IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 97
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 'unless' orders
BETWEEN	SHABEENA SHAREEN NISHA (NISHA ALIM) Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant

Hearing: By memoranda of submissions filed on 20 and 30 March and 10 April 2015

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

Judgment: 24 June 2015

INTERLOCUTORY JUDGMENT (NO 7) OF CHIEF JUDGE G L COLGAN

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[1] The plaintiff has applied for 'unless' orders. The application is based on the plaintiff's contention that the defendant (LSG) has failed to comply properly with its document disclosure obligations. The 'unless' orders sought would require the defendant, within seven days, to file and serve a sworn affidavit or affidavits recording the steps taken (including how electronic searches for documents were conducted, by whom, and when) to search for relevant documentary material in the possession or control of Jacob Roest and Hing Kai Cheung and of the documents discovered as a result of those searches.

[2] Next, the plaintiff seeks an order that, within seven days, the defendant must provide inspection of the originals of notebooks of Maree Park and Peta Kone. In

the event that these notebooks have been lost, destroyed, or disposed of, the plaintiff seeks an order that, within seven days, the defendant must file and serve a sworn affidavit deposing to the details of when and where those notebooks were lost, destroyed or disposed of, who was last in possession of them, and why copies of extracts were made and for what purpose.

[3] Penultimately, the 'unless' orders sought would require that, within seven days, the defendant must file and serve a sworn affidavit by whoever conducted searches of the computer systems of Mr Cheung in the LSG Asia Pacific office, recording the searches conducted (including how searches were conducted, by whom, and when) and the result of those searches.

[4] Finally, the orders sought by the plaintiff include that, within seven days, the defendant must file and serve a sworn affidavit from its payroll provider, PSG Payroll Ltd, recording the searches for relevant documents that were conducted (including how the searches were conducted, by whom, and when) of its computer systems and the results of those searches.

[5] The 'unless' consequence of non-compliance with the foregoing directions that the plaintiff seeks is that the defendant's defence to the proceeding should be "struck out and costs awarded to the plaintiff …". I infer that the plaintiff seeks thereby to prohibit the defendant from defending the proceeding against it which would, in turn, allow the plaintiff to formally prove her claims to relief in the absence of the defendant.

[6] The plaintiff relies, for jurisdiction, on s 189 of the Employment Relations Act 2000, reg 6(2) of the Employment Court Regulations 2000 and, thereby, on rr 7.48 and 8.16 of the High Court Rules. Although there is no express provision for the Employment Court to make an 'unless' order, I am satisfied that reg 6(2) allows recourse to the relevant procedures under the High Court Rules which include, in appropriate cases, making such orders. The Court has done so rarely and although the consequences sought for the breach of the 'unless' order claimed are draconian, if

the interests of justice require such an order, then it may be granted. The following passages from the *Anderson* judgment are apposite:[1]

> [45] Seen in that light, our view is that "unless" orders should generally be reserved for cases where breach or continued breach is objectively measurable and unchallengeable. The consequences of failing to comply with "unless" orders —striking out, stay or the like — are so significant that, in general, they should not be made in other cases, particularly where the obligations of the party in default are not unmistakably clear. As an example, failure to file a particular document by a particular day can be assessed objectively without possibility of challenge and can, for repeated breach, be properly the subject of an "unless" order.
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> [46] By contrast, particulars, interrogatories and disputes over discoverability are so commonly the subject of legitimate disputes between parties and counsel that they should only be the subject of an "unless" orders if the matter has been considered by the Court and the defaulting party's obligation clearly defined. That can especially apply where a party's obligation is to serve particular documents but not file them.

[7] In support of her application for 'unless' orders and relying on the Court of Appeal's judgment in *SM v LFDB*,[2] the plaintiff contends that such orders may be made where there has been a repeated failure to comply with a party's disclosure obligations and not merely with a specific court order such as one of those made in the Court's second interlocutory judgment delivered on 4 December 2014.[3] I accept that statement of principle as applicable to proceedings in this Court. Its application in practice will be a matter of fact and degree in each case.

The plaintiff's grounds for 'unless' orders

[8] The plaintiff begins, I assume by way of background, by submitting that the defendant did not provide full disclosure of documents to the Employment Relations Authority when the proceeding was in that forum. The plaintiff says that no fewer than 171 new documents have been disclosed to her in these proceedings that were not made available to the Authority.

[9] The fact that more documents may now have been disclosed in this Court than were disclosed by the defendant in the Authority, does not mean thereby that

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[1] *Butler v Li* (1997) 12 PRNZ 23 (HC) at 25; *Anderson v Mainland Beverage Ltd* (2005) 17 PRNZ 757 at [45]-[46].
[2] *SM v LFDB* [2014] NZCA 326, (2014) 22 PRNZ 253 at [31].
[3] *Nisha v LSG Sky Chefs New Zealand Limited (No 2)* [2014] NZEmpC 224.

LSG was either resistant to providing disclosures in that forum or that the Court should infer that there are likely to be further documents as yet undisclosed. The document disclosure process in the Authority is significantly different to that in the Court. It is the Authority that calls for, and determines the relevance of, documents rather than there being a strict obligation to disclose and exchange documents between the parties at first instance.

[10] Next, the plaintiff says that as a result of the defendant's failure in July 2014 to carry out appropriate searches (required of the defendant by the plaintiff but not the Court), the plaintiff brought interlocutory proceedings resulting in the Court's second interlocutory judgment delivered on 4 December 2014. That may or may not be so, but it is non-compliance with court orders that will determine whether an 'unless' order is made.

[11] In this regard, also, I do not accept that, simply because the defendant may not have carried out document searches demanded of it by the plaintiff but not covered by any court order, the 'unless' order claimed should be made. Regard must be had to the court-directed part of the document disclosure exercise, the first instance of which was the second interlocutory judgment delivered on 4 December 2014.

[12] The plaintiff says that on 22 January 2015 the defendant requested an extension of time to comply with the Court's 4 December 2014 orders "as it did not consider complying with the Orders a business priority". Then, the plaintiff says, on 13 February 2015 the defendant provided "grossly deficient affidavits recording the purported steps taken to comply with disclosure". The plaintiff complains that the defendant's affidavits failed to provide "even the most basic information regarding the searches". The plaintiff says that the defendant has not subsequently complied with its assurance that it would provide a further affidavit containing details of the searches undertaken in respect of Mr Cheung's computer systems. The plaintiff also complains that the defendant has still not provided any affidavit evidence detailing searches of Mr Cheung's material, nor with searches undertaken by PSG Payroll Ltd. The plaintiff says that on 20 February 2015 she was "forced to file an application" for further and better disclosure.

[13] So, the plaintiff alleges generally:

> … the defendant has repeatedly demonstrated that it will only comply with its disclosure obligations if it is convenient and to its liking and, therefore, unless orders are required in order to resolve the outstanding disclosure issues prior to the fixture currently set down for 10 to 13 August 2015.

[14] I consider that the answer to the plaintiff's concerns just expressed lies in the last sentence of [12] above. Whatever may have been the failures or deficiencies previously, the plaintiff did apply to the Court on 20 February 2015 for orders for further and better and disclosure, and obtained such orders as the Court considered just at that point.[4]

Defendant's grounds of opposition

[15] In response and in opposition to the making of the order, the defendant has submitted the following. The defendant opposes the making of these orders, saying that the application is misconceived and vexatious.

[16] First, the company says that the steps taken to search documents in the possession, power or control of Mr Roest were recorded in Ms Park's affidavit dated 13 February 2015. The plaintiff says, however, that this affidavit only goes so far as to say that Ms Park had asked other LSG employees to conduct searches of their files. The plaintiff complains that Ms Park has not specified who those employees were. It further says, by contrast, that in a letter to the plaintiff's solicitors dated 7 July 2014, the defendant advised that physical searches of Mr Roest's documents had not been carried out. The plaintiff says that it is "difficult to reconcile these two very different positions".

[17] Next, the defendant says that it is willing to supply an affidavit recording the steps taken to search for hard copy (physical) material held by Mr Cheung but that no application to this effect has been made to the Court. The plaintiff says, however, that its application requesting such an affidavit is now before the Court as part of its application for 'unless' orders; and, in addition, the defendant's position that if Mr

[4] *Nisha v LSG Sky Chefs New Zealand Ltd (No 5)* [2015] NZEmpC 64.

Cheung holds physical material it would have been listed, cannot be reconciled with the position that no searches were undertaken.

[18] In these circumstances, I will make an order that the defendant is to file and serve an affidavit by a knowledgeable representative addressing the steps that it has taken and/or will take to search the hard copy (physical) material held by its Mr Cheung. Given the long delays in interlocutory matters and the fact that the case has a fixture, this affidavit must be filed and served within 14 days of the date of this judgment.

[19] The defendant says next that file or meeting notes, including in notebooks, were placed on personal files, although the plaintiff says that the defendant had previously advised her that it does not retain those personal files. Counsel for the plaintiff submits that those two explanations by the defendant are irreconcilable so that the plaintiff has requested that an affidavit be filed either providing the notebooks or explaining how those were dealt with if they are not available. The plaintiff says that there is no proper evidence on oath that the file notes were placed on personnel files or what happened to those notes that did not relate to individuals and which would not be placed on personal files.

[20] In similar vein to the previous request, I require that the defendant file and serve an affidavit by a knowledgeable representative, either producing the relevant file or meeting notes (including in notebooks) that were placed on personal files as claimed by the plaintiff; or, if these documents either do not exist or are no longer within the possession or control of the defendant, explaining how that came about. Similarly, the defendant must do so within 14 days of the date of this judgment and the material may be incorporated into a single affidavit if the defendant wishes to do so.

[21] Next, the defendant asserts that additional affidavits claimed by the plaintiff were not ordered by the Court in its second interlocutory judgment of 4 December 2014. The plaintiff accepts that this is so, but points out that in its affidavits dated 13 February 2015, the defendant undertook to provide two further affidavits

"shortly" in order to complete its disclosure obligations. The plaintiff points out again that these affidavits have not been filed to date despite her requests for them.

[22] I consider that the defendant should be held to its assurance, in its affidavit or affidavits dated 13 February 2015, as to the provision of further affidavits to complete its then obligations to disclose documents. An affidavit or affidavits as required must be filed within 14 days of the date of this judgment. If there are to be two affidavits, one of them may be part of the affidavit already directed to be filed by the defendant if it wishes to do so.

Summary of decision

[23] The fate of this 'unless' order application is largely determined by the interlocutory judgments numbered 5 and 6 that I have issued recently affecting document disclosure between the parties.[5] The background to my reasons for declining the application for an 'unless' order can be ascertained from reading those two other interlocutory judgments. In addition to dismissing most of the plaintiff's document discovery claims against the defendant, the outcomes requiring the defendant to take some steps have only just been imposed and there is nothing to suggest that these directions will not be adhered to by it.

[24] I am satisfied that, together with the decisions and reasoning set out in interlocutory judgments numbered 5 and 6 and after compliance with such directions as are given in those judgments and in this, the defendant has or will have met its reasonable obligations to make disclosure of relevant documents to the plaintiff in this otherwise unremarkable personal grievance case in which modest monetary remedies are sought. I reiterate that interlocutory preparation for the hearing of the plaintiff's substantive claims must be proportionate to the matters at issue and the remedies claimed. The increasingly frequent interlocutory applications must take account of this. I have recently directed that any more must have leave to be heard.

[25] The plaintiff's application for 'unless' orders is accordingly adjourned to a date to be fixed if it is still appropriate.

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[5] *Nisha*, above n 4, *Nisha v LSG Sky Chefs New Zealand Ltd (No 6)* [2015] NZEmpC 65.

[26] Costs on this application are reserved until costs are determined finally and compendiously at the conclusion of the substantive litigation.

GL Colgan
Chief Judge

Judgment signed at 11.45 am on Wednesday 24 June 2015