

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2017] NZEmpC 64
EMPC 253/2015**

IN THE MATTER OF an application for a verification order and
 further disclosure

BETWEEN KAMLESH PRASAD
 First Plaintiff

AND LIUTOFAGA TULAI
 Second Plaintiff

AND LSG SKY CHEFS NEW ZEALAND LTD
 Defendant

AND SOLUTIONS PERSONNEL LIMITED
 First Third Party

AND BLUE COLLAR LIMITED
 Second Third Party

Hearing: On the papers filed on 21, 24 April, 5, 16, 22 May 2017

Appearances: P Cranney and T Oldfield, counsel for plaintiffs
 C Meechan QC and J Douglas, counsel for defendant

Judgment: 24 May 2017

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE M E PERKINS

Introduction

[1] These proceedings, which are set to be heard before a full Court of the Employment Court, involve applications by the plaintiffs for declarations pursuant to s 6(5) of the Employment Relations Act 2000 (the Act). The declarations sought are that they were, at all material times, employees of the defendant LSG Sky Chefs New Zealand Ltd (LSG).

[2] Third parties have been joined to the proceedings on the basis of their alleged involvement in the work which the plaintiffs performed at the defendant's premises in the environs of Auckland Airport.

[3] In order that the full Court hearing can take place on the dates allocated, the parties are undertaking the completion of interlocutory matters pursuant to directed timetabling.

[4] An issue has arisen between the defendant and the plaintiffs relating to disclosure of documents. The defendant wishes to have the plaintiffs verify disclosure pursuant to reg 46 of the Employment Court Regulations 2000 (the Regulations).

[5] The defendant was out of time in applying for a verification order and an order for further and better disclosure. Accordingly, it applied for leave to bring its application out of time. While the plaintiffs originally opposed such leave, the plaintiffs have now consented to the application being brought out of time. Nevertheless, they oppose the making of the verification and other orders against them.

[6] A similar application has been made by the defendant against the third parties for a verification order and for further and better disclosure. That application also appears to have been made out of time, but again, the granting of leave was not opposed by the third parties. That application is now the subject of timetabling directions.

[7] The application for a verification order and further and better disclosure against the plaintiffs seeks the following orders:

- 1.1. The plaintiffs each disclose in a sworn or affirmed statement, stating whether the following documents listed below, (being documents specified in a notice requiring disclosure dated 12 July 2016), have at any time been in the possession, custody, or control of the plaintiffs and if such documents are no longer in the plaintiff's possession, custody or control, when it was parted with and what has become of it:

- a) bank records, demonstrating payments received from work carried out as contractors or as employees
 - b) IRD and ACC records
 - c) Employment agreements or contractor agreements.
- 1.2. that the plaintiffs each provide further and better disclosure of the documents relevant to this proceeding, as outlined in paragraph 1.1.

[8] The grounds upon which the orders are sought are:

- 2.1. That the documents sought are relevant to the issue of employment status;
- 2.2. The defendant has requested that the documents be provided and, in the event the documents have ceased to be in the plaintiffs' possession, custody or control, the date that occurred, but have received no satisfactory response to those requests;
- 2.3. Appearing in the affirmation of Marie Lynne Park filed in support of this application.

[9] The plaintiffs filed a notice of opposition to the applications. The grounds upon which the plaintiffs opposed leave and the making of a verification order are as follows:

...

- a. The application is over 9 months out of time;
- b. The [defendant] did not previously indicate it intended to bring applications for verification orders;
- c. Leave to file verification orders out of time would not more effectually dispose of the matter before the Court according to the substantial merits and equities of the case;
- d. Verification orders would not advance matters.

[10] The grounds upon which the plaintiffs opposed the making of the orders for further and better and disclosure are as follows:

...

- a. The [plaintiffs] are opposed to the order sought in respect of ACC records because ACC records are not relevant and they

understood the request for these records was withdrawn by letter dated 21 September 2016;

- b. As the [defendant] is already aware, the [plaintiffs'] instructions are they no longer have copies of their contracts with the third parties, excepting the first plaintiff's contract with the first third party, which has already been provided to the [defendant]. The information was provided to the [defendant] with the [plaintiffs'] list of documents in accordance with r 42(3)(c) Employment Court Regulations 2000; and
- c. The [plaintiffs] are opposed to the order sought in respect of the bank records, as the bank records are not relevant.

[11] As indicated, leave to file the application out of time is no longer an issue. The defendant is no longer pursuing orders in respect of the ACC records. The IRD records have been provided since the defendant's application was filed.

[12] Ms Douglas, who has presented written submissions on behalf of the defendant in support of the application, pointed out that the claim is one that focuses on employment status. Therefore, any agreements entered into by the plaintiffs which apply to the work that they did at LSG premises are relevant. Relevant also is any work that they did during the period of their claims for any other employers/clients or clients of either of the third parties. She further submitted that the plaintiffs' bank statements are the most reliable record of income derived from their work in the circumstances which prevail in this case. She also submitted that the plaintiffs have not been able to provide full documentation relating particularly to their relationship with either of the third parties. Therefore it is important that the plaintiffs' position in respect of such documentation is put on oath by way of a verification order.

[13] In his written submissions in reply, Mr Oldfield, on behalf of the plaintiffs, submitted that the defendant is already aware of all of the circumstances surrounding the documents and that the plaintiffs are unable to recall when they may have parted with contractual documents. He stated that the only ground of opposition raised by the plaintiffs is in respect of the application for the verification orders and that such orders would not advance matters.

[14] Insofar as further disclosure is concerned, the plaintiffs do not oppose an order requiring them to produce bank statements showing income received from work performed for persons other than the defendant during the period the plaintiffs allege they were employed by the defendant. However, the plaintiffs oppose the making of a wider order on the basis of relevance.

[15] The jurisdiction of the Court to make a verification order is clearly established by regs 46 and 47 of the Regulations. The exercise of the jurisdiction is discretionary. The applicant must show that an unsatisfactory position exists in response to the notice requiring disclosure. The Court also has to be satisfied of the probable existence of the document or class of documents specified or described in the notice and application. Once a verification order has been made and served, the party who has been served with it is required, pursuant to reg 46(3) to swear or affirm a verifying statement setting out its position in respect of the documents in the usual way. This will include specifying documents in the party's possession. In addition, if documents were formerly in its possession or power but are no longer in its possession or power, it will need to explain how those circumstances came about.

[16] Applications such as the present have been dealt with by this Court previously. In *Postles v Airways Corporation of New Zealand (No 3)*¹ a similar situation to that existing with the present application came before the Court. In that case, Chief Judge Goddard expressed surprise that:²

... any party or their representatives would wish to oppose an application for verification especially having regard to the requirement for co-operation which is a feature of regs 45 to 59 [Employment Court Regulations 1991] dealing with mutual disclosure and inspection of documents.

Chief Judge Goddard went on to state:

[24] I am satisfied of the probable existence of documents of the classes the plaintiffs are after. That is to say, documents relating to the abandonment, review, or confirmation of the policy against re-employment following redundancy except on conditions. If, contrary to this view, no such documents are extant, there is still every reason to order the defendant, in view of its studied reticence on the subject, to state on oath or by way of affirmation —

¹ *Postles v Airways Corporation of New Zealand (No 3)* [2002] 2 ERNZ 822 (EmpC).

² At [14].

- whether it has ever had any such documents, and
- if it does not have them now, when it last had them, and what has become of them.

[17] The matter is one of discretion as was confirmed in *Matthes v New Zealand Post Ltd*.³ As Judge Travis stated in that case:⁴

The Court must also retain a discretion pursuant to regulation 45 to prevent unnecessary or undesirable disclosure, even of relevant documents. If disclosure was being sought in an oppressive manner this would also be a consideration to be taken into account. Such objection may be made the subject of a separate application to resist disclosure or be taken into account when exercising the discretion to make a verification order. It is only if the documents are found to be relevant that the validity of the grounds for objection contained in regulation 52 must be determined.

[18] In the present case the issue is not, as Mr Oldfield has submitted, that the order will not advance matters, but rather that, from the defendant's point of view, the plaintiff's position is put on oath so that the defendant has certainty prior to the trial taking place. Knowing the position, the defendant will be able to prepare accordingly.

[19] There is no dispute that the plaintiffs are able to recover and disclose bank statements. I agree with the submission of Ms Douglas that these bank statements would provide valuable evidence of the plaintiffs' source of income during the relevant period. There has been agreement that non-relevant personal information appearing in the statements can be redacted. I also agree with Ms Douglas that the plaintiffs should put their position on oath as to contractual documents whether presently or formerly in their possession and, if the latter, what became of them. This will enable the defendant to know what it faces at trial and also to make further enquiries or seek disclosure from other persons or parties.

[20] In applying the relevant principles, I am satisfied of the probable existence of the documents or class of documents which the defendant now seeks. Accordingly, there will now be an order in terms of paragraph 1.1 and 1.2 of the defendant's application but with reference to IRD and ACC records deleted. The plaintiffs are

³ *Matthes v New Zealand Post Ltd (No 1)* [1992] 3 ERNZ 145 (EmpC).

⁴ At 150.

required to comply with the order within 14 days by filing and serving the verifying affidavits or affirmations on or before 4 pm on 7 June 2017. In respect of the documents sought, the affidavits or affirmations are to comply with the requirements of reg 46(3) of the Regulations.

[21] Costs are reserved.

M E Perkins

Judge

Judgment signed at 2 pm on 24 May 2017