



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2016](#) >> [\[2016\] NZEmpC 37](#)

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

Zespri International Limited v Yu [2016] NZEmpC 37 (15 April 2016)

Last Updated: 20 April 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 37](#)

EMPC 25/2015

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

AND IN THE MATTER of an application for directions as
 to key search terms

BETWEEN ZESPRI INTERNATIONAL LIMITED
 Plaintiff

AND JOSEPH YU Defendant

Hearing: By memoranda of submissions filed on 16 and 23 March,
 and 5
 April, by hearing on 6 April, and by further submissions
 on draft judgment filed on 15 April 2016

Appearances: M Richards and A Chote, counsel for plaintiff
 P Skelton QC, counsel for defendant

Judgment: 15 April 2016

INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE G L COLGAN

[1] The defendant, Joseph Yu, seeks further directions from the Court, in the absence of agreement between the parties, about key search terms to be provided to the independent information technology (IT) expert appointed by the Court. These terms will enable the analyst, Michael Spence, to undertake his forensic analysis of a laptop computer and two USB drives which have been the subject of previous

interlocutory judgments.¹ At [33.6] of the Court's first interlocutory judgment issued

on 8 July 2015, the Court directed the parties to:

... provide all necessary assistance to the independent IT expert ... including

about the manner in which groups of documents or individual documents on

¹ *Zespri International Ltd v Yu* [2015] NZEmpC 107; *Zespri International Ltd v Yu (No 2)* [2015] NZEmpC 140.

ZESPRI INTERNATIONAL LIMITED v JOSEPH YU NZEmpC AUCKLAND [2016] NZEmpC 37 [15 April 2016]

the laptop [and now USBs] are to be searched for (by key word searches)

and subsequently identified in the independent IT expert's report ...

[2] Leave was also reserved to the parties to apply to the Court for further directions if they were unable to agree on the instructions to be provided to Mr Spence.

[3] The absence of complete inter-party agreement on this issue includes, in particular, the plaintiff's rejection of the defendant's proposed search terms to identify documents on the electronic devices that may be personal or, if relevant to the proceeding, in which Mr Yu may assert privilege.

[4] There are two categories of documents which may be held on the electronic drives that are affected by this application. The first is what might be described as purely personal documents irrelevant to this proceeding, including documents such as personal bank statements, family correspondence, photographs, medical records and the like. The plaintiff acknowledges that it will deal with other documents according to its disclosure obligations. The second category of documents in issue are ones which are relevant to the proceedings but which may be subject to a claim to privilege by Mr Yu or by Zespri International Limited (Zespri) or both, so that there should be no disclosure of their contents, or restrictions upon their admissibility or use.

[5] It is an important reality check to remember that the sole purpose of selecting

'key word or phrase' search terms is to identify documents which are both relevant and may potentially be subject to privilege or, put the other way, to eliminate documents which are irrelevant and which are not privileged. It is the first filter in a process that may subsequently see some documents subjected to closer scrutiny on these grounds. Nevertheless, this initial filter is an important mechanism because it should not be so coarse as to allow potentially privileged documents to pass through the filter and be disclosable and so find that it catches inappropriate documents. It is a particular problem in this case because neither party can say more than very generally what may or may not be contained in electronic media which have been out of their control since before the litigation commenced and, in the case of Zespri, can really only be very broadly guessed at.

[6] In these circumstances, it is better to err on the side of identifying documents that may be relevant or privileged (and, in the latter category, in the hands of either party or both) so that these can be more closely inspected by an appropriately independent person to determine, if they are relevant, whether privilege attaches to them. In this regard, I record that I raised with counsel the possibility of an independent barrister being appointed by the Court to address these assessments of privilege rather than burdening the Court with this substantial task in the litigation. A barristerial filter would, in any case of a dispute, be able to refer a still-disputed document to the Court for decision. The volume and complexity of that relevance/privilege assessment will be clearer after the initial identification of affected documents using the search terms. Once this point is reached, the parties should first attempt to agree on the methodology of determining any disputes before leave to approach the Court about these is exercised.

[7] The background to this application is as follows. On 19 February 2016, Mr Yu proposed key search terms to Zespri. The plaintiff has, however, objected to the defendant's proposed search terms because it says it is difficult to ascertain certainly whether documents using those search terms will be purely personal to Mr Yu and therefore not relevant to the proceeding.

[8] Mr Yu says, however, that Zespri's objection mischaracterises the purpose of a key word search, which the defendant says is to assist the Court (by its appointed expert) and the parties, as a preliminary measure, to identify documents which are likely to be personal to Mr Yu. Counsel, Mr Skelton QC, submits that there is no way of identifying in advance, and with sufficient certainty, whether any particular document is purely personal or irrelevant to the case because there has not yet been any disclosure of the contents of the laptop and USB drives.

[9] The defendant proposes that if the independent IT analyst, Mr Spence, identifies a document as one containing one of the defendant's proposed key word criteria, the parties will subsequently be able to review Mr Spence's full report which will list key metadata for each document; that is, the names of the sender and recipient, date and other useful data but which do not disclose the content of the document. The defendant says that this will allow better analysis of whether any

particular document in question is, in fact, personal to Mr Yu. Counsel proposes that if the parties are unable to agree on whether the document is purely personal by reference to those metadata, then the Court may be asked to inspect such a document to finally determine whether it is either personal to Mr Yu (and therefore irrelevant) or is potentially relevant to the proceeding.

[10] Next, Mr Skelton submits that this preliminary analysis will not result in the wrongful disclosure, or the withholding of disclosure of any documents, because, under the Court's orders, the parties are to be provided in the first instance only with a copy of Mr Spence's report, not with the documents themselves. Put shortly, what is said to be the purpose of the key word search is only to highlight documents which are likely to be personal to Mr Yu, which likelihood will subsequently be able to be ascertained, in any appropriate case, by reference to the metadata or, ultimately, by independent inspection.

[11] Turning to the second issue in disclosure, privilege, Mr Yu has proposed a list of key search terms which may identify a document in which there may be a claim to privilege either by him or jointly with Zespri. The latter is a shortlist of four terms and the former, a much longer list. Three of the proposed search terms include alternatives in Chinese characters.

[12] Zespri's objection to Mr Yu's proposed key search terms for privileged documents is made on two grounds. First, Zespri does not accept that Mr Yu has any claim to joint privilege in respect of documents identified by him. Even if that is not so, Zespri does not accept that the majority of documents identified by Mr Yu's proposed key search terms are likely in fact to be privileged.

[13] As to joint privilege, Mr Yu asserts that he and Zespri hold valid claims to privilege in respect of legal advice which he received (or into which he was copied) from "his/Zespri's" legal advisers during his employment with Zespri. Mr Skelton submits that it is axiomatic

that any legal communication on Mr Yu's laptop was sent to, and received by, him: Mr Yu is not seeking access to any legal advice to which he has not previously been granted access.

[14] This claim raises an interesting point about assertions to joint privilege in relevant documents between opposing parties to the same litigation, but counsel are now agreed that this argument is for later, if at all, in this case.

[15] Zespri's proposal is for a narrower class of key search terms limited to a list of the parties' respective legal advisers. Mr Yu objects to this narrow categorisation because he says he is not presently in a position to review the history of his receipt of legal advice, or his correspondence with legal advisers, during the course of his employment of between three and four years. As previous judgments have confirmed, Mr Yu is currently imprisoned in the People's Republic of China and without ready access to his New Zealand lawyer. In these circumstances, Mr Yu considers that the preferable course is to employ a list of key search terms focusing on subjects likely to identify documents potentially subject to legal privilege, even at the risk of some initial unnecessary inclusiveness, so that the parties can be sure that potentially privileged documents are not overlooked.

[16] The parties are agreed, now, that there should be a single list of key search terms in relation to relevance and legal professional privilege consisting of those words or phrases either agreed by them or, in the case of those objected to by Zespri, directed by the Court.

[17] There is now no dispute about the list of search terms consisting of the names and email addresses to be used to identify documents in which the plaintiff asserts it has legal professional privilege. These are the 30 combinations of words or phrases (some of which are in both English and Chinese scripts) set out at para 12 of the memorandum of submissions of counsel for the plaintiff dated 23 March 2016. I will not repeat those search terms here but they will, of course, be available to the parties and to Mr Spence.

[18] The second set of search terms for potentially privileged documents, which should be incorporated with those described above, is set out at para 11 of the defendant's memorandum of submissions to the Court dated 16 March 2016. I will not set these out but the single list compiled from these two separate lists will be available to Mr Spence through the Registrar. There need be no differentiation at

this stage between the categories in the 16 March list relating to "joint privilege" and "sole privilege".

[19] Turning to a list of search terms to identify potentially irrelevant documents personal to Mr Yu, which he may have placed on his electronic media, there is a degree of agreement but not unanimity about those additional search terms. Those in contention include the following search terms:

- (a) Joseph.Yu7@hotmail.com; (b) "Password(s)";
- (c) "John Yu";
- (d) "Mike Yang";
- (e) "Mother/mom/father/dad".

[20] I deal with each of these contentious search terms as follows.

(a) The plaintiff can put it no higher than it "believes" that some emails were sent by Mr Yu to this hotmail address during the course of his employment. To allow for that possibility, I consider that this should be deleted as a search term to identify purely personal documents, even although it may transpire that some purely personal documents are picked up in the search.

(b) The search term "Password(s)" has now been deleted by consent.

(c) John Yu is the defendant's brother. The plaintiff contends that the defendant may have operated in conjunction with his brother in matters relevant to this proceeding. Again at the risk of filtering out a number of purely personal and irrelevant documents, I consider that this search term should also be eliminated from those provided to Mr Spence to identify purely personal documentation.

(d) Mike Yang is a friend of the defendant who is resident in the United States of America. The plaintiff says that information in the proceedings already indicates his involvement with the plaintiff about issues relevant to the proceedings and, for similar reasons in relation to John Yu, I agree that the search phrase "Mike Yang" should be eliminated from the list to be provided to Mr Spence.

(e) The plaintiff says that the defendant's parents have also been involved in communications and discussions with the plaintiff about issues now relevant to the proceeding. For similar reasons to those set out above, I consider that there is a risk that some relevant material may be excluded from the forensic IT search if these search words or phrases are included. In these circumstances, also, they are not to be included in the instructions to Mr Spence of words or phrases that are to be ignored.

[21] As I have indicated, the plaintiff's case about these search terms is speculative, as is parts of the defendant's in relation to privilege claims. If it eventuates that this speculation was unfounded and there are no documents which are relevant to the proceeding, this may be dealt with as a matter of costs.

[22] Because the list of search terms for irrelevant material has been adjusted significantly, I will set those terms for both purely personal, and irrelevant documents out again in final form for Mr Spence's purposes:

Bank, bank account(s) Brother/Sister

Family Friend(s) Gummy/Gummy bear

Gwenny Kao

Health, medical, physical examination record(s)/report(s)/sick

Kevin Kao Photo(s) Susan Yu

[23] In addition to using the word/phrase search terms alone, the plaintiff has requested that Mr Spence be asked to also search for combinations of these. The plaintiff proposes discussing such permutations with counsel for the defendant and, if agreement cannot be reached on combinations, then leave is reserved to apply further to the Court.

[24] Leave is reserved to either party to apply for any further orders or directions on reasonable notice.

GL Colgan
Chief Judge

Judgment signed at 2.50 pm on Friday 15 April 2016

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZEmpC/2016/37.html>