

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2017] NZEmpC 27
EMPC 13/2015
EMPC 264/2016**

IN THE MATTER OF a challenge to determinations of the
Employment Relations Authority

AND IN THE MATTER of proceedings removed from the
Employment Relations Authority

AND IN THE MATTER of a challenge to objection to disclosure

BETWEEN ERIN THERESE DENT
Plaintiff

AND WAIKATO DISTRICT HEALTH BOARD
Defendant

EMPC 136/2015

IN THE MATTER of a challenge to a determination of the
Employment Relations Authority

AND BETWEEN WAIKATO DISTRICT HEALTH BOARD
Plaintiff

AND ERIN THERESE DENT
Defendant

Hearing: 24 February 2017
(Heard at Auckland)

Appearances: E Dent, plaintiff in person
A Russell, counsel for Waikato District Health Board

Judgment: 8 March 2017

**INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS
REGARDING CHALLENGE TO OBJECTION TO DISCLOSURE**

Introduction

[1] This matter involves a challenge by Ms Dent to a determination of the Employment Relations Authority dated 19 December 2014. The Waikato District Health Board (WDHB) has also filed a cross-challenge to the same determination.¹ The effect of the challenge and cross-challenge is that the entire matter will proceed before the Court as a de novo challenge, even though Ms Dent has only challenged those parts of the determination unfavourable to her.

[2] There was a subsequent determination of the Authority on costs dated 24 February 2015.² Ms Dent's pleadings in the matter are now contained in a third amended statement of claim dated 27 August 2015. In the second statement of claim, Ms Dent included a challenge to the costs determination that has been carried through in a different form into the third amended statement of claim. It is appropriate for the hearing of the challenge and cross-challenge to proceed on the basis that the subsequent costs determination is also subject to challenge.

[3] At a directions conference on 4 November 2015, Ms Dent indicated that she had further personal grievances which she had raised with the WDHB and which were filed as statements of problem with the Authority but not dealt with. There were also further grievances for which she would be seeking leave to raise with the WDHB out of time. These matters needed to go back to the Authority. If there were statements of problem already before the Authority, then these could be determined there, or alternatively Ms Dent could apply to have them removed to the Court. Insofar as any applications for leave to raise personal grievances out of time were concerned, these would require an originating application being filed with the Authority. They could either be dealt with by further determination of the Authority or Ms Dent could apply to have them removed to the Court. Whatever the procedure adopted, it was considered desirable that eventually all matters subject to dispute were heard together, either by way of further challenges or orders for removal if the Authority considered that appropriate. Pending these matters being dealt with by the Authority, the Court proceedings were adjourned.

¹ *Dent v Waikato District Health Board* [2014] NZERA Auckland 526.

² *Dent v Waikato District Health Board* [2015] NZERA 86.

[4] Unfortunately it took nearly 12 months for these further matters raised by Ms Dent to make their way through the Authority. It is emphasised that this was not as a result of any delay on the part of the Authority. In the meantime, however, the substantive challenges before the Court were being held in abeyance and could not be progressed further.

[5] In an oral determination of the Authority dated 20 October 2016³ the further matters were dealt with. Most of Ms Dent's application for leave and removal to the Employment Court of the further personal grievances was dismissed by agreement. Costs were reserved and will need to be determined by the Employment Court when it eventually hears the entire matter. The Authority made a determination removing one of Ms Dent's claims to the Court. This was a wage arrears claim related to non-payment of a higher duties allowance. Costs in respect of that removal were ordered to lie where they fell. Other grievances Ms Dent had filed with the Authority were withdrawn.

[6] It is helpful by way of background to set out the following brief paragraphs from that determination:

Employment relationship problem

[1] Ms Dent had applied for leave to raise three personal grievances out of time and for removal to the Employment Court for hearing. Those applications had been set down for hearing in November 2016.

Application for leave and removal to Employment Court

[2] Both parties appeared before me today by way of teleconference. There is agreement for dismissal of the three personal grievances identified in my previous Minute dated 12 May 2016, the application for leave and removal.

[3] Ms Dent has already advised the Authority in June 2016 the two grievances that occurred post-termination were no longer being pursued. She seeks to withdraw those grievances.

[4] The remaining grievance pertains to a letter Ms Dent wrote to Deryl Penju[i]li dated 13 December 2010 (not 13 March 2013 as recorded in the Minute). She confirms the grievance is about bullying by Eileen MacGowan since October 2007. That grievance is the subject of an appeal currently before the Employment Court. It does not require leave or removal.

³ *Dent v The Waikato District Health Board* [2016] NZERA Auckland 356.

Wage Arrears

[5] Ms Dent now raises a separate issue arising from her letter dated 13 December 2010. This is an issue of wage arrears. She alleges she was entitled to receive a higher duties allowance as set out in the parties [MECA] of \$20 per day over a period of 14 months from April 2009.

[6] Mr Russell has raised an issue of whether the wages claim is statute barred. That seems to be a matter that could be dealt with by the Employment Court rather than having a separate hearing here at a future date. This is because it already has proceedings before it between the parties on related issues. The issues for the hearing in November did not deal with wage arrears.

Orders

[7] By consent the following orders are now made:

- a) The investigation meeting set down for 23 and 25 November in Hamilton is set aside.
- b) All of the witness summonses are also set aside.
- c) Dr Jonathan Phillips is to be advised he is no longer required to give evidence.
- d) Ms Dent's applications for leave and removal to the Employment Court of personal grievances are dismissed.
- e) Costs are reserved to be determined by the Employment Court.
- f) I remove Ms Dent's wage arrears claim relating to non-payment of a higher duties allowance to the Employment Court pursuant to s.178(2)(c) of the Employment Relations Act 2000. Costs in respect of the removal will lie where they fall.

[7] It will be seen that apart from the matter relating to the higher duties allowance, Ms Dent did not press on any of the matters before the Authority and consent orders were made.

[8] Once that determination was made, a further directions conference was convened in the Court to see whether the challenges and proceedings now removed from the Authority could be set down for hearing with appropriate timetabling. At the directions conference Ms Dent and Mr Russell, counsel for the WDHB, agreed that the matter could be set down for a two-week hearing in Hamilton. It was indicated that there were some minor issues relating to final disclosure of documents but it was anticipated that they would easily be resolved. If they could not be

resolved, then Ms Dent would be required to adopt the procedure contained in regs 37-52 of the Employment Court Regulations 2000 (the Regulations) with the issuing of a notice requiring disclosure.

[9] As it transpired, agreement could not be reached and Ms Dent did issue a notice requiring disclosure. Instead of setting out a brief list of disputed documents as would be inferred from the statements made by Ms Dent at the directions conference, her notice requiring disclosure contains 36 categories of documents where there is dispute. The request for further particulars is now so wide-ranging and comprehensive that if the WDHB was required to comply with the request in its entirety, it would mean that the two-week fixture which is set for May this year would have to be abandoned. Even though 36 categories are contained in the list of documents set out in the notice requiring disclosure, many hundreds of documents are involved. Many hours of attendances by employees of the WDHB would be required and substantial financial costs would be incurred.

[10] Following the notice being served by Ms Dent on the WDHB, it gave notice of objection to disclosure and that in turn resulted in Ms Dent filing a challenge to the objection to disclosure, which then needed to be heard by the Court.

[11] In preparation for the hearing of the challenge to objection to disclosure, each of the parties filed a memorandum effectively containing their submissions. In addition the WDHB filed an affidavit in opposition to the challenge to objection to disclosure. This affidavit was sworn by an employee relations consultant in the human resource department of the WDHB and sets out some of the history of disclosure of documents in this matter. There are four grounds upon which the WDHB now objects to disclosure. These are as follows:

- (a) the plaintiff's request is oppressive;
- (b) the breadth and extent of the plaintiff's request make it difficult for the defendant to establish whether privilege attaches to the documents;

- (c) disclosure of the documents would be injurious to the public interest;
- (d) disclosure is both unnecessary and undesirable because:
 - (i) the documents are not relevant to the proceedings;
 - (ii) volumes of documentation have already been provided;
 - (iii) the plaintiff has already made extensive disclosure requests; and
 - (iv) the resources required for the defendant to carry out the disclosure would be disproportionate to the requirements of the proceedings.

Legal principles

[12] Regulation 37 provides that the object of the disclosure regulations is to ensure that, where appropriate, each party to proceedings has access to the relevant documents of the other party, acknowledging that such access is usually necessary for the fair and effective resolution of the litigation but also recognises that there are circumstances in which it is unnecessary or undesirable or both.

[13] Only relevant documents need to be disclosed to the other party. Regulation 38(1) states that a document is relevant if it directly or indirectly:

- (a) supports, or may support, the case of the party who possesses it; or
- (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
- (c) may prove or disprove any disputed fact in the proceedings; or
- (d) is referred to in any other relevant document and is itself relevant.

[14] Even though relevance is not listed in reg 44(3) as a ground for an objection to disclosure, it was held in *Snowdon v Radio New Zealand* that the recipient of a notice requiring disclosure may serve a notice of objection to disclosure on the grounds of relevance.⁴

[15] The applicable principles are set out in *Fox v Hereford School Trust Board* where Chief Judge Colgan stated:⁵

[40] The pleadings define primarily the ambit of the proceedings and therefore the issues to which questions of relevance must relate. The Court must determine more than that there is a possibility of relevance: it must determine the actual existence of relevance (as defined in the Regulations). Authority for this proposition is the judgment in *Air New Zealand Ltd v Kerr*. I agree with the statements of principle also articulated in *Kerr* that a party cannot seek disclosure of a document in order to find out whether it may be relevant and that the Court is entitled to take into account, as a matter of proportionality, the extent to which disclosure may become oppressive and to ensure that the disclosure process is not misused oppressively. Nor should the disclosure process be used to determine whether documents may reveal a new head of claim or cause of action. Finally, I accept also the commonsense that the Court should not order disclosure of documents which do not exist or would be required to be created in order to exist and be disclosed. There may be other litigation strategies that will reach that result, but document disclosure is not one of them.

[41] Even if documents are relevant (as defined), the Court retains a discretion to refuse unnecessary or undesirable disclosure and whether this would be oppressive as a consideration to be taken into account. In determining this balancing exercise, a relevant consideration is also the likely probative value of the documents sought.

[16] The circumstances which the Court would take into account in deciding whether a search of documents was reasonable were discussed in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* and may include the following factors:⁶

- (a) The nature and complexity of the proceeding;
- (b) the number of documents involved;

⁴ *Snowdon v Radio New Zealand* [2005] ERNZ 905 (EmpC); leave to appeal against that decision was refused in *Snowdon v Radio New Zealand Ltd* CA 28/06, 23 June 2006.

⁵ *Fox v Hereford School Trust Board* [2014] NZEmpC 154 (footnotes omitted).

⁶ *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at [14]; see also High Court Rules 2016, r 8.14(2).

- (c) the ease and cost of retrieving a document;
- (d) the significance of any document likely to be found; and
- (e) the need for discovery to be proportionate to the subject matter of the proceeding.

Conclusions and disposition

[17] At the hearing of the challenge Ms Dent proceeded through the categories contained in her notice and endeavoured to relate them to those matters specifically contained in her substantive challenge as now set out in the third amended statement of claim. Some of the items clearly relate to those areas of grievance for which she went back to the Authority either for leave to raise out of time or have determined or removed to the Court. Except to the extent that her claim to a higher duties allowance has been removed to the Court, the other matters are not before the Court for consideration.

[18] Before going on to deal with the categories on an item by item basis, a further matter she raised is mentioned. Ms Dent alleges that she raised (in time) a grievance with the WDHB for a further wages claim. This was based on her allegation that she was forced to carry out the same duties also carried out by other employees but for which she did not receive pay at the same level. This allegation rests on a pay parity argument. It is different from the claim for a higher duties allowance where she was carrying out duties above her delegation. The problem with this particular issue is that in the determination of the Authority dated 20 October 2016 this grievance is not specifically mentioned. If it is not covered by that determination but was raised within time with the WDHB (which is disputed) and a statement of problem was filed with the Authority within time, then Ms Dent will need to return to the Authority to request that this grievance be investigated if that has not already occurred. It is not a claim which could be regarded, even by inference, as being included in those matters now before the Court.

[19] Turning now to a consideration of the 36 categories which Ms Dent has set out in her notice requiring disclosure:

- (1) and (2): These are particularly vague categorisations. Ms Dent refers to “[a]ny documentation” and “[a]ny records”. The alleged documents relate back to 2007 and apparently arise from a protected disclosure Ms Dent made against two doctors who had disciplinary action taken against them. She indicated that the request relates to grievance referred to in her third amended statement of claim relating to alleged bullying. No leave has been granted to raise grievances relating to this period and the incidents she refers to are far too remote from the matters that are now before the Court. The requests are almost unrestricted in ambit and her application for documents (if they exist) is declined.
- (3) and (4): These requests relate to the crash of a computer system on 2 and 3 October 2008. Ms Dent apparently worked overtime to reinstate roster data. The items appear to relate to a wages claim which is not before the Court. Once again the requests are of an unlimited ambit when Ms Dent requests “[a]ny defendant communications” and “[a]ny payroll evidence”. The requests are unfocussed and are declined.
- (5): This request relates to the wages parity claim which is not before the Court. As indicated earlier it may still be an unresolved grievance in the Authority. If it is, then Ms Dent will need to return to the Authority to have that statement of problem determined. Once again the request is wide-ranging and requests “any documentation” and covers a period of over two years. This request is declined.
- (6), (7) and (8): These requests relate to elective surgery performance indicator targets and assessments (ESPI). Insofar as category 8 is concerned, the period covered is six years between 2008 and 2014. It is difficult to ascertain exactly which documents Ms Dent is seeking here as the category is more in the form of a narrative rather than isolating particular documents. From what Ms Dent said during her oral

submissions, I understand that this request relates to the dismissal for incompatibility. Her theory is that WDHB simply wished to be rid of her for economic reasons rather than the stated reason of incompatibility. She alleges these documents go to the issue of blame for the ESPI failures and her allegation that it was blamed on her. Under all three categories the documents relate back to 2008 and would involve an enormous amount of time and expenditure of internal costs by the WDHB. Most of the information is either too remote from the grievances before the Court or is oppressive and unreasonable and this request is declined.

- (9) and (10): Ms Dent no longer pursues a request for these categories of documents.
- (11): This category relates to a period between 13 April 2009 and June 2010 and involves the signing off of doctor's leave. It also relates to an allegation of bullying against another employee dating back to 1999. In respect of the doctor's leave, Ms Dent alleges that it was during this period that she worked above her delegation. Accordingly, this directly relates to her claim for a higher duties allowance. These documents are relevant and will be easily available to the WDHB. Ms Dent's request for these documents is granted. The other item is so historic as to be irrelevant. That part of the request is declined.
- (12): This item involves a request for an email dated 3 July 2009. Ms Dent alleges that she saw the email at a photocopier and it related to a protected disclosure complaint in 2007. This category is the same as categories (1) and (2). It is too remote and the request is declined.
- (13): Ms Dent is no longer pursuing the request for this category of documents. In any event it would involve the WDHB releasing a great deal of information which is protected by privacy insofar as the named employee is concerned.

- (14): This item relates to the wages claim which is not before the Court and it is declined.
- (15): This is a request for minutes of two meetings in 2010 and is related to the pay parity claim. Again this is a matter not before the Court and will need to go back to the Authority if the Authority still has the unresolved statement of problem. Ms Dent indicated at the hearing that she was no longer pursuing this request.
- (16): This is a request for a substantial number of financial records of the WDHB between 2008 and 2014. Ms Dent indicates that this relates to what she says was the true reason for her dismissal. Once again the request is for “any document”. It is unfocussed and in any event a lot of the information would well pre-date the time the alleged grievances which are the subject of these proceedings arose. It is declined.
- (17): This again requests documents relating to ESPI failures following their introduction in 2008 and covers a period between 2008 and 2014. The category appears to relate to another employee in a supervisory role who Ms Dent accuses of causing theatre cancellations arising from insufficient recruitment and rostering of anaesthetists. The request is particularly wide-ranging. Ms Dent, in her submissions, stated that information is easily available on Excel spreadsheets. Mr Russell submitted in the schedule attached to his memorandum that recovering this information (if it indeed exists) will involve substantial time and expense at the end of which the WDHB would be unable to certify that it had located all of the documents sought. He also submitted that the documents are not relevant. This request is declined.
- (18): Ms Dent is no longer pursuing the request for this category of documents.
- (19): There are two requests contained in this. The first category is a request for any “Anaesthetic Executive Group minutes” where there were

discussions that Ms Dent's behaviour had led to another employee being reduced to tears. She stated that this relates to her claim for reinstatement and also a remedy which she seeks that the Court makes specific recommendations as to future conduct by the WDHB. It is debatable whether this particular remedy is available to her in any event. Apparently for the period she requests there would be 100 sets of minutes. This request is unreasonable and is declined. The second request is impossible to understand and raises an allegation of defamation against a doctor employed by WDHB. It is similarly declined as being irrelevant.

- (20): This relates to a grievance which has been dismissed by the Authority and Ms Dent advises that she is no longer pursuing this request.
- (21): This request relates to a position description for another employee who was providing backup service to Ms Dent in her roster compiling duties. It relates to the pay parity claim which has already been discussed and it is declined as it is not an issue before the Court.
- (22): This is a request for “[E]vidence” of the “fiscal importance and monetary return of pain data entry” to the WDHB. Ms Dent claims that this relates to the allegation of incompatibility which was used as the grounds to terminate her employment. She stated that it was part of an attempt to sabotage her. It is difficult to see the relevance of this information but in any event, once again, it is far too wide and unfocussed and this request is declined.
- (23): This relates to an allegation that Ms Dent made overpayment to a doctor. This was apparently discussed in email communications in the week of 11 October 2013 between Ms Dent and human resources. Ms Dent will already have these documents. Ms Dent seems to be alleging, although it is unclear, that another employee made a similar mistake and was not disciplined whereas she was. It may well be that there are no

documents being requested under this category but in any event the request is declined.

- (24): This item seems to relate to both the overpayment issue, which is declined for the same reason, and also documentation relating to another employee's role in a complaint being raised against Ms Dent for being drunk at work which proved to be unfounded. The date of this allegation was 15 October 2013. Ms Dent is entitled to any documents held by WDHB relating to the complaint of drunkenness against her. They would specifically relate to a disadvantage grievance which she has raised. This request is granted.
- (25): In this category Ms Dent seeks "[E]vidence of the fortnightly then weekly meetings between [two named employees] throughout 2013 and what was discussed". The request is totally unspecified. Apparently it relates to allegations that she refused to attend meetings. However, the way the request is worded it is far too remote from the matters before the Court and is declined.
- (26): This request is for "evidence of the paediatric SPANZA conference [in October 2013] and the shortfall of paediatric anaesthetists that month". Ms Dent requests evidence of "all theatre cancellations in October 2013". It is hard to see what relevant documents would be likely to be produced by this request. Ms Dent states that it relates to disciplinary action against her on 18 November 2013 but does not say how the documents requested are relevant. The request is declined.
- (27): This is a request for minutes of a meeting of 17 October 2013 and requests information about a code of conduct policy on anonymous complaints against colleagues. The request is far too vague and cannot be related to any particular part of the claim. Ms Dent submitted that the request would show that the WDHB was endeavouring to frame charges against her. However, that is entirely speculative. This request is declined.

- (28): This request relates to any documents that state a requirement for leaving open the doors to the Medical Records room. It is hard to know what relevant document this will produce and which grievance it relates to. This request is declined.
- (29): This request relates back to information dating from 2004 and any process of the WDHB for investigating bullying complaints. The request spreads over a period of 10 years and once again it is hard to see how this relates to Ms Dent's challenges. An enormous amount of research would be required to meet this request and it is declined.
- (30): This category is virtually the same as the previous. Ms Dent requests information of the total number of bullying complaints against staff at the WDHB over the previous 10 years. This request is too remote from Ms Dent's grievances and in any event is not likely to be relevant or assist. It is declined.
- (31): This request relates to private information relating to a fellow employee and is declined.
- (32): This is a request for evidence of asbestos removal from the WDHB's offices. It does not appear to relate to any of the challenges or remedies and is declined.
- (33) and (34): Ms Dent no longer pursues these requests.
- (35): This is a request for a further set of the bundle of documents produced at the Authority. There is no need for any disclosure order as they can be resupplied to Ms Dent by the Authority.
- (36): This also relates to documents before the Authority and there is no need for this Court to make any order.

[20] As indicated earlier Ms Dent's notice requiring disclosure is particularly wide-ranging. It is surprising that she has made this request at a time when preparation for the two-week hearing of this matter should now be well underway. The request for these documents could have been made during the 12-month period when the proceedings were held in abeyance pending resolution of further matters in the Authority. In any event, the Court needs to take account of the proportionality of the requests by balancing them against the nature of the proceedings before the Court.⁷ There are two of her requests which are related to the claims that she is making and where the WDHB should be able to locate the documents without too much difficulty. However, the majority of the requests are too remote or do not relate to the claims at all or are simply not relevant. In considering the requests, I have endeavoured to narrow the requests down to categories of actual documents. The categories in Ms Dent's notice are, in a lot of instances, accompanied by narrative or questions which have not assisted in considering whether the requests are warranted.

[21] As Mr Russell submitted during the hearing, the bulk and scale of the requests which Ms Dent has now made make it oppressive and will cause the WDHB a substantial amount of time, cost and inconvenience. I agree that, assessed overall, the majority of the requests would involve substantial expenditure of time and internal costs for the WDHB disproportionate to the nature and extent of Ms Dent's challenge.

[22] As indicated earlier, this interlocutory application has put the fixture at risk. The bundle of documents for the hearing was meant to have been prepared by now, but that timetabling cannot now be complied with. In addition, Ms Dent was required to have prepared her briefs of evidence before now and has been unable to do so. There will be a need to reassess the timetabling, hopefully so the fixture can still proceed. The bundle of documents can now be finally prepared. Ms Dent indicates that she has a large number of other documents which she wishes to have included in the bundle and she will need to discuss this with Mr Russell. Once the

⁷ High Court Rules 2016, r 8.14, sch 9 cl 1 as discussed in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760.

bundle is complete then there should be an urgent directions conference so that future timetabling can be discussed.

[23] In conclusion, WDHB is to provide Ms Dent with documents relating to her signing off of doctor leave for the 14 month period specified. It is also to provide her with documents relating to the unsubstantiated accusation that she was drunk while at work. The other requests are all declined.

[24] The issue of costs on this challenge to objection to disclosure will be reserved and can be considered along with other costs when the merits of the challenges has been finally decided.

M E Perkins
Judge

Judgment signed at 12 noon on 8 March 2017