

[3] By a statement in reply filed on 22 December 2006, the Board resisted those claims and indicated that at all times it had complied with the terms of the LPS agreement and its duty of good faith.

[4] By notice of direction dated 15 January 2007, I directed the parties to mediation and that mediation was scheduled to take place in Christchurch on 3 April. APEX alleges that the Board cancelled the mediation at the last minute and then refused to compensate APEX for its unavoidable costs with respect to the mediation. Given the Board's stance in this matter, APEX indicated its unwillingness to mediate further and sought an urgent investigation meeting in the Authority.

[5] A teleconference was held with the parties on 30 April 2007 at which I declined to order further mediation but encouraged the parties to undertake mediation themselves. The matter was set down for an investigation meeting on 31 July and 1 August 2007.

[6] In the meantime, the parties had had an exchange of correspondence through their representatives concerning the issue of discovery. In the context of expressing its views about the cancelled mediation, the Board reminded APEX of its 19 December request for discovery by its letter of 5 April 2007 and in a responding letter of 12 April 2007 from APEX counsel, APEX set out in detail its discovery requirements. No doubt both parties were by then conscious of the upcoming investigation meeting and the need for the documentary trail to be provided both to each other and to the Authority. In the teleconference with the parties on 30 April 2007, the issue of the provision of documents was discussed and on the basis of an apparent understanding between the representatives that the matter could be resolved by agreement, I declined to make orders in respect of the provision of documents.

[7] By letter dated 8 June 2007, the Board, rather than responding to APEX's request for information, indicated it was not in a position to respond to APEX's request for discovery of documentation until APEX had responded to its request for discovery.

[8] That response provoked a further letter from APEX to the Board's representative dated 18 June 2007 in which APEX reiterated its demand for discovery of the Board's documents. In a letter to the Authority's support officer dated 26 June 2007, APEX's counsel indicated that, without discovery of the Board documents,

APEX was not even in a position to complete the preparation of its evidence and so meet the timetable which I had already set for the exchange of briefs of evidence.

[9] By letter dated 26 June 2007, the Board's representative wrote to APEX's counsel objecting to his letter of 18 June 2007 and claiming that the Board could take no further steps until APEX produced *any documents that (it) intended to rely on* and that *such documents are supposed to be produced when filing your statement of problem*.

[10] I convened a further teleconference with the parties' representatives on 24 July 2007 at which the investigation meeting dates for 31 July and 1 August were vacated in favour of dates on 25 and 26 October 2007. At that teleconference, counsel for APEX confirmed that APEX had disclosed all relevant documents to the Board, that APEX was to file an amended statement of problem and provide to the Board a draft memorandum concerning the operation of the LPS agreement to enable the Board's advocate to take instructions from the Board in respect of it. I then timetabled submissions on the discovery issue.

[11] Further documents were then filed by the parties' representatives in accordance with the directions that I had made and on 19 September 2007 I convened a further teleconference with the parties, the burden of which was that the parties' representatives agreed that I should now consider the submissions filed on the disputed discovery question and issue an interim determination on that matter. The parties' representatives agreed they did not wish to be heard on the discover matter and were happy to rest on the submissions they filed.

Disclosure issues

[12] APEX has requested disclosure by the Board of four categories of document. For the sake of completeness, I set these categories out in full now:

- (a) Medical notes of the 12 patients referred to in the amended statement of problem;
- (b) Communications by, or between, all, or any, of the 12 patients and any member of the hospital's staff regarding, in each case, the patient's condition, prognosis, qualification for life preserving service, and the request to APEX for LPS cover;

- (c) Board communications, both internally and with any third party, regarding:
 - (i) The LPS agreement, its interpretation and application;
 - (ii) APEX's challenge to the request for LPS cover and the Board's response to that challenge;
- (d) Communications concerning APEX's allegation that, in breach of its duty of good faith, the Board failed to use its best endeavours to resolve, in a constructive manner, APEX's complaints.

[13] The Board objects to disclosure of all four categories of document but, as APEX makes clear in its submission, the Board's submissions appear to only address the first two categories of document.

[14] In essence, the Board's position is that disclosure should not be ordered because:

- (a) The documents are not relevant to any determination that the Authority might make;
- (b) The documents are not relevant to the breaches alleged by APEX;
- (c) The LPS agreement does not require those documents to be provided; and
- (d) The disclosure request amounts to a *fishing expedition*.

[15] In summary, then, the Board says that the documents sought by APEX are not relevant and because the documents are subject to patient confidentiality, extra care must be taken in releasing them to third parties. Further and finally, the Board says that APEX is not entitled to the documents under the LPS agreement and it is using the discovery process to effectively mount a claim.

[16] Both parties appear to acknowledge that, while access to the right of disclosure is a discretionary remedy, the business of conducting any litigation, even in an inquisitorial forum such as the Employment Relations Authority, may, in terms of natural justice, require discovery of the other party's documents.

[17] APEX submits that the general principle is that access to one's opponent's documents is, to quote the Employment Court Regulations 2000, Regulation 36, *usually necessary for the fair and effective resolution of differences between parties to employment relationships*. Generally speaking then, a party is entitled to its opponent's documents unless there are special circumstances, or the documents are not relevant to the matters in contention. I accept that broad proposition.

[18] Whether a document is relevant or not depends on whether it relates to the dispute between the parties. A reference to Regulation 38(1) of the Employment Court Regulations 2000 supports this general proposition.

[19] Looking at the matter in the round, it is difficult to see how APEX can satisfy itself that documents are or are not relevant, without examining those documents. In essence, APEX says that the Board did not comply with the LPS agreement and the Board says it did. The Board clearly has documents which might assist in getting to the nub of that issue but without the Board being prepared to make those documents available, matters cannot be taken any further.

[20] As APEX says, the threshold issue which underpins the very cornerstone of APEX's claim is whether or not the condition of the 12 patients in contention falls within the terms of the LPS agreement. The patients' notes must be relevant to that inquiry. I accept APEX's submission that not only are the patient notes relevant, but they may even be *the best evidence* of the patients' medical conditions.

[21] I am not moved by the Board's contention that the source of the request to APEX is determinative; on the basis that the request was made by the radiologist who did not have access to the patient's notes, the Board says there can be no entitlement for APEX to have the same notes. That whole issue is in dispute and the Authority cannot determine who made the requests to APEX without hearing evidence. Until that evidence is heard, on the face of it, the patient notes are *prima facie* evidence of the condition of those patients at the relevant time.

[22] I am also not attracted by the Board's contention that APEX has had all the information it is entitled to pursuant to the LPS agreement. I accept that the LPS agreement provides a process by which APEX gets information about requests made for access to emergency services under the LPS agreement, after the event. The agreement cannot, in my judgment, be read so as to mean that in the present

circumstances, where APEX has filed a statement of problem in the Authority, it cannot apply for discovery of documents relevant to that proceeding because of the effect of that provision in the agreement.

[23] Finally, I do not accept that APEX is mounting a *fishing expedition* in this particular proceeding. In my opinion, APEX is entitled to the discovery of the information it seeks in order to appropriately progress the claim it has already filed.

Determination

[24] I direct that the Board is to discover to APEX the documents referred to in each and every one of the categories of documents referred to at the beginning of this determination.

[25] The parties' representatives are to confer urgently and establish realistically how long the Board will take to produce to APEX the information directed to be provided.

[26] In the event it is not possible for that information to be made available to APEX sufficiently early so that APEX can complete the preparation of evidence for the substantive hearing of this matter in the Authority, then the Authority will entertain a further application for adjournment.

Costs

[27] Costs are reserved.

James Crichton
Member of the Employment Relations Authority