



Employment Court of New Zealand

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Wills v Farmlands Co-Operative Society Limited [2020] NZEmpC 135 (31 August 2020)

Last Updated: 4 September 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2020\] NZEmpC 135](#)

EMPC 218/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for discovery against a non- party
BETWEEN	SUSAN WILLS Plaintiff
AND	FARMLANDS CO-OPERATIVE SOCIETY LIMITED Defendant

Hearing: On the papers

Appearances: A Sharma, counsel for plaintiff
S Townsend, counsel for
defendant

Judgment: 31 August 2020

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Discovery against a non-party)

[1] Susan Wills unsuccessfully applied to the Employment Relations Authority for leave to raise a personal grievance with her former employer, Farmlands Co-

Operative Society Ltd.¹

[2] Ms Wills required leave because she had not raised a personal grievance with Farmlands within the 90 days allowed by [s 114\(1\)](#) of the [Employment Relations Act 2000](#) (the Act). She has challenged that determination and has now applied for non-

¹ *Wills v Farmlands Co-Operative Soc Ltd* [\[2019\] NZERA 352 \(Member van Keulen\)](#).

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party discovery from her former lawyers, Pitt & Moore. The application was not opposed by Farmlands or Pitt & Moore.

[3] Before considering the application, it is necessary to describe what is said to have happened. The following description of events was taken from Ms Wills' affidavit in support of the application and the Authority's determination. With one exception, to be discussed shortly, there is no significant disagreement to be resolved.

[4] Ms Wills resigned from her employment with Farmlands in circumstances she considered might amount to an unjustified dismissal. She sought advice from Nick Mason, who was then a solicitor employed by Pitt & Moore and is now a

partner in that firm. She met Mr Mason on 25 January 2018 and the advice he provided encompassed the circumstances of her resignation, the process for raising a personal grievance, possible outcomes, and remedies that might be available.

[5] The disagreement referred to was whether Mr Mason was instructed to take steps to raise a personal grievance with Farmlands on Ms Wills' behalf. Ms Wills' recollection was that she instructed Mr Mason to proceed but before that could happen she would have to complete a Pitt & Moore engagement letter, as requested by Mr Mason. Mr Mason's recollection, as recorded by the Authority, was that he was not instructed to raise a personal grievance. That was because Ms Wills intended to reflect on his advice, particularly his concerns about the extent of any remedies that might be available if she succeeded.

[6] That disagreement aside, after the meeting Mr Mason sent an email to Ms Wills that had attached to it copies of Pitt & Moore's letter of engagement and related documents. In that email he advised Ms Wills that the time within which she could raise a personal grievance as of right ended on 15 February 2018. She responded a few days later, on 27 January 2018. In her email she commented about being unable to locate the signature page of the engagement letter and asked a question about fees.²

[7] The last emails in this initial exchange were sent on 2 February 2018. Ms Wills sent Mr Mason an email confirming having informed Pitt & Moore's receptionist, on

2 At [18].

the preceding Tuesday, that she accepted the conditions in the firm's letter of engagement. On the same day, Mr Mason replied and thanked her for that email and ended his correspondence with the remark "that's perfect".³

[8] Ms Wills current employment means that she is away from Nelson for lengthy periods of time in circumstances which seem to make communication uncertain. However, she sent Mr Mason follow-up emails in March, April and early July 2018 the last two of which asked about progress with her personal grievance, but they were not answered. Ms Wills and Mr Mason met in mid-July 2018 when he explained for the first time that no steps had been taken to raise a grievance with Farmlands. A grievance was not raised until a statement of problem was lodged with the Authority on 27 August 2018 and served on the company.

Raising a personal grievance

[9] As has already been mention, [s 114\(1\)](#) of the Act requires a personal grievance to be raised within 90 days. Under [s 114\(3\)](#), where an employer does not consent to a personal grievance being raised after the 90-day time limit has expired, an application for leave to lodge one can be made to the Authority. One of the grounds for such an application is that the delay was caused by exceptional circumstances.⁴ What is meant by exceptional circumstances is dealt with in [s 115](#) of the Act. The circumstance relied on this case is in [s 115\(b\)](#); that is, where an agent acting for the would be grievant has unreasonably failed to act. The subsection reads:

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; ...

[10] The Authority did not accept that the grounds in [s 115\(b\)](#) were met, concluding that steps were not taken by Mr Mason because he was waiting for instructions to proceed that did not arrive.

[11] The application for non-party discovery has been made against that background.

3 At [20].

⁴ [Section 114\(4\)\(a\)](#) and (b). The Authority must be satisfied that granting the application is just.

The application

[12] Ms Wills' application sought an order that Pitt & Moore file an affidavit stating whether certain listed documents were in the firm's possession, custody or power. It also sought a related order that, if any of those documents were no longer in the firm's possession, custody or power, the firm provide information about when they were parted with and what became of them.

[13] Four categories of documents were listed in the application, each entailing a different date range spread over several months. The orders sought are set out below using the format in the application:

Document category	Date range
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Evidence of oral and/or written communications of server issues experienced by Pitt & Moore impacting the email document management of <u>client file matter 355869</u> - Susan Wills.	25 January 2018–2 August 2018
Evidence of oral, and/or written communications to include employee wage and time records relating to Mr Nick Mason, with special reference to his non-attendance at his workplace of Pitt & Moore Lawyers.	25 January 2018–17 July 2018
Evidence of oral, and/or written communications naming the supervising partner for the <u>client matter 355869</u> - Susan Wills.	25 January 2018–31 July 2018
Evidence of oral, and/or written communications of the person(s) managing Mr Mason's incoming email correspondence during any evidenced absence from the workplace relating to <u>client file number 355869</u> - Susan Wills.	25 January 2018–31 July 2018.

(Emphasis original)

[14] The same grounds are relied on for each category. That is, Ms Wills has reason to believe the documents referred to in the application are in Pitt & Moore's possession and relate to a matter in question in the proceeding between her and Farmlands.

[15] Pitt & Moore is not a party to this proceeding so this application relied on cl 13 of sch 3 to the Act. The clause reads:

13 Discovery

(1) The court may, in relation to discovery that relates to proceedings brought or intended to be brought in the court, or intended to be brought in the Authority, make any order that the District Court may make under [section 105](#) or [106](#) of the [District Court Act 2016](#); and those sections apply accordingly with all necessary modifications.

(2) Every application for an order under [section 105](#) or [106](#) of the [District Court Act 2016](#) (as applied by subclause (1)) is to be dealt with in accordance with regulations made under this Act.

(3) Nothing in subclauses (1) and (2) limits the making of rules under [section 212](#) or regulations under [section 237](#).

[16] Clause 13 refers to [ss 105](#) and [106](#) of the [District Court Act 2016](#) which deal with pre-proceedings discovery and non-party discovery respectively.

[17] There is an obvious problem caused by cl 13 referring to the [District Court Act](#) in conjunction with the [Employment Court Regulations 2000](#). The regulations do not, despite what might be expected given the way cl 13 is written, deal with non-party discovery.

[18] In situations where the regulations are otherwise lacking reg 6 usually fills the gap. It does so by requiring the Court to dispose of the case as nearly as may be practicable in accordance with the provisions of the Act, regulations or rules affecting any similar case.⁵ As an alternative, the regulations allow the [High Court Rules 2016](#) affecting a similar case to be applied.⁶ If there are no such provisions then the case is to be disposed of in such manner as the Court considers will best promote the object of the Act and "the ends of justice".⁷

⁵ [Employment Court Regulations 2000](#), reg 6(2)(a)(i).

⁶ Regulation 6(2)(a)(ii).

[19] The High Court rules provide for discovery against a non-party but, in this situation, I consider a better approach is to rely on reg 6(2)(a)(i) and apply the regulations for disclosure of documents between parties with some modification.⁸

[20] Under the regulations the object of disclosure is to ensure that each party has access to the relevant documents of the other party. While relevance is the cornerstone of disclosure, the regulations empower the Court to limit disclosure if there are circumstances where it may be unnecessary, undesirable, or both.⁹ Relevance is ascertained by considering what has been placed in issue by the scope of the pleadings.¹⁰ A document is relevant if it directly or indirectly:¹¹

- (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 in any other relevant document and is itself relevant.

Ms Sharma's submissions

[21] Ms Sharma's submissions referred, succinctly, to cl 13(2) and to reg 6(2)(a)(i) and submitted that:¹²

- (a) the information referred to in the application exists and the only issue is relevance;
- (b) Mr Mason's employment by Pitt & Moore was relevant;

8. [High Court Rules 2016](#), r 8.21; [Employment Court Regulations](#), regs 37–43. See the discussion in *Nisha v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 77, [2016] ERNZ 568 at [86]–[90],

[103] and [105]; and *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605.

9 Regulation 37.

10 *Airways Corp of New Zealand Ltd v Postles* [2002] NZCA 155; [2002] 1 ERNZ 71 (CA) at [5].

11 Regulation 38 and in particular reg 38(2).

12 Applying *Zara's Turkish Ltd v Kocatiirk* [2020] NZEmpC 31.

(c) even if discovery does not ultimately assist in determining the matters in issue it may provide, indirectly, support for arguments Ms Wills wishes to advance;

(d) Mr Mason was summonsed by the Authority and gave evidence at the investigation meeting, although he did not take with him relevant documents;

(e) following the investigation meeting there were further submissions to the Authority about an important email chain that was not on the Pitt & Moore client file for Ms Wills, available at the time of the investigation meeting; and

(f) the email chain that was available to the Authority did not include Mr Mason's response to Ms Wills on 2 February 2018.

Analysis

[22] Ms Sharma did not explain how the application for discovery might extend to oral communication, which is more in keeping with an attempt to administer interrogatories.

[23] That point aside, Ms Sharma's submissions did not link each of the four categories of documents in the application with the pleadings to explain why discovery of the documents referred to would produce, or may produce, relevant documents. In the first category, about Pitt & Moore's computer server, the application appears to be directed towards an explanation given by Mr Mason for the complete chain of emails between him and Ms Wills not being on the client file subsequently made available to Ms Sharma. The explanation was that there may have been a problem with the firm's computer server at some point in time.

[24] The application asking for information about Mr Mason's wage and time records is directed towards ascertaining when Mr Mason was absent from work for personal reasons and is connected to the third and fourth applications. They seek to ascertain Pitt & Moore's method of dealing with communication at any time when Mr Mason may not have been available.

[25] Before considering the relevance of the information sought in the application it is necessary to record that:

- (a) Pitt & Moore does not dispute that the emails between Ms Wills and Mr Mason were sent and received; and

(b) it has not suggested that there was any delay that meant, for example, the communication fell outside of the time within which a personal grievance could be raised as of right; and
(c) the whole email chain was made available to Ms Wills, and referred to the Authority, before the determination was issued.

[26] As has already been mentioned, the relevance of what is sought by discovery is determined by the scope of the pleadings. The statement of claim describes the circumstances of Ms Wills' meeting and taking advice from Mr Mason. It culminates in a pleading that she made reasonable arrangements with him and he unreasonably failed to act within time. The statement of defence responds to those allegations by disputing, generally, that the circumstances satisfy s 115(b) of the Act and does not raise affirmative defences expanding the nature or extent of the issues to be decided.

[27] Based on those pleadings, what will be relevant to this challenge is any evidence necessary to establish the exceptional circumstances relied on to satisfy the test in s 115(b) of the Act. That is, probably, evidence about the meeting in January 2018 and how it concluded, whether Ms Wills gave any instructions to proceed with a grievance at that meeting or subsequently, and the email correspondence. None of that requires establishing whether Pitt & Moore had computer server problems, and if so when, or to compel the disclosure of Mr Mason's time and wage records over several months, or to supply information about his (then) supervising partner, or how emails were handled during his absence. That information is irrelevant because it is beyond

the scope of the pleadings and will not shed any light on the issue of whether Mr Mason was instructed to act within time and, if he was, why that did not happen.

[28] The application is misconceived and it is dismissed.

[29] Since neither Farmlands nor Pitt & Moore sought to participate there will be no order for costs.

K G Smith Judge

Judgment signed at 11.30 am on 31 August 2020

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