

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2015] NZEmpC 65  
ARC 22/14**

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

AND IN THE MATTER    of a challenge to objection to disclosure

BETWEEN                      SHABEENA SHAREEN NISHA (NISHA  
   ALIM)  
   Plaintiff

AND                                LSG SKY CHEFS NEW ZEALAND  
   LIMITED  
   Defendant

Hearing:                      By memoranda of submissions filed on 27 March and 10 and 16  
   April 2015

Appearances:                AF Drake and B Nicholson, counsel for plaintiff  
   Jo Douglas, counsel for defendant

Judgment:                    15 May 2015

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**INTERLOCUTORY JUDGMENT (NO 6) OF CHIEF JUDGE G L COLGAN**

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[1] This interlocutory judgment decides the defendant's challenge to the plaintiff's objection to disclosure of documents in this proceeding.

[2] The documents at issue are described in the defendant's notice requiring disclosure dated 23 December 2014 as follows:

- a) Any and all relevant documents between Ms Alim and representatives of her former employers operating the business of Pacific Flight Catering through the companies of either Pacific Flight Catering Limited (PFC) or PRI Flight Catering Limited [(PRI)], including:
  - i) any document, including emails, letters, file notes, memoranda, and other correspondence, whether in hard copy or electronic format, evidencing Ms Alim's terms and conditions of

employment or variations to those terms of employment which occurred up to the date of transfer being 22 February 2011;

ii) any document including emails, letters, file notes, memoranda, and other correspondence, evidencing an agreement regarding support or funding of Ms Alim's claims against LSG Sky Chefs New Zealand Limited.

iii) For the avoidance of doubt, individual representatives of PRI or PFC covers, but is not limited to the HR Manager, Gerda Gorgner, Terry Hay, Director, the 4 Supervisors, Karen Sullivan, Tara Patel, James, and Elizabeth Ramotu, the Executive Chef, Keith Munt or Sous Chef Rudy or Cyril Belk or any other Supervisor or Manager responsible for Ms Alim's employment. This should include any correspondence relating to her alleged promotion to Supervisor, and the artificial inflation of Ms Alim's pay and leave records that is alleged to have occurred on or around 31 January 2011.

- b) Any documents, including employment agreements or variation letters, relating to her employment with any other employer, including but not limited to Eurest NZ Limited, during her initial period of employment with Pacific Flight Catering in around November 2005 to April 2006, when she was working as a casual employee, in the business of Pacific Flight Catering.
- c) Any information or other documents, including letters, emails or other documents, rosters or schedules or instructions whether in hard copy or in electronic format which describe the duties and the role that Ms Alim was undertaking in the business of Pacific Flight Catering.
- d) Any time and wage records, leave records, or payslips from Ms Alim's former employment in the business of Pacific Flight Catering;

[3] The plaintiff's objection to disclosure of these documents asserts:

- that they are irrelevant to the issues in the litigation;
- that even if the documents are relevant, it is unreasonable and oppressive to require such documents going back six years before the matters at issue in the case;
- that even if such documents contain relevant elements, they will also contain irrelevant ones as well; and

- that such a request for disclosure is in the realm of a fishing expedition or audit of the plaintiff's history.

[4] In more detail, the plaintiff makes the following points. The plaintiff identifies what she says are errors in the defendant's notice. These include the defendant's assertions:

- that Mr Hay is or was a director of PRI Flight Catering Limited (PRI);
- that there were four supervisors at PRI;
- that the defendant has identified insufficiently the persons named only as 'James' and 'Ruby' as representatives of PRI or Pacific Flight Catering Limited (PFC) – the plaintiff says that she cannot identify the persons to whom the defendant is referring thus; and
- that the defendant alleges incorrectly that the plaintiff was employed by both PRI and PFC.

[5] The plaintiff's principal submission, in support of her contention of the irrelevance of the documents the defendant seeks, is her assertion that only the plaintiff's terms and conditions of employment with PRI immediately before her transfer to the defendant are relevant to her personal grievance. That grievance, the plaintiff says, deals with two issues: first, whether the defendant recognised and honoured those terms and conditions of the plaintiff's employment; and second, whether the defendant's actions left the plaintiff with no option but to resign from her employment with it and to raise a personal grievance for unjustified constructive dismissal.

[6] The plaintiff acknowledges, however, that the defence mounted by LSG addresses whether the pre-transfer changes to Ms Alim's terms and conditions were genuine amendments to her employment agreement that she was entitled justifiably to expect would be continued in her transferred employment with the defendant. As

the Court's earlier interlocutory judgment,<sup>1</sup> refusing to determine the interpretation of s 69I(2)(b) as a preliminary legal point, illustrates, this will be a mixed issue of fact and law which will include a consideration of the plaintiff's pre-variation terms and conditions of employment with PRI or PFC. Documents relating to those terms and conditions of employment of the plaintiff will, therefore, be relevant to that inquiry.

[7] It may be that, following the hearing, the plaintiff will be found to be correct in the interpretation of the statutory provision for which she contends. In that case her prior terms and conditions of employment may have lesser or even no relevance. But the relevance of the documents must be determined now on the pleadings and no such conclusion can be reached at this stage. This means that no narrowing of the documents can occur now. Those documents cannot be excluded from disclosure on grounds of irrelevance.

[8] Next, the plaintiff contends that it will be undesirable and oppressive to expect:

... vulnerable employees in industries prone to frequent restructuring ... to retain six years' worth of employment records, making it very difficult, if not impossible, for an employee to provide forensic or sufficient proof, or documentary evidence, of their terms and conditions to the satisfaction of the incoming employer.

[9] This submission, however, misses the point. Any requirement for disclosure of documents is not as between incoming employee and new employer of the transferred employee in those capacities but, rather, as between litigants in court proceedings. Document disclosure requirements in the Employment Court (and in other courts also) concern the disclosure of relevant documents which exist; or, if they existed previously but no longer exist, address what happened to them. Whether it is right to expect an employee such as the plaintiff to retain her employment records for six years or any other period is not the issue for determination by the Court now. Rather, it is the disclosure and inspection of such records as are currently available to the plaintiff. If those documents are unavailable to the plaintiff, she must explain how that came to be so.

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<sup>1</sup> *Nisha v LSG Sky Chefs New Zealand Limited (No 3)* [2015] NZEmpC 22 (Interlocutory judgment).

[10] Next, and more persuasively than the just described submissions, the plaintiff says that to require her to locate this information will create a significant, unnecessary, and oppressive burden, in particular where the records sought go back 10 years, that is, beyond the Limitation Act's general limitation period of six years. Further, the plaintiff says, it is unrealistic to expect the plaintiff, as a "vulnerable employee", to retain all her employment records, irrespective of their perceived significance or insignificance at the time, at least for such an extended period.

[11] This latter submission is, also, not to the point. The Court's inquiry at this stage is to focus on those records which have been retained or are otherwise accessible by the plaintiff. If some of the relevant records sought by the defendant no longer exist, then the plaintiff's obligation is to explain their loss. If the Court is then satisfied of their non-existence or non-availability now, little more can be done by the defendant in these circumstances.

[12] In essence, the plaintiff's other objections all amount to ones on the grounds of relevance or oppressiveness. To determine relevance, the matters at issue in the litigation must be discerned from the pleadings. The latest operative pleadings are the plaintiff's amended statement of claim filed on 11 April 2014 and the defendant's statement of defence to this, filed on 13 May 2014. These issues are conveniently set out between [4] and [15] of the Court's second interlocutory judgment in the proceeding issued on 4 December 2014.<sup>2</sup> I will not repeat that summary here but adopt it for the purpose of this judgment.

[13] The case is going to turn on the terms and conditions of the plaintiff's employment with Pacific Flight Catering Limited (PFC) and/or PRI Flight Catering Limited (PRI). Although the particular focus of the case will be on those terms and conditions applicable to Ms Alim's employment "immediately before" 22 February 2011 (whatever that phrase may be interpreted to mean)<sup>3</sup> when she elected to transfer to the defendant, the genuineness of some of those pre-transfer terms and conditions asserted by Ms Alim will also be in issue. To determine that, the history of Ms Alim's employment with PFC and/or PRI will be relevant.

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<sup>2</sup> *Nisha Alim v LSG Sky Chefs New Zealand Limited* [2014] NZEmpC 224.

<sup>3</sup> The meaning of that phrase will be for decision in the substantive judgment.

[14] Therefore, I do not uphold the plaintiff's contention that the only relevant documents are the ones evidencing the plaintiff's terms and conditions "immediately before" (ie during the days or, at most, weeks before) transfer on 22 February 2011.

[15] While it is true, in one sense, as counsel for the plaintiff submits, that "... there are no [Part 6A] provisions ... that allow an incoming employer to unilaterally review, re-determine or audit a transferring employee's previous employment history" and that "... an incoming employer is required to give effect to whatever terms and conditions applied to the transferred employee *immediately before* transfer", that is not the question faced here. What is sought in this case is disclosure of documents relevant to the issues between the parties in litigation. The plaintiff's categorisation of them for this purpose is too narrow.

[16] Nor is it, as the plaintiff submits, a case of the defendant having "no ability to look beyond that [transfer] date and retrospectively enquire whether, for example, the transferring employee's duties were sufficient to justify a promotion one month before the restructure occurred ...". Here, the defendant says that the plaintiff's true terms and conditions of employment with her previous employer or employers were not what she asserted them to be and on which she claims an entitlement to have continued employment with the defendant following the transfer. To determine the genuineness of those terms and conditions claimed by the plaintiff, but put in issue by the defendant, it will be necessary for the Court to have regard to relevant background material including some, but not all, of that sought by the defendant in its notice requiring disclosure of documents.

[17] As I read the judgment of the Court of Appeal in associated litigation,<sup>4</sup> and in respect of which an appeal was dismissed by the Supreme Court,<sup>5</sup> this issue has not been determined judicially. At [8] of the judgment of the Court of Appeal, however, it is recorded that:

... counsel for LSG, Mr Skelton QC, said that Pacific had deliberately inflated all but two or three of the transferring Pacific employees' leave balances and given them pay rises, in most cases without informing the employees they were doing so. Pacific's conduct in that regard appears to

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<sup>4</sup> *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386, [2014] NZLR 1.

<sup>5</sup> *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 158.

have been reprehensible, but we do not see it as having any bearing on the issues before us in the present appeal.

[18] The defendant's challenge to the plaintiff's objection to disclosure of these documents is upheld.

[19] Next, I deal with the objection to disclosure of documents about support or funding of Ms Alim's litigation. My first inclination, in considering the application for disclosure of documents evidencing an agreement for the support or funding of this litigation against the defendant, was that it might be relevant only to questions of costs. Upon reflection, however, I consider that such documents (if they exist) will be relevant to the remedies claimed by the plaintiff for the wrongs said to have been committed against her by the defendant. Accordingly, such documents must be disclosed.

[20] I now address the plaintiff's other grounds of opposition. Generally, documents that may contain both relevant and irrelevant material are not at all uncommon in the disclosure process. They must be disclosed in full, except to the extent that if the irrelevant content is privileged or the holder of the document is otherwise entitled in law to object to the disclosure of that content. In such a case a redaction process should be agreed between counsel.

[21] So, in the foregoing respects, I allow the defendant's challenge to the plaintiff's objection to disclosure of documents in part. Defining the required disclosure is best done by modifying the defendant's original description of the documents to be disclosed to, and available for inspection by, the defendant as follows, using a similar but modified indexing system.

- a) Any and all relevant documents between Ms Alim and representatives of her former employers operating the business of Pacific Flight Catering through the companies of either Pacific Flight Catering Limited or PRI Flight Catering Limited including:
  - (i) Any document, including emails, letters, file notes, memoranda, and other correspondence, whether in hard copy

or electronic format, evidencing Ms Alim's terms and conditions of employment or variations to those terms of employment which occurred up to the date of transfer being 22 February 2011.

(ii) Any document including emails, letters, file notes, memoranda, and other correspondence, evidencing an agreement regarding support or funding of Ms Alim's claims against LSG Sky Chefs New Zealand Limited.

(iii) For the avoidance of doubt, individual representatives of PRI or PFC include, but are not limited to, the HR Manager Gerda Gorgner, Director Terry Hay, Supervisors Karen Sullivan, Tara Patel, James and Elizabeth Ramotu, Executive Chef Keith Munt, Sous Chefs Rudy or Cyril Belk or any other supervisors or managers responsible for Ms Alim's employment including, in particular, correspondence relating to the plaintiff's promotion to supervisor, said to have occurred on or about 31 January 2011.

b) Any other documents, including letters, emails, rosters or schedules or instructions, whether in hard copy or in electronic format, which describe the duties and the role that Ms Alim was undertaking in the business of Pacific Flight Catering.

[22] For completeness, I confirm that the foregoing reduced description of documents for disclosure excludes some categories sought by the defendant. I have not allowed disclosure of documents with Ms Alim's previous employer, Eurest New Zealand Limited, during the initial period of her engagement with PFC in 2005/2006 when she is said to have worked as a casual employee in the business of PFC. Such documents are altogether too remote from the matters at issue in this proceeding.

[23] Taking account of Ms Alim's overseas domicile, the documents set out at in [21] above must now be disclosed by the plaintiff to the defendant by a verified



affidavit of documents to be sworn, filed and served within the period of 21 days of the date of this judgment.

[24] There will be no order for costs on this challenge to objection to disclosure, both parties having been successful and unsuccessful in part.

GL Colgan  
Chief Judge

Judgment signed at 9 am on Friday 15 May 2015