



# Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2021](#) >> [\[2021\] NZEmpC 85](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

---

## Wilson v Manukau Institute of Technology [2021] NZEmpC 85 (11 June 2021)

Last Updated: 16 June 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 85](#)

EMPC 24/2021

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
BETWEEN	BRIAN WILSON Plaintiff
AND	MANUKAU INSTITUTE OF TECHNOLOGY Defendant

Hearing: (on the papers)

Appearances: T Oldfield, counsel for plaintiff  
M S King, counsel for defendant

Judgment: 11 June 2021

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:

**(Challenge to objection to disclosure)**

### Introduction

[1] Disclosure issues have arisen in proceedings brought by Mr Brian Wilson against his former employer, Manukau Institute of Technology (MIT).

[2] The proceeding is in the form of a non-de novo challenge to a determination of the Employment Relations Authority.<sup>1</sup>

<sup>1</sup> *Wilson v Manukau Institute of Technology* [\[2020\] NZERA 523 \(Member Robinson\)](#).

BRIAN WILSON v MANUKAU INSTITUTE OF TECHNOLOGY [\[2021\] NZEmpC 85](#) [11 June 2021]

[3] Because MIT accepted it had unjustifiably dismissed Mr Wilson, in the determination the main focus was on remedies, including compensation, and entitlements for lost wages, holiday pay and KiwiSaver payments. Mr Wilson's challenge relates to the Authority's views about the quantum of these remedies. The case is set down for hearing on 17 and 18 August 2021.

[4] For the purposes of his challenge, Mr Wilson served a notice requiring disclosure of some 13 categories of documents. There was compliance with some, and objection to disclosure of others.

[5] Mr Wilson has now filed a challenge to the objections, asserting they were ill-founded. Initially, the challenge was opposed, but in the process of filing submissions for the purpose of the disclosure challenge, MIT provided further documents. MIT's current position is laid out in an affidavit of its Human Resources Business Partnering Manager, Ms Carolyn Pene.

[6] The issues which remain are whether further disclosure by MIT would give rise to a disproportionate burden, and whether the documents sought are in fact relevant. I address each concept briefly.

[7] When assessing proportionality, it is well established that the Court takes into account the criteria outlined in r 8.4 of the [High Court Rules 2016](#). That rule explains that, in considering whether a search for documents is reasonable, there should be an assessment of the nature and complexity of the proceeding; the number of documents involved; the ease and cost of retrieving a document; the significance of any document likely being found; and the need for discovery being proportionate to the subject matter of the proceeding.<sup>2</sup>

[8] Relevance is a broad concept, as described in reg 38 of the [Employment Court Regulations 2000](#). A document is relevant if it may prove or disprove any disputed

*2 Dent v Waikato District Health Board [2017] NZEmpC 27 at [16].*

fact, supports or may support the case of the party who possesses it.<sup>3</sup> The pleadings provide a guide as to what is relevant.<sup>4</sup>

[9] Attached to this judgment is a description of the categories of documents which remain for consideration.

## Analysis

*Categories 3 and 4: pay records and employment agreements*

[10] An issue in the proceeding concerns the pay steps on which Mr Wilson was placed. It arises from the following paragraphs of the statement of claim:

10. The Plaintiff should have been paid as a Lecturer commencing at L11 salary step of his employment agreement, with automatic annual increments up to the L13 salary step thereafter at the rates set out in subsequent collective agreements pursuant to:
  - (a) Clause 3.2 of the employment agreement, which required the Defendant to operate its policy in respect of the starting salaries for employees;
  - (b) This policy meant that the Plaintiff should have started at L11 from 1 January 2013;
  - (c) The Defendant's Recruitment and Selection policy, which said, at cl 4.2:

*All salaries offered must align to the remuneration schedules and methodologies relating to the role as outlined in collective agreements and/or MIT's Remuneration policy and processes.*

(d) This policy meant that the Plaintiff should have had the salary increases in subsequent collective agreements applied to him, and he had a contractual entitlement to them.

11. The plaintiff started on a salary step that was less than other, equivalent lecturers.

[11] What is sought under Categories 3 and 4 of the notice are documents showing the starting salary step for other lecturers appointed at MIT's Automotive School, as well as annual increments and pay increases.

<sup>3</sup> See *ASB Bank Ltd v Nel* [\[2017\] NZCA 558](#), [\[2017\] ERNZ 879](#) at [\[17\]](#)–[\[18\]](#).

<sup>4</sup> *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [\[2018\] NZEmpC 25](#) at [\[28\]](#).

[12] The Court is advised that MIT's lawyers recently provided an anonymised list of other lecturers appointed within the Automotive School during Mr Wilson's period of employment. Those terms were governed by IEAs for some or all of their employment. The list sets out the starting salary step of each; whether each employee was fixed-term or permanent; the employee's start date and (if applicable), end date; and any pay increases which were awarded to each employee during their tenure, where that tenure overlapped with Mr Wilson's dates of employment. The document summarises the circumstances of 10 employees.

[13] Ms Pene says that producing this documentation has been arduous because of the introduction of a new payroll system which was implemented in 2018. She says there are two current employees only who have a sound knowledge of the previous system, and how to obtain relevant data from spreadsheets that were generated at the time of transition to a new payroll system. The conclusion to be drawn from this evidence is that even obtaining the information provided has been time consuming and not straightforward.

[14] What has not been provided to date are pay records relating to employees other than those engaged on IEAs. Mr Oldfield, counsel for Mr Wilson, submits documents in Categories 3 and 4 relating to these persons are relevant because the "Starting Step Policy" operated by MIT applied to all employees regardless of union membership.

[15] Mr Oldfield also submits MIT has not yet disclosed a “Starting Step Policy”. In the originating notice requiring disclosure, policies were requested. Ms Pene has annexed to her affidavit copies of all documents disclosed, which includes five policies. None of these are described as a “Starting Step Policy”. Until now, no assertion of incomplete disclosure of this category of documents has been raised. As a result, no information has been provided to confirm whether such a document even existed. No reliance is placed by MIT on such a policy in the statement of defence. No doubt, the organisation can clarify this issue and advise Mr Wilson accordingly.

[16] For what it is worth, I proceed on the basis that MIT might, when fixing starting salaries, have taken into account the pay circumstances of all employees of the Automotive School.

[17] I have carefully considered Ms Pene’s evidence as to the further work which would be required to provide documents relating to persons employed directly under collective employment agreements rather than IEAs.

[18] She says that significant time and effort, as well as expense, would be involved in tracing such information.

[19] I am not persuaded the need for this disclosure would be proportionate to the subject matter of the proceeding. As things stand at present, the parties may choose to lead evidence about 10 other employees for the purposes of the issue relating to Mr Wilson’s annual increments thereafter. They may also lead evidence as to the practice adopted with regard to union members for each relevant period. The totality of this information will provide a reasonable basis for considering Mr Wilson’s position.

[20] Employment agreements have not been disclosed, but, given the level of detail now provided in the spreadsheet relating to the 10 anonymised individuals, I do not consider these now need to be disclosed.

[21] In summary, the challenge in respect of these categories is dismissed. MIT should, however, clarify the position as to a “Starting Step Policy”.

#### *Categories 9, 11 and 12*

[22] It will be seen that, in Categories 9, 11 and 12, certain requests were made as to factual issues which would appear, again, to be potentially relevant to the issue of pay steps.

[23] Ms Pene confirms that MIT has now complied with regard to these categories because it has provided:

- a. A spreadsheet which shows the number of students enrolled on MITO courses with MIT for each year of Mr Wilson’s employment, and for the calendar year following his dismissal.
- b. The 2016 MITO contract between MIT and MITO, and a schedule to the 2018 MITO contract. The 2016 contract forms the “base” contract, with a relevant schedule being updated each year. The 2019 MITO contract schedule has not been located in MIT records, despite reasonable efforts to locate it.
  - c. A spreadsheet showing the gross income MIT derived from the MITO contract during the period of Mr Wilson’s employment and the calendar year following his dismissal.

[24] There remains a dispute between the parties as to whether or not this information is in fact relevant. I am satisfied that appropriate disclosure has been given. Relevance can, if necessary, be addressed at the hearing.

[25] There are two outstanding issues with regard to the documents which have been disclosed. The first is that they are said to be confidential, and protective orders are therefore required. So the parties can address this issue fully at the hearing, I make an interim order of non-publication of the contents of these documents.

[26] Second, Mr Oldfield submits that MIT has not formally stated when the 2019 MITO contract was parted with or what became of it. No doubt MIT can provide this information to Mr Wilson in the near future. No formal order is required.

[27] The challenge with regard to these categories is dismissed, although MIT should provide the clarification.

#### *Category 10: number of employees engaged by the Automotive School*

[28] Category 10 relates to documents showing the number of employees employed by MIT at the Automotive School for certain years. Disclosure of this category is opposed both on the grounds of relevance and proportionality. The Court is told it would take approximately four weeks to search for and provide such information.

[29] As to relevance, Mr Oldfield refers to a paragraph in the Authority’s determination where reference was made to the falling number of student enrolments, and that there were sufficient permanent employees when considering resources required for the 2019 academic year. This issue is also, Mr Oldfield confirms, referred to in the statement of defence.

[30] Ms King, counsel for MIT, says the only information that could reasonably be required to support its position that the Automotive School was over-resourced when it considered ending its engagement with Mr Wilson would relate to the number of permanent staff employed at the time, and in the year following.

[31] I agree that documents in this category are relevant for the period from the start of Semester 2, which I assume would have been in July 2018, to the end of the teaching year in December 2019. Counsel should, however, agree the precise dates for each of these events.

[32] A search for these documents, or the relevant information, may have timing implications. The plaintiff is to file his evidence on 29 June 2021, the defendant on 20 July 2021, and the plaintiff's evidence in reply on 3 August 2021.

[33] MIT will accordingly have until the date when its briefs are to be filed, 20 July 2021, to search for, and disclose, these documents or a summary thereof for the period I have identified. Mr Wilson may, if he chooses, give any reply evidence with regard to those matters by 3 August 2021.

[34] The challenge in respect of Category 10 is accordingly allowed in part.

*Category 13: emails as to Mr Wilson's employment status*

[35] Documents are sought relating to whether Mr Wilson was a casual or permanent employee.

[36] The statement of claim asserts, at para 7, that Mr Wilson was a permanent full-time lecturer from 1 January 2013. MIT denies this allegation but asserts:

- a. MIT agreed to recognise Mr Wilson as a permanent full-time lecturer from 1 January 2013 to 31 December 2018 for the purposes of the Authority's investigation meeting.
  - b. At all times during his employment, MIT genuinely understood Mr Wilson was a casual tutorial assistant.
  - c. Mr Wilson did not take any steps to amend the nature of his employment from casual to permanent prior to the termination of his employment in December 2018.
  - d. No other employee took any steps on behalf of Mr Wilson to amend the nature of his employment from casual to permanent prior to the termination of his employment.
  - e. MIT's records of Mr Wilson's employment confirm he was a casual tutorial assistant.

[37] The statement of defence goes on to acknowledge that Mr Wilson's dismissal was unjustified, and not effected in accordance with [s 103A](#) of the [Employment Relations Act 2000](#).

[38] In light of this pleading, MIT submits there is no live issue before the Court in relation to Mr Wilson's employment status.

[39] However, MIT's pleading also states that the unjustified dismissal was not intentional or malicious; it was based on MIT's genuinely held understanding that Mr Wilson was a casual employee; and, on MIT's assessment of student numbers and staffing resources, it did not need to engage him as a casual employee in the following academic year.

[40] On this topic, the Authority found there had been a genuine misunderstanding on MIT's part as to Mr Wilson's status.<sup>5</sup>

5 At [68].

[41] It appears the documents sought may be relevant to the credibility of MIT's assertion that it genuinely thought Mr Wilson was retained on a casual basis, and, if there was such a misunderstanding, whether this is relevant to the extent of any compensatory award.

[42] Ms Pene states that searching for documents of the kind now requested would involve different problems from those relating to pay records. She says that over the period of Mr Wilson's employment by MIT, it has been attempting to move from hardcopy records to softcopy records; these records may be held in a number of formats and locations. She says she was advised by MIT's IT team that a "generalised" search would be difficult. She also says a search for these may take an additional six weeks.

[43] I agree that such a search would be onerous. For at least some of the period there may be digital search options. In any event, the documents sought are sufficiently relevant and proportionate to an issue that is squarely raised as to justify the effort.

[44] Again, there may be timing issues. If documents in this category are located, they are to be disclosed by 20 July 2021.

[45] The challenge in relation to Category 13 succeeds.

## Conclusion

[46] The plaintiff's challenge succeeds partially, as noted.

[47] I reserve costs.

B A Corkill Judge

Judgment signed at 1.45 pm on 11 June 2021

Appendix 1

*Category 3:*

Pay records and employment agreements showing the starting salary step for every other lecturer appointed at the Automotive School during the period of the Plaintiff's employment with the Defendant.

*Category 4:*

Pay records showing the annual increments and any pay increases applied to every other lecturer at the Automotive School during the period of the Plaintiff's employment with the Defendant.

*Category 9:*

Documents showing the number of students enrolled on MITO courses with the Defendant for each year of the Plaintiff's employment and for the calendar year following his dismissal (this may be provided in summary form).

*Category 10:*

Documents showing the number of employees employed by the Defendant at the Automotive School for each year of the Plaintiff's employment and for the calendar year following his dismissal, their hours of work and their positions (this may be provided in summary form).

*Category 11:*

The 2019 MITO contract between the Defendant and MITO, and any drafts of that contract that mention the Plaintiff.

*Category 12:*

Spreadsheets showing the gross income the Defendant derived from the MITO contract during the period of the Plaintiff's employment and the calendar year following his dismissal.

*Category 13:*

Any documents, including but not limited to emails, dealing in any way with the Plaintiff's employment status (meaning whether he was a casual or permanent employee or whether he was a Casual Tutorial Assistant, or a Permanent Full Time Lecturer, or any other matter pleaded in paragraphs 7(b), (d) and (e) of the statement of defence).