Employment Court of New Zealand

George v Auckland Council no.2 [2012] NZEmpC 143 (29 August 2012)

Last Updated: 8 September 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 143

ARC 91/10

IN THE MATTER OF an application for special leave to remove Employment Relations Authority proceedings

AND IN THE MATTER OF an application for costs

BETWEEN LAURA JANE GEORGE Plaintiff

AND AUCKLAND COUNCIL Defendant

ARC 124/10

AND IN THE MATTER OF proceedings removed from Employment

Relations Authority

AND IN THE MATTER OF an application for further and better disclosure

AND IN THE MATTER OF an amended application for further and better particulars of amended statement of claim

BETWEEN AUCKLAND COUNCIL Plaintiff

AND LAURA JANE GEORGE Defendant

Hearing: 24 November 2011 and 24 August 2012 (Heard at Auckland)

Appearances: Tony Drake, counsel for Ms George

Tim Clarke, counsel for Auckland Council

Judgment: 29 August 2012

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B S TRAVIS

LAURA JANE GEORGE V AUCKLAND COUNCIL NZEmpC AK [2012] NZEmpC 143 [29 August 2012]

[1] In the file described as ARC 124/10, which is a claim for damages by the Auckland Council (AC) against Ms George, she has applied for further disclosure of documents and for further and better particulars of the statement of claim. In the personal grievance proceedings (ARC 91/10) brought by Ms George against the AC, she has applied for costs in relation to her application for further and better disclosure. Mr Drake's submissions on behalf of Ms George took up all of the half day allocated for the hearing of the three interlocutory applications on 24 November

2011. They were therefore, of necessity, adjourned part-heard to give Mr Clarke (on behalf of the AC) the opportunity to be heard in opposition.

[2] Through, largely, a series of applications brought on behalf of Ms George the resumed hearing could not take place until 24 August this year.

[3] In support of, and in opposition to the applications for further and better discovery and particulars in relation to the statement of claim, the parties filed and served voluminous affidavits annexing many documents and made lengthy legal submissions supported by reference to authorities.

Further and better disclosure

[4] Ms George's amended notice of application sought orders against the AC and, in the alternative, if required, against a non-party. The non-party was Tax Team Ltd (Team) a firm of external accountants employed by the AC's predecessor, the Auckland Regional Council (ARC). Team allegedly provided to Ms George two opinions on taxation matters which it is alleged she did not disseminate and which led to the AC incurring substantial taxation liability. These matters form the basis of the damages claim against her. Ms George in her affidavits contended that there are documents, or classes of documents, which she has requested and which have not yet been disclosed by the AC.

[5] In broad terms, Ms George seeks disclosure of all relevant documents on the Team file, including the quote for the particular work to be done in late 2007, the documentation scoping the work required to be done by Team, the documents

requesting Team to supply a tax compliance review, the emails and other documentation Team sent to employees of the ARC relating to tax matters around December 2007 and early 2008.

[6] Ms George also seeks all correspondence and other documents from Team's

files for the work that firm carried out for the ARC from 1 January 2005 until 30

September 2010, relating to any of the issues in the damages proceedings.

[7] It appeared from the affidavits filed on behalf of the AC that, as a result of the amalgamation of the Auckland local bodies, it was extremely difficult to locate relevant ARC files during the relevant periods. However, it was common ground that much of the relevant material would have been contained in Team's files which were not affected by the amalgamation.

[8] A separate application for further discovery related to the ARC's overdraft

facilities with the Bank of New Zealand (BNZ) for the period 1 April 2006 to 30

September 2007. The BNZ documents have been the subject of an exchange of correspondence. Counsel have agreed that they will continue to work through a methodology for dealing with such documentation as may be relevant to the AC's claim for special damages against Ms George. If the parties are unable to resolve that matter to their satisfaction, leave is reserved to enable them to refer the matter back to the Court for resolution.

[9] It appeared to Mr Drake from the AC's notice of opposition that the AC was claiming that Team's files were not within AC's control or possession for the purposes of disclosure. That has been clarified so that it is now clear that the only files that the AC were asserting were not within its control or possession were any working documents held by Team. The Service Engagement Standard issued by the Council of the New Zealand Institute of Chartered Accounts (NZICA) recommends that any working papers prepared by members in relation to their terms of engagement by clients should remain the member's property. Team is a member of the NZICA.

[10] Mr Drake confirmed that it was unlikely that any relevant documents would be found in the working papers (if any) relating to these proceedings. However, in reliance on the matters deposed to by Ms George, he and Ms George were seeking the opportunity to personally examine Team's files in relation to the relevant matters to ensure that there had been full disclosure.

[11] Mr Drake relied on the disclosure provisions in the Employment Court

Regulations 2000 (the regulations) and the object expressed in reg 37 which states:

The object of regulations 40 to 52 is to ensure that, where appropriate, each party to proceedings in the court has access to the relevant documents of the other parties to those proceedings, it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both.

[12] Mr Drake also relied on the definition of relevance contained in reg 38 which provides:

(1) For the purposes of regulation 37 and regulations 40 to 52, a document is relevant, in the resolution of any proceedings, 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 proceedings;

or

(d) is referred to in any other relevant document and is itself relevant.

[13] In its initial affidavits in opposition, the AC had relied heavily on an affidavit from Jeffrey Eaton, a director and owner of Team which denies the existence of various categories of documents sought by Ms George.

[14] Mr Drake submitted at the 24 November hearing that Mr Eaton should not have been directly involved in the process of disclosure, as he was not an officer of the AC which was party to the litigation in question. He contended that Mr Eaton could have no knowledge of what had been disclosed by the AC to Ms George in response to her notice requiring disclosure and that he had not given clear evidence

of the steps that had been taken to ascertain which documents were relevant. As a cure-all for those deficiencies, Mr Drake required the whole of the Team file that was relevant to be provided to Ms George so that she, with the assistance of counsel, could examine the file and determine whether any relevant documents had been omitted.

[15] At the conclusion of the 24 November hearing, counsel for the AC sought, and was given without objection, the opportunity to file further affidavits addressing the matters raised by Mr Drake. A second affidavit of Mr Eaton was filed on 2

February 2012. In that affidavit Mr Eaton deposed that Team had been heavily involved in the AC's disclosure of relevant documents for these proceedings and that on 23 May 2011 he had had a meeting with the AC's solicitors at Team's offices in Wellington to discuss Ms George's request for further and better disclosure. At that meeting, copies of the relevant Court documents relating to Ms George's application were provided to him. He deposes that the AC's solicitors asked Team to assist AC to comply with its disclosure obligations by searching for, extracting and compiling a bundle of documents relevant to each category of document requested by Ms George. Ms George's requests were extensive. Mr Eaton deposes how he carried out those obligations and his subsequent involvement as a result of Ms George's subsequent applications for further disclosure.

[16] In addition to Mr Eaton's affidavit, AC filed an affidavit from Richard Kerr, who in 2009 was the ARC's Group Manager, Finance, and a further affidavit of Julia Wiegandt-Goude, sworn on 27 January 2012. Ms Wiegandt-Goude had been working for the AC in 2011 and had assisted in the disclosure process.

[17] Ms Wiegandt-Goude had previously sworn an affidavit on 23 September

2011 with an extensive annexed paginated bundle of documents. She had also deposed as to her work with Sharmaine Naidoo, who was employed by the ARC as a Financial Controller in the finance department, in finding documents for disclosure purposes.

[18] The AC also filed an affidavit of Sharmaine Naidoo. Ms Naidoo explained

the process for paying invoices and annexed copies of invoices relating to Team's

work in November and December 2007 and February 2008 which had apparently been signed by Ms George and approved for payment. She swore a supplementary affidavit on 16 March 2012.

[19] Ms George responded by an affidavit sworn on 30 March 2012 in which she further explained her understanding of the process by which quotations for services to be performed were undertaken for accounting purposes by the ARC. She repeated her assertions that there would have been quotations for services to be performed and that there were many documents that she would have expected to have seen which were still missing. In relation to Ms Naidoo's affidavit, which annexed the three invoices, and contained the number of the purchase orders, the account numbers and signatures (including signatures that were allegedly hers), she stated that those had not been previously disclosed to her by the AC.

[20] It is common ground, however, that the invoices themselves had been disclosed but not the versions annexed to Ms Naidoo's affidavit which contain the account numbers and signatures. Ms George explained in her affidavit that the reference to purchase orders on those invoices annexed to Ms Naidoo's affidavit disclosed the existence of additional documents which had not been previously disclosed to her by the AC.

[21] On the face of it, that allegation appears to be correct. Mr Clarke undertook to make enquiries as to whether there are documents comprising the purchase orders and account numbers which have not been disclosed. If such documents exist, they will be disclosed by the AC to Ms George. If there are any issues arising from that exercise, leave is reserved to refer them back to the Court.

[22] With that exception, the position of the AC from the affidavits it has filed in support of its opposition is that all relevant documents have been disclosed. Those documents still being sought by Ms George and asserted by her to have been created, for example the quotations and what have been described as the "scoping documents", are said by the AC's deponents to have

never existed and are therefore not available for disclosure.

[23] Mr Clarke submitted that the AC has complied with "the tenor" of Ms George's notice of disclosure, to use the words of reg 43(a) of the regulations. He contended the AC had acted diligently in causing comprehensive searches and in extracting and compiling the documents falling within the categories in the notice. He submitted that the application by Ms George was an exercise in futility and that a verification order would not serve any useful purpose in light of the existing affidavit evidence. He also observed that there were significant conflicts of evidence between Ms George and all of the AC's deponents and that the Court was not in a position to go behind the affidavits and seek to reconcile those conflicts of evidence. Mr Clarke's submissions annexed a table showing the documents requested by Ms George, where they have either been disclosed already or where they do not exist, and the evidence in support of those propositions.

[24] I accept those submissions. Ms George clearly believes that in accordance with the ARC's usual practice scoping documents should have been brought into existence but I have affidavit evidence from Mr Eaton that there were no such documents. I am unable to go beyond Mr Eaton's affidavit and direct the disclosure of documents which are sworn on behalf of the AC not to exist.

[25] The exercise Ms George and Mr Drake wish to undertake of examining Team's files for relevant documents has been undertaken by AC and it has not been established that the exercise was undertaken on any false or mistaken basis. What Ms George wishes to undertake is a fishing expedition and the authorities in this area do not permit that approach.

[26] With the exception of the purchase orders and account numbers and the newly requested BNZ documents, which counsel have agreed will be dealt with between them, Ms George has failed to establish that there are grounds for believing that the AC has not discovered documents that should have been discovered in terms of the High Court Rules. Except in respect of the two matters I have referred to, the application for further and better disclosure is dismissed and costs are reserved.

Application for a more explicit statement of claim

[27] Ms George had served upon the AC a notice requiring the AC to give further particulars of its statement of claim for damages under ARC 124/10. The application was opposed. Mr Drake made extensive submissions in support of the requirement to provide further particulars on 24 November. One of the matters of which he complained was that the bulk of the particulars that had been supplied were contained in letters from the AC's solicitors and these should be incorporated into a single amended statement of claim for the ease of the Court and the parties and to enable Ms George to plead to them. Whilst not conceding that the particulars provided were required because they were irrelevant or evidence rather than allegations, the AC adopted this practical course and filed and served a second amended statement of claim on 17 February 2012. This embodied the bulk of the particulars that had been provided in correspondence.

[28] Following a telephone chambers conference on 8 February 2012, Mr Drake was given the option of either filing a statement of defence to the second amended statement of claim which was to be filed by 17 February or to advise which particulars Ms George was still seeking. This he did by letter of 9 March 2012 in which he sought the following particulars, the numbering having come from the original notice dated 9 May 2011:

(f) Of paragraph 31 of the statement of claim please state:

...(ii) the date when each of the nine persons who had been incorrectly treated as contractors was employed by the plaintiff;

(iii) the person or persons amongst the plaintiff's managers and human resources personnel who employed as contractors each of the nine persons who had allegedly been incorrectly treated as contractors;

...

(v) how the alleged potential tax liability of $380,000 was calculated; (vi) the information relied on in making this calculation.

[29] The application on behalf of Ms George was based on reg 11 of the regulations, which requires every statement of claim to specify the facts (but not the

evidence of the facts) upon which the claim is based and 11(1)(d) in particular which states that a statement of claim must specify:

(d) the relief sought, including in the case of money, the method by which the claim is calculated;

[30] Mr Drake invoked reg 11(2) which states:

(2) The matters listed in subclause (1) must be specified with such reasonable particularity as to fully, fairly and clearly inform the court and the defendant of –

(a) the nature and details of the claim; and

(b) the relief sought; and

(c) the grounds upon which it is sought.

[31] Mr Drake also relied on r 5.21 of the High Court Rules which allows for a notice requiring further particulars to be served and for the Court to order such particulars that have not been properly provided to be provided.

[32] Mr Clarke submitted that it had already provided the details referred to in the notice above in its solicitors' letters of 11 July and 13 September 2011 and had incorporated these in the second amended statement of claim. Mr Clarke observed that para 31(iv) of the second amended statement of claim now provided the date when five of the persons (including one person who had been engaged multiple times) who had been incorrectly treated as contractors had been engaged by the ARC and the names of the persons who engaged them. Neither dates when they were engaged nor the names of the persons who engaged them in relation to four other named contractors could be provided by AC.

[33] I find that this pleading complies with the request for the particulars in (f)(ii)

and (iii) above.

[34] As to the calculation of the potential tax liability of $380,000 and the information relied on in making that calculation, this I find is sufficiently pleaded in para 31 of the second amended statement of claim, which has not been altered from the way it was first pleaded. That paragraph states:

TE&M [a reference to Team] concluded that at a minimum the defendant's failure to implement the best practice procedure meant that nine persons had been incorrectly treated as contractors. The defendant's failure exposed the plaintiff to a potential tax liability of $380,000.

[35] Particulars are then provided of the persons allegedly incorrectly treated as contractors and the potential tax liability over a four year period. Reference is made to a document dated 24 May 2010 from Team to the Inland Revenue Department (IRD) which is described by the parties, I believe, as "the voluntary disclosure document". The second amended statement of claim now pleads that the evidence explaining how the potential tax liability of $380,000 was calculated and the information relied upon in making the calculation will be given at trial.

[36] There is no claim by way of special damages for the $380,000 but it may well have been taken into account in the negotiations between the ARC and the IRD which produced a negotiated settlement.

[37] I am not, however, persuaded that there is an obligation imposed by reg

11(1)(d) to provide more detail as to the method of calculation in the statement of claim because the $380,000 is not part of the relief sought. Therefore the method by which it was calculated does not have to be provided. In the event it does appear that sufficient information has been provided, as I am informed by Mr Clarke that the voluntary disclosure document has been provided to Ms George.

[38] Mr Drake also sought particulars of how the IRD had calculated the figure paid out by ARC in the negotiated settlement. This, he contended, has not been particularised in the second amended statement of claim.

[39] Mr Clarke referred to the documents which have been disclosed which show how the figures were calculated and attached a spreadsheet as a schedule to his written synopsis of submissions which showed the relevant figures. I do not consider the regulations require particularisation of this aspect of the special damages claim. The gravamen of the AC's complaint is that it was required by the IRD to pay out this sum as a result of the breaches of duties by Ms George and that this is what it did. The only proof the AC would need to support that argument is that the sums were paid in response to the IRD's requirements. The AC may then

have to face a claim by Ms George that it had no need to make such a payment, but that has yet to be pleaded.

[40] I am therefore of the view that the second amended statement of claim has satisfied Ms George's request for further particulars and her application therefore must be dismissed. Costs are reserved.

[41] Ms George should now file and serve a statement of defence to the second amended statement of claim within 21 days from the date of this judgment.

Ms George's application for costs on her application for further and better discovery and verification order in ARC 91/10

[42] To deal with Ms George's application for costs in her claim for further and better discovery in ARC 91/10, it is necessary to canvass from the affidavits what took place between the parties' representatives

[43] Ms George gave the AC notice requiring disclosure on 16 February 2011. On

30 March the AC's solicitors provided to Mr Drake a folder of the documents requested in the notice, in chronological order. On 29 April, Mr Drake wrote to the AC's solicitors and advised that Ms George was not satisfied with the AC's disclosure in a number of respects. AC's solicitors responded in considerable detail on 13 May 2011.

[44] On 17 May 2011 they wrote again and stated in paragraph 2:

...

2. We have now had another opportunity to consider the Notice in light of your letter dated 29 April 2011. On reflection, we have some difficulty understanding your client's request for information in paragraph 1(e) of the Notice. That paragraph requests documents relating to the recruitment of:

"all other students and/or short term or casual employees whom the defendant employed, whether for a fixed term of employment or otherwise, during the period between 1

August 2009 and 6 December 2009."

3. For instance, it does not make sense to request documents for a

"casual employee" on a "fixed term of employment". While we are

not entirely sure, it appears that Ms George may be seeking documents relating to the Council's recruitment of students, whether they are employed:

(a) part-time; (b) full-time;

(c) on a casual basis; or

(d) on a fixed-term contract during the specified period.

4. Would you please clarify the meaning of paragraph 1(3) of the Notice and let us know if a different meaning was intended. In addition, please clarify whether the relevant employees are limited to those employed in the finance team. If the request is intended to apply to other employees engaged by the Council, please explain how documents relating to the recruitment of other employees are relevant to the maters in issue in the proceedings.

5. Once you have clarified the intended meaning of paragraph 1(e) and the scope of the request, then our client can consider whether there are any additional documents which it is required to disclose.

[45] By this stage there had been a directions conference on 2 May 2011 and, in a minute recording what had been discussed at that conference, I had stated:

1. Mr Drake advised that there are still issues regarding disclosure and that he has written to Mr Clarke about these matters.

2. Mr Clarke is taking instructions and will respond by **4pm on Friday**

13 May 2011.

3. Depending upon the outcome of the communications Mr Drake indicated that his client may wish to apply for further disclosure or a verification order.

4. Mr Drake advised that if there are no further outstanding disclosure matters then an amended statement of claim will be filed and served by

4pm on Friday 20 May 2011.

[46] Mr Drake responded to the letter of 17 May by stating that:

Paragraph 1(e) in the notice of disclosure dated 16 February 2011 is quite clear.

[47] Mr Drake's letter then went on to describe the terms full-time, part-time and casual and referred to the many different meanings of what is a casual employee, and

stated that the documents sought related to all students who were short-term or casual employees whom the AC had employed during the relevant period. This was said to be because Ms George was dismissed in part because she allegedly breached the AC's recruitment policy. The letter noted that the AC was still searching its files and concluded:

... Would you please advise before 20 May 2011 whether the defendant will be able to complete its searches and disclose the remaining documents to the plaintiff before that date. Alternatively, if the defendant wishes to request additional time to do this please advise me of this before 20 May 2011.

[48] The solicitors for the AC replied by an email at 16.44 on Friday 20 May stating that they did not find Mr Drake's response helpful, expressing their view of what was meant by para 1(e) of the notice requiring disclosure and indicated that they would give disclosure in terms of their view.

[49] At 5pm that day an application for further and better disclosure in relation to additional classes of documents under the notice, as well as para 1(e), was filed and served on behalf of Ms George. Her affidavit in support was filed on 25 May.

[50] On 8 June 2011 AC's solicitors wrote to Mr Drake providing a folder containing further documents which were relevant to para 1(e) of the notice. It also provided some additional documentation and an explanation for these. AC filed a notice of opposition to Ms George's application on 15 June, together with an affidavit of Ms Westlake in support. It filed a further affidavit in opposition on 7

July 2011.

[51] On 5 August 2011 Mr Drake filed a memorandum of counsel in response to a memorandum for the AC dated 27 July. In para 3 of that memorandum, Mr Drake referred to the additional folder of documents and the two affidavits filed by the AC and stated:

...following a review of the additional folder of documents disclosed in the affidavits filed the plaintiff is satisfied that the four classes of documents listed in the notice of application dated 20 May 2011 have now been adequately disclosed; that is, classes 1(b), 1(e), 2(c) and 6. Costs are sought for that part of the application having to be made.

[52] The amended application for further and better disclosure in ARC 124/10 referred to above was later filed.

[53] Mr Drake submitted that in order to comply with the timetable directions set out in the Court's minute of 2 May, Ms George had to file a formal application in relation to disclosure if she was not satisfied with disclosure by 20 May 2011, or otherwise file a defence to the amended statement of claim. Because the AC had not provided disclosure of the documents in para 1(e), he submitted that the application was necessary and that an affidavit of Ms George was required to support the application. He accepted that the AC subsequently provided disclosure of the documents and later provided a verified list, but that Ms George sought costs for the application which it should not have been necessary to bring. He submitted that it would be just for the Court to fix the costs on that application and order that they be payable by the AC now.

[54] In response, Mr Clarke submitted that despite Ms George's invitation for the AC to respond by 20 May 2011, and without waiting for that response, Ms George filed and served her application for further and better disclosure and a verification order, at 5pm on that very day. He submitted that despite the fact that the only outstanding issue was class 1(e) documents and all other disclosure sought had been given, the application sought disclosure of additional documents. Mr Clarke submitted that Ms George had acted precipitously and that her application was premature, unnecessary and a waste of costs because the AC had always indicated it was prepared to file and serve a verifying affidavit once Ms George had clarified the meaning or confirmed the AC's interpretation of class 1(e) of the notice. In these circumstances, he submitted that nothing was gained by Ms George's application and requested that her application for costs be dismissed with costs awarded to the AC.

[55] I find that the AC was not refusing to provide compliance with the notice in relation to the class of documents described as 1(e) but was seeking clarification as to what precisely was being sought.

[56] I do not consider that the description in 1(e) was sufficiently clear in the circumstances and find that the AC's request for clarification was appropriate and was not adequately responded to on behalf of Ms George.

[57] All of the difficulties could have been avoided if either side had sought an extension of time for dealing with disclosure. These proceedings contain many examples where counsel have requested additional time to comply with formal directions. These have all been readily consented to and granted by the Court. There was no suggestion in my minute of 2 May 2011, recording counsel's agreement, that

20 May was an absolute deadline.

[58] Whilst I understand Mr Drake's concern to preserve Ms George's rights to apply for further disclosure, if the AC had not complied, the AC was clearly in the course of endeavouring to comply at the time the application was made. Better communication between the parties could have avoided all of this.

[59] I consider in the circumstances that costs should lie where they fall in relation to this matter.

B S Travis

Judge

Judgment signed at 3pm on 29 August 2012