IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 92
EMPC 242/2022

IN THE MATTER OF	proceedings removed in part from the Employment Relations Authority
AND IN THE MATTER OF	a challenge to defendant's objection to disclosure
AND IN THE MATTER OF	an application for a verification order
BETWEEN	NEW ZEALAND NURSES ORGANISATION INCORPORATED First Plaintiff
AND	PUBLIC SERVICE ASSOCIATION TE PŪKENGA HERE TIKANGA MAHI Second Plaintiff
AND	TRACEY BLACK and approximately 33,000 other healthcare worker members of the first plaintiff Third Plaintiffs
AND	JOY NEILSON and approximately 2,000 healthcare worker members of the second plaintiff Fourth Plaintiffs
AND	TE WHATU ORA – HEALTH NEW ZEALAND Defendant

Hearing:	3 May 2023 (Heard at Wellington)
Appearances:	RE Harrison KC and P Cranney, counsel for plaintiffs V Casey KC and M Vant, counsel for defendant
Judgment:	20 June 2023

INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE B A CORKILL
(Challenge to objection to disclosure)
(Application for verification order)

Introduction

[1] In my judgment of 30 November 2022, I directed the scope of disclosure which the parties should give on a mutual basis.[1] Both the background of the making of the disclosure directions, and the scope of them, are outlined in that judgment.[2]

[2] I do not need to repeat the details except to say that the proceeding concerns certain agreements that were entered into whilst pay equity claims were being bargained for. A key document is an Agreement in Principle signed on 22 December 2021, the terms of which were not subsequently implemented. The parties are well apart as to why this is the case.

[3] As a result of my consideration of the submissions made by the parties, I directed disclosure, describing the categories of disclosure in a schedule. For ease of reference, a copy of the schedule is attached.

[4] After hearing from counsel, I established a timetable for the provision of disclosure. Documents were subsequently reviewed and disclosed. Each side, however, now says there are inadequacies in the disclosure given by the other party.

[5] The two union plaintiffs, the New Zealand Nurses Organisation Inc (NZNO) and the Public Service Assoc Te Pūkenga Here Tikanga Mahi (PSA) have now challenged an objection as to disclosure raised by Te Whatu Ora Health New Zealand (Te Whatu Ora). Originally, its objection related to documents for which legal professional privilege had been claimed, as well as asserting a public interest privilege for documents concerning Te Whatu Ora's bargaining strategy. By the time of the hearing, the asserted legal professional privilege was no longer challenged and the scope of the asserted public interest privilege had reduced from 503 to 317 documents.

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1 *New Zealand Nurses Org Inc v Te Whatu Ora Health New Zealand* [2022] NZEmpC 218 at [98].
2 At [98] and the schedule thereto.

Te Whatu Ora takes the position that the privilege is properly claimed for the 317 withheld documents.

[6] For its part, Te Whatu Ora has brought an application for a verification order against the two union plaintiffs which, it says, concerns an inadequate process for seeking and reviewing documents for disclosure purposes. NZNO and the PSA assert that their disclosure obligations have been properly discharged.

The hearing of the challenge/application

[7] The parties filed affidavits with regard to these contested points; they also filed submissions prior to the hearing; it was held on 3 May 2023, when counsel addressed their submissions in detail.

[8] Following the hearing and in light of those submissions, I issued a minute, indicating that each party should file further evidence. I said that given the strong criticism each had made as to the adequacy of the disclosure processes of the other, evidence, as opposed to submissions, would be particularly important on both sides.

[9] I elaborated on the particular points which needed further evidence. For the purposes of the unions' challenge, Te Whatu Ora had filed an affirmation from Ms Vant, its junior counsel. She outlined the process that had been undertaken and provided some information as to why the public interest privilege had been claimed. At the hearing, senior counsel for Te Whatu Ora, Ms Casey KC, told the Court the defendant would be prepared to file further evidence elaborating on certain paragraphs of Ms Vant's affirmation.

[10] Ms Casey also indicated that a further electronic search would be undertaken on the documents previously considered irrelevant, in light of criticisms that had been made at the hearing as to the initial stage of the Te Whatu Ora process. I indicated that evidence as to this process and its results should be provided.

[11] The basis for the public interest privilege was that certain documents should be withheld as they related to a continued bargaining strategy for ongoing unconcluded equal pay negotiations between the parties. In my minute, I said it would be

appropriate to provide evidence explaining how and why a continuing strategy was considered appropriate by Te Whatu Ora given its statutory responsibilities, or for any other reason, in elaboration of the initial evidence given by Ms Vant on this topic.

[12] Turning to evidence for the purposes of the application for a verification order, I indicated I would be assisted by receiving further evidence as to two topics.

[13] First, the Court had been told that work was in the course of being undertaken and/or would be undertaken by the defendant on several issues over the following two weeks. I directed the filing of an affidavit to confirm the steps taken, and their results.

[14] Second, Mr Cranney, junior counsel for the plaintiffs, had given extensive submissions as to the context and rationale adopted when dealing with the unions' disclosure obligations. In my minute, I noted that submissions had been based on evidence from the bar. I said that given the issues which had been raised, this material should be formalised by affidavit from a lawyer for the reasons given, for example, in *Fox v Hereworth School Trust Board*,[3] which emphasised the weight which the Court might place on evidence about disclosure given by lawyers. I noted that such evidence would provide an evidential basis for the plaintiffs' submissions.

[15] Ms Vant and Mr Cranney filed further evidence as directed. I also received further submissions from both sides.

[16] In the result, a considerable amount of evidence and submissions has been received. I will refer to the key aspects of the parties' cases where relevant.

[17] A preliminary comment with regard to both matters is that it is clear each party holds strong views as to the merits of the arguments they are advancing. This has translated into (at times) difficulties in their communications with each other over disclosure issues and, to some extent, a lack of trust. Against this background, submissions have drilled down to a minute analysis of the perceived shortfalls of the approach adopted by the other party.

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

[18] The parties have adopted different disclosure processes. The union parties have not considered it appropriate, in light of their understanding of the issues, to rely solely on electronic search methods. In the main, they have considered it preferable to obtain potentially relevant documents from the relatively few number of officials who have been engaged in applicable bargaining and/or negotiations, and then analyse them.

[19] For its part, Te Whatu Ora has taken the view that there has been a substantial volume of documentation which it has needed to analyse from a broad variety of sources, both within its own organisation, with regard to the previously 20 District Health Boards (DHBs) that preceded the creation of Te Whatu Ora, as well as the various external agencies which have necessarily been involved in funding and approving the steps it has taken in the equal pay bargaining, including as to backpay. It considered that a different modus operandi was necessary for obtaining and then considering relevant documents.

[20] The Court did not direct how disclosure was to be performed. It was left to the parties to determine this. The issues which now arise relate to the different processes which were adopted.

[21] The final point which is worth emphasising relates to the role of the Court where disclosure takes place in employment-related litigation in this Court.

[22] Former Chief Judge Colgan discussed this issue helpfully in *Fox v Hereworth School Trust Board*, saying this:[4]

> [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.
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> [4] The Court does not undertake or even supervise the process of disclosing and producing relevant documents, at least until a point where an

4 *Fox v Hereworth School Trust Board (No 6)*, above n 3.

> impasse has been reached between the parties. Representatives, especially those who practise 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.
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> [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 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.

[23] These observations, with which I respectfully agree, will require consideration when considering the evidence tendered by the parties.

The plaintiffs' challenge to the defendant's objection to disclosure

[24] Elaborating upon the plaintiffs' challenge to the public interest objection, Mr Harrison noted that in its formal response Te Whatu Ora had said the withheld documents were those which "contain, record or describe" the former DHBs' "confidential strategy documentation" relating to their strategizing in the "lead up to and during the bargaining phase for the nurses' pay equity claim". He went on to argue that, having regard to the submissions that were filed for Te Whatu Ora, the time span of the withheld documents covered a period which both preceded the Agreement in Principle by some four months and extended to a point some five months thereafter.

[25] Ms Casey responded to this point by stating that of the 317 documents in contention, a maximum of 20 post-dated the Agreement in Principle which was, she said, consistent with the fact that at the point "where the unions decided to back away from the Agreement in Principle, … the pay equity bargaining process was not concluded." I consider the date range for the withheld documents is reasonable.

[26] This was the context for the four particular points on which counsel then focused.

[27] The first was a submission raised by Mr Harrison to the effect that it was "practically unlikely and legally inconceivable" that Te Whatu Ora had maintained the

bargaining strategy of the predecessor DHBs. He said that the significant changes to the health system wrought by the Pae Ora (Healthy Futures) Act 2022 (the PO Act), including the establishment of Te Whatu Ora, rendered the proposition unlikely. He said, also, that there was no evidence from Te Whatu Ora to support the claims made to this effect.

[28] Ms Casey said that the comprehensive provisions which vested all aspects of the DHBs' operations in Te Whatu Ora, as set out in cl 10 of sch 1 to the PO Act, make it clear that as a matter of law the DHB processes rolled over to the new entity, and continued. On the face of it, I consider Te Whatu Ora could, in light of these provisions, maintain a previously existing strategy as to equal pay. The question is whether in fact it did so.

[29] Pursuant to my direction, further evidence was given by Mr James Green, Deputy Chief People Officer of Te Whatu Ora. After explaining how the bargaining strategy had been established by the DHBs, he stated that following their disestablishment and the establishment of Te Whatu Ora on 1 July 2022, that organisation maintained the "existing, approved bargaining strategy". He said there was no reason to alter it, as the underlying basis for it remained unchanged. I will return to this response later.

[30] The second point developed by Mr Harrison was that when the unions lodged a pay equity claim, and Te Whatu Ora filed a defence to that, the parties effectively confirmed they were now in litigation rather than in a settlement mode. He said that when considering whether the privilege should be upheld, historic documents relating to the development and content of what he invited the Court to accept was an outdated bargaining strategy of the DHBs, had to be assessed in the present-day context.

[31] Ms Casey argued that this submission would result in a public interest privilege ending if the other party makes a "unilateral decision to withdraw from discussions and instead issue proceedings." This would have the effect, she said, of a party having to choose between defending the claim or protecting its privilege, but it could not do both.

[32] As a matter of law, it would not be correct to conclude that the filing of an application for fixing can be taken as necessarily bringing pay equity bargaining, and any strategy in relation to it, to an end. The Equal Pay Act 1972 provides for various dispute resolution mechanisms. These include mediation, during which the parties' respective positions may be discussed,[5] as well as facilitated bargaining on equal pay issues.[6] In these circumstances, it could not be regarded as unlikely that a party has a developed strategy for bargaining after the filing of a fixing application.

[33] In any event, I do not think Mr Harrison was going as far as was suggested; rather, he was raising the issue as one of context. His primary point was that it was inherently unlikely the bargaining strategy would continue if the parties had proceeded to litigation. That is a question of fact to be considered on the basis of evidence now filed by Mr Green. Again, I will return to this shortly.

[34] The third point discussed by counsel was whether Te Whatu Ora had waived any entitlement it might have had to advance the privilege or immunity asserted, both by its pleading stance and its own approach to, and conduct of, the disclosure process.

[35] This submission was based on the proposition that Te Whatu Ora had pleaded it would be necessary to rely on the full course of dealings in relation to the pay equity settlements and agreements; and that all of the parties' dealings with regard to the Agreement in Principle were also in issue. Those assertions were made for the same period that a blanket protection was sought for some 317 documents; Mr Harrison said this indicated a double standard.

[36] It does not follow that because a comprehensive pleading has been filed, the content of documents that are otherwise privileged are no longer protected. There is no evidence, at this stage, that Te Whatu Ora is now taking a step in reliance of, or contrary to, privileged material. That said, I accept that it is Mr Harrison's position that this proposition should be tested by the checking of the withheld documents.

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5 Equal Pay Act 1972, s 13ZO.
6 Section 13ZT.

[37] The final point discussed by counsel in their respective submissions concerned proposals for inspection.

[38] Ultimately, Mr Harrison suggested that he should, as senior counsel for the two unions, be directed to inspect the documents subject to an undertaking not to disclose their content any further without leave of the Court or the defendant's counsel in writing, along with any other appropriate terms.[7] Alternatively, the Court should inspect the documents.

[39] Ms Casey argued that inspection by counsel conducting the case for the plaintiffs would not be appropriate, as such counsel could not "unsee" what ought not to have been seen. She also said that whilst the Court of course has power to inspect documents, it is not a matter of automatic practice and there are recognised difficulties.

[40] She also submitted that whilst a verification order had not been sought, the lawyers acting for the defendant had taken the step of re-inspecting the withheld documents. This had resulted in the initial volume of withheld documents being reduced from 503 to 317. The Court was invited to take confidence from this further step.

[41] Ms Casey suggested that there was sufficient information in Ms Vant's first affidavit, including a schedule which had been produced to explain why the material had been withheld. She highlighted Ms Vant's evidence that having undertaken a broad search initially, only a small proportion of the material which was contained in the withheld documents was within the scope of the disclosure order; that the remainder of those documents would not fall within the scope of the order so would not be disclosable in any event; and that much of the privileged material which had been withheld was repeated across documents.

[42] Furthermore, she said, the privileged material was often repeated in emails which were part of a chain resulting in numerous documents being withheld in relation

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[7] Reference was made to confidentiality conditions imposed by the Court in *Yu v Zespri International Ltd* [2017] NZEmpC 146 at [90(a)–(d)].

to the same privileged material. Ms Casey argued that these factors explained why the volume of withheld documents appeared to be substantial.

[43] Before analysing the position further, I refer to the legal framework. Regulation 44(3) of the Employment Court Regulations 2000 (the Regulations) describes three grounds for objection. The third of those is that the document or class of documents, if disclosed, would be "injurious to the public interest".[8]

[44] That expression is not defined. Mr Harrison submitted that in essence the privilege relates to matters of the State. He also said the evaluation of a claimed public interest immunity involves a balancing exercise, and the onus lies on the party resisting such disclosure or discovery to make out this ground, relying on the position at common law,[9] and under the provisions of the Evidence Act 2006.[10]

[45] Counsel referred to an authority where a public interest protection had been recognised as attaching to bargaining strategy documents for current unresolved collective bargaining: *Julian v Air New Zealand Ltd*.[11]

[46] In *Kaikorai Service Centre Ltd v First Union Inc*, Judge Smith had noted that the decision in *Julian* was "open to criticism as having extended what was conventionally seen as falling within the ambit of 'public interest' by widening its application into areas which, at least initially, are essentially private disputes."[12] However, Judge Smith was prepared to accept that "both parties are entitled to maintain a claim of privilege for documents created for the purposes of bargaining, containing either directly, or indirectly, information about the strategy intended to be used."[13]

[47] This conclusion was reached in reliance on dicta of the Court in *Lloyd v Museum of New Zealand Te Papa Tongarewa (No 2)* where it was held that documents

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8 Employment Court Regulations 2000, reg 44(3)(c).
9 As discussed in *Zhou v Chief Executive of the Department of Labour* [2011] NZEmpC 36 at [96]–[111].
10 Evidence Act 2006, ss 52 and 70.
11 *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 88 (EmpC) at [89]–[90].
12 *Kaikorai Service Centre Ltd v First Union Inc* [2018] NZEmpC 83, [2018] ERNZ 258 at [25].
13 At [26].

created in a context of trust and confidence, as a matter of public interest ought not to be disclosed, having regard to the broad principles espoused by the Act.[14]

[48] Judge Smith considered that in a sense, this approach was pragmatic because it had a similar outcome as was achieved in *Julian*, but should not be taken as endorsing the decision itself. I respectfully agree.

[49] Mr Harrison also referred to the fact that at an earlier point in the proceeding, Ms Casey had outlined the parameters of "negotiation privilege". In that context, she had acknowledged that the plaintiffs might have an arguable case to withhold disclosure of specific documents relating to their bargaining strategies for ongoing unconcluded negotiations. She had stated that a document-specific analysis was required. A party claiming it must demonstrate that the privilege is clearly required, and that the public interest in keeping the material confidential outweighs the interests of justice in having all relevant material before the Court.

[50] In effect, Mr Harrison submitted that an inconsistent approach had been adopted. The plaintiffs had to clear a high bar; the defendant did not.

[51] I have determined that the correct approach is as outlined in *Lloyd* and *Kaikorai Service Centre Ltd*. The question is whether it is in the public interest for the withheld bargaining documents to be protected, given the confidential context within which they arose.

[52] I return to Mr Green's affirmation. As noted earlier, he is now the Deputy Chief People Officer for Te Whatu Ora; he previously performed the role of Chief People Officer on an interim basis when the organisation was established. Prior to that, he was Chief Executive of the Tairāwhiti District Health Board. He stated he had been involved in bargaining for the nurses' pay equity claim, both before and after the creation of Te Whatu Ora.

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[14] *Lloyd v Museum of New Zealand Te Papa Tongarewa (No 2)* [2003] 2 ERNZ 685 (EmpC) at [43]; and *Kaikorai Service Centre Ltd v First Union Inc*, above n 10, at [26]

[53] In his affirmation, he said that the DHBs worked in consultation with the Ministry of Health, the Pay Equity Taskforce within the Public Service Commission, and Crown Law Office. In addition, there was consultation with the Health Employment Relations Governance Group made up of representatives from the DHBs and the Ministry of Health; and the Cross Agency Governance Group made up of representatives from the Department of the Prime Minister and Cabinet, the Treasury and the Public Service Commission. Ultimately, he said, the DHBs' bargaining strategy was approved by the Ministry of Health and the other supervising agencies for implementation.

[54] He then said that Te Whatu Ora has maintained the pre-existing strategy which had been adopted by the DHBs for the purposes of the nurses' pay equity claim. Te Whatu Ora did so because there was no reason to change the approved approach. Mr Green's evidence also demonstrates that when Te Whatu Ora assumed its responsibilities, negotiations in pay equity were reasonably expected to continue, which has proved to be the case.

[55] As Mr Harrison properly accepted, the union parties are not in a position to contradict this evidence, save for one comment made about union conduct which is not material to the issues I need to consider.

[56] I have carefully considered this evidence, as given by a member of senior management within Te Whatu Ora. I have no reason to conclude that Mr Green is not a responsible and knowledgeable person whose evidence on this topic may be relied on for present purposes. I accept his description as to the manner in which the ongoing bargaining strategy for equal pay matters has been developed and maintained.

[57] A key point developed by Mr Harrison is that the initial selection process adopted by Te Whatu Ora is open to significant criticism. I infer from his submission that having regard to that problem – which I will discuss in more detail shortly – neither the unions nor the Court could have any confidence in the process which was adopted to identify privileged documents.

[58] I consider the initial selection problem to which Mr Harrison referred is different from the question of whether the withholding of the 317 documents is justified. The two issues should be dealt with separately.

[59] As noted earlier, 503 documents were originally said to be privileged on public interest grounds. This tranche was reduced to 317. This circumstance might suggest that the initial process of identifying documents was inadequate. I consider it is likely the second review was undertaken more carefully, since it resulted in a reduction in the number of documents for which privilege was claimed. It was no doubt carried out in light of the criticisms which had been made. The withheld documents were checked twice.

[60] In summary, the evidence contained in Ms Vant's first affirmation is to the effect that the documents have been withheld because disclosure would be injurious to the public interest, as they include discussion and decisions as to Te Whatu Ora's bargaining strategy for the pay equity bargaining, that a number of the documents also include material subject to legal professional privilege, and that the documents have been checked twice. Mr Green's affirmation is to the effect that the pre-existing strategy has been maintained because it was not considered necessary to alter it. On the basis of this evidence, I am satisfied that the claim raised is appropriate. I do not consider a waiver issue arises purely on the basis of a broad pleading.

[61] In these circumstances, I am not persuaded that the Court should direct a review of the withheld documents by Mr Harrison as he now submits would be appropriate. Nor am I persuaded that the Court itself should undertake this exercise. The authorities are clear that judicial inspection is a matter of last resort.[15]

[62] I am satisfied that the privilege has been correctly claimed at this stage. Because of the content of the documents and the confidential context in which they arose, public interest considerations justify the withholding of them in the particular circumstances. The challenge is dismissed.

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[15] See *Yu v Zespri International Ltd*, above n 7, at [28]–[32]; and *NZ Iron Sands Holdings Ltd v Toward Industries Ltd* [2019] NZHC 1416, [2019] NZAR 1199 at [34].

Further work by defendant?

[63] In Ms Vant's first affirmation, reference was made to a first "sort" of approximately 60,000 documents which had initially been identified for potential selection. She said that any which did not refer to pay equity were not analysed further. Ms Vant explained that this approach was undertaken because Te Whatu Ora had understood the Court's disclosure order required disclosure only of documents which concerned backpay in relation to the nurses' pay equity claim. The view was taken that documents that did not include this reference were unlikely to come within the parameters of the disclosure order. This filter reduced the volume of documents which were to be reviewed individually to about 35,000 in number.

[64] Mr Harrison was highly critical of what he asserted in effect was a rudimentary first search, since it did not make reference to a number of other terms which the defendant had insisted be adopted by the plaintiffs, at the initial stage.

[65] Ms Casey submitted that these criticisms were not justified. She also noted there was no application for a verification order with regard to this category of documentation. However, she acknowledged further preliminary work could be undertaken with a view to establishing the nature of the problem, if any.

[66] Ms Vant said in her second affirmation that a further search of the 25,000 documents which were originally excluded for irrelevance had been undertaken, using nine further search terms which had not been used for filtering in the first search. This second search produced 5,598 documents for further review. She said such a review would take up to five weeks, costing up to $15,000.

[67] The results of the second search suggest it will be appropriate for the 5,598 documents to be checked in the same way as were the documents that were originally identified for analysis. In my view, a consistent approach is desirable. I also regard this work as being an aspect of the continuing obligation which arises under reg 50 of the Regulations. The further analysis described by Ms Vant should be undertaken.

[68] Given the way this aspect of the matter has developed, I do not consider that it is necessary to make a formal order.

Application for verification order

[69] Te Whatu Ora's application for a verification order requires consideration of the processes adopted by the union parties when dealing with disclosure. The question is whether the Court is satisfied of the probable existence of a document, or class of documents held by the unions, which they should confirm in a verifying statement.[16]

[70] At the hearing, Ms Casey advanced detailed submissions which asserted that the plaintiffs' disclosure was inadequate and warranted the making of a verification order. She analysed the documents which had been disclosed by NZNO on the one hand, and the PSA on the other. She said it was simply not credible that these parties could locate only 245 documents for compliance purposes, of which, she said, only a few were relevant and within the scope of disclosure ordered by the Court.

[71] In his submissions at the hearing, Mr Cranney outlined the history of the unions' disclosure. He said a particular method which had been proposed on behalf of Te Whatu Ora for the union parties to undertake when dealing with disclosure went further than was required to meet the unions' disclosure obligations. He also referred to the fact that, as at the date of the hearing, work was ongoing with regard to the documents made available by the current Chief Executive of NZNO, Mr Goulter.

[72] In response to the direction I made following the hearing,[17] Mr Cranney filed a comprehensive affidavit in which he outlined the rationale adopted for the union parties in respect of disclosure, and the steps taken.

[73] Ms Casey then filed detailed further submissions to the effect that the approach adopted by the unions was minimalist and wholly inadequate in light of the issues in the major litigation which is before the Court. She also said the affidavit contained inadmissible content.

[74] She argued that the plaintiffs had simply carried forward their opposition to the disclosure order as sought last year when it was suggested that none of the requested

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16 Employment Court Regulations 2000, regs 46-48.
17 Outlined at [14].

material was relevant. She submitted that the plaintiffs were maintaining their previous positions.

[75] She also commented on a further tranche of documents which had been disclosed on behalf of the unions on 19 May 2023. She noted that these appeared to be mainly emails from Mr Goulter's records, although there were some documents from other sources. The documents now disclosed were, she said, largely relevant. These ought to have been picked up in the initial disclosure and there could be other similarly relevant documents still undisclosed.

[76] I note that the Court was told at the hearing that there were several boxes of materials from Mr Goulter that had yet to be processed; in my minute I requested evidence as to the subsequent processing of these documents. If the documents had yet to be reviewed at that stage, it could not be argued that an incorrect analytical approach had been adopted.

[77] Ms Casey also submitted there would likely be relevant documents of other union officials, including those of Mr Shankar, Ms McCulloch, Mr Wait, Ms Watabe, Ms Alexander and Mr Harry.

[78] Mr Harrison filed submissions in reply.

[79] First, he addressed Ms Casey's submission that the affidavit contained extensive inadmissible material, and that it provided little information as to the topics which had been requested in the Court's minute.

[80] Mr Harrison stated that the affidavit had been filed in direct response to a direction that Mr Cranney's "evidence from the bar" be "formalised by affidavit from a lawyer". He argued that the direction not only contemplated but required the affidavit to incorporate and confirm on oath what Mr Cranney had submitted at the hearing. He was the only lawyer with overall involvement in and direction of the two unions' disclosure processes, and so was the sole available deponent in respect of disclosure.

[81] In the circumstances, I accept the submission that the content of Mr Cranney's affidavit was both admissible and necessary.

[82] Turning to the content of Mr Cranney's affidavit in more detail, he described difficulties which he said arose from uncertainty surrounding the interpretation of the defendant's pleadings for the purpose of identifying its proposed defence, as well as facts which are disputed. These impacted on the parameters of disclosure. In the result, documents had been disclosed even although it was not accepted they were relevant.

[83] Mr Cranney then described inquiries he had made of the unions about database-wide searches. He cited examples which indicated many thousands of hits would potentially have been produced. For example, in the case of the NZNO database, 7.7 million emails had been accumulated from 2018. For three particular staff email accounts, there were 6,000 hits. For all staff, there were 89,000 hits.

[84] Mr Cranney went on to say that the use of key words, such as those proposed by the defendant, was of no utility in the present disclosure exercise, unless the existence of a particular document or target document was known and was able to be located, or the scope of the search was narrowed prior to application of the key word. Even then, he said, he considered it to be a crude methodology.

[85] He said that when attempting to search union records, the problem was greatly exacerbated when the words at issue were common to multiple bargaining situations, as well as pay equity bargaining across many employers. For instance, he said that inquiries about "backpay" were common in almost every collective bargaining settlement, regardless of the identity of the employer.

[86] Mr Cranney then described in detail the approach that was considered preferable. He said that once the plaintiff unions were made aware of the required disclosure obligations, they adopted various methods for obtaining documents from personnel who were directly involved. He said named union officials sourced documents, records and communications, both electronic and hard copy, relating to the various processes and documentation referred to in the pleadings, which he

particularised in his affidavit. He said that both plaintiff unions were aware that the documents required were those relating to the processing, bargaining and settlement of the nurses' pay equity claim insofar as they directly or indirectly related to or referred to backpay, remuneration or recognition for past work, effective dates or implementation dates, or concepts and terms similar to these.

[87] In her submission as to the affidavit, Ms Casey argued that the "straw man" of too many "hits" on, for example, "backpay" was not sensible. She said it was basic that electronic searches could filter, so that the word "backpay" could be combined with other relevant search terms to reduce the number of hits to a more manageable number.

[88] For his part, Mr Harrison responded by stating that the unions must be entitled to form a view that the number of "useless" hits produced by a particular proposed search term was so great as to negate its utility. This conclusion resulted in alternative search methods being adopted to source hard copies and electronic copies of documents.

[89] He contrasted aspects of the Te Whatu Ora processes, where he said key words had not been consistently used as search terms across the electronic database; rather, the Te Whatu Ora team had reviewed each document individually, with key words "in mind."

[90] Mr Harrison also commented on the submission made by Ms Casey about the 19 May tranche of documents that a particular PSA email had been disclosed, which Ms Casey had said was of critical relevance.

[91] Mr Harrison said that it was not accepted the email in question was of "critical relevance". He also stated that the late provision of a single email from a particular PSA organiser responding to a member inquiry said nothing about the adequacy of the overall process adopted by each of the plaintiff unions.

[92] It appears that the document was revealed by the ongoing disclosure exercise that Mr Cranney said was being undertaken.

[93] One class of documents that Mr Cranney said were sourced more recently related to "phasing" and to "staging".

[94] In her original submissions, Ms Casey had stressed that documents relating to phasing and/or staging were important concepts on which document searches should focus; she said the terms described whether any backpay obligation linked to an effective date would see full backpay or only partial backpay, reflecting whether the pay equity rates were to be phased in, rather than paid in full, from that date. She also said that such documents fell within the Court's orders for disclosure.

[95] In his affidavit, Mr Cranney said that the submissions on the phasing and staging point had not been pleaded at any previous stages of the proceeding; nor had it been understood prior to receipt of Te Whatu Ora's submissions that a search on this basis was required. However, since it had been raised, he said he caused searches and inquiries to be made. For the relevant NZNO staff, approximately 8,000 emails were identified and printed for review between 10 and 15 May 2023. A senior NZNO official checked each of them. The process was completed on 17 May 2023. At the date of his affidavit, the "potentially relevant documents" sat with Mr Cranney for his review. Mr Cranney had also asked the PSA to conduct searches on this topic in respect of its relevant staff. Documents thus identified had then been disclosed.

[96] I have reviewed with care the contents of the affidavit tendered by Mr Cranney. I am satisfied that a logical approach has been adopted for dealing with the disclosure requirements settled by the Court previously. It was determined that a different methodology to that adopted by Te Whatu Ora was appropriate in light of the unions' understanding of the issues, and in light of their different practices as to record keeping. The unions' ongoing disclosure obligations have been recognised.

[97] On the evidence, Mr Cranny was well placed to make the assessment as to the appropriate method of searching and analysing the documents held by union officials. The scope of the documentation is understandably narrower than the scope of documentation which it has been necessary for Te Whatu Ora to obtain and review.

[98] I return to the observations I made earlier as to how disclosure works. An assurance to the Court given on oath or affirmation by a responsible and knowledgeable person as to disclosure processes will usually be accepted by the Court. As was noted in *Fox v Hereworth School Trust Board*, the Court will not go behind such compliance with the relevant ethical obligations lightly.[18] The process of litigation can only work on the basis of trust and confidence between court and bar, and depends upon an independent and strong legal profession.

[99] Te Whatu Ora has not persuaded the Court that it would be justified in going behind the comprehensive information which has been provided on the part of the union parties, and then make a verification order.

[100] The application is accordingly dismissed.

Result

[101] The timetable for the filing of evidence, including documents for the fixture, commences on 17 July 2023.

[102] So that the parties would know promptly where they stood on the issues of disclosure after the filing of their further evidence and submissions up to 9 June 2023, I issued a minute on 12 June 2023 outlining my intended decisions, which I said would be recorded in a judgment to be issued as soon as possible. I now confirm the indications given in that minute.

[103] The plaintiffs' challenge to the objection to disclosure is dismissed.

[104] The defendant's application for a verification order is dismissed.

[105] It is appropriate for the defendant to undertake the further work outlined.[19]

[106] I also noted the express acknowledgement made by both sides that if further relevant documents are located, they would be disclosed. As I said in my minute, that

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18 *Fox v Hereworth School Trust Board*, above n 3, at [5].
19 See above [66]–[67].

acknowledgement was appropriate in each instance since it accords with the continuing obligation to disclose, as described in reg 50 of the Regulations.

[107] I also made, by consent, a confidentiality direction in respect of a small portion of Mr Green's affirmation; that meant the material could not be published beyond the parties. I reserved leave for any necessary directions.

[108] I reserve costs.

B A Corkill
Judge

Judgment signed at 1 pm on 20 June 2023

Schedule

1. All documents, records and communications relating to the raising, processing, bargaining and settlement of the Nurses' Pay Equity Claim insofar as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates or implementation dates for any similar concept or terms, in the bargaining for the following Multi-Employer Collective Agreements (MECAs):

    a. The DHBs/NZNO Nursing and Midwifery MECA 4 June 2018 – 31 July 2020.

    b. The DHBs/PSA Mental Health and Public Health Nursing MECA (New Zealand except Auckland Region) 1 October 2017 – 30 September 2020.

    c. The DHBs/PSA Mental Health and Public Health Nursing MECA (Auckland Region) 15 December 2017 – 14 December 2020.

    d. The DHBs/NZNO Nursing and Midwifery MECA 2 August 2020 – 31 October 2022.

    e. The DHBs/PSA Mental Health and Public Health Nursing MECA (New Zealand except Auckland Region) 1 October 2020 – 31 December 2022).

    f. The DHBs/PSA Mental Health and Public Health Nursing MECA (Auckland Region) 15 December 2020 – 15 March 2023.

2. All documents, records and communications relating to the raising, processing, bargaining and settlement of the Nurses' Pay Equity Claim in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates or implementation dates or any similar concepts or terms.

3. All documents, records and communications relating to the draft Terms of Reference as drafted in 2017 for the NZNO pay equity claim for nurses in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates or implementation dates or any similar concepts or terms.

4. All documents, records and communications referring to the March 2019 Bargaining Process Agreement between the DHBs, NZNO and the PSA for the Nurses' Pay Equity Claim in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates or implementation dates or any similar concepts or terms.

5. All documents, records and communications relating or referring to the August 2021 PSA Terms of Settlement in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates, implementation dates or any similar concepts or terms.

6. All documents, records and communications relating or referring to the August 2021 PSA Memorandum of Understanding in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates, implementation dates or any similar concepts or terms.

7. All documents, records and communications referring to the September 2021 NZNO Terms of Settlement in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates, implementation dates or any similar concepts or terms.

8. All documents, records and communications relating or referring to the September 2021 NZNO Memorandum of Understanding in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates, implementation dates or any similar concepts or terms.

9. All documents, records and communications from the point of execution of the PSA or NZNO Pay Equity Back Pay Agreements (respectively) to the execution of the Agreement in Principle dated 22 December 2021, in so far as they directly or indirectly relate or refer to backpay, remuneration or recognition for past work, effective dates, implementation dates or any similar concepts or terms.

10. All documents, records and communications directly or indirectly relating to the Agreement in Principle from 22 December 2021 to the point of the filing of the plaintiffs' claim with the Authority.

11. Disclosure as above is subject to the following:

    a. Relevance is to be assessed under reg 38(1) of the Employment Court Regulations 2000.

    b. Documents which would otherwise be included in Categories 1 to 10 which have already been provided by the first and/or second plaintiffs to the defendant or its predecessor DHBs, or vice versa, are not required to be disclosed.

    c. Objections to disclosure under any of the categories of reg 44 of the Employment Court Regulations 2000, if taken, are to be particularised in the index of disclosure.