

counterclaim was filed by CANZ in its statement of defence, but that was struck out on the basis that the Court did not have jurisdiction to consider it.¹

[3] CANZ sought documents from the applicants on 1 August 2024. On 2 August 2024, Mr Little, on behalf of the applicants, objected on the basis that the documents sought were not relevant. Accordingly, CANZ sent a notice requiring disclosure on 5 August 2024 to the applicants. Mr Little filed a notice in response, indicating that one document had been identified as relevant. Mr Little did not file any objection to the disclosure application. Subsequently, on 13 August 2024, Mr Roberts, on behalf of CANZ, filed an application for a verification order.

[4] Mr Little sent a notice requiring disclosure to CANZ on 21 August 2024. Mr Roberts filed a notice of objection in respect of some of the documents sought. Mr Little did not file a challenge to the notice of objection. However, on 11 October 2024, he filed an application for a verification order. Finally, on 18 October 2024, after the application for a verification order had been filed, Mr Roberts provided the applicants with a list of documents that CANZ considered to be relevant.

[5] The proceedings between the parties to date have exhibited a high degree of tension and mistrust.

Principles of disclosure

[6] The Employment Court Regulations 2000 (the Regulations) allow any party to require any opposing party to provide disclosure of documents which are relevant to any dispute.² Before a notice for disclosure is effective the material sought must be relevant.³ A document is relevant if it directly or indirectly:⁴

- (a) supports, or may support, the case of the party who possesses it; or
- (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or

¹ *Al-Bustanji v Corrections Association of New Zealand Inc* [2024] NZEmpC 186.

² Employment Court Regulations 2000, regs 37–41.

³ Regulation 40(1); and *Carrington Resort Jade LP v Knight* [2023] NZEmpC 198 at [26].

⁴ Regulation 38(1).

- (c) may prove or disprove any disputed fact in the proceeding; or
- (d) is referred to in any other relevant document and is itself relevant.

[7] Once a notice of disclosure has been served on a party, they must comply with it within 14 days unless they file a notice of objection to the disclosure within five days of being served.⁵ A notice of objection may be challenged, within five days of it being received, by filing an application for an order declaring the documents be disclosed.⁶

[8] Any party who is dissatisfied with the documents disclosed may, within five days of receiving the disclosure, apply to the Court for a verification order.⁷ A verification order means an order requiring the opposing party to disclose, in a sworn or affirmed statement, whether any relevant documents exist or existed.⁸ The Court may make a verification order if it is satisfied of the probable existence of a document or of a class of documents.⁹

CANZ's application for a verification order

[9] In its application for a verification order, CANZ seeks for the applicants to make a sworn or affirmed statement in relation to four classes of documents. The documents sought fall into two main categories.

- (a) Communications between the applicants and any other person, other than any officer or employee of CANZ on or after 19 February 2024 that criticises, makes allegations, or raises concerns about CANZ.
- (b) Communications between the applicants, members of CANZ and members of the National Executive of CANZ on or after 2 April 2024 related to letters received by the applicants from the President of CANZ on that date.

⁵ Regulations 42(3) and 44.

⁶ Regulation 45.

⁷ Regulation 46.

⁸ Regulation 46(3).

⁹ Regulation 47.

[10] Mr Little submitted that the disclosure sought is not relevant to the proceedings before the Court, particularly now that the counterclaim from CANZ has been struck out. He submitted that the judicial review proceedings filed by the applicants relate to the legality of CANZ's decision-making and that the communications sought cannot have any bearing on the resolution of those proceedings. In particular, he submitted that all correspondence relating to the allegations against the applicants was disclosed to them at the time and that any other communications by the applicants cannot be relevant to those allegations or any decision-making in respect of those allegations. Finally, he emphasised that in a judicial review proceeding, it is the processes and conduct of the decision-maker which are under review, not the actions of those at the receiving end of the decision-maker's decision.

[11] Mr Roberts submitted that the applicants cannot resist the verification order as they failed to file a notice of objection to disclosure. He submitted that their objection to the verification order application is an abuse of process as it is, in reality, a late objection to disclosure that does not comply with the Regulations. Further, he submitted that while the Court has struck out CANZ's counterclaim, it has not struck out its defence, and that the documents sought are relevant to that defence. He also submitted that the documents sought will provide the necessary factual context to the applicants' case. Finally, he submitted that the verification order is appropriate as it is probable that the documents sought exist.

[12] Although Mr Roberts is correct that the applicants failed to file a notice of objection to disclosure, that does not prevent the Court from addressing the issue of relevance. Regulation 47 provides that the Court "may" make a verification order if satisfied of the probable existence of a document or class of documents. In exercising that discretion, the Court will also consider, where appropriate, the issue of whether the document or class of documents sought is relevant to the proceeding.¹⁰

[13] I do not consider that either category of documents is relevant to the proceeding as pleaded.¹¹ Disclosure is ordinarily not necessary in judicial review proceedings as

¹⁰ *Postles v Airways Corp of New Zealand Ltd (No 3)* [2002] 2 ERNZ 822 (EmpC) at [17]; and *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc (No 2)* [2018] NZEmpC 98.

¹¹ See above at [9].

it is intended to be a short and simple means to test the legality of decision-making.¹² That decision-making is assessed against the material that was available and relied on by the decision-maker at the time; the Court will not embark on a broad appraisal of the decision-maker's factual findings. Therefore, evidence in judicial review hearings is usually confined to evidence showing what material was before the decision-maker and explaining what factors were considered.¹³

[14] In relation to the first category, the judicial review proceedings brought by Mr Jenner and Mr Al-Bustanji relate to specific allegations made against them and, more broadly, whether CANZ has followed or is following a fair process in respect of those allegations. Only documents that are relevant to the legality or fairness of the actions taken by CANZ in relation to those allegations can be relevant. CANZ already has the relevant information in relation to those impugned allegations and processes.

[15] While I accept that the broader factual context can assist the Court, it is clear from the way these proceedings are being conducted that the parties have a degree of personal animosity towards each other – documents illustrating that point would not assist the Court in deciding the relatively narrow issues before it. Nor could such documents be used to retrospectively justify CANZ's actions if they were otherwise unjustifiable. They cannot, therefore, be relevant. The documents sought may well have been relevant to the defendant's counterclaim, but they are no longer relevant now that the counterclaim has been struck out.

[16] The second category of documents sought relates to a date range after the decisions at issue were made. These documents cannot be relevant.

[17] Further, I am concerned that the disclosure sought has all the hallmarks of a fishing expedition. The Court will not require disclosure where an attempt is being made to discover information either as to a new cause of action or circumstances that may or may not support a baseless or speculative claim or defence.¹⁴ The information

¹² *Ririnui v Landcorp Farming Ltd (No 1)* [2014] NZHC 732 at [5].

¹³ *CD v Immigration and Protection Tribunal* [2015] NZCA 379, [2015] NZAR 1494 at [22]; and *Deep v Auckland Gold Line Co-Operative Taxi Society Ltd* [2018] NZHC 2362 at [10].

¹⁴ *Carrington Resort Jade LP v Knight* [2023] NZEmpC 198 at [50]; and *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 190 (HC) at 196.

sought appears to seek information that would provide a basis for further claims of misconduct against the applicants. Using the disclosure process to achieve that goal is inappropriate.

[18] Therefore, CANZ's application for a verification order is unsuccessful.

The applicants' application for a verification order

[19] In their application for a verification order, the applicants seek for CANZ to make a sworn or affirmed statement in relation to three classes of documents:

- (a) Communications between specified officials and staff of CANZ between the dates of 26 March 2024 and 14 May 2024 about the proposed disciplinary action outlined in the letters to the applicants dated 2 April 2024.
- (b) Any documents or notes prepared by specified officials and staff of CANZ for the meeting of CANZ's national executive held on 13 and 14 May 2024, whether or not presented to the meeting held on 13 and 14 May 2024, relating to the proposed disciplinary action.
- (c) Communications from specified officials of CANZ to any member of CANZ between 26 March 2024 and 30 June 2024 relating to the proposed disciplinary action.

[20] Mr Little submitted that the documents sought are relevant to an examination of CANZ's use of its decision-making power and that subject is the focus of the judicial review proceeding. The documents, if they exist, are said to be relevant to the issue of whether the officials of CANZ are biased or have predetermined their decision. Mr Little acknowledged that there has already been some disclosure but states that various other documents, of which the applicants have knowledge, have not been disclosed.

[21] Mr Roberts submitted that CANZ filed a notice of objection to the applicants' notice of disclosure and that the applicants did not file a challenge to that notice of

objection. He submitted that, therefore, the application for a verification order could not apply to the documents sought which are included in the notice of objection. He also submitted that the applicants filed their application for a verification order prior to CANZ finalising its disclosure when they were not in a position to even assess whether or not disclosure was complete. Finally, he submitted that the application does not identify any basis for the Court to be satisfied of the probable existence of documents.

[22] Mr Roberts makes a fair point about the applicants' approach to the disclosure requirements of the Court. Although these requirements are cumbersome and not particularly intuitive, they are part of the regulatory framework within which the Court works. The applicants have not helped themselves.

[23] As a result of the position taken by CANZ, along with the applicants' approach to the disclosure requirements, it is necessary to consider the applicant's application for a verification order in two groups. The first group relates to disclosure unaffected by CANZ's challenge to the notice of disclosure. The second group relates to disclosure affected by that challenge.

[24] Turning to consider the first group, I accept that Mr Little filed his application for a verification order prematurely. However, I consider that that error can be waived pursuant to s 221(b) of the Employment Relations Act 2000 so as to enable the matter to be disposed of according to the substantial merits and equities of the case.

[25] I acknowledge that CANZ has now provided disclosure. A list of the disclosed documents was provided as an annexure to Mr Robert's submissions. Mr Roberts says that there is no reason to believe that any further documents exist apart from privileged communications.

[26] However, Mr Roberts's submission acknowledges that further documents, which he says are privileged, exist. No notice of objection to disclosure was filed in relation to those privileged documents. It is not immediately clear why not. In the absence of such an objection, the applicants are not in a position to be able to file a challenge in relation to the allegedly privileged documents.

[27] Accordingly, I consider it appropriate to make a verification order in relation to the first group of documents.

[28] On the other hand, the second group of documents gives rise to different issues. The notice of objection filed by CANZ objected to the date ranges in the first and third categories of documents sought by the applicants. In particular, the notice of objection stated that the applicants' pleadings cover events up to 2 April 2024 and the events of 13 and 14 May 2024. It stated that correspondence on dates between 2 April 2024 and 13–14 May 2024, and then subsequent to those dates, is irrelevant.

[29] In light of the allegations of bias, the notice of objection is surprising. However, the applicants cannot challenge an objection to a notice of disclosure by filing an application for a verification order. The challenge process is separate to the verification order process. I accept Mr Roberts's submission that Mr Little ought to have filed a challenge to the notice of objection if he considered the objection to be unfounded. He ought to have done so within five days of receiving the notice of objection.

[30] In the absence of such a challenge, the Court is not in a position to make orders. Nor is the Court in a position to treat the application for a verification order as an informal challenge to the notice of objection. That may have been possible pursuant to ss 219 or 221 if the applicants had engaged with the issue, but even after CANZ had explicitly identified the issue, the applicants did not address it in their submissions in reply. If the applicants wish to pursue a challenge to the notice of objection, they will need to file an application for leave to file that challenge out of time.

[31] Therefore, insofar as the application for a verification order relates to documents affected by the notice of objection, it is unsuccessful.

Outcome

[32] CANZ's application for a verification order is unsuccessful.

[33] The applicants' application for a verification order is successful in part.

[34] Accordingly, I order that CANZ verify the position as to documents referred to in the applicants' application for a verification order, excluding documents covered by the notice of objection. For the avoidance of doubt, the order applies to the following documents:

(a) All emails, text messages (whether on cell-phone-based text messaging or through messaging apps such as Whatsapp, Signal or similar) or communications on any other platform for person-to-person messaging or group messaging between:

(i) Officers of CANZ;

(ii) Officers and staff members of CANZ;

(iii) Officers and members of CANZ's national executive; and

(iv) Members of CANZ's national executive

between the dates of 26 March 2024 and 2 April 2024 and on 13 and 14 May 2024 concerning the proposed disciplinary action outlined in CANZ's letters to the applicants of 2 April 2024.

(b) Any documents or notes prepared by any officer, national executive member or staff member for the national executive meeting of CANZ held on 13 and 14 May 2024, whether or not presented to the meeting held on 13 and 14 May 2024, relating to the proposed disciplinary action against the applicants outlined in CANZ's letters to the applicants of 2 April 2024.

(c) Any communications (including by way of emails, text exchanges and social media posts) by any officer or national executive member of CANZ to any member of CANZ, whether individually or to any group of members, between 26 March 2024 and 2 April 2024 and on 13 and 14 May 2024, relating to the proposed disciplinary action against the applicants outlined in CANZ's letter to the applicants of 2 April 2024.

[35] As the successful party in relation to CANZ's application for a verification order, the applicants are entitled to costs. The applicants had a measure of success on their application for a verification order, but their failure to properly follow the Regulations may have implications in respect of costs. Those costs ought to be able to be agreed. If that does not prove possible, the applicants may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. CANZ is to respond by memorandum filed and served within 14 days thereafter, with any reply from the applicants filed and served within a further seven days. Costs then will be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 3.40 pm on 22 November 2024