

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

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

**[2019] NZEmpC 60
EMPC 125/2018**

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

AND IN THE MATTER OF a challenge to objection to disclosure

BETWEEN BARRY DEAN SEXTON
Plaintiff

AND PHILLIP LOWE
First Defendant

AND PASMR (NZ) PTY LIMITED
Second Defendant

Hearing: On the papers

Appearances: B Sexton, plaintiff in person
G Denholm, advocate for first defendant
No appearance for second defendant

Judgment: 16 May 2019

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Objection to disclosure)**

[1] The plaintiff, Mr Sexton, has challenged an Employment Relations Authority determination that found he was not an employee of Mr Lowe or Pasmr (NZ) Pty Ltd (Pasmr), being the first and the second defendants.¹

[2] There have been ongoing issues regarding disclosure of documents in the course of which the defence of the second defendant was, with its consent, struck out.

¹ *Sexton v Lowe* [2018] NZERA Auckland 99.

[3] This judgment resolves whether further documents must be disclosed by Mr Lowe.

[4] Mr Sexton says the documents he seeks are relevant to his claim that he was an employee of Mr Lowe and/or Pasmr. Mr Lowe says that he does not have some of the documents sought and that others are not relevant to the issues in these proceedings.

Documents must be relevant

[5] For documents to be disclosable, they must be relevant to a matter in question in the proceedings, as identified by the pleadings.²

[6] For the purposes of disclosure, a document is relevant if it directly or indirectly supports, or may support, the case of the party seeking disclosure.³ The obligation on a disclosing party is broad; it is not necessary for Mr Sexton to establish that the documents definitely will support his arguments, but only that they may do so, directly or indirectly.⁴

Nine categories of document sought

[7] The particular categories of documents that Mr Sexton says Mr Lowe has access to and which are relevant but have not been provided comprise:

- (a) Any text correspondence sent by Mr Lowe to Mr Sexton regarding pay rates or raising Mr Sexton's rate of pay or any other matters relating to Mr Sexton.
- (b) Any emails between Phillip Lowe, Sally Mallander and Peter Paalvast relating to or authorising payments to staff.

² Employment Court Regulations 2000, reg 40; *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA) at 644.

³ Employment Court Regulations 2000, reg 38(1)(b).

⁴ *ASB Bank Ltd v Nel* [2017] NZCA 559 at [17].

- (c) Copies of timesheets for Mr Sexton from 1 March 2017 to 20 September 2017.
- (d) Jabroli Trust bank statements that have not been redacted.
- (e) A GST number for Jabroli Trust.
- (f) IRD and GST numbers for Mr Lowe.
- (g) Copies of any receipts for a Site Safe course or for any other induction courses relating to Mr Sexton.
- (h) Any documentation relating to Mr Sexton filed by Mr Lowe regarding security clearance at Auckland International Airport, or site passes for Fletcher Construction Company Limited (Fletchers).
- (i) Any documentation relating to Mr Sexton regarding rates he was paid and a breakdown showing any charges added to this rate for PAYE, ACC, KiwiSaver, holiday pay and other items that were on-charged and made up the total rate at which he was charged to Fletchers.

[8] Mr Lowe says he does not have any documents in the categories listed at [7](a), (b) or (c) above.

[9] In relation to the Jabroli Trust bank statements, Mr Lowe says that the redacted information does not relate to Mr Sexton's claim and is not relevant to the issues in these proceedings. He says Mr Sexton seems intent on a "fishing expedition".

[10] He says the documentation described in [7](e) to [7](i) above is unrelated to Mr Sexton's claim.

Some documents are relevant

[11] The key issue for the substantive case is whether the real nature of the relationships between Mr Sexton and either or both defendants was one of

employment. The Court will look at indicia of that relationship, which will include examining the arrangements entered into and the way in which the relationship between Mr Sexton and the defendants operated.

[12] I make no orders in respect of documents that Mr Lowe says he does not have. I am also satisfied that Mr Lowe is entitled to redact the bank statements to remove information that is not related to Mr Sexton or to E. Clean NZ Limited, being the company through which Mr Sexton invoiced Mr Lowe.

[13] Mr Sexton seeks the GST and IRD numbers simply to establish whether Jabroli Trust and/or Mr Lowe were GST registered. It is unclear how that is relevant to the issue of whether Mr Sexton was an employee. In any event, that is evidence that may be obtained through cross-examination. No order is made in that regard.

[14] At this stage in the proceedings, it is difficult to tell whether the invoices for the Site Safe course or other induction courses relating to Mr Sexton will assist him. The same is true of the documentation about a security clearance. However, I am satisfied that these documents may, directly or indirectly, shed light on the arrangements entered into between the parties and so may support Mr Sexton's claim. They are to be disclosed.

[15] The documentation relating to Mr Sexton's rates, paid to him (or presumably to E. Clean NZ Ltd) and as on-charged to Fletchers, likewise may directly or indirectly support his argument that he was an employee. They are to be disclosed.

[16] Accordingly, I make the orders that follow.

Orders made

- (a) Mr Lowe is to provide a further sworn or affirmed statement listing the documents which are or have at any time been in his possession, custody or control, and if such documents are no longer in his possession, custody or control, when they were parted with and what became of them, comprising:

- (i) any receipts for a Site Safe course or other induction courses relating to Mr Sexton.
 - (ii) any documentation filed by Mr Lowe about Mr Sexton's security clearance at Auckland International Airport or his site pass for Fletchers.
 - (iii) any documentation regarding rates Mr Lowe or E. Clean NZ Ltd was paid, including any breakdown that exists showing any charges added to those rates for PAYE, ACC, KiwiSaver, holiday pay or other items that were on-charged and made up the total rate at which he was charged to Fletchers.
- (b) Mr Lowe also must provide Mr Sexton with copies of the non-privileged documents listed in the sworn or affirmed statement.
- (c) The affidavit or affirmation is to be filed and served, and copies of the non-privileged documents listed provided to Mr Sexton within 20 working days of the date of this judgment.

[17] As Mr Sexton is not represented, there is no order for costs on this application.

J C Holden
Judge

Judgment signed at 2.30 pm on 16 May 2019