

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 99
ARC 21/11**

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 ALEX WAITE BROUGHTON
Plaintiff

AND MICROSOFT NEW ZEALAND
LIMITED
Defendant

Hearing: 1 August 2011
(Heard at Auckland)

Counsel: Tony Drake, counsel for plaintiff
Kirsty McDonald and Adam Weal, counsel for defendant

Judgment: 8 August 2011, recalled and re-issued 10 August 2011

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] This interlocutory judgment determines the defendant's objection to disclosure and inspection of certain documents as requested by the plaintiff, and associated issues.

[2] The procedure that has led to this hearing, and the need to depart significantly from the statutory scheme for disclosure and inspection of documents under the Employment Court Regulations 2000, well illustrates the inaptness of those Regulations in cases such as this involving numerous email and other electronic records, many of which were generated and are stored electronically beyond New Zealand. The regulatory process of notice – objection – challenge to objection under the Regulations would have proved very difficult and slowed the proceedings interminably had the Court not agreed to deal with ongoing discovery

adequacy and privilege issues without requiring them to be the subject of the formal staged and arguably inflexible process outlined above.

[3] That has been particularly important in this case because there is scheduled a judicial settlement conference about two weeks hence in which the parties should be aware of the nature and contents of relevant documents to enable them to have the best chance of a well informed settlement.

[4] As in all document disclosure disputes, it is necessary to put the objections and the plaintiff's challenge to them in the context of the fundamental pleadings, the amended statement of claim (dated 18 July 2011) and the statement of defence (dated 28 April 2011) to the statement of claim (dated 24 March 2011). There is not, as yet, a statement of defence to the plaintiff's amended statement of claim but I will assume that this will follow the statement of defence in relevant respects.

[5] Mr Broughton's claim is a challenge to the determination¹ of the Employment Relations Authority that he was not dismissed unjustifiably by the defendant. It includes also claims of breach of contract by the defendant. The plaintiff pleads implied and incorporated terms of his employment agreement, including an obligation on the employer to deal with him in good faith, an implied term that he would be treated fairly and reasonably, and a further implied term that the defendant would not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the reputation of the plaintiff or to cause him undue anxiety, humiliation, loss of dignity or injury to feelings, or to damage the relationship of trust and confidence between them.

[6] The plaintiff claims that between 22 June and 6 October 2009 the defendant's country manager, Kevin Ackhurst, breached those terms and, in particular, commenced correspondence and discussions with Microsoft's regional office in Singapore and with a manager based in its subsidiary in Australia by planning to disestablish the plaintiff's position without consulting or informing him. The plaintiff also says that between 22 June and 6 October 2009 Mr Ackhurst corresponded and discussed with his immediate manager in the Microsoft regional

¹ [2011] NZERA Auckland 73.

office in Singapore, Emilio Umeoka, with the defendant's human resources manager, Sally Doherty, and with its associate general counsel of its Legal and Corporate Affairs Department for Australia and New Zealand, Jeffrey Bullwinkel, to obtain approval for the plaintiff's position to be made redundant.

[7] The documents first at issue are a class identified in the plaintiff's notice (dated 15 June 2011) requiring disclosure of those in para 1(i) to (iii) inclusive. They are, specifically:

1. All email messages, attachments to email messages and notes of telephone discussions between
 - (i) Kevin Ackhurst and Emilio Umeoka; and
 - (ii) Kevin Ackhurst and/or Sally Doherty and any other person in the regional office of Microsoft in Singapore; and
 - (iii) Kevin Ackhurst and/or Sally Doherty and any person based in the office of the Microsoft subsidiary in Australia;created between 18 June 2009 and 11 December 2009 in which the plaintiff is referred to by name, job title or otherwise.

[8] The defendant's grounds for objecting to disclosure are as follows:

1. The class of documents referred to in paragraph 1 (i) to (iii) inclusive is unreasonably wide in that:
 - 1.1 the class of documents is linked only to the plaintiff's name and job title and not necessarily to the issues in the case as defined by the plaintiff's statement of claim. Paragraph 1 of the plaintiff's notice purports to include all documents within a certain timeframe whether relevant to the issues in the case or not; and
 - 1.2 paragraph 1 (ii) and (iii) refer to documents/correspondence with "any other person" in the Microsoft offices in Singapore and Australia. That request is unreasonably wide in that hundreds of employees fall into those classes and the names of the officers/ employees indicated by the plaintiff should be named.
2. For these reasons, the class of documents referred to in paragraph 1 is unduly and unreasonably wide and should be further particularised so as to relate to "relevant" documents as defined by the plaintiff's statement of claim and under Regulation 38 of the Employment Court Regulations 2000.

3. Assembling the full class of documents referred to in paragraph 1 of the plaintiff's notice would put the defendant to unreasonable and undue time and expense, and delay these proceedings.

[9] The defendant's objection was taken later than the five days allowed for in the Regulations to do so and the defendant seeks leave to object out of time. That is permitted under s 221 of the Employment Relations Act 2000 and I formally grant leave.

[10] On the affidavit evidence, the defendant has already gone a substantial way to satisfying this request for disclosure although I accept that it is too broad in some respects. That is because there are substantial numbers of Microsoft employees attached to the relevant offices in Singapore, Australia or New Zealand who would be very unlikely to have had any email messages or attachments or notes of telephone discussions relating to Mr Broughton, certainly in respect of the matters at issue in the litigation. Mr Bullwinkel has deposed to arranging for the collection of relevant documents (including electronic documents) from a number of individuals within the Microsoft organisation in New Zealand, Australia, Singapore and Germany, who may have had access to documents relevant in the proceeding. The names of those persons are set out in para 13 of Mr Bullwinkel's affidavit sworn on 25 July 2011 and he deposes to having received a number of relevant documents from them which have now been disclosed in a supplementary index of documents.

[11] I am satisfied that the defendant has caused its documentary records relevant to the matters at issue in this case to be searched for, and that such records as have been identified by those searches have been disclosed to the plaintiff. The classes of persons nominated by the plaintiff are too broad and should be confined to those whose records have been searched and, if relevant, disclosed. In this event, the plaintiff's challenge to the defendant's objection is not upheld.

[12] I turn to the second issue for decision. After the original objection to disclosure and the challenge to that, the defendant has sought leave to extend its objection to disclosure to cover a document described as "[a] memorandum prepared by the defendant's then HR Director, Sally Doherty, on or about 28 September 2009 on the ground that it is subject to legal professional privilege." This document discusses the defendant's proposed November 2009 restructuring and potential legal

and human resources implications. The document is said to have been intended to be confidential and was made in the course of, and for the purposes of, obtaining legal advice, both internally and externally.

[13] A substantial part of Mr Drake's challenge to the claim to legal privilege in this document centred on the status of Waldo Kuipers, the defendant's Auckland based legal counsel. Mr Drake asserted that the defendant has not established that Mr Kuipers is a practising lawyer in New Zealand so that communications with him for the purpose of obtaining legal advice might attract privilege. Ms McDonald advised the Court, however, that Mr Kuipers is a qualified New Zealand lawyer holding a current practising certificate and that he will confirm this status in a brief affidavit. If the plaintiff still challenges the defendant's assertion of privilege in this communication, it has been agreed that the defendant's solicitors will make a copy of the memorandum available to the Registrar for me to inspect and to determine the claim for privilege. Mr Drake should advise Ms McDonald/Mr Weal promptly whether he requires this.

[14] The third issue for determination is not unassociated with the second. A string of email communications has now been disclosed by the defendant in its supplementary index of documents but legal professional privilege in these is asserted by it. The plaintiff does not accept that these documents are privileged although it is not entirely clear whether that stance has been taken for reasons of proof of qualification of practising lawyer status. Also in this case, Mr Drake should now indicate promptly to Ms McDonald/Mr Weal whether that challenge to privilege is maintained in view of the clarification of Mr Kuipers's status and, if so, counsel for the defendant should make a copy of these documents available to the Registrar, along with the Doherty memorandum, so that the Court can determine the question of privilege at the same time.

[15] The next issue concerns the work diaries of Mr Ackhurst. These were paper notebooks provided by the defendant to Mr Ackhurst and in which the evidence establishes he made notes of significant events during meetings and at other times, as is a common commercial practice. The issue with these diaries is not whether they may contain information relevant to these proceedings because, if they do, that

would be disclosable and I do not understand the defendant to contend otherwise. Rather, the defendant says that these diaries were lost either in Sydney, Australia, before Mr Ackhurst's transfer within Microsoft to Singapore or, alternatively, with his possessions in transit to his new posting.

[16] I agree with the plaintiff that the defendant has not established sufficiently the steps it has taken to attempt to locate these diaries and the circumstances in which they may have been lost. Accordingly, Mr Ackhurst should provide an affidavit that addresses more comprehensively these questions of what relevant material the diaries may contain, the efforts to locate the diaries, and the circumstances in which they have been lost. That affidavit should be filed and served by 15 August 2011, that is 14 days after the hearing on 1 August 2011 when the probability of this requirement was signalled. In view of Mr Ackhurst's location in Singapore, it will be sufficient in the first instance if his affidavit is filed and served in scanned electronic format.

[17] The final issue raised by the plaintiff is in the nature of a catch-all and it is whether the defendant has provided complete discovery. Mr Broughton is suspicious that it has not.

[18] Disclosure and inspection of documents is, of course, an ongoing obligation and as recently as a day or so before the hearing on 1 August, the defendant had provided some supplementary disclosed material. Mr Broughton's complaint appears to be more along the lines that, having purported to have given complete disclosure on several occasions (including in the Employment Relations Authority), the defendant continues to supply relevant discoverable documents.

[19] That is not unusual in litigation and at least shows that the defendant is alive to the ongoing and dynamic nature of the disclosure process. Having considered the affidavits filed by the defendant, I am not satisfied from the plaintiff's claims that the defendant has not met its disclosure obligations. As discussed with counsel at the hearing, there is, however, one further step that the defendant should now take to ensure that the plaintiff and the Court are satisfied that disclosure obligations have been complied with. There is reference in Mr Bullwinkel's affidavit to Eric Ching

(of Microsoft's Singapore based Information Technology team) who undertook a search of Mr Ackhurst's email for communications using a number of search terms relevant to this proceeding. Mr Drake said that Microsoft's principal electronic servers are based in Redmond in the State of Washington in the United States of America and it is unclear whether the searches undertaken by the defendant of its electronic records are confined to servers based in Singapore and/or Australia and/or New Zealand. The plaintiff's concern is that there may be relevant documents contained on Microsoft's Redmond servers which have not been discovered by the electronic searches conducted to date.

[20] In these circumstances, I think it would be appropriate for Mr Ching's affidavit to address the nature of Microsoft's electronic record keeping systems, including whether documents of the sort searched for by him in relation to these proceedings might reside on other servers (including in Redmond, Washington) but not have been identified in the searches already undertaken by Mr Ching. For the sake of clarity, Mr Ching's affidavit should include evidence about whether there are other relevant documents of the sort referred to in para 11 of this judgment that I have concluded are disclosable which may, nevertheless, be located on other Microsoft servers not yet searched including, but not limited to, Microsoft's servers in Redmond. Again, given the proximity of the judicial settlement conference and the raising of this suggestion of an affidavit at the hearing on 1 August 2011, the defendant should have until 15 August 2011 to file and serve Mr Ching's affidavit which may also be sent to the Court and to the plaintiff in electronic form in the first instance.

[21] I reserve costs in respect of this interlocutory hearing.

[22] This interlocutory judgment was issued in draft to the parties on 4 August 2011 to attempt to retain the judicial settlement conference scheduled for 18 and 19 August 2011.

GL Colgan
Chief Judge

Judgment re-signed at 10 am on Wednesday 10 August 2011