

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 10
ARC 23/12**

IN THE MATTER OF proceedings removed
AND IN THE MATTER of an application for disclosure orders
BETWEEN JOHN MATSUOKA
 Plaintiff
AND LSG SKY CHEFS NEW ZEALAND
 LIMITED
 Defendant

Hearing: 7 February 2014
 (Heard at Auckland)

Appearances: Anthony Drake and Ben Nicholson, counsel for plaintiff
 Garry Pollak and Anja Borchardt, counsel for defendant

Judgment: 7 February 2014

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

[1] The plaintiff Mr Matsuoka, issued against the defendant LSG, a notice requiring disclosure, which specified various categories of documents. There has apparently been some discussion between the parties following that and the matter came before me today on the basis that some of the categories are not in dispute by LSG. Indeed where that is the case, I understand that Mr Pollak, on behalf of his client, has made disclosure to Mr Matsuoka through Mr Matsuoka's lawyers.

[2] Mr Drake and Mr Pollak, very helpfully prior to the hearing today, filed quite lengthy memoranda relating to these issues. This was helpful to me in advance, and during the course of the hearing today we have gone through the categories, of which there are eight, and dealt with how those might be dealt with on a sensible basis.

[3] In addition to that Mr Pollak has raised two further issues. I am of the view that probably we have reached some resolution of them today so that we can move forward to try and get these proceedings set down for hearing. Before I deal with the specific categories I will just deal with those two points.

[4] The first relates to a second set of proceedings, which Mr Matsuoka has recently filed. Those proceedings also name two officers of the defendant LSG. The reason for that is plain because compliance is sought in the proceedings on the basis that Mr Matsuoka has no certainty that he was employed by LSG in the first place, and secondly has a wages claim. A further issue is that the proceedings seek compliance with a decision of Judge Travis. That decision involved Judge Travis merely answering certain questions and thereby invoking statutory provisions under Part 6A of the Employment Relations Act 2000. In the sense that the proceedings seek compliance with Judge Travis's Judgment they are fraught with difficulty and I have discussed that with Mr Drake this morning.

[5] In any event Mr Pollak raises an objection to the naming as defendants individual officers of LSG. The reason for that is clear in that if penalties and remedies are sought there is some suggestion of seeking orders of imprisonment. Hence the reason for naming those parties. I think that is all fraught with difficulty as well, but remedies which those parties as individuals have, are available by virtue of the rules of procedure of the Court and Mr Pollak will have to take those issues up on their behalf if he considers it appropriate.

[6] The second issue relates to an affidavit of documents which Mr Matsuoka has filed and served on Mr Pollak on 5 February 2014. Apparently it merely discloses wage slips but that is obviously not adequate because Mr Matsuoka has power and control over other categories of documents which are relevant to the proceedings and which he must discover at this stage. First, as a matter of statutory empowerment, he has the right to require his full wage and time records from the employer PRI or Pacific Catering, whatever it is. So he has power and control over those documents and he is easily able to ascertain what they are and he should include them in his affidavit of documents.

[7] Secondly, he has power and control over his bank statements and he should ascertain what statements are relevant which disclose his income and make disclosure of those. Thirdly, he has power and control over all his tax records whether that is through his former employer or the Inland Revenue Department. He is required to ascertain what those documents are insofar as they are material to income and disclose them, and make those documents, all of them, available for inspection. I would have thought that he would have done that anyway from his own point of view, because he is under an obligation when these proceedings go to trial to prove mitigation. It will not be good enough for him to come along to the hearing and then try and produce documents which relate to mitigation if he has not disclosed them. If he refuses to disclose the documents then the Court could draw an adverse inference against him on the basis of mitigation. I just make those comments because it seems to me they give Mr Matsuoka an incentive to make sure that he makes full disclosure of all documents relating to any attempts that were made by him as to mitigation following the termination of employment by LSG.

[8] I just return to the proceedings that have been issued now, the second set of proceedings, because there is some suggestion in them that Mr Matsuoka feels unable to prove his employment with LSG as a transferring employee under the Employment Relations Act. That cannot be the position for two reasons. First, Mr Matsuoka has a statutory right once Judge Travis made his declarations to be an employee and is deemed to be an employee of LSG. But even that is not necessary because in the pleadings which were filed in the proceedings under ARC 23/12 relating to the personal grievance, Mr Matsuoka pleaded that he was an employee of LSG and LSG filed a statement of defence admitting it. That is the end of the matter; it is pleaded and no further evidence is required whatsoever from Mr Matsuoka to prove that he was an employee of LSG.

[9] I now turn to the categories of documents.

[10] Insofar as Category One in the notice is concerned it is not in dispute. Mr Pollak agrees that those documents are to be disclosed. Indeed I understand the defendant has made disclosure.

[11] Insofar as Category Two is concerned, this relates to job descriptions, job specifications, policy manuals and standard operating procedures relating to the position of ground steward with the defendant. I am informed that the defendant does not have a position of ground steward but as a matter of logic and common sense if Mr Matsuoka was employed by LSG he would have been employed in an equivalent position or some other position. Whatever position it was to be, clearly as part of his personal grievance, he is entitled to have job description specification and any operating procedures that were put into writing from time to time. Insofar as the policy manual is concerned, obviously those will be substantial documents, and counsel can cooperate in ascertaining what documents in the manual specifically relate to Mr Matsuoka's proposed employment and disclose those. If there is any further dispute well then no doubt it can come back to Court, but I would hope that it would not be. Even though the parties are in loggerheads in this matter, counsel don't need to delve into that surrounding atmosphere, if I can put it that way, and no doubt they can speak sensibly to their clients so that there is cooperation.

[12] Insofar as category three is concerned this relates to communications between LSG and the Service and Food Workers Union relating to the plaintiff. Mr Pollak says that he has already provided whatever documents there are which specifically relate to Mr Matsuoka and so there is no real dispute at the moment on that.

[13] Insofar as category four is concerned this related to the accountants and Mr Drake has indicated that he withdraws any application in respect of the accountants. So category four is out.

[14] Insofar as category five is concerned this relates to payroll information. Mr Pollak agrees to this particular category. Apparently the payroll IT provider has provided some emails. I will leave it to Mr Drake and Mr Pollak to resolve any further issue which relates to category five. I understand from them that it may well be resolved already by the filing of some sworn statements from the IT provider.

[15] Category six relates to Singapore Airlines. Singapore Airlines is the company which contracted with the defendant having terminated the contract with Mr Matsuoka's former employer. This has given rise to this entire matter. Mr Pollak

has agreed that he will enquire both of his client and Singapore Airlines as to any correspondence which may be in existence and which relates specifically to Mr Matsuoka. If there is no such correspondence then obviously that should be specified in the sworn statement which LSG is going to have to file in respect of these further disclosure issues.

[16] Mr Pollak expressed a concern that Mr Matsuoka, who is being funded by his former employer in these proceedings, may be endeavouring to obtain the commercial contract between Singapore Airlines and LSG. As I understand it Mr Drake gives an assurance that that is not the case. In any event I may make it clear that under no circumstances will Mr Matsuoka, the plaintiff in these proceedings, be obtaining the commercial documents which relate to that transaction. They are simply not relevant and that would be an unjustified fishing expedition for motives which are totally inappropriate.

[17] Insofar as category seven is concerned, as it relates specifically to Mr Matsuoka those documents will be provided if they haven't already been provided. Obviously other employees need their identities and their personal information protected and they can be protected quite easily by redacting information.

[18] Insofar as category eight is concerned it appears that there is really no need to deal with that as it has been covered by the other categories and so I do not need to make any specific ruling on that.

[19] So that really covers the issues between the parties as to categories of documents which are material or relevant to these proceedings between Mr Matsuoka and LSG. It is really a personal grievance proceeding arising out of the termination of his employment by LSG by virtue of the fact that he became an employee having to be transferred under Part 6A of the Act. That is not the reason for his termination, but that is the reason why LSG had to accept him as an employee.

[20] Hopefully there are no remaining issues of disclosure once these matters have been attended to. LSG should insofar as possible, deal with all of these categories

where they are to provide further documents by setting them out in an affidavit, perhaps sworn by Mrs Park, who is the Human Resource Manager, but it does not really matter who. I do ask Mr Drake and his client to give serious consideration to that second set of proceedings. It would seem to me that some of the matters which seem to be important could be covered in the personal grievance proceedings simply by amending the pleadings and the remedies but it is not for me to determine that. If those proceedings are to continue they probably involve similar documentation to the personal grievance proceedings and I would imagine that they could both be set down for hearing together and heard in the one trial.

Costs

[21] Insofar as today's hearing is concerned, costs are reserved until the outcome of these proceedings is determined on its merits.

M E Perkins
Judge

Oral judgment delivered at 11.41 am on 7 February 2014