IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 147
EMPC 144/2024

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for leave to extend time to file a challenge to an objection to disclosure
BETWEEN	ALADDIN AL-BUSTANJI First Applicant
AND	GLEN JENNER Second Applicant
AND	CORRECTIONS ASSOCIATION OF NEW ZEALAND INCORPORATED Respondent

Hearing: On the papers

Appearances: M O'Flaherty and A Little, counsel for applicants
JM Roberts and K Kleingeld, counsel for respondent

Judgment: 18 July 2025

INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE KATHRYN BECK
(Application for leave to extend time to file a challenge to an objection to disclosure)

---

[1] This judgment resolves an application by the applicants, Aladdin Al-Bustanji and Glen Jenner, for leave to extend time to file a challenge to an objection to disclosure (the leave application).

[2] The substantive proceeding in this case involves an application for judicial review brought by the applicants against the respondent, Corrections Association of New Zealand Incorporated (CANZ). An earlier decision dealt with mutual applications for verification orders arising as part of the disclosure process.[1] CANZ's application for a verification order was unsuccessful; the applicants' application was only successful in part. In that judgment, I found that the applicants could not challenge an objection to a notice of disclosure by filing an application for a verification order. I noted that the challenge process was separate from the verification order process and that counsel ought to have filed a challenge to the notice of objection, if he considered it to be unfounded, within five days of receipt.

[3] The applicants did not address that issue in their submissions in reply at the time. I noted that if they did wish to pursue a challenge to the objection, they would need to file an application for leave to extend time to file that challenge. Four months later, they have done so.

Disclosure

[4] 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 supports, or may support, the case of a party opposed to the case of the party who possesses it; or
>
> (b) may prove or disprove any disputed fact in the proceeding; or
>
> (c) is referred to in any other relevant document and is itself relevant.

---

1 *Al-Bustanji v Corrections Assoc of New Zealand Inc (No 3)* [2024] NZEmpC 225.
2 Employment Court Regulations 2000, regs 37–41.
3 Regulation 40(1); and *Carrington Resort Jade LP v Knight (No 2)* [2023] NZEmpC 198 at [26].
4 Regulation 38(1).

[5] 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 service.[5] A notice of objection may be challenged within five days of receipt by filing an application for an order declaring that the documents be disclosed.[6]

Application for leave to extend time to file a challenge to objection to disclosure

[6] On 21 August 2024, the applicants sent the respondent a notice requiring disclosure. On 26 August 2024, the respondent served a notice of objection on the applicants, objecting to some of the documents sought.

[7] On 31 March 2025, the applicants filed the leave application in relation to the documents the respondent objected to on the basis of privilege.[7] They relate to communications between officers and officials of the respondent.

[8] The applicants failed, at the correct time, to challenge the objection on the grounds that no privilege exists over the documents sought. The grounds set out in the leave application are that the documents at issue are relevant to the exercise of the respondent's decision making which is the subject of the original judicial review application. They say they will be unduly prejudiced if documents bearing on the decisions the respondent wishes to make about the applicants are not disclosed. The applicants also submit that the respondent will suffer no prejudice if their challenge is considered now.

[9] The leave application is supported by an affidavit from Michael O'Flaherty, the applicants' solicitor. He deposes that from around July 2024 to October 2024 when the parties were dealing with issues of disclosure, counsel overlooked the complete requirements for disclosure according to the Regulations. Following this period, the parties' focus shifted to preparing for a judicial settlement conference and a strikeout application, which was occurring at about the same time. Mr O'Flaherty sets out his

---

5 Regulations 42(3) and 44(1).

6 Regulation 45.

7 While the leave application only refers to documents over which the respondent claimed privilege, in a later draft document the applicants appear to broaden the challenge to other documents. I will deal with this later at [13]-[15].

view that the documents sought by the applicants are not in fact privileged and that the applicants will be prejudiced if that information is not before the Court in its consideration of the substantive application.

[10] The respondent opposes the application on the grounds that the documents are privileged and the applicants have not provided any evidence to the contrary. It says it has verified by affidavit that no relevant documents exist that come within the category sought by the applicants other than the documents that have been disclosed. It says it has properly claimed privilege in reliance on ss 54 and 56 of the Evidence Act 2006.[8]

[11] Additionally, the respondent says that granting the application would unjustifiably result in additional costs for the respondent in what have been protracted legal proceedings. It says that the disclosure process is not intended to be unnecessarily drawn out and notes that the parties initially engaged in respective disclosure informally on 27 June 2024. The interlocutory judgment was issued on 22 November 2024,[9] and this application was served on 31 March 2025. It says that more than nine months have elapsed since disclosure was contemplated by the parties and the application is unduly delayed.

[12] The respondent says that there is a clear process and timeframe for engaging in disclosure and that the applicants are well outside that timeframe. It notes that the applicants had an opportunity to address their concerns regarding the objection in their submissions for verification orders but they did not do so.

[13] To add to the picture of delay, when the applicants filed submissions in support of their leave application on 16 May 2025, they provided a draft challenge to objection at the same time, being a draft of the document they proposed to serve on the respondent if their leave application was successful. The respondent has correctly pointed out that this draft notice appears to relate to documents other than those over which privilege has been claimed. It does not refer to the issue of privilege at all.

---

8 Section 54 relates to privilege for communication with legal advisers and s 56 relates to privilege for preparatory materials for proceedings.

9 *Al-Bustanji v Corrections Assoc of New Zealand Inc (No 3)*, above n 1.

Instead, it refers to the respondent's "flawed view" that the relevant documents are confined to a particular date range. The applicants' submissions focus on this category of documents.

[14] This unsignalled and unexplained change in focus is unhelpful and inconsistent with the application filed and Mr O'Flaherty's affidavit, which only relate to the privilege issue. The Court is able to validate something informally done,[10] such as the amendment of a leave application, to be consistent with the draft notice of challenge. However, it would require an acknowledgment of the difference and explanation for the further delay, as well as the reasons why the second category of documents was not previously sought and why there is now no reference to the issue of privilege. Absent these requirements, validating what amounts to an amended leave application in these circumstances would not be an appropriate exercise of the Court's discretion.

[15] I am therefore limiting my consideration to the category of documents referred to in the application (over which the respondent has claimed privilege).

The law

[16] Section 221 of the Employment Relations Act 2000 (the Act) provides:

> **221 Joinder, waiver, and extension of time**
>
> In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
>
> (a) direct parties to be joined or struck out; and
>
> (b) amend or waive any error or defect in the proceedings; and
>
> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
>
> (d) generally give such directions as are necessary or expedient in the circumstances.

[10] Employment Relations Act 2000, s 219.

[17] In exercising its powers under this section, the Court must consider:

(a) whether doing so will more effectually dispose of the matter;

(b) whether doing so is in accordance with the substantial merits and equities of the case; and

(c) whether any terms ought to apply to any order made.

[18] In *Almond v Read*,[11] the Supreme Court upheld the Court of Appeal's reasoning in that case,[12] confirming that the overarching consideration in relation to applications for leave out of time is the interests of justice.[13]

[19] In *Carrington Resort Jade LP v Maheno*,[14] this Court confirmed that in applying s 221(c) of the Act:[15]

> … A non-exhaustive list of potentially relevant factors includes:
>
> (a) the reason for the omission;
>
> (b) the length of the delay;
>
> (c) any prejudice or hardship suffered to any person;
>
> (d) the effect on the rights and liability of the parties;
>
> (e) subsequent events; and
>
> (f) the merits.

[20] Citing *Almond v Read*, the Court went on to say: "In assessing these factors, the ultimate question for the Court is what the interests of justice require".[16]

---

11 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
12 *Almond v Read* [2016] NZCA 147.
13 *Almond v Read*, above n 10, at [5] (footnote omitted).
14 *Carrington Resort Jade LP v Maheno (No 2)* [2023] NZEmpC 115.
15 At [7].
16 At [8] (footnote omitted).

Analysis

What was the reason for the omission/delay?

[21] The applicants say that the failure to lodge a challenge to objection was a regrettable oversight by counsel in a matter that had a number of moving parts at the time.

[22] The objection to disclosure was provided on 26 August 2024. Accordingly, any challenge to that objection should have been filed by 31 August 2024.

[23] There are two periods of delay. The first is from 21 August 2024 to 22 November 2024 and the second is from 22 November 2024 to 31 March 2025. Arguably, there is also now a third period from 31 March 2025 to 16 May 2025, when the draft challenge was filed and a further category of documents was sought to be included.

[24] It is of note that over the period 5 August to 29 August 2024, there were various exchanges between the parties in terms of the Regulations, including the respondent's objection to disclosure. On 29 August 2024, a case management conference was held where disclosure was discussed. In the circumstances, it is difficult to understand how a challenge to objection was overlooked. However, these things happen and there were a number of factors ongoing at the time.

[25] That said, the failure to challenge the objection was specifically brought to the respondent's attention in the Court's judgment issued on 22 November 2024,[17] and this application was not filed until 31 March 2025. That oversight is more difficult to understand. The applicants say this is because matters were paused and efforts were focused elsewhere while the judicial settlement process was ongoing.

[26] The judicial settlement conference was initially scheduled for 26 November 2024; however, it was rescheduled on two occasions, to the end of November 2024 and then to 3 December 2024. The judicial settlement conference process was

---

[17] *Al-Bustanji v Corrections Assoc of New Zealand Inc (No 3)*, above n 1, at [30].

ultimately unsuccessful, which was apparent by 5 March 2025 when the respondent advised the applicants of its position.

[27] In relation to the first period of delay, the respondent does not accept Mr O'Flaherty's explanation, given the focus on disclosure at the time. It submits that it is not feasible for him to have overlooked challenging the objection. However, that is counsel's clear statement in a sworn affidavit. It would require specific evidence to the contrary for me not to take that at face value.

[28] The respondent has not provided submissions in relation to the second period of delay, which the applicants attribute to a pause during the judicial settlement process. Following the judicial settlement conference, the parties filed a joint memorandum seeking an extension of time for filing any submissions on costs or filing any appeal until 28 March 2025. However, the joint memorandum does not refer to anything else being on hold. There is no reference to disclosure.

[29] That said, it would not be unusual for parties to agree to pause the timetabling of disclosure pending the expectation that matters will be settled. It is also noted that the respondent has neither confirmed nor denied the applicants' contention that the deadlines, including for disclosure, were pushed out to 28 March 2025 by agreement. On balance, I accept there was likely an agreement to pause timetabling and park the completion of the judicial settlement conference process.

[30] In relation to the third period, no explanation is offered.

[31] On balance, this factor counts in favour of the granting of leave.

Length of the delay

[32] The applicants say that at the time they applied for a verification order, it was clear that they were seeking to challenge the respondent's objection to disclosure. They accept that on the face of it, the delay is lengthy. However, they say it is explained by the pause in proceedings while the judicial settlement process was ongoing. They say the deadlines were pushed out to 28 March 2025 and this leave application was filed promptly thereafter.

[33] They submit that it is not a case of their having done nothing; they say that in the meantime, this leave application was previously signalled.

[34] I note that while it could be said to have been signalled in November 2024 as part of the proceedings in relation to applications for verification orders, there is no evidence of it being raised subsequent to the judgment being issued.

[35] The respondent says that the application would not have arisen but for what it refers to as the Court's invitation in its judgment of 22 November 2024.

[36] Paragraph [30] referred to by counsel for the respondent states that if the applicants wished to pursue a challenge to the notice of objection, they would need to file an application to extend time to file that challenge.[18] That is a statement, not an invitation, and it was certainly not an invitation that was taken up with any alacrity, the leave application not having been filed until 31 March 2025.

[37] The respondent submits that the seven-month delay in rectifying counsel's oversight is inordinate. It does not consider the applicants' submissions persuasive in this respect and nor does it accept that this is an inadvertent error.

[38] I agree that the significant length of the delay, although partly explained, counts against the granting of leave.

Prejudice/hardship

[39] The applicants say that there is no prejudice to the respondent. They make substantive submissions in relation to the relevance of the documents they seek. However, the category of documents they seek to challenge is different to that referred to in the leave application and Mr O'Flaherty's affidavit. As already noted above, the draft notice of challenge refers to other documents outside timeframes set by the respondent and not the documents over which privilege is claimed. The respondents have had the opportunity to respond to the submissions and draft notice. However, the moving nature of the target category of documents is confusing and prejudicial.

---

[18] *Al-Bustanji v Corrections Assoc of New Zealand Inc (No 3)*, above n 1, at [30],

No acknowledgement or explanation for the change is offered in the applicants' submissions.

[40] The applicants say that if leave is not granted, they will be potentially deprived of documents which are directly relevant to the proceedings. They submit that they will almost certainly suffer material prejudice if they are unable to challenge the objection. Conversely, should the application be granted, the respondent will not suffer prejudice or harm. They argue that the proceedings have only recently been set down for a substantive hearing on 30 September and 1 October 2025, and that there is ample time between now and then to locate the documents sought. However, they do not make an allowance for arguments and resolving the challenge to objection (which will almost certainly be opposed). While not impossible, it would require a very tight timeframe, which will take focus away from preparation for the hearing. I am concerned that this will impact the hearing date.

[41] The respondent submits that the further documents that appear to be covered in the draft challenge to objection are neither relevant nor in the scope of the documents in the applicants' leave application. It says the applicants will not be significantly prejudiced, as they allege. It submits it has fully engaged in disclosure and has provided documents relevant to the judicial review proceedings, barring those that are legally privileged. It says it has disclosed approximately 80 documents, email threads and text messages. These include:

(a) the documentation disclosed in the interim injunction proceedings;

(b) the entirety of the email correspondence shared between the officers arising from the email from the applicants from 3 March 2024 until 26 March 2024;

(c) documents in class 1 between 26 March and 2 April 2024, and those on 13 and 14 May 2024; and

(d) documents in class 3 between 26 March and 2 April 2024, and those on 13 and 14 May 2024.

[42] The respondent says that engaging further in the issue of disclosure through granting the leave application would unjustifiably result in additional cost to the respondent in what have already been protracted legal proceedings. It says that such costs would be unacceptable and disproportionate given the lack of the challenge's substantive merits.

[43] As stated above, consideration is limited to the documents referred to in the application and affidavit in support. I agree that it appears that the extension of the disclosure process, even on the limited issue of privilege, after such significant delay, would be prejudicial to the respondent.

The effects on the rights and liabilities of the parties

[44] The applicants say that if they are deprived of access to documents which are material to the issues before the Court, and which are likely to exist, they will be denied a fair hearing. Given that the documents in question are ones over which privilege has been claimed, it is difficult to see how this will assist the hearing in the absence of a finding that such privilege is not properly claimed. I note that no evidence has been put forward to support such a submission.

Merits

[45] Counsel for the respondent says that privilege is claimed on the grounds that the documents relate to the provision of legal advice or preparation for legal proceedings. Even if leave to challenge is granted, the respondent will oppose any challenge.

[46] There is no evidence of grounds on which any claims of privilege might be overturned in relation to the documents. The merits do not support an extension of time.

Interests of justice

[47] Both parties claim that it is in the interests of justice that their respective positions be successful. The applicants argue that the oversight by counsel in failing to file a challenge to an objection is regrettable and may have caused inconvenience

to the respondent. However, they say that this error in the disclosure process has not caused any delay in the proceedings. The scheduled hearing dates for the substantive application is sufficiently distant in the future that complying with an order from the Court will cause little to no disruption or inconvenience given the other interlocutory applications presently on foot.

[48] The respondent says that the overall justice of the case, taking into account the factors it has raised in relation to the inordinate delay in the face of opportunities to correct the oversight, weighs against the granting of leave. It says it has complied with disclosure in good faith and in accordance with the timeframes, and that the provision of additional information, if any, would be an injustice given the nature of proceedings, the causes of action pled by the applicants, and the significant delay. It says it is in contradiction to the intent and objectives of disclosure.

[49] I agree that the seven-month delay in this instance is inordinate. It is not minor and such a significant delay in itself will inevitably cause prejudice to the other party and potentially put the hearing date at risk. While that delay has been partly explained, the merits do not support the application. The disclosure framework is designed to ensure that issues are dealt with in a focused and efficient manner. In all the circumstances, it is not in the interests of justice to grant the application.

Outcome

[50] The application for leave to extend time to challenge an objection to disclosure is declined.

[51] Costs are reserved. In the event the parties are unable to agree on costs, the respondent will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the applicants having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 11 am on 18 July 2025