**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2014-092-1026**
**[2016] NZHC 3005**

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| BETWEEN | MELISSA JEAN OPAI<br>Plaintiff |
| AND | LAURIE CULPAN<br>First Defendant |
| | ATTORNEY-GENERAL<br>(sued on behalf of the COMMISSIONER OF POLICE)<br>Second Defendant |

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| Hearing: | 31 October 2016 |
| Appearances: | N W Woods for Plaintiff<br>No appearance for First Defendant (not required to appear)<br>A Todd and N Ridder for Second Defendant |
| Judgment: | 13 December 2016 |

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**JUDGMENT (No.2) OF ASSOCIATE JUDGE R M BELL**
**[Plaintiff's discovery application against second defendant]**

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*This judgment was delivered by me on **13 December 2016** at **3:00pm***
*pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

*Solicitors*:
Rice Craig (N W Woods/P Amaranathan), Papakura, for Plaintiff
Thomas Dewar Sziranyi Letts (D G Dewar), Wellington, for First Defendant
Crown Law Office (A Todd) Wellington, for Second Defendant

*Copy for*:
Hugh Rennie QC, Wellington, for First Defendant
Matthew F McClelland QC, Wellington, for Second Defendant
New Zealand Police (N Ridder), Wellington, for Commissioner of Police

[1] This decision gives rulings on Ms Opai's discovery application against the second defendant. It is unnecessary to set out the background to this workplace defamation proceeding because that is covered in my decision also given today on applications directed at the parties' pleadings.[1] Ms Opai's discovery application was extensive. Counsel conferred ahead of the hearing and reached agreement on many issues. In my minute of 31 October 2016 I gave directions by consent as to discovery. That left two matters:

[a] whether a report as to an investigation into the conduct of another watch-house officer should be disclosed in unredacted form; and

[b] the extent of search terms to be applied to Senior Sergeant Culpan's vault emails.

**The investigation report**

[2] Ms Opai made a complaint about another watch-house officer. Another staff member at the Counties Manukau District Headquarters also complained about the same watch-house officer. Ms Watson, an HR advisor, investigated the complaints and made a report dated 18 June 2013. The second defendant has disclosed the report, but has covered up large parts of it. The Attrorney-General's grounds for covering up parts of the document are that they are not relevant to the matters in issue in this proceeding and it is necessary to protect the privacy of other staff referred to in the report.

[3] The report runs for 27 pages. The parts that have not been covered up generally refer to Ms Opai having lodged a complaint, describe the matters complained of and recommend that the watch-house officer's breach of the code of conduct be treated as mid-level misconduct. No information as to the first complaint or the complainant is disclosed. Similarly, information as to the conduct of the investigation into Ms Opai's complaint and Ms Watson's findings is not disclosed.

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1 *Opai v Culpan and Attorney-General (No. 1)* [2016] NZHC 3004.

[4] The fact that Ms Opai made a complaint about another watch-house officer has an indirect bearing on two publications in this proceeding. In the first version of the performance appraisal for the year 1 July 2012-30 June 2013, there are references to Ms Opai having an alleged misdirected sense of responsibility which may be viewed as malevolence or ill-will, to her circumventing her supervisor and taking issues directly to senior management. In my decision on the pleadings, I have struck out Ms Opai's claim in respect of the performance appraisal as *Jameel* disproportionate.[2] Accordingly she cannot rely on it to justify disclosure of Ms Watson's report.

[5] The other publication is the 258 report of 5 November 2013. While I rejected one of the pleaded meanings, the claim is arguable. The 258 report by Mr Culpan refers to Ms Opai having made a complaint in 2013 about another staff member (not the watch-house officer who was the subject of Ms Watson's report). For Ms Opai, Ms Watson's report may be relevant as showing that when Ms Opai has made a complaint about a staff member, it has been well-founded.

[6] The second defendant does not contest that relevance. Instead, it says that those parts of the investigation report that have been disclosed are adequate to serve that purpose. It is unwilling to disclose the balance of the report because the investigation of the first complaint is not relevant to this proceeding and because other parts disclose the identity of other staff members, whose privacy should be protected.

[7] The second defendant provided me with a complete copy of the investigation report. Having read it, I am satisfied that there are additional parts that should be disclosed. Those parts go primarily to the fact of Ms Opai's complaint and the outcome of the investigation. On that basis, the following additional paragraphs are to be disclosed: paragraphs 116, 153, 163 and 168. Paragraphs 116 and 168 have the name of the other complainant. That should remain covered up. That aside, all these paragraphs may be disclosed.

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2 *Jameel v Dow Jones* [2005] EWCA Civ 75, [2005] QB 946.

[8] It is unnecessary for Ms Opai's case that the balance of the report be disclosed. It is sufficient for her to know that both complaints were investigated by a human resources adviser, her investigation included interviews with other staff members and with the watch-house officer and both complaints were upheld.

**Search terms to be applied to Snr Sgt Culpan's vault emails**

[9] The parties agree that there should be a search of Snr Sgt Culpan's vault emails from 2013 to 2015. They disagree on the search terms. The second defendant proposes "Mel", "Melissa" and "Opai". Ms Opai accepts those terms but also proposes "QID",[3] "review team", "mid-year review", "brief", and "briefing paper", "categorisation" and "time".

[10] As the Attorney-General is being sued for vicarious liability for publications made by Mr Culpan, emails he made within the Police dealing with the subject matter of his publications are relevant. Some emails of Mr Culpan have already been disclosed. Those are the ones in his Microsoft Outlook account which have not been deleted. Ms Opai criticises that discovery because the search terms used are inadequate: "OC Station Manukau" and "OC Station Manukau 2013, 14". She objects that the searches do not cover his inbox, sent mail, junk mail, deleted mail and misfiled emails. The Attorney-General's rejoinder is that his inbox was also searched using the terms "personal grievance", "employment relationship problem", "theft of time", "PG notification" and "mid-year review". That led to a limited number of emails being found, viewed and disclosed. That did not include documents in the vault storage system.

[11] The Police have two vault storage systems. The enterprise vault contains emails after December 2015 and the pre-emptive vault which contains emails before January 2015. For emails between January 2015 and December 2015, both the pre-emptive and enterprise vaults need to be checked. A search of the vault is likely to produce emails deleted by Mr Culpan. The issue here is the width of the search.

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3 QID is an acronym the Police use for staff identification.

[12] As to discovery to date, the Police have searched outlook accounts of other officers who have had to deal with Ms Opai: Superintendent Tims, Inspector Brady, Inspector Brand, Assistant Commissioner Boreham, Inspector Wilkie, Superintendent Emery, Inspector Shearer, Ms Vito, Superintendent Searle, Superintendent Schwalger and a number of Police legal advisors. The search terms used were generally "Opai", "restructure", "personal grievance", "briefing paper", and "review + public counter".

[13] The search now proposed will accordingly cover any documents that may have been missed in the searches of other outlook accounts.

[14] Rule 8.14 of the High Court Rules 2016 says:

> **8.14 Extent of search**
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> (1) A party must make a reasonable search for documents within the scope of the discovery order.
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> (2) What amounts to a reasonable search depends on the circumstances, including the following factors:
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> (a) the nature and complexity of the proceeding; and
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> (b) the number of documents involved; and
>
> (c) the ease and cost of retrieving a document; and
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> (d) the significance of any document likely to be found; and
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> (e) the need for discovery to be proportionate to the subject matter of the proceeding.

As Associate Judge Doogue noted in *NSK Ltd v General Equipment Co Ltd*, there is no absolute obligation to seek out and discover every arguable document.[4]

[15] The Attorney-General says that the Police IT staff have searched Mr Culpan's preemptive and enterprise vaults to assess how many emails would result, if Ms Opal's search terms were used. Approximately 15,700 documents would be generated with approximately 11,500 in the preemptive vault (before

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4 *NSK Ltd v General Equipment Co Ltd* [2015] NZHC 1979.

January 2015). Retrieving a single email from the preemptive vault by IT staff would take each person three to four minutes because of the need to obtain access to the user's mailbox, find the email based on the search term, open the email, record its identity, open an auditor tool and enter the message identity manually and restore it again manually. The Police estimate that it would take one staff member working full time 575 hours (14 weeks) to retrieve 11,500 documents from the preemptive vault. It would, in turn, require another six weeks to review all 15,700 documents. The Police say on the other hand that if the search were restricted to its preferred terms ("Mel", "Melissa" and "Opai"), that will generate approximately 1,000 emails from both the preemptive and enterprise vaults.

[16] The reason for the second defendant proposing the search terms, "Mel", "Melissa" and "Opai" is that they are likely to pick up emails dealing with Ms Opai and then be reviewed for relevance to the issues in this proceeding. In response to my question, Ms Todd also accepted that Ms Opai's QID was also likely to pick up emails dealing with her. She did not object to that addition.

[17] For Ms Opai, Mr Woods refined matters to require searches for "review team", "mid-year review", "brief", "briefing paper" and "time" only" for 2013. So far as the first four terms were concerned, he explained that Ms Opai's case was that there was no genuine review of watch-house functions in 2013, and that the only review took place in 2014.

[18] The Attorney-General's case will be that qualified privilege applies to Mr Culpan's publications. The briefing paper was said to be for the purpose of a review of the watch-house of Counties Manukau District HQ. Ms Opai's case will be that there was not in fact any review and there was therefore no occasion of qualified privilege. The Police response at trial will be that there were two separate reviews, one in 2013 confined to Counties Manukau, and another in 2014 which was nation-wide. In light of that, it is appropriate for Ms Opai to press for documents relevant to any review in 2013. But the matter will, to a large extent, be self-regulating. The Attorney-General will be concerned to search for and disclose any documents evidencing a review in 2013. It should not require an order from the court to check for those documents. If the Police do not produce any documents

evidencing the 2013 review, Ms Opai will be able to rely on the absence disclosure as supporting her case that there never was a review in 2013. Accordingly I see no need to direct the second defendant specifically to search for documents relating to any review in 2013.

[19] "Categorisation" refers to classifying reports for further action, such as 258 reports. Ms Opai seeks "categorisation" as a search term to show how the 258 report form of 5 November 2013 was dealt with. I regard it as improbable that anyone would have categorised the 258 report relating to Ms Opai without identifying her by name or QID. In other words, it is only necessary to use search terms which identify her. Requiring an additional search under "categorisations" that does not specifically identify Ms Opai is likely to throw up emails which have no reference to her.

[20] The word "time" is in frequent use. The danger of using it is that it will bring up many emails which have no relevance to the issues in this case. It should not be used.

[21] Accordingly I am satisfied that the search of Mr Culpan's vault emails can be kept in reasonable scope if the search terms are "Mel", "Melissa", "Opai" and her QID. Allowing other search terms will impose an unnecessary and disproportionate burden on the defendant. It would be inefficient to require the retrieval of a large number of documents, a lengthy exercise, when there is little realistic prospect of any of those documents not having been discovered already or of having any relevance to the issues in this case.

[22] Accordingly the search terms to be applied are "Mel", "Melissa", "Opai" and Ms Opai's QID.

[23] I anticipate that the further discovery by the second defendant, including that ordered in my minute of 31 October 2016 will be completed by the end of February 2017. That is with a view to having all interlocutory matters completed in time for the case management conference to take place after 10 March 2017.[5] If counsel

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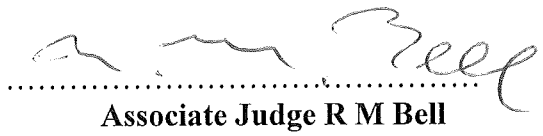
5 *Opai v Culpan and Attorney-General (No.1)* [2016] NZHC 3004 at [129](o).

consider that that time for completing discovery should be adjusted, I reserve leave to ask for a telephone conference to review this direction.

[24] I invite the parties to confer on costs. If they cannot agree, memoranda may be filed and I shall decide costs on the papers. The party seeking costs is to file and serve their memorandum by 20 January 2017 and the party opposing is to file and serve its memorandum by 27 January 2017.



**Associate Judge R M Bell**