

Decision No. 11 /02

Reference No. HRRT 17/02

BETWEEN JEAN-PIERRE POINTU

Plaintiff

AND EMPLOYRITE LIMITED

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

R D C Hindle	Chairperson
Ms P McDonald	Member
Mr G Cook	Member

HEARING

8 August and 16 September 2002 (Auckland).

APPEARANCES

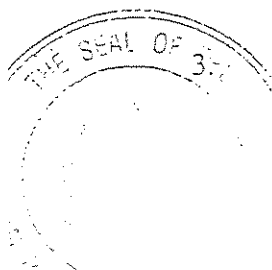
Mr J Robertson and Ms M Smith for plaintiff.
Mr D Birchall (managing director of defendant) for defendant on 8 August 2002;
Mr D McLellan for defendant on 16 September 2002.
Ms M Donovan & Ms A Dowgray for Privacy Commissioner.

DECISION

Background

1. On 3 February 2001 Mr Pointu obtained a position as a sales consultant at the Yves Saint Laurent counter at Smith & Caughey's retail shop in Queen Street, Auckland. Initially he was employed by Yves Saint Laurent.
2. On 22 February 2001 Smith & Caughey offered him a position managing the Yves Saint Laurent counter. That involved terminating his employment with Yves Saint Laurent and taking up employment with Smith & Caughey. There was a formal job application process.

As part of the process Mr Pointu was asked to sign a declaration. He did so. The declaration was also signed by the Human Resources Manager for Smith & Caughey in such a way as to confirm that she had reviewed Mr Pointu's



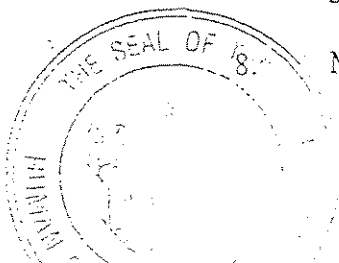
application. She authorised it to be screened by Employrite. The declaration included the following:

"(2) I [i.e., Mr Pointu] irrevocably authorise you [i.e., Smith & Caughey] or your agent [for present purposes meaning Employrite] to contact the named referees of all my previous/ current employers, including any employers I have not nominated on this application. ...

"(8) By completing this application you [i.e., Mr Pointu] agree to your application being reviewed by Employrite. You are entitled to seek access to the material held by Employrite about you. If you do not agree with the information held about you by Employrite you may ask that it is corrected. Employrite can be contacted at [the address details are given]."

4. It seems that Mr Pointu took up employment with Smith & Caughey before the screening process was completed. However on 1 March 2001 he received a letter from Smith & Caughey stating that Employrite had returned a report of "not recommended". The letter went on to say "*as a result of that report we will not be offering you employment with Smith & Caugheys*". Mr Pointu said that he was dismissed from Smith & Caughey on the same day. By then he had left the position with Yves Saint Laurent. He was left without a job of any kind.
5. Mr Pointu immediately took steps to find out what it was that had led to the 'not recommended' report from Employrite. He contacted Mr Birchall, the managing director of Employrite, on 2 March 2001. Mr Birchall wrote to him on 5 March 2001, enclosing a copy of his application which Employrite had "resulted" as not recommended. It was clear that Employrite had been in contact with someone (referred to in this decision as 'the referee') who had given information about Mr Pointu, and that it was on the basis of that information that Employrite had made its 'not recommended' report. But Employrite would not disclose the information to Mr Pointu. Employrite said that because the information had been given to it in confidence it was unable to disclose it because of section 29 (1) (b) of the Privacy Act 1993 ('the Act').
6. Mr Pointu referred the matter to the office of the Privacy Commissioner on 13 March 2001. Mr Pointu also made a claim against Smith & Caughey for unjustified dismissal. That was settled in May 2001. We do not know what the terms of the settlement were, but they were not considered by any of the parties at the hearing in the Tribunal to be relevant to the matter before us.
7. Following an investigation, on 12 November 2001 the Privacy Commissioner informed Mr Pointu that in his final opinion Employrite's refusal to disclose the information did not amount to an interference with Mr Pointu's privacy because there were good grounds for withholding the information under section 29(1)(b) and (3) of the Act.

Mr Pointu filed this claim in the Tribunal on 21 May 2002.



9. In the meantime, Mr Pointu had been trying to get a job. He gave evidence of a number of instances where he felt that his initiatives were unsuccessful because he had to disclose that he had been "not recommended" for employment at Smith & Caughey. When asked by the prospective employer why, he was unable to say. In evidence Mr Pointu described the considerable stress that he has been under as a result of the position that he finds himself in.
10. It is impossible not to have sympathy for Mr Pointu. It seems to him that he has been the subject of an accusation, but he does not know what the accusation is and he does not even know who his accuser is. He feels victimised and powerless to deal with the situation that he finds himself in.
11. At the hearing on 8 August 2002 Mr Birchall explained the procedure Employrite adopts upon receipt of an application that is to be screened.
12. Employrite has been in the business of screening applicants such as Mr Pointu for around sixteen years. We gather that in that time it has processed over 100,000 applications. Different enquiries are made depending on what position is being applied for. If, for example, the job in question involves driving then there may well be enquiries as to the applicant's driving record. Similarly, a job involving management of cash will probably generate an enquiry into any previous convictions for dishonesty. Different investigators may make different enquiries in respect of any one application.
13. Mr Birchall told us the names of three investigators at Employrite who had been involved in screening Mr Pointu's application. One of the investigators was a Mr Lou Bennett, who was identified as the investigator who spoke to the referee. We will return to the evidence that Mr Bennett gave in due course, but before doing so it is appropriate to set out the circumstances in which he was allowed to give evidence at all.

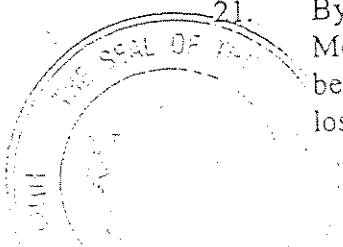
The Conduct of the Proceeding

14. As we have noted, the claim was filed on 21 May 2002. At the time Mr Pointu did not have a lawyer. In his Notice of Intention to Bring Proceedings he named Mr Birchall as the defendant. Mr Birchall filed a reply. There was then a telephone conference on 12 July 2002. Mr Birchall participated in the conference from his base in Melbourne, Australia. Although not recorded in the minute of that conference, Mr Pointu said that Mr Birchall stated during the conference that the then proposed hearing date of 8 August 2002 would not make any difference to him "...because he did not personally deal with the referee and that a colleague of his did, and that it would be better to hear it from the horse's mouth."
15. An important topic that was discussed during the 12 July 2002 conference was what should be done about the notes of what the referee had said. Mr Pointu realistically accepted that he could not expect to see the notes before the Tribunal had decided the case. On the other hand the Chairperson of the Tribunal was anxious to avoid a situation in which a hearing might take place with Mr Pointu being the only person present who did not know what had been said about him. Mr Birchall was therefore asked to send the information



in a sealed envelope to the Secretary of the Tribunal, to be held by the Secretary until such time as the Chairperson considered it appropriate that the envelope be opened.

16. Directions for the exchange of evidence were also made, including a direction requiring Mr Birchall to file any statement or statements of evidence that he wished to present at the hearing, such statement or statements to be filed and served by 26 July 2002.
17. On 15 July 2002 Mr Birchall sent the note of the information at issue to the Secretary of the Tribunal as he had been asked to do. His covering letter stated *'In regards the hearing set down for the 8th August I confirm that our company's Chief Investigator Mr Lou Bennett will represent the company at the hearing as I will be back in Australia'*. This letter does not appear to have been copied to either Mr Pointu or the Privacy Commissioner. In fact it was not until sometime later, after an issue about what had been said at the telephone conference emerged (and after the Tribunal's minute dated 26 August was circulated), that the Tribunal became aware of the letter.
18. As events transpired, Mr Birchall did not file any evidence before the hearing on 8 August 2002, but he did appear in person to represent himself and Employrite. Mr Bennett was not present. That gave rise to some difficulties, because although Mr Birchall was permitted to give evidence he had no first hand knowledge of what had been discussed as between Mr Bennett and the referee. For reasons set out in a minute issued by the Tribunal dated 26 August 2002 the defendant (which was by then accepted to be Employrite rather than Mr Birchall personally) was given leave to call Mr Bennett. When the subject was discussed with the parties at the close of the hearing on 8 August 2002 neither Mr Robertson (who appeared for Mr Pointu) nor the Privacy Commissioner objected to the proposal that Employrite be given an opportunity to call Mr Bennett.
19. The hearing had by then taken all of the day on 8 August 2002. For that reason, and because Mr Bennett was not present in any event, it was necessary to adjourn the hearing to a date to be fixed by the Secretary. In due course the date for the remainder of the hearing was fixed as 16 September 2002.
20. In the meantime Employrite was directed to provide Mr Pointu with a copy of the sheet of paper on which the notes of Mr Bennett's discussion with the referee had been made, but with all information that might identify the referee or of what might be described as being in the nature of opinion or evaluative material masked. The purpose of that was to enable Mr Pointu to see the record (such as it was) of any reference to the issue of confidentiality in the conversation between the referee and Mr Bennett, and to afford Mr Robertson some information on which to prepare to cross-examine Mr Bennett in due course.
21. By 16 September 2002 Employrite had engaged a lawyer, namely Mr McLellan of the firm of Jones Fee. That created an unforeseen difficulty, because Mr McLellan and one of the Tribunal members Mr Cook (who is a loss adjuster by profession) are known to each other in a professional capacity.



The nature of the association between the two was disclosed to the other parties at the outset of the resumed hearing on 16 September 2002. Mr Pointu objected to Mr Cook's continued participation. The Chairperson was obliged to deal with that objection. For reasons set out in the decision by the Chairperson on 16 September 2002 the objection was not accepted.

22. Mr Pointu then applied to give further evidence on the question as to why he had anticipated that Mr Bennett would have been present on 8 August 2002. Mr McLellan objected essentially on the basis that the proposed evidence was irrelevant. We allowed Mr Pointu to give the further evidence. In the end, however, we agree with Mr McLellan that it is not relevant to the substantive issues that we have to decide. The whole issue of why Mr Bennett was not called to give evidence at the hearing on 8 August 2002 may be relevant to costs, but that is all. It has no bearing on the question as to whether the information provided by the referee can properly be withheld from Mr Pointu under the Act.

Mr Bennett's Evidence

23. Mr Bennett was then called. He confirmed that he was an investigator retained by Employrite at the relevant time. He said that he had personally uplifted the file for Mr Pointu's application from Employrite, and taken it home to deal with it. It was he who telephoned the referee. He explained to the referee who he was, and said that he was calling to get a reference in respect of Mr Pointu. The referee did not want to oblige. After some further explanation from Mr Bennett, the referee made it clear that information would be given only if both the identity of the referee and the content of the information was kept confidential.
24. Mr Bennett agreed. He took notes of what he was told. Mostly the notes were taken while the information was being given. Mr Bennett said that after the call finished he received another call on an unrelated matter, but that he completed his note making in respect of what the referee had told him as soon as that call ended. In all he said that the entirety of his notes were made within 15 minutes of his conversation with the referee. He confirmed that the notes he took that day were an accurate account of what he was told.
25. Mr Bennett said that he would not ordinarily have volunteered to have such a conversation on a confidential basis, and that he was certain that it was the referee who had asked for confidentiality. It was because of that request that he wrote the words 'confidential comments' after the notes. He was also clear that the arrangement about confidentiality was made before the referee would give him any information about Mr Pointu.
26. After the telephone conversation with the referee Mr Bennett spoke to the Human Resources manager of Smith & Caughey by telephone. He said that Mr Pointu was not recommended. The manager questioned him as to why, but he told her that since he had agreed to keep the information confidential he was not able to say. Apparently Smith & Caughey then acted on the 'not recommended' report from Employrite without ever finding out what the referee had said.



Relevant Provisions of the Act

27. The starting point in this case is Information Privacy Principle 6 (1) which provides

"Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled: -

(a) To obtain from the agency confirmation of whether or not the agency holds such personal information; and

(b) To have access to that information"

28. It was not suggested that Employrite is not an agency to which the principle applies. It is also clear that the information at issue in this case is personal information about Mr Pointu. Principle 6 undoubtedly applies unless it can be shown that the circumstances fall within section 29 of the Act.

29. Section 29 sets out grounds upon which an agency can refuse to make personal information available. Of relevance in this case, section 29(1)(b) provides:

"(1) An agency may refuse to disclose any information requested pursuant to principle 6 if ...

(b) The disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise -

(a) Which was made to the person who supplied the information; and

(b) Which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; ..."

30. Section 29(3) defines the term "evaluative material":

"(3) For the purposes of subsection (1)(b) of this section, the term "evaluative material" means evaluative or opinion material compiled solely-

(a) For the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the material relates-

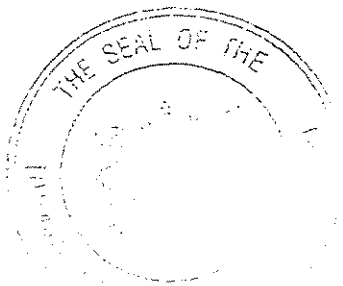
(a) for employment or for appointment to office; or

(b) for promotion in employment or office or for continuance in employment or office; or

(c) for removal from employment or office; or

(d) for the awarding of contracts, awards, scholarships, honours or other benefits; or

(b) For the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or



(c) *For the purpose of deciding whether to insure any individual or property or to continue or to renew the insurance of any individual or property."*

31. Thus in order for an agency to be entitled to withhold information under s 29(1)(b) it must be shown that the information in question is "evaluative or opinion material" within the meaning of s 29(3) and that the disclosure of that information would breach an express or implied promise, made to the supplier of the information, that the information or their identity or both would be held in confidence.
32. The defendant did not challenge the submission advanced by both Mr Pointu and the Privacy Commissioner that the onus of establishing that there is good reason to withhold information that would otherwise be available under Principle 6 falls on the person seeking to withhold the information.

The Nature of the Information

33. We deal first with the question of whether the information given by the referee was 'evaluative or opinion material'. In doing so we note that the Act refers to 'evaluative' material disjunctively from 'opinion' material. Plainly information can be withheld under this definition even if it is not limited to the expression of an opinion.
34. We have been unable to find an authority which discusses the meaning of the word 'evaluative' in a directly relevant way. However it seems to us that the word is intended to convey the idea of assessment and appraisal in a way that is consistent with the definition of the word 'evaluate' in the Oxford English Dictionary (2nd Ed.), i.e., "*To work out the 'value' of ... To 'reckon up', ascertain the amount of ...*". 'Evaluation' is defined as "*The action of appraising or valuing (goods, etc.) ... The action of ... determining the value of (a mathematical expression or physical quantity) ...*". 'Evaluative' is defined as "*Of, pertaining to, or tending to evaluation; appraisive, estimative*".
35. Ms. Donovan invited us to adopt a restrictive approach to the interpretation of the phrase 'evaluative or opinion material'. She submitted that the exceptions contained in section 29 are to a greater or lesser extent at odds with the fundamental principle of accessibility of personal information that is provided in Principle 6, and that as a result we should guard against extending the potential scope of the exception unnecessarily. We accept the sense of her submission, but on the other hand the reality is that the Legislature has seen fit to provide exceptions to the accessibility principle. We think it would wrong be to read the exceptions down if to do so would be to interfere with the purposes for which they were included in the Act.
36. In the end these nuances of interpretation do not need to be determined because we are satisfied that the information given by the referee and recorded by Mr Bennett in this case falls squarely within the phrase 'evaluative or opinion material' in section 29(1)(b).

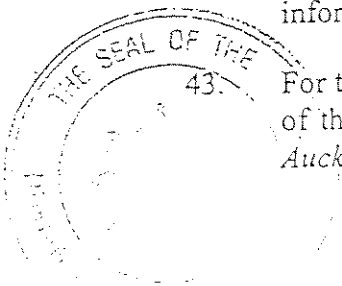


37. As events transpired, we did not open the sealed envelope containing the notes made by Mr Bennett until after the hearing was completed. Having now done so it is clear to us that, whether one regards the process that Mr Pointu was involved in as having been an application for employment or for promotion, the notes are plainly evaluative or opinion material compiled solely for the purpose of determining Mr Pointu's suitability.

The Confidentiality Issue

38. The second substantive issue is whether the information was given to Mr Bennett under an express or implied promise made to the supplier of the information to the effect that the information and the identity of the person providing it would be held in confidence.
39. If Mr Bennett's evidence about his discussion with the referee is accepted then it is clear that just such a promise was made to the referee by Mr Bennett; indeed it is clear that the referee would not have provided any information but for the promise.
40. Mr Robertson invited us to find that Mr Bennett's evidence lacked credibility and should not be accepted. He mounted his attack on the basis of suggested shortcomings in the way in which Employrite dealt with Mr Pointu's application, and in allegations of other possible failures by Employrite to respect the confidentiality of the information at issue. He submitted that there was no evidence of anything having been done to check the accuracy of the information provided by the referee, notwithstanding that it seems clear that it was on the basis of that information (and that information alone) that Mr Pointu's application was 'resulted' as not recommended. Mr Robertson also pointed to differences between two copies of the coversheet used by Employrite for its file for Mr Pointu's application, and the likely timing of entries made on it. He was critical of the terms of the declaration that Mr Pointu had been asked to sign.
41. Even if the criticisms raised by Mr Robertson are valid (and we are not to be taken as having decided that they are) they would not in our view do anything to undermine Mr Bennett's evidence about what was said when he spoke to the referee. Indeed most of not all if the criticisms are not things for which Mr Bennett can sensibly be held responsible. Mr Bennett's account of his discussion with the referee is supported by the notes he made at the time. In particular he said that he wrote the words 'Confidential Comments' at the end of the notes for the very reason that that was the basis on which they had been made. There was nothing about the way in which Mr Bennett gave his evidence, or the content of it, to give rise to any concern about his credibility.
42. We are satisfied that the information was given to Mr Bennett on the basis of an express promise made to the referee by Mr Bennett to the effect that the information and the identity of the referee would be held in confidence.

43. For the sake of completeness, there is a final question as to whether disclosure of the information to Mr Pointu would breach that promise. In *Westwood v Auckland University* (Decision No. 14/97, CRT 18/96, 30 April 1997) the



point was made that in some cases the supplier of confidential information may later be found to be agreeable to the information being released. In that case it is difficult to see how disclosure would be a 'breach' of the promise. But in the present case there is nothing to suggest that the referee has agreed to the release of the information. There is no basis on which to conclude that the defendant is not still bound by the obligations of confidentiality that it undertook before it was given the information.

44. It follows that we are satisfied Employrite was and is entitled under section 29 (1) (b) of the Act to refuse to disclose the identity of the referee and the information given by the referee to Mr Pointu.

Comment

45. Given the way in which the case unfolded we make the following observations.
46. It was clear that when Mr Birchall first responded to Mr Pointu's request, and even at the hearing on 8 August 2002, he (Mr Birchall) believed that Employrite was prevented by section 29 from releasing the information in question to Mr Pointu. That was not correct. What section 29 does is to create a discretion which allowed Employrite to refuse to disclose the information. It has always been the case that Employrite could choose to disclose the information to Mr Pointu and face whatever consequences flow from that. Given that Employrite is a screening agency, one can imagine that it might be reluctant to compromise a promise of confidentiality made in circumstances of the kind in this case. But it goes too far to say that Employrite is or has ever been prohibited by section 29 from releasing the information.
47. Much was made by Mr Robertson about the suggested unfairness in Smith & Caughey requiring Mr Pointu to sign a declaration that authorised Employrite to contact Mr Pointu's former employers, including employers not nominated in his application. But we do not have to decide whether the declaration was unfairly obtained in this case. That was not a focus of the claim filed by Mr Pointu. Indeed since such an allegation has not been investigated by the Privacy Commissioner it is unlikely that we have jurisdiction deal with it, at least at this stage. More importantly, it seems to us that whatever the rights and wrongs of the circumstances in which Mr Pointu signed the declaration may be, the correct focus of our inquiry is the relationship between Mr Bennett and the referee to whom he spoke. On the evidence that we heard we do not think that it can sensibly be suggested that Mr Bennett was acting in any way that was illegal.
48. We do agree with Mr Roberston, however, that paragraph 8 of the declaration was very poorly worded. That was the paragraph which included the statement '*You are entitled to seek access to the material held by Employrite about you. If you do not agree with the information ... you may ask that it is corrected...*' Mr McLellan submitted that these words are accurate in that Mr Pointu could 'seek access' to his information; the fact that he might not obtain it being a separate issue altogether. But as we read the paragraph we find it hard to accept that a layperson would have understood that access might be



denied. One can ask rhetorically, how is the applicant to know that he or she does not agree with the information if he or she does not know what it is? Although this will not be of any comfort to Mr Pointu, we were relieved to hear that the shortcomings of this form have been recognised and that it has since been amended in such a way that the possibility that confidential information may be withheld is made clear.

49. Mr Robertson submitted that there is no public interest in continuing to withhold the information at issue from Mr Pointu. We appreciate that Mr Pointu will be disappointed by our decision. From his perspective, it must seem very unfair that he still does not know who said what, and why he was not recommended for the job at Smith & Caughey. We accept that he has suffered as a result of his inability to deal with the accusation he feels has been made against him, and that the circumstances may well have diminished his chances of persuading another employer to take him on. As we have said, it is impossible not to have sympathy for him.
50. But with respect to Mr Robertson we do not agree that the case has no public interest element. Section 29 (1) (b) is designed to protect the communication of evaluative or opinion material by a referee when someone is being considered for employment. This is the expression of a public interest in ensuring that circumstances exist in which those who are asked to supply information or to comment in that sort of situation can do so candidly and without fear of recrimination or objection from the subject.
51. Something of the same concern lies behind the defence of qualified privilege in the law of defamation. Of course the law of defamation is not concerned about withholding information, but where the subject of the reference does have the information he or she will not have an action for damages unless malice is shown (putting aside the policy issue of whether there should be an independent action in tort if a reference is given carelessly: see e.g., *Spring v Guardian Assurance Plc* [1994] ICR 596).
52. Whether the Act strikes the right balance between the privacy interests of individuals like Mr Pointu and the wider public interest in candour by those who give job references may be open to debate. Certainly this case shows that the consequences of the existing exception to the principle of accessibility can be profound for someone in Mr Pointu's position. Another approach might have been to make the information accessible, but not actionable (or perhaps actionable but only in limited circumstances).
53. In the end, however, these are not issues for us to deal with. Our role is simply to apply provisions of section 29(1)(b). In doing that we are satisfied that Employrite is entitled to withhold the information that Mr Pointu wishes to have access to.

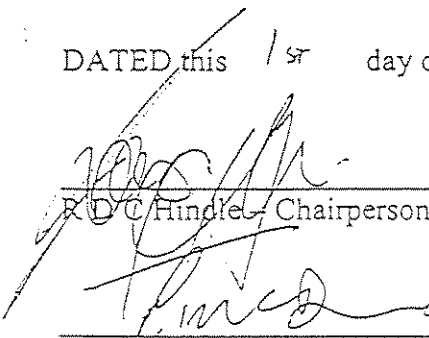
Conclusion

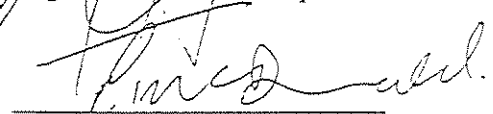
54. For the foregoing reasons, Mr Pointu's claim is dismissed.

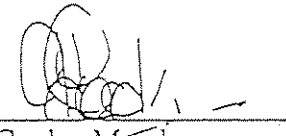
Costs

55. All parties may make submissions on costs by filing memoranda within 21 days of the receipt of this decision.

DATED this 1st day of October 2002


R D C Hindle - Chairperson


P McDonald - Member


Mr G Cook - Member

