Employment Court of New Zealand

Wilson v Manukau Institute of Technology [2021] NZEmpC 160 (22 September 2021)

Last Updated: 28 September 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2021] NZEmpC 160
EMPC 24/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out part of the proceedings
AND IN THE MATTER	of an application to exclude evidence
BETWEEN	BRIAN WILSON Plaintiff
AND	MANUKAU INSTITUTE OF TECHNOLOGY Defendant

Hearing:	Submissions-only hearing by telephone on 9 and 10 August 2021
Appearances:	T Oldfield, counsel for plaintiff M S King, counsel for defendant
Judgment:	22 September 2021

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL

(Application for order reg 52 Employment Court Regulations 2000, and as to admissibility of evidence)

Introduction

[1] This judgment deals with two issues which were raised for the purposes of an upcoming fixture. The first related to a question as to whether the Manukau Institute of Technology (MIT) complied with previous disclosure orders; and the second related to admissibility issues as to some evidence MIT intends to call. Both applications were opposed. I received submissions at an oral hearing and issued a minute soon

after so the parties could continue with their preparation for the hearing. I now set out my reasons for the conclusions expressed in my minute.

Regulation 52 application

[2] Regulation 52 of the Employment Court Regulations 2000 (the Regulations) provides that where there is a default in disclosure, the Court may make such order as it thinks just, this being without prejudice to the power to make a compliance order.

[3] In this case, Brian Wilson asserted there had been a failure to fully comply with the direction I made in my first interlocutory judgment, when I determined that emails as to his employment status should be disclosed.1

[4] I do not need to repeat what was said in that judgment as to the background. I directed that documents, including emails, which dealt in any way with Mr Wilson's employment status, and any other matter pleaded in para 7(b), (d) and (e) of the statement of claim which related to MIT's belief that Mr Wilson was employed on a casual not permanent basis, were to be disclosed.2

[5] For the purposes of Mr Wilson's subsequent application, I was advised that three digital searches were carried out on MIT's email server, as follows:

(a) "Brian Wilson" AND "Casual", which produced 2,186 emails;
(b) "Brian Wilson" AND "Permanent", which produced 1,354 emails; and
(c) "Brian Wilson" AND "Casual" AND "Permanent", which produced 434 emails.

[6] A review of the emails retrieved from the first two searches was not undertaken. It was decided this would be unreasonably onerous given the volume involved; it was also considered there would be many irrelevant emails.

1 *Wilson v Manukau Institute of Technology* [2021] NZEmpC 85 at [35]–[45].

2 At [45] and Appendix 1.

[7] This approach took into account the Court's acceptance that the particular search it had directed would be onerous.

[8] A review of the emails retrieved from the third search was undertaken. Of the 434 emails reviewed, 21 were relevant. These were disclosed.

[9] A debate then arose between the parties as to whether MIT should review the emails obtained from the first two searches. Since the parties could not resolve this issue, Mr Wilson brought an application under reg 52 of the Regulations.

[10] Mr Oldfield, counsel for the plaintiff, submitted that in the event of non-compliance with that order, MIT should be prevented from relying on the defences it has pleaded at para 7(b), (d) and (e) of the statement of defence. He argued that a similar direction should be made in respect of para 13 of the statement of defence where MIT pleads that Mr Wilson's dismissal "was based on [MIT's] genuinely held understanding that the plaintiff was a casual employee".

[11] As I explained in the first interlocutory judgment, the Employment Relations Authority found that there had been a genuine misunderstanding on MIT's part as to Mr Wilson's status. When considering this issue, I concluded that the documents sought may be relevant to the credibility of MIT's assertion that it genuinely thought Mr Wilson was retained on a casual basis, and, if there was such a misunderstanding, whether this is relevant to the extent of any compensatory award.3

[12] Further elaboration is necessary. The challenge before the Court is brought on a non-de novo basis.4 One aspect concerns the Authority's conclusion that Mr Wilson was entitled to $5,000 for humiliation, loss of dignity and injury to feelings.5 Mr Wilson will contend that this finding was erroneous, because the Authority wrongly focused on the actions of the employer rather than effects of the established grievance on the employee, so that its award was too low and not in keeping with relevant judgments.

3 At [41].

4 Employment Relations Act 2000, s 179(1) and 179(4).

5 *Wilson v Manukau Institute of Technology* [2020] NZERA 523 (Member E Robinson).

[13] If Mr Wilson's argument on this point is correct, then it may be the case that MIT's erroneous belief is not relevant. However, if his argument does not succeed, this factor might be relevant. It is accordingly necessary to analyse the disclosure issues in case it becomes necessary to consider the employer's actions, as well as those of the employee, when assessing the challenge as to compensation.

[14] Counsel for MIT, Ms King, submitted that the extent of work involved in analysing the documents arising from the first two searches would be unduly onerous and not proportionate, having regard to the likely significance of the documents located.

[15] It appears that the manager who held the relevant belief is Paul Hollings, General Manager at the time of Mr Wilson's dismissal. He is to give evidence for MIT.

[16] The documents that were revealed when undertaking the third search dated from 2015. At that time, Mr Hollings had been recently appointed. According to evidence which Mr Hollings will give, the recently disclosed emails which he sent

raised concerns about the high use of casual employees within the Engineering and Trades faculty. He found this concerning from an expenditure perspective. In those emails, he recommended that the issue be addressed, so that relevant employees would be placed on correct contractual arrangements. Mr Wilson was one of the employees referred to in these emails.

[17] Mr Hollings said he flagged these issues with appropriate staff, including Toby George (HR Business Partner), Timhela Wong (Accounts) and James Cannan (Head of School). He anticipated these managers would take responsibility for rectifying the concerns he had raised. He said he would not, in these circumstances, have followed the issue up.

[18] According to his brief of evidence, Mr Hollings will say that when Mr Wilson's employment was terminated in 2018, the 2015 emails did not come to mind; he genuinely believed Mr Wilson was employed on a casual basis.

[19] At the hearing, I raised with counsel whether further, and more refined, searches could be undertaken within the first two categories that had been identified. Additional search terms could be added; furthermore, since the relevant witness, Mr Hollings, did not commence his employment until 2015, date filters could also be added. Ms King said she would take instructions as to whether these further steps might be taken and as to how long would be required to do so.

[20] When the hearing resumed, Ms King confirmed that MIT would undertake such searches, although a further four to six weeks would be required to conduct them, extract the documents located, review for relevance, and compile them for provision to the plaintiff.

[21] Were this to occur, an adjournment of the fixture which had been scheduled for hearing on 17 August 2021 would be necessary. The parties agreed that this was the appropriate way forward.

[22] Accordingly, in the minute I issued on 10 August 2021, I made these directions:

> [3] I ... direct that MIT is to undertake, by the same date, searches for documents with the following search terms, for the period 6 May 2015 to 22 December 2018:
>
> (a) "Brian Wilson" AND "Permanent" AND "Paul Hollings" OR ("Toby George" OR "Timhela Wong" OR "James Cannan"); and
>
> (b) "Brian Wilson" AND "Casual" AND "Paul Hollings" OR ("Toby George" OR "Timhela Wong" OR "James Cannan").
>
> [4] MIT is also asked to use its best endeavours, by the same date, to search
>
> for emails, between 25 May 2018 and 22 December 2018, under the following search terms:
>
> (a) "Brian Wilson" AND "Permanent" AND "Paul Hollings" OR ("Joanne Verry" OR "Kirsten Sargent").
>
> (b) "Brian Wilson" AND "Casual" AND "Paul Hollings" OR ("Joanne Verry" OR "Kirsten Sargent").

[23] Those directions resolved the reg 52 application.

Admissibility issue

[24] The second issue relates to certain paragraphs to be given in evidence by Carolyn Pene, Human Resources Business Partnering Manager for MIT, employed by it since late 2018.

[25] In four paragraphs of her brief of evidence, she intends to give evidence about Mr Wilson's circumstances at the time of his employment in 2011; she will also express an opinion as to the extent of his experience and qualifications.

[26] This evidence is potentially relevant to an issue which flows from the challenge as to how Mr Wilson's starting salary was fixed.

[27] She also proposes to comment on the circumstances of another employee, Mr Murray, when his starting salary was fixed.

[28] For Mr Wilson, it was submitted that if Mrs Pene is permitted to give this evidence, prejudice would arise. The Court would have contextual evidence as to the fixing of Mr Wilson and Mr Murray's starting salaries but not as to 10 other employees in respect of whom a schedule of basic information is to be produced by MIT. The schedule makes reference to their starting salaries but not their experience and qualifications. Mr Oldfield also pointed out that no evidence is to be led

by any MIT manager as to how the starting salaries of these 10 employees were established.

[29] Mr Wilson's employment agreement stated that MIT was to operate a policy in respect of the starting salaries for employees. MIT has confirmed through counsel that it has been unable to locate any "starting step policy" nor any indication that such a policy ever existed.

[30] Accordingly, it will be necessary to review the circumstances of employees other than Mr Wilson in order to establish whether or not MIT operated a practice which acquired the status of being a policy.

[31] Following discussion of these and other issues with counsel, it was agreed that instructions would be taken from MIT as to whether further documentation relevant to the employment processes in respect of the 10 employees could be obtained.

[32] Ms King subsequently advised the Court that MIT expected to be able to locate and collate further evidence with regard to the 10 employees referred to on the schedule. She said this could consist of curriculum vitae, and/or comments from MIT's hiring system, insofar as these are available. It would consider whether any further information is held, which could assist the Court. She said it would take some two weeks for this information to be obtained.

[33] With this material being available to the Court, Mr Oldfield accepted that the extent of prejudice which might otherwise have arisen in respect of Mrs Pene's evidence was not so significant as to require that the evidence should not be admitted.

[34] I note that as Mrs Pene was not directly involved in the fixing of the relevant salaries, submissions as to the weight which should be attributed to her evidence may be raised.

[35] Accordingly, by consent, I directed that MIT disclose any documents relevant to the decisions as to the starting steps of the employees listed in the document which refers to the 10 employees, and dismissed the application to exclude evidence.

Residual matters

[36] To allow MIT to undertake the further searches in disclosure, the parties accepted, as did I, that the fixture for 17 and 18 August 2021 would have to be vacated.

[37] The hearing has now been rescheduled for 7 and 8 October 2021 with a timetable for the filing and serving of updated evidence.

[38] I reserve costs.

B A Corkill Judge

Judgment signed at 12.35 pm on 22 September 2021