IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 101
EMPC 144/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a permanent non-publication order
BETWEEN	UXK Plaintiff
AND	TALENT PROPELLER LIMITED Defendant

Hearing: 1 June 2022
(Heard in Wellington via VMR)

Appearances: A Fechney, advocate for the plaintiff
R Upton, counsel for the defendant

Judgment: 13 June 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] A challenge has been brought to a decision of the Employment Relations Authority (the Authority) concerning the issuing of witnesses summonses to two medical practitioners, requiring them to attend an imminent investigation meeting and to produce various records relating to the plaintiff. The issue centres on the appropriateness of such a step, particularly in light of the significant confidentiality concerns UXK has as to her medical records.

[2] Ms Fechney, advocate for UXK, submitted in summary that the summonses should be set aside, as the medical reports of the medical practicalities have already been filed and are self-explanatory.

[3] Mr Upton, counsel for Talent Propeller Limited (Talent), submitted the Authority acted correctly by issuing the summonses in light of the issues Talent wishes to raise about these reports; but he also said a practical resolution of the problem should be considered.

[4] A second issue relates to the question of whether a permanent non-publication order should be made in this proceeding.

[5] Ms Fechney sought a permanent order of non-publication. Mr Upton submitted an interim order only was appropriate since the Authority would investigate the issue of whether a permanent order should be made at the upcoming investigation meeting.

[6] That meeting is now due to commence on 20 June 2022 for three and a half days; it has been necessary for the challenge to be heard and resolved promptly so that the parties know where they stand in advance.

[7] The parties agreed a statement of facts for the purposes of the issues before the Court as well as a comprehensive common bundle which traces the history of the matter. The Court has also been assisted by thorough submissions. All this material has been carefully considered.

Background

[8] In February 2020, Talent terminated UXK's employment following its conclusion she had engaged in serious misconduct. It was of the view that she had:

(a) altered the contents of her employment agreement without consent; and/or

(b) produced an email in a disciplinary meeting that she had falsified or forged.

[9] Talent brought penalty proceedings against her for breaching the terms of the individual employment agreement; the Authority has determined part, but not all, of these claims. Talent's remaining claims will be investigated shortly.

[10] Later, UXK raised a personal grievance, challenging Talent's decision to dismiss her. Her claims have not yet been determined and these will also be investigated at the imminent meeting.

[11] In UXK's statement of problem, she seeks, among other things, a permanent non-publication order as to her identity. This is strongly opposed by Talent.

[12] It is common ground that UXK's health will be a relevant consideration to the issue of whether a permanent non-publication order should be granted.

The medical reports

[13] As mentioned, in the course of the Authority's proceedings UXK filed two medical reports.

[14] First, she filed a short report from her general practitioner (GP), Dr David Thompson, dated 18 May 2020. She relied on its contents for the purposes of seeking an extension of time for filing closing submissions in respect of the Authority's first investigation.

[15] The report also mentioned that due to the stress she was suffering in light of health issues, name suppression should be considered.

[16] However, Ms Fechney confirmed to the Court that UXK will not rely on the report for the purposes of the outstanding application for permanent non-publication orders.

[17] Talent says the document remains relevant, however, because it will assist the Authority in resolving the credibility issues that arise in respect of Talent's claims against UXK. It asserts there are questions as to the authenticity of the GP's report, having regard to a statement made by UXK in a contemporaneous email that suggests she attended the GP so as to obtain the report on a Sunday, which Talent says is unlikely. It also says that the contents of the report are akin to the sort of document UXK would produce, rather than her GP.

[18] Ms Fechney clarified that for the purposes of the application for a permanent non-publication order, UXK will rely solely on a report she has obtained from a psychiatrist, Dr Karl Jansen, dated 18 May 2021. The report was filed in the Authority soon after that date. It specifically addresses the importance of a non-publication order being granted in light of UXK's medical circumstances, which were comprehensively described. The report suggests that she is vulnerable. In summary, Dr Jansen's evidence refers to matters of fact, and outlines his opinion as to non-publication on the basis of the information provided to him.

[19] UXK's position is that neither of the medical practitioners need attend the investigation meeting. Questioning of them would be unnecessary and inappropriate because her health information is highly confidential.

The Authority's consideration of the reports

[20] The Authority convened a case management conference with the representatives on 1 March 2022. The issue of medical evidence was discussed. The Authority recorded Talent's request that the two medical practitioners be summonsed.

[21] The Authority noted that Talent had questions for the report writers, and that it may well have questions for them also. However, the Authority observed it was unclear how central the documents themselves or the information contained in them would be to the matters for investigation and determination. The filing of witness statements by the parties would clarify matters. Further directions could then be made.

[22] The Authority also noted that UXK was concerned about questions that may be put to the medical practitioners, and how the information held by them should be

treated. The Authority considered that how such concerns may be addressed would be a matter to come back to. UXK would have an opportunity to advise if there were any particular requirements that needed to be considered, to enable her to participate fully in the investigation process.

[23] The parties subsequently filed their witness statements. As already noted, one of the witnesses to be called by Talent proposes to say that the reports in question were not properly produced, that there is an issue as to the authenticity of the report sent to the Authority by UXK from her GP; and that there were some clarifications required in respect of the report from Dr Jansen.

[24] In light of Talent's intended position, Mr Upton pressed the previously made request for the witness summons which, he said, had been drafted by Talent. Ms Fechney strongly opposed the request, submitting that UXK's health information was confidential and should be protected; and that questioning would be inappropriate.

[25] On 13 May 2022, the Authority issued a minute dealing with this request in light of the parties' submissions.

[26] It recorded that Talent wished to question the two medical practitioners and had sought summonses for this purpose; and confirmed that the Authority was likely to have questions for them also.

[27] UXK's position was noted. UXK had said it would be sufficient for the evidence to be affixed to her witness statement, and that she herself could answer any relevant questions. Without her consent, any questioning about her private medical information would be a breach of the Health Information Privacy Code 2020 (HIPC). There was also a concern that summonsing the witnesses would result in a breach of the interim non-publication order.

[28] The Authority went on to say that Authority Members, Employment Court Judges, and decisions makers from other bodies routinely hear and test evidence, either by their own questions or via representatives, from doctors, scientists, accountants, educators, and other professions, without themselves being experts or practitioners in

those areas. The Member said that the HIPC expressly allowed for disclosure of health information for the conduct of proceedings before any Court or Tribunal.

[29] The Authority accepted the evidence was sensitive and personal. Steps could be taken to address those concerns, such as further non-publication orders. To that end, UXK should set out what protections she proposed. These could be considered and balanced against the important consideration that the evidence sought to be produced could be examined.

[30] The summonses for Dr Jansen and Dr Thompson were accordingly to be issued and served.

[31] Each of the authorised summons required the recipient to attend the investigation meeting, and "to produce at the same time ... all information relevant to the commissioning of the respective reports, including diary and calendar entries about any attendances with [UXK]", during a lengthy period prior to the date of each report, and for a shorter period after the date of each report.[1]

[32] The minute containing the direction was issued on Friday, 13 May 2022; the investigation meeting had been scheduled to commence on 23 May 2022.

[33] On Monday, 16 May 2022, UXK brought a challenge, accompanied by applications seeking a stay of the Authority's proceedings, and non-publication and urgency orders.

[34] On the basis the Court would hear the matter promptly, and because Mr Upton then properly gave an undertaking that he would not serve the witness summonses until the Court had an opportunity to consider the challenge, no order of stay was needed.

[35] For its part, the Authority adjourned the dates for the investigation meeting, so it will now commence on 20 June 2022, as mentioned earlier.

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[1] The information to be produced by Dr Thompson related to the period 1 January to 31 May 2020. The information to be produced by Dr Jansen related to the period 1 January to 31 May 2021.

First issue - the challenge concerning the witness summons

Section 179

[36] Section 179 of the Employment Relations Act 2000 (the Act) allows parties to challenge a determination of the Authority that they are dissatisfied with, electing to have the matter heard by the Court. However, challenges are not allowed with respect to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow.[2]

[37] Ms Fechney submitted that both these hurdles were cleared. Mr Upton did not submit to the contrary. However, because the Court must be satisfied it has jurisdiction to consider the challenge, it is necessary to address these threshold issues.

[38] It is well established that what is a "determination" is to be interpreted broadly. Section 179(5)(a) reflects that determinations can include procedural decisions that might be termed elsewhere either as interlocutory judgments or minutes.[3]

[39] The way in which a document from the Authority is described is not determinative of whether it is a determination.[4]

[40] Here, there are two documents, described as "Minutes". But they resolve contested applications including findings and orders in relation to those matters. I am satisfied that for the purposes of s 179 they are determinations of the Authority.

[41] It is also necessary to consider s 179(5), the general principles of which are well known.

[42] Authority proceedings should not be interrupted by challenges at a pre-determination stage.[5]

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2 Employment Relations Authority 2000, s 179(5)(a).
3 *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, [2013] ERNZ 460 at [15].
4 At [22].
5 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].

[43] The policy reasons for this are to increase speedy and non-legalistic decision-making, to keep costs down and avoid delays. Access to justice considerations are dealt with in the right of challenge, or once the Authority has made a final determination on the matter before it.[6]

[44] However, the Court must have regard to the effect of the determination in light of the policy objectives. It can consider determinations that have an irreversible and substantive effect. But it is not enough that an order has an impact on the parties. Any decision will have some impact on parties.[7]

[45] Here, the question under s 179(5) is whether a direction to issue the broad witness summonses which Talent drafted should be regarded as having an irreversible and substantive effect on UXK.

[46] There have been previous judgments where this Court has had to consider whether a witness summons requiring the production of documents was a matter of procedure under s 179(5). A recent example is the judgment of *Johnstone v Kinetic Employment Ltd* where Judge Holden found that summons issued to two witnesses to bring and produce computer systems in their possession or control, and to provide all passwords and other things necessary for the Authority and a forensics computer expert to examine the computer systems, was a matter of procedure, and thus a decision not amenable to challenge.[8] Accordingly, the challenge had to be dismissed.

[47] I was not referred to any previous judgment where the propriety of a witness summons requiring questioning of medical practitioners, or the production of medical records, was at issue.

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6 At [23].
7 *Fletcher v Sharpe Tudhope Lawyers* [2014] NZEmpC 182 at [18].
8 *Johnstone v Kinetic Employment Ltd* [2019] NZEmpC 91, [2019] ERNZ 250 at [28]–[30].

[48] As the authorities make clear, whether the matter is one about procedure does not extend to matters concerning jurisdiction and does not extend to matters that have an irreversible and substantive effect.[9] There is not a bright line that separates procedure and substance, at least in all cases.[10] The issue then becomes one about focusing on the effects of the case that has come before the Court on challenge.[11]

[49] In my view, the question of whether witness summons of this nature may cause irreversible, and substantive effect, is one which requires a careful consideration of context. The assessment in this case involves a consideration of the initial status which confidential health records have under a variety of instruments including the HIPC, and, as I shall explain later, any measures for determining admissibility of confidential information as found in s 69 of the Evidence Act 2006 (the EA).

The Authority's ability to receive health information in circumstances such as the present

[50] When arguing the merits of the present challenge, Ms Fechney submitted that the production of the two reports by UXK when giving her evidence would suffice. Her primary position was that the Authority should simply have allowed this evidence to be admitted. The issuing of formal witness summonses so the medical practitioners could be cross-examined, was not, she said, permitted under the Act.

[51] Section 160 describes the powers of the Authority when investigating *any* matter. It states:

> (1) The Authority may, in investigating any matter –
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> (a) call for evidence and information from the parties or from any other person:
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> (b) require the parties or any other person to attend an investigation meeting to give evidence:
>
> (c) interview any of the parties or any person at any time before, during, or after an investigation meeting:

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9 For example *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 (EmpC); *Oldco PTI (NZ) Ltd v Houston* [2006] ERNZ 221 (EmpC); *Morgan v Whanganui College Board of Trustees*, above n 3; and *Johnstone v Kinetic Employment Ltd*, above n 8.

10 *Morgan v Whanganui College Board of Trustees*, above n 3, at [58].

11 See for example *H v A Ltd*, above n 5, and compare with *Kennedy v Chief Executive of Oranga Tamariki – Ministry for Children* [2020] NZEmpC 58 at [13].

(d) in the course of an investigation meeting, fully examine any witness:

(e) decide that an investigation meeting should not be in public or should not be open to certain persons:

(f) follow whatever procedure the Authority considers appropriate.

(2) 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.

(2A) The Authority must allow cross-examination of a party or a person to the extent that is consistent with subsection (2).

…

[52] It is usually the case that in a civil proceeding, evidence from a witness should be produced either orally or via affidavit, unless consent is given to produce the evidence in some other way, such as via an agreed statement of facts.

[53] Section 83 of the EA provides for this in its description of the "ordinary way of giving evidence".

[54] The term "strictly legal evidence", as used in s 160(2) covers the production of evidence in the ordinary way. However, as can be seen from s 160(2), the Authority has a discretion as to whether it may receive evidence that is not strictly legal evidence.

[55] The result is that if the Authority chooses to receive evidence that is not strictly legal evidence, it may do so. But equally, it may require evidence to be produced formally, such as by the giving of evidence on oath, by affidavit, or by some other stipulated method.

[56] Ms Fechney emphasised that the Authority has the "role of resolving employment relationship problems" by establishing the facts and making a determination "according to the substantial merits of the case", and "without regard to technicalities".[12] She said the issue of non-publication is not an employment relationship problem.

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12 Employment Relations Act, s 157(1).

[57] She argued that there was thus a presumption against the use of a technical process for matters unrelated to the substantial merits of the case.

[58] She went as far as submitting that the Authority does not have the power to question the plaintiff's medical practitioners, to allow a cross-examination of them, or to order them to disclose all information relating to the commissioning of their reports.

[59] Whilst the primary role of the Authority is indeed to resolve employment relationship problems as defined in the statute, it must also follow whatever procedure the Authority considers appropriate for resolving any matters it may need to consider as part and parcel of its investigation. Issues relating to non-publication of name are potentially very significant, as numerous cases considering these issues readily demonstrate.[13]

[60] Parliament expressly bestowed on the Authority a discretion to order non-publication. It was plainly aware of the importance of the issue. In doing so it did not restrict the Authority from being able to exercises its usual evidential powers. Thus, it is able to call for evidence from persons for the purposes of an application for non-publication;[14] interview those persons;[15] fully examine witnesses;[16] or allow cross-examination, if these steps are consistent with equity and good conscience.[17]

[61] Since Parliament has not seen fit to rule out the possibility of the Authority questioning witnesses whose evidence may be relevant to a non-publication issue, including medical practitioners, I do not accept Ms Fechney's submission to the contrary.

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13 For example, *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 47; *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684; *GF v New Zealand Customers Service* [2021] NZEmpC 162; *H v A Ltd,* above n 5; *C v Air Nelson Ltd* [2010] NZSC 110.

14 Section 160(1)(a).

15 Section 160(1)(c).

16 Section 160(1)(d).

17 Section 160(2A).

[62] Later in her submission, when discussing Dr Jansen's potential evidence as a psychiatrist, Ms Fechney submitted that the Authority was not trained in psychiatry. This was a reason, I infer, for not requiring a psychiatrist to attend for an investigation meeting for questioning.

[63] As the Authority correctly noted in its minute, like many other judicial bodies, the Authority is required to consider evidence from an endless range of persons having specialist expertise.

[64] The EA provides guidance as to how opinion evidence given by an expert is to be treated.[18] It defines an expert as "a person who has specialised knowledge or skill based on training, study or experience".[19]

[65] Section 25 of the EA permits expert opinion evidence to be admitted if the fact finder is likely to obtain "substantial help" from the opinion in understanding other evidence in the proceeding, or in ascertaining any fact that is of consequence to the determination of the proceeding. A decision-maker must of course first determine whether an expert witness is properly qualified to testify, so as to meet the definition of that term as contained in s 4(1) of the EA.

[66] Although the EA does not apply per se to the Authority, its provisions will nonetheless, from time to time, be of assistance.

[67] The point is that there are well recognised filters for dealing with expert evidence which contain specialist observations and/or interpretation of information in support of an expert opinion, as is the case here.

[68] Then may follow the process of oral examination. A number of general propositions may be stated. The mere expression of opinion or belief by an expert witness does not necessarily suffice. It may be necessary to evaluate the witness and the soundness of his or her opinion, for instance, by examining the internal consistency and logic of the evidence, the care with which the subject has been presented, how the

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18 Evidence Act 2006, ss 23–26.
19 Evidence Act 2006, s 4(1).

witness responds to appropriate cross-examination, and the extent to which a witness faces up to, and accepts, the logic of a proposition put in cross-examination. An important element may be whether or not the expert is biased or lacks independence. These are well established techniques for testing expert evidence with which all judicial officers are well experienced. The duties which fall on a representative cross-examining an expert are also well established and should be properly understood.[20]

[69] In short, the Authority is permitted to question an expert such as a medical practitioner, or to allow a party to do so, subject to any necessary restrictions it may consider appropriate in the circumstances.

The Authority's ability to issue a witness' summons

[70] Clause 5 of sch 2 of the Act provides that:

> (1) For the purposes of any matter before the Authority, the Authority may, on the application of any party to the matter, or of its own volition, issue a summons to any person requiring that person to attend before the Authority and give evidence.
>
> (2) The summons must be in the prescribed form, and may require the person to produce before the Authority any books, papers, documents, records, or things in that person's possession or under that person's control in any way relating to the matter.
>
> …

[71] This provision re-enforces the fact that the Authority has a broad discretion to require the production of evidence at an investigation meeting. As noted earlier, it is not restricted in scope.

[72] It is not unduly technical, in my view, for the Authority to exercise its discretion to issue a witness summons in respect of a medical practitioner, so that a witness may give relevant evidence, but subject of course to any considerations that establish this is inappropriate.

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[20] See John Katz *Expert Evidence in Civil Proceedings* (Thompson Reuters, New Zealand, 2018) at 241: "Cross-examination of Expert".

[73] Requiring the two medical practitioners to attend the meeting to produce their reports was not controversial, as Ms Fechney conceded. More difficult, was the direction contained in the witness summonses to produce records.

[74] A broad range of documents was required for production under each summons. In the case of Dr Thompson, this was for a five month period in 2020. In the case of Dr Jansen, this was for a five month period in 2021.

[75] In addition, the language used as to the scope of documents to be produced was wide. All information relevant to the commissioning of the report was to be produced, including diary and calendar entries about certain attendances. As Mr Upton accepted, because the reports referred to UXK's medical conditions, the scope of the witness summonses extended to medical records, as maintained by each medical practitioner.

The guidelines relating to health information

[76] It is therefore necessary to refer to the special rules relating to the production of health information.

[77] I was referred to a variety of sources, such as the guidance and standards mandated by the relevant regulatory authority for both practitioners, the Medical Council of New Zealand, and in the case of Dr Jansen, by the Royal Australian, and New Zealand College of Psychiatrists. All these documents underscore the importance of patient confidentiality, and spell out the obligation of medical practitioners to maintain patient confidentiality except in defined circumstances.

[78] The Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 is also relevant. It states that a health consumer has the right to have his or her privacy respected.[21]

[79] The United Nations Convention on the Rights of Persons with Disabilities is another important instrument which states that the personal health and rehabilitation information of persons with disabilities should be protected on an equal basis with

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[21] Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, reg 2, sch 1, cl 2(2).

others.[22] Often, persons attending psychiatrists can properly be regarded as being disabled in a legal sense.

[80] These themes are drawn together in the HIPC. In summary, it states that there are limits on the use of health information (r 10) and on disclosure of health information (r 11).

[81] So, under r 10, a health agency that holds health information obtained in connection with one purpose may not use it for another purpose unless that agency believes on reasonable grounds that the use is necessary for another purpose, including "for the conduct of proceedings before any court or tribunal".[23]

[82] Rule 11 states that a health agency that holds health information must not disclose that information unless the agency believes, on reasonable grounds, that non-compliance with this provision is necessary "for the conduct of proceedings before any court or tribunal".[24] In such a case, disclosure is permitted only to the extent necessary for the particular purpose.

[83] It will be seen that the question of whether a health agency should disclose information entails that person believing on reasonable grounds that non-compliance is "necessary".

[84] These provisions, however, do not bind a judicial body.

[85] Normally, any issues as to admissibility of confidential health information to a judicial body is resolved under s 69 of the EA, so as to achieve the appropriate balancing of public interest factors.

[86] Section 69 provides:

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22 Convention on the Rights of Persons with Disabilities 2515 UNTS 3, art 22. This Convention was ratified by New Zealand: *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69 (at footnote 46).

23 Health Information Privacy Code 2020, Limits on use of health information, r 10(1)(f)(ii).

24 Rule 11(2)(j)(ii).

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.

[87] Although neither the Authority nor the Court is strictly bound by the provisions of the EA, guidance is often obtained from its provisions. Thus, s 69 has been referred to by the Authority from time to time,[25] and by the Court.[26]

[88] As explained by the Court of Appeal in the leading authority of *R v X*,[27] 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).[28] It is 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. The assessment undertaken under s 69 is necessarily fact specific, and discretionary.[29]

The Authority's consideration of the confidentiality issues

[89] The Authority in its minute of 13 May 2022, when considering the issues as to confidentiality, said that the HIPC expressly allowed for disclosure of health information for the conduct of proceedings before any court or tribunal. Whilst it is correct that the HIPC allows for such disclosure, this is the case only if the health agency believes on reasonable grounds that disclosure is "necessary": rr 10(1)(f) and 11(2)(j). In this case, there was no evidence as to whether the medical practitioners believed the production of confidential records was necessary.

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25 For example, *McGowan v Southern District Health Board* [2016] NZERA Christchurch 153l; and *Stuart v Downer New Zealand Ltd* [2012] NZERA Christchurch 160.

26 For example, *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111, *Bracewell v Richmond Services Ltd* [2014] ERNZ 434, [2014] NZEmpC 63 (leave to appeal declined in *Bracewell v Richmond Services Ltd* [2014] NZCA 629); and *O'Boyle v McCue* [2020] NZEmpC 51, [2020] ERNZ 111.

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

28 At [70].

29 *O'Boyle v McCue*, above n 26, at [38]–[42].

[90] The Authority went on to acknowledge that the subject evidence would be sensitive and personal in nature; but it also said this would have to be balanced against the important consideration that the evidence sought to be produced should be able to be examined. The Authority said that UXK's concerns could be addressed, such as by making further non-publication orders.

[91] That approach, however, proceeded on the basis that the records referred to in the witness summons would be produced.

[92] The threshold question as to the propriety of admissibility was not referred to. It was an issue which needed to be resolved by a careful balancing exercise of the important considerations relating to confidentiality, as described in s 69 of the EA.

[93] Regrettably the Authority was not asked by either party to undertake a s 69 analysis.

Section 69 analysis in this case

[94] The evidence before the Court is that, at all material times, Dr Thompson treated UXK as her GP.

[95] However, the issue relating to Dr Thompson's report concerns its authenticity. The issues Talent wishes to raise are whether he prepared and signed the report, and if so, when UXK consulted him for doing so. Mr Upton confirmed that no information is required with regard to the clinical aspects of UXK's presentation to her GP. I therefore discern no public interest in the disclosure of confidential health information, as contained in UXK's medical records.

[96] Under s 69(2), the public interest in preventing harm to UXK's and other doctor/patient relationships is an important aspect of the balancing exercise.

[97] In *O'Boyle,* I said with regard to a doctor/patient relationship involving a GP:[30]

> [55] The importance of confidentiality in such a therapeutic relationship is hardly controversial. The duty of medical confidentiality goes back to the

[30] *O'Boyle v McCue,* above n 26.

> Hippocratic Oath, comp[il]ed between 460 and 300 BC.[31] Ethical codes state information disclosed in a doctor/patient relationship are confidential to the utmost degree.[32] 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.[33] There are also many common law cases where expectations of confidentiality in a medical professional relationship have been upheld, on contractual or fiduciary grounds.[34]
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> [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.[35]
>
> [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.

[98] In this case, given that the medical records are not relevant, and that there is a powerful public interest in a GP not disclosing them, as just discussed, I conclude they should remain confidential. The authenticity, or otherwise, of Dr Thompson's report, to the extent that it may be relevant, can be examined without the disclosure of the GP's medial records.

[99] Turning to the records maintained by Dr Jansen, a similar analysis is appropriate. The issues which fall for consideration on the defendant's case are limited.

[100] First, Talent says the report should be properly produced.

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31 Graeme Laurie, Shawn Harmon and Edward Dove *Mason and McCall-Smith's Law and Medical Ethics* (2nd ed, Butterworths, 1987) at Appendix A.

32 Sylvia Bell and Warren Brookbanks *Mental Health Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2017) at ch 41.15.2.6

33 Health Act 1956, ss 22B–22H.

34 Peter Skegg and Ron 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 32, at ch 41.15.1.

35 Bell and Brookbanks, above n 32, at ch 41.15.1.

[101] Second, a question is raised as to the extent of the briefing given by UXK, and for example, whether, for the purposes of providing opinions about her children, he actually examined them.

[102] A third issue arises from the fact that Ms Fechney said UXK had been in an ongoing therapeutic relationship with Dr Jansen after the preparation of his report. The question which thus arises is whether, on the basis of the therapeutic relationship, Dr Jansen's opinion about UXK's health has changed over the period since the report was written.

[103] In considering the public interest in disclosing health information compiled by Dr Jansen, two periods require consideration. The first period relates to the preparation of the report which was to be filed in the Authority. The second period relates to the subsequent therapeutic relationship.

[104] The issues that are to be raised with regard to the preparation of the report are largely answered by the report itself, or its associated invoice. Dr Jansen set out fully the sources of all his information. It is evident that on a particular date, he conducted a long interview with UXK for the purpose of the report. He carefully listed all other sources of the information he had considered. He did not say in his report that he interviewed one or more children of UXK. In any event, the Court is advised that one of the children will be providing evidence to the Authority, who, to the extent it is relevant, could be asked if they attended an interview with Dr Jansen.

[105] Taking these factors into account, there is no obvious public interest in the production of confidential notes taken by Dr Jansen on many personal and sensitive topics for the purposes of the report, when he subsequently referred to those when summarising the relevant history.

[106] It is also necessary to consider the public interest in preventing harm to this and other therapeutic relationships.

[107] The Royal Australian and New Zealand College of Psychiatrists has considered this issue in a document to which reference was made in its Code of Ethics, "Patient –

psychiatrist confidentiality: the issue of subpoenas". There, it considered the "Impact of forcible disclosure on patients", and says:[36]

> When their clinical records are disclosed against their will, patients frequently feel ashamed, helpless and stigmatised. Successful therapy may become impossible in such circumstances; the relationship of trust with the psychiatrist may be permanently damaged, and in some cases, patients may be re-traumatised by the forcible disclosure. Actual or threatened disclosure can be particularly harmful for psychiatric patients, as they have an acute need for supportive, reliable, and trusting relationships.

[108] Given the fact the records are barely relevant to the issues Talent wishes to raise, and given also the strong public interest in maintaining their confidentiality, I am not persuaded the notes made by Dr Jansen for the purposes of his report should be admitted, nor the notes for a surrounding five-month period.

[109] Turning to the second and subsequent period of time, when UXK was in a therapeutic relationship with Dr Jansen, the public interest factors weigh even more heavily against disclosure of confidential records made by Dr Jansen. Additionally, I note the witness summons which was issued for him did not address the possibility of the disclosure of her health information for the period of the therapeutic relationship.

[110] I conclude that by not obtaining the views of the health practitioners involved prior to making any decision and/or simply requiring those persons to produce documents and medical records relating to several months in two consecutive years without carrying out an evaluation of the confidentiality issues involved, was erroneous.

[111] Additionally, given UXK's particular vulnerabilities as outlined by Dr Jansen, I am satisfied it is likely such disclosure would have an irreversible and substantive effect on her. I do not consider that the disclosure of sensitive medical information required by the issue of the two summonses in the form placed before the Authority by Talent is not one of procedure such that it falls foul of s 179(5).

[112] The determination is accordingly justiciable, and the challenge is allowed.

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[36] The Royal Australian & New Zealand College of Psychiatrists "Patient-psychiatrist confidentiality: the issue of subpoenas" (October 2016) <https://www.ranzcp.org/confidentiality>.

The way forward

[113] The Court could, at this point, simply set aside the witness summonses, and invite the Authority to reconsider the issues in light of this judgment. However, given the proximity of the hearing, there are obvious practical difficulties in advancing the issues in the next few days, which would have to occur if the investigation meeting is to proceed on 20 June 2022, as both parties wish.

[114] At the hearing of the challenge, it was agreed that if this point was reached, there were practical options for dealing with evidence of the medical practitioners in light of the principles I have discussed.

[115] That involves each of the medical practitioners being asked to complete an affidavit annexing their reports and dealing with questions which relate to the issues that Talent has raised. The representatives agree these affidavits should be filed and served prior to the investigation meeting with either party, and the Authority if it chooses, then having the opportunity to indicate that there are further questions then to be put to the deponents at the investigation meeting. If that circumstance arises, questions can be asked in a structured way, and in light of any necessary s 69 EA evaluation.

[116] In respect of Dr Thompson, the questions he is invited to answer by affidavit are:

(a) Did he prepare the report of 18 May 2020?

(b) Did he sign it?

(c) At what time and date did he see his patient for the purposes of preparing that report?

[117] The questions which Dr Jansen is invited to answer by affidavit are:

(a) Did he prepare the report of 18 May 2021?

(b) Did he sign it?

(c) Did he interview any person other than UXK for the purposes of the report; if so who and when?

(d) Are the sources referred to on page 2 of the report the only sources relied on?

(e) Has there been a therapeutic relationship between Dr Jansen and UXK since the preparation of the report?

(f) If so, has any opinion expressed in the report changed?

(g) Does he wish to make the modification referred to in his email to Mr Upton of 11 May 2022?

[118] The final question has been asked to formalise a clarification Dr Jansen indicated he wishes to make.

[119] It is agreed between the representatives that Ms Fechney will arrange for the medical practitioners to prepare these affidavits promptly. I anticipate they will agree the date by when these are to be tendered, and on a mechanism for establishing whether there are further questions that may need to be asked of them including from the Authority, which may require the attendance of the deponents at the investigation meeting.

[120] The Authority has already alluded to the possibility of having to make protective orders in respect of any sensitive health information received at the meeting.

Issue 2: A permanent non-publication order?

Background

[121] At present there is an interim order of non-publication of the plaintiff's name and identifying details in this proceeding.

[122] Ms Fechney argued strongly that the Court should now make a permanent order in respect of UXK's name and identifying details. In developing her submissions, Ms Fechney submitted that since confidential health information had

been filed with the Court it was all the more important that a permanent order be made protecting UXK's identity, along with her confidential health information.

[123] Mr Upton submitted that it was entirely appropriate for the current interim order of non-publication of name and identifying details to continue on an interim basis, but that it would be inappropriate for the Court to make a permanent order.

[124] The parties agreed at an earlier stage of their litigation that a permanent order was an issue which could not be determined until the substantive investigation meeting had taken place, and that it would be a question which the Authority itself should undertake.

[125] Mr Upton accepted, however, that a permanent order in respect of the confidential health information of UXK, as filed in this Court, would be appropriate.

Analysis

[126] At the first stage of its investigation, the Authority made a permanent order of non-publication. That was challenged in this Court; the challenge was resolved by a consent order, the effect of which was interim orders would apply both in this Court and in the Authority. The consent order was expressed as follows:[37]

> [The] identity of UXK is not to be published, pending further order of the Authority or the Employment Court.

[127] This form of order meant there was an interim order in the Authority which it could consider subsequently; and there was an interim order in the Court which it could consider subsequently. It did not mean the Authority could consider the status of the Court's order, or vice versa.

[128] For the Court now to make a permanent order would, in effect, override the parties own agreement as expressed in the consent order. Moreover, it would remove an important issue which should, in the first instance, be resolved by the Authority in the usual way.

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[37] *Talent Propeller Ltd v UXK* [2021] NZEmpC 26 at [3](b).

[129] In support of her submission that this Court should make permanent orders, Ms Fechney said there was a previous judgment of this Court where a permanent order had been made prior to a relationship problem being dealt with by the Authority. She said *WN v Auckland International Airport Ltd* was the authority for such an approach.[38]

[130] I note there was no opposition to such a course by the employer in that instance.

[131] Here, the circumstances are quite different. There is a live issue as to the making of a permanent order of name and identifying details which the Authority is about to investigate. The issue has not been removed to this Court. In the present circumstances, a permanent order is inappropriate. Suitable protection will be given by continuing the interim order until further order of the Court.

[132] However, the position with regard to the confidential health information, as placed before the Court is different. I have already discussed at length the confidentiality issues that arise. I am satisfied that the confidentiality of UXK's health information should be maintained, and that the normal principles of open justice should not, in respect of that evidence, prevail. A permanent order of non-publication in respect of that information is appropriate.

Result

[133] The challenge is allowed. The witness summonses are set aside. Rather, affidavits are to be sought from the medical practitioners involved as described earlier.

[134] The application for non-publication orders is partially allowed. In summary, I make the following orders:

(a) An interim order of non-publication of name and identifying details of UXK until further order of the Court.

(b) A permanent order of non-publication of the evidence which is before the Court as to UXK's health information.

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[38] *WN v Auckland International Airport Ltd*, above n 13.

(c) A direction that the Court's file may not be searched without leave of a Judge.

[135] Costs are reserved. The Court is advised that UXK is legally aided for the purposes of the challenge. Any issues as to costs should be discussed between the representatives in the first instance. If they cannot be resolved directly, any relevant application is to be made within 21 days, with a response given within a like period thereafter.

B A Corkill
Judge

Judgment signed at 12.55 pm on 13 June 2022