

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2014] NZEmpC 196
CRC 13/13
CRC 14/13
CRC 9/14**

IN THE MATTER OF an application for a compliance order

AND IN THE MATTER of an application for directions as to
disclosure

BETWEEN MIA NELSON
Plaintiff

AND TONY WAYNE KATAVICH
First Defendant

AND HALDEMAN LLC
Second Defendant

Hearing: On documents dated 31 March, 29 April, 11, 12, 18, 19, 23, 24,
25 June, 2, 3, 21, 24 July, 2, 11, 12, 16, 19, 23, 24 September, 5,
9 October 2014

Counsel: L Acland, counsel for the plaintiff
R A Moodie, counsel for the defendants

Judgment: 24 October 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This decision deals with applications where the plaintiff asserts the defendants have not given adequate disclosure; and for their part, the defendants contend the plaintiff has not given adequate disclosure.

[2] In the interlocutory decision of 3 February 2014, Judge Couch resolved a challenge brought by the plaintiff to an objection to disclosure made by the defendants; and also resolved an application by the defendants who sought an order

for disclosure of documents by the plaintiff on the grounds that disclosure to that point had been incomplete.¹

[3] Judge Couch summarised the background to the matter as follows:

[2] Mr Katavich is the “managing member” of Haldemann LLC, a company incorporated in the United States of America but operating in New Zealand. Mr Katavich describes the company as “the limited liability vehicle used by myself to conduct my international provisioning, publishing and marketing business from Nelson, New Zealand.”

[3] Through discussion with Mr Katavich, Ms Nelson was employed to work for the business in New Zealand, beginning on 6 June 2011. Ms Nelson says she was employed by Mr Katavich personally. The defendants say she was employed by Haldemann LLC. The Employment Relations Authority determined that the employer was Haldemann LLC. Ms Nelson challenges that aspect of the Authority’s determination. She seeks judgment against Mr Katavich personally. In the alternative, she seeks a conclusion by the Court that her employer was “an unincorporated group of individuals known as *Plantation Trust* and trading under the names Facts and Information LLC and Haldemann LLC.”

[4] Ms Nelson was dismissed in June 2012. She pursued personal grievances that she had been unjustifiably disadvantaged in her employment, that she had been unjustifiably dismissed and that she was owed arrears of wages. These claims were upheld by the Authority which awarded her remedies totalling more than \$35,000. The defendants challenge all of those conclusions and, in the alternative, challenge the quantum of remedies.

[5] In the Authority, Haldemann LLC pursued a claim for damages arising out of alleged misconduct by Ms Nelson in the course of her employment. That claim was dismissed by the Authority. It is renewed in the current proceedings before the Court.

[6] Other issues were also before the Authority but its determination of them is not challenged by any party.

[4] The defendants were ordered to make disclosure of all documents in their possession, custody or control in the following categories:

1. The employer’s PAYE records (IR345) for Ms Nelson;
2. the IRD Employer Registration documents (IR443)² of Ms Nelson’s employer;
3. the document confirming Haldeman LLC’s IRD number;

¹ *Nelson v Katavich & Haldeman LLC* [2014] NZEmpC 8.

² This was a typographical error, the relevant form being an IR334.

4. the document confirming Tony Wayne Katavich's IRD number;
5. documents showing which bank account (New Zealand and/or overseas) is used by the employer to pay Ms Nelson;
6. bank account information showing payments to Ms Nelson; and
7. the deed of trust for a trust known as Plantation Trust.

[5] The plaintiff was ordered to make further and better disclosure of all documents in her possession, custody or control in the following categories:

1. All documentation related to Ms Nelson's employment with John Casablanca Modelling and Career Center;
2. all documentation related to the hitlerhatesbabies@gmail.com Gmail account, created by Ms Nelson; and
3. all documentation relating to postings made on the www.pissedconsumer.com website upon suspension of Ms Nelson and then post-termination of employment by Ms Nelson.

The plaintiff's application

[6] Thereafter the plaintiff issued proceedings seeking a compliance order requiring the defendants to comply with the order set out above.

[7] According to the affidavit evidence filed in support, some documents had been disclosed since the making of the Court's orders. But the plaintiff contended that proper disclosure of documents in categories 4, 5 and 6 had not been provided. For its part, the defendants pleaded that disclosure in respect of the disputed categories had been given.

[8] I conducted a telephone directions conference with counsel for the parties on 16 May 2014. After hearing from counsel I issued a minute directing the defendants to provide further documents in respect of each of the subject categories.

[9] On 13 August 2014, I conducted a further telephone directions conference with counsel, and was advised that the only category in which there was an outstanding issue related to category 6. So as to resolve that issue I directed the filing of submissions and evidence if any.

[10] Documents in category 6 are potentially relevant to an issue in the challenge as to the source and quantum of wages paid to Ms Nelson. Mr Katavich says that Haldemann LLC's bank, Citibank, made "bulk" wire transfers of funds for wages for several staff members on any given occasion. Each transfer was made from a Haldeman LLC account; the funds for Ms Nelson were ultimately credited to her ASB bank account for a time and then to her Bank of New Zealand account.

[11] For the plaintiff it was submitted:

- (a) The defendants' counsel had suggested that the bank information, which would confirm what sums were credited, was in fact in the plaintiff's control rather than the defendants' control. This was because it was asserted the plaintiff would have received from her bank an "inward transfer notice" for each payment from her employer. Counsel submitted that email advice had been received from the Bank of New Zealand which confirmed that confirmation of an inward telegraphic transfer would only be given when the overseas bank sent the customer's address with the telegraphic transfer message; this would only be done if the customer requested such. The evidence suggested that Citibank had not sent any address for Ms Nelson, and therefore no advice in that regard was given to her. As it was put by the bank officer: "the funds would literally just have been received by ANZ Bank and then deposited direct into her account [at BNZ] as per the instructions from Citibank".

- (b) It was submitted that the category 6 documents concerned the plaintiff's allegation that her employer unlawfully made a deduction from her wages before transferring money into her bank account. The plaintiff's bank statements, which had been disclosed to the defendants, showed the plaintiff received in her bank account \$27 less than the amount shown in her payslips.
- (c) What was sought was "the defendants' side of those transactions" – i.e. the employer's bank statements detailing payments made to the plaintiff. This would show whether or not the full amount of wages was transferred.

[12] For the defendants it was submitted in response:

- (a) Discovering "bank account information showing payments to Ms Nelson" had proved problematic, because such documentation does not exist. This was because the second defendant ran a payroll system where bulk wire transfer payments from the employer's account were made for up to six staff members at a time.
- (b) These were made to a New Zealand receiving bank which received inward transfers on behalf of the employees' banks.
- (c) Consequently, the second defendant's bank statement did not provide information about actual transfers into Ms Nelson's account by her own bank.

[13] I have reviewed the evidence provided by the parties. It is apparent from the documentation obtained from the banks involved that the second defendant's bank, Citibank, made wire transfers to a receiving bank which divided those funds and on-paid them to particular New Zealand banks for individual staff members. Consequently all that is recorded on the Citibank bank statements were withdrawals from the second defendant's account of the amount of each such wire transfer, and not the amount ultimately credited to the individual employee from that employee's own bank.

[14] As Judge Couch observed in his judgment which dealt with disclosure issues, where disclosure has been made and the party making that disclosure swears on oath that it is complete, the Court will usually not make an order for further disclosure unless there is good reason to believe that other documents exist which ought to have been disclosed.³

[15] I am not persuaded that there is further bank account information showing payments to Ms Nelson which should be the subject of a compliance order, because:

- (a) On the affidavit evidence there is no such further bank account information which is within the power, possession or control of the defendants to produce.
- (b) In any event, the issue of concern to the plaintiff is whether the employer unlawfully made deductions from her wages before funds were transferred into her bank account. She will be able to give evidence as to how much was credited to her bank account on each relevant occasion; that evidence will assist in determining whether she received her due entitlements. If not, the Court may need to draw inferences from such evidence as is available as to why that is the case.

[16] I reserve costs in respect of the plaintiff's application for determination at the conclusion of the proceeding.

Defendants' application

[17] The defendants seek "discovery orders" in seven categories. The application is made under reg 52(1) of the Employment Court Regulations 2000 (the Regulations). It relevantly provides:

If any party who is required by any of these regulations, or by any notice given or order made under the authority of any such provision, to disclose any documents, or to produce any documents for the purpose of inspection, fails to comply with any provision of that regulation or with that order, as the

³ At [25].

case may be, then, without prejudice to the power of the court to make compliance orders, the court may make such order as it thinks just.

[18] Essentially the defendants' application seeks further and better disclosure. The Court has jurisdiction to consider such an application.

[19] The first four categories are related. They arise from an assertion in the defendants' statement of defence and counter-claim where it is contended that Ms Nelson falsified her CV, and provided misleading information to her employer as to her previous experience. The defendants plead that she never worked at John Casablancas Modelling and Career Center (John Casablancas), contrary to an entry in her CV that she did.

[20] In her affidavit evidence Ms Nelson relevantly stated:

8. ... In 2010 while I was studying in Seattle USA, I worked as an assistant to Jackson Powell who took photographs for the modelling agents John Casablanca. I worked on Sundays. It was pretty casual. I was paid cash which I basically treated as pocket money.

...

14. In terms of disclosing documentation related to John Casablanca and Jackson Powell, I have already disclosed all of the documents I hold concerning that work. Those documents are number 1 to 6 in the list of documents my lawyer sent to the defendants on 16 July 2013. Copies of these documents have already been sent to the defendants and [they] were also discovered as part of the High Court defamation case Tony brought against me and has subsequently withdrawn. The defendants have all these documents.

15. Just to be clear, those documents include: some emails I hadn't deleted between me and Jackson in 2010; some email correspondence between me and Jackson in April 2013 after [Mr Katavich] first raised this allegation against me; and some documents showing photograph slides of models I happened to have kept in my email inbox.

16. I have no other documentation to disclose. ...

[21] The position in summary therefore is that Ms Nelson has stated on oath that she has provided such documentation as she has; she says she worked for John Casablancas and Jackson Powell, but that the work which was carried out was of a casual nature and for cash. Mr Katavich has produced evidence from representatives of John Casablancas denying that she worked for that entity.

[22] The first category for which disclosure is sought relates to Ms Nelson's employment with John Casablancas; the second category relates to Ms Nelson's state and/or federal income taxation and/or social security records for the financial year in which he claims she was employed by John Casablancas.

[23] The third category relates to Ms Nelson's employment with Jackson Powell between February and August 2010; and the fourth category relates to her state and/or federal income taxation and/or social security records in respect of her employment with Jackson Powell.

[24] It is contended for the defendants that Ms Nelson has the ability and authority to request copies of relevant documentation from any former employer. Specific reference is made to bank statements she operated in America in 2010; and that if she no longer possesses those bank statements she has the authority to request copies of them from her American bank/s to enable her to provide disclosure in this proceeding. It is also submitted that she has control of her taxation and/or social security records whilst working in America, and that if she no longer possesses these, she has the authority to request copies of them from the state and federal taxation authorities and her former employers.

[25] Given Ms Nelson's evidence that the work she undertook was casual and for cash, I am not satisfied that it is now necessary to order Ms Nelson to disclose further documents regarding the earlier employment. It is inherently unlikely the documents sought will contain information which will be of assistance to the Court. Furthermore, Ms Nelson herself has given evidence on oath to state that there are no further documents of relevance.

[26] The next category relates to Ms Nelson's bank records showing all and any salary, fees or other payments for services for the period when she was employed by either the first or second defendant, together with all and any bank deductions resulting from any bank fees or charges, or exchange rate adjustments.

[27] I have previously set out the submissions made for Ms Nelson, which suggests that advice of international telegraphic transfers was not provided to her.⁴ The plaintiff has made disclosure of her bank statements, as the defendants acknowledge in their amended notice of application.

[28] I am not persuaded that an order for further and better discovery in respect of this category should now be made.

[29] The final two categories are in respect of:

- (a) Any resumes, covering letters or other documentation submitted to Enterprise Recruitment and/or the Invercargill City Council in support of an application that resulted in her being employed by that body.
- (b) All documentation including but not limited to correspondence in respect of employers or employment agencies with respect to references of former employers, Facebook posts, LinkedIn posts and any other documentation in which she has made reference to Haldeman LLC (including Facts and Information Limited) or Tony Wayne Katavich being, or having been, her employer.

[30] In support of the application for documentation in these two categories, it is contended by the defendants:

- (a) Ms Nelson's pleading in this proceeding that she was employed by Mr Katavich and not Haldeman LLC is inconsistent with the content of her Facebook and LinkedIn internet posts, which identify Facts and Information Limited (the previous name of the entity which is now Haldeman LLC) as her previous employer.
- (b) After termination, she obtained employment with the Invercargill City Council through an employment agency called Enterprise Recruitment; it is submitted she would have included in her resume

⁴ At [11(a)] above.

and other documentation the identity of her immediately previous employer.

(c) Such evidence would be relevant for the purposes of the proceeding.

[31] It is submitted for Ms Nelson that the documents sought for disclosure are irrelevant to the identity issue, having regard to principles that apply when considering the identity of a correct employer in previous cases, such as *Colosimo v Parker*.⁵ These principles include:

- The onus of proving the identity of the employer rests on the employee (where the employee is putting that fact in issue).
- The standard of proof is on the balance of probabilities.
- The question of who the employer was must be determined at the outset of the employment.
- It is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties; the question to be asked is who would an independent but knowledgeable observer have said was the employer?
- Failure to notify or make an employee aware of the identity of the employer is not conclusive.

[32] It is submitted that what Ms Nelson wrote would not assist the objective assessment which the Court will need to undertake. The fact she may have written “Haldeman LLC” was equivocal, because it was her belief this was Mr Katavich’s trading name in New Zealand.

[33] It is submitted that what is relevant is what passed between the parties, rather than what was communicated to third parties.

⁵ *Colosimo v Parker* (2007) 8 NZELC 98,622 (EmpC) at [28]-[37]. See also *Wilson v Bruce Wilson Painting and Decorating Ltd* [2014] NZEmpC 83 at [13]-[16].

[34] Ultimately, it is likely that the Court will need to consider a range of evidential points so as to determine the identity of the employer. Part of the analysis may require credibility assessments of the witnesses who are called. At this early stage I conclude that what Ms Nelson said to the third parties after the termination of her employment could be relevant for credibility purposes.⁶

[35] On that basis, I direct disclosure of the information described in [29] above, within 21 days.

[36] Costs with regard to the defendants' application are reserved to be determined at the conclusion of the proceeding.

B A Corkill
Judge

Judgment signed at 3 pm on Friday 24 October 2014

⁶ See Evidence Act 2006, s 7(3) where it is states that evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.