

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2012] NZEmpC 9  
ARC 81/11**

IN THE MATTER OF proceedings removed from the  
Employment Relations Authority

BETWEEN RICHARD LAWRENCE  
First Plaintiff

AND NICHOLAS FRANKISH  
Second Plaintiff

AND IAN LOCK AND JOHN SHEAHAN AS  
LIQUIDATORS OF EX CED FOODS (IN  
LIQUIDATION)  
Defendants

Hearing: 27 January 2012 by telephone conference

Appearances: Phillipa Muir and Katherine Burson, counsel for the first plaintiff  
Don McKinnon, counsel for the second plaintiff  
Philip Skelton and Lorne Campbell, counsel for the defendants

Judgment: 27 January 2012

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**INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH**

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[1] This judgment deals with a challenge by the defendants to an objection to disclosure of documents by the first plaintiff.

[2] These proceedings arise out of the sale of the business operated by a company formerly called Cedenco Foods (the Company). The first plaintiff was the managing director of the Company. The second plaintiff was the chief financial officer and company secretary of the Company.

[3] On 9 November 2009, receivers were appointed to manage the assets and undertaking of the Company. The receivers carried on the business with a view to

sale. On 23 November 2009, the receivers terminated the employment of the plaintiffs with immediate effect. At the same time, the receivers offered the plaintiffs employment by the Company in receivership on different terms. The plaintiffs accepted those offers.

[4] The plaintiffs claimed that the termination of their employment by the receivers entitled them to payment of salary in lieu of notice and redundancy compensation. The receivers acknowledged those claims.

[5] On 6 May 2010, the Company was placed in liquidation. The plaintiffs' employment was again terminated and they were offered further employment by the Company in receivership subject to their waiving claims against the Company arising from it being put in liquidation. The plaintiffs accepted those offers.

[6] On 10 June 2010, the plaintiffs each lodged an unsecured creditor's claim with the liquidators for the money they claimed was owing to them when their employment was first terminated by the receivers in November 2009.

[7] On 20 August 2010, the Company's business was sold. The employment of both plaintiffs by the Company was terminated. The second plaintiff was offered and accepted employment by the new owner of the business. The first plaintiff was not offered further employment and his involvement with the business ended. Following the sale of the business, the name of the Company was changed to Ex Ced Foods.

[8] The liquidators have accepted the plaintiffs' creditor claims in part only. Specifically, the liquidators have rejected the plaintiffs' claims for payment in lieu of notice and redundancy compensation arising out of the initial termination of their employment by the receivers.

[9] The plaintiffs' claims in this Court are for payment of the salary in lieu of notice and redundancy compensation which the liquidators have refused to pay. They are also pursuing personal grievances alleging unjustifiable disadvantage because all other employees' claims were paid in full.

[10] The defendants have sought disclosure of documents by the plaintiffs. There is no issue regarding the disclosure made by the second plaintiff. The first plaintiff has, however, objected to disclosure of one of categories of documents sought, being:

“documents evidencing any bonus or other remuneration or benefit derived by the first plaintiff arising from or concerned with the sale of the business of Ex Ced Foods on or about 20 August 2010”

[11] The ground on which the first plaintiff objected to disclosure was:

“that any such documents are not relevant in terms of Regulations 37 and 38 of the Employment Court Regulations 2000”

[12] The defendants challenge that objection to disclosure and seek an order requiring the first plaintiff to disclose the class of documents in question.

[13] Counsel agreed that the sole issue is whether the documents in question are relevant. Regulation 38 of the Employment Court Regulations 2000 provides:

**38 Relevant documents**

- (1) For the purposes of regulation 37 and regulations 40 to 52, a document is relevant, in the resolution of any proceedings, if it directly or indirectly—
  - (a) supports, or may support, the case of the party who possesses it; or
  - (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
  - (c) may prove or disprove any disputed fact in the proceedings; or
  - (d) is referred to in any other relevant document and is itself relevant.

[14] The starting point in determining whether any document is relevant to particular proceedings is the pleadings. That is because the pleadings describe the case of each party and, to a large extent, identify issues of fact.

[15] In this case, the first plaintiff alleges that, pursuant to his employment agreement with the Company, he was contractually entitled to certain payments and that the defendants have wrongfully refused to admit those claims in the liquidation.

[16] The defendants admit that the termination of the first plaintiff's employment was a breach of contract and accept that he may be entitled to damages for that breach but say that he had a duty to mitigate his loss. They also affirmatively allege that the first plaintiff entered into an agreement with the receivers that he be paid substantial sums of money by way of bonuses including a bonus upon sale of the business.

[17] Mr Skelton submits that this gives rise to a question of law whether the first plaintiff had a duty to mitigate his loss and, if so, an issue of fact regarding the extent to which he did mitigate his loss. He submits that documents evidencing payments made to the first plaintiff as a result of the sale of the business are therefore directly relevant.

[18] In her submissions on behalf of the first plaintiff, Ms Muir proceeds on the assumption that the first plaintiff became entitled to payment in lieu of notice and to redundancy compensation when his employment was initially terminated by the receivers in November 2009. That being so, she submits that any payments which may have been made to the first plaintiff following the sale of the business in August 2010 are too remote from the issues to be relevant.

[19] With respect, what those submissions overlook is that the defendants have denied that the first plaintiff had a contractual entitlement to the sums claimed. They say he was entitled, at most, to damages for breach of contract and must prove his loss.

[20] I am satisfied that the pleadings put in issue whether the first plaintiff needs to prove his loss, whether he has a duty to mitigate that loss and, if so, the extent to which he has done so. It follows that the documents in question may support the defendant's case and should be disclosed.

[21] Through counsel, the first plaintiff is ordered to provide the defendants with copies of the documents in question, that is documents evidencing any bonus or other remuneration or benefit derived by the first plaintiff arising from or concerned with the sale of the business of Ex Ced Foods on or about 20 August 2010. That is to

be done no later than 4pm on Tuesday 31 January 2012. Those documents, and any copies made of them, may be used only for the purposes of this proceeding and, except for the purposes of the proceeding, must not be made available to any other person.

[22] Costs are reserved.

AA Couch  
Judge

Signed at 11.30am on 27 January 2012