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Miller v Fonterra Co-operative Group Limited [2011] NZEmpC 20 (4 March 2011)

Last Updated: 10 March 2011

IN THE EMPLOYMENT COURT

AUCKLAND

[20101 NZEmpC20

ARC 45/09 IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN SEAN MILLER

Plaintiff

AND FONTERRA CO-OPERATIVE GROUP

LIMITED

Defendant

Hearing: 25 February 2011

(Heard at Auckland)

Counsel: Tony Drake, counsel for the plaintiff

John Rooney, counsel for the defendant

Judgment: 4 March 2011

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B S TRAVIS

[1] In my second interlocutory judgment, issued on 6 September 2010^[1], I noted that Mr Drake, counsel for the plaintiff, would be considering whether or not to seek further and better discovery of the documents listed by the defendant. In that judgment I referred to the taking of the evidence of a witness who was very unwell and the arrangements that were made for that evidence to be taken on Tuesday 5 October 2010. That witness sadly passed away on 16 September, but in the plaintiff's affidavit in support of the application for further and better discovery, sworn on 12 August 2010, Mr Miller annexed an affidavit of that person, Mr Young, which was sworn on 29 May 2008.

[2] Mr Rooney, counsel for the defendant, has indicated that objection will be taken to that affidavit being read as part of these proceedings but Mr Drake has called on that affidavit in support of the plaintiff's application for further and better disclosure, which was filed on 8 October. I will take the affidavit of Mr Young into account for the purposes of the present application.

[3] The plaintiff's application has been refined by Mr Drake, following a half

day interlocutory hearing on 14 February 2011. The plaintiff now seeks documents under two main categories:

(a)(i) All documents relating to any involvement which the defendant's predecessor organisations, viz. New Zealand Dairy Group, New Zealand Dairy Board, [NZ Dairy Board] Kiwi Co-operative Dairies Limited [Kiwi], including their subsidiaries and related entities, had during the period 1996 to October 2001 in marketing or selling a proportion of their produce outside the regulatory regime of the NZ Dairy Board in effect at that time;

(a)(ii) All documents relating to the disclosure of information the defendant made to the Ministry of Agriculture and Forestry [MAF] and to the Serious Fraud Office [SFO], in the course of their respective investigations into alleged illegal exports of dairy produce during 2001-2002.

[4] Mr Drake filed a memorandum on 23 February in which he states that, in an

attempt to narrow the scope of disclosure under those two main categories, leave was sought to amend the original notice of application in the following ways:

(a) In relation to category (a)(i), the types of documents described in

(a)(i) specifically coming within the following sub-classes of relevant documents, for the period referred to in the notice of application (1)(a)(i) except as otherwise stated below:

- (i) Internal memoranda and internal emails of the defendant's officers and staff.
- (ii) Transcripts of any personal statements given by the defendant's officers or employee[s].
- (iii) Those documents that are copies of the defendant's own documents which I have included in my [the plaintiff's] list of documents but which the defendant has not included in its list to date.
- (iv) The defendant's Board Minutes and Board Papers for the period 1996 until 1 March 2007.

[5] The extended date referred to in (iv) above takes matters through to the time

when the plaintiff has pleaded in his statement of claim that he was discharged without conviction in relation to charges laid against him under the [Customs and Excise Act 1996](#) by the SFO. Leave is granted to amend the application to cover that period for the Board minutes and papers,

[6] In relation to category (a)(ii) Mr Drake indicated that he sought an order in the following terms: the disclosure of correspondence, attachments and related documents between the defendant, MAF and the SFO, and their respective legal advisors during the period 1 August 2001 and 1 April 2004, but not the files of documents provided to those organisations by the defendant in response to any summons to produce documents.

[7] The extension until 1 April 2004 for category (a)(ii) documents from the original date of 2002 in the application, was sought on the basis that, after that date, in 2004 the plaintiff had become involved in criminal proceedings brought by the SFO, allegedly as a result of material provided by the defendant. The extension also relied on an allegation in the statement of claim that the defendant had failed to inform MAF and the SFO of all the relevant facts which, if they had been disclosed, would have persuaded the latter not have continued with the prosecution against the plaintiff. Leave to extend the period in the original application is granted to cover those communications up to the SFO's laying of charges against the plaintiff on 1 April 2004.

[8] The gravamen of the plaintiff's complaint is that MAF was not satisfied with the information it was provided by the defendant between November 2001 and March 2002, and therefore requested the SFO to take over the investigation. The plaintiff alleges that the defendant did not disclose to the SFO an accurate account of what the plaintiff claims was a "widespread practice" for dairy companies operating in New Zealand to sell a portion of their product outside the control of the NZ Dairy Board. This practice was described as "Powdergate" in the dairy industry and I will use this as a shorthand for those actions. As a result of this non-disclosure the plaintiff alleges that the SFO continued with its investigation and subsequently charged the plaintiff and three other former employees of Kiwi with serious offences under the [Crimes Act 1961](#) and later, after withdrawing these, laid charges under the [Customs and Excise Act 1996](#).

[9] The plaintiff also alleged that the "widespread practice" was known and approved by the boards of the respective companies and organisations in the dairy industry, including the boards of Kiwi, the New Zealand Dairy Group and the NZ Dairy Board.

[10] These allegations are all denied by the defendant.

[11] It is common ground that on 16 October 2001 Kiwi, together with the NZ Dairy Group, amalgamated and the defendant was formed pursuant to the provisions of the [Companies Act 1993](#) and the Dairy Industrial Restructuring Act 2001. The NZ Dairy Board became a subsidiary of the defendant.

[12] It may be broadly stated that documents which the plaintiff now seeks to have the defendant disclose relate to the state of knowledge of the defendant and its predecessor organisations of the "widespread practice" of Powdergate and the alleged failure of the defendant to adequately disclose its knowledge of that "widespread practice" to both MAF and the SFO.

[13] The plaintiff, as part of the criminal disclosure in respect of the charges brought against him by the SFO, received from the SFO a substantial number of documents obtained by the SFO from the defendant which deal with the central issues. Many of these documents have not been listed by the defendant in the lists of documents it has provided to the plaintiff. The plaintiff also requires the defendant to file and serve an

affidavit dealing with these documents, a process which is contemplated by regs 46 and 47 of the [Employment Court Regulations 2000](#).

[14] Mr Drake relies, for the present application, on regs 38 and 40 of the [Employment Court Regulations](#), which define the meaning of relevant documents and set out the availability of the disclosure of such documents.

[15] Mr Drake also relied on rule 8.24 of the High Court Rules, which provides: 8.24 Order for particular discovery against party after proceeding

commenced

If at any stage of the proceeding it appears to a Judge, from evidence

or from the nature or circumstances of the case or from any document

filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—

(a) to file an affidavit stating—

(i) whether the documents are or have been in the party's control; and

(ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control, and who now has control of them; and

(b) to serve the affidavit on any other party.

[16] In support of his application the plaintiff has filed two affidavits he has sworn which annex various documents and the affidavit of Mr Young, a former Chairman of Kiwi and its representative on the NZ Dairy Board for three years, whose evidence supports the NZ Dairy Board's knowledge of the "widespread practice".

[17] In his submissions on 14 February Mr Drake relied on another document annexed to the plaintiff's affidavit of 12 August, a news release dated 21 December 2001 from the defendant which referred to "Powdergate" and which stated these arguments were "not unique to any of the Fonterra predecessor organisations". It claimed it involved lower level personnel and knowledge on the part of senior management was generally after the event and related to the risk management action.

[18] The affidavit also annexed an interim report dated 11 December 2001 to what was described as the "A&R Committee" which refers to the involvement of representatives of Kiwi and the NZ Dairy Group and their subsidiaries in Powdergate activities. The interim report concludes that a former senior employee of one of the subsidiaries amalgamated into the defendant and who subsequently became a senior employee of the defendant had not given a full or truthful account in a statutory declaration provided pursuant to the defendant's request, as to his involvement in Powdergate. I do not choose to identify that person at this stage.

[19] As a result of Mr Drake's submissions and his references to other documents not annexed to Mr Miller's affidavits, I invited him to file a further memorandum annexing those documents relevant to these issues which were in the plaintiff's possession. I have read all of that material and received submissions on them from both counsel.

[20] One is the transcript of an interview conducted by the SFO with a very senior employee of the defendant. It is strongly submitted by Mr Drake that this supports the plaintiff's claim that the SFO officer carrying out the interview on 2 December 2002 told the senior employee that if there was a common practice to avoid the NZ Dairy Board's requirements, the SFO would not want to prosecute someone in respect of a specific instance, if there were other instances of a similar nature which made it an industry practice. The senior employee responded that it would have been dealt with "very, very harshly" if it had come to the attention of the Dairy Group Board. Mr Drake observed that this statement was difficult to reconcile with earlier communications to the defendant's interim board in late 2001 and minutes of the NZ Dairy Board as early as May 1998.

[21] The documents relied on by Mr Drake, the pleadings and the submissions, have satisfied me that the defendant has not disclosed one or more documents, or a group of documents, that should have been disclosed.

[22] I am, however, sympathetic to Mr Rooney's submissions, based on the affidavit filed in support of the defendant's opposition by David Allan Matthews, that, as originally framed, the plaintiff's application would require the examination of many thousands of documents and would involve lengthy, expensive and time consuming investigations by the defendant and its staff.

[23] Mr Drake's amended application has attempted to address those practical difficulties.

[24] As a result of the submissions of counsel at the resumed interlocutory hearing on Friday 25 February 2011, I considered that there was a way of limiting the investigation into what I was satisfied were relevant documents by reference to the work done to prepare the interim report to the "A&R

Committee" dated 11 December 2001. According to the press release from the Board of Directors of the defendant on 21 December 2001, the board of the defendant had commissioned an extensive investigation into allegations around Powdergate which had involved hundreds of hours of investigatory time and interviews and the examination of more than 100,000 emails, a huge volume of documents and interviews with more than 30 individuals, some of whom were reinterviewed.

[25] Using the A&R Committee's documents as the starting point, however, that should cover relevant documentation for the period 1996 until October 2001 of the defendant's predecessor organisations involved in Powdergate. This should also include the relevant internal memoranda and internal emails of the defendant's officers and staff and the relevant officers and staff of its predecessor organisations which were provided to the A&R Committee and the transcripts of statements given by any persons to the A&R Committee.

[26] If the documents collated by the A&R Committee and copies of the transcript of the interviews it conducted are still available, Mr Drake advised that these may well satisfy the plaintiff's request for those documents referred to in paragraphs (i)-(iii) above, inclusive. I consider that relevant documents within those categories should be disclosed by the defendant if those documents are or have been in the defendant's control.

[27] I also consider that, if there are any relevant documents contained in the defendant's board minutes or board papers for the period from its inception until 1 March 2007, they should similarly be disclosed. I reserve the issue of further disclosure of board minutes and papers of the defendant's predecessors until after disclosure of the interim report material.

[28] The further disclosure should be by affidavit. The person employed by the defendant to complete the affidavit must indicate which of those documents are, or have been, in the defendant's control, and if they are no longer in the defendant's control, state, to that person's best knowledge and belief, when the documents ceased to be under the defendant's control and who may now have control of them.

[29] I will also permit that person to give evidence on affidavit as to which documents can no longer be readily located and the steps which either have been taken or will need to be taken to locate the documents and will allow the defendant leave to rely on such evidence to argue that the further disclosure I have ordered will be oppressive because of practical difficulties in locating them.

[30] The defendant must also provide, in the affidavit, disclosure of the documents in category (a)(ii) consisting of the correspondence, attachments and related documents between the defendant to MAF and SFO, including to and from the respective legal advisors of MAF, the SFO and the defendant, during the period 1 August 2001 and 1 April 2004, but not the files of documents provided to these organisations by the defendant in response to any summons to produce documents. The same limitations set out above apply.

[31] Leave is reserved to the plaintiff, after inspection, to apply for further disclosure of other categories of relevant documents which may be revealed by the further disclosures. Leave is also reserved to the defendant to apply for a restriction on the further and better disclosure on the grounds that it may be oppressive because of the practical unavailability of all or any of those documents.

[32] I have invited Mr Drake to prepare a draft order for further and better disclosure in light of this judgment. That draft order is to be provided to the defendant's counsel and, if any objections are taken to it, the defendant should notify the Court and a further hearing to deal with such matters may be convened.

[33] At present it is contemplated that the further disclosure will be completed within a six week period, but if it proves necessary for an extension of time to be sought, the defendant has leave to make such an application.

[34] Costs in relation to this present application are reserved.

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[1] [2010] NZEmpC116.