



Employment Court of New Zealand

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Kumar v New Zealand Post Limited [2021] NZEmpC 128 (12 August 2021)

Last Updated: 20 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 128](#)

EMPC 106/2021

IN THE MATTER OF	an application for s 6(5) declaration as to employment status
AND IN THE MATTER OF	an application for verification order
AND IN THE MATTER OF	an application for leave to extend time to file evidence
AND IN THE MATTER OF	an application to exclude evidence
AND IN THE MATTER OF	an application to adjourn hearing
BETWEEN	ASNEIL AMIT KUMAR Plaintiff
AND	NEW ZEALAND POST LIMITED Defendant

Hearing: 11 August 2021 (by telephone)

Appearances: G Pollak and M Pollak, counsel for plaintiff
H Kynaston, E von Veh and P Conroy, counsel for
defendant

Judgment: 12 August 2021

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application for verification order) (Application for leave to extend time to file evidence)

(Application to exclude evidence) (Application to adjourn hearing)

[1] This proceeding relates to an application for declaration of employment status by Mr Kumar who works with New Zealand Post as a courier driver. NZ Post contends that he is an independent contractor. The case has been set down for a three-day

ASNEIL AMIT KUMAR v NEW ZEALAND POST LIMITED [\[2021\] NZEmpC 128](#) [12 August 2021]

hearing in Auckland commencing on Tuesday 24 August 2021, just less than two weeks away. A number of interlocutory matters have arisen which require prompt resolution. I dealt with these matters during a hearing by telephone with counsel yesterday afternoon and made a number of directions and orders. In summary:

- (a) I made a verification order in NZ Post's favour;
- (b) I granted leave for an extension of time for NZ Post to file expert evidence;
- (c) I adjourned the application to exclude evidence;
- (d) I reserved leave to the parties to apply for further orders.

[2] I indicated that my reasons would follow. These are my reasons.

Application for verification order

[3] The jurisdiction of the Court to make a verification order is set out in regs 46 and 47 of the [Employment Court Regulations 2000](#).¹ In essence, the Court may make a verification order if satisfied of the probable existence of the document or class of documents specified in the notice requiring disclosure.² The effect of a verification order is to require the opposing party to disclose, in a sworn or affirmed statement, whether any document or class of documents which has not been disclosed in response to a request, is in the possession, custody or control of the opposing party; if not, whether such document or class of documents was ever in the possession, custody or control of the opposing party; and if so, when it was parted with and what became of it.³

[4] At the heart of any assessment as to whether a verification order should appropriately be made is the relevance or otherwise of the documents sought. A document is relevant if it directly or indirectly supports, or may support, the case of

1 See generally *Prasad v LSG Sky Chefs New Zealand Ltd (No 3)* [2017] NZEmpC 64.

2 [Employment Court Regulations 2000](#), reg 47.

3 [Employment Court Regulations 2000](#), reg 46.

either party or is referred to in any other relevant document and is itself relevant.⁴ The pleadings provide the framework for assessing relevance; and relevance itself is defined in speculative rather than definitive terms.

[5] Also relevant, in terms of the analysis, is the underlying purpose of the disclosure regime provided for in the [Employment Court Regulations](#). Disclosure is designed to ensure that each party has access to relevant documents of the other party, recognising that, while such access is usually necessary for the fair and effective resolution of differences between the parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both.⁵ Regard must be had to the overarching statutory objective of securing the speedy, fair and just determination of the proceeding.⁶

[6] The documents sought by NZ Post are set out in its application and all relate to Mr Kumar's financial records. They are plainly relevant to an assessment of his status in terms of a conventional approach to s 6 of the [Employment Relations Act 2000](#), and following discussion I did not understand counsel for Mr Kumar to be suggesting otherwise.

[7] Has a reasonable basis been made out by NZ Post to satisfy the Court of the probable existence of documentation specified in the notice requiring disclosure? I am satisfied that there is. The basis emerges from the documentation currently before the Court. That material throws up a degree of uncertainty as to the likely completeness of the material disclosed to date, including as to what documentation existed when and who may have been in possession of it; how communications in respect of Mr Kumar's financial affairs have been made, and the nature of them; and currently unexplained gaps in some of the figures referred to. I accept Mr Kynaston's submission for NZ Post that all of this raises issues as to the likelihood of undisclosed documentation either having been, or being, in Mr Kumar's possession or control and/or in someone else's possession or control at relevant times, and that there is a

4 [Employment Court Regulations 2000](#), reg 38.

5 [Employment Court Regulations 2000](#), reg 37.

6. *New Zealand Post Primary Teachers Association v Board of Trustees for Rodney College and The Secretary for Education* [2019] NZEmpC 3 at [3].

reasonable basis for concluding that the documents sought probably exist, based on the information currently before the Court.

[8] Counsel are agreed that this case is important and that it is preferable for there to be full information before the Court. I concluded that it was appropriate to make an order for verification and did so at the conclusion of yesterday's hearing.

[9] Mr Kumar was accordingly ordered to make a sworn or affirmed statement, stating whether documents, as described in NZ Post's application for a verification order dated 9 August 2021, are or have at any time been in the possession, custody or control of the plaintiff and if such a document or class of documents is no longer in the plaintiff's possession, custody or control, when it was parted with and what has become of it. The affidavit or affirmation is to be filed and served by midday Monday 16 August 2021.

Leave for an extension of time for New Zealand Post to file further evidence

[10] I considered it appropriate, in light of the orders I made in terms of verification and the matters traversed in Mr Kumar's most recent affidavit in respect of his financial arrangements, to grant NZ Post's application to extend the time for filing additional evidence. Counsel for Mr Kumar, Mrs Pollak was not opposed to such a course in the circumstances. The corollary of that is that the plaintiff will need to have time to consider his position and have the opportunity to reply to any such evidence.

[11] It was agreed that any further evidence from Mr White is to be filed and served by 5.00pm Wednesday 18 August 2021. Any evidence in reply is to be filed and served by 5.00pm Friday 20 August 2021.

Application to exclude evidence

[12] NZ Post's application to exclude evidence was deferred. I indicated that Mr Kynaston could apply to bring the application back before the Court in advance of the hearing or it may be that the matters of concern can be dealt with through discussions

between counsel. A further conference call can be convened prior to the hearing and these issues dealt with after argument if necessary. Leave was reserved accordingly.

Application to adjourn hearing

[13] It was agreed that this application would be deferred in the meantime. Much will depend on the outcome of the verification process. Co-counsel for Mr Kumar, Mr Pollak, indicated that any application would be strenuously opposed. If NZ Post brings the application back on, I will hear full argument on it. At present it is premature to decide whether or not the hearing can appropriately proceed on its currently allocated dates.

[14] I reserved costs.

Christina Inglis Chief Judge

Judgment signed at 4.17 pm on 12 August 2021