

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 160
EMPC 407/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for further and better disclosure
AND IN THE MATTER	of an application for third party disclosure
BETWEEN	MARIA VAN KLEEF Plaintiff
AND	ALLIANCE GROUP LIMITED Defendant

Hearing:	(on the papers)
Appearances:	M van Kleef, in person J Cowan, counsel for defendant
Judgment:	12 October 2020

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL:
(Application for further and better disclosure, and application for third party
disclosure)**

Introduction

[1] This judgment resolves two applications as to disclosure. The first is brought by Ms Maria van Kleef against Alliance Group Ltd (Alliance), being described as an application for further and better disclosure. It follows an earlier interlocutory

judgment in which I directed Alliance to file an affidavit of documents in Form G37 under the High Court Rules 2016.¹

[2] As a result of that direction, an affidavit of documents was sworn by Mr Kenneth Smith, in-house counsel for Alliance.

[3] Ms van Kleeef considered the disclosure was inadequate. She brought an interlocutory application for what was initially described as being for “further and better particulars”. Alliance took the point that what was sought were documents not particulars. Thereafter, I treated the application as being one for further and better disclosure under reg 6 of the Employment Court Regulations 2000. Several categories of documents were sought.²

[4] Alliance did not oppose Ms van Kleeef’s requests as recorded at paras 5, 6 and 8 of her application. I directed that disclosure of these documents occur. Mr Smith searched for, and located, a small number of relevant documents, and provided them in accordance with a timetable determined by the Court, on 1 June 2020. But the requests at paras 2, 3, 4 and 7 were opposed.

[5] At the same time, Ms van Kleeef brought an application for third-party disclosure against the New Zealand Meat Workers and Related Trades Union Inc (the Union), which was party to relevant collective employment agreements (CEAs) with Alliance. She sought documents held by the Union which constituted her personal information under Principle 6 of the Privacy Act 1993; a copy of all variation agreements that had been made to a particular departmental agreement of 2006; a copy of all documents relevant to offers made in the context of a 2012/2013 CEA; and a copy of all documents held with regard to negotiations for a further CEA with Alliance 2016, as it pertained to certain amendments made to the Employment Relations Act 2000 (the Act).

¹ *Van Kleeef v Alliance Group Ltd* [2019] NZEmpC 157.

² See generally the discussion as to this approach to discovery in *Nisha v LSG Sky Chefs New Zealand Ltd (No 20)* [2016] NZEmpC 77, [2016] ERNZ 568 at [33]–[34].

[6] The Union did not oppose this application, although it was emphasised that it should not be assumed it did in fact possess any relevant documents. The Court is advised that the Union did provide documents to Ms van Kleef on 3 June 2020. Accordingly, no order is required in respect of the application brought against the Union.

Submissions and evidence

[7] Affidavits and submissions have been filed by both parties, to which I shall refer where appropriate.

[8] Ms van Kleef also filed submissions raising concerns as to the adequacy of the disclosure of those categories which Alliance agreed to provide as indicated above. She asserts that some of that disclosure was inadequate. She has also raised further issues to do with the litigation more broadly. I will touch on these issues briefly later.

What this case is about

[9] Before turning to the disputed disclosure issues, it is necessary to repeat what I said about the background of this case, in my first interlocutory judgment.

[10] The proceedings arise from a determination of the Employment Relations Authority issued on 2 November 2018.³

[11] In its determination, the Authority first addressed an overtime issue. It concluded Ms van Kleef was entitled to refuse to work compulsory overtime which she had been instructed to perform. It found her CEA contained an availability clause which did not comply with the Act, so that overtime could not in those circumstances have been requested. Accordingly, she had successfully established a grievance to the effect that her employer had contravened s 67F of the Act, which meant her dismissal was unjustified entitling her to remedies.

³ *Van Kleef v Alliance Group Ltd* [2018] NZERA Christchurch 159.

[12] Next, the Authority found Ms van Kleef had been subjected to an unjustified disadvantage by the employer's failure to provide her with a notice of a relevant meeting held on 22 February 2017, by issuing her with a first written warning and by not informing her of a meeting with Union representatives at which an adverse remark was made about her.

[13] The Authority also determined Ms van Kleef had been frequently unable to take rest breaks in breach of s 69ZE(1) of the Act.

[14] The fixing of remedies was reserved because there were some complexities in quantifying Ms van Kleef's losses.

[15] Alliance initiated a challenge on a non-de novo basis with regard to a range of issues concerning payment of rest breaks, and as to whether the CEA included an availability provision.

[16] Ms van Kleef then brought a de novo challenge seeking not only compensation for the various breaches on which she had already succeeded, but also for other claims that were rejected by the Authority, including that she had been deliberately locked out of her employment; that she was owed wages for the time spent in donning and doffing for five minutes in each break for the six years prior to 23 April 2017; for rest breaks not paid appropriately from 1 April 2009 to 23 April 2017; for a unilateral reduction of pay rate from 29 August 2016 without her knowledge; and for penalties on multiple grounds. Alliance contests liability for all these claims.

Applicable principles

[17] In my first interlocutory judgment, I set out the relevant legal principles for dealing with disclosure issues. It is not necessary to repeat those, but I note they are all relevant to the current application. I particularly emphasise a key point I made in my first judgment to the effect that disclosure is a function of relevance, proportionality and discretion.⁴

⁴ *Van Kleef*, above n 1, at [24].

[18] There is, however, an additional issue which arises at this stage, since Ms van Kleef's concerns now focus on the adequacy of the disclosure undertaken by Alliance to this point.

[19] When a lawyer engages in disclosure, as here, the Court has certain expectations of counsel. The position was summarised by Judge Colgan in *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections (No 1)*, when he said:⁵

The pretrial process of discovery in litigation places serious, even onerous, duties upon counsel to ensure that the rules governing discovery or disclosure of documents are strictly adhered to. That is because a party is obliged to disclose documents unfavourable to that party's position in litigation as much as to make available documents which support that party's position. It is also because, unlike the trial, there is little or no independent supervision by a Judge of what is to be disclosed and what is to be withheld unless, of course, there is a formal challenge to disclosure as here. Counsel is, ultimately, responsible for the conduct of the litigation and cannot delegate important aspects of that to someone who ... has no accountability to the Court for the discharge of legal professional duties.

[20] Similar observations were made by the same Judge in *Fox v Hereworth School Trust Board*, when he said:⁶

[3] This is an appropriate case in which to re-state some fundamental, but sometimes overlooked, truths about the way document disclosure operates in practice and the Court's expectations of parties' representatives and especially of counsel and those they represent. Obtaining disclosure of another party's documents is frequently a very important part of litigation preparation. It is no exaggeration to say that another party's documents, the existence of which is unknown until their production, can dictate the outcome of a case. It is axiomatic that the Court should have the best relevant and admissible evidence about the issues for decision to try to get to the right answer.

[4] The Court does not undertake or even supervise the process of disclosing and producing relevant documents, at least until a point where an impasse has been reached between the parties. Representatives, especially those who practice as counsel, have onerous responsibilities which are sometimes difficult to explain to, and discharge on behalf of, lay litigants, requiring them to ensure and satisfy the Court that all relevant admissible documents have been disclosed if a party has been called upon to do so.

[5] Therefore, an assurance to the Court by counsel, or a statement made on oath or affirmation by a responsible and knowledgeable person filed by

⁵ *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections (No 1)* [1998] 3 ERNZ 500 (EmpC) at [515].

⁶ *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251.

counsel that, for example, no such documents exist, or that relevant documents are privileged, or the like, will usually be accepted by the Court. The Court will not go behind such compliance with these ethical obligations to it. The process of litigation can indeed only work on this basis of trust and confidence between Court and Bar and, in turn, depends upon an independent and strong legal profession.

[21] In *McCook v Chief Executive of the Inland Revenue Department*, I explained that these obligations would also apply to in-house counsel, if they were acting in that role, as is the case in this instance.⁷

[22] I proceed in light of the foregoing principles.

Paragraph 2

That the respondent's Chief Information Technology Manager provides by sworn affidavit, the information/data, management policies and procedure on retention, archiving, purging and backup at Alliance Group Ltd and an overview of their information/record management infrastructure, that is, the searchable databases, systems, Cloud, apps and internal/external repositories where record are kept. To verify whether any 2012/2013 or 2016 collective agreement bargaining documents were removed, altered or destroyed between the 22 February 2017 and their search (for the purposes of the 2019 affidavit of documents), stating the date and nature of the document.

[23] In her application, Ms van Kleef's states that this request was made because Alliance had installed a new system with a Cloud-based platform, which could have multiple access, sites and storage. Ms van Kleef said Mr Smith's previous searches had failed to find documents that should have been retained or located. She said Alliance's policies and procedures would help show why.

[24] Alliance's notice of opposition stated that the company had met its disclosure obligations and had filed an affidavit of documents which described the searches it undertook. It would accordingly be unnecessary, inexpedient and improperly onerous in all the circumstances to provide documents in the disputed categories.

[25] In my earlier interlocutory judgment, I discussed the adequacy of the search undertaken by Alliance prior to Ms van Kleef making her first application; and the

⁷ *McCook v Chief Executive of the Inland Revenue Department* [2020] NZEmpC 109 at [56].

contents of the affidavit filed by Mr Smith for the purposes of that application, sworn on 18 April 2019. I concluded in that judgment there were some areas where a further or more elaborate search was justified.⁸ It is unnecessary to repeat my conclusions which are self-evident.

[26] In the affidavit of documents which was filed on 4 December 2019, Mr Smith stated that to fulfil the obligations required in preparing the affidavit of documents which the Court had directed Alliance to provide, he said he had taken the following steps:

- (a) Searched for and through Alliance’s hardcopy collective bargaining documents for the relevant bargaining rounds;
- (b) Searched through Alliance’s electronic files in relation to the relevant bargaining rounds;
- (c) Had Alliance’s IT search across Alliance’s systems for search terms “Maria” and “Kleef” including searching across Human Resources documents, the Chief Executive Officer’s documents, and the wider electronic system;
- (d) Reviewed documents disclosed during the Employment Relations Authority investigation meeting, including those in the bundle of documents;
- (e) Searched for and located where possible boxes of hardcopy collective bargaining documents and reviewed those documents;
- (f) Searched for documents or records showing piece-rate payments in relation to this claim, broking down in any way; and
- (g) Further steps outlined in [an] affidavit of 18 April 2019 filed in these proceedings.

[27] In his most recent affidavit filed for the purposes of the present application,⁹ Mr Smith referred to his December affidavit, as just summarised, and emphasised that Alliance had complied with its disclosure obligations. He confirmed again that the search which he arranged for Alliance’s IT personnel to undertake was broad. He said it would have captured all documents relating to Ms van Kleef, given the search terms used. He also recorded, for completeness, that the documents relating to collective

⁸ *Van Kleef*, above n 1, at [32], [45] and [48].

⁹ Sworn on 22 May 2020.

bargaining were often stored in hardcopy format, which is why a physical search for hardcopy documents had been undertaken.

[28] I refer to the principles outlined earlier as to the obligations falling on a lawyer in circumstances such as the present; plainly, they are onerous, and the Court expects a lawyer to have fulfilled his or her duties properly. Before the Court could be persuaded to make an order of the kind Ms van Kleef seeks in para 2, there would need to be very compelling evidence that the searches undertaken by Alliance to this point were obviously defective.

[29] In support of her application. Ms van Kleef referred to a letter she had received from counsel for Alliance, Mr Farrow and Mr Cowan, when forwarding the further documents the company agreed to provide in June 2020. In that letter, counsel confirmed Alliance had completed an extensive search for documents in the yet further categories it had agreed to provide. One of these related to documents relevant to the 2012/2013 collective employment agreement negotiations between Alliance and the Union. Counsel said:

2012 collective bargaining documents Alliance once held include ‘remits’ and correspondence between Alliance and [the Union]. Alliance is not aware of when those documents ceased to be in its possession, or what happened to those documents. Alliance’s email archives only include emails from dates in 2013 onwards. It is possible any relevant documents have been lost or destroyed in the course of Alliance’s business.

[30] Counsel went on to state that Alliance understood the Union held a file of documents which had been disclosed on behalf of the Union by its lawyer. Alliance understood that those documents provided a comprehensive record.

[31] Ms van Kleef argued that the Union’s disclosure produced only four documents, one being a repeat of a document Alliance had previously produced, although not signed off.

[32] She submitted that there was accordingly an “unnatural lack of disclosure” from the company and the Union regarding the 2012/2013 negotiations, and that there was a “strong prima facie case of spoliation/concealment”. She went on to submit, in effect, that the Alliance response to her request was inherently implausible. She said

that if Alliance could not produce the documents she had been seeking, particularly with regard to the 2012/2013 bargaining, that was due to inadequate record-keeping. She also suggested that other adverse inferences could be drawn from documents she has seen, although these have not been produced to the Court.

[33] All the Court is concerned with, at this stage, is the disclosure of relevant documents. It is not at present the function of the Court to make a judgment as to the adequacy of a party's record-keeping practices, or whether the company has acted improperly. That said, these issues may become relevant when assessing the issues arising from the challenges at a later point.

[34] In these circumstances, I dismiss the application in respect of para 2.

Paragraph 3

That under Principle 6 of the Privacy Act, the respondent provides a copy to the applicant of all personal information they hold on Maria Annetta van Kleef. If any document has been in your possession, custody or control is no longer in your possession, custody or control, to disclose both when it was parted with and what became of it.

[35] In support of this application, Ms van Kleef said that Alliance had failed to use adequate search terms for documents relevant to a particular email she stated she sent to the Chief Executive Officer (CEO). She said she was entitled to personal information and any documents regarding her email to the CEO should be found in a search for personal information.

[36] The background to this request is that in her first application, she sought:

All documents ... created in response to [Ms van Kleef's] e-mail to the Alliance Group GEO ... on the 3 July 2017 and [Ms van Kleef's] advocates letter ... on the 7 July.

[37] Mr Smith had, in his first affidavit of 18 April 2019, stated he had asked the CEO's personal assistant to search the CEO's email mailbox for any emails, and that person had been unable to locate any relevant documents.

[38] In his second affidavit of 4 December 2019, Mr Smith referred to a particular IT search which had then been made following the Court-ordered disclosure.¹⁰

[39] Alliance's notice of opposition states that relevant documents relating to Ms van Kleeef's personal information have been disclosed, and that otherwise her personal information was not relevant, nor did the Court have jurisdiction to make an order with regard to compliance under the Privacy Act 1993. That proposition is well established: *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*.¹¹

[40] I put the reference to the Privacy Act to one side, when considering whether a proper search has been carried out for any further documents in connection with Ms van Kleeef's email to the CEO of 3 July 2017. In the face of the contents of the three affidavits filed by Mr Smith, I am not persuaded that the Court has any proper basis for making a yet further order for disclosure for the documents referred to in this paragraph.

Paragraph 4

That the respondent provides in one single sworn affidavit all documents in Part 2 of Kenneth Smith's affidavit dated 4 December 2019 showing: a separated list of each and every author; recipient, date, privilege claimed and the dominant reason for the document or communication.

[41] In support of this request, Ms van Kleeef referred first to documents listed in Part 2 of the affidavit of documents; these were stated to be those which were in the defendant's control and for which one of three categories of privilege was claimed.¹²

[42] After the affidavit of documents was filed, Ms van Kleeef raised an issue as to the groupings of the documents contained in Part 2. I received submissions from the parties about that matter at a telephone directions conference held on 11 December 2019. On the basis of that discussion, I recorded:

¹⁰ As recorded above at [26(c)].

¹¹ *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614 (EmpC).

¹² Privilege for communications with legal advisors under s 54 of the Evidence Act 2006; privilege for preparatory materials for proceedings under s 56; and privilege for settlement negotiations, mediation, or plea discussions under s 57.

Part 2: Ms van Kleef raised an issue as to the groupings of documents in Part 2. Mr Cowan said Part 2 had been prepared under r 8.61(2) of the High Court Rules. He has, however, agreed to file a memorandum by 17 December 2019 clarifying the association of particular authors and particular recipients, where a group listing approach has been adopted. Dates will be provided in respect of internal communications by Mr Smith, as listed in categories AGL.001.0056–AGL.0001.0057.

[43] Mr Cowan provided that information in a memorandum of 17 December 2019. Subsequently, Mr Smith confirmed in his third affidavit that the information contained in Mr Cowan’s memorandum was accurate.

[44] In short, I am satisfied that the information raised with regard to para 4 has already been provided.

Paragraph 7

That the respondent provides to the applicant a copy of all documents relevant to the respondent’s Holidays Act, non-compliance and remediation. If any document has been in your possession, custody or control is no longer in your possession, custody or control, to disclose both when it was parted with and what became of it.

[45] In support of this application, Ms van Kleef said she had just learned Alliance was remediating Holidays Act arrears, to which she may have an entitlement. She said she needed to know why this was occurring, so she could check her position with regard to her entitlements. Alliance, she said, had omitted statutory entitlements previously.

[46] In its notice of opposition, Alliance said that any non-compliance and remediation under the Holidays Act 2003 was not relevant to Ms van Kleef’s claim. Reference was also made to this topic by Mr Smith in his third affidavit, where he confirmed his view that the documents sought were not relevant. He noted that the remediation related solely to Alliance’s salaried workers; Ms van Kleef was a piece-rate worker. He said there was no current Ministry of Business, Innovation and Employment, or other Government-led, investigation or inquiry into Alliance’s compliance with the Holidays Act 2003 that he was aware of.

[47] This issue is not raised by the pleadings. Accordingly, this category of documents is not relevant to the proceedings before the Court.

Other matters

[48] I referred earlier to reply submissions made by Ms van Kleef, in which she was critical of the yet further disclosure which Alliance had provided in respect of paras 2, 3, 4 and 7 of her notice of application.

[49] I have touched on some of her comments in that regard already.¹³ I do not consider it necessary to comment further on any of the other matters raised, since they either concern matters that are not relevant to the proceedings before the Court, or there is no adequate evidential foundation for concluding that there has not been compliance with the directions of the Court. Specifically, I am not satisfied that there is a proper basis for concluding that the company is not entitled to maintain its claims for privilege. Whether there are factual issues which Ms van Kleef can properly raise at the hearing of the challenges as to the conduct of the company when, for example, it disciplined her, is a separate question which may fall for consideration at the hearing.

[50] In one of her documents,¹⁴ Ms van Kleef referred to a range of other questions she invites the Court to consider, including the making of an order of strikeout, or compliance orders, or a declaration that Alliance has abused the process of the Court. I decline to consider these matters, since there are no applications before the Court which properly raise these issues.

Conclusion

[51] I dismiss Ms van Kleef's application for further and better disclosure. No order is required in respect of the application for third party disclosure.

[52] Alliance is entitled to the costs of the application against it, which will be fixed following the substantive hearing. No order for costs has been sought by the Union.

[53] The Registrar is to schedule a telephone directions conference with the parties, at which I propose to discuss:

¹³ Above at [29]–[33].

¹⁴ Dated 2 March 2020.

- a) whether a direction should be made that no further interlocutory applications be made without leave of the Court; and
- b) directions for the hearing of the challenges.

B A Corkill
Judge

Judgment signed at 12.05 pm on 12 October 2020