



# Employment Court of New Zealand

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## Dotcom v Orduna [2016] NZEmpC 109 (26 August 2016)

Last Updated: 31 August 2016

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2016\] NZEmpC 109](#)

EMPC 391/2015

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

BETWEEN KIM DOTCOM Plaintiff

AND PANFILO J ORDUNA JR First  
Defendant

AND JOHN RYAN TACTAQUIN Second  
Defendant

AND RUTH NOLOSCO RELLEVE Third  
Defendant

**EMPC 85/2016**

AND 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

AND BETWEEN PANFILO J ORDUNA JR First Plaintiff

AND JOHN RYAN TACTAQUIN Second Plaintiff

AND RUTH NOLASCO RELLEVE Third Plaintiff

AND KIM DOTCOM Defendant

KIM DOTCOM v PANFILO J ORDUNA JR NZEmpC AUCKLAND [\[2016\] NZEmpC 109](#) []

**EMPC 86/2016**

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

AND BETWEEN KIM DOTCOM Plaintiff

AND PANIFILO J ORDUNA JR First Defendant

AND JOHN RYAN TACTAQUIN Second Defendant

Hearing: 22 August 2016 (in Chambers) and by submissions filed on 24 August 2016 (Heard at Auckland)

Appearances: E Telle and M Pollak, counsel for individual parties  
S Cogan and H Enright, counsel for K Dotcom

Judgment: 26 August 2016

#### INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This is a challenge by what I will call the individual parties to this litigation (other of course than Kim Dotcom) to Mr Dotcom's objection to disclosing a number of documents to them. This challenge, filed on 5 August 2016, was generated by Mr Dotcom's notice of objection to disclosing the documents given on 15 July 2016. That, in turn, related to a notice given by those individual parties requiring document disclosure from Mr Dotcom on 15 June 2016.

[2] To understand the complexity of these proceedings, it is necessary to summarise each of the three separate claims before the Court which are to be heard and decided together.

[3] The proceedings in EMPC 391/2015, in which Mr Dotcom is the plaintiff on preliminary matters, are a challenge to the Employment Relations Authority's preliminary determination that New Zealand is forum conveniens for this litigation, and that Mr Dotcom was, at material times, the employer of Panfilo Orduna Jnr, John Tactaquin and Ruth Rellve (the individual parties).<sup>1</sup>

[4] The proceeding in which those individual parties are plaintiffs (EMPC

85/2016) is the challenge by the individual parties to the second determination of the Authority issued on 11 March 2016.<sup>2</sup> This is the case in particular in which these disputed document issues arise. I have had regard to the pleaded allegations and defences to justify the acceptance or refusal of disclosure of classes of documents by Mr Dotcom.

[5] The third set of proceedings, which have been amalgamated for the purposes of a common hearing, will also affect the issues now for decision. These proceedings under EMPC 86/2016 are Mr Dotcom's cross-challenge to the same determination of the Authority issued on 11 March 2016 as to the matters found against him by the Authority. The allegations, admissions and denials in the pleadings likewise form the background to document disclosure issues.

[6] At the heart of these proceedings are the questions of whether Mr Dotcom was the employer; and, if so, whether the individual parties were disadvantaged or dismissed unjustifiably by Mr Dotcom. Finally, there are claims to unpaid remuneration made by the individual parties against Mr Dotcom. Determining these claims will, in turn, require the Court to decide whether either new employment agreements were entered into, or there were variations to the original agreements whereby the individual parties say that, in return for undertaking more onerous and time-consuming duties, Mr Dotcom agreed to pay them more money. Leading to that issue, the individual parties' cases are that, as a consequence of Mr Dotcom's arrest and detention, he relinquished a very substantial proportion of his household

or personal staff (of which the individual parties were members) by terminating their

<sup>1</sup> *Orduna v Dotcom* [2015] NZERA Auckland 377.

<sup>2</sup> *Orduna v Dotcom* [2016] NZERA Auckland 83.

employment, in some cases at least on terms and conditions settled between them and Mr Dotcom.

[7] In respect of documents relating to the employment of other employees of Mr Dotcom, the individual parties say that whilst the contents of these may not be relevant directly to their claims, there is nevertheless indirect relevance. That will be, they say, because the contents of these documents will tend to prove their (denied) allegations that they enjoyed enhanced terms and conditions of employment either following his arrest or after Mr Dotcom's release on bail, with which terms and conditions Mr Dotcom has failed or refused to comply. One part of the individual parties' case is that these enhanced terms and conditions were, in part or in whole, conditional upon Mr Dotcom being in a financial position to make those payments. The individual parties say that this condition was fulfilled, that is Mr Dotcom was in a financial position to make those payments, but failed or refused to do so. They say that evidence of payments made to other employees in settlement of their dismissals from employment will assist them to establish this breach by Mr Dotcom.

[8] There is a feature of the case which distinguishes the employment circumstances of the parties before and after what is known by them colloquially as "the raid" on Mr Dotcom's home (or as it is known to the parties, "the Dotcom mansion"). That involved Mr Dotcom's arrest, imprisonment and subsequent release on bail to defend extradition proceedings brought against him by the United States of America. Mr Dotcom says that even if the claims are justiciable in New Zealand, he ceased for ever to be the employer at or about the time of the raid and his imprisonment.

[9] The most convenient starting point to determine what the pleadings reveal is in issue between the parties and, thereby, governing the relevance of disclosable documents, is the statement of claim of the individual parties in EMPC 85/2016 (filed on 8 April 2016). This is a claim for unpaid remuneration, for non-payment of a contractual bonus and to increased remedies for those parties' unjustified

dismissals of them as found by the Authority. They also seek to re-litigate the

Authority's rejection of their claims to penalties and to its refusal to allow interest on their compensatory damages.

[10] In response to those claims, and in addition to general denials of them, Mr Dotcom pleads that before the raid on or about 20 January 2012, he had "around 45 household staff and 25 other staff" but says that these numbers were not maintained thereafter. Mr Dotcom also claims that he relinquished his obligations as employer of these staff when he was arrested and that any employment obligations (except to his security guards) were assumed by his wife, Mona Dotcom, not only for the period of his absence in prison, but indefinitely. Mr Dotcom also pleads that not only the other individual parties in these proceedings but all other similar staff were on what are described as their 'Hong Kong employment agreements', that is employment agreements executed by the staff in Hong Kong or the Philippines and, Mr Dotcom alleges, subject to the law of Hong Kong.

[11] The statement of claim in EMPC 86/2016, in which Mr Dotcom is the plaintiff, challenges the Authority's determination that he dismissed the defendants to that proceeding unjustifiably, but does not challenge the Authority's conclusion in relation to Ms Relleve whom it found failed in her claims against Mr Dotcom.

[12] Mr Dotcom also pleads that the individual parties in these proceedings were paid a salary rather than an hourly wage so that they are not entitled to any additional remuneration for performance of additional work after the raid.

[13] I should note here that, two days after the close of the hearing, while judgment was still reserved and without leave as should have been sought, Mr Dotcom tried to make further submissions in support of his objection to disclosure of documents. As I recorded in a Minute issued to the parties on the following day, 25

August 2016, I did not require to hear from counsel for the individual parties because I was not satisfied that Mr Cogan's further submissions for Mr Dotcom were well founded.

[14] They related to an issue that had arisen in the course of argument on the challenge to objection to disclosure in which there had been some discussion about

[s 130](#) of the [Employment Relations Act 2000](#) (the Act) which relates to the disclosure of employees' time and wage records.

[15] If further explanation of that ruling is required, reference should be made to the Minute issued on 25 August 2016 which explains the nature of the additional arguments that Mr Dotcom wished to advance and my reasons for rejecting these and not needing to hear from Mr Telle and Ms Pollak in reply.

[16] I should add, also, that where parties have closed their cases and the Court's judgment has been reserved, leave should be sought to reopen the hearing, particularly where the issue had been the subject of argument and there had been an opportunity to address it at the hearing.

[17] Questions of document disclosure between parties are governed by regs 37-

52 of the [Employment Court Regulations 2000](#) (the Regulations). Regulation 37 says that the object of the following regulations is to ensure that, where appropriate, each party to proceedings has access to the relevant documents of the other party. Regulation 37 acknowledges that such access is usually necessary for the fair and effective resolution of the litigation but allows for circumstances in which it is unnecessary or undesirable or both.

[18] Regulation 38 provides:

### **38 Relevant documents**

(1) For the purposes of regulation 37 and regulations 40 to 52, 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.

(2) For the purposes of regulation 37, this regulation, and regulations 40 to 52, **document** means a document in any form; and includes —

(a) any writing on any material;

(b) any information recorded or stored by means of any tape recorder, computer, or other device; and any material subsequently

derived from information so recorded or stored:

(c) any label, marking, or other writing that identifies or describes [anything] of which it forms part, or to which it is attached by any means:

(d) any book, map, plan, graph, or drawing:

(e) any photograph, film, negative, tape, or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

[19] Regulation 40 provides:

#### **40 Availability of disclosure**

(1) In proceedings to which this regulation applies, any party may

require any opposing party—

(a) to disclose and make available for inspection any documents

which are in the opposing party's possession, custody, or

control and which are relevant to any disputed matter in the proceedings; and

(b) if any document which has been in the opposing party's possession, custody, or control and which is relevant to any disputed matter in the proceedings is no longer in that

party's possession, custody, or control, to disclose both when it was parted with and what became of it.

(2) The parties may agree to dispense with or limit the disclosure of documents to which subclause (1) applies.

[20] The first category of documents sought by the individual parties (what I will call the 2(a) documents) includes the employment agreements, job descriptions, hours worked and/or other documents providing details of hours worked and job descriptions of all staff employed at Coatesville (referred to as "the Dotcom Mansion") immediately prior to the raid by New Zealand Police on or about 20

January 2012.

[21] The second category of documents (the 2(b) documents) can be dealt with in conjunction with the first. These 2(b) documents relate to persons employed to carry out work at the Dotcom Mansion before the raid and for whom there were no employment agreements or in respect of whom employment agreements do not contain job descriptions and hours worked. These documents include copies of any relevant documents which provide details of those persons employed at Mr Dotcom's mansion before the raid including the hours they worked, job descriptions, any correspondence to and from those employees about the matters of their employment, any written records of hours worked and payslips for the period of three months before the raid.

[22] Also dealt with in conjunction with the 2(a) and (b) documents, the third category of documents (the 2(c) documents) includes employment agreements (including job descriptions and hours of work) of all staff employed at the Dotcom Mansion after the raid and until (now) 30 November 2013.<sup>3</sup>

[23] Also conveniently dealt with in this collection is the fourth category of documents (the 2(d) documents). They relate to persons employed to carry out work at the Dotcom Mansion after the raid for whom there are no employment agreements (or where those agreements do not contain job descriptions and hours worked), copies of any other relevant documents which provide details of those persons employed at the Dotcom Mansion after the raid including hours they worked and job descriptions such as in correspondence to and from those employees, written records of hours worked and payslips after the raid and (again) until 30 November 2013.

[24] These four categories of documents were dealt with together in counsel's

submissions and I will determine them together.

[25] It is very unlikely that the employment agreements of other staff contained the actual hours worked by them. Such documents generally contain the employer's expectation of the hours to be worked but, in any event, these more pertinent documentary records may be the subject of more targeted disclosure dealt with subsequently.

[26] Mr Dotcom says such documents are not relevant to the proceeding because:

- they are not relevant to the proper construction of those plaintiffs'

employment agreements;

- the claims to disclosure relate to the period after the raid, whereas the documents sought by the notice relate to the period before the raid

when they say that their workload increased; and

3 Although this end date was originally 31 December 2014, Mr Telle accepted in argument that the more appropriate cut-off date for these records was shortly after the termination of employment of the last of the individual parties in mid-November 2013.

- there is no correlation between the employment agreements, job descriptions and hours worked of other employees and those of the individual parties.

[27] I agree with Mr Dotcom's argument of irrelevance in respect to some of the documents sought. While I accept the relevance to these proceedings of time and wage record documents relating to other domestic or household (including security) staff and as opposed to business employees of Mr Dotcom or his associated entities, the application for disclosure of employment agreements is drawn too widely. Employment agreements may, at best, show expectations of hours of work but will not disclose what the individual parties really seek: that is a record of hours of work performed by relevant like employees both before and after the raid.

[28] In these circumstances, Mr Dotcom will be required to disclose to the individual parties all wage and time records (including any records of, or related to the performance of, their work by those other employees for the period or periods of the employment of those individual employees until 30 November 2013). This requirement to disclose does not include the individual employment agreements of those employees. It does, however, include relevant job descriptions and particularly records of hours worked and payments made to those other employees.

[29] I do not accept Mr Dotcom's objections to the relevance of these documents as summarised above. The questions at issue in the litigation include not only the proper consideration of the individual parties' employment agreements but also their claims that they were required to work longer and harder to perform the functions of a substantial number of employees who had been dismissed and that they are entitled to receive agreed greater remuneration therefor. The documents relating to the pre-raid period are relevant, for comparative purposes, to the individual parties' claims (and Mr Dotcom's denials) that there was more work to be done by the individual parties after the raid as a result of the significant reduction in staff members. There is, I accept therefore, at least this indirect correlation between records of work performed by other domestic or household employees, both before and after the raid, and the additional work that the individual parties say they will establish in evidence in justification for their claims.

[30] As to disclosure of Mr Dotcom's financial position at relevant times (the 2(e) documents), objection is taken to providing documents about the funds that were available to him or were potentially available to him after the raid to date.

[31] Next, in relation to the 2(f) documents, Mr Dotcom says that, irrespective of whether documents were created or arrangements otherwise entered into before or after the raid, any settlement agreements with other employees are not relevant to the individual parties' claims. That is said to be so because they are not relevant to the proper construction of the individual parties' respective employment agreements; are not relevant to the hours alleged to have been worked by them; are not relevant to the performance by Mr Dotcom of his obligations under the individual parties' respective employment agreements; will not prove or disprove any disputed fact because the individual parties have not pleaded any facts relating to settlements of other employment disputes; and are not referred to in any other relevant document.

[32] Next, in response to the individual parties' claim for access to documents relating to their PAYE entitlements and obligations (the 2(g) documents), Mr Dotcom asserts that there is no pleading of any cause of action related to PAYE entitlements and that any such documents will not prove or disprove any disputed fact.

[33] Finally, Mr Dotcom says that records, if any, of hours worked by the individual parties (the 2(h) documents) are irrelevant to the proceedings because they were salaried employees and, in any event, he was not required to keep records of the hours that they worked.

[34] In addition to irrelevance, Mr Dotcom asserts that the disclosure sought is disproportionate, oppressive, unnecessary, undesirable, of no probative value, and would be injurious to the public interest. He says that on the question of disproportionality, the individual parties have sought documents dating back to 2012 and which relate to at least 45 non-parties, but none of the evidence in such documents supports their cases.

[35] As to oppressiveness, Mr Dotcom says that the time and expense required to comply with the notice will be significant due to the number, nature and extent of the documents sought, and cannot be justified in the absence of probative value and his inability to meet the legal expenses of this proceeding.

[36] As to necessity, Mr Dotcom says that disclosure would unnecessarily expand the scope of the hearing, causing unnecessary delay and expense to the parties, would be wasteful of judicial resources and out of all proportion to any relevance which is itself denied.

[37] As to Mr Dotcom's allegation that disclosure of these documents would be injurious to the public interest, he says that it would be in breach of the rights of third parties under [s 6](#) of the [Privacy Act 1993](#). Mr Dotcom says that in the circumstances, to compel disclosure of personal information of third parties cannot be justified when the documents have little or no relevance to the pleaded allegations.

[38] Mr Dotcom says that disclosure would also be injurious to the public interest because it would breach his right to privacy under [s 6](#) of the [Privacy Act](#). He says that in the circumstances, to compel disclosure of personal information to third parties cannot be justified when the documents have little or no relevance to the pleaded allegations.

[39] Dealing now with Mr Dotcom's general grounds opposing disclosure, I conclude that disclosure of those documents which is required to be made by Mr Dotcom will not be disproportionate, oppressive, unnecessary, undesirable, of no probative value or injurious to the public interest. These are all relevant business records that the Court would expect a business to maintain and retain,

certainly for a period of at least four years.

[40] In my conclusion, it would not be oppressive to require disclosure of such documents in litigation of this sort, irrespective of the particular parties involved. Despite some of the personalities, this is a run-of-the-mill employment case.

[41] Nor do I consider that, as currently timetabled, disclosure of these documents will unnecessarily expand the scope of the hearing and bring about delay and unwarranted expense to the parties. This is, as I have said previously, standard document disclosure in claims of this sort and the inevitable expense arising out of it is a to-be-expected cost of such litigation.

[42] Mr Dotcom's objection to the production of these documents by reference to the [Privacy Act](#) is ill-founded. The provisions of the [Privacy Act](#) do not extend to cover court litigation (or certainly document disclosure) but any issues of commercial or personal privacy can be protected by a variety of mechanisms that will be well-known to counsel and that both allow the information to be disclosed and do not interfere unduly with the privacy of others. In addition, there are

statutory protections about the use to which disclosed documents may be made.<sup>4</sup> I

understood Mr Cogan, for Mr Dotcom, to accept that the provisions of the [Privacy Act](#) do not trump the disclosure requirements of the Employment (or indeed any other) Court and that adequate safeguards of persons' privacy can be achieved, either as between counsel or by direction of the Court, while still allowing the essential information contained in such records to be used in the case.

[43] I do not accept that it would be injurious to the public interest that Mr Dotcom's privacy may be affected by document disclosure. Mr Dotcom is engaged in public litigation in which he is not only a defendant but also a plaintiff and this carries with it the risk that he may have to disclose documents which he would prefer not to disclose for reasons of his own privacy. As I have already noted, on a case-by-case basis, orders that the Court may make (and agreements that may be made between counsel) will fairly and reasonably balance those rights and obligations

### **Decision**

[44] I will decide these objections class by class as identified above.

[45] As to documents under 2(a), 2(b), 2(c) and 2(d), I conclude that documents being or concerning job descriptions, hours worked and/or other documents

4 [Employment Court Regulations 2000](#), reg 51.

providing details of hours worked and job descriptions of other staff employed at the Dotcom mansion, both immediately before the raid by New Zealand Police on or about 20 January 2012 and afterwards, are relevant pursuant to the reg 38(1) tests. They must be disclosed to what I have described as the individual parties. Employment agreements are excluded from these requirements. The challenge to the disclosure of these documents is upheld in part and dismissed in part.

[46] Documents relating to Mr Dotcom's funds (the 2(e) documents) are not relevant to the litigation except, potentially, if there are enforcement proceedings taken following findings against Mr Dotcom. It is, however, at least premature to require the disclosure of any such documents at this point in the litigation and the challenge to Mr Dotcom's objection is dismissed in this regard. It may be renewed at a later stage depending on the outcome of these proceedings as currently pleaded. The nature of Mr Dotcom's ability to pay increased remuneration to the individual parties which they claim to have been a condition of their varied employment agreements, may be the subject of specific and targeted interrogatories of Mr Dotcom, but the wholesale disclosure of Mr Dotcom's financial records for this purpose is unwarranted.

[47] Dealing with the individual parties' applications for disclosure of agreements entered into with other employees settling any claims (the 2(f) documents), it transpired at the hearing that the individual parties have these already because they were disclosed to the Authority. Mr Telle's concern was, rather, to have these documents ruled admissible for the trial. This had apparently been an unresolved issue in the Authority.

[48] Given that the current exercise is to determine questions of disclosure of documents and that different considerations may apply to their admissibility at trial, this particular application for disclosure (the 2(f) disclosure) was abandoned by counsel but may be the subject of a pre-trial argument of admissibility to be heard at the same time as what the parties are confident will be a number of similar pre-trial admissibility questions. These questions are better determined in context when it is known what evidence the parties propose to call and what documents they seek to

use in evidence. Accordingly, there is no need to deal with this part of the challenge to objection to disclosure.

[49] Next are PAYE and other documentary records (the 2(g) documents) between Mr Dotcom and the Commissioner of Inland Revenue including those relating to PAYE deductions from the individual parties' earnings during their employment from late 2011 to (now) 30 November 2013. These documents are clearly relevant to the employment of the individual parties. Mr Dotcom's principal objection to their disclosure is that these are documents which are obtainable by the individual parties themselves from the Commissioner of Inland Revenue. However, even if that is so, that is not the same thing as seeking disclosure of Mr Dotcom's original copies of these records which may theoretically include elements not in the IRD's or the individual parties' versions of them. It is not a sufficient ground to oppose disclosure of documents that they may be available to the party seeking disclosure, including from a third party.

[50] The challenge to Mr Dotcom's objection to disclosing the individual parties' documents relating to their PAYE entitlements and similar statutory or regulatory obligations succeeds. Such documents are relevant to the questions at issue and must be disclosed. It is

altogether too narrow an objection to say that because the pleadings do not expressly refer to the information that may be contained in such documents, they are therefore irrelevant. They are relevant to the disputed question of employment status which is in issue.

[51] I understood Mr Cogan to accept, in argument, that it would not be open to Mr Dotcom to assert that he was not required to maintain and retain such records simply because the individual parties' remuneration was expressed as an annual salary. The requirements of s 130 of the Act and, particular, subs (2) relate generally to remuneration for employment, whether that be paid hourly, weekly or otherwise including by annual salary. That is so, at least in the case of the Minimum Wage Act

1983 which will be in issue in this case.<sup>5</sup>

5 See *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

[52] Finally, the challenge to objection to disclosure of the category 2(h) documents also succeeds in relation to records, if any, of hours of work by the individual parties. Such records, if they existed or exist, will be relevant to the individual plaintiffs' disputed claims under their employment agreements and such documents must be disclosed.

[53] As to when those documents must be disclosed, Mr Dotcom has been on notice for some time that he is at risk of having to do so and, I imagine, has been advised of the likelihood of that. Counsel have also been retained for some time and I expect will have been properly briefed including as to documents and will have taken steps to ensure their preservation.

[54] In all these circumstances, disclosure of documents required by this judgment

must be made within 21 days of today's date.

[55] Any interrogatories to be delivered by the individual parties to Mr Dotcom in relation to questions of his funds for the purpose of fulfilling any contractual obligation he may have had to pay the individual parties, should be delivered to him within the next 21 days. Any objection to answering any such interrogatories should be filed and served within the period of seven days following delivery.

[56] Costs are reserved.

GL Colgan

Chief Judge

Judgment signed at 9 am on 26 August 2016

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