



# Employment Court of New Zealand

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## S v I Limited [2016] NZEmpC 145 (4 November 2016)

Last Updated: 16 November 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 145](#)

EMPC 7/2015

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 of documents

BETWEEN S Plaintiff

AND I LIMITED Defendant

Hearing: (on papers filed on 15, 22 and 23 March, 1, 15 and 29 July, 12 and 23 August, 1 and 8 September and 28 October 2016)

Appearances: A Shaw, counsel for the plaintiff and M Osmond, advocate for the plaintiff

R Harrison and E McWatt, counsel for the defendant

Judgment: 4 November 2016

INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE B A CORKILL

### Introduction

[1] S seeks an order for further and better discovery. I Limited opposes this, stating that it has already given extensive disclosure and has no additional information to provide; and that to check its records further would involve a very costly retrieval of archived electronic data.

[2] The present application follows previous interlocutory judgments of Chief Judge Colgan where, first, it was necessary to determine whether privilege applied to some documents held by I Limited. The Court determined that the

defendant was entitled to refuse disclosure of a number of its documents because not

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only were they the subject of litigation privilege but also because some were irrelevant.<sup>1</sup>

[3] Then the Court was required to consider an application for security for costs brought by I Limited against S. In the course of that application, the possibility of an application for further and better disclosure of documents was raised and discussed. The Court stated that the substantial cost of that exercise – said at that time to be about \$100,000 – was a factor when considering whether security should be

ordered.<sup>2</sup>

[4] Since it is relevant to the present application, I set out the salient passages of that judgment:

[6] Of greater concern to the defendant is that the plaintiff's demands for further and better disclosure of documents will, if required of it, require the expenditure of substantial sums of money to recover substantial numbers of documents which may, at most, be of marginal relevance to the case, if at all. The defendant says that requiring it to recover and make these documents available to the plaintiff is an irresponsible application of the document disclosure process and, although it has not used this word (yet at least), its submissions amount to saying that this aspect of the conduct of the litigation by S is vexatious.

[7] In regard to the cost and trouble of document disclosure, I Ltd's case is that when it purchased L Ltd in mid-2014 (that is after these proceedings were in train),<sup>3</sup> a deliberate decision was made to retain in hard copy L Ltd's documents that were relevant to the proceeding and all documents that had, by then, been requested by S's former representative and his then advocate. I Ltd says that at that point there was no information that a significantly expanded list of documents would subsequently be sought by the plaintiff.

[8] I Ltd says that its costs of defending S's proceeding in the Authority came to about \$32,000 and anticipates that this will be exceeded substantially on S's challenge to this Court, if it has not been already. For example, and to be dealt with as another interlocutory issue, I Ltd says that S's request for a direction that it undertake a large-scale search for information no longer retained, will cost it about \$100,000. It says, further, that it is unclear whether such information will be relevant to the case and, indeed, what its relevance may be in any event.

[5] When discussing this issue further, Chief Judge Colgan stated:

<sup>1</sup> *S v I Ltd (formerly L Ltd) (No 2)* [2016] NZEmpC 57.

<sup>2</sup> *S v I Ltd (formerly L Ltd) (No 3)* [2016] NZEmpC 70 at [8].

<sup>3</sup> This issue has been the subject of updating evidence which is documented below.

[11] Whilst that is true in principle, questions of relevance and proportionality to the litigation affect the extent of those obligations. The cost (and delay) of minute examination of large quantities of documents, the relevance of which may only be speculative at this stage, must also be considered by the Court. Disclosure processes that cost the parties, individually or collectively, more than the amounts at issue in the litigation, require very careful consideration. So, too, do the assessments and assurances of counsel in determining questions such as relevance and privilege. The most recent interlocutory judgment issued by the Court reflects the application in practice of those principles. In particular, the plaintiff's submission that "The probative nature of the data can only be truly known once it is supplied" illustrates the inappropriateness of using an interlocutory procedure to require, initially and at significant cost and delay, the exchange of numerous documents without any discriminating assessment of their relevance.

[12] As the plaintiff's submissions also illustrate (albeit perhaps inadvertently), requiring the defendant to restore electronically data that are now destroyed or at least very difficult to access, may be a course adopted in commercial litigation of very substantial monetary value or of public interest. That is illustrated by cases such as those relied on by the plaintiff such as *NGC New Zealand Ltd v Todd Petroleum Mining Co Ltd* and *Commerce Commission v Telecom Corporation of New Zealand Ltd*. Indeed, in the *Telecom* case, the Court ordered only a sample restored, not full-scale restoration, because of the huge cost of the exercise. In that case, also, there was reason to believe that the other party had knowledge of breaches of a contractual undertaking, and there was a clear line of relevant inquiry. The restoration of files was known to be highly relevant.

(footnotes omitted)

[6] The Court concluded:

... on balance ... careful judicial control of the document disclosure process is a more appropriate way of ensuring that the defendant's primary concern, that disproportionately large expenditures of time and money are not incurred, is addressed. Requiring the plaintiff to give security for costs is a more blunt instrument. Albeit by a narrow margin, it is not appropriate, at least at this stage, to require the plaintiff to give security. I therefore decline the application for an order that the plaintiff give security for costs.

### **Factual context**

[7] It is appropriate to describe briefly the factual context of the present proceedings. S has brought a challenge to a decision of the Employment Relations Authority (the Authority), wherein it was determined he did not have a viable personal grievance and was not entitled to any substantive remedies.<sup>4</sup> The key issue

was whether he had been unjustifiably dismissed in the context of concerns regarding criminal charges which had been brought against S.<sup>5</sup>

[8] S had worked for another employer in the financial services sector. L Limited was a substantial entity operating in that

sector. As I shall explain later, I Limited now operates the business formerly operated by L Limited. S was approached on behalf of L Limited to work for it. He agreed to do so and was appointed to the position of Workforce Planner. Before he was able to start his employment, he was arrested by the police and charged with an offence allegedly relating to events which took place prior to his engagement by L Limited. S says, and it appears L Limited accepted, that until his arrest by the police he had no knowledge of that possibility or that he was the subject of investigation for financial impropriety.

[9] Some person or persons informed L Limited that S was facing charges. This information led to L Limited discussing these matters with S. Although L Limited kept S employed for some time, conditions were imposed which it was intended would ensure L Limited was kept informed about the progress of the criminal charges. The company says S did not abide by these conditions. Ultimately he was dismissed by L Limited.

[10] In the challenge now brought by S, he asserts that he was treated unfairly and unjustly by the employer because there was:

i) Pre-meditation ... in deciding to dismiss [S] without due process.

ii) Determination of matters without reference to [S] which ought to have been put to the plaintiff.

iii) Non-disclosure of information which [the employer] ought to have disclosed to [S] including the names of the alleged informants (who had an axe to grind against [S]); information obtained by the [employer] as to the charges that [S] faced (which was inaccurate); and information regarding the escalation of the contact and threats from the informants.

iv) Failure to observe the principles of the [Privacy Act 1993](#) by wilfully withholding information from [S] following lawful requests to do so.

v) Non-observance of [S's] right to silence, non incrimination, privacy as

to defence strategy, and the right to be considered ... innocent.

[11] Elaborating on some of these assertions in a recent affidavit, S says that the employer conducted a clandestine investigation in relation to the prosecution of the charges he faced – and still faces – in the District Court. He says that those secret communications and information were the real reason for the ultimate dismissal. He alleges that had he been aware of the nature of the communications and the identity of the persons who were in touch with the employer, he would have been able to address his employer's concerns constructively at the time. Because L Limited withheld this information, his dismissal was unjustified.

[12] It is in that context that S's current and detailed application for further and better discovery arises. It follows numerous previous requests for disclosure. It seeks documents relating to contact between a variety of persons employed on the one hand by or on behalf of L Limited, and third parties. These are allegedly persons who had knowledge of and/or were involved in the matters which are the subject of the criminal prosecution brought against S, such as a police officer Detective E, a private enquiry agent, Mr C and an investigator, Mr J.

[13] As already indicated, this application is strongly opposed by I Limited. This is because, it says, full discovery has already been given, and because compliance with the request for documents now made would raise significant logistical challenges which although not impossible would nonetheless be very costly.

### **Disclosure history**

[14] S was dismissed on 18 June 2013. It is necessary to summarise the various requests for documents which S has made since.

[15] First, he made a comprehensive [Privacy Act](#) request on 24 June 2013. Since

S relies heavily on this initial request, it is appropriate to set it out:

I request under the [Privacy Act](#) (1993) that you deliver to me a full and unabridged complete copy of any and all information you and your company holds on myself, no matter the medium it is stored in.

These shall include all documentation, letters, faxes, memoranda, notes and reports.

In addition I request under the [Privacy Act](#) (1993) that you send me a full and unabridged complete copy of any and all emails, electronic media, or such like media.

This shall include in its entirety that portion of any information relating to me that is archived as a separate file or files. I request that you identify that file(s) that [has] been archived including both the dates of archive and dates files were removed from archive.

Please convert all electronic communications to hard copy. ...

[16] This request was addressed both to L Limited, and to its lawyers. Initially there was no response so that it had to be repeated. Some documents were provided at mediation which was held on 18 July 2013. Then on 30 July 2013, the Authority conducted an investigation meeting to consider S's application for interim reinstatement. For the purpose of that hearing, a bundle of documents was placed before the Authority by L Limited, and copied to S. He says the bundle included documents which contained material information that had not previously been known to him.

[17] The application for interim reinstatement was declined by the Authority; its determination was challenged in this Court. On 16 October 2013, a notice requiring disclosure under the [Employment Court Regulations 2000](#) (the Regulations) was served. It too was comprehensive in form. On 8 November 2013, a list of documents was provided. It referred to documents that S says were arguably covered by the initial [Privacy Act](#) request, but which had not been made available previously by L Limited. S then asserted there were yet further documents that had not been disclosed. Through his representative, S filed an application for an order for compliance on 13 November 2013. This resulted in an amended list being filed and served on 25 November 2013 which again included documents that S says had not previously been disclosed, either in response to S's [Privacy Act](#) requests, or pursuant to the initial list provided in early November 2013.

[18] On 20 December 2013, S filed a request for further and better disclosure. This was complied with on 29 January 2014. S says that at this stage more documents were provided of which he had been unaware. Some of these showed

there had been an exchange between the company and a private investigator, Mr C. He repeated his assertion that the documents which he obtained at this stage, should have been provided to him in the first place when he issued a [Privacy Act](#) request.

[19] Then two disclosure issues were raised, which required consideration by the Court.<sup>6</sup> The first related to whether transcripts of two particular telephone calls which took place prior to S's dismissal, should be released to him. Chief Judge Colgan held that S should have access to this material. The second issue related to the identity of a person who had telephoned an employee of L Limited in January 2014, as recorded in an email made at the time by one of its employees, Mr P. The Court set out some details of that email, including the fact that the employee was given contact details of a caller who wished to remain anonymous. It

was concluded that the name and other details of the caller should not be disclosed at that point.<sup>7</sup> It was thereby evident that the identity of the caller was known. S now asserts that it is apparent Mr P had made a misleading statement in the evidence he gave to the Authority for the purposes of the application for interim reinstatement; this is because Mr P said he received a call from an anonymous caller, but did not disclose that he knew the identity of that caller.

[20] On 18 June 2014, this Court dismissed S's challenge to the Authority's determination declining to order his reinstatement.<sup>8</sup> Then the matter was investigated by the Authority, which resulted in its substantive determination of 4 December 2014 dismissing S's claim.<sup>9</sup>

[21] S brought a challenge to that determination on 12 January 2015. Further disclosure processes then took place. An application for third party disclosure was made in mid November 2015; it was complied with later that month. Documents disclosed at that point confirmed that two emails had been sent by a private enquiry agent to an employee of L Limited, prior to his dismissal; these had not been

disclosed previously. He says that they were within the ambit of the initial Privacy

<sup>6</sup> *S v L* [\[2014\] NZEmpC 18](#).

<sup>7</sup> *At* [10].

<sup>8</sup> *S v L Ltd* [\[2014\] NZEmpC 97](#) at [55].

<sup>9</sup> *A v B*, above n 10.

Act application as well as the subsequent request for disclosures which had been made.

[22] Later, a member of L Limited's Human Resources (HR) Department who had been responsible for dealing with the discovery issues said she had not been provided with these emails by the relevant employee. She said that the employee no longer worked for the company, so she could not seek an explanation as to why this had occurred. She could only assume that he had deleted the emails from his system or overlooked providing them if they were still available.

[23] On 24 November 2015, a further broad-ranging notice requiring disclosure was issued. It sought documents in several categories, from January 2012 through to the date when the notice was issued.

[24] A list of documents was served on 13 January 2016. It stated that some documents were still being retrieved. S says that it described a significant number of previously unseen and unknown correspondence and information. He says it included some 28 non-privileged communications that predate the disclosure which had been given to him in January 2014. As already

mentioned, the Court resolved a claim for privilege in respect of some of these documents, stating that some of the listed documents were privileged and/or irrelevant.

[25] S refers now to two further emails which he has obtained in disclosure under the [Criminal Disclosure Act 2008](#) between a police officer and junior counsel for the defendant, which were not referred to in the list of documents, either on a privileged or unprivileged basis.

[26] It is against that background that S has brought his current application for further and better discovery. As will be elaborated on shortly, it is in some respects similar to the notice served in November 2015. In other respects it is more targeted. For instance, it is restricted to documents which were allegedly created in the first half of 2013.

### **Who is the correct defendant?**

[27] S formulated his current request as being one for third party disclosure. This was apparently because S believed the employer had been L Limited, although I Limited had acquired the business formerly operated by L Limited.

[28] The Court requested further information on this topic from the defendant, as the issue was not adequately explained in evidence. Counsel clarified that I Limited had acquired shares in L Limited on 1 July 2014; further, on 20 December 2015, the assets and business of L Limited were transferred to I Limited. It was explained that L Limited is no longer trading, and that I Limited is now the appropriate defendant.

[29] This application is appropriately dealt with under the Regulations as a discovery issue between parties, rather than as an application for third party discovery. As proposed by counsel for the defendant, I amend its name to I Limited, as shown in the intitolment of this judgment.

### **The application**

[30] The application for further and better disclosure describes five categories of documents. They relate to:

- a) Communications between a particular employee of L Limited, Detective E, and a private enquiry agent, Mr C; and between that employee and any other employee of the defendant; and with regard to any meetings concerning the plaintiff.
- b) Any contact between the defendant and Mr J, an investigator.
- c) The suspension or curtailing of the plaintiff 's access to L Limited's

computer system, as authorised by named staff members.

d) Any communications or notes with regard to communications between one of those employees, Mr P, and any private investigator or Mr C, relating to the plaintiff.

- e. Telephone toll records of Mr P relating to toll calls made between him and Mr C or his company.

### **The defendant's response**

[31] As already mentioned, the defendant's notice of opposition states that there is no additional information to disclose with regard to the first category; no information to disclose with regard to the remaining categories; and that the cost of undertaking retrieval and search of electronic records would be prohibitive.

[32] Turning to the defendant's evidence, its Human Resources Manager, who is responsible for the management of the case on behalf of I Limited, said she had sought copies of documentation from staff members who were in any way involved with the circumstances giving rise to the plaintiff 's claim. She said she did this in order to comply with the various requests for disclosure and in preparation for the interim reinstatement application and the Authority hearing, which I infer was in

2013. She explained she was involved in all meetings or discussions that involved the plaintiff's employment issues, and that all of the documentation which related to such meetings had been disclosed to S. She said these documents were also the subject of evidence at the Authority's investigation meeting.

[33] She then commented on the notice requiring disclosure which had been served by S on I Limited on 24 November 2015. She confirmed that a list of documents had been provided by the company in respect of that notice on

13 January 2016. No documents had been disclosed for at least two of the categories in the notice, because there was a significant issue due to electronic archiving of electronic diaries, electronic calendar entries and emails of some 15 employees of L Limited. She said, however, that she was confident that no further documentation would be located following any further search of the majority of those 15 persons as the majority of them had no involvement in matters relating to the plaintiff's employment claim. The only persons who did have some involvement had given evidence at the Authority's

investigation meeting, as well as Mr P. She said that other than herself and a current colleague, the involvement of others was very limited. She said that all email and other documentation involving her and her

colleague had been disclosed, so that in her view there was no further relevant information which could or should be disclosed.

[34] Evidence was also provided from the defendant's Information Security Manager as to the retrieval issues. It was explained that the electronic email/Outlook accounts of ex employees were placed into offsite facilities between late May 2015 and late June 2015. The accessing of this data for the period 2013 to 2015 would be in excess of \$100,000. At the request of the Court, further evidence was given to the effect that the approximate cost of retrieval of data for the first six months of 2013 only would be approximately \$90,000. A server would have to be built, the cost of which would be significant regardless of the timeframe of data being restored. It appears that some of this work would be undertaken by a contractor, but otherwise it would involve IT staff within I Limited, so that it would appear that some of the cost would be wages of the defendant's IT staff; it is not known what other tasks those persons would be involved in were they not undertaking this work, and in particular whether those tasks would have contributed to revenue.

## Discussion

[35] On the face of it, documents have been provided by or on behalf of L Limited on a piecemeal basis. The initial [Privacy Act](#) requests made by S, and the initial Form 6 request which was filed in this Court in late 2013, were all in broad terms. It is regrettable that the documents which were subsequently disclosed were not made available then. I make no further comment at this stage as to the way in which disclosure matters unfolded, in case this becomes a relevant issue at the hearing of the challenge. It suffices to say that the manner in which documents have been released has encouraged S to believe that there may be yet further documents which he now seeks; so also has the archiving of documents in mid 2015, by which time the current challenge had been filed and was unresolved.

[36] It appears there are broadly two sources of potential documents: those which have been archived electronically and those which have not. The principle objection, on the grounds of cost, relates to a search of the former; the objection with regard to the latter is the assertion that there simply are no more documents to disclose.

[37] Before addressing each of these possibilities, it is appropriate to refer to the relevant principles. It is well established that discovery, including tailored discovery, should be limited to that which is reasonable and proportionate.<sup>10</sup> This assessment requires a consideration of the chances of finding a relevant document in a disclosure exercise, and the degree of relevance which those documents might have. This is to be balanced against the cost of undertaking that process. Broader considerations might also be relevant, one of which is the resources of the parties. If highly relevant documents may be revealed, then the greater cost could be justified.<sup>11</sup>

[38] Starting with the category which would require retrieval of archived documents, I am not satisfied that the defendant would necessarily incur all the costs described in its evidence. But even making allowances for that uncertainty the expense would unquestionably be very significant, assessed in the context of a claim for a personal grievance where the remedies sought are lost wages, compensation for hurt and humiliation, and costs.

[39] Normally, when documentation is to be retrieved, the cost of doing so falls on the party who has archived it, especially where that occurred – as here – after a proceeding has been commenced.<sup>12</sup> In such circumstances, a Court will often require the party who has archived such documents to bear the initial cost of retrieving them, the Court having the option of apportioning that expense when cost issues are dealt with ultimately. The Court does, however, also have the ability to make a cost shifting order at the outset, if the circumstances warrant it.<sup>13</sup> But it is pointless to consider such a possibility in this case, having regard to S's financial circumstances as analysed in this Court's judgment dealing with the application for security for costs.

[40] The strongest point made for S relates not only to the disjointed way in which documentation has been provided, but also the fact that when it has been provided, it

has not been complete<sup>14</sup> or there may be other difficulties with it.<sup>15</sup>

<sup>10</sup> *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at

[40]; *Riyanto v Dong Nam Co Ltd (No 2)* [2015] NZEmpC 85 at [32].

<sup>11</sup> *Commerce Commission v Cathay Pacific Airways Ltd* [2012] NZHC 726 at [18] and [21].

<sup>12</sup> *Commerce Commission v Telecom Corp of New Zealand Ltd* [2006] NZCA 252; (2006) 18 PRNZ 251 (CA).

<sup>13</sup> At [18] – [24].

<sup>14</sup> Above at paras [18] and [25].

[41] Against those issues I must consider the fact that documents are sought in respect of a significant number of employees who had little to do with the circumstances of this case, and that S can only speculate that there may be further relevant documents. The circumstances here are quite different in that respect from the circumstances which have arisen in previous cases where retrieval was considered justified because relevant documents, although archived, were known to

exist.<sup>16</sup>

[42] Standing back, I conclude that the prospects of actually locating a relevant document even given the unfortunate disclosure history are relatively modest, especially when considered against the cost which the defendant would incur in so doing. In my view, such a step would involve a disproportionately large expenditure of time and money, and is not justified in the present circumstances.

[43] The second source of documentation relates to documents which were not archived electronically. I have already referred to the fact that a list of documents was filed and served in response to the plaintiff's notice of disclosure of November 2015. Although the current request may overlap in some respects with the provisions of the earlier notice, I consider that I Limited should in the light of the history of disclosure file and serve a verified list of documents referred to in the plaintiff's application for further and better discovery.

## Conclusion

[44] Accordingly, I direct that an employee of I Limited having knowledge of the circumstances which arise in this proceeding is to swear an affidavit of documents in Form G37 of the High Court Rules, subject to the following conditions:

a) The affidavit is to refer to the categories of documentation described

in the plaintiff's application of 1 July 2016.

<sup>15</sup> Above at para [19].

<sup>16</sup> See *S v I Ltd (formerly L Ltd) (No 3)*, above n 2, at [12].

b) A specific category may be included with regard to those documents which have been archived electronically, as referred to in the evidence of the defendant's IT Security Manager.

c) Reference may need to be made to documents which the Court has held to be privileged;<sup>17</sup> if so, reference may also be made to the finding of the Court in respect of any such document.

d) The affidavit is to be filed and served within 21 days of this judgment, or such longer period as may be approved by the Court.

[45] I reserve costs.

B A Corkill

Judge

Judgment signed at 12.00 pm on 4 November 2016

<sup>17</sup> *S v I Ltd (formerly L Ltd) (No 2)*, above n 1.