



Employment Court of New Zealand

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Alkazaz v Asparona Limited [2020] NZEmpC 81 (11 June 2020)

Last Updated: 17 June 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 81](#)

EMPC 130/2019

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	application for further disclosure
BETWEEN	AHMED ALKAZAZ Plaintiff
AND	ASPARONA LIMITED First Defendant
AND	DELOITTE LIMITED Second Defendant
AND	DELOITTEASPARONA LIMITED Third Defendant

Hearing: 3 December 2019 (Heard at Auckland)

Appearances: Plaintiff in person
J Hardacre and D Findlay, counsel for
defendants

Judgment: 11 June 2020

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE M E PERKINS

(Application for further disclosure)

Introduction

These proceedings involve challenges to determinations of the Employment Relations Authority (the Authority) dated 11 April 2019 and 2 August 2019.¹ The

1. *AlKazaz v Asparona Ltd* [\[2019\] NZERA 215](#) ([Member Campbell](#)); *AlKazaz v Asparona Ltd* [\[2019\] NZERA 456](#) ([Member Campbell](#)).

AHMED ALKAZAZ v ASPARONA LIMITED [\[2020\] NZEmpC 81](#) [11 June 2020]

plaintiff, Ahmed AlKazaz, was unsuccessful in his claim to the Authority. The second determination imposed an order for costs on him. He was ordered to pay costs to the third defendant, DeloitteAsparona Ltd in the sum of \$4,500.

Following the finalising of pleadings in respect of both challenges, a directions conference was held at which the proceedings were set down for a hearing for four days to commence on 3 December 2019. When the challenges were set down for hearing, Mr AlKazaz, who is representing himself in the proceedings, indicated that there were no outstanding interlocutory matters. The defendants gave notice that there was to be an application for security for costs. Leave was reserved for the filing of that application

and it has now been dealt with.²

Following the allocation of the hearing dates, Mr AlKazaz applied for leave to file further interlocutory applications, which included a request for disclosure of documents. The further applications have also been dealt with.³ Unfortunately, though, the issue of disclosure of documents remains unresolved.

Initially, counsel for the defendants indicated that they would not be opposing Mr AlKazaz's application for disclosure and would collate all relevant documents and provide them to Mr AlKazaz. The issue relating to disclosure of documents, however, did not end there and has now escalated into a wide-ranging search by Mr AlKazaz for documents which he alleges the defendants have and should disclose. Eventually, it became clear that the dispute as to documents had put the allocated fixture at risk. The time to be taken to resolve the dispute relating to documents would have meant that there would have been insufficient time for the parties to complete the other preparations necessary for the hearing, such as briefs of evidence and so on. The fixture was accordingly vacated, but one day of the time allocated was set aside for hearing of an application by Mr AlKazaz for further disclosure.

² *AlKazaz v Asparona Ltd (No 2)* [2019] NZEmpC 146.

³ *AlKazaz v Asparona Ltd* [2019] NZEmpC 124.

The application for further disclosure

Mr AlKazaz began this further request for documents by issuing a notice requiring disclosure against the defendants pursuant to reg 42 of the [Employment Court Regulations 2000](#) (the Regulations). Because a substantial part of Mr AlKazaz's proceedings seek large penalties against the defendants, the application of regulations 40 to 52 relating to disclosure of documents does not apply.⁴ Disclosure of documents needs to be dealt with by way of a formal application seeking the exercise of the Court's powers under the [Employment Relations Act 2000](#) (the Act). Mr AlKazaz filed a further notice requiring disclosure on 22 October 2019. Despite this technical deficiency, I allowed the notice to be treated as a formal application to the Court because he is a litigant representing himself and is not experienced in such matters. That second notice contained additional requirements and is the document upon which Mr AlKazaz's application for disclosure has proceeded. That notice sets out 22 categories of documents and evidence upon which Mr AlKazaz seeks disclosure. The defendants oppose the further disclosure sought.

Unfortunately, in documents that Mr AlKazaz has subsequently filed relating to his application for further disclosure, and indeed in his submissions presented to the Court when this matter was heard, he has made immoderate, inappropriate comments attacking the integrity of not only officers of the defendant companies but also opposing counsel.

The pleadings determine relevance

Before embarking on a consideration of the numerous categories of documents which Mr AlKazaz is now requesting, a consideration of the pleadings filed in this matter is necessary. It is upon the basis of those pleadings that the relevance of any document or categories of documents needs to be determined. I also have regard to established principles applying in respect of an application for disclosure of documents of such a wide-ranging nature as occurs in the present case.

4. [Employment Court Regulations 2000](#), reg 39(2). See also *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605.

Regulation 38(1) of the Regulations provides that a document is relevant in the resolution of any proceedings if it directly or indirectly:

(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.

Section 221(d) of the Act gives the Court wide powers to give procedural directions. Also, pursuant to reg 6(2) of the Regulations, in any case for which no formal procedure has been provided, the Employment Court may have recourse to the [High Court Rules 2016](#) affecting any similar case. Schedule 9, cl 1(d) of the [High Court Rules](#) is applicable in this case, as it requires the Court to assess proportionality by weighing up the costs of any discovery procedure against the sums in issue or the value of the rights in issue in the proceedings.

The amended statement of claim is somewhat unfocussed and confusing. Mr AlKazaz has raised several disputes. Although it is an issue which may already be concluded by the pleadings, Mr AlKazaz has raised a dispute as to which of the three defendants employed him. He commenced employment in 2013 and then entered New Zealand on a skilled migrant category resident visa. His

employment ended on 29 August 2016. In April 2016, Mr AlKazaz was given notice of commencement of a redundancy process. He was not made redundant, as negotiations took place leading to an agreement. Mr AlKazaz and the third defendant, DeloitteAsparona Ltd, entered into a Record of Settlement, which was then endorsed on 7 July 2016 pursuant to s 149 of the Act by a mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment.

Sometime after the settlement, Mr AlKazaz claimed that he was pressured into signing the Record of Settlement and did so under duress. He now seeks to have the settlement set aside so that he is free to raise personal grievances, including a claim that he was, substantively and procedurally, unjustifiably dismissed. He also appears, in his pleadings, to raise a claim of constructive dismissal.

If the settlement is not set aside, Mr AlKazaz claims that the defendants have breached the Record of Settlement by making disparaging remarks about him and jeopardised his prospects of finding alternative employment. He seeks a compliance order, an apology, compensation, penalties and damages.

All these matters Mr AlKazaz raises will need to be dealt with at the eventual hearing of the claims. On their face, they are fraught with difficulties. These include the difficulties always associated with an attempt to set aside a s 149 Record of Settlement. They also include limitation and jurisdiction issues. For instance, claims are made for remedies under the [Human Rights Act 1993](#) and the [Privacy Act 1993](#); outside the jurisdiction of this Court. There may also be difficulties as to limitation relating to the question of whether personal grievances have been raised in time or raised at all. Further jurisdiction and limitation issues arise in respect of several of the penalty actions Mr AlKazaz has commenced. Apart from pecuniary penalties under [Part 9A](#) of the Act, only the Authority, not the Court, has originating jurisdiction in respect of an action for a penalty. Any action for a penalty must be commenced within 12-months after the earlier of:

(a) the date when the cause of action first became known to the person bringing the action;

(b) the date when the cause of action should reasonably have become known to the person bringing the action.

The first determination indicates the penalty actions Mr AlKazaz raised in his proceedings before the Authority. New claims for penalties have been initiated in the challenges.

Principles applying

Similar issues to those relating to disclosure of documents in the present case were discussed by this Court in *Matsuoka v LSG Sky Chefs NZ Ltd*.⁶ In that case the

5 See [Employment Relations Act 2000, ss 133](#) and [135](#).

6 *Matsuoka v LSG Sky Chefs NZ Ltd* [\[2017\] NZEmpC 11](#), [\[2017\] ERNZ 35](#).

Court referred to *Transpacific All Brite Ltd v MPC Traders* in which the High Court noted that:⁷

A balance must be struck between the potential cost, time and difficulty involved in the additional discovery against the potential value that the discovery will add to the proceedings.

Also considered was *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* where Asher J applied a four-stage approach to an application for such disclosure as follows: 8

(a) Are the documents sought relevant, and if so how important will they be?

(b) Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?

(c) Is discovery proportionate, assessing proportionality in accordance with Part 1 of the Discovery Checklist in the [High Court Rules](#)?

(d) Weighing and balancing these matters, in the Court's discretion applying r 8.19, is an order appropriate?

In the present case, the defendants have already made substantial disclosure to Mr AlKazaz. As earlier indicated in this judgment, he now applies for further wide-ranging disclosure under 22 separate heads, although some of those headings overlap. During the course of the hearing of Mr AlKazaz's application it came to light that he himself has not made disclosure of documents to the defendants and he must now do so. As I have also indicated to him on more than one occasion, any documents he produced at the hearing before the Authority will not be automatically transferred to the Court for the purposes of his challenges. If there are documents which he produced before the Authority and which he now wishes to use in the challenges, then he will need to uplift those documents from the Authority for that purpose. Ideally all documents to be used at the challenge should be contained in an agreed bundle of documents, although the directions already given to the parties indicate that, if the admissibility of any document is in dispute, then there is a proper procedure as to production which must be followed.

7. *Transpacific All Brite Ltd v MPC Traders Ltd (previously All Brite Industries Ltd)* HC Napier, CIV-2011-441-169, 24 November 2011 at [37] (footnotes omitted).

8. *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760, [2018] NZAR 600 at [14].

Mr AlKazaz's categories for further disclosure

Mr AlKazaz seeks disclosure of documents consisting of any books, papers, emails, notes or documents of any nature relating to the 22 categories set out in his amended notice, dated and received by the Court on 22 October 2019. As indicated earlier, this was an updated version of the earlier notice and included further categories. In addition to covering a lengthy, marginally relevant period of the employment, several of the categories seem to extend into a request for disclosure of oral evidence rather than documents.

Categories 01)-05) relate to Mr AlKazaz's assertion that his contemplated redundancy was not genuine and that the employer's decision to retain another employee instead of him to remain in employment, while he was eased out of employment, was unjustifiable. In this interlocutory judgment dealing with disclosure, the substantive merits of Mr AlKazaz's assertions cannot be resolved. In addition, Mr AlKazaz is asserting that the other employee was preferred to him because of racial and religious bias; Mr AlKazaz is Egyptian with a Muslim and Arabic background.

Categories 01)-05) are very wide and would appear to extend into a period in the employment substantially before the occurrence of the events which led to Mr AlKazaz's negotiated termination of employment. The categories, under which documents are sought, read as follows:

01) Mr Ahmed AlKazaz work performance and any business reports that would have led to his position becoming redundant or otherwise during his entire employment period with the Defendants.

02) How the decision for redundancy was made favouring Mr Arturo Bravo over Mr Ahmed AlKazaz while the education business was declining over the course of 2015 as alleged by Mr Gareth Glover at the ERA.

03) The steps Deloitte/s or any of its affiliates took to conclude the Redundancy decision of Mr AlKazaz.

04) What procedures/steps did Deloitte/s or any of its affiliates follow to honour their agreement with Mr AlKazaz.

05) The attempts made for redeployment and evidence of its failure, if any.

During oral submissions Mr AlKazaz raised the issue of his entitlement to work performance reports which are yearly based and of which he says there are three. He also seeks documents setting key performance indicators upon which his performance is based. He also seeks any other relevant performance remarks. These documents should be easily obtainable by the defendants, although I understand the defendants state that they have already provided Mr AlKazaz with his personnel records.

The response from the defendants is that, beyond the documents already provided to Mr AlKazaz, the further documents requested either do not exist or upon reasonable search and inquiry cannot be located. While I do not accede to most of the requests made by Mr AlKazaz in categories 01)-05), it seems to me that he should be entitled to documents relating to his performance, including those setting performance indicators, if they have not already been provided. If there are any remaining documents categorised as performance reports or performance indicators, then they are to be disclosed.

One further category of documents which Mr AlKazaz mentioned were the records of his travel between Wellington and Auckland. This relates to his assertion that even though he was stationed in Auckland he was freely moved to Wellington to perform duties. He alleges that the person selected to be retained was Wellington- based. This is a matter which again may be marginally relevant to an assessment of whether Mr AlKazaz's position was surplus to requirements. It is really a matter for evidence, but, if there are documents evidencing the way Mr AlKazaz was moved between Auckland and Wellington during his employment, then these are to be disclosed as well.

Another issue, which appears to relate to the genuineness of the redundancy, are reports covering the utilisation of Mr AlKazaz by the employer. Apparently, utilisation reports have been disclosed, but Mr AlKazaz wants utilisation reports for other employees for comparative purposes. I discussed this with Ms Hardacre during her submissions, and the sensible suggestion she made was that the utilisation reports for other individuals could be disclosed in an unredacted form except for redaction of the individuals' names. This would then ensure privacy was protected for the other employees.

Categories 06)-09) relate to Mr AlKazaz's assertion that he was subject to racist and bullying behaviours during his employment and that the racial prejudice extended to communications with others following the termination of his employment. These categories read as follows:

06) Records of Mr Mark Rosser's known racial and bullying behaviours against current and/or previous employees.

07) Mr Rosser's communications with any Deloitte employees (or employees of any company considered affiliate of Deloitte in any way) about:

- Mr AlKazaz person, employment and/or life in any way

- Mr AlKazaz ties with the Egyptian community in New Zealand; and
- Mr AlKazaz's family and his child's citizenship status in particular.

08) Ms Andrea Kenrick's involvement in making any comments of any nature (disparaging or not regardless of your assessment of those comments or communications) about Mr AlKazaz during or after the end of his employment.

09) Meeting notes with Ms Andrea Kenrick about Mr AlKazaz.

As far as the allegations against Mr Rosser are concerned, the response of the defendants is that, following searches, no documents were found. The conclusion reached is that either the documents never existed or, if they did, they cannot now be found. These requests by Mr AlKazaz are very much in the form of a fishing expedition for documents. Mr AlKazaz's belief they exist is pure speculation. He attached to his submissions a document evidencing a conversation he had with a friend in which statements allegedly made by Mr Rosser were discussed. However, this is far from confirming documents would exist. If Mr AlKazaz wishes to use this evidence, he would need to call the other person as a witness. I would have thought this type of evidence is unlikely to be contained in documents.

From the point of view, however, of providing propensity evidence against Mr Rosser, some documentary evidence may be available if, as Mr AlKazaz alleges, he made racially based comments against other employees and was disciplined. In view of the nature of the way Mr AlKazaz has pleaded his case, records of disciplinary action against Mr Rosser may have some relevance. Such evidence might be relevant not only to the allegations of disparaging comments in breach of the record of settlement but also towards the issue of the genuineness of the redundancy. The defendants are to carry out searches for any such records and disclose them. This should not be a difficult exercise. The names of other employees may be redacted to preserve privacy.

Insofar as the documents involving Ms Kenrick are concerned, all relevant documents have been provided. This request is otherwise not focussed towards relevance or is unreasonably wide, and the defendants are not required to carry out any further searches.

Categories 10)-11) appear to relate to issues of redeployment and Mr AlKazaz's allegations that attempts were made by Ms Kenrick and others at Deloitte to impede his utilisation and redeployment. The categories read as follows:

10. Mr Ahmed AlKazaz's requests which were made few months prior to the end of his employment by email to his colleague (Nick Charles) and the resources manager at DeloitteAsparona's business practice which was approved for him to be deployed on upcoming Database Administration in light of his previous work as a Database Administrator in the past. Also, how and why did Ms Kenrick intervened to stop this agreement from happening?
11. Why the offer of utilization made by Mr Nick Charles was interrupted by Deloitte/s or any of its affiliates.

The defendants' position is that all relevant documents have been provided or simply do not exist. Ms Hardacre, in her oral submissions, suggested that any assertions against Ms Kenrick in this regard need to be dealt with by oral evidence at the hearing. That, similarly, applies to Category 11). Category 11) is very wide and may be a request for evidence rather than documents. That also applies to Category

12. which reads:

12. The racial grounds and pressure practiced by Ms Kenrick and Mr Rosser to push the Applicant to resign and/or leave working with Deloitte.

Mr AlKazaz's request under these headings is refused. The request under Category 12) is unreasonable having regard to the principles applying and earlier discussed.

Category 13) reads as follows:

13. Deloitte's records of the immigration and financial distress that Mr AlKazaz alleges undergoing and how it was used to coerce him on signing the agreement with Deloitte to leave his position in such dire times of his life.

This category is insufficiently directed and is far too wide. It is hard to imagine what documentation would be in existence in relation to this category. This is really a matter for oral evidence. The defendants indicate that whatever relevant documents they have relating to this issue have already been provided.

Categories 14)-19) are directed at the allegation that the defendants disparaged Mr AlKazaz in breach of the record of settlement. These categories read as follows:

14. The grounds of which Mr Mike Enderby made his disparaging comments to third parties and/or Deloitte employees and the nature of those comments in details.
15. Any ties between Mr Mike Enderby and third parties that led to his comments in this regard.
16. The grounds of Mr Enderby comments against Mr AlKazaz's CV and its accuracy.
17. Mr AlKazaz's internal CV copies while working with Deloitte/s and/or DeloitteAsparona.
18. Any documents that show engagement and any work history between Mr AlKazaz and Mr Enderby.
19. Any information Mr Enderby received about Mr AlKazaz that could have in any way led to your disparaging comment made to third parties.

Mr AlKazaz seeks any documentary evidence of contact between Mr Enderby and three firms or companies known as Enterprise IT Ltd, Spectrum Consulting Ltd

and Halcyon Knights. The documents that he seeks of the alleged communications relate to his employment either with the defendants or subsequent to the termination of his employment. Ms Hardacre indicated in submissions that searches have already been conducted and documents arising from those searches have been provided to Mr AlKazaz. While I am not prepared to allow further wide-ranging requests, inquiry into the alleged connection between Mr Enderby and those entities alleged should be made. Mr AlKazaz is to provide no more than six key words for a further search of documents relating to Mr AlKazaz emanating from contact between Mr Enderby and the three entities mentioned. Any further documents uncovered are then to be provided to Mr AlKazaz.

Categories 20)-22) read as follows:

20. Any instructions from Ms Andrea Kenrick to Mr Stephen Rengan, Mr Dmitry Lozitskiy or Mr Ricardo Rivero that relates in any way to Mr AlKazaz performance and/or redeployment instead of ending his employment.
21. Any external communications with any third parties that relate in any way to Mr AlKazaz during or after his employment with any of the respondents or any of its affiliates.
22. Any meeting notes of disciplinary or non-disciplinary nature with employees or ex-employee of Deloitte or any organization that relates to Deloitte/s or any of its affiliates in anyway (*including but not limited to Asparona, DeloitteAsparona, TEAMAsparona or otherwise*) related to the Plaintiff where his name, person or employment were subject or part of those meetings.

Under Category 20), the defendants' position is that those documents have already been provided following the notice being issued. Categories 21) and 22) are far too wide. These requests have all the hallmarks of a fishing expedition to try and procure evidence alleged to exist. The requests relate to matters of pure speculation and are refused.

Mr AlKazaz indicated that the defendants transferred the details of their disclosed documents to him electronically. While he was accessing the electronic communication from the solicitors acting for the defendants, it closed down and he was unable to access it further. In his inimitable fashion, Mr AlKazaz alleged during the hearing that this was a deliberate act on the part of the defendants and their

solicitors to deprive him of the opportunity of viewing the documents. This, of course, cannot be the case. During the course of the hearing, I discussed the matter with Ms Hardacre, and she undertook to make further efforts to transmit details of the documents to Mr AlKazaz. If this cannot be achieved, then hard copy will be provided and may already have been done so.

As indicated earlier, it was revealed during the hearing that Mr AlKazaz has not himself provided disclosure to the defendants, and he must now do so. If he has not already provided his full disclosure list to the defendants, then he is to prepare a properly sworn or affirmed list of the relevant documents in his possession and provide this to the solicitors for the defendants. This is to be completed on or before 4 pm on 26 June 2020.

So that the proceedings can now be advanced to a hearing a further directions conference is to be convened in approximately four weeks so that any further timetabling necessary may be directed.

Costs are reserved.

M E Perkins Judge

Judgment signed at 11 am on 11 June 2020