IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 113
EMPC 289/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for disclosure
BETWEEN	JOHN FAITALA First Plaintiff
AND	VAHANOA VEA Second Plaintiff
AND	THE PACIFIC ISLAND BUSINESS DEVELOPMENT TRUST Defendant

Hearing:	On the papers
Appearances:	P Pa'u, advocate for plaintiffs B Craig and J Williams, counsel for defendant
Judgment:	5 June 2025

INTERLOCUTORY JUDGMENT OF JUDGE HELEN DOYLE
(Application for disclosure)

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[1] John Faitala and Vahanoa Vea have challenged a determination of the Employment Relations Authority seeking a non-de novo hearing.[1] An issue about disclosure has arisen in the progression of the proceeding.

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1 *Faitala v The Pacific Island Business Development Trust* [2024] NZERA 403.

[2] The Pacific Island Business Development Trust (the Trust) says Mr Faitala and Ms Vea are not entitled to require the disclosure of documents under the statutory procedure in regs 40–52 of the Employment Court Regulations 2000 (the Regulations). The Trust says that the disclosure sought can only relate to the penalty claims. Reliance is placed on reg 39(2) and the common law privilege against self-incrimination.

[3] Regulation 39(2) provides as follows:

> Nothing in regulations 40 to 52 applies to any action for the recovery of a penalty.

[4] In *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* the defendants also claimed that they were not required to disclose any documents at all because of the application of reg 39(2).[2] Orders were made in *Radius Residential Care Ltd* pursuant to the Court's powers to regulate its proceedings under ss 189 and 221(d) of the Employment Relations Act 2000 (the Act). These included the defendants filing affidavits including, or annexing, lists of documents containing a reference to the document's general nature, the date of its creation and to whom it was sent. If there was privilege against self-incrimination, or another recognised class of privilege, then a brief description of the ground for which privilege was asserted was required. If there remained a dispute, then all the disputed documents were to be provided to the Registrar of the Employment Court for a Judge to determine each assertion of privilege.[3]

[5] There was agreement to a similar process in this matter.[4] The Chief Executive of the Trust Mary Los'e provided a sworn affidavit of documents. Part 1 of the attached schedule lists documents that are in the Trust's control for which the Trust does not claim privilege or confidentiality. Part 2 of the schedule lists the documents in the Trust's control for which the Trust claims privilege. Alongside each document, reference is made to its general nature, date, and a brief description of the grounds

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2 *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 86, [2016] ERNZ 334. There was a combination of remedies sought in *Radius Residential*, including declarations, damages and penalties.

3 At [32] and [33].

4 Joint memorandum of advocate for the plaintiffs and counsel for the defendant dated 2 December 2024.

where privilege is asserted.[5] If privilege was asserted, documents were to be filed with the Court to determine whether they are disclosable.

[6] The documents that the Trust maintain are privileged are held on a separate file and have been considered by a different Judge from the Judge who will hear the substantive matter.

[7] Mr Pa'u, the advocate for the plaintiffs, raised broader issues about the application of reg 39 and the common law privilege against self-incrimination. This judgment resolves those broader issues as well as the issue of whether the documents disclosed are privileged.

The common law privilege against self-incrimination in civil proceedings

[8] Mr Pa'u submits that it is difficult to justify the continuation of the privilege against self-incrimination. He refers to the removal of the privilege against self-incrimination in civil proceedings under s 63 of the Evidence Act 2006 creating uncertainty about the continued existence of a privilege against self-incrimination in employment litigation. Further, he argues that the privilege against self-incrimination is preserved only in the Regulations, which cannot override the provisions of the statute. In particular, he points to the Court's equity and good conscience jurisdiction at s 189 (2) of the Act which provides the Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[9] Mr Pa'u also submits that s 229(5) of the Act suggests that, where Parliament intends the privilege against self-incrimination to persist, it specifically provides for it. Section 229(5) provides a specific right for a person, during an interview with a Labour Inspector, not to give an answer to any question if it would tend to incriminate them. Section 229(5A), inserted on 1 April 2016, is also relevant. It provides that a person is still required to answer a Labour Inspector's questions if doing so could expose them to pecuniary penalties under pt 9A, but any answers given are not

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5 The Trust filed an initial affidavit of documents. Following concerns from the plaintiffs regarding whether the level of detail satisfied the timetabling orders made by the Court, a further affidavit was filed.

admissible in criminal proceedings or in proceedings under pt 9A for pecuniary penalties.

[10] Mr Williams, counsel for the Trust, does not accept that the privilege against self-incrimination is an outdated concept that should lightly be set aside. He submits it is a part of natural justice and fairness in proceedings that underpin employment relationships and the wider rule of law.

[11] The Employment Court in *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* decided a question of law from the Employment Relations Authority (the Authority) about an objection to the production of documents likely to expose a party to a penalty.[6] An argument that the Evidence Act 2006 abrogated entirely the previous privilege against self-incrimination, including in employment litigation, was not accepted. Proceedings before the Authority and the Employment Court are not subject to the Evidence Act 2006.[7] It was acknowledged in *South Pacific Meats* that the previous privilege may have been reduced in the scope of its application but that it continued to apply to proceedings in the Authority and the Court in relation to penalties. There was a finding that proceedings for penalties that could be imposed under the Act are not criminal proceedings as defined by s 60 of the Evidence Act.[8] Rather they are civil penalties for statutory breaches. It was stated that if there remains a privilege against self-incrimination in document disclosure under the Act it is the same privilege as exists in pecuniary penalty proceedings under other regulatory statutory regimes.[9]

[12] *South Pacific Meats Ltd* decided that there is a residual privilege against self-incrimination relating to proceedings under the Act in which a penalty or penalties are claimed against the party seeking to invoke the privilege.[10] That is the privilege that the Trust asserts in this matter.

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6 *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138, [2015] ERNZ 104.
7 At [60].
8 At [65].
9 At [78].
10 At [83].

[13] It is correct that Regulations are subordinate legislation. In *Matsuoka v LSG Sky Chefs New Zealand* the application of reg 39(2) of the Act was considered. It was held, after considering several earlier decisions, that it is now commonly accepted in the Employment Court that a statutory discretion under the Act cannot be fettered or curtailed by a regulation under the 2000 Regulations or any other regulation. This extends to the Court's equity and good conscience jurisdiction under s 189 of the Act.[11]

[14] There was approval in *South Pacific Meats Ltd* of the statement in *Matsuoka* that reg 39(2) does not obviate any requirement to disclose documents in penalty actions under the Act. Rather, it negates the application of procedural regs 40–52 in such actions.[12] The Court stated that any compulsion to disclose documents must come from an order of the Court exercising its statutory jurisdiction under s 189 of the Act. The Court can then consider whether documents are privileged including that disclosure would be self-incriminatory.[13]

[15] Regulation 39(2), therefore, informs but does not fetter the Court's powers under s 189 of the Act.

[16] The privilege found to remain in *South Pacific Meats Ltd* is reasonably narrow. As was observed in *Radius Residential Care Ltd*, penalties are usually claimed as part of a range of remedies for several causes of action.[14] Importantly, reg 39(2) cannot be interpreted to preclude disclosure procedures in other causes of action simply because they are accompanied by claims to penalties for breach in the same proceeding. It was stated in *Radius Residential Care Ltd* that this interpretation allows the Court to ensure that there is no self-incrimination in penalty proceedings at the same time as permitting appropriate disclosure where other remedies are sought.[15]

[17] *South Pacific Meats Ltd* predates the addition of s 229(5A). *Radius Residential Care Ltd* was decided shortly after the addition of s 229(5A), but the potential relevance of that section was not raised by either party and not mentioned by the Court.

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11 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165 at [61].
12 *South Pacific Meats Ltd*, above n 6, at [66].
13 At [69].
14 *Radius Residential Care Ltd,* above n 2, at [30].
15 Above n 2 at [31].

Section 229(5A) suggests that, even in a case involving a pecuniary penalty under pt 9A, which is reserved only for serious breaches of minimum employment standards, an employer must still provide answers to a Labour Inspector's questions.

[18] However, as Mr Pa'u notes, the section was discussed in *Labour Inspector v Chhoir*.[16] There, the Court found that the intention of this section was to strike a balance between allowing a Labour Inspector to conduct an investigation by ensuring they can obtain relevant information while also ensuring that an employer is entitled not to have the information used against them in a proceeding under pt 9A.[17]

[19] It follows that s 229(5A) is intended to reduce the privilege against self-incrimination in a narrow way, only for cases pursued by the Labour Inspector, to enable it to conduct a full investigation. I do not find that s 229(5A) reflects a different intention by Parliament about the privilege against self-incrimination in cases such as these.

[20] I agree with the reasoning and the decision in *South Pacific Meats Ltd* that a privilege against self-incrimination remains in proceedings under the Act in which a penalty or penalties are claimed against the party seeking to invoke the privilege. The Court is not persuaded at this time that legislative and legal developments support that this should no longer be the case.

[21] Regulation 39(2) is not fundamentally inconsistent with s 189 of the Act. The Court can exercise its statutory jurisdiction under ss 189 and 221(d) of the Act to consider claims of self-incrimination privilege and, if appropriate, particularly where there are other causes of action, order disclosure.

Should the privilege apply in the circumstances in this case?

[22] Mr Pa'u submits that in any event, privilege should not apply in the circumstances of this case.

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16 *Labour Inspector v Chhoir, (T/A Bakehouse Café)* [2020] NZEmpC 203, [2020] ERNZ 479.
17 At [10].

[23] The Court was not persuaded in *Matsuoka* that it was necessary to consider the civil penalty privilege.[18] There is a distinguishing feature in *Matsuoka*. The plaintiff in that matter was seeking penalties and refused to disclose documents to the defendant. The Court concluded that the plaintiff was not vulnerable to a penalty. Further, the defendant was prepared to make full disclosure and there was nothing presented to show there may be a document to which privilege should attach.

[24] There were also other claims in *Matsuoka* in addition to the claim for penalties.[19] The Trust says that the only relevance the documents could have in this matter is in relation to the penalty claims. Whether the documents are relevant for other aspects of the non-de novo challenge is an important consideration for the Court when it determines whether the documents are privileged.

[25] The dismissals of the plaintiffs were found to be unjustified. Liability has already been established and the plaintiffs' challenges are on a non-de novo basis. They relate to aspects of the Employment Relations Authority determination as follows:

(a) The finding that the unjustified disadvantage grievances were not established because the nature of the grievances were more accurately characterised as unjustified dismissals.

(b) That penalties for breaches of s 4 of the Act would not be awarded.

(c) That penalties for breaches of the employment agreement would not be awarded.

(d) The level of compensation that was awarded under s 123(1)(c)(i) of the Act.

(e) The level of compensation for lost benefits that was awarded.

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18 *Matsuoka v LSG Sky Chefs New Zealand Ltd*, above n 11, at [73].
19 At [18].

(f) The amount of lost wages that was awarded.

[26] An assessment at this stage does not support that the documents will be relevant to the challenge to the quantum of the compensatory award for the loss of a benefit or the quantum of the awards for lost wages. Findings have already been made about the conduct of the employer and the circumstances surrounding the dismissal in respect of compensation for humiliation, loss of dignity and injury to the feelings of the plaintiffs. It is difficult to see how new information that the plaintiffs were unaware of could be relevant to the challenge to the quantum of compensation.

[27] The documents are also unlikely to be relevant to the challenge about whether the Authority was correct in finding that unjustified disadvantage claims are not established because the grievances were more accurately unjustified dismissals.

[28] The documents for which privilege is asserted, assessed at this stage, will be relevant only to the challenge to the Authority's decision not to award penalties. In the exercise of the statutory jurisdiction under ss 189 and 221(d), this limited relevance is a significant factor to be weighed in balancing the probative and prejudicial factors associated with the disclosure of documents and the overall interests of justice.

[29] The Court has proceeded to determine whether the listed documents for which the Trust claims privilege are disclosable.[20] Two bundles of documents have been received. Some of the documents have been duplicated. Mr Pa'u has observed that some documents in Part 1 of the Schedule also appear in Part 2 of the schedule, which are documents for which the defendant claims privilege. That is because they usually appear as part of an email chain in Part 2. Mr Pa'u has also expressed concern over what he refers to as a "sweeping claim to immunity" which if accepted renders the plaintiffs' rights to conduct litigation "practically nugatory." That is putting the matter too strongly. The findings of unjustified dismissal and factual findings about the process are not at issue in this matter.

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[20] List of documents attached to the affidavit of Mary Los'e sworn on 11 February 2025 as Part 2 of the Schedule.

[30] Mr Pa'u has made some specific submissions about the list of documents attached to the affidavit of documents.[21] These have been considered, but to comment about these matters further could have the effect of undermining the privilege against self-incrimination.

[31] The documents listed in Schedule A are disclosable and should be made available to the plaintiffs for inspection and copying.

[32] The documents listed in Schedule B are not disclosable because they are privileged and will, or are likely to, incriminate the Trust and expose the Trust to a penalty. Litigation privilege is also available for some of the documents. These documents should be returned to the Trust.

[33] Costs are reserved until they are dealt with finally at the conclusion of the proceedings.

Helen Doyle
Judge

Judgment signed at 4.15 pm on 5 June 2025

[21] Memorandum of the plaintiffs dated 3 March 2025 at [12], [22], [23], [24], [25] and [27].

Schedule A

These documents are not likely to incriminate and expose the Trust to a penalty.

Documents:	**Comments:**
0076 – 0081	
0083 – 0084	
0109	
0114	
0135 – 146	Duplicates of other documents are at 0135, 0136, 0137, 0138, 0141 and 0142. Documents should be provided as described in the index.
0151-0152	
0154 – 0159	Duplicates of other documents are at 0156 and 0159. Documents should be provided as described in the index.
0171	
0173	
0205	
0208	
0210	
0224	
0225	

Schedule B

These documents are likely to incriminate and expose the Trust to a penalty.

Documents:	**Comments:**
0001 – 0075	Duplicates of other documents at 0030, 0032, 0033, 0035, 0036, 0045, 0055, 0057, 0060, 0071.
0082	
0085 – 0108	Duplicates of other documents at 0097, 0098, 0103, 0105, 0106, 0107 and 0108.
0110 – 0113 0115 -134	Duplicates of other documents at 0111, 0129 and 0130.
0147 – 0150	
0153	
0160 – 0170	Duplicates of other documents at 0166, 0167, 0168 and 0169.
0172	
0174- 0204	Duplicates of other documents at 0174, 0192, 0193, 0194, 0195, 0196, 0197, 0198, 0199, 0200, 0201, 0202, 0203, 0204.
0206 – 0207	
0209	
0211 – 0216	
0217 -0223 0226	Documents that also attract privilege as they are documents, information compiled by, or communications by, the Trust or its agents or legal advisers when litigation was reasonably apprehended.
0227 – 0239	