

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 160  
5340213

BETWEEN

ROBERT STUART  
Applicant

A N D

DOWNER NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: David Appleton

Representatives: Heather McKinnon, Counsel for Applicant  
Bill Pepperell, Advocate for Respondent

Submissions Received 18 and 30 July 2012 from Applicant  
18 and 24 July 2012 from Respondent

Date of Determination: 2 August 2012

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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- A. Certain passages from the witness statement of Mr Thomas are inadmissible, and should be deleted.**
- B. Costs are reserved until the conclusion of the substantive investigation.**

[1] During a substantive investigation meeting on 17 and 18 July 2012 of Mr Stuart's claim of unjustifiable dismissal, Mr Stuart's counsel objected to the respondent adducing certain evidence contained in a witness statement prepared by Mr Thomas, the delegate from the Reunited Employees Association who represented Mr Stuart during the disciplinary process which led to Mr Stuart's dismissal.

[2] Mr Thomas' statement supported the respondent and it was the applicant's view that such evidence should be inadmissible insofar as it related to information

given by Mr Stuart to Mr Thomas confidentially in the latter's capacity as Mr Stuart's union representative for the purpose of representing Mr Stuart during the disciplinary process. Arguably, by the same token, the Authority should also consider whether advice given by Mr Thomas to Mr Stuart, and opinions formed by Mr Thomas, in the same capacity for the same purpose should be treated as confidential, and inadmissible.

[3] In the light of Mr Stuart's objection to the evidence of Mr Thomas, and the respondent's opposing the application that it should be declared largely inadmissible, I adjourned the substantive investigation meeting to consider the parties' respective arguments.

### **The parties' submissions**

#### *Ms McKinnon's submissions*

[4] Ms McKinnon argues for Mr Stuart that paragraphs 5, 6, 7, 8, 10, 11, 12, 13 and 17 of Mr Thomas' 19 witness statement are inadmissible.

[5] Ms McKinnon argues that Mr Thomas had been acting as a union representative representing Mr Stuart's interests, and so had acted as his adviser and helper in a matter that had serious consequences for Mr Stuart. Mr Stuart had a reasonable expectation that his communications with Mr Thomas would therefore be kept confidential, and that they would not be disclosed. Mr Stuart had not waived his right to have that information kept confidential.

[6] In Ms McKinnon's view, the public interest in protecting that confidential information outweighed the public interest in the information being disclosed. This public interest extended to protecting the free flow of information between Mr Stuart and Mr Thomas in the latter's capacity as a union representative and protecting the relationship generally between a union and its membership.

[7] Ms McKinnon argued that the respondent had other evidence it could call. She also pointed out that, as Mr Thomas had been Mr Stuart's representative, his evidence on behalf of the respondent would be given undue weight. Ms McKinnon relied on the authority of the Employment Court's interlocutory judgement in the case of *Woolf v Kelston Girls High School Board of Trustees*, AC 28B/00 and also drew my attention to s 69 of the Evidence Act 2006.

[8] In her written submissions, Ms McKinnon also relied on *Lloyd v Museum of New Zealand Te Papa Tongarewa* [2003] 2 ERNZ 685 to argue that an obligation of confidentiality is a matter of contract between Mr Stuart and the union.

[9] I have considerable sympathy with all of these submissions, and consider them to be a correct analysis of the law. For convenience, therefore, I shall comment upon each of Mr Pepperell's submissions as I refer to them.

*Mr Pepperell's submissions*

[10] Mr Pepperell for the respondent conceded that paragraphs 5 and 13 could be deleted, although this was not because he agreed with the principle that any of Mr Thomas' evidence should be treated as inadmissible.

[11] Mr Pepperell said in his oral submissions that there are hundreds of cases where union delegates give evidence in the Authority. This is true, although I suspect that the vast majority is where the union supports the applicant employee, rather than the respondent. In any event, even where the union gives evidence to support the employer against the employee's interests, the Authority would not interfere with that unless the employee objected on the basis of a breach of a duty of confidentiality, as in the present case, and the Authority believed that the public interest in hearing the evidence was not outweighed by the rights of the applicant in having the information kept confidential.

[12] Mr Pepperell pointed out that Mr Thomas had not been a paid official when he had represented Mr Stuart and that *Woolf* (and by implication, *Lloyd*) could therefore be distinguished. However, in my view, and with respect, this is a red herring. I believe that Mr Pepperell is seeking to draw an analogy between the case of a paid official and a paid lawyer, in whose advice professional privilege lies. Whilst superficially an attractive argument, the analogy cannot be taken very far. First, legal professional privilege would equally reside in the advice given by lawyers acting pro bono, as it is not a function of the lawyer being paid, but rather of the special relationship of trust that needs to exist between a lawyer and his or her client that protects the advice from public disclosure. Second, it is the expectation of confidentiality that causes the evidence from Mr Thomas to be potentially inadmissible, not the status of the union representative.

[13] Mr Pepperell also contrasted the relationship between a union representative and a member on the one hand with that between a lawyer and his client on the other, saying that the former relationship is based in the practical environment of a workplace. Whilst there are clearly many differences between the two relationships, the two relationships overlap in the expectation of confidentiality that is vested in both a lawyer and a union representative when they put themselves forward as representatives of an employee.

[14] Mr Pepperell asserts that the union is not required to provide unconditional support and advocacy to its members. I agree, but I believe that, as soon as the union has agreed to provide support and advocacy to a member, as Mr Thomas did, and thereby receive information of a confidential nature from the member, it is obliged to keep that information private even if the union subsequently decides not to represent its member further, until either the member agrees, or the operation of law requires otherwise.

[15] Mr Pepperell disclosed to the Authority the rules of the Reunited Employees Association and argued that the rules favour the advancement of the collective interest ahead of the interests of the individual, and that to treat a delegate's communications as privileged would defeat a need for dishonesty by a member to be exposed, which would be against the collective interest. However, I believe that such an issue can be dealt with by the union refusing to continue to represent a member if it believes the member to have been dishonest. I do not accept, though, that the union can then simply turn against the employee and disclose information given to it in confidence to anyone it fancies, if such a belief of dishonesty forms.

[16] Mr Pepperell has stated that Mr Thomas has already held a meeting of members where this matter has been discussed. By *this matter* I assume Mr Pepperell means Mr Stuart's situation. The confidentiality is not Mr Thomas's to waive, but Mr Stuart's. Therefore, if the information has been brought into the public domain by Mr Thomas, that action of disclosure does not extinguish Mr Stuart's rights to that confidentiality. Only if Mr Stuart had disclosed the confidential information would the information cease to be confidential.

[17] The union rules disclosed by Mr Pepperell state that its aims and objectives include the following;

- a. To promote and protect the interests of members; and
- e. To educate, represent and assist members with employment matters.

[18] These rights are not subordinated to the stated aim and objective to advance and promote members' collective employment interests in my view. The objectives can sit side by side in harmony for the most part. There will inevitably be tensions between the interests of the individual and the greater membership from time to time, and the union must decide how it deals with each such conflict as it arises. However, it does not give the union the unfettered right to disregard the duty of confidentiality that becomes vested in a delegate when the delegate agrees to represent an employee and learns confidential information about that employee in the process.

[19] Mr Pepperell argued that Mr Stuart should have made it clear if he had expected Mr Thomas to have treated his communications with him as confidential. However, I believe that it was perfectly reasonable for Mr Stuart to have expected Mr Thomas to have treated his discussions as confidential without having to seek express assurances. Mr Thomas was not a casual bystander whom Mr Stuart happened to talk to, nor even just another employee. Mr Stuart was only talking to Mr Thomas because he was a delegate from whom he expected assistance. It was in, at least, part consideration of this assistance that Mr Stuart paid his union dues. In my view the duty of confidentiality was vested in Mr Thomas's role as delegate.

[20] To turn this on its head, if Mr Thomas had said to Mr Stuart, *I'll represent you but reserve the right to give evidence against you in any proceedings and to disclose to the respondent and the Authority the contents of our private discussions and my private thoughts as a result of them*, it is very likely that Mr Stuart would have declined Mr Thomas' representation.

[21] Mr Pepperell also submits that *Woolf* can be distinguished because Ms Woolf received express assurances of confidentiality. This was because Ms Woolf saw a specific conflict which caused her concern. However, Mr Stuart had no reason to seek assurances. In my view, it was reasonable for him to have expected confidentiality to have been honoured.

[22] In addition, Mr Pepperell referred to the right of the Authority to hear such evidence as it thinks fit. He is referring to s 160 (2) of the Employment Relations Act 2000 which states that the Authority may take into account such evidence and

information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. Section 157 (2) (a) of the Act refers to the obligation of the Authority, in carrying out its role, to comply with the principles of natural justice. In my view, it would not be in accordance with the principles of natural justice to simply ignore the expectation that Mr Stuart had of Mr Thomas keeping his communications confidential.

[23] Mr Pepperell said that it was in the public interest for the evidence of Mr Thomas to be heard and that the union had the right to protect its good name. The nub of the issue for the Authority is whether the duty of confidentiality vested in the union delegate in this particular case is outweighed by the public interest in hearing Mr Thomas' evidence in its entirety.

### **My determination**

[24] Whilst a comparison was drawn in submissions in respect of the relationship between a union representative and a member employee on the one hand and a lawyer and his or her client on the other, I believe that the correct consideration relates to whether a duty of confidentiality has been created between Mr Thomas and Mr Stuart which should not be breached by the admission of Mr Thomas' evidence.

[25] The Employment Court has most recently considered the situation of the relationship between a union representative and a member when the representative was acting as an adviser to that member in the case of *Lloyd v. Museum of New Zealand Te Papa Tongarewa*, which referred to the *Woolf* case. This was a case involving an employed organiser of the PSA who had prepared an affidavit including information about communications she had had with Ms Lloyd in her capacity as her union representative. Ms Lloyd sought to prevent the respondent from adducing this evidence.

[26] The Employment Court held that there was an equitable obligation of confidence owed by the union representative to the plaintiff in this case. There was also evidence of a contractual relationship giving rise to a duty of confidence. The Court also found that there was an obligation by the union representative as a fiduciary, which arose from an obligation of loyalty which required the union representative to avoid a conflict in his or her duty. Acting for the plaintiff as a PSA advocate or organiser gave rise to a relationship of trust and confidence.

[27] The Court therefore found that the communications between the union representative and Ms Lloyd were both confidential and privileged on the grounds of public interest. The Court held, in that case, that the public interest in preventing a gross breach of confidence outweighed the public interest that the Court should make properly informed decisions.

[28] Section 69 of the Evidence Act 2006 provides that a Judge may give a direction that a confidential communication or confidential information not be disclosed in the proceeding 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, *inter alia*, preventing harm to the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded or prepared or relationships that are of the same kind as or of a kind similar to the relationship referred to.

[29] Section 69(3) of the Evidence Act 2006 provides that, 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 proceedings; and
- (c) The nature of the proceedings; and
- (d) The availability or possible availability of other means of providing 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.

[30] Section 160(2) of the Act provides that the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[31] When I weigh up the potential harm that may be done in allowing the evidence to be disclosed against the prejudice that may be done to the respondent in not allowing the evidence, I am mindful of the effect on the public confidence in a union to be able represent its members in disputes with their employers without the fear that information disclosed to the union by the members could be made public without further reference to them.

[32] In this particular case, I am also mindful that the respondent has been able to adduce unfettered evidence from Mr Henderson and Mr O'Donnell, both of whom were present at the disciplinary meeting, and that Mr Thomas' evidence is not essential for the Authority to reach a determination as to whether the dismissal of Mr Stuart was justified or not.

[33] Furthermore, in my view, the right of Mr Stuart to have his confidential communications preserved is not outweighed by *the right of the public to know that the union does not condone the behaviour of Mr Stuart*, as has been suggested by Mr Pepperell. Even if the union has concluded that Mr Stuart was dishonest in his time recording, the union can declare in general terms its condemnation of such conduct, and does not need to reveal publically confidential information that was given to the union by the former member before it had reached that conclusion.

[34] In summary, I believe that Mr Thomas should not be permitted to give evidence which relates to advice he gave to Mr Stuart as part of his confidential relationship as a union representative, nor to information he received from Mr Stuart in that role, nor to opinions he formed in his role of delegate as to the strengths or weaknesses of Mr Stuart's case. I believe that it is appropriate to allow him to give evidence about the meetings which he attended as a representative as they were clearly meetings in which any confidential information that was disclosed, was done so freely by Mr Stuart.

[35] To give comfort to the respondent and Mr Pepperell, each case of this kind will be considered on its own merits, and where the Authority adjudges that the evidence of a union delegate's confidential communications with an applicant employee is essential to assist its investigation of an employment relationship problem, the Authority is likely to admit that evidence. I do not consider that to be the case here though.

### **The practical effects of my determination**

[36] I order that the following be struck out of Mr Thomas' witness statement and a new statement signed, served and lodged:

- a. Paragraph 5, by agreement from the respondent;
- b. Paragraph 6, as this discloses an opinion from Mr Thomas rather than his witnessing anything said or done at the disciplinary meetings;
- c. Paragraph 7, as this discloses a private conversation between Mr Stuart and Messrs Drummond (a union official) and Thomas;
- d. Paragraph 8, for the same reason as paragraph 7;
- e. The second sentence of paragraph 10, as it relates to Mr Thomas's role as a representative and goes beyond his witnessing of what happened at the disciplinary meetings;
- f. Paragraph 11, as it refers to a meeting between Mr Stuart and Messrs Thomas and Drummond;
- g. Paragraph 12, as it relates to Mr Thomas' role as Mr Stuart's representative and goes beyond his witnessing of what happened at the disciplinary meetings;
- h. Paragraph 13, by agreement with the respondent;
- i. The final sentence of paragraph 16, as it goes beyond Mr Thomas' witnessing of what happened at the disciplinary meetings;
- j. Paragraphs 17, 18 and 19 as they go beyond Mr Thomas' witnessing of what happened at the disciplinary meetings.

[37] The Authority shall now seek to agree a date with the parties on which Mr Thomas' evidence can be heard.

**Costs**

[38] Costs are reserved until the conclusion of the substantive investigation.

David Appleton  
Member of the Employment Relations Authority