IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 224
ARC 22/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for further and better disclosure of documents
BETWEEN	SHABEENA SHAREEN NISHA (NISHA ALIM) Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant

Hearing:	By affidavits and memoranda of submissions filed on 15 September, 7 and 28 October, and 7, 12 November and 28 November 2014
Appearances:	AF Drake and B Nicholson, counsel for plaintiff J Douglas, counsel for defendant
Judgment:	4 December 2014

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

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[1] This interlocutory judgment deals with questions of disputed document disclosure between the parties. The plaintiff had applied separately but for disclosure orders against a non-party, the Service & Food Workers Union Nga Ringa Tota Inc (the SFWU). That disclosure process was able to be undertaken by agreement with the union and without the need for court orders. This judgment deals, therefore, only with the document disclosure dispute between the parties.

[2] The dispute between the parties is not untypical these days and reflects not so much the identity or nature of documents sought, but focuses on the electronic methodology to be used by the party required to give disclosure. This, in turn,

generates arguments over such things as defined search terms, the breadth of databases to be searched, the expertise of the persons undertaking such electronic searches, and the like. This is the new face of document disclosure in litigation.

[3] As indeed it was at first instance, these proceedings are the sort which are dealt with by the Employment Relations Authority on a daily basis and without inter-parties and non-party disclosure of documents, at least usually and to the extent now sought. Not only must the documents sought be relevant to the proceeding, but their nature and quantity, not to mention the costs associated with their discovery, must be proportionate to the claims brought.

[4] It is necessary initially to define the questions in issue between the parties by reference to their pleadings and the determination of the Employment Relations Authority to which these proceedings are a challenge .

[5] The plaintiff's claim against the defendant("LSG") is now set out in its first amended statement of claim filed on 11 April 2014. It is a challenge by hearing de novo to a determination of the Authority dated 15 October 2013.[1] Ms Nisha (also known as Nisha Alim and to whom I will refer as Ms Alim) was employed from 10 November 2005 until 22 February 2011 by a company called PRI Flight Catering Limited (PRI) which traded as Pacific Flight Catering (PFC). The plaintiff was initially a catering assistant but subsequently became a supervisor with PRI. From 23 February 2011 to 11 January 2012 the plaintiff was employed by the defendant, having elected to transfer in her employment from PRI to LSG pursuant to the relevant provisions of Part 6A of the Employment Relations Act 2000 (the Act).

[6] The plaintiff alleges that shortly before the date of her transfer, PRI increased her salary and leave entitlements. The plaintiff says that the terms and conditions of her employment by PRI were contained in a collective agreement entered into between the company and the SFWU. Expressed terms of that collective agreement included an hourly rate of pay of $18.03 as a supervisor, overtime pay calculated at the rate of time and a half for the first five hours and double time thereafter, call-

[1] *Alim v LSG Sky Chefs New Zealand Limited* [2013] NZERA Auckland 472.

back pay calculated at the aforementioned overtime rates, and service pay calculated by reference to the plaintiff's start date.

[7] Ms Alim's first cause of action is for breach of the PRI collective agreement by LSG which she says LSG inherited statutorily. The plaintiff says that it failed or refused to pay her in accordance with the minimum requirements of the PRI collective agreement during her employment with it as required by Part 6A of the Act. In addition, the plaintiff claims that the defendant underpaid her for untaken leave during the period of her employment.

[8] The plaintiff's second cause of action against the defendant is for unjustified constructive dismissal.

[9] The plaintiff's third cause of action is for breach of the statutory requirements of good faith.

[10] Fourth, the plaintiff claims that the defendant failed to provide her with wage and time records.

[11] The plaintiff's fifth cause of action is for breach of relevant sections of Part 6A of the Act requiring the defendant to employ the plaintiff on the same terms and conditions as applied to her immediately before her statutory transfer to the defendant.

[12] This is a claim by a single former employee. The principal cause of action is for breaches of her employment agreement. Remedies claimed are:

- arrears of remuneration amounting to $602.54;
- arrears of overtime amounting to $866.32;
- for "additional pay" of $622.04;
- unpaid bereavement leave amounting to $27.10;

- unpaid service pay of $1241.01
- unpaid outstanding leave amounting to $2,728.42;
- unpaid "accruing" leave amounting to $504.94; and
- unpaid "alternative leave" amounting to $19.60

[13] Together, these monetary claims total $6,611.97.

[14] For the plaintiff's claim for unjustified constructive dismissal, she claims a sum equivalent to three months' wages calculated as an hourly rate of $18.03[2] and compensation under s 123(1)(c)(i) of the Act in the sum of $15,000.

[15] The remaining causes of action seek declarations and monetary penalties, although no sum is specified for the latter.

[16] Given the modest monetary remedies claimed by the plaintiff, the costs which must have been incurred in pursuing this and other interlocutory issues, not to mention associated litigation in this and other courts involving LSG and PRI, mean that this case on its own must now be uneconomic and that there are bigger issues at play between these two corporate entities.

[17] The defendant's statement of defence was filed on 13 May 2014. It denies the essential allegations of unlawful conduct made against it. No affirmative defences are raised by the defendant, nor are there any counterclaims made by it against the plaintiff.

[18] The other source of relevance about the proceedings is the determination of the Authority in respect of which this is a challenge. The Authority found entirely in favour of LSG in that forum.

[2] Assuming, for the purposes of this judgment, that for a 40 hour working week, this would amount to less than $10,000.

[19] At [26] of its determination the Authority referred to evidence given in associated High Court proceedings involving PRI affecting Terry Hay, one of the PRI owning entities who is said to have made decisions about the employee information supplied by PRI to LSG. The plaintiff says that LSG is likely to have relevant documents sent to or from Mr Hay dealing with the terms and conditions of employment of employees who transferred from PRI to LSG, including the plaintiff.

[20] In Ms Alim's case the Authority remarked[3] that the evidence heard by it "… strongly indicates … that payroll information provided by Pacific [PRI] to LSG had been tampered with" or "deliberately hijacked."

[21] The following is a brief chronology of the relevant events in the document disclosure process between the parties.

[22] On 28 May 2014 the plaintiff gave the defendant a first notice requiring disclosure of documents. The plaintiff sought disclosure of, and access to, all documents concerning the plaintiff's employment relationship with the defendant in regard to payroll matters and referred to the names of 15 specified persons who may have created, been the recipients of, or were otherwise affected by, those records. The plaintiff sought the defendant's records (including data logs) relating to the use of her "swipe card". She sought all communications between the defendant and its Hong Kong-based regional office and, in particular, nominated the same 15 named individual managers or managerial personnel referred to above. Similar records were sought in relation to communications between the defendant and its German-based head office and an associated company called LSG South America GMBH.

[23] Next, the plaintiff sought all communications between the defendant and the SFWU relating to the plaintiff and named, in particular, six persons associated with the union. The plaintiff sought "all visitor logs" (I assume relating to LSG's premises) relating to meetings with the SFWU including with the same six named union officials.

[3] At [30].

[24] Penultimately, the plaintiff sought access to documented communications between the defendant and PSG Payroll Ltd and named two particular persons who may have been the subject of those communications.

[25] Finally, the plaintiff asserted:

> In respect of all of the above, the plaintiff is one member of the group of transferring employees. Therefore, all communications relating to the group of transferring employees will necessarily relate to the plaintiff and must be disclosed.

[26] By letter dated 7 July 2014 the defendant's legal advisers responded to the plaintiff's solicitors enclosing a list of documents and further information about questions of disclosure.

[27] On 31 July 2014 the plaintiff applied for "disclosure orders" seeking an order that the defendant comply with her 28 May notice requiring disclosure. The plaintiff said that the defendant had provided inadequate disclosure. On the same date, 31 July 2014, counsel for the plaintiff filed a detailed memorandum in support of the plaintiff's application.

[28] On 11 August 2014 the plaintiff filed an amended application for disclosure orders which narrowed the orders sought to the following:

> a That the defendant instruct its IT department to carry out full and complete IT searches of its computer systems using the keywords set out below within 7 days:
>
> i 'Nisha', 'Nisha Alim', 'NA', 'PRI', 'PFC', 'Pacific', 'PRI Flight Catering', 'Pacific Flight Catering', '6A transfer', '6A transferees', 'Terry Hay', 'SFWU', 'Union', and 'Service and Food Workers Union'; …

[29] A memorandum from counsel for the plaintiff filed on 11 August 2014 confirms that this application relates solely to her challenge to the Authority's substantive determination under court file ARC 22/14.[4] The plaintiff had earlier filed a challenge to an interlocutory or preliminary determination issued on 22 July 2013 by the Authority in which the Member refused to recuse himself.[5] The Court

[4] Above, n 1.
[5] *Alim v LSG Sky Chefs New Zealand Limited* [2013] NZERA Auckland 312.

directed, in an interlocutory judgment, that this non-recusal challenge was to be stayed until this proceeding, the plaintiff's challenge to the Authority's substantive determination, has been decided.

[30] The plaintiff has confirmed in a subsequent memorandum the significantly narrowed terms of the order now sought which does not include, for example, that the plaintiff's nominated independent computer consultant undertake or supervise the document-search exercise, the extended 'specified named person' search parameters, or an extension of those parameters to include particular overseas offices of LSG.

[31] Even on this now narrowed basis, the Employment Court Regulations 2000 (the Regulations) do not make express provision for applications of these sorts. In these circumstances, the Court is thrown back on reg 6 which provides as follows:

> **6 Procedure**
>
> (1) Every matter that comes before the court must be disposed of as nearly as may be in accordance with these regulations.
>
> (2) If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the court must, subject to section 212(2) of the Act, dispose of the case—
>
> (a) as nearly as may be practicable in accordance with—
>
> (i) the provisions of the Act or the regulations or rules affecting any similar case; or
>
> (ii) the provisions of the High Court Rules affecting any similar case; or
>
> (iii) the provisions of the rules (other than those on registrable Australian judgments) in the Trans-Tasman Proceedings Regulations and Rules 2013, but only insofar as the case is or involves a proceeding in which an initiating document is to be or has been served on a defendant in Australia under section 13 of the Trans-Tasman Proceedings Act 2010; or
>
> (b) if there are no such provisions, then in such manner as the court considers will best promote the object of the Act and the ends of justice.

[32] In the absence of any relevant provisions in the Act or elsewhere in the Regulations, the first point of call is therefore the High Court Rules affecting any similar case. In this regard, the proceeding is materially no different to a civil claim brought in the High Court and covered by its procedural rules.

[33] Finally, if the orders sought are not able to be dealt with in accordance with relevant High Court Rules, this Court must revert to r 6(2)(b) and deal with it "… in such manner as the Court considers will best promote the object of the Act and the ends of justice".

[34] Turning first to the High Court Rules, Part 8, Subpart 1 *(Discovery and inspection)* addresses these issues as follows.

[35] Rule 8.2 (Co-operation) provides:

> **8.2 Co-operation**
> (1) The parties must co-operate to ensure that the processes of discovery and inspection are—
> (a) proportionate to the subject matter of the proceeding; and
> (b) facilitated by agreement on practical arrangements.
> (2) The parties must, when appropriate,—
> (a) consider options to reduce the scope and burden of discovery; and
> (b) achieve reciprocity in the electronic format and processes of discovery and inspection; and
> (c) ensure technology is used efficiently and effectively; and
> (d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.

[36] Rule 8.14 ("Extent of search") of the High Court Rules provides some guidance as to the obligations of a party against whom discovery or disclosure is sought. It provides:

> **8.14 Extent of search**
> (1) A party must make a reasonable search for documents within the scope of the discovery order.
> (2) What amounts to a reasonable search depends on the circumstances, including the following factors:
> (a) the nature and complexity of the proceeding; and
> (b) the number of documents involved; and
> (c) the ease and cost of retrieving a document; and
> (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.

[37] Rule 8.19 is also relevant to the nature and extent of the application now made to the Court by the plaintiff. It provides:

8.19 Order for particular discovery against party after proceeding commenced

If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—

(a) to file an affidavit stating—

(i) whether the documents are or have been in the party's control; and

(ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and

(b) to serve the affidavit on the other party or parties; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[38] Because the plaintiff's applications (at least as addressed in submissions) include one for the appointment of an independent expert to search the defendant's computer systems, and the defendant has submitted as a preliminary point that the Court has no power to make such an order, consideration must be given to whether the High Court Rules allow the making of such orders generally.

[39] Rule 9.34 falls under Part 9 (Evidence), *Subpart 4 (Inspection and testing)* and provides:

9.34 Order for inspection, etc

(1) The court may, for the purpose of enabling the proper determination of any matter in question in a proceeding, make orders, on terms, for—

(a) the inspection of any property:

(b) the taking of samples of any property:

(c) the observation of any property:

(d) the measuring, weighing, or photographing of any property:

(e) the conduct of an experiment on or with any property:

(f) the observation of a process.

(2) An order may authorise a person to enter any land or do anything else for the purpose of getting access to the property.

(3) In this rule, property includes any land and any document or other chattel, whether in the control of a party or not.

[40] Subpart 5 (Experts) of Part 9 provides at r 9.36:

9.36 Appointment of court expert

(1) In a proceeding that is to be tried by Judge alone and in which a question for an expert witness arises, the court may at any time, on its own initiative or on the application of a party, appoint an independent expert, or, if more than 1 such question arises, 2 or more such experts, to inquire into and report upon any question of fact or opinion not involving questions of law or of construction.

(2) An expert appointed under subclause (1) is referred to in this rule and in rules 9.37 to 9.42 as a court expert.

(3) A court expert in a proceeding must, if possible, be a person agreed upon by the parties and, failing agreement, the court must appoint the court expert from persons named by the parties.

(4) A person appointed as an independent expert in a proceeding under rule 9.44(3) may not be appointed as a court expert unless the parties agree.

(5) In this rule, expert, in relation to a question arising in a proceeding, means a person who has the knowledge or experience of, or in connection with, that question that makes that person's opinion on it admissible in evidence.

[41] The parties disagree about what constitutes a reasonable search in this case. The plaintiff's original position was that the defendant should be directed to carry out a full and complete search of all its computer systems, conducted or at least supervised by someone appropriately qualified to do so, and by reference to suitable search terms. The plaintiff said that the defendant has a large IT department and it would not be disproportionate for such a search to be directed. The plaintiff said that it was inadequate for the defendant to request, as she contends it has done to date, individual employees to conduct computer searches of their own files. The plaintiff said that there was no or insufficient evidence about those individual employees' skills or qualifications or about what search terms had been used by them.

[42] The plaintiff's position originally relied on its expert witness and proposed independent computer consultant, Michael Spence, who gives evidence about the process of conducting what he describes as "proper computer searches" including about the nature of information that can be recovered. Mr Spence says that the various options proposed would be informed by specific "search criteria". These would include details of the types of documents and correspondence required to be disclosed; specific date parameters for the search period; a list of key words to inform the search; and details of any specific documents.

[43] In its notice of opposition, filed on 7 October 2014, the defendant says that the scope of disclosure sought by the plaintiff, and the draft order submitted at the Court's request, are too broad.

[44] The defendant submits first that the plaintiff may, in law, only seek orders for compliance that the defendant locate, list and make available relevant documents or classes of document. The defendant says that the plaintiff may not seek orders for "search terms" as outlined in its draft order.

[45] The defendant also seeks a reasonable period of time within which to carry out relevant searches and to locate and list any remaining relevant documents in its possession or control. The defendant does not oppose carrying out a search of its computer systems per se, provided that it has a reasonable time within which to compile the results of those searches and lists of any relevant documents. Nor does the defendant object to this search being carried out by someone appropriately qualified to do so but considers that its IT manager, Tinu Kochery, is so qualified.

[46] The defendant opposes any requirement to carry out unreasonable computer searches which are disproportionate to the nature of the case and are unlikely to assist in the location of relevant documents.

[47] In particular, the defendant submits that the inclusion of "Terry Hay" as a search term is inappropriate. It says that Mr Hay had no direct relevance to the plaintiff's employment with LSG, at least so far as the defendant is aware. The defendant says that Mr Hay may have had something to do with whether Ms Alim was re-employed and/or subsequently dismissed after her employment with LSG ended, but says that this can only possibly be an issue concerning remedies in this litigation. The defendant says that Ms Alim herself is the best person to locate, list and make available any documents relating to Mr Hay directly from PFC as she is entitled to access these documents under the Privacy Act 1993.

[48] Next, the defendant says that terms in the draft order "NA" and "Terry Hay" are too generic, irrelevant, or would produce too many results, and so should not be included in any orders that the Court may make. In particular, the defendant says

that the search term "NA" is too broad to effectively capture the required information and would produce large amounts of irrelevant information.

[49] The defendant then objects to the inclusion in the draft order of non-documentary items including the suggestion that "smart phones" and the defendant's "telephone system" be searched.

[50] The defendant's Mr Kochery gives evidence of conducting forensic computer searches on LSG's computer systems from about mid-July 2014 at the request of LSG's Human Resources Manager, Marie Park. Mr Kochery says that he searched "the entire LSG server" and "the individual computers (local drives) and emails of the named individuals in the [original] notice requiring disclosure dated 28 May 2014." Mr Kochery says that, for about a month from mid-July to mid-August 2014 he spent between 60 and 70 hours on this search and was assisted by a desktop support technician at LSG. He deposes to having undertaken his searches based on the key words proposed by the plaintiff, with the exception of "NA" which brought up a substantial number of irrelevant and unmanageable documents. Mr Kochery also deposes to the identities of the persons at LSG whose individual computers were searched. He says that he did not search in the computer of HK Cheung and Corina Cheung because LSG in New Zealand does not have control of, or access to, company files in other countries. Mr Kochery says that he did not search LSG's telephone system and deposes to the fact that Jaap Roest is the only person on the list with a smart phone (a Blackberry). Mr Kochery says that any emails or documents on Mr Roest's Blackberry would be picked up by a search of his computer as was undertaken.

[51] Mr Kochery deposes to LSG not archiving data but, rather, retaining it on its server until data is deleted. He says that LSG cannot search for permanently deleted files.

[52] As to LSG's visitor log system, Mr Kochery says that this was introduced in a digital form in about March 2012. Before that time, LSG used visitor logs in a book format in which visitors wrote manually the details of their visit. Mr Kochery says

that he did not search the digital visitor logs as any records would have been created outside the relevant timeframe when Ms Alim was employed.

[53] Ms Park is LSG's Human Resources Manager. She, too, has filed an affidavit in relation to this application. Ms Park says that documents for the Authority were searched manually on physical files but that computer-based searches have now also been commenced in respect of proceedings in this Court. Ms Park's evidence is that these digital searches have been undertaken using narrower search terms than were sought by the plaintiff.

[54] Ms Park deposes to not having undertaken computerised searches of information about Ms Alim held by LSG in its accounting system and associated management reports created after her employment ended. That is said to be because such records relate to the costs to LSG of defending Ms Alim's claims which will not assist to prove or disprove them.

[55] As to Ms Alim's claim to disclosure of "pay enquiry" or "pay query" forms", Ms Park says that these were hard copy (paper) documents which were completed in handwriting by employees and passed to their supervisors before being remitted to LSG's payroll office, when an employee believed that he or she had not been paid correctly. LSG's process was then to review the relevant pay and, if appropriate, to correct it. Ms Park says that there are no handwritten pay inquiry forms in relation to Ms Alim that it can locate which would indicate to it that none was completed or submitted by her. Ms Park says that computer searches of its records would not assist because if there were no paper forms generated, there would not be any electronic record created. Ms Park deposes to her belief that LSG carried out a thorough manual review of files relating to Ms Alim during the Authority's investigation. Nevertheless, Ms Park says that in respect of these proceedings, LSG has carried out "an initial [computer] search" based on the search terms proposed in the plaintiff's solicitor's first letter and notice requiring disclosure. Ms Park says that LSG has produced a list of documents for inspection but that the plaintiff's response was to seek a wider search and not to inspect the documents initially listed.

[56] As to the search terms "Terry Hay" and "NA", Ms Park deposes that these are unlikely to produce anything relevant to Ms Alim's case. That is said to be because Mr Hay had no part in the plaintiff's employment with LSG, although he may possibly have had dealings in relation to the remedies the plaintiff seeks because Ms Alim may have been re-employed by PRI and subsequently dismissed by Mr Hay.

[57] There has been a good deal of to-ing and fro-ing about disclosure by the defendant but the nub of the disclosure dispute between the parties is now set out in their counsel's written submissions dated 28 October, 7 and 12 November 2014 respectively.

[58] There are now essentially three issues to be decided about the nature, scope and methodology of further document disclosure by the defendant. They can be summarised as being:

- whether the search for documents should extend beyond the defendant's computers' and service's databases to "smart phones" and its telephone system;

- the search terms to be used in the search of the defendant's documents; and

- whether an independent consultant proposed by the plaintiff should undertake the search and, if so, how.

[59] The Employment Court Regulations do not define what is a "document" referred to in rr 7-52 (inclusive). To do so in this case is unnecessary for the most part because the defendant accepts that it is obliged to search for and, where appropriate, disclose electronic records kept on, or otherwise locatable through, its computer systems and their servers (storage and distribution mechanisms). Nor is it contested that relevant contents of its "smart phones" are not electronic documents. The defendant does, however, contest that the contents of its "telephone systems" constitute documents, in part because it says that it is unclear what sorts of records held in its telephone systems are sought; and, second, that the document disclosure

process does not extend to documents which would have to be created from other records for the purpose of disclosure as it apprehends would be the case if there was to be discovery in relation to its telephone systems.

Decision

[60] I propose to apply r 8.14 of the High Court Rules (set out at [36] of this judgment) to the orders sought by the plaintiff for further and better disclosure. That means that the defendant will be required to make a reasonable search for documents defined by the criteria set out in sub-r (2).

[61] Dealing first with the electronic search terms, the following are agreed between the parties to be appropriate electronic search terms: "'Nisha", "Alim", "PRI", "Pacific", "PRI Flight Catering", "Union" and "Service and Food Workers Union". The decision on the following disputed search terms takes into account the foregoing concessions as well as the nature of the proceedings and the reasonableness in all the circumstances of requiring such terms to be used.

[62] The plaintiff was known by several different combinations of her names. Given that the words "Nisha" and "Alim" are agreed search terms, it is logical that the search term "Nisha Alim" is likewise appropriate and must be used by the defendant.

[63] "NA" is an abbreviation of the plaintiff's name. I accept that there is evidence, from other proceedings involving similar issues, that the defendant sometimes initialised employees' names. It is possible to search electronically using only the capitalised letters "NA" alone so as to eliminate any other combination of those letters in other words, and "NA" is therefore a search term which can and should be used.

[64] "PFC" are the initials of the trading name of PRI Flight Catering Limited, "Pacific Flight Catering". There was some suggestion, at least at the time with which these events are concerned, that the defendant was employed by Pacific Flight

Catering which would probably have been initialised as PFC in correspondence so that this will be an appropriate search term.

[65] As just noted, "Pacific Flight Catering" was the trading name of PRI Flight Catering Limited and this search term is both quite specific and appropriate. It should be used.

[66] With regard to "6A transfer", the plaintiff was one of a number of employees whose employment was transferred statutorily from PRI Flight Catering Limited trading as Pacific Flight Catering to the plaintiff pursuant to the provisions Part 6A of the Act. The defendant accepts that the search phrase "6A trans" is appropriate so that it is logical that "6A transfer" and "6A transferees" should also be search terms and must be so.

[67] "Terry Hay" was the person in PRI Flight Catering Limited/Pacific Flight Catering who was involved principally in the Part 6A transfers of employees between the companies, including the plaintiff. I accept that there may have been documents in which Mr Hay's name was mentioned dealing with the issue of the plaintiff's correct rate of pay which is the subject of this proceeding. "Terry Hay" is an appropriate and necessary search term.

[68] "SFWU" are the often-used initials of the Service and Food Workers Union Nga Ringa Tota Inc which was, at relevant times, the plaintiff's representative. Given that the search terms "Union" and "Service and Food Workers Union" are agreed to, logically "SFWU" must also be a search term.

[69] The foregoing directions do not mean, of course, that all documents containing any one or more of those search terms must be disclosed. They must be documents which are relevant to the proceedings between the parties as pleaded and as was dealt with in the Authority. In respect of such documents that these search terms may turn up that do not refer to the plaintiff herself, relevance will also need to be determined by whether the contents refer to other employees who were likewise transferees or potential transferees or otherwise to the issues to be determined by the case.

[70] To ensure the efficient and effective conduct of such electronic searches, case-sensitive combinations of the search terms must be applied. Capital letters are not infrequently transposed to lower case so that, for example, "Nisha" may also appear as "nisha" and so on. In each case set out above where the search term appears using capitalised letters, the lower case same letters should form the basis of a further and alternative search term. However, where there are repeated capital letters in the search term or a combination of capital and lower case letters, all capitalised letters in the search term should be transposed to lower case as an alternative. So, for example, in relation to the search terms "PRI", the alternative lower case search would be "pri". There would be no requirement to further search the multitudinous combination of capital letters and lower case letters such as, for example, "Pri" and, in the case of multiple words ("PRI Flight Catering"), the alternative search term would only be "pri flight catering".

[71] Turning to the second question of what I will call "telephonic records", the plaintiff submits in effect that a search of the company's "telephone system" and "smart phones" is a subset of the search of its entire computer system because such devices are an integral part of that system. So, the plaintiff says, in the same way that laptop computers are an integral part of the defendant's computer system, so too are "smart phones" which have the capability of sending and receiving emails. The plaintiff says that the defendant's telephone system memory forms part of this system as would, for example, a printer's memory.

[72] Dealing with the defendant's objection to having to create documents in this exercise, the plaintiff says that the defendant's telephone system's memory will have recorded all incoming and outgoing calls in the form of a log the production of which does not involve the creation of new documents, so that this information is disclosable. The plaintiff says, by analogy, that there can be no objection to printing out hard copies of emails from a computer system and that such does not involve the creation of new documents. The plaintiff says that it is materially the same to print a copy of the information stored electronically on the defendant's telephone or printer memory.

[73] Specifically the plaintiff says that such call logs will identify calls between the defendant and the SFWU. The plaintiff says that the relevance of these call times and durations will lie in the cross-checking of them with the records of meetings with union representatives and with visitor logs for the relevant time periods to ascertain who visited whom at the defendant's premises and when.

[74] Addressing the matter of "smart phones", the plaintiff submits that the defendant's Mr Kochery is unlikely to be correct that these records will already have been captured because the defendant's Mr Roest was the only person with a smart phone and that its records will have been duplicated on the company's computer system. The defendant says that it is possible that the information from Mr Roest's smart phone is stored on a different server than the defendant's Auckland server or may indeed be stored on the Blackberry device itself. In summary, the plaintiff says that the defendant should be required to search its entire computer system or network including all the component parts of that which include smart phones connected to the computer system and its desktop telephone system.

[75] I am not satisfied that a general search of all electronic telephonic records is warranted to ensure a reasonable search for documents and the orders to be made will not extend to telephone records. I would have accepted that "smart phone" records, to the extent that they may include emails sent and received, would have been disclosable, but I am satisfied from the evidence that the electronic synchronisation of these with personal computers will ensure that such emails as are stored on smart phones will be picked up in any event. The Court has not been addressed on the matter of SMS (short message service) or text ("txt") records of smart phones, so that the orders will not extend to these records.

[76] I consider that the relevance asserted in a telephone log of calls from LSG to the SFWU (cross-checking with the times of meetings) is altogether too tenuous to require the defendant to go to the trouble of recreating such records.

[77] As to the plaintiff's application affecting what are known as "pay query forms", the plaintiff says that it is unlikely to be correct, as Ms Park has deposed on behalf of the defendant, that any such forms would have existed in hard copy only

and that the plaintiff does not have any of them that it has not already disclosed. The plaintiff says that emails between Ms Park and the defendant's payroll office or personnel "might mention pay query forms that the defendant contends do not exist". It says that such documents, if disclosed, would corroborate the plaintiff's case that despite submitting numerous pay query forms to the defendant, these were not acted on and so the plaintiff remained underpaid. In association with this, the plaintiff says that disclosure of the defendant's "payroll audit trail" (which contains the raw data of the payroll system affecting the plaintiff as opposed to subsequently generated reports) will evidence all actions taken as well as comments about them. The plaintiff says that it is reasonable to assume that such information may corroborate the existence of what it says are the missing pay query forms.

[78] A knowledgeable witness having deposed to events, it is not sufficient for the plaintiff, through a memorandum filed by counsel, to challenge the veracity of that evidence in a speculative way. It follows that there is no requirement on the defendant to make further disclosure of documents relating to "pay query forms".

[79] The plaintiff challenges the defendant's affidavit evidence (of Ms Park) that there are no reports by Ms Park to senior management of the defendant dealing with the plaintiff. The plaintiff says that she thinks it is reasonable to believe that Ms Park would have discussed her employment situation with other managerial personnel. The plaintiff says that the transfer of a substantial number of employees between companies was a significant issue for the defendant's business as may be seen by the proceedings issued in the High Court against PRI. She says this is also illustrated by the numerous discussions with the SFWU to determine how to deal with such employees and their terms and conditions of employment. The plaintiff was one of a number of those SFWU members.

[80] Counsel for the plaintiff submits that it is not credible to suggest that Ms Park did not discuss these issues or her approach to them with anyone else in the defendant's business so that database searches are necessary to uncover this relevant information.

[81] I deal with this request for particular disclosure as I have with the "pay query forms" above. Ms Park has deposed to an absence of reports by her to senior management of the defendant dealing with the plaintiff. The plaintiff's conjecture that there are likely to have been such reports is insufficient to require an investigation by the defendant of their existence.

[82] As to the adequacy of electronic document searches to date, the plaintiff says that Mr Kochery's affidavit evidence for the defendant establishes only that its Auckland server has been searched. The plaintiff submits that electronic information can be searched in any location and there is no evidence about how the defendant's network of servers is set up or connected so that a search of all of the defendant's servers is required to be undertaken.

[83] In this respect, also, I am not satisfied that a very broad speculative assertion by the plaintiff should require the defendant to make extended searches of overseas electronic databases which it or its parent entities may control. These databases are to be limited to those of the defendant in New Zealand or on which LSG's New Zealand operations information may be held if elsewhere than in New Zealand.

[84] Next, the plaintiff criticises Mr Kochery's evidence that the defendant does not archive electronic material and points out that this appears to be contradicted by Ms Park's evidence for the defendant where she deposes that its IT department has searched its "email archive". The plaintiff submits that it would be surprising if a large company such as the defendant did not back up its data including, especially, information that it is obliged by law to keep for certain minimum periods including wage, time and tax records. The plaintiff submits that it is implausible and the Court should not accept that the defendant would not archive or back up its data so that, for example, all email records of employees who have left the defendant's employment are deleted irretrievably.

[85] In this respect, I am more drawn to the plaintiff's speculation about the reliability of the defendant's case that the email records of its former staff are deleted automatically and unrecoverable electronically as a matter of course when such persons leave the defendant's employment. I agree that this must be a questionable

business practice (deleting all email records from ex-employees' computers) and am sceptical that such records cannot subsequently be obtained even if attempts have been made to "delete" them. Whilst not determining whether or not such records continue to exist electronically and are recoverable, I regard the defendant's current explanation of their absence as unsatisfactory and require it to file and serve further and more detailed affidavit evidence to support that contention. Leave will be reserved to the plaintiff to respond by affidavit and to ask the Court to determine this issue.

[86] Next, the plaintiff asserts that the defendant has acted in breach of r 8.3(2) of the High Court Rules by deleting documentary information from its servers when employees left their employment. The plaintiff says that r 8.3(2) requires that documents be kept in readily retrievable form even if they would otherwise be deleted in the ordinary course of business. It says that the defendant has been aware of this litigation since at least January 2012, and at least from that date it was required to retain this information. It says that if the defendant's IT manager, Mr Kochery, does not have the ability to retrieve it, that is an argument in favour of an independent expert being appointed to do so.

[87] Rule 8.3 of the High Court Rules provides as follows:

> **8.3 Preservation of documents**
> (1) As soon as a proceeding is reasonably contemplated, a party or prospective party must take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding.
> (2) Without limiting the generality of subclause (1), documents in electronic form which are potentially discoverable must be preserved in readily retrievable form even if they would otherwise be deleted in the ordinary course of business.

[88] The application of r 8.3 is predicated on a reasonable contemplation of a proceeding amenable to the application of the High Court Rules, that is of a proceeding which may be brought in the High Court. In that sense, r 8.3 cannot impose a legal obligation on a litigant or potential litigant in Employment Court proceedings. The High Court Rules are only engaged in Employment Court proceedings where the regulations and practices of this Court do not cover a particular interlocutory circumstance.

[89] For these reasons, I would not go so far as to say that the defendant has acted in breach of the High Court Rules. Equally, however, a litigant or potential litigant deleting relevant records in the knowledge of reasonably contemplated proceedings (or subsequently) runs a significant risk of criticism and potentially adverse findings if the Court is satisfied that there were or may have been relevant documents that were improperly destroyed.

[90] Next, the plaintiff criticises the defendant's failure to search the computer of KH Cheung on the basis that the defendant does not have control of, or access to, company files held in "other countries". The plaintiff says that Mr Cheung is a director of LSG Sky Chefs New Zealand Limited so that his relevant computer must be, or be able to be, under the control of the defendant.

[91] Accepting that Mr Cheung is a director of the defendant and that the subject matter of this litigation was of sufficient moment to have probably been discussed at Board level, the electronic searches directed to be made by the defendant should include of Mr Cheung's computer(s) under the control of the defendant.

[92] The defendant agrees to provide any additional lists of relevant documents following a computer search to be appended to an affidavit in Form G37 of the High Court Rules.

Orders

[93] The plaintiff has established a case for the restricted orders now set out in its amended application for disclosure filed on 11 August 2014.

[94] Although not in the same terms precisely as applied for, the defendant's IT manager, Mr Kochery, is to carry out full and complete IT searches of its computer systems under its control using the key words set out below.

[95] Those key words are "Nisha", "Nisha Alim", "Alim", "NA", "PRI", "PFC", "Pacific", "Pacific Flight Catering", "PRI Flight Catering", "6A transfer", "6A trans", "6A transferees", "Terry Hay", "SFWU", "Union", and "Service and Food

Workers Union". Variations of these key search terms, including the use of lower case as well as capitalised letters, is also to be undertaken but only to the extent specified in [70] of this judgment.

[96] The defendant is to file and serve a list of documents resulting from the foregoing search that are relevant to the matters in issue between the parties by reference to the pleadings and the issues determined by the Authority.

[97] Taking account of the forthcoming holiday season, the defendant's list of relevant documents and further affidavit evidence are to be filed and served by 23 January 2015. Inspection of those documents may then take place.

[98] Leave is reserved for either party to make any further application for interlocutory orders or directions.

[99] Costs are reserved on this application.

GL Colgan
Chief Judge

Judgment signed at 2.45 pm on 4 December 2014