

Reference No. HRRT 027/2013

UNDER THE PRIVACY ACT 1993

BETWEEN KAREN MAY HAMMOND

PLAINTIFF

AND CREDIT UNION BAYWIDE

DEFENDANT

AT NAPIER

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Ms KM Hammond in person

Mr AJ Harris and Mr GJC Ferguson for defendant

DATE OF HEARING: 1, 2 and 3 December 2014 (continuing)

DATE OF DECISION: 3 December 2014

DECISION OF TRIBUNAL EXCLUDING OPINION EVIDENCE

Background

[1] On the morning of the first day of hearing (Monday 1 December 2014) NZCU Baywide filed a brief of evidence by Mr Murray James Cowan, the founding Director of Grow Human Resources Ltd (Grow HR), a human resources company providing advice to employers in the Hawke's Bay district.

[2] Ms Hammond objected to the admission of the evidence on the grounds of relevance. The issue was left to be determined at some later point as the Tribunal did not in the opening session on the first day have sufficient understanding of the context of the proffered evidence and it was of the view that the matter should be determined if and when the evidence was sought to be introduced.

[3] On the morning of Wednesday 3 December 2014 Ms Hammond called Mr Peter McAuley to give evidence. Mr McAuley was the Chief Financial Officer of NZCU Baywide in the period January 2010 to November 2013. In the course of cross-examining Mr McAuley, Mr Harris wished to put to Mr McAuley the evidence intended to be given by Mr Cowan. In so doing he was acting entirely properly, it being his duty to put to Mr McAuley evidence to be called by NZCU Baywide in conflict with Mr McAuley's own evidence. Ms Hammond at that stage renewed her objection to the admission of Mr Cowan's evidence.

[4] It was in these circumstances that the Tribunal was required to rule on the admissibility of Mr Cowan's evidence. After hearing argument the Tribunal ruled that all of Mr Cowan's evidence was inadmissible. To avoid further interruption of Mr McAuley's evidence and to ensure that his evidence was completed in time for him to return to Auckland that evening, the Tribunal advised that the reasons for its decision would be given later.

[5] The purpose of this decision is to give those reasons.

Brief overview of events

[6] As best we can tell at this early stage of the hearing the general circumstances of the case can be summarised in the paragraphs which follow.

[7] On 31 March 2012 Ms Hammond, a former employee of NZCU Baywide, made a cake for a private dinner party held for a good friend of hers, Ms Jantha Gooding. She and Ms Gooding had worked together at NZCU Baywide. Ms Gooding resigned on or about 28 February 2012 following mediation. A short time later Ms Hammond also resigned, her last day at work being 27 March 2012.

[8] At the time Mr McAuley was the Chief Financial Officer. His employment at NZCU Baywide ended in November 2013, one year and seven months after the events in question.

[9] The cake baked by Ms Hammond was iced with swear words which some in NZCU Baywide might find offensive. Ms Hammond took a photograph of the cake and uploaded the picture to her Facebook page. The privacy settings allowed only her "friends" to access the photograph.

[10] On 12 April 2012 Louise Alexandra, the Human Resources Manager at NZCU Baywide obtained a screenshot of the cake and circulated it to a number of employment agencies in the Hawke's Bay area (including Grow HR) with a caution against employing Ms Hammond. It is part of Ms Hammond's case that in the period 12 April 2012 to 26 April 2012 members of the senior management team at NZCU Baywide also brought sustained pressure to bear on Ms Hammond's new employer, Mr Rob Tonge of FinancePoint, to dismiss Ms Hammond.

[11] In his evidence today Mr McAuley has given evidence favourable to Ms Hammond. In essence he says that as a member of the executive team he was at a meeting of that team convened on 12 April 2012 to discuss the photograph. He says he heard Mr Grant Porter, Chief Operating Officer at NZCU Baywide state that other employers should know what sort of person Ms Hammond was so that they would not employ her. Mr McAuley warned that Ms Hammond's privacy rights were at risk of being breached. The essence of his evidence is that the actions taken against Ms Hammond were driven by personal malice.

[12] It is apparent from the witness statements filed by NZCU Baywide, particularly those of Mr Porter, Ms Julie Baxter, Manager Lending and Ms Alexandra that Mr McAuley's version of events is to be strongly contested. We have yet to hear their evidence. Conflicts of this nature are not, however, unusual as it is common for those involved in events to have different recollections, understandings and perspectives.

The intended evidence of Mr Cowan

[13] The intended evidence of Mr Cowan, however, is of a different category. He was not in any way involved in the events in question. Rather, the purpose of his evidence is to support the contention by NZCU Baywide that Mr McAuley is not a truthful witness.

[14] It is not intended to set out Mr Cowan's statement at length. In summary, Mr Cowan intends giving evidence that:

[14.1] He has been a human resources professional for more than 25 years. Grow HR has been operating for nine of those years.

[14.2] NZCU Baywide has been a client of Grow HR for nine years. In 2009 Grow HR managed a comprehensive overhaul of NZCU Baywide's entire people management framework. Mr McAuley was not employed by NZCU Baywide at that time. Mr Cowan does not agree with Mr McAuley's evidence which portrays the senior management team at NZCU Baywide as being highly dysfunctional and malicious. To the contrary, he believes them to be persons of integrity.

[14.3] In October 2013 Mr Cowan interviewed nine unnamed NZCU Baywide employees in the course of assessing the future performance of the organisation. Some of the comments made to Mr Cowan about Mr McAuley were unfavourable.

[14.4] Mr Cowan made representations to Mr Gavin Earle, Chief Executive Officer of NZCU Baywide with the result that in November 2013, by mutual agreement, Mr McAuley resigned from NZCU Baywide.

Admissibility – discussion

[15] For NZCU Baywide it is submitted that Mr Cowan's favourable views as to the credibility of the NZCU Baywide witnesses and his unfavourable view of the credibility of Mr McAuley are admissible under s 24 of the Evidence Act 2006 which provides:

24 General admissibility of opinions

A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

[16] In our view this rather misses the point which is that Mr Cowan is offering veracity evidence, that is evidence of the disposition of certain witnesses to tell the truth or to refrain from telling the truth. Such evidence cannot be offered unless the evidence is "substantially helpful" to the Tribunal in assessing veracity. See s 37(1) of the Evidence Act:

37 Veracity rules

- (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.

- (2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.
- (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
 - (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
 - (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
 - (c) any previous inconsistent statements made by the person:
 - (d) bias on the part of the person:
 - (e) a motive on the part of the person to be untruthful.
- (4) A party who calls a witness—
 - (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
 - (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
- (5) For the purposes of this Act, *veracity* means the disposition of a person to refrain from lying, whether generally or in the proceeding.

[17] We do not find the offered evidence substantially helpful. Indeed we find it of no help whatsoever:

[17.1] Mr Cowan was not a witness to or involved in the lead up to the events in question or in the events themselves which occurred in the period March-April 2012.

[17.2] Mr Cowan's favourable assessment of credibility is offered in relation to the senior executive management of a long term client. It is hardly an objective assessment.

[17.3] Mr Cowan's interpretation of the feedback received during the October 2013 exercise is of no assistance, based as it is on the hearsay views of anonymous contributors who are not available for cross-examination on the validity of their reported opinions.

[17.4] Mr Cowan, having been instrumental in securing the negotiated exit of Mr McAuley from NZCU Baywide, has a substantial interest in justifying his advice and in denigrating Mr McAuley.

[17.5] We are not persuaded Mr Cowan's intended evidence tends to show bias or motive on the part of Mr McAuley to be untruthful.

[18] For these reasons we believe it would not only be unfair to admit Mr Cowan's views on credibility but unsafe to do so. His opinions have no evidentiary value. Furthermore the collateral issues raised by his evidence will create a real risk that the Tribunal's attention will be diverted from NZCU Baywide's reaction to the cake baked (and iced) by Ms Hammond to the validity of Mr Cowan's views and actions which led to the resignation of Mr McAuley from NZCU Baywide. In this respect we are guided by s 8 of the Evidence Act which requires the exclusion of evidence where its probative value is outweighed by the risk it will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding:

8 General exclusion

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
 - (a) have an unfairly prejudicial effect on the proceeding; or
 - (b) needlessly prolong the proceeding.

- (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[19] It is correct that s 106(1)(d) of the Human Rights Act 1993 (incorporated into proceedings under the Privacy Act via s 89 of that Act) allows the Tribunal considerable discretion as to the evidence it will admit:

106 Evidence in proceedings before Tribunal

- (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.

[20] Nevertheless we are of the view that for the reasons given the evidence of Mr Cowan will not be of assistance. Rather it will hinder our determination of the issues before us.

[21] For these briefly stated reasons all of the intended evidence by Mr Cowan as set out in his witness statement is ruled inadmissible.

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Mr RPG Haines QC
Chairperson

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Ms WV Gilchrist
Member

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Mr BK Neeson JP
Member