



Employment Court of New Zealand

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Lyttelton Port Company Limited v Arthurs [2017] NZEmpC 100 (21 August 2017)

Last Updated: 23 August 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2017\] NZEmpC 100](#)

EMPC 85/2017

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

AND IN THE MATTER of an application for disclosure of
 documents

AND IN THE MATTER of an application to strike out part
 of the pleadings

BETWEEN LYTTELTON PORT COMPANY
 LIMITED
 Plaintiff

AND CHRIS MILES ARTHURS Defendant

Hearing: 4 August 2017

Appearances: T Mackenzie, counsel for the
 plaintiff
 D Beck, counsel for the defendant

Judgment: 21 August 2017

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

[1] This judgment deals with two interlocutory applications. First, Lyttelton Port Company Ltd applied to strike out a paragraph in the defendant's statement of defence containing an affirmative defence. Second, Chris Arthurs has applied for disclosure of documents he says will be relevant to a claim of disparity of treatment.

Both applications were opposed.

LYTTELTON PORT COMPANY LIMITED v CHRIS MILES ARTHURS NZEmpC CHRISTCHURCH [\[2017\] NZEmpC 100](#) [21 August 2017]

Application to strike out

[2] Lyttelton Port applied to strike out para 22.8 of Mr Arthurs' statement of defence in which he raised an affirmative defence and sought to advance issues about alleged discrimination:

22.8 The Defendant anticipates from the concurrent Plaintiff's Stay Application that an objection to him returning to work will be on the basis that he may pose a danger to the public and by implication other workers, due to his PTSD. The Stay Application filed on 18 April posited that: *There is a public interest in the safe operation of the applicant's workplace, which may be compromised by the return of the respondent.* The Defendant considers that such an assertion would raise an issue of the employer engaging in a discriminatory practice in contravention of section 22 [Human Rights Act 1993](#) and [section 104](#)

[Employment Relations Act 2000](#).

(Original emphasis)

[3] The plaintiff applied to strike out that paragraph because the discrimination claim was abandoned during the investigation meeting and was not part of the matter placed in issue by its challenge.

[4] At para [40] of the determination, the Authority recorded Mr Arthurs having abandoned part of his claim in the following way: "At the beginning of the hearing, Mr Arthurs confirmed the withdrawal of his disadvantage and discrimination personal grievances."¹

[5] Initially, Mr Beck, counsel for Mr Arthurs, resisted this application by submitting para 22.8 identified a novel proposition, about whether or not an employee diagnosed with Post Traumatic Stress Disorder (PTSD) can be dismissed for medical incapacity without the employer engaging in unlawful discrimination.

[6] However, after a brief adjournment, counsel advised me that an agreement had been reached to address this affirmative pleading by withdrawing it. Consequently Lyttelton Port's application was resolved apart from any issue about costs.

1 *Arthurs v Lyttelton Port Company Ltd* [2017] NZERA Christchurch 53.

Challenge to objection for disclosure

[7] Both Lyttelton Port and Mr Arthurs sought disclosure of documents. Lyttelton Port sought access to documents about Mr Arthurs' mental and physical health arising from his condition and subsequent injury.

[8] Mr Arthurs objected because he considered what was requested was expressed too widely and not all of the information was relevant. Before the hearing an agreement was reached for certain documents to be provided as a result of which it was not necessary to consider Lyttelton Port's application.

[9] On 27 June 2017, Mr Arthurs gave notice to Lyttelton Port that he required disclosure by it of documents identified or described in six numbered paragraphs. The company objected because it considered the requests were too broad, vague, the documents requested did not exist, or what was asked for was not relevant.

[10] Lyttelton Port's objection was supported by an affidavit sworn by its industrial relations manager, Ms Sally Williams. Her evidence was that all of the documents that she had been able to obtain, by searching through Mr Arthurs' file, had been supplied to him. Where no documents existed of the sort requested by Mr Arthurs, Ms Williams was able to say so.

[11] By the time Mr Arthurs' application was heard agreement had been reached to disclose those documents he sought which were copies of emails, file notes, and memoranda relating to his dismissal, Lyttelton Port's policies for handling medical incapacity, the criteria it adopted in dealing with long-term incapacity and all documents relating to how it deals with employees suffering from PTSD.

[12] What remained unresolved was para 6 of Mr Arthurs' notice which reads:

6. A list of all employees from 1 January 2007 who have been afforded in excess of six months sick leave and their positions kept open (identifying names to be removed). The list to be compiled in a table in chronological order stipulating occupations and to include:

a. A concise description of the illness or incapacity (including whether covered by ACC as work related accident or not) and an outline of the steps taken by the Plaintiff to engage with and

support each identified individual including any additional paid sick leave granted.

b. An indication of any active engagement with ACC and the nature of such including the use of any specialist occupational health practitioners or workplace modifications.

c. The length of service of each individual.

d. An indication of any extant disciplinary issues during each

individual's absence.

e. A notation on each individual case indicating how each situation was resolved including by either resignation or ongoing employment whether by continuance of existing position or any redeployments.

f. Notation of any instances where graduated return to work plans and/or use of alternative or limited duties and/or reduced hours were utilised and the nature of such.

g. A list of all employees terminated for medical incapacity in the period from 1 January 2007 and an outline of their length of absence prior to termination and description of the incapacity.

h. An indication on each case on how the individual's position was

covered during the absence.

[13] What lies behind this application is a concern by Mr Arthurs that he has suffered from a disparity of treatment and he is seeking information that may assist him in that argument.

[14] Some information of the type now sought has already been supplied by Lyttelton Port but not in the detail required to satisfy para 6. A table was created by Lyttelton Port for the Authority investigation meeting, a copy of which was provided to the Court. That table listed employees who had sick leave of six months or more from 1 January 2010. The table listed 14 individuals who were not named but were identified only by the letters A-N inclusive. In each case the table provided some, possibly limited, information about each employee's incapacity. For example, the employee identified as A had suffered a non-work accident in November 2010 by injuring both knees. The employee was treated through ACC and had surgery in June 2011, with the cost being covered by a private health insurer, before returning to work on full-time duties in September 2011.

[15] The same type of information was provided for each of the remaining employees listed in the table. Ms Williams said that the compilation of this table had been time consuming and difficult. She doubted that the requests made in Mr Arthurs' application could be answered, even putting aside the amount of time that might be required to attempt to do so. She said that in some cases the company would no longer have the files and for others it is unlikely that there will be complete information to answer what had been asked. Ms Williams noted that this request seeks information for a further three years beyond what was provided in Lyttelton Port's table.

[Employment Court Regulations 2000](#)

[16] The starting point is reg 40 of the [Employment Court Regulations 2000](#) which provides that any party may require an opposing party to disclose and to make available for inspection any documents which are in the opposing party's possession, custody, or control.

[17] Central to disclosure is the relevancy of the documents sought to be disclosed. Relevancy is dealt with in reg 38 as follows:

(1) ... 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.

[18] As was described in *Fox v Hereworth School Trust Board*, it is axiomatic that what is in issue between the parties to litigation is identified by the pleadings.² *Fox* also supports the proposition that, even where a document is relevant, the Court has

a discretion to refuse unnecessary or undesirable disclosure.³

² *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154 at [40].

³ At [41].

[19] In *Nel v ASB Bank Ltd*⁴ the Court also observed that disclosure will not be ordered where what is involved is no more than a fishing expedition. That is where the party requiring disclosure is seeking information or documents to discover a new cause of action or circumstances which may or may not support a baseless or speculative cause of action.⁵

[20] Mr Beck submitted that *Fox* and *Nel* correctly focus on the issue of relevance in the proceeding, both under reg 38(1) and by analogy with r 8.14 of the [High Court Rules 2016](#). He submitted Mr Arthurs' application was reasonable and relevance in this context should not be looked at too narrowly.

[21] The submission was that Mr Arthurs' application is reasonable because it is intended to bolster his pleading that he was subjected to disparity of treatment by Lyttelton Port. In *Wikaira v Chief Executive of the Department of Corrections*⁶ former Chief Judge Colgan considered the test for disparity following the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)*,⁷ and held there were three parts to consider:

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[22] Mr Beck submitted that the material sought in para 6 will go towards satisfying the test in *Wikaira*. Among the matters relied on was the possibility that this information might show broad comparisons of the types of injuries to employees Lyttelton Port had dealt with.

[23] Those comparisons extended to information about the length of absence, and numbers of medical certificates supplied by each employee including how the

company dealt with ACC and medical practitioners in those cases. Other

⁴ *Nel v ASB Bank Ltd* [2017] NZEmpC 56.

⁵ At [33].

⁶ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175.

⁷ *Chief Executive of Department of Inland Revenue v Buchanan (No 2)* [2005] NZCA 428; [2005] ERNZ 767 (CA).

information to be gleaned from this disclosure included how positions were filled during an employee's absence, whether alternative duties were offered, the extent to which other employees were accommodated in returning to work and whether or not Lyttelton Port generally adhered to its own return to work policies.

Analysis

[24] Paragraph 6 makes it clear that what is expected is the compilation of a new document by Lyttelton Port. Mr Beck acknowledged that satisfying para 6 necessitates creating a list with a descriptive statement in it rather than disclosing an existing document. Similarly, the requirement in para 6b, for "an indication of any active engagement with ACC" together with a request about the nature of that engagement, is for information to be compiled and either summarised or described.

[25] What is required at para 6c, is information about the length of service of each of the individuals who might be identified once the list to be compiled to satisfy para 6 has been prepared. Mr Beck confirmed that paras 6d to 6h, are designed to build on the list sought to be compiled under para 6.

[26] What is sought goes beyond disclosure as provided for in the regulations and cannot be justified on the basis of reasonableness or by the observations about the ambit or purpose of disclosure in *Fox* and *Nel*. In *Fox* the Court said:⁸

... Finally, I accept also the commonsense that the Court should not order disclosure of documents which do not exist or would be required to be created in order to exist and be disclosed. There may be other litigation strategies that will reach that result, but document disclosure is not one of them.

(Footnotes omitted)

[27] The application for disclosure in para 6 falls squarely within those comments in *Fox*. Having some information about disparity of treatment may assist Mr Arthurs' claim. However, that does not mean Lyttelton Port is required to go to the extent of creating a new document which satisfying this notice requires.

⁸ *Fox*, above n 2, at [40].

[28] In reaching that conclusion I have borne in mind that Lyttelton Port has compiled a separate document which does list, anonymously, other employees who have been absent for long periods of time. It may be that Mr Arthurs is entitled to explore that list in some way but not by the mechanism adopted in para 6 of his notice.

Outcome

[29] Mr Arthurs' application for disclosure is dismissed.

[30] Costs on both the application seeking to strike out a paragraph of the statement of defence and for disclosure are reserved.

K G Smith

Judge

Judgment signed at 2.15 pm on 21 August 2017

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