

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 35
EMPC 307/2017**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for orders for supplementary
 affidavit

BETWEEN TITIIMAEA EUGENE ELISARA
 Plaintiff

AND ALLIANZ NEW ZEALAND LIMITED
 Defendant

Hearing: On the papers

Appearances: P Kiely and S Worthy, counsel for plaintiff
 L Scampion and J MacGibbon, counsel for defendant

Judgment: 29 March 2019

**INTERLOCUTORY JUDGMENT (NO 2)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for orders for supplementary affidavit)**

[1] By judgment dated 28 August 2018 the defendant was ordered to file and serve a verifying affidavit in respect of certain documents and categories of documents within 20 working days.¹ The order was complied with in terms of the timeframe; the question that now arises is the extent to which the order was substantively complied with.

¹ *Elisara v Allianz New Zealand Ltd* [2018] NZEmpC 100 at [55].

[2] The plaintiff says that the affidavit is inadequate in material respects and seeks orders requiring the defendant to swear a supplementary affidavit. The defendant is opposed to the making of the orders sought. Submissions have now been filed on behalf of both parties. It was agreed that the application could be dealt with on the papers.

[3] It is necessary to set out the terms of my earlier order to put the application, and the defendant's response to it, in context:

[55] The defendant is ordered to serve a verifying affidavit in respect of the documents and categories of documents identified in [22], [25]-[26] and [52]-[53] above, within 20 working days of the date of this judgment. The verifying affidavit is to be sworn/affirmed by a suitably qualified person so as to fully inform the Court and the plaintiff as to the position in respect of the documentation at issue. *The affidavit is to be given by a person with the requisite authority to make the necessary full and proper inquiries as to the existence and whereabouts of the documentation (including as to documentation that was in existence but is no longer in existence) and who is in a position to confirm what has happened to any such documentation and when. This may well necessitate broader inquiries, including within Allianz outside New Zealand.* The affidavit is to be *fully particularised, including setting out each of the steps taken to fulfil the defendant's disclosure obligations in respect of the identified documents, and listing the documents to be disclosed in a schedule appended to the affidavit* which is to identify the documents that:

- (a) are in the control of the defendant for which the defendant does not claim privilege;
- (b) are in the control of the defendant for which privilege is claimed, stating the nature of the privilege claimed;
- (c) have been, but are no longer, in the possession, custody or control of the defendant, stating when the documents were parted from and what became of them;
- (d) have not been in the defendant's possession, custody or control but which the defendant knows would be discoverable if it had possession, custody or control of them; and
- (e) identify any document in respect of which confidentiality issues are said to arise and why; and set out any restrictions proposed to protect the claimed confidentiality of any such document.

(emphasis added)

[4] As I have said, the defendant filed an affidavit in response to those orders. The affidavit was sworn by Mr Fearnley, General Manager, Business Partnering, Human

Resources at Allianz Australia Ltd. The defendant is a branch of that company. In the affidavit Mr Fearnley states, amongst other things, that:

- he is aware of the obligations on parties to litigation to make disclosure of documents, which may contain information that is directly or even indirectly relevant to the issues in the proceeding;
- he has followed and complied with the guidance provided at [7]–[8] of the judgment;
- he is “certain that the Defendant and Allianz Australia and the Allianz Group of Companies have made more than full and comprehensive disclosure”; and
- he has directed and controlled the “diligent searching for all documents that the Defendant is required to discover pursuant to the judgment”, including searching all electronic records held by the defendant and/or Allianz Australia, and making inquiries of managers of Allianz Australia involved in the plaintiff’s disciplinary matter.

[5] In addition to the verification affidavit, there is correspondence between counsel which has been put before the Court. It is fair to say that the correspondence expands on the matters covered by Mr Fearnley in his affidavit. I agree with the concern identified by counsel for the plaintiff that, to the extent that the defendant’s correspondence does respond to the plaintiff’s legitimate concerns, those responses have not been provided in sworn form and do not meet the requirements imposed by way of the Court’s judgment.

[6] I now turn to consider the matters raised by the plaintiff in support of its application.

[7] The orders contained within my earlier judgment included a direction that the verifying affidavit not only be sworn by a person who was in a position to do so, but that it be fully particularised, including setting out each of the steps taken to fulfil the

defendant's disclosure obligations in respect of the identified documents. There is nothing specific in Mr Fearnley's affidavit as to any searches for relevant documents stored outside of Allianz New Zealand Ltd and Allianz Australia Insurance Ltd. Rather, the affidavit is focused on the steps taken to search the records of the latter company. For example, no detail is provided as to the searches undertaken within the broader worldwide structure, including (but not limited to) Allianz Germany, or precisely why any such searches are not considered necessary. Counsel for the plaintiff says that this raises issues because documentation that has been disclosed reflects that employees of the Allianz Group located in Germany were involved in the plaintiff's case (Dr Theis's name is referred to in this regard). And while Mr Fearnley has confirmed that he has made inquiries of managers within Allianz Australia Ltd, he says nothing about whether such inquiries have been directed elsewhere.

[8] While counsel for the defendant has written to counsel for the plaintiff seeking to address these issues, that does not meet the requirements of the Court's order. In any event, while emails and correspondence sent from Germany may have been directed to either Australia or New Zealand and, on this basis, may already have been disclosed, that does not adequately cover off the possibility that there are other documents not transmitted electronically that exist, or previously existed but no longer exist.

[9] In these circumstances, I consider it appropriate to require confirmation by way of supplementary affidavit that the necessary searches have been made, including that a request has been made of Dr Theis to provide relevant documents, notes or other information about the plaintiff on the November 2016 earthquake, and the outcome of any such inquiries.

[10] Further particulars are also required, by way of supplementary affidavit, as to the nature and extent of the searches applied in relation to the Board reports referred to in the original orders. In this regard Mr Fearnley says:

8 The Allianz Australia legal team is responsible for the retention of all Board Reports. A search of all Board Reports was undertaken. Electronically, this included using the terms "Eugene Elisara + Prime Account" as well as "Eugene Elisara + Termination".

9 The Board Reports, including those obtained electronically encompassing the above search terms, were then reviewed and the irrelevant material redacted. ...

[11] Two particular issues emerge. First, it remains unclear who actually carried out the search; who carried out the subsequent review of the Board reports which were obtained (both electronically and by other (unspecified) means); and what the “review” entailed. Those matters should be clarified.

[12] Second, what search terms were used other than the two terms specifically identified? That question arises because of the inclusive (rather than comprehensive) way in which Mr Fearnley has expressed himself. I accept counsel for the plaintiff’s submission that Mr Fearnley should specify each of the terms used. If, for example, variations of the term “termination” (such as “terminate”) have not been used, that will call into question the sufficiency of the steps taken in terms of the Court’s orders.

[13] I directed that the verifying affidavit deal with what has been referred to as the “29 claims”. Mr Fearnley has set out the steps he has taken to search for data relevant to the 29 claims and the results of his inquiries. Counsel for the defendant contends that Mr Fearnley’s affidavit does not adequately particularise where the information relating to the claims was held (electronically and/or manually); the instructions provided to the Allianz IT team in relation to them; and why certain constraints were placed on the search. Further details are sought.

[14] I do not consider it necessary or appropriate to make further orders as to where information relating to the 29 claims was held. The answer to that question appears to me to be of little or no consequence in light of Mr Fearnley’s evidence as to what has been disclosed. One of the key aspects of the plaintiff’s claim is, as Mr Fearnley points out, an assertion that his dismissal arose because of his involvement in the writing of insurance cover in breach of underwriting instructions. Mr Fearnley confirms that six of the 29 claims were identified as being in breach of the underwriting instruction; the others were identified as being compliant. He confirms that all documents requested by the plaintiff in relation to the residual 23 claims have been disclosed, whether assessed as relevant or not. Mr Fearnley also confirms that he has carefully reviewed each of the six claim files and has disclosed, with his

affidavit, all relevant documentation and correspondence from the claim notification date through to 30 April 2017 (three months after the plaintiff's dismissal).

[15] Nor do I consider it necessary or appropriate to make further orders as to the search terms, given Mr Fearnley's confirmation that he has reviewed the six potentially relevant files and disclosed relevant information contained on them. The other 23 files have, he says, already been disclosed.

[16] Finally, the plaintiff takes issue with the sufficiency of the search terms used in respect of the "Guppy" documentation. Mr Fearnley's affidavit confirms that prior to the judgment he had:

... enquired with all Senior Management involved to ascertain the existence of any possibly relevant documents. Additionally, I worked with the IT team at Allianz Australia to search for any material referencing "Marc Guppy + relocation" against a list of employees provided by the Plaintiff.

[17] Mr Fearnley says that, as a result of the judgment, a further search was undertaken "including electronically the terms "Marc Guppy + relocation", that further emails have now been disclosed and that he is "certain that there are no other documents in this category" which are relevant to the proceeding. His certainty is no doubt predicated on the search term used and the results which were thrown up by it. I agree with counsel for the plaintiff that it is unclear why Mr Fearnley considered that the one search term was sufficient. Other search terms involving variations of "relocation", such as "move" and "transfer", would seem to be obvious contenders.

[18] A supplementary affidavit is to be filed and served, addressing each of the above issues identified in [9], [10], [11], [12] and [17]. Given the date on which the common bundle of documents is due to be provided to the Court (namely by 1 May 2019), I direct that the affidavit be filed and served no later than 16 April 2019.

[19] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 2 pm on 29 March 2019