IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 102
EMPC 402/2018

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 to strike out for want of prosecution
BETWEEN	MARIA ANNETTA VAN KLEEF Plaintiff
AND	ALLIANCE GROUP LIMITED Defendant

EMPC 407/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALLIANCE GROUP LIMITED Plaintiff
AND	MARIA ANNETTA VAN KLEEF Defendant

Hearing:	21 April 2023 (Heard at Christchurch)
Appearances:	M van Kleef in person, assisted by B Frew B Locke, counsel for Alliance Group Ltd
Judgment:	3 July 2023

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B A CORKILL
(Application for further and better disclosure)
(Application to strike out for want of prosecution)

Introduction

[1] This judgment resolves two interlocutory applications. The first is Ms van Kleef's application for further and better disclosure; the second is an application for dismissal for want of prosecution brought by Alliance Group Ltd (Alliance). Both applications have been on foot for some time. Common to each has been a problem of extensive delay in advancing disclosure requests as raised by Ms van Kleef.

What this case is about

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

[3] The proceedings arise from a determination of the Employment Relations Authority issued on 2 November 2018.[1]

[4] 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 collective employment agreement (CEA) contained an availability clause which did not comply with the Employment Relations Act 2000 (the Act), so that in those circumstances overtime could not 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 and entitling her to remedies.[2]

[5] Next, the Authority found Ms van Kleef had been subjected to an unjustified disadvantage by the employer's failure to provide her with adequate notice of a relevant meeting held on 22 February 2017, by issuing her with a first written warning

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1 *van Kleef v Alliance Group Ltd* [2018] NZERA 159 (Member Appleton).
2 At [84].

and by not informing her of a meeting with union representatives at which an adverse remark was made about her.[3]

[6] The Authority also determined Ms van Kleef had frequently been unable to take rest breaks in breach of s 69ZE(1) of the Act.[4]

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

[8] 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.

[9] For her part, Ms van Kleef 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.

Background to both applications

[10] I have already issued two disclosure judgments in this proceeding. The first was in 2019, in which I directed Alliance to file an affidavit of documents.[5] The second was in 2020, when I dealt with another application by Ms van Kleef for further and better disclosure, which was dismissed.[6]

[11] Then, on 23 June 2021, Ms van Kleef filed a further application for disclosure. A long history of attempts to deal with that application followed. Alliance took the position that although it did not necessarily consider that some of the documents

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3 At [204].
4 At [107].
5 *van Kleef v Alliance Group Ltd* [2019] NZEmpC 157.
6 *van Kleef v Alliance Group Ltd* [2020] NZEmpC 160.

sought were relevant, it would nonetheless provide them if they existed. In some instances, they did not exist.

[12] I convened a series of telephone directions conferences so as to advance the disclosure process. On 8 July 2021, Ms van Kleef was asked to clarify a class of documents she was requesting.

[13] At a telephone directions conference on 3 August 2021, it was noted that clarification had now been given, and that Alliance would require an opportunity to consider and respond to the new information. Alliance responded on 24 August 2021 saying, in summary, that the various classes of documents requested had either been provided or were not in its possession.

[14] There was then a hiatus during which neither party filed any updating memoranda. On 4 March 2022, Ms van Kleef requested an extension for filing amended pleadings due to various personal circumstances. Alliance consented to this step. Then, on 7 April 2022, Alliance filed an application to dismiss proceedings for want of prosecution.

[15] On 29 April 2022, I convened a telephone directions conference to discuss this development. It transpired that Ms van Kleef had received the application to dismiss, but she had been ill and had not appreciated she needed to respond to the document. Consequently, no notice of opposition and affidavit had been filed. Ms van Kleef also told the Court that there were outstanding documents which she required. Counsel for Alliance, on that occasion Mx Hornsby-Geluk, was asked to review this issue.

[16] On 18 May 2022, Ms van Kleef filed a detailed memorandum outlining the wide range of difficulties she had encountered in either obtaining documents, downloading them, or processing the information which had been disclosed.

[17] The next telephone directions conference took place on 24 May 2022. On that occasion there was a lengthy discussion as to whether categories of some documents, identified by Ms van Kleef in her interlocutory application of 23 June 2021, remained

outstanding. It was agreed that she needed to file a further memorandum to clarify precisely which documents now needed to be provided.

[18] I also indicated that the application to dismiss could not be considered until the unresolved interlocutory application for further and better disclosure had been dealt with.

[19] On 28 September 2022, I reviewed the steps taken by the parties in the intervening period. Ms van Kleef raised concerns as to the security arrangements of linked documents provided by Mx Hornsby-Geluk's office to her, which Ms van Kleef had been unable to access. She said she would need further time to peruse the documentation before advising whether there were outstanding disclosure issues.

[20] At a further telephone directions conference on 26 October 2022, Ms van Kleef told the Court she required an extension of time to complete an analysis of documents which, by then, had been provided by Alliance, and to draft a third amended statement of claim. In doing so, she said there were a number of "incorrect documents" provided to her, which had impeded progress.

[21] Mx Hornsby-Geluk said that the position was unsatisfactory. It was submitted that a timetable should be imposed, whereby Ms van Kleef would have a defined period for filing a third amended statement of claim. A failure to comply with the deadline would result in Mx Hornsby-Geluk taking instructions as to whether Alliance should then reactivate its application for a strikeout order. Mx Hornsby-Geluk also said that a third amended statement of claim did not need to fully particularise the monetary amounts being sought by Ms van Kleef. What was important was a pleading that set out the essential elements on which each claim was being brought by her. Precise details of quantum could be timetabled for provision later.

[22] I concluded that an extension of time to complete the pleading was appropriate, given the difficulties to that point. I directed the filing of the third amended statement of claim by 16 December 2022, time being strictly of the essence. I directed a further telephone directions conference. I said that if the third amended statement of claim had not been filed, Mx Hornsby-Geluk was to file and serve a memorandum for the

purposes of a further telephone directions conference, indicating the defendant's instructions.

[23] Regrettably, Ms van Kleef did not file a third amended statement of claim by the due date. On 21 December 2022, she advised the Court that she was prejudiced by what she believed was the incomplete provision of wage and time records by Alliance. Mr Locke, counsel for Alliance on that occasion, said that the company did not understand what was required.

[24] After discussion, I indicated that I would conduct an in-person hearing to deal with the outstanding issues as to disclosure there and then and to receive submissions as to the application for dismissal. I also directed the filing of updating memoranda.

[25] The hearing took place on that basis on 21 April 2023.

[26] With regard to Ms van Kleef's position, there was an in-depth discussion concerning several documentary issues, which reduced to two, about which Mr Locke indicated he would take instructions. These were:

(a) The provision of wage and time records for the months of July, August, September and October 2011 and for the weeks of 16–18 May and 21–25 May 2015. The 2011 documents would be provided without prejudice to any time limitation issues which Alliance says may exist.

(b) The provision of an explanation as to differing rates for certain products across a broad period up to February 2015.

[27] I adjourned the hearing for a short time to allow Ms van Kleef to consider, with the aid of a family member who was assisting her at the hearing, whether there were any remaining requests from her June 2021 application for disclosure. After the adjournment, she said there were not.

[28] I indicated that once Alliance had dealt with the above points, there could be no outstanding issues arising from Ms van Kleef's application for disclosure.

[29] I also indicated that Ms van Kleef was to file any application for leave to file and serve a third amended statement of claim 14 days after the final tranche of disclosure; that is, by 19 May 2023. I said that upon receipt of such an application, an opportunity would be provided for Alliance to respond to the application for leave, and to indicate when, were leave to be granted, it could file a statement of defence to the amended pleading.

[30] On 5 May 2023, Mr Locke filed a comprehensive memorandum on behalf of Alliance, dealing with the two outstanding issues which had been identified at the hearing. That dealt with the disclosure application.

[31] On 19 May 2023, Ms van Kleef sent an email to counsel for Alliance, and to the Court, indicating she had run into problems trying to access files and addressing formatting issues in time to complete a proposed application for leave. She said she was in the course of addressing these matters and would have an affidavit filed as soon as possible. No subsequent communication has since been received from Ms van Kleef. No application for leave to file an amended pleading, supported by an affidavit, has been filed. This is regrettable, since it seemed Ms van Kleef had intended to take this step. No proper explanation as to why this had not occurred has been given.

[32] In these circumstances, the outstanding applications must now be resolved.

Application for further and better disclosure

[33] It is obvious that there has been excessive delay in processing Ms van Kleef's disclosure application. As noted earlier, Alliance has taken the position that it would provide documents, even if, on its view of the issues, these are not necessarily relevant. I am satisfied it has now discharged its responsibilities with regard to disclosure.

[34] As there are no further issues arising from the originating application of 23 June 2021, I dismiss that application and reserve costs in relation to it.

Amended statement of claim?

[35] As no application for leave to file a third amended statement of claim has been lodged, the proceeding must now be progressed on the basis of Ms van Kleef's existing pleading; that is, her second amended statement of claim. As Mx Hornsby-Geluk observed at one point, it is important for the proceeding to be progressed – if it is not otherwise dismissed – because details of quantum can be timetabled at a later point if that proves necessary.

Application to dismiss

[36] Alliance applied to dismiss Ms van Kleef's proceedings for want of prosecution on the grounds set out in r 15.2 of the High Court Rules 2016. This rule applies via reg 6 of the Employment Court Regulations 2000.

[37] Alliance submits that this is justified because of Ms van Kleef's inordinate delay in prosecuting her claim as filed in November 2018; that the delay is inexcusable; and that the company is seriously prejudiced by that delay.

[38] Without prejudice to that application, Alliance seeks, in the alternative, an order that the proceedings be dismissed on a date set by the Court (an 'unless order')unless Ms van Kleef files her proposed third amended statement of claim prior to that date; a yet further option proposed by Alliance is that an unless order be made in respect of the filing of briefs of evidence for the substantive fixture.[7]

[39] Ms van Kleef opposes the application that the proceeding be dismissed. In essence, she says the delay has primarily been due to the difficulties she experienced in obtaining disclosure from Alliance, which she implied involved deliberate obfuscation. As noted earlier, her concerns relate not only to the obtaining of documents, but to her ability to analyse them properly so as to deal with quantum issues, and any other matter that may result in her deciding to amend her existing statement of claim.

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[7] The principles relating to the making of an unless order were usefully reviewed in *Craig v Stringer* [2016] NZHC 362 at [64].

[40] Mr Locke referred to standard authorities on this type of application. He correctly identified the three main principles; the applicant must show, first, that the plaintiff is guilty of inordinate delay; second, that the delay is inexcusable; and third, that it has seriously prejudiced the defendant. He also submitted that it is necessary for the Court to stand back and have regard to the interests of justice.[8]

[41] The application can be dealt with succinctly. There is no doubt that inordinate delay has occurred. However, there are a range of reasons for this, as Ms van Kleef outlined in detail in several memoranda. These include:

(a) technical issues with regard to the manner in which documents have been transmitted to Ms van Kleef, who was unable then to process them for a period, as well as having to deal with other significant computer challenges;

(b) misunderstandings between the parties, perhaps due to imprecision in the way in which requests were framed, so that Alliance did not appreciate precisely what was being sought and/or why;

(c) the disclosure of documents by Alliance that were not complete and/or not readily understood without further explanation;

(d) the need to analyse detailed schedules; initially Ms van Kleef hoped to have an accountant undertake this work, but that did not prove possible;

(e) personal factors which impeded Ms van Kleef's ability to advance the matter, such as stress and illness;

(f) given limited finances, an inability to obtain representation; and

(g) broader considerations which must be also taken into account, such as the fact that Ms van Kleef is not legally trained, and it appears that she

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8 *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.

has therefore not always understood what was required of her when attempting to deal with her disclosure requests.

[42] These circumstances raise an access to justice issue. An unrepresented litigant is entitled to bring a claim to the Court, albeit in a timely way.[9] The Court must be realistic in assessing the challenges involved for such a person.

[43] Ms van Kleef made attempts to prosecute her claim, but has been unable to do so in a timely way. By a narrow margin, I find that these factors excuse the delay.

[44] I acknowledge Mr Locke's careful submissions, including as to the prejudice he says Alliance has suffered due to the significant delay. He referred to the uncertainty and distraction of facing an unresolved and long-running piece of litigation; the many and varied disclosure requests which he characterised as often being convoluted and repetitive as well as costly; its inability to progress its own cross-challenge; and the departure from the company of intended witnesses. He also noted the several failures to comply with directions of the Court.

[45] I do not diminish these realities, but I must also have regard to the issues Ms van Kleef has raised. I also note that it is only recently that the disclosure requests have been fully satisfied. If it transpires that documents obtained in disclosure were not in fact relevant to substantive issues, that eventuality may be relevant to the assessment of costs.

[46] I do not agree that Alliance has deliberately delayed the requests involved. In fact, the company and its lawyer have attempted to deal with the requests in a constructive and responsible manner.

[47] In assessing the overall justice of the application, I take into account the fact that when her claim was before the Authority, Ms van Kleef was successful in establishing that she was unjustifiably dismissed, that she had suffered unjustifiable disadvantage in respect of certain actions, and that she had not received her full break entitlements in accordance with statutory and contractual requirements. These

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9 Employment Relations Act 2000, sch 3 cl 2(1)(a).

findings were made on the basis of a careful review of each cause of action by the Authority. Although these findings are the subject of a cross-challenge by Alliance for present purposes, I consider that these particular causes of action are not without merit.

[48] Standing back, I am not satisfied that the interests of justice would be met by the proceeding being dismissed.

[49] Nor am I persuaded that it would be appropriate to make an unless order for the filing of a third amended statement of claim. I take the view that at this stage, the question of whether the second amended statement of claim needs to be amended is one for Ms van Kleef.

[50] I also note Mr Locke's suggestion that an unless order might be made with regard to the filing of briefs of evidence once the case is set down. Because another Judge will be presiding at the hearing of Ms van Kleef's challenge, that will be a matter for that Judge.

[51] Accordingly, I dismiss the application to dismiss the proceeding for want of prosecution. Whether a further application for an unless order might follow is a matter for Alliance to consider in due course.

Further comment

[52] It is apparent that a key issue for the parties relates to the monetary value of Ms van Kleef's claims. If that is indeed the case, it may be that dialogue should be undertaken between the parties, either directly, or at mediation, or at a judicial settlement conference. Such an option may now be appropriate in light of the disclosure which has occurred. At the least, there may be some elements of the scope of the monetary claims that could be agreed, that would truncate the length of the hearing of the challenges, which is currently estimated to be 10 sitting days.

[53] For these reasons, the Registrar is to convene a telephone directions conference to discuss the way forward.

Result

[54] The application for disclosure is dismissed.

[55] The application for an order striking out the proceeding is dismissed.

[56] Costs are reserved.

B A Corkill
Judge

Judgment signed at 4 pm on 3 July 2023