IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 185
EMPC 181/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for further and better disclosure
BETWEEN	MICHAEL LANIGAN AND THE OTHER PLAINTIFFS LISTED IN APPENDIX A First Plaintiffs
AND	E TŪ INCORPORATED Second Plaintiff
AND	FONTERRA BRANDS (NEW ZEALAND) LIMITED Defendant

Hearing:	3 June 2025 (Heard at Christchurch via Audio Visual Link)
Appearances:	T Oldfield, counsel for first plaintiffs P Cranney, counsel for second plaintiff M Dew KC, R Rendle and J Greenheld, counsel for defendant
Judgment:	22 August 2025

INTERLOCUTORY (NO 4) JUDGMENT OF JUDGE K G SMITH
(Application for further and better disclosure)

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[1] In April 2023, the Employment Relations Authority dealt with an urgent application by Fonterra Brands (New Zealand) Ltd.[1] The company sought a

[1] *Fonterra Brands (New Zealand) Ltd v Lanigan* [2023] NZERA 197.

declaration that it could lawfully and reasonably instruct its employee, Michael Lanigan, to register and use fingerprint scanning technology for the purposes of recording time and attendance on any day he worked.[2] The Authority recognised that the outcome would apply to other employees.

[2] The Authority granted the declaration.[3] It was satisfied that Fonterra had consulted with the union, E tū Inc, as required by the collective agreement, complied with the duty of good faith and satisfied Principle 1 of the Privacy Act 2020.

[3] The Authority's determination was challenged by Mr Lanigan (and the other first plaintiffs) seeking a full rehearing of the matter.[4] E tū did not participate in the Authority investigation but subsequently has become a party to the challenge.

The claim

[4] The union and Fonterra were bound by a collective agreement in force from 1 March 2023 until 28 February 2024. Mr Lanigan and the other first plaintiffs were, at all relevant times, employees of Fonterra covered by that collective agreement.

[5] The allegations made by the plaintiffs in the fourth amended statement of claim can be summarised for present purposes as pleadings to the effect that:

(a) there was no express or implied term in the collective agreement[5] or in any individual terms and conditions of employment requiring the first plaintiffs to provide fingerprints or any biometric information to Fonterra or use fingerprinting/finger scanning[6] technology;

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2 At [21].
3 At [92].
4 E tū Inc was joined as a party under s 221 of the Act; *Lanigan v Fonterra Brands (New Zealand) Ltd* [2024] NZEmpC 60.
5 That collective agreement has since been replaced by the Maintenance Technicians Collective (Employment) Agreement between E tū and Fonterra at their Takinini plant which came into force on 1 March 2024.
6 The union pleaded that Fonterra's requirement was for fingerprinting. Fonterra's response was that it was requiring finger scanning.

(b) there is no legal requirement imposed on the first plaintiffs to provide fingerprints or biometric information to the defendant or use fingerprinting/finger scanning; and

(c) they disputed a claim attributed to Fonterra that it needed only to consult before introducing the scanning technology; and

(d) that, in any event, Fonterra did not genuinely consult.

[6] Fonterra accepts that the relevant collective agreement and individual terms and conditions of employment do not expressly require the first plaintiffs to use fingerprint/finger scanning, or provide biometric information. Its defence is that there is an implied term in the employment relationship that it is entitled to require the first plaintiffs to comply with a "reasonable instruction" to use the timekeeping system it chose.

[7] Fonterra also denied the plaintiffs' claim that it did not engage in genuine consultation. Its response was that it had undertaken a genuine and fair consultation process in relation to the introduction of the technology.

Disclosure notice

[8] In June 2024, Fonterra served a notice on E tū requiring disclosure under r 42 of the Employment Court Regulations 2000. A similar notice was served on the first plaintiffs which they have satisfied.

[9] Fonterra required disclosure from E tū of three categories of documents but only the first one remains alive:

> 1. Any evidence including but not limited to, letters, emails, written communications, meeting minutes, notes, recordings of oral conversations or other documentation, that outline or discuss the Second Plaintiff's position communicated to its members and/or to the Defendant and/or Fonterra Co-operative Group Limited relating to the proposal to introduce, introduction and/or use of finger scanning technology.

[10] The union responded to the notice by providing a list of documents through its solicitors. The response to category 1 was a list of five emails, some of which had redactions to deal with what was described as "references to legal risk/advice". Copies of the listed emails were supplied in this response, so inspection was provided at the same time as disclosure occurred.

This application

[11] In January 2025, Fonterra applied for orders "directing further and better disclosure by the Second Plaintiff", in particular:

> (a) that the documents listed at paragraph 1 of the Defendant's Notice Requiring Disclosure dated 14 June 2024 (**Disclosure Notice**) are disclosed by the Second Plaintiff;
>
> (b) for verification of the redactions made by the Second Plaintiff for legal professional privilege, in respect of the documents provided in accordance with the Disclosure Notice; and
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> (c) any other order the Court thinks just.
>
> (emphasis original)

[12] Conventional grounds were relied on to support the application; that the documents sought are relevant, Fonterra believed on reasonable grounds that they exist and are in the union's possession or control, they were requested and there has been no satisfactory answer from the union. It further relied on reg 52(1) and directions issued by Judge King in a minute dated 17 December 2024.

[13] The application was supported by an affidavit from Fonterra's Senior Human Resources Business Partner.

[14] While E tū did not object to the notice it opposed Fonterra's application. The union gave four grounds to resist the orders being sought. The first ground was a description of what the union considered category 1 is about, namely documents which outline or discuss its "position" relating to the fingerprinting/finger scanning proposal communicated to its members. Having defined the subject in that way, the notice of opposition stated as the second ground that there are no relevant documents in this category but any resembling them were provided or made available either by it or by the first plaintiffs.

[15] The remaining two grounds of the notice of opposition touched on the redactions made to the documents provided by E tū to Fonterra which subject is addressed later in this judgment.

[16] E tū supported its opposition with an affidavit from its in-house counsel providing a copy of certain email chains, and the disclosure notice served on the first plaintiffs.

The disclosure regulations

[17] Mutual disclosure and inspection of documents is dealt with in regs 37–52 of the Employment Court Regulations.

[18] Regulation 37 states the object of regs 40–52 which, in turn, provide the mechanism by which documents are disclosed and inspected. Mutual inspection and disclosure is to ensure that, where appropriate, each party has access to relevant documents. Despite the potential breadth of disclosure contemplated by the scope of the regulations, reg 37 recognises that there are circumstances where it is unnecessary, undesirable, or both.

[19] What is relevant for the purpose of the regulations is defined by reg 38. A document is relevant if it directly or indirectly:

(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

(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]

[7] Regulation 28(2) provides an extended definition of "document".

[20] The disclosure process begins with serving a notice.[8] A notice may be objected to on specified grounds.[9] They are that the document is subject to legal professional privilege, that disclosure would tend to incriminate the objector, or would be injurious to the public interest.[10] An objection to a notice for disclosure may be challenged.[11]

[21] Failure to comply with the regulations, any notice given under them, or an order for disclosure has consequences. The Court is empowered to make a compliance order or any other order it thinks just.[12] Without limiting the scope of the Court's powers, the regulations permit the Court to refuse to receive in evidence any document tendered by a party in default.[13] Further, if the party in default is the plaintiff, the proceeding might be adjourned until compliance occurs or, if there are repeated defaults, it may be dismissed.[14]

[22] In *Airways Corp of New Zealand Ltd v Postles*, the Court of Appeal held that the pleadings define the ambit of the proceeding and the issues to which questions of relevance must relate.[15] The Court also held that while relevance cannot be divorced from the pleadings it should not be looked at narrowly.

[23] A well-established principle for disclosure is that the Court will not make an order allowing a "fishing" exercise; that is where what is sought is information or documents to discover a new cause of action or a baseless or speculative cause of action.[16]

[24] In *Van Kleef v Alliance Group Ltd*, the Court described the disclosure process as a function of relevance, proportionality and discretion.[17] I agree.

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8 Which is required by reg 42 to be in form 6.
9 Regulation 44.
10 Regulation 44(3).
11 Regulation 45.
12 Regulation 52.
13 Regulation 52(3).
14 Regulation 52(2).
15 *Airways Corp of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA).
16 *Van Kleef v Alliance Group Ltd* [2019] NZEmpC 157 at [20].
17 At [24].

[25] Ms Dew KC submitted that the documents in category 1 are relevant and further disclosure should be ordered. To support her submission, she referred in summary to the following:

(a) The documents are relevant to understand the first and second plaintiffs' position at the time consultation occurred about implementing the fingerprint/finger scanning technology.

(b) The documents are also relevant to the issue of consultation given that the plaintiffs' claim Fonterra did not consult genuinely.

(c) The purpose of the disclosure in (a) also goes to the question of whether the instruction by Fonterra to use the scanning technology is lawful and reasonable.

(d) The union should be required to disclose documents that indicate its understanding of the proposal to introduce scanning and the obligations owed to Fonterra at relevant times particularly during consultation.

[26] To supplement these submissions, Ms Dew said that it is reasonable to believe that further documents in category 1 exist because:

(a) while there has been some further disclosure from the union, that appears to duplicate what was provided by the first plaintiffs and did not include material from E tū officials;

(b) the disclosure provided by both plaintiffs showed that emailing was the usual way of communication between Mr Lanigan and the union. It is therefore reasonable to infer that there would have been emails between the union official Mr Lanigan wrote to and other union officials but none were supplied;

(c) it is reasonable to expect the union to maintain internal communications about the collective agreement and/or consultation but none were disclosed; and

(d) the disclosed documents contain references to other communications that were not provided.

[27] The timing and nature of the additional documents provided by the union was said to suggest a fragmented and incomplete approach to disclosure. Ms Dew acknowledged that E tū filed an affidavit addressing disclosure, but criticised its contents because there was no statement in it on oath about the extent of the inquiries made to satisfy the notice. For that matter, she submitted that the affidavit did not go so far as to state that there are no other documents in the union's possession or under its control in category 1.

[28] Mr Cranney's response began by identifying that the primary issue in the proceeding, from E tū's perspective, is a contractual one. That is, whether the first plaintiffs are contractually bound to use the scanning technology and provide biometric information to Fonterra.

[29] Mr Cranney described Fonterra's notice as "very peculiar". He was critical of category 1 because it sought documents that, he considered, were about the union's "position" in the sense of its opinion or belief about the proposal to introduce and/or use the fingerprinting/finger scanning technology.

[30] Related criticisms of category 1 were that it involved an assumption that there was a union "position" and that there are documents communicating that position to its members.

[31] Following those criticisms, Mr Cranney submitted that the category had a narrow scope and it would be surprising if any documents in it existed. He went so far as to say that there was no union position and it was, therefore, not communicated to the members so there are no documents falling into the category. Fonterra was criticised for mischaracterising the category throughout its submissions, referring to correspondence that he said went beyond what would be mere communication of its "position".

[32] Mr Cranney identified a further problem with the notice. While it seeks documents about the union's position, whatever that is or might be, that is irrelevant to the contractual interpretation required to resolve the dispute.

Analysis

[33] I do not share Mr Cranney's view that the notice is flawed depriving it of the meaning relied on by Fonterra. While he concentrated on "position" in the notice to reduce the scope of the documents sought to those about the union's opinions or beliefs, that is not what was intended. The notice should not be looked at so narrowly. While the notice uses "position" to at least partly describe the category, it cannot be disconnected from the rest of what was asked for. It is plainly about the union's documents in relation to the introduction and/or use of the scanning technology and communications with its members, Fonterra and Fonterra Co-Operative Ltd, on the same subject.

[34] Despite Mr Cranney's submissions to the contrary, there is sufficient in the material referred to by Ms Dew to suggest there may be documents in category 1 that are yet to be disclosed.

[35] Are any documents relevant to the pleadings? I do not accept Mr Cranney's submission that the ambit of the pleadings renders the documents sought irrelevant. Interpreting the collective agreement will be required but the pleadings go further than that. The fourth amended statement of claim, and the statement of defence, put in issue the quality and nature of consultation having a bearing on complying with the collective agreement and may, potentially at least, be relevant to Fonterra's claim that its instruction to use scanning is lawful and reasonable.

[36] If there are documents falling into category 1 yet to be disclosed, is requiring the union to disclose them unnecessary, undesirable or both? The scope of the category is sufficiently confined that the inquiry is not likely to be burdensome and is not so broad that it could be rejected as an impermissible fishing expedition. That limited scope and the minor nature of the issue (as Mr Cranney described it) suggests the number of (any) documents is likely to be low.

[37] The application will be granted. The further and better disclosure will need to be addressed as soon as reasonably possible, but it is not necessary to stipulate a time within which that step must occur.

[38] Of course, the requirement to provide this disclosure will be met if the union provides an affidavit confirming Mr Cranney's submission, describing the search for documents and, if none are found, confirming as much.[18]

[39] Having decided that further and better disclosure should be ordered it is not strictly necessary to consider Fonterra's argument that a verification order should be made. That said, I am not satisfied that Fonterra applied for one. Regulations 46(1) and 46(2) were not complied with and the claim for general relief is not a sufficient substitute.

[40] The last matter is the redactions in documents already disclosed. I accept counsel's proposal that the documents be reviewed by a Judge who is not a member of the hearing panel to determine whether they were appropriately made based on the claimed privilege. The matter is left with the parties to make arrangements with the Registrar.

Outcome

[41] The application for further and better disclosure is granted.

[42] Leave is reserved to apply for further orders, if required.

[43] Costs are reserved.

K G Smith
Judge

Judgment signed at 3.30 pm on 22 August 2025

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[18] *Fox v Herewith School Trust Board (No 6)* [2014] NZEmpC 154; [2014] 12 NZELR 251.

APPENDIX A

PETER ARMSTRONG
JAN BOSMA
MARTIN BROCK
ANTHONY CROPP
SHANNON FARLEY
DION HUBERS
BRIAN HUGHES
ANDREW JAMES
BRADLEY JESSON
CLIFF MCNEIL
WILLIAM MARR
BRUCE MUNRO
JASON POWRIE
DARREL ROBERTS
PAUL TAU
JEREMY WRIGHT