



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2019](#) >> [\[2019\] NZEmpC 157](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Van Kleef v Alliance Group Limited [2019] NZEmpC 157 (7 November 2019)

Last Updated: 12 November 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2019\] NZEmpC 157](#)

EMPC 407/2018

IN THE MATTER OF a challenge to a determination of
 the Employment Relations
 Authority
AND IN THE MATTER of an application for disclosure
BETWEEN MARIA VAN KLEEF
 Plaintiff
AND ALLIANCE GROUP LIMITED
 Defendant

Hearing: 7 October 2019
 (Heard at Christchurch)
Appearances: M Van Kleef, in person
 J Cowan, counsel for
 defendant
Judgment: 7 November 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for disclosure)

Introduction

[1] The Employment Relations Authority issued a determination dealing with a range of issues following Ms Maria Van Kleef's dismissal by Alliance Group Ltd (Alliance).¹ She brought a challenge to the determination. Now, disclosure issues require resolution by the Court.

¹ *Van Kleef v Alliance Group Ltd* [2018] NZERA Christchurch 159.

MARIA VAN KLEEF v ALLIANCE GROUP LIMITED [\[2019\] NZEmpC 157](#) [7 November 2019]

Background

[2] The Authority's determination provides a convenient starting point, since the challenges before the Court relate to its conclusions.

[3] First, the Authority concluded that Ms Van Kleef had been entitled to refuse to work compulsory overtime which she had been instructed to perform. It found that her collective employment agreement (CEA) contained an availability clause which did not comply with the [Employment Relations Act 2000](#) (the Act) so that overtime could not in those circumstances have been requested. This led to a conclusion that she had successfully established a grievance that her employer had contravened [s 67F](#) of the Act, which meant that her dismissal was unjustified entitling her to remedies.² The fixing of remedies was reserved.

[4] The Authority also determined that Ms Van Kleef had been frequently unable to take her rest breaks in breach of [s 69ZE\(1\)](#) of the Act. Remedies for this breach were also reserved.

[5] Then the Authority found that Ms Van Kleef had been subjected to unjustified disadvantage by the failure to provide her with notice of a relevant meeting held on 22 February 2017, by issuing her with a first written warning and by not informing her of the meeting with Union representatives at which an adverse remark was made about her.⁴

[6] Alliance initiated a challenge on a non-de novo basis with regard to a range of issues concerning payment of rest breaks, and as to whether the CEA included an availability provision. Then Ms Van Kleef brought a de novo challenge not only seeking compensation for the various breaches on which she had already succeeded, but also for other claims that were rejected by the Authority, including that she had been deliberately locked out of her employment; that she was owed wages for the time spent in donning and doffing for five minutes in each break for the six years prior to 23 April 2017; for rest breaks not paid appropriately from 1 April 2009 to

2 At [82].

3 At [107].

4 At [142]-[177], and [204].

23 April 2017; for a unilateral reduction of pay rate from 29 August 2016 without her knowledge and consent; and for penalties on multiple grounds. Alliance contests liability for all these claims.

[7] On 20 March 2019, Ms Van Kleef served a notice of disclosure on Alliance, requesting six categories of documents. Alliance provided some of the documents sought on the same day on the basis that the information existed or was reasonably available. No notice in Form 7, under the [Employment Court Regulations 2000](#) (the Regulations), was served.

[8] On 4 April 2019, Ms Van Kleef filed and served an interlocutory application for disclosure alleging that there remained for discovery six categories of documents which should be disclosed. Annexed to this judgment is a schedule of the six categories of documentation contained in the notice of disclosure.

[9] Alliance filed a notice of opposition on multiple grounds including:

- a. that it had already satisfied its disclosure obligations;
- b. that the further documents sought were not relevant;
- c. that some documents were the subject of penalty actions for which the formal rules of disclosure could not apply;
- d. that there were legitimate grounds of objection based on legal professional privilege and the privilege against self-incrimination; and
- e. that it was inexpedient for Alliance to locate and provide the information requested.

[10] The procedure adopted in this case has not been followed in accordance with the Regulations. However, no prejudice has arisen. I consider it appropriate to deal with the notice of application and notice of opposition on their merits, since both parties proceeded on the basis that these documents summarise the issues which need to be resolved.

[11] Both parties filed affidavits supporting their positions. In her affidavit, Ms Van Kleef in summary referred to documents she had obtained from various sources which she submitted supported her contention that there were indeed further relevant documents which should be disclosed.

[12] Legal counsel for Alliance, Kenneth Smith, filed an affidavit explaining the steps which he had taken to locate documents both those which had already been disclosed, and three further documents which were annexed to his affidavit; and why Alliance should not be compelled to provide any further documents.

[13] Written submissions were filed. At the submissions-only hearing, both parties developed those submissions, which will be referred to where relevant later.

[14] In light of the materials placed before the Court, the issues for resolution are:

- a. Is it probable that there are further relevant documents in any of the categories for which disclosure has been sought?
- b. Is it inexpedient for Alliance to locate and provide information requested by Ms Van Kleef?
- c. Are there potential issues of privilege?
- d. What disclosure, if any, should be ordered?

Legal principles

[15] As I explained in *Nel v ASB Bank Ltd*,⁵ the starting point must be reg 40 of the Regulations, which provides:

40 Availability of disclosure

(1) ... any party may require any opposing party—

(a) to disclose and make available for inspection any documents which are in the opposing party's possession, custody, or control ...

⁵ *Nel v ASB Bank Ltd* [2017] NZEmpC 56, [2007] ERNZ 297 at [28].

[16] One of the issues in this case relates to the concept of relevance for disclosure purposes. Regulation 38 defines relevance in this way:

38. Relevant documents

(1) ... a document is relevant, in the resolution of any proceedings, if it directly or indirectly—

(a) supports, or may support, the case of the party who possesses it; or

(b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or

(c) may prove or disprove any disputed fact in the proceedings; or

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

[17] The role of pleadings in assessing relevance is obviously important. The leading authority on this topic is *Airways Corporation of New Zealand Ltd v Postles*, a Court of Appeal decision which considered the former reg 48 of the [Employment Court Regulations 1991](#).⁶

[18] For the purposes of that regulation, the Court of Appeal said:

[5] With respect we consider the judge erred in law in drawing for present purposes the distinction between pleadings and proceedings. The pleadings define the ambit of the proceedings and thereby define the issues to which questions of relevance must be related. While the concept of relevance should not be looked at narrowly, it can never be divorced from the issues raised by the pleadings. That is what is meant by the reference in reg 48 to any disputed matter in the proceedings.

[19] The former reg 48 did not state that a document is relevant if it “directly or indirectly” falls within any of the defined categories. That phrase was added when reg 38 of the current Regulations was introduced. But the addition of these words reinforces the conclusion of the Court of Appeal that, whilst the pleadings define the ambit of the issues, the concept of relevance should not be looked at narrowly.

[20] It is well established that a court will not order discovery, or disclosure as it is termed in this Court, where an applicant does no more than engage in a ‘fishing’ exercise, that is, when he or she seeks information or documents so as to discover a

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

new cause of action or to discover circumstances which may or may not support a baseless or speculative cause of action.⁷

[21] In *Fox v Hereworth School Trust Board*, Chief Judge Colgan discussed these principles, emphasising that, even if documents are relevant, as defined, the Court retains a discretion to refuse unnecessary or undesirable disclosure; whether disclosure would be oppressive is a matter which is to be considered.⁸

[22] The Court also referred to factors described in r 8.4 of the High Court Rules, which address the reasonableness of the scope of a discovery order; it was noted that the rule is relevant by analogy. It indicates that relevant circumstances may include:

(a) the nature and complexity of the proceedings;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document likely to be found; and

(e) the need for discovery to be proportionate to the subject matter of the proceeding.

[23] In *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry for Primary Industries*, it was held in the circumstances of that case that the extraction and review of some 9,700 emails would not be considered oppressive, since these could be reviewed reasonably quickly and not at a cost disproportionate to what was at issue in the proceeding.⁹ In any event, the expenses incurred could be reflected in costs awarded against the parties seeking disclosure

if, at the end of the case, that is appropriate.¹⁰ These are, of course, case specific considerations.

7 *AMP Society v Architectural Windows Ltd* [1986] NZHC 275; [1986] 2 NZLR 190 (HC) at 196.

8 *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [41].

9. *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry for Primary Industries* [2016] NZHC 406 at [27].

10 At [28].

[24] In dicta which was also directed to the applicable High Court Rules, but which is nonetheless relevant to the present case, disclosure was said to constitute a function of relevance, proportionality and discretion.¹¹

First issue: further documents?

[25] Mr Smith stated in his affidavit that Alliance was opposing Ms Van Kleef's application partly because the categories sought are too broad. However, where it was possible to understand Ms Van Kleef's disclosure requests, the company had complied with them.

[26] In the course of the hearing, Ms Van Kleef was able to clarify the categories of documentation she sought. It is likely that this was not apparent either from Ms Van Kleef's original notice of disclosure or from her notice of application.

Categories 1 and 2: Alliance documents relating to paid rest breaks

[27] The documents sought by Ms Van Kleef, arising from categories 1 and 2, related to when and how Alliance would pay employees for rest breaks; how the company would calculate and pay employees for those rest breaks; and documents relating to back payments of rest break remuneration.

[28] By way of background, Mr Smith said that there were no documents identifying how rest breaks would be calculated and paid by Alliance; that there was a longstanding agreement that rates of pay incorporated payments for rest breaks; that there was no back pay component to that agreement; and that, with regard to a CEA agreed in 2012, a statement was introduced to record that all pay rates were "deemed to incorporate payment for rest breaks".

[29] Ms Van Kleef in essence made three points about this response to her request for documents.

11. *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760, [2018] NZAR 600 at [14].

[30] First, she said that no documents had been disclosed with regard to the alleged historic understanding that pay rates incorporated payment for rest breaks. She also said this contention conflicted with an agreement entered into between Alliance and the New Zealand Meat Workers' and Related Trades Union Inc (the Union) with regard to the relevant processing room at the Alliance plant at Pukeuri. In that additional departmental agreement, hours of work recorded the fact that rest periods and a meal break were unpaid.

[31] Second, Ms Van Kleef referred to evidence given by Mr Smith to the Authority, in which he confirmed that in 2011 the Union filed an employment relationship problem claiming Alliance was not complying with its statutory obligations as to paid rest breaks in relation to some groups of workers, including piece rate workers at the Pukeuri plant. He said Alliance had denied this claim. Ms Van Kleef said she sought documentation relating to the Union's claim, since the making of the claim conflicted with the assertion that inclusive rates were paid.

[32] Third, Ms Van Kleef sought documents relating to an issue over which bargaining had occurred in 2012, which Mr Smith had explained when giving evidence to the Authority was resolved by the express agreement that payment for rest breaks would be deemed to be incorporated into rates of pay. Mr Smith attached to the affidavit filed in the Court an extract from the applicable CEA which recorded that agreement, as well as a letter dated 14 March 2012 from Alliance to the Union, which referred to a settlement reached the previous day, including on the rest breaks issue. Ms Van Kleef pointed to other documents she had obtained, including from the Union, which suggested that there were yet further documents relating to the bargaining on this issue, including after the date of the letter recording an apparent settlement. She sought all relevant bargaining documents.

[33] A final issue raised by Ms Van Kleef related to the question of whether, as an aspect of the bargaining in 2012, pay rates were increased so as to provide for rest breaks. The evidence she alluded to suggested there had been an initial offer of a

2.5 per cent increase, but this was subsequently increased to three per cent, backdated to a pay week in February 2012. She asserted that the .05 per cent difference related to rest breaks. Mr Cowan, counsel for Alliance, told the Court that the initial offer of

a 2.5 per cent increase in pay was increased to three per cent which was agreed; and that the figure concerned the rate of pay for

work. Ms Van Kleef sought bargaining documents relating to these issues.

[34] I am satisfied that the various categories of documents just referred to fall within the confines of the original notice of disclosure. There is an issue which arises from the pleadings as to whether or not Ms Van Kleef has been paid for rest breaks under the legislation which initially came into force in 2009.¹² Alliance says payment has been made because the pay rates which have been agreed over the years contain an allowance for paid rest breaks. It is clear from the pleadings that this assertion is in dispute. I do not consider the request to be unreasonable or that it amounts to “fishing”. Since the documents sought relate to a disputed issue, disclosure of the requested documents should be given.

Document relating to availability provisions

[35] Categories 3, 4 and 5 relate to the availability provisions which were introduced when ss 67C to 67E of the Act took effect on 1 April 2016.¹³

[36] In his affidavit, Mr Smith said that, apart from one document he had been unable to locate any documents where “availability” was referred to during the 2016

– 2018 bargaining round. There were references to this issue in one letter which was sent by Alliance to the Union on 11 April 2016, in which it was indicated that work was being undertaken with external lawyers “in relation to some draft wording”. It was indicated this would be provided to the Union when it became available and could be finalised after discussion and agreement with the Union. The author of the letter stated that the legislation provided that Alliance had a year from 1 April 2016 to update its CEA. That letter was disclosed.

[37] Ms Van Kleef said that this was not the only document pertaining to the issue, as there was a later exchange between Alliance and the Union on 2 November 2016, in which it was recorded that the parties had agreed to finalise the wording required to

¹² [Employment Relations \(Breaks, Infant Feeding, and Other Matters\) Amendment Act 2008, s 6.](#)

¹³ [Employment Relations Amendment Act 2016, s 9.](#)

reflect the amendments by 1 April 2017 – the implication being that there had been bargaining on the issue since April 2016.

[38] She sought all bargaining documents pertaining to the progression of this issue. She said this was necessary because she proposed to allege that fraudulent misrepresentations had been made to her and/or her advocate about the company’s obligations to comply with the legislation, in the course of a series of meetings which led to her dismissal. Essentially, she wishes to assert that Alliance was aware it had an obligation under the recently enacted availability provisions to amend the 2016/2018 CEA, which would be relevant to the instruction given to her to work overtime; and that, by not complying with that obligation, she was, in effect, illegally locked out.

[39] In summary, Ms Van Kleef said she wanted documents that would show what knowledge Alliance had at the time to fulfil its obligation to meet the availability requirements. She submitted that the company and the Union were obviously obtaining legal advice; she accordingly sought from Alliance the legal advice it obtained; and she also sought bargaining documents which referred to that legal advice.

[40] I will need to return to this topic shortly because Mr Cowan focused on this request for the purposes of his submissions as to legal professional privilege and the privilege against self-incrimination.

[41] Subject to that point, I am satisfied that all documents relating to the adoption of availability provisions are potentially relevant to Ms Van Kleef’s pleaded assertions that she was locked out and should be disclosed.

Category 6: documents created in response to communications of 3 and 7 July 2017

[42] The final category of documentation concerns an email sent to the Chief Executive Office (the CEO) of Alliance on 3 July 2017 by Ms Van Kleef and a letter sent by her advocate to lawyers acting for Alliance on 7 July 2017.

[43] Mr Smith said he was unaware of any documents held by Alliance in relation to these documents. He explained he had asked the CEO’s personal assistant to search his mailbox for any emails created in response to his email to Ms Van Kleef of 3 July 2017, and that person had been unable to locate any relevant emails.

[44] Mr Cowan submitted that a proper search had been conducted for any documents arising from the email of 3 July 2017,

and the Court should accept an assurance from Alliance's general counsel that this was the case.

[45] I accept Mr Smith's evidence that an enquiry was made of the CEO's personal assistant, but there is no evidence as to whether any documents other than emails were created in response to Ms Van Kleef's originating email which may be held by other persons.

[46] Mr Cowan also submitted that the advocate's letter of 7 July 2017 had been sent to Alliance's lawyer, Mr Farrow, and that any documents created in response thereto would plainly be privileged.

[47] He also argued that these documents were not discoverable because they were created after the termination of Ms Van Kleef's employment. However, the fact that documents came into existence after the termination of employment is not necessarily the end of any consideration of relevance. Those documents could contain information pertaining to previous acts and omissions.

[48] I am satisfied that a further search should be conducted for all documents relating to the two subject communications. I deal with issues as to privilege below.

Second issue: inexpedient for Alliance to locate and provide the information sought?

[49] Now that there is greater clarity as to the documents Ms Van Kleef seeks, I consider that the scope of any search for relevant documents has been confined and that it should not be concluded at this stage that it would be inexpedient for Alliance to locate and provide those documents.

Issue three: potential issues of legal professional privilege and/or privilege against self-incrimination

[50] Mr Cowan referred to reg 39 of the Regulations, which deals with the applicability of the Regulations relating to disclosure to penalty actions, as follows:

39. Applicability

- (1) Subject to subclause (2), regulations 40 to 52 apply to all proceedings in the court.
- (2) Nothing in regulations 40 to 52 applies to any action for the recovery of a penalty.

[51] Then Mr Cowan referred to *New Zealand Airline Pilots Association Inc v Jetconnect Ltd (No 2)*, in which former Chief Judge Colgan concluded that having regard to this provision, it may be necessary for a plaintiff seeking disclosure to separate causes of action that do not seek penalties from those which do.¹⁴

[52] Mr Cowan also cited the later judgment of *Matsuoka in LSG Sky Chefs New Zealand Ltd*, where Judge Perkins concluded:¹⁵

[64] I have already indicated that I am of the view that reg 39(2) means that where a penalty is sought the requirements of the provisions contained in regs 40-52 do not apply to either party. That does not mean ... that disclosure in the proceedings is bought to an abrupt end and that the matter then remains in a vacuum. That would be to allow the subordinate regulation to override the provisions of the statute. Upon a proper assessment of its effect, reg 39(2) in combination with ss 189 and 221(d) has the distinct purpose of ensuring that where penalties are sought, the Court retains control of the issue of disclosure of documents between the parties. One of the reasons for that might well be to protect the civil penalty privilege if it appropriately applied.

[53] I respectfully agree with these conclusions for the reasons given.

[54] Mr Cowan went on to submit that not only was Alliance at risk of being subjected to penalties which meant the foregoing dicta would be relevant; but allegations of fraud were also being made by Ms Van Kleef – at least in a memorandum she recently filed. He argued that although there was no evidence to support the allegation of fraud, and Alliance refuted it, broad disclosure in the terms sought could

14. *New Zealand Airline Pilots Association Inc v Jetconnect Ltd* [2009] ERNZ 207 (EmpC) at [27] – [30].

15 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605.

give rise to a risk of self-incrimination. He went on to submit that a different conclusion should not be reached via s 189 of the Act, which refers to the Court's equity and good conscience jurisdiction.

[55] There are two related issues. The first is that an assurance given to the Court by counsel that documents are privileged, will usually be accepted by the Court, given the ethical obligations which exist. As former Chief Judge Colgan said in *Fox v Hereworth School*:¹⁶

The process of litigation can ... only work on this basis of trust and confidence between Court and bar and, in turn, depends upon an

independent and strong legal profession.

[56] Mr Cowan also referred to *Nisha v LSG Sky Chefs New Zealand Ltd*, when the Court discussed serious allegations which had been made against the other party's lawyer, for unprofessional conduct in complying with document disclosure obligations.¹⁷ The Court noted that, in the particular instance, the evidence to support such allegations were meagre and, in most instances, non-existent. Given the high standard of proof required to establish such serious allegations, the Court would have been required to draw untenable inferences, which it was unprepared to do.¹⁸

[57] To the extent that it may have been suggested in this case that Mr Smith has not respected his professional obligations to the Court when dealing with disclosure issues, I reject them since the evidence before the Court does not support such a conclusion. This is not a case where a deliberate withholding of documents has been undertaken. Rather, it is a case where broad requests for disclosure have been made, and it has not been immediately apparent from Ms Van Kleef's memoranda, affidavits and submissions what and why further documents may need to be disclosed. That issue was clarified only in the course of the hearing. No fault can be attributed to Mr Smith on this point.

[58] Moreover, I accept his evidence that there may be categories of documents for which Alliance is entitled to object to disclosure, on the grounds of legal professional

¹⁶ *Fox v Hereworth School Trust Board (No 6)*, above n 10, at [5].

¹⁷ *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 126.

¹⁸ At [37].

privilege or the privilege against self-incrimination. That is a different issue, however, and one which can be dealt with in the usual way by the filing of an affidavit of documents which allows privileged documents to be listed and, if necessary, subsequently examined by the Court. In my view, a further search should be conducted in respect of Category 6 documents on this basis.

Disposition

[59] Mr Cowan alluded to the fact that the making of any orders of disclosure would create delay in the disposition of the challenges. I agree. However, against that must be balanced the need to do justice between the parties. Ms Van Kleef is entitled to have recourse to a formal process of disclosure, which may allow the issues which will have to be resolved by the Court in due course, to be refined.

[60] I am also concerned, as already noted, that some of Ms Van Kleef's requests were initially too broad, and that the process of dealing with her current application has allowed for a more refined description of documents for disclosure. In all these circumstances, it is appropriate to grant the application in part.

[61] Drawing these threads together, I consider it is possible there are further documents which should be disclosed, in several discreet areas. Accordingly, I direct the filing and service of an affidavit of documents in Form G37 under the High Court Rules, modified where necessary. Those documents will be with regard to Categories 1 – 6 of the Appendix and in light of the findings made in this judgment at paras [35],

[42] and [48].

[62] It will be seen that Form G37 specifically allows for the listing of documents that are in control of the deponent, and for which privilege is claimed, as well as a description of the nature of the privilege that applies.

[63] After the filing of the affidavit of documents, I request the Registrar to schedule a telephone directions conference to discuss any further steps which may need to be undertaken. I request each party to file a memorandum for the purposes of that telephone directions conference, indicating what directions, if any, they seek in light of the affidavit which I anticipate will have been filed by then.

[64] I reserve costs.

B A Corkill Judge

Judgment signed at 1.00 pm on 7 November 2019

1. The agreements that were reached between Alliance Group Limited and the New Zealand Meat Workers and Related Trades Union Incorporated after [Part 6D](#) of the [Employment Relations Act](#) came into effect on the 1 April 2009 on:
 - a. When Alliance Group Limited was to pay their employees rest breaks.
 - b. How Alliance Group Limited was to calculate and pay their employees rest breaks.
 - c. The agreement reached on back paying Alliance Group Limited employees rest breaks.
2. Documentation showing how the applicants rest break payments were “calculated” in the pay week ending 09 May 2019, the pay week ending 21 April 2012 and the pay week ending 11 March 2017. The calculation to be shown and explained i.e. 5% on carcass rate etc and the resulting rest break payment for each day in these 3 pay slips.
3. All documents, which includes any memo, note, e-mail or sound recording between the Alliance Group Limited and the New Zealand Meat Workers and Related Trades Union Incorporated in regard to when the 1 April 2016 [Employment Relations Act ss67C-7F](#) applied to collective agreements.
4. All documents, which includes any memo, note, e-mail or sound recording showing the agreements reached between the Alliance Group Limited and the New Zealand Meat Workers and Related Trades Union Incorporated in regard to availability provisions during the 2016-18 collective bargaining round.
5. All documents, which includes any memo, note, e-mail or sound recording that Alliance Group Limited relied on to verify [ss67C-67F](#) in the [Employment Relations Act](#) did not apply to the 2016-18 collective agreement.
6. All documents, which includes any memo, note, e-mail or sound recording that was created in response to the applicant’s e-mail to the Alliance Group CEO David Surveyor on the 3 July 2017 and her advocates letter to Mr Farrow on the 7 July notifying them that the applicant was entitled to refuse the overtime due to the non-compliant availability provision.