

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2015] NZEmpC 108
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 orders for document
disclosure by a non-party

BETWEEN SHABEENA SHAREEN NISHA (NISHA
ALIM)
Plaintiff

AND LSG SKY CHEFS NEW ZEALAND
LIMITED
Defendant

Hearing: 8 July 2015 by telephone conference call in Chambers
(Heard at Auckland)

Appearances: B Nicholson, counsel for plaintiff
J Douglas, counsel for defendant
P Cranney, counsel for non-party (Service & Food Workers
Union Nga Ringa Tota Inc)

Judgment: 9 July 2015

INTERLOCUTORY JUDGMENT (NO 9) OF CHIEF JUDGE G L COLGAN

[1] This further interlocutory judgment disposes of the plaintiff's application for an order that a non-party disclose documents relevant to this litigation. The case raises an interesting and possibly unique issue of privilege in the contents of documents, at least in this jurisdiction.

[2] At relevant times, Ms Alim was a member of the Service & Food Workers Union Nga Ringa Tota Inc (the Union). She relied on the Union for advice about her situation in the statutory transfer of her employment from Pacific Flight Catering Ltd (PFC) to LSG Sky Chefs Limited (LSG) under pt 6A of the Employment Relations Act 2000 (the Act) and, in particular, upon advice (including legal advice) given to

her by the Union and its in-house lawyer. The Union, in turn, obtained its own legal advice from independent counsel about some of these (and associated) issues that affected Ms Alim.

[3] The plaintiff has sought orders for non-party disclosure of documents from the Union. It has asserted privilege in some documents which it holds, being generally correspondence between its officials and its then in-house solicitor (Mr Timothy Oldfield) and between Mr Oldfield and the Union's external solicitor and counsel, Mr Cranney.

[4] The plaintiff has raised the valid question whether privilege in some of those communications may not only be the Union's to assert, but also Ms Alim's. That is on the basis that the legal advice sought and obtained was, in part or even sometimes in whole, for her benefit. Where this question has arisen in relation to particular documents, the orders made affecting them will take account of the plaintiff's claim to assert privilege, as well as the Union's. This has avoided the necessity to determine which of those two persons (Ms Alim and the Union) may have an exclusive right to assert privilege in the documents, or whether there is a joint right in these circumstances.

[5] After obtaining a substantial measure of agreement between Messrs Nicholson and Cranney, the following directions can be made, using the commonly accepted document numbering system that the parties have adopted in this aspect of the case. Mr Cranney has described each of the documents in issue by its nature, date, sender and recipient, and the general purport of its contents, without breaching any privilege that may be able to be asserted in it, either by the Union or by Ms Alim. This methodology has also enabled the Court to determine whether the documents are relevant to the current proceedings, a fundamental prerequisite for their disclosure by the non-party. As will be seen, many are not relevant to the case as pleaded.

[6] Although the directions in relation to particularly contentious documents will contain specific conditions upon which disclosure will take place, the parties and the Union are reminded of the conditions attaching to document disclosure in the

Employment Court generally, under regs 50-51 of the Employment Court Regulations 2000 (the Regulations) which are as follows:

50 Continuing obligation

If any party who has been served with a notice in form 6 obtains, during the proceedings and after responding to that notice, possession, custody, or control of a document relevant to the proceedings, that party's possession, control, or custody of that document must immediately be disclosed by that party to both the other party to the proceedings and the court.

51 Conditions of disclosure

It is a condition of the disclosure of documents that the integrity and confidentiality of any documents disclosed pursuant to any provision of regulations 40 to 50 or to any notice or order given or made under such provision must be maintained at all times and for all purposes and, in particular, that—

- (a) the party obtaining disclosure must use such documents and their contents for the purposes of the proceeding only and for no other purposes:
- (b) if copies of any documents have been made available by any party,—
 - (i) those copies must be returned to that party within 28 clear days after the conclusion of the proceedings or after the conclusion of any related appeal, whichever is the later; and
 - (ii) copies of any of those copies must not be retained by the party to whom those copies were made available:
- (c) the information contained in any document so disclosed but not used in evidence in the proceeding—
 - (i) must, to the extent that that information is derived from that document, remain confidential to the party whose document it is or in whose possession it was immediately before it was made available to any other party; and
 - (ii) must not, to the extent that that information is derived from that document, be disclosed by any person except as may be necessary for the conduct of the proceeding.

[7] Finally, this judgment will give some amended timetabling directions as between the parties.

Decision by document

[8] Document 75 is an email from the Union's solicitor (Mr Oldfield) to its counsel (Mr Cranney) attaching documents which have been redacted to preserve the

privacy of individuals not connected with this litigation. Those redacted documents have already been disclosed to Ms Alim and no further order is appropriate.

[9] Documents 76-77 are also correspondence between Mr Oldfield and Mr Cranney's office on 31 August 2012 consisting of a draft 'will say' statement and a memorandum for a judicial settlement conference in a case between PFC and parties known as *Ngakau*. I agree that these documents are not relevant to the proceedings and so do not need to be disclosed.

[10] Documents 78-81 are communications between Mr Oldfield and Mr Cranney, copied to the Secretary of the Union, concerning another matter than these proceedings in which Mr Cranney was representing Mr Oldfield and not the Union. The documents include a draft letter to a professional body and attachments. I accept that they are not relevant to the proceeding and do not have to be disclosed.

[11] Document 82 is an email between the Union's Mr Oldfield and Mr Rushton, the Union's Regional Secretary. The document consists of commentary about a case and advice to the Union. Privilege in it is asserted by the Union and is upheld.

[12] Document 83 is a court judgment in proceedings known as *Matsuoka v LSG Sky Chefs Ltd* which is not relevant to the disclosure exercised in this case and is readily available.

[13] Documents 84-85 are a communication from Mr Oldfield to Mr Cranney on 25 October 2010 and an enclosed High Court judgment. Solicitor-client privilege is asserted and upheld.

[14] Document 86 is an email dated 31 July 2012 from Mr Oldfield to Mr Cranney seeking legal advice. It is privileged and need not be disclosed.

[15] Documents 87-89 have already been disclosed by the Union to the plaintiff.

[16] Documents 90-92 consist of communications between LSG's Marie Park and the Union's solicitor, Mr Oldfield, about evidence in the *Ngakau* case which was given by Ms Park as part of an email chain between 3 and 5 April 2012 including an

attached brief of evidence. I accept that these documents are not relevant to the current proceeding and need not be disclosed.

[17] Document 93 is a communication between the Union's solicitor, Mr Oldfield, and an organiser, Mr Richards, which the Union has agreed to disclose to the plaintiff.

[18] Document 94 is a letter dated 3 June 2011 from Mr Richards to Mr Oldfield giving legal advice. This is the first of several documents that will be subject to a partial waiver of privilege described more particularly at [36] towards the conclusion of this judgment. It is disclosable to the plaintiff on these conditions.

[19] Document 95 is correspondence between the Union's Secretary, John Ryall, and Mr Oldfield dated 21 February 2011 responding to a judgment of the High Court. The Union asserts legal professional privilege in this document. I am satisfied that the document is not relevant to the present case and need not be disclosed.

[20] Document 96 will be disclosed generally by the Union (by agreement of its counsel) although it consists of an email in which solicitor-client privilege may have been asserted.

[21] Document 97 is a communication from the Union's solicitor, Mr Oldfield, to its officer, Mr Richards, dated 19 May 2011, giving legal advice. Although arguably irrelevant, it will be disclosed by the Union to the plaintiff on the partial waiver of privilege basis referred to specifically at [36] below.

[22] Document 98 is legal advice dated 27 April 2012 provided by Mr Oldfield to the Union's Mr Richards and the claimed privilege in it is upheld.

[23] So, too, is document 99 with the same result.

[24] Document 100 is an email chain between an officer of the Union and Mr Oldfield for which legal professional privilege is claimed, but will be disclosed to the plaintiff on the same basis of partial waiver of privilege as set out in [36].

[25] Document 101 consists of communications dated 14 December 2010 between Mr Oldfield and union officers. Legal professional privilege is claimed in respect of these communications and is upheld. This document does not need to be disclosed.

[26] Documents 102-103 are a report dated 8 March 2011 prepared by Mr Oldfield for the Union's Secretary, Mr Ryall, on pt 6A transfer issues and an attachment. Because Ms Alim may be able to assert privilege in the disclosure of that document (as does the Union), there will be the same partial waiver of privilege to enable her to consider these documents as set out in [36] of this judgment.

[27] Document 104 is an email between the Union's solicitor, Mr Oldfield, and its counsel, Mr Cranney, dated 20 September 2011, and document 105 is an associated letter to a professional body. I am satisfied that these documents are both irrelevant to the proceeding and would, in any event, be subject to a privilege that Mr Oldfield has in them and which Mr Cranney says Mr Oldfield asserts. They will not be disclosed.

[28] I move next to the documents which are contained in the Part 3 list of documents identified by independent counsel, Gemma Mayes, who was engaged by agreement between the plaintiff and the Union to undertake a preliminary assessment of more than 2,000 documents in the Union's possession.

[29] I am satisfied that the following documents are irrelevant to the current proceedings, being documents in other proceedings, many of which will either be in the possession of the plaintiff or will be available to be obtained by her from the relevant courts and tribunals if she considers that they may be relevant: Documents 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 131, 132, 133, 137, 138, 139, 143, 144, 146, 147, 148, 149, 152, 153, 154, 155, 156, 157, 158 and 159. The Union has, however, agreed to disclose documents 140, 141, 142, 145 (perhaps already provided), 150, 151, 160 and 162 to the plaintiff.

[30] Document 130 is an email sent on 8 March 2011 at 3.44 pm relating to the *Matsuoka* litigation. The Union says that it is irrelevant to the present proceedings

and Ms Douglas (who now acts for one of the parties to that email, LSG, whose then solicitor was Mr Garry Pollak) agrees that the document is irrelevant. Ms Douglas claims, on behalf of LSG, privilege in the document which the defendant will not waive. It is to be the subject of discussions between Ms Douglas and Mr Nicholson as to its relevance and as to whether LSG is entitled to assert privilege in it and, if so, whether that privilege will be waived.

[31] Document 134 is an email from the Employment Relations Authority to the plaintiff's former counsel and the Union's solicitor, Mr Oldfield. I am satisfied that it is irrelevant to the current proceedings and need not be disclosed.

[32] Document 135 is a complaint made by PFC about the Authority's conduct of other litigation and is irrelevant to these proceedings. It should not be disclosed.

[33] Document 136, an email from LSG to the Union's Mr Richards, will now be disclosed by the Union.

[34] Document 146 is an email from the Union's lawyer, Mr Oldfield, to the Authority and the Authority's reply. I am satisfied that these documents are irrelevant to the current proceedings and need not be disclosed by the Union.

[35] The manner of partial waiver of privilege asserted by the Union, referred to on several occasions previously in this judgment, is as follows.

[36] The Union's waiver of its assertion of privilege applies only to copies of those documents being given to counsel for the plaintiff to enable the plaintiff to consider whether she wishes to assert a claim to privilege in them as well as the Union. If the plaintiff does not assert a claim to privilege in respect of such documents, all copies thereof must be returned by the plaintiff's solicitors to the Union's solicitors, together with an undertaking from the plaintiff that she has not made or kept any further copies of those documents. If the plaintiff asserts privilege in any of those documents, she will be entitled to retain one copy thereof but the Union's claim to privilege must be respected by the plaintiff not disclosing the contents of such documents in any way to any other person. Such documents and

their contents as are supplied by the Union to the plaintiff under this partial waiver of privilege are not to be used by the plaintiff, her lawyers, or anyone else, for any other purpose at all, whether in relation to these proceedings or otherwise, than to enable the plaintiff to determine whether she asserts privilege in the documents for the purpose of this case. In all other respects, reg 51 of the Regulations will apply expressly to such disclosure under partial waiver of privilege, unless the regulation is contrary to the specific directions given in this paragraph.

[37] Mr Cranney has advised the Court that the Union will attempt to give disclosure of the documents that it is required to, and of other documents not the subject of this judgment, by later this week which will, in turn, generate the plaintiff's ongoing obligation to disclose such documents to the defendant.

[38] Finally, there will be an amendment to the directions made by the Court for the parties' filing and exchange of briefs of evidence before the trial. The plaintiff may now have until two weeks before that date to file and serve briefs of the intended evidence-in-chief of her witnesses, with the defendant having until one week before the commencement of the hearing to do likewise in respect of its witnesses.

[39] Costs as between the plaintiff and the Union (as non-party) are reserved and I record that the hearing which preceded this judgment occupied one hour and 36 minutes.

GL Colgan
Chief Judge

Judgment signed at 10.45 on Thursday 9 July 2015