

Neutral Citation No: [2007] NIQB 106

Ref: **MORF5892**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **10/07/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

SAMUEL REID

Plaintiff;

-and-

NEWTOWNABBEY BOROUGH COUNCIL

Defendant.

Ruling on application for leave to issue a Khanna subpoena

MORGAN J

[1] The plaintiff has been employed as the head of environmental services by the defendant since 1994. It appears that since 1995 the plaintiff has been in dispute with a senior environmental officer working for the defendant who eventually resigned on 16 June 2003. The plaintiff was granted special leave by the defendant on 29 October 2002 and on 16 May 2003 disciplinary proceedings were commenced against him by its chief executive. On 30 September 2003 the plaintiff was suspended. On 22 December 2003 the defendant rejected an application by the plaintiff to investigate a complaint by him against the chief executive. In these proceedings the plaintiff seeks a mandatory injunction requiring the defendant to investigate that complaint, an injunction restraining the defendant from proceeding with the disciplinary procedure commenced on 16 May 2003 and damages for loss and damage as a result of negligence and breach of contract on the part of the defendant.

[2] Of relevance to this claim are a number of documents which were prepared in 2002 and 2003. The first of these was a stress audit report concerning the environmental health department produced by Mr RJ Pryce of RJP management consultancy in December 2002. The terms of reference of

that report were to conduct an audit of conditions in the environmental health department which are causing or have the potential to cause unreasonable stress to staff and make recommendations for action and a way forward. The copy of the report exhibited by the defendant in the proceedings contains a questionnaire which apparently was used as a framework for discussion with staff. The report is critical of the style of management practised at senior level and concludes that because of the relationship which developed between the plaintiff and the senior environmental officer they should not be re-employed in their present positions. It was asserted that there had been an improvement in relationships within the department in the absence of the plaintiff and the senior officer concerned and it was recommended that each should not be re-introduced to their roles as this would damage the improvement in relationships. The plaintiff questions the authenticity of this report. He relies in particular on a letter of 5 February 2004 from Mr Pryce to the chief executive disclosed under the Freedom of Information Act in which Mr Pryce indicates that the content of the report was entirely agreed with him at each stage. The plaintiff is concerned that this discloses that the report was not the independent work of Mr Pryce.

[3] The second relevant report was an investigation into allegations of bullying and harassment made by the senior officer against the plaintiff. The report was submitted on 26 March 2003 by Dr Olive Lundy, an independent person. This was an extensive report which concluded firstly that there was no evidence found to sustain the senior officer's complaint against the plaintiff of bullying or harassment. The report further concluded that the plaintiff's action in introducing the disciplinary process into the performance review process was one of misconduct coming within the terms of the grievance procedure and it recommended that the plaintiff be issued with a written warning. The plaintiff contends that this report in fact exonerates him.

[4] The third report is a statistical audit dated 6 May 2003 prepared by Mr Arthur Morgan of Northern Group Systems. That report examined the period 1 October 2001 to 31 March 2002 and 1 October 2002 until 31 March 2003. The first period was one during which the plaintiff was in post as chief executive and the second was a period for most of which the plaintiff was absent. The report indicated that there had been a marked improvement in the second period over the first period. The plaintiff points out, however, that the initial draft of the report from Mr Morgan advised that it was not appropriate to make comparisons between the two periods because of the different bases against which each period was judged. On the basis of correspondence disclosed to him he contends that this is evidence of manipulation of this report by the chief executive of the plaintiff in order to manufacture a disciplinary claim against him.

[5] The final document to which I need to refer in connection with this application is a memorandum for the attention of the chief executive of the defendant dated 26 June 2003 marked "Strictly Private and Confidential". It is signed by or on behalf of 18 members of staff within the environmental health department and criticises the defendant's management style as autocratic and divisive. The memorandum further asserts that should the plaintiff return it would have a seriously detrimental effect on the improvements in both performance and morale which had been noted during his absence.

[6] The plaintiff seeks leave to issue a Khanna subpoena directed to Mr Pryce to require him to produce:

- (1) original stress audit report
- (2) all drafts of the said report
- (3) all notes of interviews with staff or meetings with other council members relating to the report
- (4) all notes of all meetings with the chief executive and environmental staff between 16 May 2003 and 30 July 2003 concerning the report of Mr Pryce or issues pertaining thereto
- (5) copy e-mails relating to the report
- (6) telephone attendance notes relating to the report
- (7) any documentation not already specified relating to the preparation of the stress audit report.

[7] The plaintiff wants disclosure in particular of the comments made by individual members of staff to Mr Pryce in the course of the preparation of his report. In an affidavit sworn by the Director of Central Services he described how the employees were advised that any comments that they made to Mr Pryce would be treated on a confidential basis and that the anonymity of the employee would be respected. Indeed at paragraph 18 of his replying affidavit the plaintiff himself accepts that the interviews with staff conducted by Mr Pryce were properly treated as confidential so that staff would not be inhibited from expressing their honest opinions. The Director also refers to a circular sent to the staff in the environmental health department by the plaintiff in September 2003 which contains the following paragraph:

"The sole issue upon which any disciplinary action will be based, is the opposition and apprehension expressed by Environmental Health staff to Mr Dunn regarding my return to work (in the event of legal proceedings the implications of this for individual members of staff should be obvious to experienced enforcement officers)"

He also refers to a telephone conversation between the plaintiff and another senior officer on 10 September 2003 in which the Director contends that the

plaintiff made clear than in the event of his dismissal he would initiate legal proceedings against members of staff whom he believed had spoken out against him. The defendant accordingly contends that the disclosure of individual comments by individual employees would critically undermine the ability of the defendant to engage in future in confidential surveys in respect of matters of employment and health and safety at work.

[8] The plaintiff denies that it was his intention to intimidate or threaten staff and contends that the defendant has misunderstood the thrust of what he was saying in the paragraph quoted above. He says that he intended to caution the staff that they would be required to give evidence and substantiate any concerns expressed by them if the issues between the plaintiff and the defendant could not be resolved informally.

[9] In his statement of claim the plaintiff essentially makes five points. The first is that the chief executive failed to manage the dispute between the plaintiff and the senior environmental officer properly. This appears to be a historical alleged failure which does not directly impinge on the matters in issue in this action. The second complaint is that the plaintiff was not given details of the charges against him as a result of the disciplinary procedure initiated in May 2003. The third is that the chief executive pursued disciplinary action against the plaintiff on the basis of assertions by staff about the plaintiff's behaviour and the manner in which he engaged with the senior environmental officer and that those assertions were so vague and unspecific as to be incapable of amounting to breaches of discipline. The fourth general point is related to alleged specific bias on the part of the chief executive including allegations that he failed to disclose all relevant information, sought to construct a case against the plaintiff and abused the power of suspension. The fifth complaint relates to the failure of the defendant to act on the plaintiff's complaint against the chief executive on 22 December 2003.

[10] By virtue of sections 31 and 32 of the Administration of Justice Act 1970 the court can order discovery from a non-party of documents either before commencement of an action or during its continuance where a claim in respect of personal injuries to a person or in respect of a person's death is being made. In England and Wales further statutory provisions and Rules extend the power so that it is available in all actions where the disclosure sought is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs. In this jurisdiction a party in the position of the plaintiff must rely on the mechanism devised by the court in *Khanna v Lovell White Durant* [1994] 4 All ER 269. In that case the Vice-Chancellor held that the court has a wide measure of control over the manner in which a trial is to be conducted and he approved the practice of calling for the production of documents specified in a subpoena on a day

prior to the date of the intended trial so as to promote earlier disclosure of evidential material in order that the parties may know the strengths and weaknesses of each other's cases as soon as possible.

[11] There are certain differences between this procedure and a third party discovery procedure. First although this procedure can be used where the action has been set down for trial its use prior to setting down requires justification for the issue of the subpoena at that stage. Consequently the opportunity to obtain the information may be delayed. Secondly documents produced on foot of a discovery order are subject to the implied undertaking that they be used only in connection with the existing proceedings. No such undertaking is implied in relation to material produced by a witness. As a matter of discretion I consider that the court should be given an express undertaking or an explanation as to why no such undertaking is proffered so that the witness may appreciate the implications of the production of the information and take any proper steps in connection with its disclosure. Thirdly I gratefully adopt the suggestion in the 13th report of the Law Reform Advisory Committee for Northern Ireland that the grounding affidavit for a Khanna subpoena should contain the following:

- (a) specify the nature of the proceedings and identify the relevant issues raised therein which justify the making of the application;
- (b) state the stage which the proceedings have reached;
- (c) clearly identify the third party concerned;
- (d) identify clearly and precisely the documents or classes of documents which the moving party is seeking to have produced on foot of the subpoena;
- (e) specify why it is necessary or appropriate to require the production of the documents in question in advance of the actual trial in the proceedings;
- (f) specify the suggested return date for the subpoena;
- (g) state whether the documents have been sought from the third party on an informal basis and if not why it is considered necessary to apply for a subpoena to require the production of the documents before such an informal request is made;
- (h) exhibit any correspondence referred to in paragraph (g);
- (i) state whether the moving party is willing to undertake that the documents produced on foot of the subpoena will not be used for any purpose other than for the purpose of the pending proceedings.

Fourthly the holder of the documents is entitled to raise any proper objection to their disclosure at the return of the subpoena. It may be necessary to so advise the holder.

[12] In light of the correspondence showing the amendment to the report prepared by Mr Morgan I consider that the plaintiff has made out a case in relation to the disclosure at this stage of the original stress audit report and all drafts of the said report together with any notes, e-mails, telephone attendances or other documents relating to meetings between Mr Pryce and the chief executive in respect of the preparation of the stress audit report. The application did not specify a suggested return date or deal with the question of an undertaking.

[13] Issues in relation to the disclosure of confidential information generally require careful consideration by the court. It is clear that confidentiality alone cannot be a basis for objection to the discovery of otherwise discoverable documentation. Relevance alone, however, will not lead to inspection or production without an examination of the necessity for disclosure and a consideration of the mechanisms that may be available to properly respect confidentiality (see *Science Research Council v Nasse* [1980] AC 1028). I am satisfied that similar principles should underpin the approach to the exercise of discretion by the court in the issue of a Khanna subpoena. Having regard to the allegations in the statement of claim set out in general form at paragraph 9 above I do not consider that the plaintiff has demonstrated that inspection or disclosure of the individual statements of employees is necessary at this stage of the proceedings. The plaintiff is aware from the content of the report of Mr Pryce and the memorandum of 26 June 2003 of the material which was before the defendant and in particular its chief executive. The thrust of the plaintiff's case is that the chief executive improperly used and manipulated information made available to him for the purpose of engineering the plaintiff's removal from his post. The criticism of the chief executive comprises among other things his reliance on the material within the report without investigation. The validity of that allegation does not depend on the content of the statements made to Mr Pryce and at this stage it is not at all clear to me that any of the makers of the statements will be called as witnesses in this trial.

[14] I will relist this case on 7 September 2007 to deal with the undertaking and a return date. The applicant will have leave to file an affidavit on the undertaking within 28 days and the defendant has a further 14 days to respond. If either party wants an extension to either of those times they should apply in writing to the office in advance.