

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2014] NZEmpC 230  
ARC 57/14**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER of a rehearing

AND IN THE MATTER of a challenge to objection to disclosure of  
documents

BETWEEN GRAHAM D'ARCY-SMITH  
Plaintiff

AND NATURAL HABITATS LIMITED  
Defendant

Hearing: By affidavit(s) and written submissions filed on 25 November  
and 4,8, 10 and 15 December 2014

Appearances: Plaintiff in person  
J Burley and K Lee, counsel for defendant

Judgment: 16 December 2014

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**INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE G L COLGAN**

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[1] This interlocutory judgment deals with two issues in this litigation. The first is the plaintiff's challenge to the defendant's objection to disclosure of certain documents. The second issue is the rehearing of the Court's earlier judgment<sup>1</sup> staying execution of the Employment Relations Authority's costs award<sup>2</sup> on condition that Mr D'Arcy-Smith pays that award into court.

[2] Dealing first with the matter of document disclosure, the issue in the proceedings is whether Mr D'Arcy-Smith was employed by Natural Habitats

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<sup>1</sup> *D'Arcy-Smith v Natural Habitats Ltd* [2014] NZEmpC 181.

<sup>2</sup> *D'Arcy-Smith v Natural Habitats Ltd* [2014] NZERA Auckland 287.

Limited (Natural Habitats). If he was, there may need to be a subsequent hearing about whether he was dismissed justifiably and, if so, about remedies.

[3] I set out the 11 categories of documents sought by Mr D’Arcy-Smith on disclosure by the defendant:

- 1 The email or phone records from Natural Habitats (NH) either from Anne Curtis or Donal Stevenson that requests a new invoice with a GST number on it.
- 2 The email sent from the plaintiff with the revised invoice.
- 3 Complete Planting plan with the complete list & description of planting pads, types of plants, numbers, any & all planting directions, sprays, fertilisers, etc. & any & all variations.
- 4 Mighty River Power (MRP) full contract with NH& any & all variations.
- 5 Security Gates logs from the 15<sup>th</sup> of June 2013 till the following people. Donal Stevenson, Nick Blanchard, All First Call People Graham D’Arcy-Smith & Chris Oertel (please note Mr Oertel was using multiple security cards after losing several, so records must reflect when he was on/off site each day).
- 6 Time Sheets for Chris Oertel, Nick Blanchard, Graham D’Arcy-Smith & all First Call Staff from the 16<sup>th</sup> of June to 20 July 2013.
- 7 Time Sheets for Chris Oertel, Nick Blanchard, any other NH staff on site & all First Call Staff for the period 16<sup>th</sup> to 20<sup>th</sup> Sept 2013.
- 8 Records for Mr Stevenson, Mr Oertel & Ms Curtis for both landline & cellular from 16 June 2013 till 30<sup>th</sup> July 2013.
- 9 All performance reviews for Mr Stevenson, Mr Oertel & Mr Blanchard from June 2013 till August 2014.
- 10 Any & all reports Mr Oertel wrote on Mr Blanchard regarding his activities including walking off site & returning to Auckland during his time in Taupo & any & all replies by Mr Blanchard.
- 11 NH full Health & Safety plan for the MRP site & any & all written variations made by Mr Oertel or others, handwritten or otherwise.

[4] Under reg 44(3) of the Employment Court Regulations 2000 (the Regulations) there are three grounds upon which to object to the disclosure and production of relevant documents. Any document must meet the test of relevance in reg 38 before any of those reg 44(3) exemptions are examined.

[5] Protection of privacy under the Privacy Act 1993 and its Principles is not a ground per se for objecting to disclose a relevant document or class of documents. Subject to the ability to categorise a matter of privacy as amounting to a public interest injury under r 44(3)(c), ss 6 and 7(1) of the Privacy Act exempt document disclosure in Employment Court proceedings from the application of Information Privacy Principle 11 under that Act. That is confirmed by cases such as *Talbot v Air New Zealand Ltd (No 2)*,<sup>3</sup> *New Zealand Police Assoc Inc v Commissioner of Police*,<sup>4</sup> and *Vice-Chancellor of Massey University v Wrigley*.<sup>5</sup>

[6] The defendant's objection to disclosure, Mr D'Arcy-Smith's submissions in opposition to those objections, and the Court's decision of those challenges, may be summarised as follows. I use the same original numbering as did Mr D'Arcy-Smith.

#### *Categories 1-2*

The defendant says that "to the extent that these records are available" (but does not expand on that enigmatic phrase), it has already given these to Mr D'Arcy-Smith when the matter was before the Authority.

Mr D'Arcy-Smith has now clarified that he is asking for any document which contained a request by Natural Habitats for a new invoice with a GST number, from the plaintiff. If the defendant has such a document, it must be disclosed. If it does not, the defendant should confirm so by affidavit.

The plaintiff is entitled to the defendant's copy of a document sent by the plaintiff to the defendant. Put another way, it is not a valid objection to disclosure of a document that the plaintiff sent the original to the defendant. Documents in such circumstances may be annotated or otherwise modified so that what the plaintiff has is not necessarily the same as what the defendant has. The defendant must disclose to the plaintiff its version of the plaintiff's email to it with the revised invoice.

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<sup>3</sup> *Talbot v Air New Zealand Ltd* [1994] 2 ERNZ 216 (EmpC) at 223-224.

<sup>4</sup> *New Zealand Police Assoc v Commissioner of Police* [1995] 1 ERNZ 658 (EmpC) at 665.

<sup>5</sup> *Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 52 at [12]-[16].

*Categories 3-5 and 8-11*

These documents are said by the defendant to be irrelevant to the proceedings. In particular, the defendant says that it has already provided Mr D'Arcy-Smith with a copy of one relevant page of its contract with Mighty River Power Ltd, being Schedule 1, "Special Conditions of Contract". It says the balance of that document is irrelevant to the matters at issue in the proceeding.

The plaintiff has not justified his original request for the defendant's planting plan (category 3) including lists and descriptions of planting pads, types of plants, numbers and any and all planting directions, sprays, fertilisers etc. In these circumstances, I am not satisfied that this document or these documents are relevant and the defendant is not required to provide them.

The nub of this objection relates to the full form of contract between the defendant and Mighty River Power Ltd and any variations thereto (category 4). The plaintiff says that any commercial sensitivity about the contents of this document can be accommodated by monetary figures being redacted from the contract (and variations) to be provided to him. The issue for the Court to decide at this stage, however, is whether Mr D'Arcy-Smith was employed by Natural Habitats. I am not persuaded that the parts of the Mighty River Power Ltd contract which have not been supplied by the defendant are relevant to this question and, in these circumstances, the defendant's objection to disclosure must be upheld on the fundamental ground of irrelevance.

As to the plaintiff's request for security gate logs from 15 June 2013 for named persons (category 5), I am satisfied that when such persons came to and left the site may be relevant to the plaintiff's claim that the defendant exercised control over him. A comparison of Mr D'Arcy-Smith's entry and exit times with those of others involved with the same or other work may also be relevant to his claim. Accordingly, the defendant is obliged to disclose its security gate logs from 15 June 2013 until the plaintiff ceased

work in respect of Donal Stevenson, Nick Blanchard, the plaintiff, and Chris Oertel, together with those logs affecting persons engaged on the site by a labour hire contractor known as “First Call”.

I am not satisfied, however, that landline and cellular telephone records of Messrs Stevenson and Oertel, and Ms Curtis for the period 16 June to 31 July 2013 (category 8) are relevant to the proceedings and the objection to disclosure of these is upheld.

In the same category of irrelevance are “in and all reports Mr Oertel wrote on Mr Blanchard regarding his activities including walking offsite and returning to Auckland during his time in Taupo and any and all replies by Mr Blanchard” (category 10). The objection to disclosure of these documents is upheld.

Finally, in this regard, I am satisfied that the documents in category 11 may be relevant to establishing Mr D’Arcy-Smith’s claim that he was an employee. These documents are Natural Habitat’s health and safety plans for the Mighty River Power Ltd site including any written variations to these plans. The defendant’s objection to their disclosure is not upheld.

#### *Categories 6-7*

The defendant says that the documents in these categories are subject to the provisions of the Privacy Act 1993 and, in particular, Information Privacy Principle 11. That is the sole ground of its objection to their disclosure and inspection. For the reasons set out in [5] above, the defendant is not able to rely on the Privacy Act to resist disclosure of these documents. I accept that these documents may be relevant in determining the question of the plaintiff’s employment status in the sense that their contents may assist the Court to determine to what extent he worked under the control of the defendant. These documents must be disclosed to the plaintiff.

#### *Category 9*

The defendant says that the documents listed under this category do not exist and would, in any event, be irrelevant to these proceedings.

The defendant's confirmation of the non-existence of these documents is accepted and, I would add, they would be irrelevant in any event to Mr D'Arcy-Smith's claim that he was employed by the defendant. The objection to their disclosure is upheld.

[7] I turn now to the question of whether Mr D'Arcy-Smith should be required to pay into court the amount of the costs awarded against him by the Authority. As directed, Mr D'Arcy-Smith has filed and served affidavits addressing his current financial circumstances. This reveals that Mr D'Arcy-Smith's debts are massive and his assets (which are not easily saleable) are of minimal value, that he remains long-term unemployed, and that his Jobseeker benefit income is entirely expended on fundamental costs of existence and the requirement that he be available to take up work opportunities. Mr D'Arcy-Smith says that he is residing in someone else's car and although there are some prospects of time-limited work in the first quarter of 2015, there is no certainty that this will be able to be done by him.

[8] The defendant has challenged comprehensively the accuracy of Mr D'Arcy-Smith's account of his financial circumstances, but has produced no affirmative evidence showing that it is inaccurate. Natural Habitats has, albeit dressed up as evidence in an affidavit, made submissions casting doubt on the accuracy of the plaintiff's affidavit evidence about his financial circumstances.

[9] Because the plaintiff is unrepresented I should say that parts of his latest affidavit in which he is gratuitously insulting to the defendant's Mr Stevenson, for reasons that are irrelevant to the issues now before the Court, have no place in evidence and Mr D'Arcy-Smith should not repeat these or do likewise in future. Rather than delay the proceeding further by rejecting his second affidavit and requiring a replacement to be filed, I have simply ignored those objectionable elements of it just described. I hope that this will not be counter-productive to attempts to settle this proceeding.

[10] There is no prospect realistically of the defendant being paid its costs awarded in the Authority, at least at this time and for the foreseeable future, and enforcement of these through court processes would seem unlikely to produce this result for the company.

[11] Had the Court been in receipt of this information about Mr D’Arcy-Smith’s circumstances when it made its decision on 23 September 2014 to require, as a condition of stay of execution of the Authority’s determination, Mr D’Arcy-Smith to pay that sum into court, such a condition would not have been attached to the order for stay. The interests of justice require that outcome now. I simply offer the observation that, with the benefit of hindsight, it may have been preferable for Mr D’Arcy-Smith to have brought these circumstances to the Court’s notice at an earlier stage rather than, or at least in addition to, advancing esoteric but futile legal points.

[12] I reiterate my suggestion to the parties, conveyed in a Minute issued on 5 December 2014, that they reconsider seriously further mediation, a judicial settlement conference, or other alternate dispute resolution mechanism in the increasingly uneconomic circumstances of this litigation.

[13] Be all that as it may, the order for stay made by the Court on 23 September 2014 is revoked and in its place there will be an unconditional order that, until issues of the Court’s substantive judgment on Mr D’Arcy-Smith’s challenge or earlier order of a judge, execution of the Authority’s costs determination is stayed.

[14] I reserve costs on the matters dealt with by this interlocutory judgment.

GL Colgan  
Chief Judge

Judgment signed at 8.30 am on Tuesday 16 December 2014