

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2017] NZEmpC 11
ARC 23/12 and ARC 102/13**

IN THE MATTER OF of proceedings removed from the
Employment Relations Authority

AND IN THE MATTER of an application for wasted costs order

AND IN THE MATTER of an application for further and better
discovery

BETWEEN JOHN MATSUOKA
Plaintiff

AND LSG SKY CHEFS NEW ZEALAND LTD
Defendant

Hearing: 24 and 25 August 2016
(Heard at Auckland)

Appearances: R Stewart QC, B Nicholson and M O'Brien, counsel for
plaintiff
C Meechan QC, A Bortchardt, G Pollak, counsel for defendant

Judgment: 15 February 2017

**INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS
IN RESPECT OF
1) APPLICATION FOR WASTED COSTS ORDER
2) FIRST AMENDED APPLICATION FOR FURTHER AND BETTER
DISCOVERY IN RESPECT OF ELECTRONIC DOCUMENTS; FURTHER
PARTICULAR DISCOVERY; AND HARD COPY DOCUMENTS**

Introduction

[1] This judgment deals with several interlocutory applications made by the parties. Apart from the application by the defendant for a wasted costs order, which was to be decided upon the papers filed, the applications were set down for a day and a half hearing in August 2016. The hearing of all applications could not be

completed and further time has now been allocated in March 2017, being the earliest dates that are suitable to all counsel.

[2] It was originally my intention to deal with all outstanding interlocutory applications at the conclusion of the hearing. However, I have decided that in view of the completion of legal submissions on some of the applications, it is appropriate to issue an interlocutory judgment at this stage on those applications where the hearing is completed.

[3] Following the hearing in August 2016, I issued a judgment dealing with the defendant's application for non-party discovery against PRI Flight Catering Ltd (PRI).¹ Argument on that application had been completed and there was a need to resolve the application urgently in view of PRI's intention of having the company removed from the Register.

[4] This judgment now deals with the following two applications where argument has also been completed:

- (a) The defendant's application for a wasted costs order;
- (b) The plaintiff's first amended application for further and better discovery in respect of electronic documents, further particular discovery and hard copy documents.

[5] Mr Matsuoka's previously outstanding application for an order requiring LSG Sky Chefs New Zealand Ltd (LSG) to re-do its initial discovery is not now pursued by him. The announcement that it would not be pursued was made for the first time at the hearing in August 2016. This late indication led to some debate between counsel. I have resolved that issue by making an order that the application is dismissed and costs are reserved.

¹ *Matsuoka v LSG Sky Chefs NZ Ltd* [2016] NZEmpC 110.

The application for a wasted costs order

[6] This application is not unrelated to the series of applications which were partially argued at the hearing in August 2016. Those applications had earlier been set down for a two-day hearing commencing on 26 May 2016. That hearing had been allocated on the basis of the state of the pleadings between the parties at that stage, and counsel for LSG prepared their submissions for that hearing accordingly.

[7] On 20 May 2016, six days prior to the hearing that had been set for the outstanding applications, the plaintiff filed a second amended statement of claim (Mr Matsuoka has subsequently and less controversially filed a third amended statement of claim). The second amended statement of claim was a substantial pleading. Its preparation and filing must have been in contemplation, if not already in the course of being drafted, a considerable time before the hearing on 20 May 2016. Counsel for Mr Matsuoka failed in their obligation to be considerate to both opposing counsel and the Court by not advising from the outset that the amended pleadings were in contemplation, about to be drafted, and would have an effect on the basis upon which the applications relating to disclosure were being prepared by opposing counsel and would be argued. The nature and extent of the pleadings are crucial in determining the basis upon which disclosure can be argued and parameters set.

[8] The filing of the second amended statement of claim led to the hearing set for 26 May 2016 being adjourned. Even though the adjournment was by consent, Ms Meechan QC, counsel for LSG, indicated that an application for wasted costs was to be made. I indicated that I would consider such an application and timetabling was directed for submissions to be filed.

[9] Counsel in their submissions, in support of and in opposition to the wasted costs orders, have dealt with the comparison between the pleadings and remedies sought in the first amended statement of claim, correspondence between the parties dealing with subsequent pleading modifications and the second amended statement of claim. The differences were sufficiently significant to justify counsel for the defendant seeking an adjournment of the hearing set for the interlocutory applications which were to deal primarily with disclosure.

[10] Counsel for the defendant, in their written submissions in support of a wasted costs order, have annexed copies of invoices rendered to the defendant between 29 January 2016 and 2 June 2016. This is for the period leading to the adjourned hearing in May 2016. Those portions of the costs claimed to be wasted are highlighted and total \$31,578.90.

[11] In her submissions in support of an order for wasted costs, Ms Meechan makes the following points:

- (a) Identifying wasted costs is not an exact science. The concept of wasted costs includes work undertaken that will not have any benefit for the case as well as the value of work that will be duplicated in order to prepare again for the hearing.
- (b) In this case the significant re-pleading incorporated in the amended statement of claim must have been prompted by counsel for the plaintiff's realisation that the various discovery applications being made by the plaintiff did not have a basis in earlier pleadings.
- (c) Further work would be required by the defendant in view of further pleadings necessary in filing a statement of defence to the second amended statement of claim.
- (d) The adjournment of the applications at the last minute would mean duplication of preparation and becoming familiar again with the facts, issues and relevant law after a hiatus of several months.
- (e) Finally Ms Meechan asked the Court to take a balanced approach, but one which reflects, in terms of quantification, the Court's disapproval at the litigation being run in a way that prompts wasted effort.

[12] Mr Stewart QC, counsel for Mr Matsuoka, filed lengthy submissions in answer. In summary he submitted as follows:

- (a) That the adjournment was not caused by the plaintiff's default and that the defendant must prove that the plaintiff was in default of a Court order or that wasted costs were incurred as a result of some particularly egregious behaviour or oversight on the part of the opposing party.
- (b) In the alternative he submitted that the quantum of the wasted costs claim in this case is excessive.
- (c) That there is an inadequate breakdown of the costs that were truly wasted in this particular case if that has occurred.
- (d) That the costs claimed are disproportionate to other wasted costs awards.
- (e) That the quantum of wasted costs cannot be measured until the conclusion of the interlocutory hearings and that the assessment of any wasted costs should await the outcome of those hearings.
- (f) That indemnity costs are inappropriate and that in assessing any wasted costs the Court should have regard to the High Court and Employment Court scales.

[13] Counsel have referred to a number of authorities dealing with wasted costs. In this case, particularly helpful are the statements of Heath J in *Burgess v Monk* where he stated:²

[15] There is no doubt that this Court has jurisdiction to order that wasted costs be paid when, through the fault of one or more parties, a trial has been postponed, to the detriment of others. The concept of "wasted costs" includes those incurred for work undertaken that will not have any further benefit to the case of the claimant party, as well as the value of work that will be duplicated in order to prepare for a trial in the future.

[16] There are also systemic reasons for making such orders. In *Jeffreys v Morgenstern*,³ Venning J said:

² *Burgess v Monk* [2015] NZHC 1881.

³ *Jeffreys v Morgenstern* [2013] ZNHC 1361.

[31] I turn to consider the issue of wasted costs. It follows from my discussion above I accept the plaintiffs' submission that the trial was vacated because of the defendants' default. The plaintiffs have inevitably incurred wasted costs as a result of that. This Court has jurisdiction to make an order for wasted costs. As this Court has previously observed in the case of *Fu Hao Construction Ltd v Landco Albany Ltd*⁴ default that leads to vacation of fixtures leads to inconvenience and costs not only to the other parties to [those] proceedings but to other parties awaiting fixtures in the Court. Fixtures allocated by this Court are commitments of limited judicial and Court resources. Time is booked for the case. Other parties who might otherwise have had their cases allocated hearing time are disadvantaged by default which leads to late vacation of fixtures.

[32] That is a further reason which supports an award of wasted costs. The Court should apply sanctions to parties who, through their own default, cause fixtures to be vacated.

[14] This Court has a wide discretion to award costs. On the same basis that the High Court has, as part of its overall discretion, assumed jurisdiction to award wasted costs, this Court may do the same and apply the same principles.

[15] I do not agree with Mr Stewart's submission that wasted costs should be limited simply to situations where the behaviour of the party which has resulted in the costs being wasted consists of default of a Court order or the party has committed particularly egregious behaviour of the kind which is referred to in *Simpson v Hubbard*.⁵ That case involved late disclosure of a substantial number of discoverable and relevant documents that had been overlooked and resulted in the week long hearing having to be abandoned. I consider that the jurisdiction to make an award of wasted costs having been established; the circumstances where it would be appropriate to make such an order will be variable and dependent on the facts in each case.

[16] I do, however, agree with Mr Stewart that some moderation in an award is necessary. This is confirmed in my view by the overall and appropriate tenor of Ms Meechan's submissions.

⁴ *Fu Hao Construction Ltd v Landco Albany Ltd* HC Auckland CIV-2004-404-006608, 23 May 2008.

⁵ *Simpson v Hubbard* [2012] NZHC 3020 at [18].

[17] While counsel have referred to a number of authorities in their submissions, the two paragraphs cited from *Burgess* are suitable for the purposes of a decision in this case. While in those cases mentioned, the costs have arisen out of an adjournment on the application of the defaulting party, the exercise of the discretion depends upon exactly what happened in a given case. In the present case, the behaviour of the plaintiff and his counsel leading up to the hearing set for the numerous interlocutory applications was inconsiderate and wasted costs could have been avoided by the simple measure of informing opposing counsel and the Court that amended pleadings were in contemplation and that an alternative hearing date should be set. The fact that wasted costs would have been avoided by that simple expedient indicates the areas to be considered and where the parameters for any award of wasted costs should lie.

[18] I am not entirely satisfied that all of the claimed wasted costs indicated in Mr Pollak's and Ms Meechan's invoices are truly wasted. However, it is correct that as a result of what has transpired in this case, arguments which had been prepared for the hearing which needed to be adjourned would of necessity have required review for the resumed hearing and some may have needed to be abandoned. The primary point in my view is that counsel inevitably would have to re-traverse ground in re-preparing for the further dates when the applications were and still require to be heard.

[19] This is a case where wasted costs should be ordered. I do not agree with Mr Stewart that such an order should await the outcome of the interlocutory hearings, which are now not due to be completed until March 2017. In terms of quantum, I agree with Ms Meechan's concession that a balanced approach is necessary. The extent of that cannot be accurately calculated.

[20] It is difficult to make an appropriate assessment. Weighing up matters as best I can, I consider an award of \$10,000 is appropriate. There will be an order against the plaintiff for wasted costs of \$10,000. Those are costs in any event and are to be paid to the defendant forthwith.

The application for further and better discovery

[21] This application consists of three parts. The first is an application for orders requiring the appointment of an independent expert to carry out a search of the defendant's computer hard drive using prescribed indicators. This is further to the search of electronic documents already carried out by the defendant on a previous occasion. Secondly, there is an application for further particular discovery. This seeks an order that the defendant provide to the plaintiff copies of communications between the defendant and the Service and Food Workers Union Nga Ringa Tota Inc regarding earlier proceedings in 2011. In addition, there is a request for orders for further documents including those relating to the defendant's payroll records and telephone logs. Thirdly, there is a request for an order for further hard copy documents including documents created by, or sent to or by, certain named managers and employees of the defendant. This application also includes relevant documents held by the defendant's human resources office and human resources files in the defendant's archives. Included also is the physical material held in the payroll office and the payroll files in the defendant's archives.

[22] These applications are particularly contentious and follow attempts over many months to see whether agreement could be reached between the parties. The preceding discussions primarily related to the extent to which the defendant might agree to searches of its hard drive and the extent of the use of indicators in such a search and the nature of such indicators. Those discussions failed, although with the agreement of LSG, some search has been made of the defendant's hard drive, but now not to the satisfaction of the plaintiff; hence the present applications.

[23] There has already been substantial discovery and disclosure of documents in this case. It is now clear from the history of these proceedings over several years that there remains antagonism and distrust between the litigants and at times this has unfortunately spilled over into the relationship between opposing counsel. That has been commented upon from time to time in judgments of this Court on the matter. Quite plainly, the plaintiff and his counsel believe that the defendant is withholding disclosure of relevant and prejudicial documents and to that end has deliberately not undertaken proper enquiries within its organisation. In addition to considering

whether the actions of LSG realistically give rise to such a belief, the Court has to have regard to the exact nature and extent of these proceedings, the remedies which Mr Matsuoka may achieve in them, and in turn the proportionality from a time-expense and costs point of view of the nature of the discovery process now being pursued.

The search for electronic documents

[24] All three parts of this application rely upon rr 8 and 9 of the High Court Rules. Pursuant to reg 6(2) of the Employment Court Regulations 2000, in any case for which no form of procedure has been provided, the Employment Court may have recourse to the High Court Rules affecting any similar case. In addition, sch 9, cl 1(d) of the High Court Rules is relevant in this case to the requirement for the Court to assess proportionality by weighing up the cost of any discovery procedure against the sums in issue or the value of the rights in issue in the proceedings.

[25] The balancing exercise to be adopted by the Court in deciding whether the use of r 9.34 of the current High Court Rules (formerly r 322) should be permitted, to allow inspection of computer records as part of the document discovery process, is the subject of several decisions of the High Court. These were referred to by counsel in their submissions.

[26] The first decision is *Tyco Flow Pacific Ltd v Grant*.⁶ In this case Tyco purchased the business of a company called Water Dynamics Ltd. Tyco later alleged that the defendants had breached various non-competition obligations arising out of the sale and purchase agreement. The alleged breaches included engaging or assisting competing companies, issues regarding the misuse of confidential information and the inducement of former employees to leave Tyco's employment.

[27] Tyco sought an order to allow its forensic expert to have unobstructed access to any computers or computer equipment owned, operated or controlled by the first defendant, Mr Grant, and associated non-parties. Tyco submitted that the defendants

⁶ *Tyco Flow Pacific Ltd v Grant* HC Auckland, CIV-2003-404-4121, 18 March 2005.

had failed to provide adequate discovery, believing that documents relevant to the proceedings had not been disclosed.

[28] Mr Grant took a year to return his laptop (owned by Tyco) which, upon inspection by Tyco's forensic expert, had been reformatted. However, the forensic expert discovered two emails that were of interest to Tyco. These emails, Tyco submitted, provided prima facie evidence of Mr Grant's failure to comply with the relevant non-competition obligations. The two emails, which involved operational information about the new competing companies, had not been disclosed by Mr Grant. Tyco believed that there had likely been replies to these emails which were relevant to the proceedings. On the application made by Tyco, the Court considered several of the then High Court Rules, including providing for particular discovery against a party and a non-party after the proceedings had commenced and considering under r 322 whether the Court should make orders for the inspection, sampling, observation, measuring, or weighing or photographing of any property.

[29] In respect of r 322 regarding the power to order inspection, the Court held that:⁷

An order for inspection will be made only where it is for the purpose of enabling the proper determination of any matter in question in the proceeding. In other words, the inspection must be relevant to the issues in dispute in that proceeding: ...

[30] The Court held that the two emails, either forwarded or copied to Mr Grant, raised a prima facie inference that he had been involved in assisting the new competing companies, allegedly in breach of the non-competition clauses. The inferences raised by these emails satisfied the threshold of relevance required for inspection. The Court thus considered that the jurisdictional requirements for an inspection order under r 322 had been made out, as "such an order would enable the proper determination of a relevant matter in question in the proceeding",⁸ namely whether Mr Grant had breached the non-competition clauses.

⁷ At [41].

⁸ At [51].

[31] The Court limited the scope of the inspection order to email correspondence within a defined period and between particular individuals and companies relevant to the proceedings. The Court also outlined the process and timeline for the inspection of the computer equipment to take place by an independent expert agreed by both parties.

[32] The second case referred to is *PAE (New Zealand) Ltd v Brosnahan*.⁹ As in *Tyco* the fundamental question for the Court was whether inspection was relevant to an issue in contention in the proceedings. In this case the plaintiff discovered a few weeks before trial date that one of the defendants still possessed a laptop computer that he had while employed by PAE. The plaintiff submitted that the laptop contained “highly relevant information” and was “of a nature that the defendants have been seeking from the plaintiff and which has not to date been discovered by the defendants”.¹⁰ In *PAE* the Court referred to the same authorities as *Tyco* regarding an order for inspection. The plaintiff stated that it had a strong suspicion that the laptop was likely to contain significant year end back-up information. This information was relevant to the plaintiff’s claim that it had paid too much for the defendants’ business, and that the plaintiff had deliberately and dishonestly increased the relevant figures. These contentions were disputed by the defendants who claimed that the plaintiff’s application was “purely speculative”.¹¹

[33] The Court held that the only way to dispel any doubts about the laptop, and whether it contained relevant information, was to order an inspection by computer experts. As in *Tyco* the Court was satisfied that the “jurisdictional requirements for an order under s 322” were met and that “such an order would enable the proper determination of a relevant matter in question in [the] proceeding”.¹²

[34] In the third case, *Transpacific All Brite Ltd v MPC Traders Ltd*,¹³ the claim alleged breach of restraint of trade arising out of the sale and purchase of a recycling business in which the plaintiff procured paper and pulp from suppliers and on-sold it.

⁹ *PAE (New Zealand) Ltd v Brosnahan* HC Wellington CIV-2005-485-843, 3 September 2007.

¹⁰ At [6]c).

¹¹ At [21].

¹² At [30].

¹³ *Transpacific All Brite Ltd v MPC Traders Ltd* HC Napier, CIV-2011-441-169, 24 November 2011.

The sale and purchase agreement contained a 5-year restraint of trade clause on the three defendants, two of whom were appointed as directors of the plaintiff, and one of whom was employed by the plaintiff as its financial controller. When they left after two years they became involved in a competing business.

[35] Among the several orders sought in the case was the plaintiff's application for inspection orders under HCR 9.34. The purpose of the application was to determine whether there were any documents held on the defendants' computer systems which were relevant to the proceedings for breach of restraint of trade.

[36] The plaintiff submitted that there was a proper evidential basis for supposing that there were relevant documents on the defendants' computer systems. The evidence was that the defendants had initially failed to discover some relevant documents which were provided once further discovery was requested; and that the plaintiff claimed to have uncovered relevant emails sent from the defendants which the defendants had not discovered.¹⁴

[37] The defendants had themselves engaged a computer network engineer subsequently deemed by the Court to be an expert, who had been able to find further relevant emails. However the plaintiff wished to discover not just emails (which had been searched) but incomplete attachments (which had not).

[38] The Court decided that the inspection orders should be granted for the reason that further documents had in fact come to light which had not been produced through discovery; and also noting that similar orders had been made in the two earlier cases. However the Court put strict terms around the inspection so that the invasive nature of the order could be limited in order to respect rights of privilege and confidentiality.

[39] The Court put weight on the circumstances in which the order was sought and the relevance of documents which had not come to light earlier. There needed to be evidence for a belief that further relevant documents existed, and in this case it was

¹⁴ At [59].

the documents which had surfaced after the discovery process, which should have been able to be discovered and were not.

[40] The issue of proportionality was not considered at all in the context of the inspection order, although it was given significant weight in the application (in the same case) for particular discovery. In the context of that application the Court said that this could not be a fishing expedition; and that the application could be opposed where requiring discovery would be oppressive.¹⁵ The Court noted that “a balance must be struck between the potential cost, time and difficulty involved in the additional discovery against the potential value that the discovery will add to the proceedings.”¹⁶ The Court drew attention to *Simunovich Fisheries Ltd v Television New Zealand Ltd (No 6)* where the Judge found the orders were not oppressive given the “magnitude of the claim, the manner in which it ha[d] been calculated and the financial resources available to the plaintiffs...”.¹⁷

[41] The present case is similar to *Transpacific* where documents came to light after the initial discovery process had been carried out. In that case, the documents came to light at a late stage in the proceedings which distinguishes it from the present case where the documents were disclosed by LSG as soon as they were located. In addition, the evidence in this case for any belief that the disclosure of the further documents means further documents exist, is far weaker. None of these decisions considered the issue of proportionality in the context of the application under HCR 9.34, although it is clear that where that rule is being used as a means of obtaining further disclosure of documents, the issue of proportionality will be as relevant as it is under HCR 8, dealing specifically with the discovery of documents.

[42] In *Transpacific* the Court noted that “a balance must be struck between the potential cost, time and difficulty involved in the additional discovery against the potential value that the discovery will add to the proceedings.”¹⁸ Such matters have been considered in a recent judgment of the High Court in *Lyttelton Port Company*

¹⁵ At [37].

¹⁶ At [37].

¹⁷ At [37], citing *Simunovich Fisheries Ltd v Television New Zealand Ltd (No 6)* HC Auckland CIV- 2004-404-3903, 3 August 2007 at [41]-[42].

¹⁸ At [37].

Ltd v Aon NZ.¹⁹ In that judgment, which dealt with an application for further discovery after tailored discovery orders had been made, Associate Judge Osborne relied²⁰ upon the decision of Asher J in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd*²¹ also referred to by Ms Meechan in the present case. Asher J in *Assa Abloy* had applied a four-stage approach to an application for such disclosure as follows:²²

- (a) Are the documents sought relevant, and if so how important will they be?
- (b) Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?
- (c) Is discovery proportionate, assessing proportionality in accordance with Part 1 of the Discovery Checklist in the High Court Rules?
- (d) Weighing and balancing these matters, and the Court's discretion applying r 8.19, is an order appropriate?

[43] In the present case Mr Matsuoka relies upon the fact that following the initial discovery process conducted by the defendant and following further orders by the Court, further documents came to light. This was at an early stage in the proceedings, relatively speaking, and there was no suggestion that the defendant had withheld these documents for any nefarious purpose. Indeed at this stage it is unclear as to how relevant in the proceedings the further documents are. This probably will not be able to be finally determined until the trial of the matter takes place.

[44] Applying the first two stages under *Assa Abloy*, it is difficult to identify relevant documents which the plaintiff is clearly alleging will be uncovered by the process proposed. The claim that there are further documents which will be discovered by this process is speculative. The situation in this case is unlike that considered in cases such as *Tyco*, *PAE* and *Transpacific* where identifiable documents or classes of documents were reasonably and confidently expected to be uncovered. In the present case, relevant documents are not identified and there is no certainty that further documents exist. I am not satisfied, therefore, that this is an

¹⁹ *Lyttelton Port Company Ltd v Aon NZ* [2016] NZHC 2996.

²⁰ At [7].

²¹ *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760.

²² At [14].

appropriate case to allow inspection under r 9. While LSG discovered further documents after initial disclosure, I attribute that more to oversight resulting from the nature of the dispute between it and PRI at the time of the transfer of employees under Part 6A including the litigation in the civil Courts, than to any attempt by LSG to withhold documents for the purposes of deception as occurred in the cases already referred to.

[45] In accordance with the requirements of HCRR 8 and 9 and sch 9, the Court must have regard to proportionality in considering an application such as that now made by the plaintiff. Regardless of the shortcomings in the plaintiff's application, it is clear that the process proposed is out of all proportion to the nature and quantum of Mr Matsuoka's claim. Mr Stewart, in his submissions, has attached a schedule showing that if all of Mr Matsuoka's pleaded claims succeed, he will recover in excess of \$1,000,000. That assessment of Mr Matsuoka's remedies if he is successful is considerably over-inflated. As Ms Meechan submitted, this is a relatively ordinary personal grievance claim for unjustifiable dismissal. Mr Matsuoka was employed as a low-level ground steward. He was regarded as a vulnerable employee under Part 6A of the Act, hence his entitlement to transfer to LSG. He never actually commenced employment with LSG before his dismissal. He was able to return to employment with his former employer. In addition, a substantial part of the claim, in fact \$480,000 consists of claims to penalties. For various reasons none of the penalties are likely to be valid or even if claimable would be awarded at a far lower threshold than that claimed.

[46] The claim in respect of the penalties has three identifiable difficulties at present. The first of these is that the Employment Relations Act 2000 requires that penalty actions be commenced in the Authority in the first instance. Mr Stewart has filed a memorandum in this regard in which he submits that in a situation where the proceedings have been removed from the Authority to the Court, it is arguable that penalty claims may be instituted in the first instance in the Court. There are possible tenable arguments to support that view although, for the purposes of this judgment, it is not appropriate to make a final conclusion as the matter has not been fully argued.

[47] There are two more substantial difficulties, however, for Mr Matsuoka with his claims to penalties. Section 135(5) of the Employment Relations Act 2000 provides that any action for the recovery of a penalty must be commenced within 12 months after the earlier of the date when the cause of action first became known to the person bringing the action, or the date when the cause of action should reasonably have become known to the person bringing the action. In this case both of those alternatives would mean the latest possible date when limitation arose was 12 months after the date when Mr Matsuoka was dismissed from the employment of LSG. The claim for penalties under the Wages Protection Act 1983 was commenced well after the expiry of the time limit. Insofar as the other claims to penalties are concerned, it is also clear that they were commenced after the 12-month period had expired. The statement of problem which Mr Matsuoka filed with the Employment Relations Authority on 8 August 2011 did not seek any penalties. In the determination removing the proceedings to the Court, no mention is made by the Authority Member of any action for penalties. The first time that penalties were raised by Mr Matsuoka was in his first amended statement of claim which was filed with the Court on 3 August 2012. That was outside the 12-month limitation period. While this issue is yet to be fully argued it would seem clear from the Court record that Mr Matsuoka is likely to be barred from proceeding with his claim for penalties by limitation.

[48] The third difficulty which Mr Matsuoka faces in respect of the penalty action arises from the judgment of Judge Travis in *Matsuoka v LSG Sky Chefs New Zealand Limited*.²³ This judgment followed Judge Travis's substantive judgment issued on 18 May 2011 (which dealt with Mr Matsuoka's disadvantage grievance) and gave answers to questions posed by the parties arising out of Part 6A of the Act.²⁴ The judgment did not deal with Mr Matsuoka's dismissal grievance which by that time had been removed to the Court.

[49] In the later judgment Judge Travis confirmed that Mr Matsuoka accepted that a penalty could not be recovered in relation to LSG's breach of Part 6A of the Act.

²³ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2012] NZEmpC 220, (2012) 10 NZELR 592 (remedies).

²⁴ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44, [2011] ERNZ 56 (substantive).

However, Mr Towner, who was acting as counsel for Mr Matsuoka at the time in the proceedings, when faced with this difficulty during the hearing, then relied instead on alleged breaches of the parties' employment agreement to claim penalties. Judge Travis held that it was not an appropriate case for the Court to award the penalties on the grounds which had been raised by Mr Towner as an alternative once it was acknowledged that no penalties could be recovered under Part 6A.²⁵

[50] The fact that Judge Travis dealt with Mr Matsuoka's claims for penalties in this way means that the doctrine of res judicata may arise to bar him from now claiming the same penalties again. Again, that can only be a preliminary view as this is a matter which will need to be fully argued.

[51] That Mr Matsuoka faces these difficulties with the penalty actions and on the face of it is unlikely to succeed on the ground of limitation, is relevant to the consideration by the Court at this stage of the issue of proportionality when he requests substantial time and expense be incurred by both parties in the proposed search for electronic documents. In the balancing exercise undertaken as the fourth stage specified by Asher J in *Assa Abloy*, a realistic assessment of the true value of Mr Matsuoka's claims, at least on an inferential basis, needs to be made.

[52] Also included in Mr Matsuoka's claims is the sum of \$177,111 for redundancy compensation. Mr Matsuoka was not made redundant and it is unlikely that this claim would succeed. Even if he were to succeed with his claim for redundancy compensation, that would be awarded as an alternative, not in addition to his substantial wages reimbursement claim. His claim for reimbursement of lost wages, benefits and leave balances is \$225,426. Presuming that the lost wages is a claim for reimbursement of future loss of income it is clearly substantially inflated, particularly in view of the fact that the starting point imposed by the Act for such a claim is three months' remuneration. A further factor likely to diminish this claim is the requirement that Mr Matsuoka take steps to mitigate his loss and he appears to have done so.

²⁵ *Matsuoka (remedies)* at [43], [51].

[53] In addition, there are relatively small claims of \$10,080 for a contractual notice period and a claim for \$22,581 as a claim for special damages being the legal costs which Mr Matsuoka has incurred outside his litigation costs.

[54] Finally, when considering the quantum of the claim, it is noted that a sum of \$85,000 in total is claimed as compensation. While this total sum is spread across several of the claims being made, it is nevertheless a claim well in excess of the awards usually made for compensation by this Court and some of the claims may overlap others.

[55] These proceedings have degenerated into an enormous fishing expedition for the discovery of documents by the plaintiff in the hope that a smoking gun will be located. The types of exercise being proposed would involve inordinate costs and the expenditure of time by counsel for the defendants. The exercise being proposed may result in nothing being discovered as occurred in the similar case involving another Part 6A employee of the defendant arising out of the same circumstances to that involving Mr Matsuoka. The electronic document search using LSG's hard drive is estimated to procure over 10,000 documents each of which would be required to be vetted to determine its relevance and whether it is admissible or not on grounds of privilege or other reasons.

[56] In conclusion, therefore, and in particular considering the issue of proportionality, the costs of employing an expert or experts to oversee the process of searching for electronic documents, the exorbitant amount of time which will be imposed upon counsel for both sides in analysing the expected substantial number of documents which will be uncovered in the process, the likely prospect that none of the documents in any event will be relevant and the sheer overall enormity of the process in comparison with the likely value of Mr Matsuoka's claim if he is successful, must lead to a rejection of Mr Matsuoka's application.

[57] In his submissions Mr Stewart seeks alternative orders in the event that the Court declines the application for search of electronic documents by a Court approved expert. This alternative would require LSG to appoint a competent computer expert of its own and purchase approved software to conduct the searches.

Insofar as the expenditure of costs and time is concerned, that alternative is really no different from the primary proposal. Such time and costs imposed on LSG would similarly be out of proportion to the nature of Mr Matsuoka's personal grievances claim and that alternative proposal is also declined.

Further particular discovery

[58] The second part of the application is for further particular discovery. There are ten categories of documents for which such particular discovery is sought. The first category is a request for communications between the Service and Food Workers' Union Nga Ringa Tota Inc, regarding the ARC 19/11 proceedings. These are the proceedings in which Judge Travis gave judgments to the effect that Mr Matsuoka was to be regarded as an employee under Part 6A of the Act and entitled to be transferred to the employment of LSG.

[59] In her affidavit dated 17 March 2014, Ms Park has stated that all relevant communications with the Union have been discovered. However, it appears to be not disputed that LSG has adopted the position that any information involving the Union related to the transfer process prior to the eligibility hearing being concluded is not relevant to the current proceedings and LSG has refused to search for these documents and provide them.

[60] In his submissions Mr Stewart stated that the communications sought are relevant to Mr Matsuoka's allegations that LSG adopted a strategy of attempting to prevent the transfer of employees whose terms and conditions of employment were more beneficial than the equivalent terms and conditions offered by LSG. He further submitted that the communications sought are relevant to Mr Matsuoka's allegation that LSG had already determined (prior to receipt of the Employment Court's eligibility judgment dated 18 May 2011) that it would not allow Mr Matsuoka to work for LSG. Such issues are potentially relevant both to liability and remedies, and the documents should be disclosed.

[61] In her submissions in answer, Ms Meechan has simply referred to the fact that the plaintiff had committed to advise the Court and the defendant whether this

particular part of the application was to be pursued when the matter was called at the case management conference on 1 August 2016. She stated that this has not happened but in any event the documents are irrelevant and she opposes the making of a discovery order in respect of them.

[62] I consider that the application should be granted and there is an order requiring LSG to locate and discover these communications with the Union.

[63] The next four categories relate to payroll information. The documents sought are as follows:

- (a) The employee audit reports for the period 1 January 2011 until 1 September 2011. (Clearly this only relates to Mr Matsuoka).
- (b) A copy of LSG document 72, with comments field enabled. This document was listed in the schedule in Ms Park's affidavit of 17 March 2014. The document which appears to be undated is described as "audit trail".
- (c) A complete copy of the payroll audit trail for the plaintiff.
- (d) All internal instructions to the defendant's payroll department relating to the plaintiff, including, but not limited to:
 - (i) instructions to enter the plaintiff in the system;
 - (ii) instructions to pay the plaintiff on 17 July 2011;
 - (iii) instructions to terminate the plaintiff in the system;
 - (iv) instructions in relation to the plaintiff's pay-rate entered in the system.

[64] Mr Stewart in his submissions maintained that such payroll documents and in particular the documents evidencing instructions are relevant to Mr Matsuoka's claim that LSG never intended to employ him.

[65] Ms Park has deposed that Mr Matsuoka was not entered into the payroll system until 6 July 2011, but had been assigned an employee number in or around February 2011. She deposes that LSG has disclosed all documents including its

internal payroll communications and that the Zambion system relating to Mr Matsuoka is a payroll system provided to LSG by a third party. It is pertinent to note that the Court has recently directed the payroll provider to preserve all information within its system relating to Mr Matsuoka.

[66] In his submissions Mr Stewart stated that while normally a knowledgeable deponent deposing as to the non-existence of documents would be accepted, in this case Ms Park's evidence is in conflict with evidence of both LSG's former payroll supervisor and former HR advisor. The inference to be taken is that Ms Park is not to be trusted. I do not accept that submission. I am also of the view that there is considerable misunderstanding between the parties as to terminology relating to the payroll system. For instance, counsel for Mr Matsuoka are insisting that there is a payroll audit trail for Mr Matsuoka, whereas this is completely denied by LSG and I understand is not accepted by the provider. The payroll provider's webpage refers to payroll audit trails, but until this is clarified I am unable to resolve the conflict. I am not satisfied that there are further documents to disclose. Regrettably this issue may need to await the testing of evidence at the substantive hearing, or alternatively be dealt with in some way by interrogatories related specifically to the pleadings. Presently I am prepared to accept Ms Park's affidavit of 26 February 2016 that the documents requested relating to payroll records have either been supplied or do not exist.

[67] The next three categories relate to telephone logs detailing: first, inbound calls from the defendant's Hong Kong office to Ms Park, Mr Roest and Mr Dempsey for the period 1 January 2011 until 1 September 2011; and secondly, outbound calls from the defendant to the defendant's Hong Kong office for the same period. The third item is any document listing the extension numbers used and whose extension the number belonged to during the relevant period for the defendant's New Zealand, Hong Kong or German office. Mr Stewart indicated in his submissions that the third item is no longer being pursued. Ms Meechan in her submissions has submitted that the information in the first two items has already been provided as affirmed in the affidavit of Ms Park dated 26 February 2016. In her affidavit, Ms Park states that LSG has provided the telephone logs as best it can but that the information is limited and there is no documentation available as to who made or received the calls listed.

In view of Ms Park's statements in her affidavit, I am not prepared to make the orders sought. In any event I am far from persuaded that the information is relevant.

[68] The next category involves a request that LSG provide documentation detailing its IT architecture and this is broken down into four sub-categories. I accept Ms Meechan's submission that this is an extraordinary request given the nature of the dispute between the parties. In any event, having regard to Mr Stewart's submissions, this request directly relates to the application for leave to search for electronic documents, which has already been rejected.

[69] The final category under the application for further particular discovery relates to 11,837 electronic documents of Mr Cheung, one of the directors of LSG, that were provided in the proceedings *ARC 22/14 Alim v LSG Sky Chefs NZ Ltd*. The request is that the defendant reviews those documents to ascertain whether any are relevant to Mr Matsuoka and then prepare, file and serve an affidavit listing all the relevant documents from that material. This application is made as an alternative in the event that the Court does not grant the leave to search the electronic documents. Even though that application has been rejected, this alternative application also offends the principle of proportionality. Ms Meechan in her submissions categorises the request as unreasonable and I agree with her. This application is declined.

Hard copy documents

[70] This is the third part of the application, and requests that LSG will, within 14 days, conduct searches for any hard copy documents relevant to the proceedings, including but not limited to, six named individuals who are either current or former employees of LSG. At the hearing Mr Stewart added two further names to the list. In addition, the application seeks further searching for hard copy documents in the physical material held in the defendant's human resources office and the human resources files in the defendant's archives. The application further seeks searching for physical material held in the defendant's payroll office and the payroll files in the defendant's archives; and such search must be made wherever the documents are located.

[71] Apart from the two further individuals named in Mr Stewart's submissions, namely Tanja Schlitter and Elisabeta Faasee, and any hard copy documents created by or sent to or by Mr H K Cheung, who is LSG's director resident in Hong Kong, Ms Park has provided the documents requested in this part of the application and that is confirmed in her affidavit of 26 February 2016. It is pertinent to mention that Ms Park's affidavit evidence also establishes that the attention she has paid to complying with discovery obligations of LSG is not something she has undertaken in a cursory fashion. She indicates in her affidavit the substantial number of hours that she and fellow employees have expended in the discovery process and I accept this amount of time has been expended.

[72] What this part of the application amounts to is asking LSG to repeat the not insubstantial part of the discovery process that it has already undertaken. The grounds, upon which this particular application is made, as set out in Mr Stewart's submissions, are unsubstantiated or speculative. Nevertheless, Ms Park admits that the process has not extended to hard copy documents created by or sent to or by Mr Cheung. The reason for not carrying out that exercise, being that Mr Cheung resides in Hong Kong, is not adequate when it has been able to carry out the exercise in respect of the other employees named. LSG has control over those documents and insofar as the request relates to Mr Cheung, LSG is ordered to comply with the request. Fourteen days is an unreasonable period of time for LSG to comply with the request to search and list the results of the search by affidavit. It is instead to be completed within 28 days. Paragraph [15] of the application is to be complied with in respect of the documents of Mr Cheung.

[73] Similarly an enquiry has not been conducted for documents created by or sent to or by Ms Schlitter and Ms Faasee. Certainly in respect of Ms Faasee it is likely there are documents in existence having regard to existing affidavit evidence from her. In the same way that the process is to be conducted in respect of Mr Cheung, it is to be conducted in respect of Ms Schlitter and Ms Faasee.

Costs

[74] That concludes this judgment in respect of those applications that have been heard and argued to date. Mr Stewart seeks costs in respect of the applications. However, the plaintiff has been largely unsuccessful in relation to a majority of the applications he sought. I consider that it is appropriate that costs be reserved to be considered with any overall consideration of costs at the conclusion of this matter on its merits.

M E Perkins
Judge

Judgment signed at 12.15 pm on 15 February 2017