

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 23A/09  
ARC 33/09**

IN THE MATTER OF proceedings removed from the  
Employment Relations Authority

AND IN THE MATTER OF a challenge to objection to disclosure

BETWEEN NEW ZEALAND AIR LINE PILOTS  
ASSOCIATION INC  
First Plaintiff

AND GREGORY COOKSON  
Second Plaintiff

AND JETCONNECT LIMITED  
First Defendant

AND JETSTAR AIRWAYS LIMITED  
Second Defendant

AND QANTAS AIRWAYS LIMITED  
Third Defendant

Hearing: 17 June 2009 (in Chambers)  
(Heard at Auckland)

Appearances: RE Harrison QC and R McCabe, Counsel for Plaintiffs  
CA Reaich, Counsel for First Defendant  
Philip Skelton, Counsel for Second and Third Defendants

Judgment: 19 June 2009

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**INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE GL COLGAN**

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[1] The plaintiffs' challenges to the defendants' objections to disclosure of documents raise novel issues about whether a party can be required to give disclosure of documents in a proceeding where a penalty is sought against it.

[2] Assuming the plaintiffs are entitled to access the statutory document discovery procedures, disputed questions have now narrowed to a single issue concerning the cut-off date for disclosure.

[3] The nature of the proceeding and the remedies sought underpin the answer to this fundamental question about the application of the disclosure procedure. The plaintiffs claim that the defendants, whether as principles or parties, have breached the good faith provisions in s4 of the Employment Relations Act 2000 (“the Act”) and, as a separate cause of action, that they have acted in breach of a collective agreement in force between the first plaintiff and the first defendant.

[4] The remedies sought for these breaches, set out at paragraph 3 of the statement of claim dated 19 May 2009 include:

- 3.1 *A declaration or determination that Jetconnect has breached its good faith obligations under section 4 of the ERA in failing to consult with NZALPA and NZALPA’s affected pilot members over the Jetconnect restructuring and is accordingly liable to a penalty under section 4A of the ERA, in a sum to be determined.*
- 3.2 *A declaration or determination that QANTAS has procured, incited, instigated, or aided and abetted Jetconnect’s breach or breaches of section 4 of the ERA and is accordingly liable to a penalty, whether under section 4A of the ERA or otherwise, in a sum to be determined.*
- 3.3 *A declaration or determination that Jetstar has procured, incited, instigated, or aided and abetted Jetconnect’s breach or breaches of section 4 of the ERA and is accordingly liable to a penalty, whether under section 4A of the ERA or otherwise, in a sum to be determined.*
- 3.4 *A declaration or determination that Jetconnect is in breach of the CEA in all or any of the respects set out in paras 2.34 – 2.36 above and is accordingly liable to a penalty under section 134(2) of the ERA, in a sum to be determined.*
- 3.5 *A declaration or determination that QANTAS has procured, incited, instigated, or aided and abetted Jetconnect’s breach or breaches of the CEA and is accordingly liable to a penalty under section 134(2) of the ERA, in a sum to be determined.*
- 3.6 *A declaration or determination that Jetstar has procured, incited, instigated, or aided and abetted Jetconnect’s breach or breaches of the CEA and is accordingly liable to a penalty under section 134(2) of the ERA, in a sum to be determined.*

- 3.7 *An injunction restraining Jetconnect from implementing the Jetconnect restructuring, for such period and on such terms as may be just.*
- 3.8 *An injunction restraining QANTAS from implementing the Jetconnect restructuring, for such period and on such terms as may be just.*
- 3.9 *Costs of and incidental to this proceeding.*

[5] So, except for the relief of injunctions claimed in paragraphs 3.7 and 3.8 above, the remedies sought are statutory penalties.

[6] As noted in the first interlocutory judgment, there is a high statutory threshold to be attained before a penalty can be awarded for breach of s4. Section 4A provides that a failure to comply with the duty of good faith in s4(1) must be deliberate, serious and sustained; or, alternatively, intended to undermine bargaining for an individual employment agreement or a collective agreement; or to undermine an individual employment agreement or a collective agreement; or to undermine an employment relationship. Alternatively, a penalty may be imposed if the failure to comply with s4(1) was a breach of s59B or s59C which relate to bargaining and are not in issue in this case. The standard for establishing agreement breach is not stated in the Act but has been held to be on the balance of probabilities: see *Xu v McIntosh* [2004] 2 ERNZ 448.

[7] The first and most fundamental question for decision is whether reg 39(2) of the Employment Court Regulations 2000 (“the Regulations”) precludes the plaintiffs from having any recourse to regs 40 to 52 which form the statutory basis for document disclosure in this Court.

[8] Although the defendants have each provided informal disclosure of documents to the plaintiffs, they have resisted the plaintiffs’ demands for disclosure of relevant documents that were generated or otherwise came into their possession after 17 February 2009. The defendants have substantive grounds for resisting such disclosure but the second and third defendants at least also invoke the legal argument that the plaintiffs are not entitled to document disclosure in any event.

[9] Regulation 39 of the Regulations provides:

**39     *Applicability***

- (1)     *Subject to subclause (2), regulations 40 to 52 apply to all proceedings in the Court.*
- (2)     *Nothing in regulations 40 to 52 applies to any action for the recovery of a penalty.*

(my emphases)

[10]    The defendants say, simply and literally, that the plaintiffs’ action is for the recovery of penalties against them so that they cannot be required to disclose any documents in this proceeding, at least as it is framed currently by the statement of claim.

[11]    The plaintiffs say that although their proceedings include the recovery of penalties, they are not limited to that remedy. The plaintiffs submit that reg 39(2) is only applicable where a claim is for penalties alone. By contrast, the defendants say that the proceeding is overwhelmingly for the recovery of penalties but even if that is only a predominant or even an incidental element of it, reg 39(2) applies not only to the claims for penalties but to the other remedies brought in the same proceeding.

[12]    I must determine what the Executive intended by the phrase in reg 39(2), “*any action for the recovery of a penalty*”.

[13]    Mr Harrison’s argument amounts to an interpretation of reg 39(2) that requires the Court to augment the words by adding at the end of the sub-regulation the word “*alone*”. This would confine the application of reg 39(2) to cases in which the only remedy sought is a penalty. It would follow, in Mr Harrison’s submission, that in cases such as this where penalties together with other remedies are claimed, disclosure of documents must be made by a party against whom a penalty is claimed.

[14]    The purpose of the regulation is to ensure that a party at risk of the imposition of a penalty should not have to provide evidence against himself, herself or itself. It is a form of statutory avoidance of self-incrimination. The interpretation proposed by Mr Harrison would defeat that intention in practice as most proceedings in which penalties are sought include claims for other remedies too.

[15] As the authors of Brooker's Employment Law observe at EC39.04:

*The exclusion of penalty proceedings from the ambit of the disclosure requirements reflects the quasi-criminal character of such proceedings, and the principle that disclosure of documents ought not to be required if that would tend to incriminate the party who possesses them.*

[16] The predecessor to reg 39(2) was reg 47(2) of the Employment Court Regulations 1991. That read:

*(2) Nothing in regulations 48 to 59 of these regulations applies to any action for the recovery of a penalty or to any appeal.*

[17] It was the subject of a judgment in *Lakeland Health Ltd v Teviotdale* AEC74A/96, 3 December 1996 in relation to an application for discovery on an appeal from the Employment Tribunal to the Employment Court. The Court held:

*Nntc*

*... Regulation 47(2)... provides that the codified disclosure procedures contained in regs 48-59 ... do not apply to appeals as this is. It would be to defeat the intention of the Executive Council for this Court, in a general direction, to effectively order disclosure of a document solely for the purpose of an appeal. That would be to run counter to the scheme and intent of the regulations. The Court's equity and good conscience jurisdiction cannot defeat the provisions of the Act (including its Regulations): see s104(3).*

[18] Because I did not hear argument on the question of the application of s189(1) to Regulations made pursuant to s237, I simply note that the statement above from the *Lakeland Health* case may no longer be good law because of the change in the Interpretation Act 1999 to distinguish Acts and Regulations so that the latter are no longer to be regarded as a part of the former.

[19] In *NZ Baking Trades etc Union (Inc) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305, 316 the Employment Court observed that the law recognises that a party is entitled to object to production for inspection of documents which are likely to expose a party to a penalty. In *Fairmont Motors Ltd v Chitty (No2)* [1997] DCR 858 the District Court held that in proceedings for a penalty, a discovery order should not be made.

[20] The Court of Appeal confirmed the existence of the penalty privilege in *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435, 437. The Court described the penalty proceeding in that case as a “hybrid” having some analogy to a criminal proceeding and some analogy to a civil proceeding. In *Wallis Brothers Ltd v Canterbury Bye Products Ltd* (1985) 5 PRNZ 590, 594 the Court of Appeal described the ordinary meaning of penalty as a punishment or some loss or disability imposed by law for a wrongdoing. That accords with the nature of penalties under the Employment Relations Act.

[21] Regulation 37, which sets out the objective of regs 40 to 52 covering document disclosure, notes that “...where appropriate, each party to proceedings in the Court has access to the relevant documents of the other parties to those proceedings, it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both.” This allows for the exemption from the usual requirement for disclosure in the case of penalty proceedings.

[22] The plaintiffs are not assisted by reg 51 that places strict conditions on the use of documents disclosed. That is because, under reg 51(a), the restriction on use of disclosed documents is to the proceedings in which they are disclosed which will include, in a case such as this, claims to a penalty. None of the other restrictions in reg 51 saves the position against self-incrimination.

[23] The interpretation of reg 39(2) is not affected by the more recent Evidence Act 2006. That Act is not necessarily applicable to proceedings in the Employment Court. In *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 399, the Court of Appeal (Cooke J) noted that privilege against exposure to civil penalties was separate to the privilege against self-incrimination. Although acknowledging that the Act is a code, it is arguable that “privilege” dealt with under the Evidence Act 2006 relates to exposure to criminal liability and the common law of privilege affecting claims to civil penalties may have been left untouched by Parliament.

[24] The answer to the conundrum lies in the deliberate distinction drawn by Parliament between “*proceedings*” under reg 39(1) and “*action*” under reg 39(2). A party’s proceeding is the party’s case encompassed within a statement of claim or defence. The narrower category of “*action*” refers to what lawyers term a cause of action, a discrete subset of the proceeding that can and often does exist in a proceeding alongside other causes of action.

[25] So it follows that where a cause of action (“*action*”) is for the recovery of a penalty, disclosure is not available. In a proceeding, statutory disclosure is nevertheless available for causes of action which are not for the recovery of a penalty.

[26] The difficulty inherent in practice in the distinction between “*proceedings*” under reg 39(1) and “*action*” under reg 39(2) is that it is the different remedies claimed for the plaintiffs’ two causes of action that are the distinctive and vital elements rather than the causes of action themselves. So, to take the example of the plaintiffs’ cause of action for breach of collective agreement, the remedies claimed are both penalties and injunctions. In this sense, even the remedy of injunction is caught by reg 39(2) because this action (or cause of action) is for the remedy of penalty as well as injunction.

[27] Although awkward, the only way in which the intent of the Regulations may be preserved is for the plaintiffs to separate in their pleadings causes of action that seek the remedy of injunction alone for breach of collective agreement (which would be amenable to statutory disclosure) and, as a separate cause of action, for penalty for breach of collective agreement for which disclosure would not be available under reg 39(2).

[28] Even then, this separation of common causes of action by reference to relief, will not be sufficient without management by the parties or the Court of the process by which the proceeding is managed to a hearing and then heard.

[29] In view of my conclusion on this preliminary point advanced by Mr Skelton on behalf of the second and third defendants but which is logically applicable to the

position also between the first defendant and the plaintiffs, I must decline to make any other orders or directions as the plaintiffs' case is now pleaded.

[30] A consequence of this conclusion may be an attempt by the plaintiffs to re-plead their proceedings and perhaps also to seek postponement of the hearing of those parts of them that seek remedies other than penalties. Although inelegant, even clumsy, that is the consequence of reg 39(2) unless and until the Executive considers revisiting this procedural regulation. It may, therefore, assist the parties to know what my decision would have been on the substantive chronological limitation question which brought this issue to a hearing.

[31] The defendants, and the third defendant (Qantas) in particular, say that they should only be required to disclose to the plaintiffs relevant documents created before and leading to the events of 17 February 2009. That was when Qantas announced what I will call, for ease of reference, the restructuring of its New Zealand operations conducted, or to be conducted, by Jetconnect and Jetstar. Qantas says that the claim against it is that it failed or refused to consult with the plaintiffs about the decision announced on 17 February so that documents created subsequently will not be relevant to those parts of the proceeding against it.

[32] The plaintiffs say, however, that they will establish that Qantas was, in reality, the pilots' employer but, through the legal fiction of a subsidiary company or companies, and ultimately the first defendant. The plaintiffs acknowledge that they may have to lift or pierce the corporate veil to sheet home liability to Qantas as they claim. So the plaintiffs say that although relevant documents created before 17 February must be disclosed as Qantas has agreed informally to do, relevant documents created after that date must also be disclosed because they will be pertinent to the corporate veil lifting issue in this case. The plaintiffs have said that such documents created before 31 March must be disclosed. That is, in a sense, an arbitrary date but one conceded by the plaintiffs for the defendants' convenience.

[33] I would have concluded that the plaintiffs are right, that in respect of this case, post 17 February documents dealing with both the relationship between the defendants and with the restructuring plans are discoverable. The cut-off of 31



March 2009 is reasonable in all the circumstances. Although Qantas in particular complains about the inconvenience of the discovery process and, by implication, the greater inconvenience of an extended period for documents, that is not a valid ground on which to resist disclosure. However, these difficulties mean that Qantas cannot reasonably complete disclosure within the time provided by the plaintiffs' notice and I would have agreed that it is fair to extend that time to 30 June 2009 to allow the defendants a reasonable opportunity to make discovery of relevant documents created or coming into their possession on or before 31 March 2009.

[34] Costs are reserved. Leave is also reserved to any party to apply further on reasonable notice.

GL Colgan  
Chief Judge

Judgment signed at 4.15 pm on Friday 19 June 2009