

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

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

**[2019] NZEmpC 42
EMPC 139/2017**

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

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

BETWEEN MARIE MCNABB
 Plaintiff

AND SILVER FERN FARMS LIMITED
 Defendant

Hearing: On the papers

Appearances: S Mitchell, counsel for plaintiff
 T Cleary, counsel for defendant

Judgment: 8 April 2019

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for a verification order and further discovery)**

[1] This judgment resolves the defendant’s application for a verification order in relation to two contested categories of documents.

[2] The substantive proceedings brought by the plaintiff, Ms McNabb, are a challenge to a determination of the Employment Relations Authority (the Authority) that found that the dismissal of Ms McNabb by the defendant, Silver Fern Farms Ltd (Silver Fern Farms), on 27 June 2016 was justifiable.¹ Ms McNabb was dismissed for

¹ *McNabb v Silver Fern Farms Beef Ltd* [2017] NZERA Auckland 159.

failing to follow Silver Fern Farms' hygiene practices, in particular its Dropped Meat Procedure.

[3] Ms McNabb challenges the Authority's finding and seeks financial compensation as well as an order that she be reinstated to her former role at Silver Fern Farms.

[4] Ms McNabb has provided disclosure of some documents, but there remain in contest two particular categories of documents, being:

- (a) documents relevant to Ms McNabb's interactions with her former partner and/or his subsequent partner, dating from Ms McNabb's separation from her former partner;
- (b) documents relevant to a proceeding under the Harassment Act 1987 involving Ms McNabb in the District Court/Family Court.

[5] Ms McNabb's former partner was a contractor to Silver Fern Farms. His subsequent partner was employed by Silver Fern Farms, but has now left.

The parties dispute relevance

[6] Silver Fern Farms says that these documents are relevant because it will, in its defence of the challenge, include arguments if Ms McNabb is held to have been unjustifiably dismissed (which is denied):

- (a) that no remedies are available to her due to her pre-dismissal disintitling conduct, whether known or unknown at the time of the dismissal;²
- (b) that reinstatement is inappropriate given Ms McNabb's pre- and post-dismissal behaviour against both her former partner and his subsequent

² Relying on the Employment Relations Act 2000, s 123; *Ark Aviation v Newton* [2002] 2 NZLR 145, [2001] ERNZ 133 (CA); and *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193.

partner, including Ms McNabb making a false complaint to Silver Fern Farms against the subsequent partner.³

[7] Ms McNabb opposes the application. She says she has already provided to Silver Fern Farms copies of the proceedings between her and her former partner in the Family Court. She says she is also willing to provide documents relating to a Family Court proceeding in connection with a Protection Order application by the former partner, and to a criminal matter, of a charge of breach of a Protection Order.

[8] She says the application by Silver Fern Farms for further documents takes the matter too far and that the documents sought are irrelevant to the issues that need to be determined in the Court. Ms McNabb points to the subsequent partner no longer working at Silver Fern Farms.

[9] She also says that the issues raised by the documents sought were not part of the justification for her dismissal and were not addressed in the Authority investigation. She says it is too late for Silver Fern Farms to now rely on them for that purpose.

[10] Silver Fern Farms says, however, that it does not rely on Ms McNabb's conduct towards her former partner or his subsequent partner as justification for her dismissal, but that it will wish to rely on that conduct to support its argument that remedies ought to be reduced or disallowed, including that reinstatement is not appropriate in the circumstances. It also points to the challenge being *de novo*, meaning the hearing is not limited to matters traversed in the Authority.

[11] Silver Fern Farms notes that it does not seek all documents to do with Ms McNabb's interactions with her former partner and his subsequent partner, but only those that date from her separation from her former partner. It says this is the relevant timeframe because this is the time Ms McNabb first brought her separation issues to work and engaged in a concerted programme aimed at besmirching the name of her former partner.

³ Relying on *Ports of Auckland Ltd v Angus* [2011] NZEmpC 106 at [65] and *Salt v Fell*, above n 2, at [85].

[12] Silver Fern Farms filed an affidavit from the former plant manager at the Te Aroha plant in support of its application. He gives evidence that he investigated allegations made by Ms McNabb against her former partner and found that they were without foundation. The former plant manager says that the way that Ms McNabb behaved in her dealings with her former partner had a detrimental impact on him as a manager and he could see it causing disharmony at work. Silver Fern Farms says Ms McNabb's conduct could have justified a dismissal for serious misconduct. The former plant manager also points out that Ms McNabb was dismissed for failing to follow the Dropped Meat Procedure before he could consider taking any disciplinary action over her behaviour in relation to her former partner.

[13] This application does not involve the issue of whether documents or a class of documents specified or described in the application exist; it is clear they do. The issue is relevance. Under reg 40 of the Employment Court Regulations 2000 a party may require an opposing party to disclose and make available for inspection any documents in the opposing party's possession, custody or control which are relevant to any disputed matter in the proceedings. For the purposes of that regulation, a document is relevant if it directly or indirectly supports, or may support, the case of the party seeking disclosure.⁴ The obligation is a broad one; it is not necessary for Silver Fern Farms to establish that the documents definitely will support its arguments, but only that they may do so, directly or indirectly.⁵

Documents may go to remedies

[14] The documents must be relevant to a matter in question in the proceedings, as identified by the pleadings.⁶ Although the documents Silver Fern Farms seeks will not be relied on by it in its argument that Ms McNabb's dismissal was justifiable, remedies are before the Court to be considered if Ms McNabb succeeds in her claim that she was unjustifiably dismissed. At this stage I accept that documents relating to Ms McNabb's interactions with her former partner and/or his subsequent partner, from the date of Ms McNabb's separation from her former partner up until the date of

⁴ Employment Court Regulations 2000, reg 38(1)(b).

⁵ *ASB Bank Ltd v Nel* [2017] NZCA 559 at [17].

⁶ *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 at 644.

her dismissal are relevant to remedies and should be disclosed. Likewise, documents relating to any proceeding under the Harassment Act 1987, involving Ms McNabb and her former partner and/or his subsequent partner in the District Court/Family Court, arising out of events that took place between the date of separation and the date of dismissal, should be disclosed. I do not consider that documents that relate to events which occurred after the date of dismissal are relevant. They could not relate to Ms McNabb's employment obligations, as those had ceased. On occasion post-employment conduct is relevant to the issue of reinstatement, for example if compatibility with other personnel is in issue. But here the issues arose out of a relationship breakdown and neither the former partner nor his subsequent partner now works at Silver Fern Farms.

[15] Of course, the documents I consider are to be disclosed also may turn out not to assist the Court in determining the matters before it, but that is not the question. I am satisfied that these documents may, directly or indirectly, support Silver Fern Farms' arguments on the issue of remedies.

[16] Accordingly, it is appropriate to make orders as follows.

Orders made

[17] Ms McNabb is to provide a further sworn or affirmed statement setting out the documents which are or have at any time been in her possession, custody or control, and if such documents are no longer in her possession, custody or control, when they were parted with and what became of them, relating to:

- (a) Ms McNabb's interactions with her former partner and/or his subsequent partner, dating from Ms McNabb's separation from her former partner up until the date of her dismissal; and
- (b) any proceeding under the Harassment Act 1987 involving Ms McNabb and her former partner and/or his subsequent partner in the District Court/Family Court arising out of events that took place between the date of separation and the date of dismissal.

[18] Ms McNabb also must provide Silver Fern Farms with copies of the non-privileged documents set out in the sworn or affirmed statement.

[19] The affidavit or affirmation is to be filed and served, and copies of the non-privileged documents listed provided to Silver Fern Farms, within 20 working days of the date of this judgment.

[20] Costs are reserved.

J C Holden
Judge

Judgment signed at 11 am on 8 April 2019