IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2012-463-000353
[2012] NZHC 3116

BETWEEN	JOHAN AARTS Plaintiff
AND	THE COMMISSIONER OF POLICE First Defendant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Second Defendant

Hearing: 20 November 2012

Appearances: J Aarts in person, the Plaintiff and with the assistance of a lay advocate R Lee
A Russell for the Defendants

Judgment: 27 November 2012

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
27.11.12 at 11:30am, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
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Background

[1] Mr Aarts High Court proceeding was filed on 5 June 2012.

[2] In it he describes his contract of employment as a counsellor in the Rotorua branch of Barnardos from 2004 until 14 August 2006 when his contract was terminated.

[3] In May 2006 the second defendant (CYF) with the assistance of the first defendant (the Police) interviewed three children referred to Barnardos and to whom counselling services were provided by Mr Aarts.

[4] Subsequently CYF contacted the Police who spoke to Mr Aarts about claims of inappropriate behaviour. Mr Aarts says the Police then wrote to Barnardos "falsely claiming" that the children made allegations of inappropriate behaviour.

[5] Subsequently CYF and the Police interviewed two children from another family. Mr Aarts says that following those later interviews the Police again contacted Barnardos and again "falsely claimed" that further allegations of inappropriate behaviour were made. Mr Aarts employment contract came to an end shortly after.

[6] Mr Aarts denies the allegations of inappropriate behaviour. He says the children did not make any claims of inappropriate behaviour. Since, he has repeatedly requested access to the Police video tape interviews of those children. He has received a synopsis but nothing else. He does not accept the synopsis accurately records the content of those interviews even though the Privacy Commissioner has said the synopsis fairly records the content of the interviews.

The High Court proceeding

[7] Mr Aarts pleads two causes of action. The first alleges an intentional interference in economic relations which he said occurred when the Police and CYF intended to induce Barnardos to end their contract with Mr Aarts by providing

Barnardos with false and misleading information about the videotape evidential interviews.

[8] In the second cause of action Mr Aarts pleads he was defamed by the Police and CYF when he said they maliciously provided false and misleading accounts of those videotape evidential interviews to Barnardos.

[9] As to both he pleads the Police have repeatedly refused to disclose the videotaped evidential interviews; that CFY misused the process by which Barnardos accessed CYF funding by bringing pressure to bear on Barnardos to breach Mr Aarts employment contract; that together they acted maliciously and in bad faith; and that the Police and CYF continue to defame him by storing false and misleading information about him on their computer systems.

The stay and the security for costs applications

[10] In response to the proceeding the Police and CYF have applied for orders that the proceedings be stayed and for security for costs to be given.

[11] The stay application records that Mr Aarts currently has proceedings before the Employment Court based on the same alleged facts; that the issues on appeal from the Employment Relations Authority (ERA) to the Employment Court include:

(a) Whether Mr Aarts claim (that the defendants aided, abetted or incited a breach of his employment agreement) is out of time.

(b) Whether the ERA should have issued a summons requiring the Commissioner of Police to provide Mr Aarts with a copy of videotaped evidential interviews.

[12] The defendants assert that Mr Aarts first cause of action (intentional interference and economic relations) essentially mirrors the proceeding that he is pursuing in the employment jurisdiction, albeit that he is seeking a penalty in that jurisdiction.

[13] As to the defamation claim the defendants say it is out of time and that Mr Aarts had not sought leave to bring the defamation action out of time. They say that the claim before the Employment Court requires it to make findings of fact that will be central to limitation issues. Therefore a stay would enable the Employment Court to issue its judgment, and for abuse of process issues to be clarified.

[14] Concerning the application for security for costs, it is recorded that in submissions he made to the ERA on 29 February 2012, Mr Aarts advised he was "... barely able to pay rent, food and has no assets of any value".

[15] A short time later Mr Aarts filed an application seeking leave to bring the defamation claim after two years but within six years pursuant to s 4(6B) of the Limitation Act 1950.

[16] In support of that application it is claimed that between June and August 2006 the defendants telephoned and wrote to Barnardos on several occasions "expressing concerns about untested allegations...", and that subsequently he lost his employment on 14 August 2006 as a consequence. Mr Aarts claims that in September 2006 he made the first of many requests for disclosure of the videotaped evidential interviews. He says that ever since he has been "diligently attempting to obtain disclosure... [but has] been unsuccessful". He contacted the Privacy Commission but it considered the interviews in their entirety were not his private information. The Commissioner declined to assist. In the following month of June 2008 the Ombudsman declined to investigate the Privacy Commissioner's decision stating – Mr Aarts says – that the Commissioner was not bound by principles of natural justice.

[17] He said initially the Police agreed to arrange a viewing of the videotaped interviews but later reneged – when the Police became aware Mr Aarts had been defamed by officers in connection with the events in June – August 2006.

[18] Mr Aarts submits therefore that it is unreasonable to expect he could have brought defamation proceedings within two years when:

(a) He did not know he had been defamed.

(b) The information supporting his defamation claim had been illegally withheld from him.

(c) He diligently and persistently sought disclosure of the relevant information.

(d) The Police have "deliberately acted illegally" to prevent him from discovering that he had been defamed.

[19] Counsel for the defendants has filed an amended notice of opposition to Mr Aarts application for leave to bring a defamation claim after two years. Counsel notes that it appears from his proceeding that Mr Aarts alleges that he was defamed in June 2006, and on 21 July 2006, 27 July 2006, 1 August 2006 and 4 August 2006. Further, that on 18 February 2011 he brought proceedings in the Employment Court in which he made a number of allegations against the defendants, including about the meetings and the documents that now form the basis of the defamation claim; that the delay in bringing the action was not occasioned by mistake of fact or mistake of law or by any other reasonable cause. Further that because the application for leave was filed on 9 August 2012 it was not filed within six years from the date on which the cause of action accrued.

[20] Although Mr Aarts does not want his leave application to be argued at this time in his opposition to the stay application he rejects suggestions his proceeding in this Court is an abuse of process even though the proceedings before the Employment Court did arise from the same alleged facts. He says the matters before the Employment Court "are merely preliminary issues" to determine whether disclosure of the videotaped interviews can be ordered in the employment jurisdiction and whether he is precluded from pursuing his claims.

[21] In his view "the allegations against the defendants are so serious that they should more appropriately be tested in the High Court". Therefore he says he is

prepared to withdraw the claim against the two defendants from the employment jurisdiction to resolve any potential abuse of process issues.

[22] Concerning the security for costs application, Mr Aarts submits his financial position has been harmed by the intentional actions of the defendants and that it would not be in the interests of justice to place an additional financial obstacle in the way of access to the Court as this would signal to the defendants that the Court may not hold them accountable as long as they place sufficient financial obstacles in the way of a vulnerable but meritorious plaintiff.

[23] In response to the defendants' position that his High Court proceedings amounts to an abuse of process, Mr Aarts responds that for six years the Police have successfully opposed his every effort to obtain disclosure of the videotaped interviews. He surmises that the only reasonable explanation for this course appears to be that the defendants have indeed made false representations about those interviews.

The Employment Court proceedings

[24] On 18 February 2011 Mr Aarts filed a statement of problem with the Employment Court claiming he was unjustifiably dismissed. At that time he further claimed that other parties including the Police and CYF should be rejoined as respondents to his claim. Against them he alleged, among other things that the Police and CYF had:

(a) Conspired together to incite Mr Aarts employer to end his career.

(b) Supplied false information to incite Mr Aarts employer to end his career.

[25] Mr Aarts also alleged the Police illegally withheld some videotaped evidential interviews from him.

[26] It was clear from the responses filed that preliminary issues arose concerning whether Mr Aarts had filed his statement of problem within time, and whether there

was authority available to require the Police to provide Mr Aarts with copies of videotaped evidential interviews.

[27] As to the former, the ERA was tasked with determining when Mr Aarts knew or ought reasonably to have known he had the right of a complaint in connection with the actions of the defendants.

[28] As to the latter, the ERA had to consider whether it had authority to require the Police to disclose the videotaped evidential interviews.

The ERA determination

[29] There was no hearing upon these preliminary issues. Rather the determination which issued on 18 January 2012 was done "on the papers" and, as the ERA noted, "on the basis that the underlying facts pertaining to the relevant timelines as set out by Mr Aarts and his comprehensive amended statement of problem are not in dispute between the parties".

[30] Before it the ERA had considerable evidential material and extensive submissions filed by the parties.

[31] In its determination the ERA noted that the Police and CYF had made Barnardos aware of the initial allegations which had been made against Mr Aarts in May 2006; that on 27 July 2006 Barnardos were made aware of the second allegations involving Mr Aarts following which a meeting was held with Mr Aarts on 3 August 2006 with a further meeting taking place on 10 August 2006.

[32] The evidence considered included Mr Aarts statement that on 6 June 2006 a Detective McLeod had visited him in his home and advised him about disclosures made by children he had been counselling; that the Police considered inappropriate behaviour was involved and had reported the matter to Barnardos. He was advised then no criminal charges would be laid.

[33] Mr Aarts evidence was that two days later a manager from Barnardos emailed him advising she was waiting to hear back from CYF and the Police.

[34] Mr Aarts then referred to a letter dated 3 August 2006 which confirmed the receipt of "notifications of concern regarding all work with children"; that the initial concern was based on video interviews and that those had been conducted by CYF in Rotorua and had been viewed by the Police; that the Police had advised that although they did not accept the behaviour was one of criminal offence "nevertheless the behaviour or actions described by the girls is believed to be very inappropriate given the circumstances in which they occur...; that based on information they had, there were concerns of inappropriate behaviour which included closeness, inappropriate touching, offers of food/sweets".

[35] At a meeting held on 14 August 2006, Mr Aarts employment with Barnardos was terminated as confirmed in a letter of that date.

[36] On the basis of that evidence the ERA found that at the time of his dismissal on 14 August 2006 Mr Aarts was aware that his employment was being terminated on the basis of the allegations which the Police and CYF had provided Barnardos – and therefore Mr Aarts had 12 months from that date to bring claim of the kind he did before the ERA. The ERA noted that Mr Aarts action for the recovery of a penalty against the Police and CYF was brought more than three and half years outside the statutory time limit.

[37] The ERA also recorded:

(a) That on 30 September 2008 CYF sent Mr Aarts copies of the forensic interview reports. Those reports concluded with comments that Barnardos should be 'made aware of the statement made by a child', and of 'the outcome of a child's interview'.

(b) On 20 October 2008 Mr Aarts was sent a letter by the Police which enclosed a copy of a letter sent from Barnardos to the Police on 5 November 2007. It noted that Barnardos did not view the interview tapes as part of their investigation to Mr Aarts behaviour; that they were given information verbally from both sources and access to a summary review provided by CYF.

[38] The ERA concluded that Mr Aarts was aware at the date of his dismissal that allegations provided to Barnardos by the Police and CYF had led to the termination of his employment; but that even if that was not the case then at the very latest by 20 October 2008 Mr Aarts should reasonably have become aware of the role played by the Police in CYF in the events leading to the termination of his employment.

[39] ERA concluded that even if Mr Aarts was only reasonably aware of his rights of action by 20 October 2008 his action for recovery of a penalty made on 18 February 2011 was still more than 16 months outside the statutory time limit applicable.

[40] Concerning Mr Aarts request for the ERA to issue a summons requiring the Police to provide Mr Aarts with the videotaped evidential interviews the ERA noted that the Police opposed the issuing of a summons pursuant to clause 5 of Schedule 2 of the Employment Relations Act 2000 (the Act) on the basis that the Evidence Regulations 2007 prohibited disclosure of the videotaped evidential interviews. The Police also opposed disclosure on the basis that discovery was not available in an action before the ERA for the recovery of a penalty.

[41] The ERA held that whilst there was no formal discovery process before the ERA corresponding to the mutual disclosure and inspection of documents in the Employment Court, the ERA had the power pursuant to s 160(1)(a) of the Act, in investigating any matter "to call for evidence and information from the parties".

[42] The ERA stated that the disclosure regime did not apply (as in Mr Aarts case) to any action for the recovery of a penalty. It said the position reflected the quasi – criminal character of penalty proceedings and the principle that disclosure of documents should not be required to be produced if that might tend to incriminate the party who possesses them; that a party was entitled to object to production for inspection of documents which are likely to incriminate that party or expose that party to any penalty or forfeiture.

[43] The ERA held that he could not find any grounds for issuing a summons for discovery of the evidential videotaped interviews.

[44] These matters having been determined as preliminary issues, the ERA noted that the substantive matter of whether Barnardos had unjustifiably dismissed Mr Aarts remained to be addressed.

[45] Mr Aarts has appealed the ERA's findings on these preliminary matters to the Employment Court.

[46] Mr Aarts appeal is currently expected to be heard in the week commencing 11 March 2013. The unjustifiable dismissal claim against Barnardos has been stayed pending the outcome of Mr Aarts appeal to the Employment Court.

Considerations

[47] It was clear in my preliminary discussions between the parties that Mr Aarts sees the High Court proceeding as providing an opportunity to view the videotaped interviews, whereas the Employment Court may not provide that opportunity.

[48] In submissions advanced by Mr Lee on behalf of Mr Aarts considerable weight was placed upon the importance of an opportunity to view those. There is no dispute by Mr Aarts that both the Employment Court and the High Court proceedings are based on just those same essential facts. Mr Aarts intends that a proper factual analysis cannot be made until the interviews are viewed. Indeed he contends he is confused about what it is he is supposed to have known about the circumstances which led to his dismissal when he is being prevented from accessing that information from which assumptions of knowledge are to be drawn. As to the claim that he knew or ought reasonably to have known of those statements made about him (which he says were false and misleading) he responds that he still does not know exactly what was said because the particulars of the interviews have not been disclosed.

[49] As I explained to Mr Aarts and his advocate, these are matters which are the subject of his appeal to the Employment Court. I commented that whilst the Employment Court was engaged with the matter, this Court would not consider advancing the High Court proceeding whilst both in substance and in particular the

essence of what is pleaded in the High Court is at present very much before the Employment Court.

[50] Mr Aarts claim for intentional interference with the economic relations relates to his contract of employment and his dismissal. It is the ERA that has sole and exclusive jurisdiction to determine whether or not his employment agreement has been breached. His personal grievance claim alleging unjustifiable dismissal has been stayed pending the outcome of the appeal to the Employment Court on those preliminary issues earlier referred to.

[51] The Employment Court claim was filed much earlier than the claim filed in the High Court. No statements of defence have been filed in the High Court because of the applications for stay and security for costs.

[52] The submissions of Ms Russell for the defendants provide a comprehensive review of facts in support of a submission that Mr Aarts defamation claim has been filed out of time. Those issues in the High Court involve a consideration of when Mr Aarts knew or ought reasonably to have known of those facts upon which his claim is based. In that respect those limitation considerations are the same or nearly so as those to be heard by the Employment Court in March next year.

[53] There is a public interest in avoiding the possibility of two Courts reaching inconsistent decisions on the same issue.

[54] It is inappropriate for resources to be used and costs to be incurred in an exercise where those same factors are a feature of a concurrent proceeding shortly to be heard in another Court.

[55] Ms Russell's submissions also helpfully review matters for consideration upon the security for costs application.

[56] For reasons I will shortly explain, I do not consider it necessary to make a decision upon that application at this time. Likewise and for similar reasons I consider it unnecessary to rule upon Mr Aarts leave application.

Discussion and comment

[57] It is inappropriate for the High Court proceeding to advance further until the Employment Court and the ERA matters have been determined.

[58] Mr Aarts perceives an injustice has occurred and is continuing. Had he been the subject of criminal charges in connection with his employment dismissal, it seems clear he would have been entitled to view those videotaped interviews. However he has not been charged. Whether there is a statutory prohibition preventing this is yet to be determined. It is not clear otherwise what social policy considerations could justify the position taken by the Police.

[59] Evidence provided before this Court by Mr Aarts tends to suggest that in the very beginning of all of these matters his actions were not considered by others to be inappropriate. Then in the process of dismissal his actions were described as inappropriate. Then in response to his request CYF sent Mr Aarts copies of case notes. One of those dated June 2006 noted:

> An intake was recorded following clear disclosures in regard to inappropriate behaviours towards.... by [Mr Aarts who] they saw over a year ago. A subsequent investigation recorded the substantial sexual abuse in regard to all three girls.

[60] Clearly there is a variation of views about how Mr Aarts reported actions were described. This is a matter of concern.

[61] My feeling is that disclosure of the interviews whether to Mr Aarts or to legal counsel on his behalf would likely bring a much swifter conclusion to all of these issues.

[62] In the circumstances the Court defers from ruling upon the security for costs application at least until matters before the Employment Court have concluded.

[63] Likewise, there appears no urgency to deal with Mr Aarts application for leave to file his defamation claim.

Result

[64] The defendants' application for stay is granted until conclusion of matters before the ERA and the Employment Court.

[65] The security for costs application and Mr Aarts leave application are likewise to be adjourned.

[66] Costs upon the defendants' stay application are reserved.

Other orders

[67] On the morning following my hearing of this matter there was delivered to my chambers a letter from the Deputy Chief Reporter of the Rotorua Daily Post. That letter advised of the Daily Posts intention to report on matters concerning my judgment.

[68] I responded immediately with a letter which noted:

> The matter to which you refer was subject to a chambers hearing in the High Court. At the time, members of the public and a newspaper reporter were informed the matter was subject to a closed hearing and those persons were asked to leave.
>
> The hearing was concerned with preliminary issues only and otherwise did not involve any determination of the substantive matters in dispute.
>
> My decision had not yet issued. In due course, when the decision does issue, consideration will be given to whether or not publication of whole or parts of the decision will be prohibited.
>
> Meanwhile, there is an order prohibiting reference to any of the papers filed in the High Court proceeding, or to any account by any of the parties with respect to what was said in yesterday's hearing.

[69] My concern was that in the course of my discussions with Mr Aarts and with counsel there had been mention of the names of families whose children were associated with the complaints against Mr Aarts and which were reportedly the subject of videotape interviews. Further, such names were mentioned on documents filed with the High Court.

[70] On the same morning I directed a Registry Case Officer to arrange a telephone conference that same day requiring the attendance of Ms Russell for the defendants and Mr Aarts in person. Mr Aarts was informed that Mr Lee was welcome to attend that conference.

[71] That conference proceeded at 2:15pm that day. Mr Aarts advised that Mr Lee would not be able to attend.

[72] I informed Ms Russell and Mr Lee of my concern having received the letter from the Rotorua Daily Post. I then asked Ms Russell if she was aware whether any officers of the defendants had contacted any person from the press in relation to an attendance at the hearing the previous day. Ms Russell advised she was not aware of any such contact being made.

[73] I then asked Mr Aarts if he was aware of any contact having been made with the Sunday Star Times whose reporter who had been in the back of the Court when I cleared the Court at the beginning of yesterday's hearing. Mr Aarts said he was aware that that reporter had been contacted on his behalf. He said however that he was not aware of any contact having been made with the Rotorua Daily Post.

[74] I then proceeded to advise Ms Russell and Mr Aarts of the contents of the letter I have written to the Rotorua Daily Post. I then informed Mr Aarts that there could be serious consequences for any person breaching or assisting a breach of an order of the Court prohibiting any publication at all of the events that had occurred the previous day. In his response Mr Aarts said that he would pass on my warning to Mr Lee. My response was that I thought that would be a very good idea.

[75] Further to the order made on 21 November 2012 there is to be an order prohibiting media publication of anything other than the result contained in this judgment. This matter was heard in chambers in a closed Court. Although there has been a review of much of the evidence provided to this Court and to the Employment Court, the matter before me was heard on a preliminary issue only. The Court's concern is for the identity of certain persons mentioned in connection with

statements reportedly made in connection with the counselling services provided by Mr Aarts.

Associate Judge Christiansen