supreme Court in* Swanson v Maintenance Officer *[1960] NZLR 155. The Judges also consider that it is appropriate to adopt this course in view of s76(d) Employment Contracts Act 1991 which provides ...*

As it happens, two of the Judges have lately had similar questions before them in other cases. What is said in *Deka* about supervision of the Tribunal naturally extends to supervision of processes that may later come before the Tribunal or the Court. However, the cases tend to differ in point of detail and, while the principles can be readily discerned, it does not seem possible to lay down immutable rules.

Further guidance is to be gained from the Court's powers as a court of record and its special jurisdiction and powers, including the power to exercise equity and good conscience in the reception of evidence that might be normally inadmissible before a court, and in the decision-making technique.

I asked myself whether perhaps these considerations empower the Court to impose conditions that will accommodate the employer's concerns without doing violence to the employee's rights in relation to the criminal process. Just what questioning should be permitted and in what terms would then be a matter for decision according to the facts and circumstances of each case. Relevant factors might be said to be:

(a) how close is the connection in law or in fact between the employer and the State;

(b) how close is the subject-matter of the disciplinary inquiry to an interrogation along the very lines of the likely Police inquiry or along lines similar to the complaint to the Police, so far as its substance is known;

(c) how great is the risk of disclosures being made available to the complainant in the criminal case or directly to the Police;.

(d) to what extent is it possible, realistically, to control the material and prevent its use.

Some of these factors may overlap; nor is the above an exhaustive list or meant to be one; I note the argument of Mr Miles that I should decide the matter on principle rather than treat it as one of discretion. I record that Mr Miles did not suggest the imposition of terms or offer any undertaking, and resisted the suggestion that another member of the committee to whom the plaintiff objects on grounds of appearance of bias should be disqualified for that reason. I take all this to be tantamount to acceptance that the situation cannot be controlled. I will now analyse it in terms of the four factors.

(a) The plaintiff's employer is the defendant board of trustees, not the Ministry of Education. Nevertheless, both are funded from the same source – the State – and the Ministry of Education took the board of trustees into its confidence, asking its representatives to travel to Wellington for the purpose, tried to induce it to complain to the Police and, when that failed, took the same representatives of the board of trustees (or some of them) along to the police station when unveiling the Ministry's complaint. The board of trustees knows that the Ministry is very keen to see the plaintiff prosecuted and that he be suspended meanwhile. It is prepared to fund his salary for as long as it takes. The board of trustees suspended the plaintiff but the plaintiff has secured a reversal for now of that decision.

That is a description of a close relationship between the employer and the complainant.

(b) The questions and allegations put to the plaintiff appear to mirror what is known of the Ministry's complaint to the Police. They include the following questions:

> *1. Please explain how/why the College R.S 40 Return as at March 1997 appears to be incorrect in the following instances.*
>
> *The following students were on the return although they appear to had either left the school or not attended the school prior to the completion of the return. This appears to represent a breach of the instructions covering the completion of the R. S 40 return*
>
> [20 students listed]
>
> *2. Please explain how/why the College R.S 40. Return as at March 1998 appears to be incorrect in the following instances.*
>
> *The following students were on the return although they appear to have either left the school or appear to have not attended the school prior to the completion of the return. This appears to represent a breach of the instructions covering the completion of the R. S 40 return*
>
> [17 students listed]
>
> *3. Please explain how/why 46 full time students were shown as attending the "school of music" for the return period 1 March 1998.*
>
> *4. Please explain how/why the following students who were apparently part time and had only contracted for part time study were shown as full time students on the March 1998 R. S. 40 return.*
>
> [9 students listed]
>
> *5. Please explain how/why the following students who appear to have never attended the "school of music" were on the school's register as at the date of the March 1998 R. S. 40 return and still on the schools computer roll until June 1998.*
>
> [5 students listed]
>
> *6. Please explain how/why a computerised register was completed for the "school of music" when the information to complete such a register appears to be not available from any other identifiable source.*
>
> *7. Please explain how/why students at the music school were allowed to "pay off" their fees with work but no apparent allowance was made to comply with Inland Revenue regulations concerning P.A. Y. E. on such earnings.*
>
> *Students apparently involved are:*
>
> [4 students listed]

and the following, among other, allegations:

> *1. That you appear to have altered and changed the school roll when completing the Ministry of Education return form R. S. 40 for the March year 1997. This action appears to be to the detriment of your employer Wanganui City College.*

> *2. That you appear to have altered and changed the school roll when completing the Ministry of Education return form R. S. 40 for the March year 1998. This action appears to be to the detriment of your employer Wanganui City College.*
>
> *The combined cost which will be debited by the Ministry of Education to Wanganui City College arising from the two alleged actions in 1 and 2 above is $35687.39c*
>
> *3. That you appear to have included on the school roll for 1997* ***two students as full time students who were part time students of the "school of music".***
>
> *4. That you appear to have included on the school roll for 1997* ***seven students who had not attended the "school of music".***
>
> *Namely:-* [7 students listed]
>
> *5. That you appear to have included on the school roll for 1998* ***nine students as full time students who were part time students of the "school of music".***
>
> *Namely:-* [9 students listed]
>
> *6. That you appear to have included on the school roll for 1998* ***eight students who had not attended the "school of music".***
>
> *Namely:-* [8 students listed]
>
> ...
>
> *16. That you appear to have entered into agreements to accept work in lieu of payment for course fees for a number of students so contravening Inland Revenue Regulations with regard to PAYE and placing Wanganui City College in a potentially extremely embarrassing and costly position with the Inland Revenue Department.*
>
> *Namely:-* [4 students listed]

This relationship is close as well.

(c) The risk of disclosures finding their way to the Police must also be seen as great. One of the members of the subcommittee went to Wellington and probably also to the police station. She is a person to whom the Police would logically speak. The defendant's refusal to remove her from the disciplinary subcommittee does not inspire confidence in any argument that there is little risk of leakage. In any case, if the inquiry is conducted properly, especially over any adjournments, it is likely although not certain, that notes will be made and these could be compellable in criminal proceedings even if not of high probative content because of the different nature of the inquiries and the different standards of proof.

(d) Can the defendant board of trustees nevertheless be allowed to proceed on the basis of suitable undertakings? There is a short answer to this question. If the answer is yes, one would have expected the defendant to have proffered a scheme for the plaintiff's comment and the Court's approval. It would need to be a procedure

that assures the privacy of the proceeding and the integrity of any notes made or transcribed, and documents produced; it would need to enable the plaintiff not to be compelled or constrained to answer questions pointing to a hypothesis equivalent to criminal guilt. Counsel seemed to accept that this Court cannot rule, in a way that would be binding on a criminal court, that the material disclosed cannot be used in the criminal proceedings in an original or derivative way – the latter being by providing information that contributes a lead to other inquiries. This Court, unlike some other courts, cannot control or supervise the criminal process. My conclusion is that no proper basis can be detected on which the Court can permit the disciplinary inquiry to proceed – at any rate, in the way desired by the board – without doing irreparable harm to the employee's right to justice under the criminal law. So even on the assumption that, subject to appropriate safeguards, the Court could permit the inquiry to proceed, it is apparent that no satisfactory safeguards are available in this case. Perhaps they are not available in any case but I do not have to come to such a far-reaching decision now. The integrity of every branch of the law is the legitimate concern of this and every court. In this case, as I have held, there is a real risk of a criminal prosecution. The disciplinary inquiry is prejudicial to the plaintiff's right to a fair trial if that risk eventuates. I am not persuaded to rescind or vary my earlier order. The injunction must remain on foot until the further order of the Court. Costs will be reserved. So will leave to apply in the event of a change of circumstances.

I note that Palmer J has recently reached a similar result in a case involving an intended prosecution that is in a more advanced state: *Sotheran and Brown and NZ ALPA v Ansett NZ Ltd* unreported, 1 April 1999, CC7/99.

C. J.