Employment Court of New Zealand

Smalley v Hamilton Hindin Greene Limited [2025] NZEmpC 270 (12 December 2025)

Last Updated: 15 December 2025

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2025] NZEmpC 270
EMPC 188/2024

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	a challenge to an objection to a notice for disclosure
BETWEEN	JAMES SMALLEY Plaintiff
AND	HAMILTON HINDIN GREENE LIMITED Defendant

Hearing:	14 May 2025 (Heard at Christchurch)
Appearances:	S Brookes and E Mishra, counsel for plaintiff G Carter, counsel for defendant
Judgment:	12 December 2025

INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH

(Challenge to an objection to a notice for disclosure)

[1] James Smalley was employed by, or contracted to, Hamilton Hindin Greene Ltd (HHG) from 2006 until March 2018. Between 19 March 2013 and 26 June 2017, he was a director of HHG. In August 2017, after his directorship ended, he signed a fixed term employment agreement that ended on 23 March 2018.

[2] In this proceeding, Mr Smalley has made several claims against HHG arising from his time as its employee. He claims that breaches were made of the Holidays Act 2003 and the Minimum Wage Act 1983 in that:

(a) his remuneration was incorrectly treated as including his entitlements under the Holidays Act 2003;

(b) his holiday pay entitlements were incorrectly calculated relating to:

(i) the treatment of certain bonus payments; and
(ii) for annual holidays;

(c) he was not paid for sick leave, public holidays (including Canterbury Anniversary Day) or annual holidays;

(d) errors were made over the treatment of his annual holiday entitlements on the cancellation of 10 days of his annual holidays entitlement; and

(e) he was not paid between 24 February 2018 and 23 March 2018 inclusive, arising from moving from being paid in arrears

to being paid in advance.

[3] Extensive remedies are sought. As to the alleged unpaid and underpaid holiday pay, the relief claimed is yet to be quantified but is stated to be not less than $120,000. The claim is to be quantified after disclosure is completed.

[4] The amount claimed for unpaid and underpaid sick leave, bereavement leave, public holidays, and alternative days is not quantified but is pleaded to be not less than

$35,000. Again, the claims are to be quantified once disclosure is completed.

[5] Mr Smalley claimed $12,500 for unpaid salary from February 2018 to March 2018, and $2,884.67 to reimburse him for a deduction from his pay on 28 March 2018. There is also a claim, yet to be quantified, for what is pleaded as being his entitlement to pay at the end of his permanent employment.

[6] There are six further claims, each one seeking a penalty. These claims arise from alleged breaches of ss 16, 21, 50, 56 and 71 of the Holidays Act and from an alleged breach of s 10(2) of the Minimum Wage Act for the failure to pay wages for

the period between 1 to 23 March 2018. Mr Smalley wants any penalty imposed on HHG to be payable to him.

[7] HHG does not accept that it breached its statutory or contractual obligations to Mr Smalley. It denies owing him any money and resists penalties being imposed. HHG pleaded two affirmative defences. The first is promissory estoppel, arising from Mr Smalley's knowledge obtained when he was a director and shareholder in HHG. The second affirmative defence is a statutory limitation. The company pleaded that it is not clear what periods Mr Smalley is seeking to recover money for but, in any event, those claims are limited to six years prior to the filing of the proceeding. Its affirmative defence about the claimed penalties is that they are all out of time.

The disclosure notice

[8] On 17 February 2025, Mr Smalley served a notice on HHG requiring disclosure. It contained 15 categories of documents to be disclosed covering a period more or less equivalent to the whole of his time with HHG.

[9] HHG objected to the notice. It did not object to all of it but, in relation to significant parts of it, the company resisted disclosure on the basis that what was sought is irrelevant and may include privileged and/or commercially sensitive information, or information subject to privacy restrictions.

The challenge to the objection and response

[10] Mr Smalley challenged HHG's objection to his notice for disclosure. He wants the objection set aside and consequential orders requiring HHG to provide further and better disclosure. He sought to dismiss the objection on the basis that:

(a) it was served out of time and therefore is invalid; and/or
(b) an order declaring the objections to be ill-founded; and
(c) the documents he wants to have disclosed are relevant and there is reason to believe they exist.

[11] The timing-related aspect of the challenge is based on the Employment Court Regulations 2000 requiring an objection to disclosure to be made within five clear days of a notice being served. As to the other grounds, Mr Smalley sought to set aside the objection as misplaced, and outside the scope of the regulations where it touched on commercial sensitivity, confidentiality or privacy.

[12] Some disclosure has taken place. The parties attended to it in the Authority before this matter was removed to the Court.1 Further disclosure has occurred since then. In that further disclosure HHG redacted portions of documents, including in some Mr Smalley must have had access to when at HHG. Where redacted documents were disclosed, Mr Smalley wants to personally inspect the unredacted versions of them, because he considers he is best placed to assess the relevance of the information.

[13] As part of this challenge, Mr Smalley does not accept that HHG adequately described the searches it undertook to comply with the notice. He wants a fuller explanation of how the search was performed.

[14] HHG opposes Mr Smalley's challenge and the orders he is seeing. It says in response that:

(a) if the objection was not within time an extension of time is appropriate;
(b) many of the documents sought are not relevant or are only partially relevant;
(c) some of the documents are subject to legal professional privilege or are without prejudice communications;

(d) relevant and "non-privileged" documents held by it within the disclosure categories have been disclosed subject to redactions of:

(i) irrelevant information including that which is commercially sensitive and subject to privacy concerns;

1 *Smalley v Hamilton Hindin [Greene] Ltd* [2024] NZERA 315.

(ii) information that is subject to legal professional privilege.

(e) for a number of categories, it has been unable to locate documents or they do not exist.

[15] HHG supported its objection with two affidavits from Ian Perry, its Managing Principal, one of which exhibited and relied on an affidavit he provided to the Authority, and one from counsel who assisted in reviewing documents for the purposes of preparing the list of disclosed documents supplied to Mr Smalley.

The Employment Court Regulations 2000

[16] Mutual disclosure and inspection of documents is dealt with in regs 37–52 of the regulations. Regulation 37 provides the object of regs 40–52 which, in turn, contain the mechanism for disclosure and inspection of documents.

[17] At the heart of the regulations is ensuring the parties have access to relevant documents. What is relevant 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.2

[18] Despite the potential breadth of reg 38, reg 37 provides that the Court has a discretion to decline to require disclosure where it is unnecessary, undesirable, or both.

2 Employment Court Regulations 2000, reg 38(2) provides an extended definition of "document".

[19] The disclosure process begins by serving a notice.3 The notice may be objected to on specified grounds.4 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.5

[20] While not dealt with specifically as a ground to object to a notice, clearly what can be sought must be relevant. What determines relevance is the pleadings. They define the ambit of the proceeding and the issues to which questions of relevance must relate.6 That said, relevance is not to be looked at narrowly.

[21] There is a well-developed principle that the Court will not make orders for disclosure that facilitate a fishing expedition. That is, where what is sought is designed to discover a new and previously unknown cause of action or is to support a baseless or speculative cause of action.

[22] The disclosure process was described in *Van Kleef v Alliance Group Ltd* as a function of relevance and proportionality, in relation to which the Court has a discretion.7 I agree.

[23] Before considering the parties' submissions it is necessary to mention reg 39(2). Under that regulation nothing in regs 40–52 applies to an action for a penalty. Mr Smalley has sought penalties. However, HHG's notice of opposition did not seek to rely on reg 39(2) in response to it. When this matter was raised with counsel, Mr Carter did not seek refuge in the regulation.

[24] There is one thing the parties do agree on. There is significant mistrust between them which has not made disclosure an easy process or enabled reasonably conventional mechanisms to be used to allow disclosure of potentially sensitive documents.

3 Which is required by reg 42 to be in form 6.

4 Regulation 44.

5 Regulation 44(3).

6 *Airways Corp of New Zealand Ltd v Postles* [2002] NZCA 155; [2002] 1 ERNZ 71 (CA).

7 *Van Kleef v Alliance Group Ltd* [2019] NZEmpC 157 at [20].

The timing issue

[25] Under reg 44(1), HHG had five clear days to object to Mr Smalley's notice. The notice was served electronically on 17 February 2025, at 5.45 pm. By Mr Smalley's calculation any objection was due on 22 February 2025, which was a Saturday. That meant the objection would be treated as being in time if it was served on the next working day which was 24 February 2025.8 However, it was sent electronically on 24 February 2025 at 5.13 pm.

[26] Mr Brookes' instructions were to take the point that the objection was late and, therefore, could not be relied on by HHG. He referred to r 6.6(3) of the High Court Rules 2016.9 If applied, the effect of the rule is that a document transmitted electronically on a day that is not a working day, or after 5 pm on a working day, is treated as served on the first subsequent working day. Applied to this case, the objection would be treated as served on 25 February 2025 outside the time provided for by reg 44(1).

[27] Mr Brookes acknowledged that litigation in this jurisdiction is to be resolved in accordance with equity and good conscience avoiding "pedantically clinging to technical rules of procedure".10 He accepted that the delay might be seen as slight but took comfort from the presumption that rules of Court must be complied with.11 He further supported this submission by pointing out the notice should not have taken HHG by surprise. The intention to seek further disclosure was mentioned at a directions conference before the notice was served and anticipated difficulties over undertaking disclosure was at least one of the reasons for the Authority removing this matter to the Court.

[28] Mr Carter did not accept that there was any merit in the timing criticism. He described the point as overly technical because the time when the objection was served did not cause any prejudice to Mr Smalley. To support that submission, he noted that the extent of the disclosure sought was significant. Some of the categories of

8 Regulation 74A.

9. By relying on reg 6(2), which provides that where the regulations are silent on a matter it must be disposed of as nearly as practicable with the High Court Rules.

10 Citing *Stormont v Peddle Thorp Aitken* [2017] NZEmpC 12, [2017] ERNZ 51 at [35].

11 *Ratnam v Cumarasamy* [1965] 1 WLR 8 (PC).

documents stretched back many years and required some effort to access and assess. His next point was that HHG took a considered approach to disclosure and did not object to it "in toto".

[29] Mr Carter also took the point that Mr Smalley could not have been surprised because the prospect of an objection was raised when the subject was raised by Mr Brookes at the directions conference.

[30] Finally, and persuasively, Mr Carter referred to the time period to object being very short especially when measured against the extensive notice served on HHG. HHG's fallback position was that it applied for an extension of time.

Analysis

[31] I am not persuaded that it is appropriate to look at the timing of an objection to the disclosure notice through such a narrow lens as the submissions for Mr Smalley sought. No matter how the subject is looked at, a substantive response was given and any delay was at best extremely modest to the point of being inconsequential.

[32] It is not necessary to devote much time to this analysis. There is at least an argument that the time specified by reg 44 is not susceptible to an analysis using the High Court Rules. That is because the regulation specifies an objection being served within five clear days but does not otherwise define a day. It is, therefore, arguable that there is no gap or omission in the regulations to be filed by the High Court Rules.12

[33] In any event, Mr Brookes and Mr Carter agreed that s 221 of the Act confers on the Court power to extend time in an appropriate case. For the avoidance of doubt, an extension of time is appropriate and it is granted.

Mr Smalley's position on further disclosure

[34] Mr Smalley is not satisfied that HHG discharged its disclosure obligations. He considers that relevant documents have not been disclosed or insufficient explanations have been provided of the reasons they cannot or should not be disclosed. Mr Brookes

12 And see Legislation Act 2019, s 54.

said HHG providing disclosure in three batches on 3 March 2025, 11 March 2025 and 26 March 2025, supplementing what was disclosed in the Authority.

[35] Mr Brookes described some of those documents as:

(a) having been provided previously;
(b) directly relevant but were not previously disclosed; and
(c) heavily redacted Board documents.

[36] These submissions criticised HHG's handling of disclosure by expressing concern that each time a disclosure request was made it resulted in additional documents being provided. Some of those documents were described as repetitious, but it was said that on occasion new material was disclosed including documents previously described as non-existent.

[37] Mr Smalley analysed HHG's response to disclosure to emphasize what he considers to have been an inadequately organised search. He said that 161 documents were disclosed to him in 2025. Of them, 53 were provided before, or were newly provided redacted documents where the unredacted versions were provided or partly provided before or provided in an excerpt form.

[38] Mr Smalley invited an adverse inference to be drawn that HHG had done insufficient work when searching for relevant documents and that it is likely further relevant documents exist. Two examples illustrate his point. In March 2025, HHG disclosed three emails Mr Perry sent to Grant Williamson of HHG, about holiday pay calculations, and two sent to Mr Williamson and other HHG Board members. One of those emails referred to Mr Smalley in an attachment and another in its text. Those documents were not previously disclosed.

[39] At all relevant times, Mr Williamson was a director and shareholder of HHG. He performed the role of Chief Financial Officer. According to Mr Smalley, Mr Williamson played a significant role in fixing remuneration which is one facet of the present claims. The inference invited from this analysis is that it is likely Mr

Williamson provided some response to Mr Perry given the remuneration-related role he performed and that the calculations provided to him were about work that he (Mr Williamson) was responsible for.

[40] Mr Smalley's second example was that one of those emails sent by Mr Perry contained a pay-related calculation but began with the introduction "another example", suggesting something about this subject was written previously. No earlier documents were disclosed and there was no explanation from HHG.

[41] Those examples give a general sense of Mr Smalley's position. He is concerned about how thorough HHG was given what seems to have been the incremental way they attended to disclosure.

[42] Mr Smalley has little or no confidence in steps taken by HHG to identify relevant documents, or the evaluation it made to conclude that documents are wholly or partially irrelevant. He is especially critical of the broad way HHG has referred to the redactions in documents supplied to him as being privileged, or containing commercially sensitive information or private information, which he considers to be outside the regulatory grounds for objection. It is important to add that a proposal by HHG, for unredacted documents to be supplied on a counsel-to-counsel basis, was rejected by Mr Smalley who regards himself as uniquely placed to be able to assess what is relevant.

HHG's response

[43] HHG's objection is based primarily on its claim that many of the documents sought are irrelevant, or are only partly relevant, or do not exist. It objected to the disclosure of irrelevant information (including information which may be commercially sensitive or subject to privacy considerations), privileged information, documents which do not exist and documents which had previously been disclosed.

[44] The sensitive material covered by that broad response included clients' personal details relating to investments, such as common shareholder numbers (which Mr Perry described as the share registry equivalent of a bank account number), security reference numbers, and information identifying underlying assets in New

Zealand and Australian share registries. Other sensitive information were bank account details or deposit slips, spreadsheets with part or all of HHG's active and inactive transactional clients and information about them such as addresses, contact information, tax and transactional revenue.

[45] Mr Perry expressed concern that releasing this information would be a breach of HHG's data protection responsibilities

and of privacy. He was concerned that HHG would need to report itself for a breach of privacy and there might be consequences for its NZX position.

[46] HHG objected to disclosing some documents relating to legal advice received in 2015 including that relating to the treatment of holiday pay. There is no dispute that legal professional privilege justifies declining to disclose documents or in appropriate cases redacting them.

[47] Perhaps the most contentious aspects of HHG's response were where it said that, as a result of its searches, no documents in certain categories exist, or no further documents exist. The company responded to Mr Smalley's concerns about the iterative way disclosure had been handled, and his suspicion that the task had been inadequately performed, as being insufficient under the regulations to justify any orders being made.13

[48] As a potential way to overcome some of Mr Smalley's concerns, HHG proposed that the Court might consider and review the unredacted documents and an electronic bundle of them was provided to the Court. As explained to counsel at the hearing, I am reluctant to undertake that type of inquiry. The Court in *Yu v Zespri International Ltd*, decided that an inspection should not occur as a matter of automatic practice and the Court must be in real doubt before doing so.14 I am not satisfied that a threshold has been reached to warrant the Court inspecting those documents and they have not been reviewed.

13 Relying on *Fox v Hereworth School Trust Board* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [6].

14 *Yu v Zespri International Ltd* [2017] NZEmpC 146 at [31]; relying on *General Accident Fire and Life Assurance Corp Ltd v Elite Apparel Ltd* [1987] 1 NZLR 129 (CA); and *Guardian Royal Exchange Assurance of New Zealand v Stewart* [1985] 1 NZLR 596 (CA) at 599.

[49] Finally, relying on *Fox v Hereworth School Trust Board*, Mr Carter submitted that, in most litigation, assessments of relevance are taken at face value.15 He acknowledged that Mr Smalley does not consider HHG's assessments to be reliable or that the company is the appropriate party to determine relevance. He also accepted that concerns over commercial sensitivity or privacy can be addressed by conditions.16

Analysis

[50] Before discussing each of the categories in the notice some further comments are appropriate about the stance taken by each side. The effect of Mr Smalley's challenge is a demand that HHG provide further and better disclosure to enable him to assemble relevant documents to support his claims. Mr Brookes distinguished this request from oppressively using the disclosure process or a hunt for potentially relevant documents.

[51] As Mr Carter said, and as was referred to in *Fox*, considerable reliance needs to be placed on the role of counsel to ensure that the documents are properly reviewed. Most of Mr Smalley's criticisms were directed towards the quality of the search undertaken by HHG coupled with a claim that he was the best person to assess the relevance of the documents he is seeking. In that exercise, no weight was given to the evidence from Ms Larkin, the lawyer who assisted HHG in making assessments about what documents or portions of documents were or were not relevant. I am not prepared to put aside the evidence she gave.

[52] Having made that point, however, HHG's approach to describing the redactions was unhelpful. As was referred to earlier, those redactions were generally described. In each case, that step was explained as protecting portions of documents that may contain commercial or sensitive private information of the type described by Mr Perry. Mr Carter explained that HHG was not trying to create a new category of objection beyond those in the regulations. He said that what was intended was to indicate that the information redacted was irrelevant to the underlying claims because it involved commercial or private information having no bearing on the litigation.

15 *Fox*, above n 13.

16 See reg 51 and *Singh v McKee* [2025] NZEmpC 3 at [18].

[53] Be that as it may, the somewhat generic description of the reasons for the redactions and the occasional use of "may" to indicate that it was possible that the documents were appropriately redacted, is not adequate. Mr Smalley is entitled to know why the documents were redacted and this generic approach does not achieve that outcome. In each of the categories where a document or some part of it was redacted, HHG must identify that the documents were assessed and, in so doing, to say why the redacted portion is irrelevant.

[54] Further disclosure is therefore required in each of those categories where that response was given, to properly articulate why the redaction was made. Similarly, Mr Smalley is entitled to know which documents are being withheld on the basis of legal privilege. Further and better disclosure to identify them is required.

[55] In undertaking this exercise, and in inspecting the documents, the parties must bear in mind the restrictions on the use of disclosed documents in reg 51. It is a condition of disclosure that the integrity and confidentiality of any disclosed documents must be maintained at all times and for all purposes. The regulation restricts the use of documents and their

contents to the proceedings and the documents (and copies of them) must be returned to the party that provided them.[17]

The categories of the notice

Category 1: Unredacted Board Minutes and CEO/Operating Reports: October 2008 to December 2010

[56] Mr Brookes described this category as being about HHG minutes and reports from a time period which correlated with it offering to pay Mr Smalley a substantial sum for previously underpaid holiday entitlements from May 2004 to December 2008. This category was said to be relevant, because it was reasonable to expect HHG to have considered and discussed the underpayment including:

(a) Why payment was required.
(b) The calculation of the amount.

17 Within 28 days of the conclusion of the proceeding or any related appeal.

(c) The employees impacted.

[57] Mr Smalley considered that the time period in this category is relevant, because he entered into an agreement with the company in December 2008 that changed the way his remuneration was paid. He says his income was split between salary and a bonus and, thereafter, his Holiday Act entitlements were based on the salary excluding the bonus resulting in a shortfall.

[58] Mr Smalley believes that the desire to make this change, and the reasons for it, are likely to have been reported to HHG's Board with supporting papers. He mentioned the prospect that these papers may shed light on what happened with other HHG employees paid in a similar way.

[59] The criticism of the documents already disclosed by HHG within this category is twofold. The first criticism was about the approach to redactions or claims of irrelevance and a claimed lack of clarity about how the assessment was made. The second criticism was that HHG provided excerpts from the Board papers compiled into a separate document.

[60] HHG's response was that it has disclosed relevant minutes, reports and redacted documents. Those redactions remove information it assessed as not relevant to the litigation. In summary, the objection was:

(a) Disclosing unredacted copies of the minutes and reports exposes irrelevant information and commercially sensitive information relating to the defendant, or its clients, or information relating to employees where there are privacy considerations.
(b) Beyond what was disclosed, other minutes and reports do not exist or cannot be located.

[61] HHG pointed to the fact that during this time it did not have a central hard copy or electronic repository of Board documents. However, it searched to locate documents. It has provided documents that do exist but otherwise it has been unable

to find anything in this category. HHG's further response was that, given the time that has elapsed, it is unable to say what became of the missing documents. Mr Perry described HHG searching its electronic and email files, including its archived Outlook calendar appointments for the period, to try to locate minutes and reports, approaching two directors from that time as part of the search, and searching any hard copy minutes and reports. He said that when undertaking these further checks no other missing minutes and reports were located.

[62] As discussed in *Fox*, Mr Perry's confirmation that the searches were undertaken, and that nothing further was located, discharges HHG's obligations under the regulations relating to those Board minutes and papers.

[63] I am not persuaded that Mr Smalley has established grounds to require unredacted copies of these documents to be made available for inspection. Ms Larkin received documents supplied by the company to assess them for disclosure. She undertook that work by reference to the pleadings, employment agreements, remuneration and leave accrual information and by considering privilege.

[64] Ms Larkin made redactions in some documents, principally Board minutes and reports. She did so primarily on the basis that the redactions were of irrelevant information. While I accept her assessment, Mr Smalley is entitled to a fuller explanation as to why the redacted parts of the documents are irrelevant as discussed in paragraph [54]. Unredacted documents in this category do not need to be disclosed.

[65] The next issue is inspection of the documents. Mr Smalley is entitled to do so under the regulations and is not required to explain why he wants to see them rather than to rely on excerpts provided to him.

[66] For completeness, I do not accept Mr Smalley's statement that he alone is best qualified to understand the relevance of documents and that he must therefore conduct any inspection of these disputed documents personally. A common feature of civil litigation is for sensitive documents to be inspected, at least initially, on a counsel-to- counsel only basis. Counsel can be expected to be familiar with the pleadings which

should make identifying relevant documents a straightforward process. Any residual issues must be capable to resolution in this way.

Category 2: All Board minutes and CEO/Operating Manager reports in unredacted form for Board meetings between March 2013 and June 2017

[67] Mr Smalley considers that the minutes and reports in this category are relevant because he anticipates they will contain discussions regarding the treatment of his Holiday Act entitlements and the cancellation of some of his leave entitlements. He considers that these documents are likely to assist because a Board minute he has referenced discussions being undertaken about the cancellation of leave, with those involved being expected to report back at a future meeting.

[68] HHG accepts that the treatment of those entitlements is in issue. It has admitted that ten days of Mr Smalley's leave allocation were cancelled and accepted there is a dispute about the circumstances in which that occurred.

[69] Some disclosure has occurred. HHG's objection to this category is based on:

(a) some of the minutes and reports not existing;
(b) some of the disclosure sought being irrelevant; and
(c) the disclosure of unredacted reports and minutes where they are considered by HHG to be only partly relevant.

[70] By way of explanation, Mr Perry said that HHG searched its electronic email and hard copy files for this period. He said that HHG did not have a centralised hard copy or electronic repository for minutes and/or reports until October 2017 and deposed to believing that there were no Board meetings in March, August and November 2013, September and December 2014, August and November 2015, January, April and December 2016 or January 2017. His evidence was that the minutes and reports for all Board meetings in the period that exist were located and disclosed to the extent relevant and where they are not privileged. Mr Perry's explanations of the searches undertaken are sufficient to discharge HHG's obligations in this category.

[71] Mr Perry said that, where disclosure occurred, redactions were made to obscure irrelevant information which HHG also considers to be commercially sensitive or includes private information about other staff. Some of those redactions include what Mr Perry described as references to Mr Smalley that are not relevant, such as to previous employment matters unrelated to the present claims. He accepted that Mr Smalley would have received these minutes and reports in his capacity as a director.

[72] Redactions based on relevance have already been discussed and further disclosure is required.

[73] For completeness, I note Mr Perry referred to some redactions in the 2015 documents because the information concerned is about legal professional privilege. The parties agreed that this redaction is appropriate.

Category 3: The defendant's Board minutes and operating manager/CEO reports in unredacted form for the Board meetings on 24 July 2017 and 23 August 2017

[74] Mr Smalley considers these documents are relevant because they would have been created when there was a significant change to his employment terms. He anticipates those changes would have been discussed at these meetings.

[75] HHG does not dispute that there was a change in Mr Smalley's employment during this period. It disputes whether that change affected his entitlements or remuneration.

[76] HHG has disclosed Board minutes and the report relating to the meeting of 24 July 2017 with redactions. Mr Perry described those redactions as being made where the information is not relevant to the claims, including material that is sensitive or relates to other staff. He agreed that there was a meeting on 8 August 2017, at HHG's lawyer's office, in relation to certain matters involving Mr Smalley. Privilege was asserted in relation to the associated minutes.

[77] As to the 23 August 2017 Board meeting, HHG's response was that its Board met "in committee" at its solicitor's office for advice on a draft settlement agreement

relating to Mr Smalley's employment. HHG considers the notes of this meeting to be privileged. It says that, in any event, there was no CEO report.

[78] Mr Brookes drew on other submissions made for Mr Smalley to support the challenge, taking issue with the redaction of Board minutes and other documents or reports. The submission was that it is essential for Mr Smalley to be given the opportunity to analyse the documents "in full" to ensure that all relevant information has been provided. As to the redactions being unnecessary, Mr Brookes referred to the protection provided by reg 51. He also drew on *Labour Inspector of the Ministry of Business, Innovation and Employment v Samra Holdings Ltd*.[18] Rounding out these submissions was an observation that Mr Perry had not explained why the documents referred to were not relevant. Mr Brookes went further and said that the plaintiff considers the defendant's analysis "may not be correct" and that there are concerns relevant material has been withheld erroneously.

[79] While these submissions emphasised the criticisms of Mr Perry's explanations, they do not mention what Ms Larkin said when she undertook some of the redaction process which included Board minutes and reports. As was said previously, there is no reason to put aside her evidence.

[80] Further, no assistance is provided by the *Samara Holdings* decision. While Mr Brookes correctly referred to a passage from that judgment where the Court stated that unredacted documents might be relevant and should be disclosed, the context in which the decision was made is quite different from the present case. In *Samra*, the Labour Inspector began proceedings claiming, among other things, a pecuniary penalty. The employees on whose behalf the claim was brought alleged they had worked excessive hours for which they were not paid. The defence was that they had not done so. Some documents were provided to the defendant's counsel, on a "counsel only" basis. He was able to draw to the Court's attention examples from that information which might have shown that certain transactions in the redacted parts of the bank statements could support the defendant's position.

18 *Labour Inspector of the Ministry of Business, Innovation and Employment v Samra Holdings Ltd*

[2021] NZEmpC 52.

[81] In other words, in that case the defendant was able to point to information to support claims that the redactions had been excessively carried out. That is not the situation here.

[82] What Mr Smally has identified is the prospect that, because he has little confidence in HHG, it might not have undertaken this job properly or completely. That is insufficient.

[83] I accept Mr Carter's submission that the meeting by the Board at its solicitor's office on 23 August 2017 is irrelevant. What was for discussion at that meeting was alleged misconduct by Mr Smalley and is therefore beyond the scope of these pleadings. Further, as provided for in *Fox*, Mr Carter confirmed the notes of the meeting do not include information about the Holidays Act entitlements claim, annual leave, a change in payment of remuneration and otherwise are privileged.

[84] Similarly, I accept that at a meeting on 8 August 2017, the Board, at its solicitor's office, discussed other unrelated matters about Mr Smalley. That information is irrelevant.

Category 4: The transaction reports for specified months between December 2008 and February 2012

[85] HHG objected to this disclosure request because it maintains the documents are unable to be located or no longer exist. Mr Perry has responded twice to the demand for this disclosure. In his first affidavit he said HHG was unable to locate any copies of the reports. He explained that the documents were created at the end of each month and printed. Following the Canterbury earthquakes the records that could be recovered were initially placed in container storage and subsequently sent to Recall (an off-site storage provider). He said that the company has no record of payroll records or revenue transaction reports for the period December 2008 to May 2009 being sent to Recall. HHG did not know if they were destroyed or not recovered. It does not know when they were otherwise destroyed or lost.

[86] Mr Perry went on to say that HHG retrieved its archived payroll records, including for the period from September 2011, but that they did not include any

revenue transactional reports for Mr Smalley for the period between October 2011 and February 2012.

[87] In a supplementary affidavit sworn in May 2025, Mr Perry provided a further explanation. He said HHG changed its accounting software provider in 2013 and consequently electronic financial records, such as the profit and loss reports, do not exist before March 2013. He acknowledged having records for a related company, Overview Portfolio Ltd, from the time it changed to the new software provider in June 2011 but not before that.

[88] Mr Perry responded to Mr Smalley's criticism that transaction reports were prepared and said that a bonus based on revenue would not be paid to an adviser (as Mr Smalley was at that time) during an extended period of unpaid leave. That meant a revenue transaction report would not have been produced for Mr Smalley during that time.

[89] Mr Brookes' submitted that Mr Perry's response was inadequate. The effect of Mr Perry's evidence was said to be that

HHG does not know if the documents were destroyed, not recovered post-earthquake, or otherwise lost. The criticism was that no other steps appeared to have been taken to try to recover those documents and that while it appears that no records other than hard copies were kept at this time, Mr Perry did not expressly say so.

[90] Mr Smalley accepts that physical documents may have been lost or destroyed but considers electronic records should exist. His position is that the documents he sought, or some version of them, must have existed previously and he is entitled to an explanation from HHG as to why they are now unavailable.

[91] Mr Carter's response was twofold. First, if it required HHG to recreate the reports that is contrary to *Fox*; namely disclosure does not require the creation of documents.[19] His second response relied on Mr Perry's evidence that HHG does not have complete electronic records for the periods because of changes to the accounting software in 2011 and 2013.

19 *Fox,* above n 13, at [40].

[92] Mr Perry's answer is compelling. Available archived records were reviewed. He deposed to the records not existing and explained why. The explanation is self- evident given the wide-spread damage caused to office buildings in Christchurch during the Canterbury earthquakes. The change in software is also an adequate explanation.

[93] This part of the application is declined.

Category 5: Original payslips for the remuneration payments made to the plaintiff on 22 December 2008, 2 February 2009, 3 March 2009 and 2 June 2009

[94] HHG objected to producing these documents because the originals do not exist. Mr Perry explained that HHG has no record of the payslips for this period being sent to offsite document storage. He said that he did not know if these records were destroyed or not recovered because of the Canterbury earthquakes. He also said that he did not know when they were otherwise destroyed or lost.

[95] That said, Mr Perry did refer to having been able to access an HHG electronic backup file of payslips covering these periods from a third-party payroll provider. They were included in disclosure provided in response to the notice. Mr Carter accepted that they were not original in the sense that they were created from electronic backup.

[96] Mr Smalley accepted that the original payslips for the months sought in this category do not exist. He noted that there appeared to be no record of those documents being sent to storage. That said, he acknowledged HHG's evidence that these documents do not exist. No further disclosure is required.

Category 6: Revenue transaction reports for Mr Smalley for the months May 2012 through to December 2012

[97] HHG said in response to this part of the application that the revenue transaction reports for this period were included in its disclosure in response to the notice, except for May 2012. Mr Perry said that these reports were located in archived records retrieved from storage. HHG objected to this part of the notice because the report for 4 May 2012 does not exist. An explanation for that statement was given. Mr Perry

said that was because Mr Smalley took paid leave for a sabbatical following by an extended period of unpaid leave until his return to work in June 2012.

[98] The criticism made of the quality of HHG's disclosure when responding to this category was the absence of a further explanation from Mr Perry, about whether it was usual for no revenue to be generated during periods of leave. Mr Brookes submitted that it would be useful for Mr Perry to elaborate on the process if revenue was generated by a staff member during a leave period, which he said would be a likely occurrence from time to time.

[99] Mr Smalley stated his belief, despite Mr Perry's evidence, that HHG would have created these reports. He said that doing so would be consistent with when he was working as a contractor to HHG.

[100] Mr Perry has provided an explanation about the recovery of the revenue transaction reports from storage and why there is no report for May 2012. It is apparent Mr Smalley doubts the absence of a revenue report for him in that month, despite what was said. Part of his query was an assertion, not addressed by Mr Perry or in the submissions, that the absence of payroll records or transition reports might be at odds with record keeping requirements for NZX participants.

[101] In any event, Mr Smalley proposed an alternative way for the information to be sought. He referred to monthly profit and loss reports for both HHG and Overview Portfolio which were generated and he considers will still exist. Those reports include a record of each advisors monthly revenue on individual rows. A sample was exhibited to his affidavit. It showed income over various months, and the year to date, by individuals. The example referred to was from 28 February 2018 and

referred to Mr Smalley.

[102] Mr Carter did not address Mr Smalley's reference to an alternative way of obtaining this information. I accept that the revenue transaction report does not exist. However, the scope of category six must contemplate other documents which refer to the revenue generation over the relevant period of time.

[103] Further, disclosure is required from HHG to ascertain whether it has monthly profit and loss reports in the relevant period. Disclosure of that information falls within the scope of category six and is required.

Category 7: All original payslips for Mr Smalley for the period June 2012 to January 2013

[104] No objection was taken to this aspect of the disclosure notice and nothing further needs to be said about it.

Categories 8 and 9: All email correspondence sent to and from Mr Smalley's HHG account to other HHG employees and/or directors between 1 August 2017 and 31 August 2017

[105] Mr Smalley acknowledged that HHG has disclosed some documents in this category but considers more emails are likely to exist. He is pursuing these documents because he considers them to be relevant, given they are about the time period when he changed to fixed term employment.

[106] Mr Smalley referred to the limited scope of this category because it related only to internal emails and not those to or from clients.

[107] To explain why he considers HHG's disclosure to be inadequate, Mr Smalley referred to previously having had access to the emails and thinking that there are likely to be more relevant ones in the category than disclosed. Aside from expressing confidence that any further emails will contain relevant information for his claim, because any that exist would have been sent in the month his permanent employment ended and he started a fixed term job, nothing else is offered to explain why HHG's disclosure could be said to be inadequate.

[108] When disclosure was made in the Authority Mr Perry said that he performed a word search, using for the inquiry the following terms: employment, holiday, leave, pay, payslips, remuneration, bonus and brokerage. That affidavit was exhibited to and incorporated into Mr Perry's evidence in response to this application. The breadth of those searches was not criticised in submissions.

[109] HHG has adequately explained the scope of the searches it undertook to satisfy this category of the disclosure. Aside from having to clarify the references to those redactions which may contain privileged or sensitive information, no further disclosure is required.

Category 10: Any correspondence (including emails, letters and meeting minutes, diary notes or file notes) created, sent or received by HHG employees and/or directors about the plaintiff between 1 August 2017 and 31 August 2017

[110] The objection is that the relevant documents in this period were disclosed in the Authority, and what is now sought is irrelevant, may be privileged and/or commercially sensitive information or information that is subject to privacy restrictions.

[111] Mr Perry explained that what HHG considered to be irrelevant included communications and documents about the company's investigation of allegations of serious misconduct by Mr Smalley. It also claimed privilege in without prejudice communications and documents leading up to a settlement.

[112] Mr Brookes submitted that, despite Mr Perry's explanation, the documents must still be disclosed. That was because the fact there was an employment investigation does not by itself give rise to a privilege in the document. I accept that proposition but that does not make the documents relevant. I prefer Mr Carter's submission that documents relating to the alleged serious misconduct issue are not relevant because they have no bearing on the pleaded claims.

[113] In Mr Perry's supplementary affidavit, he said that documents in this period relating to holiday entitlements, leave accrual and the fixed term employment agreement have been disclosed. As to the privileged communications, he explained that they were numerous and were between HHG and its lawyer and, in turn, without prejudice correspondence leading up to an agreement.

[114] I accept that explanation. It complies with *Fox*. No further disclosure is required.

Category 11: Emails to and from Mr Smalley's work account on 15 November 2013, 14 November 2014, 23, 25 and 27 February 2015, 13 November 2015 and 11

[115] Emails retrieved for this period were disclosed with redactions. The redactions are of client names or details described as sensitive client information.

[116] The content of the emails is being pursued by Mr Smalley as part of his claim that he was working on the relevant dates.

[117] Mr Smalley said that what was disclosed for 15 November 2013, 14 November 2014, and 25 February 2015 were three emails each day, for 23 February, 27 February 2015 and 11 November 2016 four emails and for 13 November 2015 two emails. He expected to receive significantly more emails because, on any given day, he normally sent and received "upwards of at least ten emails". He also referred to receiving a number of report emails each day which were not provided.

[118] Mr Perry's affidavit unequivocally states that the emails retrieved were disclosed with redactions but he does not believe that will prevent them from being assessed. This aspect of disclosure is satisfied.

Category 12: Any emails or other correspondence to or from Grant Williamson concerning Mr Smalley's pay, leave, or holiday entitlements and specifically in the periods 1 November 2008 to 30 June 2009 and 1 November 2009 to 31 December

2009

[119] The objection described by Mr Perry is because the documents no longer exist. He said that Mr Williamson's email archives do not extend back that far and searches of electronic and email systems did not locate any documents. Part of this explanation was that, given the time periods are so long ago, HHG and Mr Williamson do not know what became of the emails or when they ceased being available.

[120] Mr Smalley's response accepted that evidence but with two queries. The first query was that he considered it would have been appropriate for Mr Perry to confirm that HHG's "usual/document management system" during these time periods and its "usual practice" did not involve hard copy storage of documents of this nature. That

request goes further than required. Mr Perry has described the extent of the searches required which is sufficient.

[121] The second query by Mr Smalley was his concern that, in disclosing documents in response to the notice, further emails between Mr Williamson and Mr Perry were provided that discuss Holiday Act and related calculations. They were not disclosed previously, despite Mr Perry having said that email accounts were checked and no records found.

[122] Mr Brookes made the point that there is a prospect that HHG's search was too narrow. When Mr Perry swore an affidavit in the Authority about this time period, he referred to an absence of records of any emails "to or from Mr Smalley by Mr Williamson". The point was that the breadth of the category was any emails concerning Mr Smalley not correspondence with him.

[123] Despite that observation, it is clear from Mr Perry's evidence that the search undertaken was wider than just for emails to and from Mr Williamson and Mr Smalley. No weight can be placed on the fact that some disclosure was made recently. It is an aspect of the continuing duty to disclose and does not suggest anything more.

[124] No further disclosure is required.

Category 13: A copy of NZX's written notification to HHG prior to October 2015 that it was introducing in October 2015 new adequacy requirements that included a requirement to report on contingent liabilities

[125] Presumably this category is regarded as relevant because contingent liabilities may include any Holiday Act entitlements or other sums due to Mr Smalley if his claim succeeds.

[126] Mr Brookes' submission was that what was supplied by HHG did not contain any information about capital adequacy calculations.

[127] Mr Carter noted that HHG did not object to this category. He pointed out that, in response to the notice, the company disclosed the NZX notification it received in September 2015. He submitted that HHG did not receive any other notice around that

time in relation to capital adequacy requirements. The company has disclosed a subsequent email, in November 2017, referring to a capital adequacy guidance note.

[128] The content of Mr Carter's submissions was not referred in Mr Perry's affidavits. In any event, it is difficult to see how this disclosure would be of any real assistance and it therefore falls outside the proportionality required by the regulations.

Category 14: Specified emails sent by Ian Perry on 22 September 2016, 15 February 2017 and 3 May 2021

[129] There was no objection to this part of the notice.

[130] There is a dispute, however, over the redaction in one email. Mr Perry described the redaction being to remove information relating to a matter "unrelated to the plaintiff's claim (referred in the emails as the Arrium issue)".

[131] Mr Smalley's response was that he needs the unredacted document because otherwise that may limit his ability to analyse the correspondence. He was critical of the description provided by Mr Perry as insufficient to satisfy him that no relevant information was withheld.

[132] As has already been referred to in relation to a number of these categories, there is a generalised complaint that certain commercial sensitivity and/or privacy is an inadequate response to claims supporting the redaction of documents. That issue has been dealt with and a further explanation is required.

Category 15: Any other documents relevant to the applicant's claims that have not yet been disclosed

[133] This category was not the subject of extensive submissions. It is unhelpful. If other relevant documents come to the attention of either party the continuing duty of disclosure requires them to be made available for inspection.

Outcome

[134] The challenge to the objection to disclosure is successful to the extent in this decision.

[135] Given that further disclosure is required, leave is reserved to apply for further orders.

[136] Costs are reserved.

K G Smith Judge

Judgment signed at 3.25 pm on 12 December 2025