Employment Court of New Zealand

Elisara v Allianz New Zealand Limited [2018] NZEmpC 100 (28 August 2018)

Last Updated: 1 September 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 100
EMPC 307/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for further and better disclosure and/or for production of documents
BETWEEN	TITIIMAEA EUGENE ELISARA Plaintiff
AND	ALLIANZ NEW ZEALAND LIMITED Defendant

Hearing:	23 July 2018 (Heard at Auckland)
Appearances:	S Worthy and H G King, counsel for plaintiff H Waalkens QC and J MacGibbon, counsel for defendant
Judgment:	28 August 2018

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS APPLICATION FOR FURTHER AND BETTER DISCLOSURE

Background

[1] The interlocutory issue before the Court relates to the disclosure of certain categories of documents which the plaintiff asserts are, or may be, relevant to the matters at issue in the proceedings and which the defendant says need not be disclosed for various reasons, some of which have 'morphed' over time. The application raises a number of issues, including the extent to which privilege attaches to settlement agreements.

[2] The application arises in the following context.

[3] Mr Elisara was the Chief Executive Officer, and a director, of Allianz New Zealand Ltd (Allianz). Allianz is an insurance company which provides commercial and corporate insurance in New Zealand. It is owned by Allianz Australia Ltd (Allianz Australia). The November 2016 Kaikoura earthquake impacted on a number of Wellington buildings. Allianz Australia suffered a significant loss from a Wellington property affected by the earthquake, and which was part of a group of properties known as the "Prime Account". A review was undertaken and concerns were raised as to whether underwriting instructions had been complied with. Mr Elisara had been involved in the underwriting process.

[4] A disciplinary process was conducted. Allianz concluded that Mr Elisara had failed to ensure that an applicable underwriting instruction had been complied with and that this failure amounted to serious misconduct. Dismissal followed. A number of other employees were also implicated in the company's review, two of whom left their employment under differing circumstances to Mr Elisara. Mr Elisara contends that his dismissal was unjustified, being both procedurally and

substantively flawed. He unsuccessfully pursued a claim in the Employment Relations Authority.1 Mr Elisara challenges the Authority's determination on a de novo basis. The issue currently before the Court is a preliminary one, relating to the adequacy of the disclosure that has taken place to enable Mr Elisara to bring his claim in the Court.

Framework

[5] The overarching framework for determining the application for disclosure and/or the production of documents is set out in the Employment Court Regulations 2000 (the Regulations). It is convenient to summarise the applicable principles at the outset.

[6] The object of the disclosure regulations in the Employment Court is set out in reg 37, namely:

1 *Elisara v Allianz NZ Ltd* [2017] NZERA Auckland 290.

... to ensure that, where appropriate, each party to proceedings in the court has access to the relevant documents of the other parties to those proceedings, it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both.

[7] A document is relevant, in the resolution of any proceeding, if it directly or indirectly:2

(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.

[8] In this jurisdiction disclosure and inspection are often dealt with on an agreed basis, without recourse to the Court. However, the Regulations enable a party to require any opposing party:3

(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.

[9] In the present case the plaintiff served a notice requiring disclosure on the defendant on 14 December 2017. Some documents were provided under the notice;

2 Employment Court Regulations 2000, reg 38.

3 Regulation 40.

others were not. The defendant's response to the notice requiring disclosure set out the documents that were:

(a) in the defendant's control for which no privilege or confidentiality was claimed (Part 1);

(b) documents that were in the defendant's control and for which the defendant claimed privilege (Part 2); and

(c) documents in the defendant's control and for which the defendant claimed confidentiality (Part 3).

A time and place for inspection was nominated.

[10] I pause to note that the defendant's response did not set out fully the matters required in reg 42(3)(c). Nor did it reflect the permissible grounds for withholding documents in this jurisdiction. As to the first point, reg 42(3)(c) requires identification of any relevant documents which *were* in the defendant's possession, custody, or control and which are no longer in its possession, custody, or control; and a statement in writing as to when the document was parted with and what became of it. The defendant's notice focuses solely on the documents which are said to be within its possession, custody, or control, and says nothing about the documents which are no longer in its possession, custody, or control.

[11] Implicit in the defendant's written response was an objection to disclosure of certain documents, namely those identified in Parts 2 and 3. The asserted basis on which the objection to disclosure was taken was, as I have already observed, "privilege" and "confidentiality".

[12] Regulation 44 makes it clear that the *only* grounds on which an objection may be based under the Regulations are that a document or class of 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.

[13] It will be immediately apparent that neither confidentiality nor commercial sensitivity comprises a stand-alone ground for objecting to disclosure; nor is a broad- brush assertion of "privilege". And even where a document is said to be subject to legal professional privilege it must still be identified with sufficient particularity to enable the opposing party to mount an objection.4

[14] The Regulations provide that a party served with a notice of objection to disclosure may challenge the objection, declaring that it is ill-founded, and directing that the documents be disclosed.5 The Court may inspect the documents to ascertain the validity of the claim.

[15] A party dissatisfied with the documents disclosed may apply to the Court for a verification order (in Form 9).6 The Court may make a verification order if satisfied of the probable existence of the document or class of documents specified.

[16] The Court must be satisfied that, in all of the circumstances before it, such an order is appropriate. Where an affidavit has been filed stating that disclosure has been completed, the Court will hesitate to look behind it. In the present case an affidavit was filed on behalf of the defendant shortly before the hearing. However, it falls short in providing a sufficient degree of comfort to either the plaintiff, or the Court, as to the adequacy of the steps taken to meet the defendant's disclosure obligations, including as to the nature and extent of the inquiries made in relation to the classes of documents sought; the extent to which such inquiries have been made by a person in a position to have made them; and to explain what has become of documents which are no longer in its possession, custody or control.

4 *Guardian Royal Exchange Assurance of New Zealand v Stuart* [1985] 1 NZLR 596 at 607 (CA).

5 Regulation 45.

6 Regulation 46.

[17] One of the cornerstones of the defendant's argument as to disclosure relates to relevance. The pleadings provide the framework for assessing relevance; and relevance itself is defined in speculative ("may support") rather than definitive ("must support") terms. There are limits, and the concept of relevance cannot be extended beyond reasonable bounds. Nevertheless a party is not engaged in an objectionable 'fishing expedition', and liable to have a request for disclosure rejected, simply because it seeks disclosure of documents which may, but not necessarily are, directly relevant to the matters at issue in the case.

[18] In *InterCity Group (NZ) Ltd v Nakedbus NZ Ltd* Asher J put it this way:7

[34] The whole purpose of discovery is to fish for documents, in the sense that a party does not know exactly what documents discovery will reveal, or their contents. Fishing is permissible if the categories of documents sought can be assumed to relate to a matter at issue. Such fishing becomes impermissible where what is sought is not relevant to any pleaded cause of action, but might reveal material that could be the basis of a new head of claim.

...

[19] And, as the Court of Appeal has recently observed in the employment context:8

[17] The test for disclosure under reg 38 of the Employment Court Regulations 2000 is broad and based on the *Peruvian Guano* test. We do not discern any error in Judge Corkill's approach in making the disclosure orders he made, which related to documents which were or "may" be relevant. The wording of the regulation is wide and includes documents that "directly or indirectly" "supports, or may support" the case of one party. It has not been shown that the documents sought are irrelevant, and indeed they have been the basis of the further particulars provided in the second amended statement of claim, which set out arguable disparity claims.

[20] In the present case the pleadings are focused on a claim that the plaintiff's dismissal from the defendant company was procedurally and substantively unjustified under s 103A of the Employment Relations Act 2000 (the Act). The pleadings include criticisms of the way in which the disciplinary meetings were allegedly conducted, including deficiencies in the information provided to the plaintiff in the course of that process. It is alleged that the decision to terminate was predetermined and made by senior management at Allianz Australia before the disciplinary investigation had commenced. It is also pleaded that the decision lacked substantive justification,

7 *InterCity Group (NZ) Ltd v Nakedbus NZ Ltd* [2013] NZHC 1054.

8 *ASB Bank Ltd v Nel* [2017] NZCA 559 (footnotes omitted).

drawing in allegations relating to the scope of the plaintiff's obligations under his employment agreement as opposed to the obligations residing with others. A claim of disparity of treatment is also advanced. The latter claim seeks to rely on the way in which other employees were dealt with at the relevant time.

Documents in dispute

Category 1(a) and (b) Board reports

[21] The plaintiff contends that documentation advising shareholders, the Board and its related companies of the Prime Account loss and disciplinary processes involving the plaintiff ought to be disclosed. I understood the defendant's position to be that all relevant documentation in these categories had been disclosed. The defendant has disclosed redacted copies of Board reports. The defendant originally asserted that the Board reports contained commercially sensitive information and disclosure was resisted on this basis. As I have already observed, commercial sensitivity is not a basis on which a party may object to disclosure. Any valid concerns about such matters can be dealt with by the Court in other, well-accepted, ways.

[22] I have not inspected the unredacted reports although heavily redacted copies were handed up during the course of argument. I agree with Mr Waalkens QC, counsel for the defendant, that it is not immediately apparent that the redacted material is relevant to the matters at issue in this case, having regard to the headings (not redacted) immediately preceding the redacted parts of the reports. However, I consider it appropriate, in the circumstances, to direct the defendant to file and serve a verifying affidavit in relation to the reports and the existence or otherwise of the other requested documentation which the defendant says does not exist. I return to the requirements of such an affidavit below.

The 29 claims

[23] I agree with the plaintiff that the documentation sought in relation to this category should be disclosed. It is relevant, in that it may support the plaintiff's arguments in regard to the plaintiff's dismissal and the (allegedly undisclosed) reasons underlying it. That is because reference to the claims and associated losses appears in the contemporaneous documentation relating to the employment process at the time. In this regard I do not accept the defendant's submission that, because it says the dismissal was not based on considerations relevant to the claims, material relevant to the claims is not relevant to a determination of the matters at issue in the proceedings. Such an approach would lead to the 'tail wagging the dog'. The plaintiff's claim is that there were underlying reasons, including in relation to the way in which the claims were handled, which fed into the decision to dismiss, and that information relating to these underlying reasons ought to have been made available to the plaintiff as part of the disciplinary process for comment but was not. It is the pleadings, not the defendant's case as to what it says was taken into consideration in dismissing the plaintiff, which set the framework for analysis.

[24] Nor am I satisfied that it would be oppressive or disproportionate to order disclosure in relation to this category of documents. Sufficiently precise search terms, including (as the plaintiff says) in relation to applicable dates, should reduce the scale of the exercise.

The "Guppy" documentation

[25] This category of documentation is relevant to the claim of predetermination, relating as it does to the timing and circumstances surrounding the appointment of another employee who, it is said, effectively took over the plaintiff's role.

[26] The defendant says that all "reasonable documentation" has been disclosed in relation to this category of documentation. That is not the test under the Regulations. If the defendant is asserting that all relevant documentation has been disclosed, this should be adequately particularised in a verifying affidavit. If the defendant's position is that some of this documentation cannot be found, or is no longer in its possession,

custody, or control, this too should be adequately detailed in the affidavit. The defendant must otherwise provide disclosure of this documentation.

Settlement agreements

[27] There are two settlement agreements relating to other individuals who left the defendant's employ around the time of the plaintiff's departure and who were involved in events leading up to the defendant's review. In support of his claim of disparity of treatment, the plaintiff seeks disclosure of the two agreements. The defendant submits that incomplete disciplinary procedures cannot support such a claim and accordingly the documentation is not relevant. I do not accept that the legal position can be stated so baldly, and not at the disclosure stage, particularly where the Courts have reiterated the factually intense nature of the inquiry into disparity.

[28] The defendant is stoutly opposed to any disclosure of these documents on the grounds that:

(a) the agreements are protected by privilege;
(b) the parties to the agreements do not agree to waive privilege in them; and
(c) the documents would (in any event) be inadmissible at trial.

[29] Both parties referred to s 57 of the Evidence Act 2006, and to the common law, in arguing about the extent to which the settlement agreements might be subject to disclosure. The Employment Court is not bound by the Evidence Act. It is bound to apply s 189(2) of the Employment Relations Act which provides that the Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit (whether strictly legal evidence of not). The Court is also required to apply the Employment Court Regulations. While it has been accepted that the rules contained within the Evidence Act provide useful guidance in this

jurisdiction,9 it seems to me that the starting point in terms of determining what is appropriately disclosed, or withheld from disclosure, is the statutory framework which specifically applies in this Court.

[30] Regulation 44 identifies only three grounds for refusing to disclose relevant documents: legal professional privilege; self-incrimination; and injury to the public interest. Other grounds do not feature.

[31] Sections 148 and 149 of the Act deal with the confidentiality of mediation and the enforceability of employment settlements.10 Section 148 provides:

(1) Except with the consent of the parties or the relevant party, a person who—
(a) provides mediation services; or
(b) is a person to whom mediation services are provided; or
(c) is a person employed or engaged by the department; or
(d) is a person who assists either a person who provides mediation services or a person to whom mediation services are provided—

must keep confidential any statement, admission, or document *created or made for the purposes of the mediation* and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

(2) No person who provides mediation services may give evidence in any proceedings, whether under this Act or any other Act, about—

(a) the provision of the services; or
(b) anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of the services.

(3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, *by subsection (1), is required to be kept confidential.*

(emphasis added)

[32] Essentially, subs (1) makes certain matters confidential, and subs (3) provides that any such confidential matters are not admissible in any Court. The focus is on confidentiality, not privilege or disclosure obligations; and admissibility (which is referred to) and disclosure are two different concepts.

9. See, for example, *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14]; *Morgan v Whanganui College Board of Trustees (No 2)* [2013] NZEmpC 117, [2013] ERNZ 285.

10 I did not understand the defendant to seek to rely on ss 148 and/or 149.

[33] Section 148 is distinct from s 149. The latter only applies when the mediator certifies the agreement by signing it after it is completed. The protections given in s 149 are not related to confidentiality or privilege but, rather, to challenges to the enforceability of the agreement. In this case the basis on which the settlement agreements were made is unclear, although Mr Waalkens referred to both having been made with the "assistance" of a mediator pursuant to the Act.

[34] Mr Worthy responsibly drew my attention to the judgment in *New Zealand Fire Service Commission v McEnaney*.11 There the Court found that the settlement agreements were reached in mediation, and so:12

They are covered by the terms of s148 and the statutory confidentiality of these documents means that the defendants are not entitled to their disclosure or inspection.

I respectfully disagree with the conclusion reached in *McEnaney*, for reasons which will become apparent.

> [35] Is a settlement agreement, arrived at as a result of without prejudice discussions during the provision of "mediation services" (as defined by the Act), a "statement, admission, or document created or made for the purposes of the mediation"? 13 Even if it is, does that mean that it can be withheld from disclosure? And if so on what basis?

> [36] It is at this juncture that reference to s 57 of the Evidence Act offers some assistance. It provides that:
>
> > (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
> > (a) was intended to be confidential; and
> > (b) was made in connection with an attempt to settle or mediate the dispute between the persons.
> > (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in

11 *New Zealand Fire Service Commission v McEnaney* EmpC Auckland AC36A/03, 21 August 2003.

12 At [15].

13 See s 148(2), (3).

connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

(2A) A person who is a party to a criminal proceeding has a privilege in respect of any communication or document made or prepared in connection with plea discussions in the proceeding.

(2B) However, the court may order the disclosure of the whole or any part of a communication or document privileged under subsection (2A) if the court considers that—

> (a) the disclosure is necessary for a subsequent prosecution for perjury; or
> (b) the disclosure is necessary to clarify the terms of an agreement reached, if the terms are later disputed or are ambiguous; or
> (c) after due consideration of the importance of the privilege and of the rights of a defendant in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it.
> (3) This section does not apply to—
>
> > (a) the terms of an agreement settling the dispute; or
> > (b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or
> > (c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer ...

[37] Mr Worthy submitted that s 57 of the Evidence Act reflected the way in which s 148 of the Employment Relations Act ought to be approached, and that "documents made for the purpose of mediation" do not include (as s 57(3) puts beyond doubt) the terms of settlement. This, it is said, reflects the fact that the final agreement is the *result* of the mediation; it is a record of the mediation being completed, not a document made for the purposes of the mediation. I agree. While s 148 contains no express exclusion in similar terms to s 57(3) of the Evidence Act, it is notable that it contains no reference to agreed terms of settlement at all. This can be contrasted to s 149 which does refer to terms of settlement, but only those signed by an authorised mediator.14

> [38] The potential difficulty thrown up by reading s 148 of the Employment Relations Act as including terms of settlement may be illustrated by the following example. Two parties to an employment relationship have signed a settlement agreement. Party A seeks to enforce the agreement against Party B. A mediator helped them reach the agreement but did not go through the prescribed steps and did not sign

14 Section 149(3)(b).

it.15 Party B subsequently denies a particular clause in the agreement exists. Since the agreement is confidential, and cannot be admitted in evidence, there is nothing Party A can do about that.

> [39] I approach the issue on the following basis. Documentation relating to the settlement negotiations that took place at mediation under the Act is covered by the confidentiality requirements of s 148(1); and is inadmissible under s 148(3). The plaintiff does not seek any documentation falling into this category, so the point is moot. The settlement agreements resulting from any such negotiations (which the plaintiff does seek), are not covered by the confidentiality requirements of s 148(1); and are not inadmissible under s 148(3).

[40] As I have said, the defendant argues that the agreements are privileged and there is accordingly no obligation to disclose them. Regulation 44 makes it clear that, in order to avoid disclosure, they would need to be subject to a particular form of privilege, namely legal professional privilege. Legal professional privilege does not apply to a concluded settlement agreement and there is accordingly no basis for objecting to disclosure of the agreements under reg 44. Nor do I accept, in any event, that a final settlement agreement is privileged. There is, as I have already said, a distinction between the process leading up to a settlement agreement being entered into and the resultant settlement agreement itself. The former is privileged. The latter is not.16 A settlement agreement may raise concerns about confidentiality. These can be addressed by appropriate undertakings and orders of the Court.

[41] I return to s 57 at this point as both parties referred to it in submissions.

[42] On its face (and putting ss 148 and/or 149 to one side), s 57(1) cannot apply to the settlement agreements between the defendant and the two individuals because of the exception under s 57(3). The section draws a clear distinction between the

15 Thus making the agreement protected under s 148, but not s 149.

16 For a discussion in a different statutory context, see *McKay v the Commissioner of Inland Revenue* [2018] NZCA 138 at [34] where the Court of Appeal (in considering the privilege attaching to a settlement agreement made under s 14 of the Family Disputes Resolutions Act 2013) upheld the High Court's conclusion that the settlement agreement itself was not privileged. A distinction was drawn between statements made during negotiations and the resulting agreement, which was said to be a "recording of the resolution of all matters in dispute ... a step taken after the FDR provider has dealt with the dispute".

negotiations (privileged) and the agreement that results from those negotiations (not privileged).

[43] Mr Waalkens advanced a two-step argument in response. First, s 57 of the Evidence Act does not apply in this instance. This, he said, is because the provision only provides a privilege against another party in the same dispute as the one where the communication took place, not against a third party in another dispute. Second, because the section does not apply, reference must be made to the common law and, in particular, the House of Lords decision in *Rush & Tompkins Ltd v Greater London Council*.17

[44] Some support for the first step of the argument emerges from the wording of s 57(1) itself, which says the privilege is "... in respect of any communication *between that person and any other person who is a party to the dispute* ...". However, a closer reading of the provision reveals that the reference is to the particular communications which are privileged, not who the privilege works against. The latter point is dealt with in s 53(1), which provides:

> (1) A person who has a privilege conferred by any of sections 54 to 59 in respect of a communication or any information has the right to refuse to disclose in a proceeding—
>
> (a) the communication; and
>
> (b) the information, including any information contained in the communication; and
>
> (c) any opinion formed by a person that is based on the communication or information.

[45] It follows that the privilege under s 57 applies in any proceeding, not only a proceeding against the other party to the negotiation.18 In other words, if the defendant held the privilege under s 57 (that is, if it did not fall under the exception in s 57(3)(a)), then that privilege could apply against any third parties, including Mr Elisara. On this basis, s 57 would apply in this fact scenario, and there would be no need to resort to the common law.

17 *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER (HL).

18 See also *New Zealand Institute of Chartered Accountants v Clarke* [2009] NZHC 249; [2009] 3 NZLR 264 (HC).

[46] Mr Waalkens further submitted that, if s 57 does not apply, the House of Lords decision in *Rush* was authority for the proposition that the settlement agreements themselves are privileged against third parties. I do not perceive *Rush* to cast any particular light on the question posed in this case. As Mr Worthy pointed out, the actual settlement agreement in *Rush* was disclosed to the party seeking discovery. In oral argument Mr Waalkens referred to the following part of the judgment which, he suggested, reflected the fact that the House of Lords was referring to the negotiations and the agreement itself:19

I would therefore hold that as a general rule the without prejudice rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party.

[47] I do not read this passage as authority for the proposition that the settlement agreement is privileged. What are said to be privileged are the "admissions made in a genuine attempt to reach a settlement." Such admissions are distinct from the settlement agreement itself. Further, the reference in *Rush* to "whether or not settlement was reached with that party" does not in my view advance matters. This appears to have been directed at a prior Court of Appeal case, *Walker v Wilsher*,

which decided that, if settlement was reached between the parties, the negotiations leading up to the settlement stop being privileged.20 It says nothing about the settlement agreement itself being privileged.

[48] As proposed by Mr Worthy, the agreements are to be disclosed but on a limited counsel-only basis at this stage, and with appropriate undertakings, the terms of which should be discussed between counsel and, if necessary, can be referred to the Court. The confidentiality provisions in the Regulations also provide a safeguard.21

19 *Rush & Tompkins*, above n 17, at 741.

20 At 740-741; *Walker v Wilsher* [1889] UKLawRpKQB 124; (1889) 23 QBD 335 (CA).

21 Employment Court Regulations 2000, reg 51.

Investigative material

[49] The plaintiff seeks disclosure of investigative material relating to the second employee. I have already dealt with, and rejected, the defendant's argument that this material is irrelevant to the plaintiff's disparity claim because the investigative process was never concluded. Disclosure is accordingly ordered.

Reinsurance documentation

[50] The plaintiff seeks documentation relating to another individual in support of his claim of disparity of treatment. The defendant submits that the documentation is not relevant because the individual was not employed by the defendant company, but by Allianz Australia. Again, the approach is too narrow. Part of the plaintiff's claim is that the decision to dismiss him was made, or influenced, at a high level within the company structure, specifically by senior management within Allianz Australia. Documentation relating to the way in which another individual was treated as part of the broader review may cast light on the reality of the decision-making process as it applied to the plaintiff; the reasons why the plaintiff (unlike others) was dismissed; and the extent to which any disparity of treatment (which is denied) was justified.

[51] One of the disclosed documents refers to another document (known as the REMS document). That document is relevant to the plaintiff's disparity claim, in that it may support it, and ought to be disclosed.

[52] In relation to other reinsurance documentation which is sought, I understood the defendant's position to be that comprehensive (as in full) disclosure had already occurred. The position should be confirmed in a verifying affidavit.

Category 10 – emails

[53] The plaintiff seeks disclosure of emails and notes. The defendant says that an email chain has been disclosed and no other documentation exists, despite the fact that the documentation which has been disclosed refers to an intended briefing, which would be forwarded; an intended meeting; and a report which had been prepared. The

existence or otherwise of this requested documentation must be confirmed in a verifying affidavit sworn or affirmed by a suitably qualified individual, including setting out the steps that have been taken to search for the documentation sought and, if they did exist but no longer exist, what became of them.

Conclusion

[54] The defendant is ordered to provide disclosure of the documents and categories of documents referred to in [23] and [48]-[51] above, within 20 working days of the date of this judgment.

[55] The defendant is ordered to serve a verifying affidavit in respect of the documents and categories of documents identified in [22], [25]-[26] and [52]-[53] above, within 20 working days of the date of this judgment. The verifying affidavit is to be sworn/affirmed by a suitably qualified person so as to fully inform the Court and the plaintiff as to the position in respect of the documentation at issue. The affidavit is to be given by a person with the requisite authority to make the necessary full and proper inquiries as to the existence and whereabouts of the documentation (including as to documentation that was in existence but is no longer in existence) and who is in a position to confirm what has happened to any such documentation and when. This may well necessitate broader inquiries, including within Allianz outside New Zealand. The affidavit is to be fully particularised, including setting out each of the steps taken to fulfil the defendant's disclosure obligations in respect of the identified documents, and listing the documents to be disclosed in a schedule appended to the affidavit which is to identify the documents that:

(a) are in the control of the defendant for which the defendant does not claim privilege;
(b) are in the control of the defendant for which privilege is claimed, stating the nature of the privilege claimed;

(c) have been, but are no longer, in the possession, custody or control of the defendant, stating when the documents were parted from and what became of them;
(d) have not been in the defendant's possession, custody or control but which the defendant knows would be discoverable if it had possession, custody or control of them; and
(e) identify any document in respect of which confidentiality issues are said to arise and why; and set out any restrictions proposed to protect the claimed confidentiality of any such document.

[56] Both parties asked that costs be reserved, and there are orders accordingly.

[57] Leave is reserved for either party to apply for any further directions which may be necessary.

Christina Inglis Chief Judge

Judgment signed at 11.15 am on 28 August 2018
