Employment Court of New Zealand

Nelson v Katavich [2014] NZEmpC 8 (3 February 2014)

Last Updated: 20 February 2014

IN THE EMPLOYMENT COURT CHRISTCHURCH REGISTRY

[2014] NZEmpC 8

CRC 13/13

IN THE MATTER OF challenges to a determination of the

Employment Relations Authority

BETWEEN MIA NELSON Plaintiff

AND TONY WAYNE KATAVICH First Defendant

AND HALDEMAN LLC Second Defendant

Hearing: on the papers - documents filed 28 June, 2 July, 1 August, 15

August and 16 August 2013

Appearances: Luke Acland, counsel for the plaintiff

Miriam Elliott, advocate for the defendants

Judgment: 3 February 2014

SECOND INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

[1] The issue dealt with in this decision is the extent to which the parties must disclose documents to each other. The plaintiff has challenged an objection to disclosure made by the defendants. The defendants seek an order for disclosure of documents by the plaintiff on the grounds that it is incomplete.

[2] Mr Katavich is the "managing member" of Haldemann LLC, a company incorporated in the United States of America but operating in New Zealand. Mr Katavich describes the company as "the limited liability vehicle used by myself to conduct my international provisioning, publishing and marketing business from

Nelson, New Zealand."

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[3] Through discussion with Mr Katavich, Ms Nelson was employed to work for the business in New Zealand, beginning on 6 June 2011. Ms Nelson says she was employed by Mr Katavich personally. The defendants say she was employed by

Haldemann LLC. The Employment Relations Authority determined that the

employer was Haldemann LLC.[1]

Ms Nelson challenges that aspect of the

Authority's determination. She seeks judgment against Mr Katavich personally. In the alternative, she seeks a conclusion by the Court that her employer was "an unincorporated group of individuals known as *Plantation Trust* and trading under the

names Facts and Information LLC and Haldemann LLC."

[4] Ms Nelson was dismissed in June 2012. She pursued personal grievances that she had been unjustifiably disadvantaged in her employment, that she had been unjustifiably dismissed and that she was owed arrears of wages. These claims were upheld by the Authority which awarded her remedies totalling more than $35,000. The defendants challenge all of those conclusions and, in the alternative, challenge

the quantum of remedies.

[5] In the Authority, Haldemann LLC pursued a claim for damages arising out of alleged misconduct by Ms Nelson in the course of her employment. That claim was dismissed by the Authority. It is renewed in the current proceedings before the Court.

[6] Other issues were also before the Authority but its determination of them is not challenged by any party.

[7] The parties have sought disclosure of documents from each other. On 16

May 2013, Mr Acland sent a notice in an appropriate form to Mr Moodie, then counsel for the defendants. The following day, Mr Moodie sent a notice to Mr Acland. On 20 May 2013, I held a directions conference with counsel at which it was agreed that disclosure could only be finalised after amended pleadings had been filed. I set a timetable for that to be done and directed that all parties were to respond to the requests for disclosure within 5 working days after service of the

statement of defence to the amended statement of claim.

1 [2013] NZERA Christchurch 35.

[8] In the course of that conference, I was informed that there were parallel proceedings between the parties before the High Court and that, although discovery was being sought in those proceedings, the issues involved did not significantly overlap the issues in this proceeding.

[9] Well before the amended pleadings had been filed, the defendants objected to disclosure of all the documents sought by the plaintiff. That was on 21 May 2013. As a result, the plaintiff filed a challenge to the objection as provided for in reg 45 of the Employment Court Regulations 2000.

[10] The plaintiff did not respond to the defendants' request for disclosure within the time agreed. As a result, on 2 July 2013, Ms Elliott2 filed an application for an

order for disclosure of the documents sought.

[11] On 16 July 2013, Mr Acland sent a list describing 52 documents disclosed by the plaintiff in response to the defendants' request. In an accompanying email, he said that these were "all the documents held by Ms Nelson" and invited inspection.

Ms Elliott did not respond.

[12] On 5 August 2013, the defendants disclosed 67 documents by description in a list and by sending copies of them to Mr Acland.

[13] In support of the plaintiff's application, an affidavit was sworn by Ms Finlayson. She also swore an affidavit in opposition to the defendants' application, as did Ms Nelson herself. For the defendants, two affidavits were sworn by Mr Katavich.

Plaintiff's challenge to objection to disclosure

[14] The list of documents which the plaintiff sought to have disclosed was:

1. The employer's PAYE records (IR345) for Ms Nelson;

2. The IRD employer registration documents (IR4433) of Ms Nelson's employer;

2 By that time, she had been appointed as the defendants' representative.

3 This was a typographical error. The relevant form is IR334.

3. Document confirming Haldeman LLC's IRD number;

4. Document confirming Tony Wayne Katavich's IRD number;

5. Documents showing which bank account (New Zealand and/or overseas) is used by the employer to pay Ms Nelson;

6. Bank account information showing payments to Ms Nelson; and

7. The deed of trust for a trust known as *Plantation Trust*

[15] The defendants' objection to disclosure of any of these documents was based on three broad contentions. With respect to 1, 2, 3 and 4, it was said that disclosure would be injurious to the public interest because it would involve "private tax information" about one or more individuals and that the documents were irrelevant. With respect to all seven categories of documents it was said that disclosure would tend to incriminate the defendants because their actions "may have breached provisions of the Companies Act".

[16] The relevance of the documents is readily decided. In the amended statement of claim, it is alleged that Haldemann LLC was not carrying on business in New Zealand prior to 4 July 2012 and did not have an IRD number prior to that date. The statement of defence denies those allegations but admits that Haldemann LLC was not registered as an overseas company carrying on business in New Zealand until 4

July 2012. Given that it is common ground Ms Nelson's employment began on 6

June 2011, evidence showing who was paying Ms Nelson's wages and who was accounting to Inland Revenue for the PAYE tax on those wages prior to 4 July 2012 is clearly relevant.

[17] As to the trust deed of the Plantation Trust, Ms Finlayson exhibits to her affidavit an extract from Haldemann LLC's statement in reply provided to the Authority. This includes the statement:

The company is structured quite simply. The Plantation Trust (in New Zealand) is a trustee of Haldemann LLC (the Nevada Company). The organisation was structured this way to allow us to operate from the US.

[18] While this statement is a little obscure, the meaning I take from it is that the Plantation Trust carried on business for Haldemann LLC in New Zealand prior to Haldemann LLC becoming entitled to do so in its own right by registering as an overseas company. The implication of such a statement is that the Plantation Trust

may have employed the people engaged to carry on the business of Haldeman LLC in New Zealand prior to 4 July 2012. This possibility makes the terms of the trust deed relevant.

[19] The defendants' objection based on the public interest cannot stand either. As regards the parties and the Plantation Trust, the public interest in a fair resolution of the dispute greatly outweighs what are really their personal interests in privacy of information. When it comes to documents containing the tax information of other persons, any possible prejudice can be avoided by obscuring the information relating to those other people.

[20] The objection based on self incrimination lacks detail. All that is said is that the defendants may have been in breach of unidentified provisions of the Companies Act 1993. Given the nature of the information sought and the facts accepted by all parties, however, it can be inferred that the defendants' concern is that the documents may reveal that Haldemann LLC was carrying on business in New Zealand without registering as an overseas company for more than the ten days permitted by s 334(1) of the Companies Act. That seems at odds with the extract from the statement in reply that, to the extent that Haldemann LLC's business was conducted in New Zealand prior to its registration as an overseas company, that was done by the Plantation Trust.

[21] The common law regarding privilege against self-incrimination has undergone considerable change in recent times. The current position is that privilege may be claimed by both natural persons and corporations but that there must be a

"real and appreciable risk" of prosecution if the documents are produced for

inspection.[4]

Applying that test to this case, I am satisfied that disclosure of the

documents sought by the plaintiff would not involve any significant increase in the risk that the defendants might be successfully prosecuted for breaches of the Companies Act. That conclusion rests partly on the fact that there would appear to

be other, readily available evidence of the defendant's conduct which has not, to

4 Paul Matthews and Hodge M. Malek *Disclosure* (4th ed, Sweet & Maxwell, London, 2012) at

[13.08] and the authorities cited there.

date, resulted in a prosecution. It also rests on the strict conditions as to confidentiality imposed by reg 51 of the Employment Court Regulations 2000:

51 Conditions of disclosure

It is a condition of the disclosure of documents that the integrity and confidentiality of any documents disclosed pursuant to any provision of regulations 40 to 50 or to any notice or order given or made under such provision must be maintained at all times and for all purposes and, in particular, that—

(a) the party obtaining disclosure must use such documents and their contents for the purposes of the proceeding only and for no other purposes:

(b) if copies of any documents have been made available by any party,—

(i) those copies must be returned to that party within 28 clear days after the conclusion of the proceedings or after the conclusion of any related appeal, whichever is the later; and

(ii) copies of any of those copies must not be retained by the party to whom those copies were made available:

(c) the information contained in any document so disclosed but not used in evidence in the proceeding—

(i) must, to the extent that that information is derived from that document, remain confidential to the party whose document it is or in whose possession it was immediately before it was made available to any other party; and

(ii) must not, to the extent that that information is derived from that document, be disclosed by any person except as may be necessary for the conduct of the proceeding

[22] In New Zealand, the common law concerning privilege against self- incrimination in civil proceedings in most courts has been substantially overtaken by the Evidence Act 2006. Privilege against self-incrimination is expressly provided for in s 60 but that section is subject to s 63. Section 63 removes privilege agaisnt self- incrimination in civil proceedings. The protection formerly afforded by provilege is now provided by making information obtained by disclosure inadmissible in crinila proceedings. This reflects a clear legislative policy that the full and fair trial of civil proceedings should not be impeded by risks of criminal prosecution. As the

Employment Court is not covered by the Evidence Act, 5 however, this policy cannot

be directly implemented in this Court by the application of s 63. My decision therfore relies on the common law rather than the Evidence Act.

5 It is omitted from the definition of “court” in s 4.

[23] For these reasons, the challenge to objection succeeds. The only remaining factor to be considered in deciding whether an order for disclosure ought to be made is whether there are likely to be documents to which such an order would apply. In his second affidavit, Mr Katavich says:

All documents obtainable by the defendant and requested in the plaintiff’s notice and subsequent interlocutory application have been disclosed to the plaintiff on 5 August 2013.

[24] Although Mr Katavich did not say how disclosure was made, I am satisfied it was in the form of a list, a copy of which was attached to Mr Acland’s memorandum of 16 August 2013.

[25] Where disclosure has been made and the party making that disclosure swears on oath that it is complete, the Court will usually not make an order for further disclosure unless there is good reason to believe that other documents exist which ought to have been disclosed.

[26] So far as the defendants are concerned, I am satisfied that the defendants are likely to have such other documents. In particular, it is apparent that the defendants have not disclosed any documents relating to Inland Revenue obligations including PAYE records. As Mr Acland correctly submits, s 22 of the Tax Administration Act

1994 imposes an obligation on every business to keep a wide range of records and to retain them for 7 years. Those records would include bank statements. Similarly, s 24 of that Act requires every employer who makes a PAYE income payment to keep proper records of the payments made in respect of every employee and to retain those records for 7 years. Those provisions also apply to “PAYE intermediaries”.

[27] These statutory obligations on the defendants mean that, if what Mr Katavich has said in his affidavit is to be taken at face value, the defendants are seriously in breach of their obligations under the Tax Administration Act 1994. I am not prepared to reach that conclusion by implication. If it is correct that the defendants have failed to keep proper records and to retain them as required by statute, that will have to be stated explicitly on oath before it can be accepted. In any event, the defendants will be able to obtain copies of all documents they have provided to Inland Revenue and to obtain copies of bank statements from their banks. The

obligation to disclose documents relates not only to documents in a party’s possession but also those in that party’s custody or

control.6

[28] The list provided by the defendants does include a document described as a

"Trust Deed" dated August 2010 and attributed to "Kemp Weirs Lawyers".[7]

It is

unclear from the list whether this relates to the Plantation Trust but, if it does, it would satisfy the last category of documents sought by the plaintiff.

[29] An order for further disclosure of documents by the defendants will be made.

Defendants' application for order for disclosure

[30] The defendants' original request for disclosure was made in seven parts relating to specific issues. I am satisfied that those issues arose out of the pleadings as amended. It follows that, to the extent the plaintiff has documents relating to those issues, they ought to be disclosed. The plaintiff apparently accepts this and has not objected to disclosure on the grounds of relevance.

[31] The application for an order for disclosure was properly made at the time it was filed. I had directed a time by which the requests for disclosure were to be answered and the plaintiff had not complied with that direction. Subsequently, the plaintiff provided a list of documents. In his first affidavit, Mr Katavich acknowledges that this satisfied the defendants' request for disclosure in many respects. In her submissions on behalf of the defendants, Ms Elliott narrowed the scope of the order sought by the defendants further to the following:

i) All documentation related to Ms Nelson's employment with *John*

Casablancas Modelling and Career Center.

ii) All documentation related to the hitlerhatesbabies@gmail.com

G-mail account, created by Ms Nelson.

iii) All documentation relating to postings made on the www.pissedconsumer.com website upon suspension of Ms Nelson and then post-termination of employment by Ms Nelson.

6 Employment Court Regulations 2000, reg 40(1).

7 Which is presumably a reference to the Auckland legal firm of KempsWeir.

[32] Ms Elliott described these categories of documents as "relevant to the proceedings" and "reasonably obtainable by the plaintiff". She acknowledged that "The other documentation initially requested has now been disclosed by the plaintiff." The issue now, therefore, is whether further disclosure in any or all of the three categories identified by Ms Elliott ought to be made and can be made.

[33] If there are any documents in the plaintiff's possession, custody or control relating to these categories which have not already been disclosed, they ought now to be disclosed. As I have said, those categories are relevant to issues in this proceeding. That narrows the issue before the Court to whether there is good reason to believe that the plaintiff may not have disclosed all such documents.

[34] In her affidavit, Ms Nelson said:

1. I am the plaintiff.

2. In June 2013 I collated all of documents that I hold concerning my claim against Tony Katavich and Haldeman LLC.

3. I listed all of these documents in a schedule, a copy of which is attached marked A.

4. I did not include in the collated documents or in the list of documents those documents which have already been exchanged between me and Tony Katavich when this matter was first heard in the Employment Relations Authority. However it may be that one or two of the documents I have listed are double-ups.

[35] Two points emerge from this evidence. The first is that Ms Nelson has apparently limited her search for documents to those relevant to her claim against the defendants. She says nothing of documents relevant to the defendants' claim against her. The obligation of disclosure encompasses both sets of claims.

[36] Secondly, it is apparent from para 4 of this affidavit that the list provided to Ms Elliott on 16 July 2013 was not complete.

While it is open to parties to agree that formal disclosure need not include documents already exchanged, there is no evidence of such an agreement in this case. It must be remembered that a challenge to a determination is a new proceeding in the Court and is separate from the proceeding in the Authority. Thus, the obligation to make disclosure in accordance with the Employment Court Regulations 2000 cannot be satisfied by what has been done in proceedings before the Authority unless by agreement.

[37] For these reasons, it is appropriate that the plaintiff also be ordered to make further disclosure.

Orders

[38] I make the following orders:

(a) The defendants are to make disclosure of all documents in their possession, custody or control described in categories 1 to 6 of the plaintiff's request for disclosure dated 16 May 2013.

(b) The plaintiff is to make further and better disclosure of all documents in her possession, custody or control in the following categories:

i) All documentation related to Ms Nelsons employment with

John Casablancas Modelling and Career Center.

ii) All documentation related to the hitlerhatesbabies@gmail.com G-mail account, created by Ms Nelson.

iii) All documentation relating to postings made on the www.pissedconsumer.com website upon suspension of Ms Nelson and then post-termination of employment by Ms Nelson.

(c) The parties are to comply with the orders in a) and b) above within 15 working days after the date of this decision.

[39] The parties have requested a judicial settlement conference which the Court has agreed to convene. The parties representatives should advise the Registrar when disclosure is complete so that a date for that conference may be arranged.

Costs

[40] Costs relating to these interlocutory applications are reserved for consideration at the conclusion of the substantive proceedings.

Signed at 4.00 pm on 4 February 2014.

A A Couch
Judge
