IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 24
EMPC 221/2023
EMPC 2/2024

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	an application for a verification order
BETWEEN	GARTH MURRAY CUNNINGHAM Plaintiff
AND	HEALTHALLIANCE NZ LIMITED Defendant

EMPC 304/2024

IN THE MATTER OF	an application for a compliance order
BETWEEN	HEALTHALLIANCE NZ LIMITED Plaintiff
AND	GARTH MURRAY CUNNINGHAM Defendant

Hearing:	On the papers
Appearances:	G Cunningham in person R Upton, counsel for healthAlliance NZ Ltd
Judgment:	20 February 2025

JUDGMENT OF JUDGE M S KING

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[1] This judgment resolves an application for a verification order and an application for a compliance order. The application for a verification order relates to documents sought in respect of a challenge of the plaintiff, Mr Cunningham, to the

Authority's substantive determination. The application for a compliance order relates to an unpaid costs award following an unsuccessful application by Mr Cunningham for a stay.

A verification order is sought

[2] Pursuant to reg 42 of the Employment Court Regulations 2000, Mr Cunningham has served a notice requiring disclosure on the defendant, healthAlliance NZ Ltd. The notice requiring disclosure sought all personal information held by healthAlliance from 1 March 2019 until 17 July 2020 in the form of emails to which Mr Cunningham was not a party but where one of three individuals was either the sender or recipient.

[3] healthAlliance did not object to the notice requiring disclosure and has provided documents to Mr Cunningham. However, Mr Cunningham is not satisfied with the documents provided and has applied for a verification order.

[4] Any party who is dissatisfied with documents disclosed may, within five days of receiving the disclosure, apply to the Court for a verification order.[1] 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.[2] The Court may make a verification order if it is satisfied of the probable existence of a document or of a class of documents.[3]

[5] Mr Cunningham submitted that common sense dictates that the number of documents would be in the hundreds rather than in the tens. He noted that the request was made for emails either to or from the three named individuals, not just emails between them. Further, he provided analysis of the disclosed emails that, he said, indicated the distribution of the disclosed emails, in relation to who they were from and to, shows that more emails should exist.

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1 Employment Court Regulations 2000, reg 46.
2 Regulation 46(3).
3 Regulation 47.

[6] Mr Upton, counsel for healthAlliance, submitted that a verification order should not be made because healthAlliance has made reasonable attempts to find the relevant documents. He indicated that it was willing to file affidavits which would have the same effect as an affidavit required by a verification order. Further, he submitted that if healthAlliance files such an affidavit, a verification order would simply duplicate that affidavit.

[7] After the parties filed submissions, Mr Upton indicated that further documents had been found as a result of searching other systems. He indicated that once that process was completed, healthAlliance would file affidavits as previously indicated. Those affidavits were eventually filed in early November 2024.

[8] The first affidavit was from a member of Te Whatu Ora's "IT team" (IT team).[4] That affidavit indicated that the searches were rendered somewhat difficult as the three individuals were no longer employed by healthAlliance so that backups of their emails needed to be searched. He stated that backups of the emails of each individual were reinstated as at the end of July 2020, which would automatically capture all emails as at the end of July 2020, as well as deleted and permanently deleted emails from 30 days before the end of July.[5] The second affidavit was from a People Partner Lead for Data and Digital at Te Whatu Ora. He stated that he had searched the email backups provided by the member of the IT team. He also indicated that he interpreted Mr Cunningham's request to only cover relevant emails that had been sent by one of the three individuals and that had also been received by one of the three individuals.

[9] Mr Cunningham is not content with the affidavits filed by healthAlliance. He submitted that Te Whatu Ora's People Partner Lead redefined the original request to include only emails between the three named individuals rather than all emails to or from those individuals with any person that contained his personal information. He also observed that one of the individuals names is misspelt in the affidavit, which would have impacted on the search.

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4 healthAlliance is now merged into Te Whatu Ora.

5 I take it as implicit that emails deleted prior to the end of June 2020 would not be caught within the search.

[10] The concerns raised by Mr Cunningham about the affidavit are fair. It appears that Te Whatu Ora's People Partner Lead has redefined Mr Cunningham's notice requiring disclosure to be narrower than intended. Further, one of the names in the affidavit is misspelt. Mr Upton ought to have identified those points to the Court, but given that they have not been addressed by him, I am concerned that the searches carried out by healthAlliance are not sufficient and am satisfied that further documents probably exist within the class of documents sought by Mr Cunningham in the notice of disclosure.

[11] Therefore, I grant the order sought by Mr Cunningham. healthAlliance is to disclose, in a sworn or affirmed statement, whether any document or any class of documents specified or described in the notice that has not been disclosed in the response to that notice:

(a) is in the possession, custody, or control of healthAlliance; and

(b) if not, whether any such document or class of documents was ever in the possession, custody or control of the opposing party; and

(c) if so, when it was parted with and what became of it.

[12] For completeness, Mr Cunningham's notice of disclosure relates to all personal information held by healthAlliance from 1 March 2019 until 17 July 2020 in the form of emails to which he is not a party but where one of three named individuals is *either* the sender or a recipient. As noted by Mr Cunningham, the request is not limited to emails *between* the three named individuals.

[13] Given that the system used by healthAlliance only includes emails deleted within 30 days of the date of the backup, it may be necessary for healthAlliance to check months prior to July 2020 to assess whether emails deleted in those months are relevant.

[14] Finally, I observe that Mr Cunningham has also noted that the minutes of the disciplinary meeting held on 8 July 2020 have not been provided to him. Those

minutes are outside the scope of the verification order, but they should be provided to Mr Cunningham if they exist.

A compliance order is sought

[15] Mr Cunningham unsuccessfully applied for a stay of execution of an order made against him by the Employment Relations Authority. That application was declined by the Court.[6] The Court subsequently ordered Mr Cunningham to pay healthAlliance $7,311.50 in costs.[7] Mr Cunningham has not paid that sum, and healthAlliance now seeks an order requiring Mr Cunningham to comply with the Court's award within 14 days of the date of this judgment. It also seeks interest on the sums owing and costs. Mr Cunningham has filed a statement of defence which states that he agrees with the particulars as stated by healthAlliance but subsequently stated that there is no requirement for a compliance order.

[16] The Court may make a compliance order under s 139(2) of the Employment Relations Act 2000 (the Act) where any person has not observed or complied with any order, determination, direction or requirement made or given under the Act by the Court. The purpose of a compliance order is to prevent a further breach from occurring. A party seeking such an order must show that there has been a breach and that further non-observance or non-compliance is likely.[8] If those circumstances are established, the Court may make an order under s 139(2) compelling the party in breach to do any specified thing, or to cease any specified activity, for the purpose of preventing further non-observance or non-compliance. If a compliance order is made, the Court must specify a time within which it is to be obeyed.[9]

[17] Mr Cunningham acknowledges that he has not made payment, and healthAlliance filed affidavit evidence indicating that Mr Cunningham is also refusing to pay one other award of costs owing against him.[10] That satisfies me that a breach has occurred and that it is likely to continue.

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6 *Cunningham v healthAlliance NZ Ltd* [2024] NZEmpC 58.
7 *Cunningham v healthAlliance NZ Ltd* [2024] NZEmpC 132.
8 *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 72 at [9].
9 Employment Relations Act 2000, s 139(3).
10 See *Cunningham v healthAlliance NZ Ltd* [2023] NZERA 771.

[18] I also consider that Mr Cunningham ought to pay interest on the costs award in accordance with the Interest on Money Claims Act 2016.[11]

[19] Therefore, I am satisfied that a compliance order ought to be made. Mr Cunningham is ordered to comply with the judgment of this Court dated 19 July 2024 by paying the amount of $7,311.50 with interest to healthAlliance within 14 days of the date of this judgment.

Costs

[20] As the parties have met with mixed success in this judgment, it may be that costs ought to lie where they fall. However, if the parties are unable to agree, they may file and serve memoranda within 14 days of the date of this judgment, with any response to be filed and served within a further 14 days. Each party will then have seven days to file and serve any memoranda strictly in response.

M S King
Judge

Judgment signed at 3.50 pm on 20 February 2025

[11] Employment Relations Act, sch 3 cl 14.