

between March 2018 and December 2020.¹ The Authority indicated that Mr McKee's father or a related company, likely employed Mr Singh between July 2017 and March 2018 but found that nothing turned on the issue as no claim was pursued at the time.² The Authority found that Mr McKee's dismissal was unjustified.³ It awarded him \$8,000 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) on the basis that there was not much evidence of hurt and humiliation, and it also awarded him three months' lost wages.⁴ The Authority awarded Mr Singh wages arrears for ANZAC day 2019; however, the balance of his wage arrears claim relating to his pay and leave entitlements was dismissed, together with his claim for a penalty for failure to provide him with a written employment agreement.⁵

[3] Mr Singh has filed a non-de novo challenge. He wishes the Court to consider the following issues:

- (a) whether Mr McKee employed Mr Singh for the period between March 2015 and July 2017;
- (b) whether Mr McKee overpaid Mr Singh his annual leave entitlement;
- (c) whether Mr McKee owes Mr Singh arrears in wages and holiday pay; in particular:
 - (i) whether an agreed weekend wage was reduced without notice or agreement during the period between March 2018 and December 2020;
 - (ii) whether payment for holiday pay in February 2021 was correctly calculated and taxed;
 - (iii) whether annual leave paid in July 2017 was correctly calculated;

¹ *Singh v S J McKee Ltd* [2024] NZERA 179 (Member Loftus) at [5] and [65].

² At [10] and [85].

³ At [63]–[78].

⁴ At [79]–[82].

⁵ At [83]–[92].

- (iv) whether wage arrears for work at race meetings/trials and on public holidays is owing for the period March 2015 to October 2019;
- (d) whether the amount of compensation awarded by the Authority under s 123(1)(c)(i) of the Act was fair.

[4] On 4 June 2024 and 23 July 2024 Mr Singh issued disclosure notices seeking three categories of documents:

- (a) Time, wage and public holidays records for other employees Mr Singh has identified in his disclosure notice for the period 1 January 2016 to 31 December 2020.
- (b) Electronic communications and documents exchanged between Mr McKee, Neville Farrelly, Fiona McKee and business advisors regarding business restructuring planning and implementation in 2020.
- (c) Emails between Mr McKee and Red Office Accounting regarding Mr Singh's wage and time records in the period March 2019 to December 2020.

Submissions

[5] Mr McKee objected to the disclosure of the documents. In relation to the other employees' documents, he submits that at least some of the documents are not in his possession and that he was not an employer for the duration of the time periods specified. He says the other employees' wage and time records are not relevant to the proceedings. Further, he says the nature of the information, being information about remuneration, is sensitive and that it would be against the public interest and would not be consistent with the Privacy Act 2020 to disclose the information. In relation to the business documents, Mr McKee submits that, to the extent that the documents

exist, they are not relevant to the proceedings as Mr Singh is not challenging the Authority's finding that he was unjustifiably dismissed.

[6] Mr Singh challenged the objection to disclosure, submitting that the documents referred to in his notice requiring disclosure are relevant. In relation to the other employees' documents, Mr Singh states those documents relate to issues which Mr Singh has specifically pleaded, namely he disputes the accuracy and authenticity of wage, time and holiday records provided by Mr McKee in the Authority in relation to his claims for arrears of wages. Mr Singh claims that he worked similar hours to another employee and that disclosure of the employment records of the other employees would allow him to compare his time, wage and leave records against those of the other employees. This comparison would tend to prove or disprove his claims about the accuracy of the wage records Mr McKee has provided and would assist in determining the issues identified at [3](c) above.

[7] In relation to Mr McKee's invocation of the Privacy Act, Mr Singh noted that privacy principle 11 in s 22 of that Act allows for the disclosure of personal information if the information is necessary for the conduct of proceedings before any court. Mr Singh accepts that the names of other employees can be redacted from records to limit any unreasonable interference with their privacy.

[8] Mr Singh disputes that the wage and time records are not in Mr McKee's possession or control. He submits that wage records did exist for all employees from 2017 onwards and that Mr McKee's records would have bank account statements that would record wage payments to the plaintiff and other employees.

[9] In relation to the business documents, Mr Singh submits that the documents between Mr McKee and his accountant and business advisors relate to the business restructuring and are relevant to Mr Singh's claims of hurt and humiliation. In particular, he says that they are relevant to his claim that the restructuring was a sham and that it was retaliation for him raising concerns and complaints during his employment.

[10] Lastly, Mr Singh claims that disclosure of Mr McKee's email communications with Red Office Accounting regarding his wage and time records in the period March 2019 to December 2020 would allow him to understand how the records provided by Mr McKee were created and would tend to prove or disprove his claims about the accuracy of these wage records and assist in determining the issues identified at [3](c) above.

Legal principles

[11] The starting point is that a party may require an opposing party to disclose documents in their possession, custody or control that are relevant to any disputed matter in the proceedings.⁶

[12] A relevant document is one that directly or indirectly:⁷

- (a) supports, or may support, the case of the party who possesses it; or
- (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
- (c) may prove or disprove any disputed fact in the proceedings; or
- (d) is referred to in any other relevant document and is itself relevant.

[13] The pleadings define the ambit of the proceedings and therefore identify the issues towards which questions of relevance must be related. Within that, relevance should not be looked at narrowly.⁸

[14] Notwithstanding that overarching principle, the Court retains a discretion to refuse unnecessary or undesirable disclosure. In exercising that discretion, relevant circumstances may include:⁹

- (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

⁶ Employment Court Regulations 2000, reg 40.

⁷ Regulation 38(1).

⁸ *Airways Corp of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA) at [5].

⁹ *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [42]; and High Court Rules 2016, r 8.14.

- (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.

[15] Regulation 44 of the Employment Court Regulations 2000 (the Regulations) provides the only grounds upon which an objection to disclosure may be based, on the grounds that the document or class or documents:

- (a) is or are subject to legal professional privilege; or
- (b) if disclosed, would tend to incriminate the objector; or
- (c) if disclosed, would be injurious to the public interest.

[16] In *Industrial Equipment Distributors Lifting Centre Ltd v Scouller* the Court confirmed that an objection based on issues of confidentiality relating to sensitive commercial information sought through disclosure did not engage public interest immunity in reg 44(3).¹⁰ There is no stand-alone ground of objection to disclosure on the grounds of confidentiality, whether in reg 44 or elsewhere in the Act or Regulations. The Court determined that such interests could be dealt with by the Employment Court giving protective directions.¹¹

Analysis

[17] In relation to the first category of documents, the other employees' documents, I accept they are relevant to these proceedings for the period of Mr Singh's claim, to the extent that these records exist. I consider the records will show the hours of work, payment and leave accrual arrangements performed for like employees during the period of Mr Singh's claim and will tend to prove or disprove Mr Singh's pleaded claims. I uphold Mr Singh's challenge to the objection to disclose this category of documents.

[18] While Mr McKee has raised concerns over the sensitive nature of the documents to be disclosed and the provisions of the Privacy Act, I observe that the Court may direct disclosure and inspection of sensitive documents by requiring

¹⁰ *Industrial Equipment Distributors Lifting Centre Ltd v Scouller* [2018] NZEmpC 90 at [24]–[26].

¹¹ At [31] and [43].

undertakings as to confidentiality, specifying the return of all copies of documents, permitting the redaction of irrelevant confidential or sensitive parts of documents and the like.¹² Any residual concerns over the sensitive nature of the documents or individual privacy can be addressed through the conditions set out in reg 51, which establishes statutory conditions that go some way towards protecting the privacy of other individuals whose information is contained in those documents and anonymisation of the employee's names if the documents are relied on in the Court proceedings. Regulation 51 is as follows:

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.

[19] In relation to the second category of documents, I accept Mr McKee's submissions that the documents he exchanged with his business advisors regarding business restructuring planning and implementation in 2020 are not relevant to the

¹² See generally *Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 52 at [17]–[19]; *Coy v Commissioner of Police* [2010] NZEmpC 88, [2010] ERNZ 199 at [34]–[37]; *Riyanto v Dong Nam Co Ltd (No 2)* [2015] NZEmpC 85, [2015] ERNZ 732 at [37] and [39]; and *Industrial Equipment Distributors Lifting Centre Ltd v Scouller*, above n 10, at [45].

proceeding based on the pleadings before the Court. Mr Singh is not challenging the Authority's finding that his dismissal was unjustified. Any assessment as to the hurt and humiliation suffered by Mr Singh as a result of his unjustified dismissal is made based on Mr Singh's evidence of his situation following his dismissal. Further evidence that may suggest that the dismissal was undertaken for more egregious reasons, unknown to Mr Singh until after the disclosure of such information, will not change the degree of hurt and humiliation he suffered at the time he was dismissed. If the pleadings were amended to challenge the nature and extent of the unjustified dismissal, such evidence may be relevant. However, on the pleadings before me, I do not consider they are relevant and decline Mr Singh's challenge to the objection to disclose this category of documents.

[20] However, in relation to the third category of documents, I do not accept Mr McKee's submissions that the documents he exchanged with his accountant regarding Mr Singh's wage and time records in the period March 2019 to December 2020 are not relevant. I consider the documents will provide information about how the wage and time records were created by the accountant during the period of Mr Singh's claim and will tend to prove or disprove Mr Singh's pleaded claims. I uphold Mr Singh's challenge to the objection to disclose this category of documents.

[21] Lastly, there is a dispute over whether all the documents in the first category are in the possession, custody or control of Mr McKee, or do not exist. Regulation 42(3)(c) provides for the provision of a written statement which may address such issues, should they arise.

Outcome

[22] Mr Singh's challenge to the objection to disclose the first and third categories of documents is successful. The following orders are made:

- (a) Mr McKee is to disclose within 21 days of the date of this judgment:
 - (i) any time, wage and public holidays records for the other identified employees Mr Singh has identified in his notice of disclosure, confined to the period 1 January 2016 to

31 December 2020. This includes disclosure of any bank transactions from Mr McKee's bank accounts which make payments to Mr Singh or the named employees during this period; and

- (ii) all email communications between Mr McKee and Red Office Accounting regarding Mr Singh's wage and time records in the period March 2019 to December 2020.
- (b) If a disclosed document also contains irrelevant confidential, personal or sensitive information, Mr McKee is permitted to redact such information from the document.
- (c) The conditions in reg 51 apply to any documents disclosed to Mr Singh. In particular, Mr Singh may only use any document provided for the purposes of the proceeding and, except for the purposes of the proceeding, must not make them available to any person (unless the document has been read out in open Court). I consider that these conditions, together with the orders made, avoid the necessity for undertakings.
- (d) If Mr McKee does not hold in his possession, custody or control any of the documents listed in [21](a), he is required to state in writing to Mr Singh whether the documents exist or existed, and if so, when that document or documents was parted with and what became of that document or documents.
- (e) I reserve leave for either party to apply for any further directions which may be necessary.

[23] Costs are reserved.

M S King
Judge

Judgment signed at 3.30 pm on 21 January 2025