(1) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON.

IN THE HUMAN RIGHTS REVIEW TRIBUNAL [2018] NZHRRT 53

Reference No. HRRT 068/2016

UNDER THE PRIVACY ACT 1993

BETWEEN SIMON COOPER

PLAINTIFF

AND HAMILTON PHARMACY 2011 LIMITED

DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:
Ms AV Twaddle for plaintiff
Ms J Forrest for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 29 November 2018

DECISION OF CHAIRPERSON ON EVIDENTIARY RULINGS SOUGHT BY DEFENDANT IN RELATION TO WITNESS STATEMENT OF LYNETTE WENDY BARRETT[1]

Background

[1] These proceedings have been the subject of three substantive decisions and seven *Minutes*. The decisions are:

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[1] [This decision is to be cited as *Cooper v Hamilton Pharmacy 2011 Ltd (Pre-Trial Admissibility Ruling)* [2018] NZHRRT 53.]

- *Cooper v Hamilton Pharmacy 2011 Ltd (Application for Non-Publication Orders)* [2017] NZHRRT 34 (8 September 2017)
- *Cooper v Hamilton Pharmacy 2011 Ltd (Strike-Out Application)* [2017] NZHRRT 38 (2 October 2017)
- *Cooper v Hamilton Pharmacy 2011 Ltd (Discovery)* [2018] NZHRRT 28 (27 June 2018)

[2] In the circumstances it is not necessary for the background facts to be set out once more.

[3] Hamilton Pharmacy 2011 Ltd (Hamilton Pharmacy) by application dated 1 November 2018 has applied for a pre-trial ruling on the admissibility of the evidence intended to be given by Lynette Wendy Barrett. She is a witness for Mr Cooper and has filed a statement of evidence dated 5 October 2018. The following particular directions are sought:

> **[3.1]** That the hearsay evidence contained in the statement be removed.
>
> **[3.2]** That the name of the third party referred to by Ms Barrett be provided to Hamilton Pharmacy.

[4] Application was also made for what might loosely be described as further and better discovery by Mr Cooper. That aspect of the application has since been resolved by the parties.

The witness statement by Lynette Barrett

[5] The essence of Ms Barrett's intended evidence is that in July 2014, while working in a pharmacy in Hamilton, she was informed by a colleague that Andrea Coombes (a director of Hamilton Pharmacy) had told that colleague that Mr Cooper should not be employed were he to seek a job with the colleague. Ms Barrett was under the impression Ms Coombes had telephoned the colleague specifically to discuss Mr Cooper and the recommendation that he (Mr Cooper) not be employed or engaged for work. Ms Barrett goes on to state that she has no doubt that a phone call of this nature from Ms Coombes would have been taken seriously and would have ruined Mr Cooper's prospects of employment in the local pharmacy profession.

[6] Ms Barrett says she does not wish to name the colleague to whom she refers. No reason for this decision is presently offered but that does not mean one does not exist.

The application by Hamilton Pharmacy

[7] By memoranda dated 1 and 16 November 2018 respectively Hamilton Pharmacy objects to the evidence of Ms Barrett on the grounds that it:

> **[7.1]** Unfairly prejudices the ability of Hamilton Pharmacy to answer the allegations made against it; and
>
> **[7.2]** Contains significant hearsay.

Hamilton Pharmacy has written to Mr Cooper on two occasions requesting (inter alia) the identity of the unnamed "colleague" referred to by Ms Barrett but this information has not been provided as Mr Cooper does not know who the person is.

[8] Hamilton Pharmacy has asked Mr Cooper whether the unnamed person is Ms Julie Bunn. This is because Hamilton Pharmacy has drawn an inference (and it is only that) from allegations made in Mr Cooper's High Court defamation proceeding that Ms Bunn is indeed the person referred to. However, because Mr Cooper has not in those proceedings provided any evidence to support the allegation Hamilton Pharmacy says it is unable to deduce whether the present evidence relates to the alleged conversation with Ms Bunn, or is a new allegation altogether.

[9] Hamilton Pharmacy submits it is accordingly unable to respond to the allegations made by Ms Barrett or to prepare reply evidence regarding the alleged conversation. Similarly, unless the unnamed third party is identified, Hamilton Pharmacy will be unable to test Ms Barrett's allegations. To the extent that she can be cross-examined on these issues, that does not address the concerns held by Hamilton Pharmacy which submits it is facing a trial by ambush.

[10] While it is accepted by Hamilton Pharmacy that the Tribunal has a broad discretion to determine what evidence is admissible in proceedings before it, the submission is made that sight must not be lost of the fact that the Evidence Act 2006 (EVA), s 6 affirms that rules of evidence must (inter alia) promote fairness to parties and witnesses and the need to avoid unjustifiable expense and delay.

[11] On the subject of hearsay, Hamilton Pharmacy submits the evidence of Ms Barrett is being tendered not to establish the fact that Ms Barrett had a conversation with the unnamed colleague, but as evidence of the truth of what the colleague passed on to Ms Barrett.

[12] Reliance is placed on EVA, s 17 which, subject to certain exceptions, stipulates that a hearsay statement is not admissible. It is contended none of the statutory exceptions apply in the circumstances of the present case and it is not clear why the unnamed colleague cannot be called, beyond Ms Barrett's asserted undertaking of confidentiality. In these circumstances it is submitted that paragraphs 1.5 to 1.9 inclusive of Ms Barrett's intended evidence be excluded in its current form on the grounds that it is hearsay and is prejudicial.

The response by Mr Cooper

[13] The submissions for Mr Cooper point out that there does not appear to be any challenge that Ms Barrett's evidence is directly relevant to the matters before the Tribunal. On the question whether the evidence is hearsay, it is submitted the evidence is tended not as proof of the truth of what the unnamed colleague said. Rather it is evidence of what the unnamed colleague said to Ms Barrett. It follows the evidence is not hearsay.

[14] For Mr Cooper it is further submitted Hamilton Pharmacy has already surmised the identity of the unnamed party and will be able to adduce evidence to address the alleged comments. In these circumstances it is difficult to see what prejudice there is to Hamilton Pharmacy in allowing the evidence.

[15] The following additional points are made:

> **[15.1]** The Tribunal is well able to assign to Ms Barrett's evidence such weight as it considers appropriate.
>
> **[15.2]** Submissions during the course of the substantive hearing can address such actual prejudice to the defendant as may then exist.

[15.3] Should prejudice be established, the Tribunal can allow Hamilton Pharmacy an opportunity to produce additional evidence.

[15.4] The Tribunal is not bound by the same rules of evidence as a court.

[16] In summary, Mr Cooper submits the evidence is the best available evidence of this aspect of his claim. To deny him the ability to have the evidence heard (and tested) would cause him substantial prejudice as it forms the foundation of a significant part of his claim. The evidence is relevant, not hearsay and Hamilton Pharmacy is already prepared to address it. It is submitted the evidence of Ms Barrett should be heard by the Tribunal and tested by cross-examination.

Discussion

[17] The Tribunal's approach to evidence in proceedings before it has most recently been explained in *Taylor v Corrections (Admissibility of Evidence)* [2016] NZHRRT 10 at [12] to [17] and in *Taylor v Corrections (No. 2)* [2018] NZHRRT 43 at [9] to [18]. No purpose would be served by repeating or summarising what is said there.

[18] The difficulty faced by Hamilton Pharmacy is that while the Evidence Act does undoubtedly apply to the Tribunal as if it were a court, the Human Rights Act 1993 (HRA), s 106(1)(d) confers on the Tribunal power to receive any evidence which may, in its opinion, assist it to deal effectively with the matter before it, whether or not it would be admissible in a court of law:

> **106 Evidence in proceedings before Tribunal**
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> (1) The Tribunal may—
> (a) call for evidence and information from the parties or any other person:
> (b) request or require the parties or any other person to attend the proceedings to give evidence:
> (c) fully examine any witness:
> (d) receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law.
> (2) The Tribunal may take evidence on oath, and for that purpose any member or officer of the Tribunal may administer an oath.
> (3) The Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Tribunal thinks fit, verifying it by oath.
> (4) Subject to subsections (1) to (3), the Evidence Act 2006 shall apply to the Tribunal in the same manner as if the Tribunal were a court within the meaning of that Act.

[19] If there is any inconsistency between the provisions of HRA, s 106 and any provision of the Evidence Act, the provisions of the Human Rights Act prevail. See EVA, s 5(1).

[20] Other than in the clearest of cases the Tribunal will not be in a position to determine whether any proffered evidence may assist it to deal effectively with the matter before it until the substantive hearing itself. That is because it is only in the context of the substantive hearing that a fully informed decision on admissibility can be made.

[21] The Evidence Act, s 14 explicitly recognises that the practicalities of court and tribunal proceedings are such that, at the time evidence is adduced, other evidence may not have already established its admissibility. Evidence can be admitted when tendered, subject to a later ruling on admissibility:

> **14 Provisional admission of evidence**
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> If a question arises concerning the admissibility of any evidence, the Judge may admit that evidence subject to evidence being later offered that establishes its admissibility.

[22] This provision illustrates why the making of pre-trial admissibility rulings must be approached with caution.

[23] That determinations of admissibility are ordinarily to be made in context was emphasised, albeit in a slightly different setting, in *Alpine Energy Ltd v Human Rights Review Tribunal* [2014] NZHC 2792 at [31] where the Tribunal was criticised for adjudicating upon admissibility without seeing the documents in question. While the present objection is not in relation to documents, but in relation to intended oral evidence, the principle remains the same namely, a properly informed decision on admissibility can only be made in context. This will most often be the context of the substantive hearing itself where witnesses can be questioned and additional relevant evidence and submissions received regarding such matters as the purpose for which the evidence is produced and any related issues including the protection of confidential information under EVA, s 69.

[24] If as a consequence of an admissibility ruling one of the parties is genuinely caught by surprise or can establish prejudice, application can be made for an adjournment, a point conceded by Mr Cooper and underlined by HRA, s 105 which requires (inter alia) the Tribunal to act in a manner that is fair and reasonable:

> **105 Substantial merits**
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> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

Conclusion on the application for pre-trial admissibility ruling

[25] In my view the objection taken by Hamilton Pharmacy is premature. The proper time for taking the objection is in the course of the substantive hearing itself when the Tribunal can assess the objection in the context of a broader range of evidence than is presently available on the limited papers presently filed and when the parties are in a better position to advance (or resist) the application in the fuller context of the trial itself.

[26] The application for a pre-trial ruling on the admissibility of Ms Barrett's witness statement dated 5 October 2018 is accordingly dismissed. This ruling does not in any way inhibit Hamilton Pharmacy from challenging the admissibility of the evidence in the course of the substantive hearing.

Case management

[27] In her memorandum dated 1 November 2018 Ms Forrest advises Hamilton Pharmacy does not wish to delay these proceedings but nevertheless seeks an extension of time to file evidence in reply to Ms Barrett's statement. An eight-week extension is suggested.

[28] Ms Twaddle objects to any extension on the grounds these proceedings have already had a long history, the additional delay is unjustified and there will be further prejudice to Mr Cooper.

[29] More recently by memorandum dated 27 November 2018 Ms Forrest has asked for a three-week extension for Hamilton Pharmacy to file its evidence in reply and an extension until mid-February 2019 for any medical or psychiatric evidence to be filed. Reference is made to the following:

[29.1] Until a ruling on the admissibility challenge to the evidence of Ms Barrett has been determined the intended evidence of Andrea Coombes cannot be finalised.

[29.2] Hamilton Pharmacy has encountered difficulty engaging its own independent psychiatrist.

[29.3] Counsel's time has been diverted by having to assist Counsel for the Professional Conduct Committee to finalise the evidence to be given by the directors of Hamilton Pharmacy in the proceedings now filed in the Health Practitioners Disciplinary Tribunal.

[30] By memorandum dated 29 November 2018 Ms Twaddle opposes the application on the grounds (inter alia) that:

[30.1] The statements of evidence by Hamilton Pharmacy were originally directed to be filed by 30 November 2018. See the *Minute* dated 10 August 2018.

[30.2] In the circumstances described in the subsequent *Minute* dated 15 October 2018 Mr Cooper sought a three-week extension. That application was consented to with the result that by *Minute* dated 15 October 2018 the timetable was adjusted across the board by three weeks. As a consequence the new date for the filing by Hamilton Pharmacy of its statements was 30 November 2018 with any evidence in reply to Dr de Beer's evidence to be filed by 21 December 2018.

[30.3] The latest request for an extension of time for the filing of medical evidence to mid-February 2019 is unreasonable given Dr de Beer's evidence (which is only 12 paragraphs in length) was filed and served on 29 October 2018. Hamilton Pharmacy has had reasonable time to engage its own medical witness.

[30.4] There is a significant cross-over of matters between the claim in the Tribunal and the proceedings now brought in the Health Practitioners Disciplinary Tribunal. Mr Cooper understands the evidence before that Tribunal was due three weeks ago, leaving adequate time for the preparation and filing of evidence in this Tribunal.

[30.5] It does not appear to have been sufficiently understood by Hamilton Pharmacy that the evidence of Ms Barrett is tendered not as evidence as to the truth of what was said to her but only that something was said to her that could only have come from an officer of Hamilton Pharmacy (Ms Coombes). Either she spoke the words reported by Ms Barrett or she did not. The account relayed by Ms Barrett is simple and short. No complexity is involved in Ms Coombes either accepting or denying what she is reported as having been said. It is not an issue that requires extensive preparation and an extension of time for the filing of Ms Coombes' evidence is not required.

[30.6] These proceedings have been before the Tribunal since October 2016 and there is no reasonable basis for further delay. Mr Cooper is anxious to have his claim heard and determined by the Tribunal at the earliest opportunity. The rescheduling sought by Hamilton Pharmacy will cause further delay to Mr Cooper's ability to seek closure through these proceedings. In terms of the Human Rights Review Tribunal Regulations 2002, reg 16 an extension of time is neither necessary nor desirable for the fair, efficient, simple and speedy hearing and determination of these proceedings.

[30.7] It is noted Hamilton Pharmacy does not seek an extension of time for the filing of a statement of reply to the amended statement of claim.

Conclusion on the application for extension of time

[31] I agree there is little justification for the case management timetable to be amended to mid-February 2019 but the filing by Hamilton Pharmacy of the admissibility challenge does mean that this decision is being delivered on the eve of the Friday 30 November 2018 deadline for Hamilton Pharmacy to file its witness statements, except those in response to Dr de Beer's evidence. For that reason (and that reason alone) a two-week extension of the timetable is to be allowed for the filing by Hamilton Pharmacy of its witness statements other than its reply evidence to Dr de Beer. The deadline for the filing of such medical evidence is unchanged. Overall, the adjustments mean that instead of the last timetable step being scheduled for Friday 1 February 2019, the new date will be Friday 15 February 2019.

[32] For the assistance of the parties the case management timetable most recently set out in the *Minute* dated 15 October 2018 is reproduced below with any new achievement dates incorporated.

Directions

[33] The following directions are made:

The filing and serving of witness statements and draft lists of documents:

[33.1] The plaintiff is to file and serve all witness statements, except that of Dr de Beer by 5pm on Friday 5 October 2018.

[33.2] The plaintiff is to file and serve a draft list of documents to be included in the common bundle of documents by 5pm on Friday 5 October 2018.

[33.3] The plaintiff is to file and serve Dr de Beer's witness statement and confirmed list of documents by 5pm on Monday 29 October 2018.

[33.4] The defendant is to file and serve all witness statements, except that in response to Dr de Beer's evidence, by 5pm on Friday 14 December 2018.

[33.5] The defendant is to file and serve a draft list of documents to be included in the common bundle of documents by 5pm on Friday 14 December 2018.

[33.6] The defendant is to file and serve any evidence in reply to Dr de Beer's evidence and a confirmed list of documents by 5pm on Friday 21 December 2018.

[33.7] The plaintiff is to file and serve any evidence in reply to the defendant's evidence and any evidence in reply relating to Dr de Beer's evidence by 5pm on Friday 25 January 2019.

[33.8] The scope of the plaintiff's evidence in reply is extended to include any evidence necessary to address any new defences (if any) raised by the defendant in its amended statement in reply. That evidence is to be filed and served by 5pm on Friday 25 January 2019.

[33.9] The common bundle of documents is to be filed and served by 5pm on Friday 15 February 2019.

The filing of defendant's statement of reply to amended statement of claim:

[33.10] The defendant is to file and serve any amended statement of reply to the amended statement of claim dated 2 March 2018 by 5pm on Friday 30 November 2018.

[33.11] Leave is reserved to all parties to make further application should the need arise.

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Mr RPG Haines ONZM QC
Chairperson