

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2017] NZEmpC 56  
EMPC 257/2016  
EMPC 303/2016**

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                    ANDRE NEL  
   Plaintiff

AND                            ASB BANK LIMITED  
   Defendant

Hearing:                    10 April 2017  
   (Heard at Auckland)

Appearances:            C W Stewart and E L Taylor, counsel for plaintiff  
   S Dench and S Kopu, counsel for defendant

Judgment:                16 May 2017

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**INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL**

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**Introduction**

[1]      This judgment resolves several discovery issues which have arisen between the parties. These centre on whether seven categories of documentation which were originally described in a notice requiring disclosure dated 17 February 2017, should be disclosed. However, there are also other discovery issues which require consideration.

*Factual context*

[2]      Before describing the scope of the dispute, it is necessary to outline the relevant factual circumstances of the present proceedings. Before the Court is a challenge and cross-challenge to a determination of the Employment Relations

Authority (the Authority).<sup>1</sup> The pleadings which each party have filed provide the context for the disclosure issues; the following facts are derived from those pleadings.

[3] Mr Nel was employed by ASB Bank Limited (ASB) in 1997, remaining in the Bank's employment for over 18 years until he was dismissed for serious misconduct on 6 October 2015.

[4] He contends that up until the time of his dismissal, his professional performance had been exceptional.

[5] The dismissal circumstances arose following an investigation of certain interactions Mr Nel had with an employee, Ms A, who reported to him.<sup>2</sup>

[6] Mr Nel asserts that he reasonably believed that Ms A had developed a romantic interest in him; they worked in a workplace where staff engaged in banter which was at times sexually suggestive; the use of profanities was common, as the working environment was "generally relatively smutty"; and Ms A participated fully in this working environment. ASB denies that Mr Nel's conclusions were justified or that there was an inappropriate work culture.

[7] A series of private Facebook exchanges took place between Mr Nel and Ms A. In the course of these, Ms A advised that Mr Nel's feelings towards her were not reciprocated and that she wished to maintain a strictly professional relationship. Mr Nel says he immediately apologised and set about repairing the relationship.

[8] At about the same time, Ms A made contact with Mr Kiran Vallabh, the People and Culture Consultant for ASB's Corporate Commercial and Rural Division, disclosing what had occurred. In due course he decided to speak to Mr Nel informally. Then, Mr Nel discussed what had occurred with Mr John Twomey, Regional Manager, East and South Auckland, to whom Mr Nel reported. It was decided that a formal disciplinary investigation should be commenced. This was

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<sup>1</sup> *Nel v ASB Bank* [2016] NZERA Auckland 323.

<sup>2</sup> Ms A's name is the subject of an interim non-publication order.

undertaken. Ultimately, a decision was made that Mr Nel's actions amounted to serious misconduct because he had:

- failed to comply with the Bank's Code of Conduct;
- failed to comply with the Bank's Harassment, Discrimination, Bullying and Offensive Behaviour Policy;
- failed to act consistently with ASB values, including its value of integrity; and
- failed to meet the Bank's expectations of Mr Nel as a senior manager.

[9] The serious misconduct was considered to be of sufficient seriousness to justify a summary termination of Mr Nel's employment.

[10] Then, Mr Nel raised a personal grievance on the basis of an alleged unjustified dismissal. In due course, an investigation was conducted by the Authority.

[11] When considering the process which was adopted, the Authority determined that Mr Nel had not been treated unfairly,<sup>3</sup> and there was no pre-determination.<sup>4</sup>

[12] The Authority was also required to consider an issue as to disparity of treatment. Evidence as to several other examples of alleged misconduct were referred to by the Authority, but it was not satisfied that the allegation of disparity of treatment was established.<sup>5</sup>

[13] When considering whether dismissal was justified, the Authority took into account the fact that Mr Nel was a long serving bank employee who had performed well with no history of disciplinary action; that he had tendered an apology to Ms A, that it had not been seen necessary to suspend him, and that Mr Nel had frankly acknowledged during the investigatory process that his comments to Ms A had been

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<sup>3</sup> At [175].

<sup>4</sup> At [182].

<sup>5</sup> At [195].

inappropriate and unprofessional. The Authority concluded that the dismissal was not the appropriate outcome in all the circumstances and that Mr Nel had been unjustifiably dismissed.<sup>6</sup>

[14] Finally, the Authority considered remedies. Reinstatement was declined. This was because Mr Twomey stated he had lost trust and confidence in Mr Nel's ability to act appropriately and in accordance with the professionalism expected of a senior manager.<sup>7</sup> In reaching this conclusion, the Authority found that Mr Nel's subsequent behaviour following his dismissal militated against reinstatement because he had made certain remarks regarding Ms A.<sup>8</sup> Three employees had also raised concerns that they felt they had been pressured by Mr Nel when he wished them to act as witnesses with regard to his unjustifiable dismissal claim.<sup>9</sup> There was therefore an issue as to whether he could work with appropriate respect in a senior position if reappointed.<sup>10</sup>

[15] Mr Nel was awarded seven months lost wages less such sum as he had received for income protection insurance; and \$15,000 compensation for hurt and humiliation.<sup>11</sup> Having regard to his contribution to the dismissal circumstances, however, the remedies were reduced by 90 percent.<sup>12</sup>

[16] As mentioned, each party has filed a challenge to the conclusions reached by the Authority in its determination so that all issues are at large.

[17] Mr Nel pleads that the dismissal was not what a reasonable employer could have done in all the circumstances and that ASB:

- Followed a predetermined cause of action designed to remove him from his employment.

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<sup>6</sup> At [198] – [203].

<sup>7</sup> At [207] – [209].

<sup>8</sup> At [210] – [212].

<sup>9</sup> At [213].

<sup>10</sup> At [214].

<sup>11</sup> At [216] – [234].

<sup>12</sup> At [234] – [238].

- Misled him in its investigation and failed to put the allegations to him in a full and fair way so that he was aware of their substance, nature and weight.
- Failed to provide Mr Nel with any adequate or real opportunity to comment on ASB's preliminary decision. ASB therefore denied him any opportunity to comment on the dismissal as a disciplinary outcome prior to the ultimate decision being taken and communicated.
- Made a finding and took a step which amounted to disparity of treatment in light of a workplace culture of alcohol abuse, profane language and other incidents involving serious concerns of bullying, use of recreational drugs, sexual and racial harassment and breaches of confidentiality. Three particular examples that allegedly demonstrate disparity are pleaded.
- Failed adequately to take into account the absence of prior offences of a similar nature despite having managed staff for 12 years, many of whom were young and female.
- Failed to take into account that Mr Nel had a clean work record over an 18-year period of employment, with excellent performance.
- Did not adequately consider alternatives to dismissal.
- Did not take into account Mr Nel's remorse, his acknowledgment of inappropriate behaviour and his assurance that such conduct would not recur.
- Did not consider that the threshold for serious misconduct was not reached.
- Failed to consider that the absence of previous warnings or conduct by Mr Nel means that his conduct should not have been treated as serious misconduct under its Code of Conduct.

- That the foregoing breaches constituted a breach of ASB's obligation of good faith under s 4 of the Employment Relations Act 2000 (the Act).

[18] In this Court, Mr Nel again seeks an order of reinstatement, lost wages, and compensation for humiliation, loss of dignity and injury to feelings. He also seeks a declaration that ASB breached its statutory and implied contractual duties of good faith by failing to engage constructively with Mr Nel and to provide him with relevant information and an opportunity to comment on those matters. He asserts that a penalty for breach of good faith should accordingly be ordered under s 4A of the Act.

[19] For its part, ASB pleads that it acted in a procedurally fair way at all times and made decisions which were open to it, meeting the statutory test of justification, and there is no entitlement to any of the remedies sought.

[20] I accept the submission of Ms Stewart, counsel for the plaintiff, that having regard to the pleadings, the following are the key factual issues for disclosure purposes:

- (a) The nature of the relationship between Mr Nel and Ms A in the workplace.
- (b) The fairness of the disciplinary investigation prior to the termination of Mr Nel's employment.
- (c) Whether there was disparity of treatment with other employees of the defendant.
- (d) Whether Mr Nel should be reinstated.

#### *History of disclosure issues*

[21] As already recorded on Mr Nel's behalf, a notice requiring disclosure was served on 17 February 2017. It specified seven comprehensive categories of documents which were sought from ASB. These will be set out later.

[22] A notice of objection was served in response on behalf of ASB on 24 February 2017. One formal objection was raised, which related to privileged material. At the same time, correspondence sent by Mr Dench, counsel for ASB, recorded that the plaintiff's notice "would include many documents that are not relevant for one reason or another"; disclosure would be limited to those documents which it was considered were relevant.

[23] Attempts were made between counsel to resolve the disclosure issues informally, which did not succeed.

[24] On Mr Nel's behalf, a challenge to the objection to disclosure was filed. It stipulated that the grounds for the challenge were that the classes of documents referred to in Mr Nel's original notice of disclosure were relevant and may support his case. This was particularly the case with regard to issues concerning:

- the nature of the relationship between Ms A and Mr Nel;
- the disciplinary investigation prior to Mr Nel's termination;
- disparity of treatment;
- Mr Nel's conduct post employment; and
- communications about Mr Nel by members of ASB.

[25] A notice of opposition to the challenge was filed on 23 March 2017. The grounds of opposition were described as follows:

- Mr Nel was insisting that every document within each category would be relevant and so had to be disclosed; ASB would provide disclosure for documents that were actually relevant but not otherwise.
- A 'fishing' exercise was being undertaken.

- Disclosure to the extent sought by Mr Nel would be oppressive, as many documents would have marginal relevance at best, and compliance would be seriously disproportionate to their probative value.

[26] Each party filed affidavits in support of their respective positions as just summarised, and this evidence will be referred to where appropriate.

[27] The key dispute between the parties relates to the scale of disclosure sought by Mr Nel.

### **Legal principles**

[28] The starting point must be reg 40 of the Employment Court Regulations 2000 (the Regulations), which provides:

#### **40 Availability of disclosure**

- (1) ... any party may require any opposing party—
  - (a) to disclose and make available for inspection any documents which are in the opposing party's possession, custody, or control ...

[29] A key issue in the present challenge relates to the concept of relevance for disclosure purposes. Regulation 38 defines relevance in this way:

#### **38 Relevant documents**

- (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.

[30] The role of pleadings in assessing relevance is obviously important. The leading authority on this topic is *Airways Corporation of New Zealand Ltd v Postles*, a Court of Appeal decision which considered the former reg 48 of the Employment Court Regulations 1991.<sup>13</sup>

[31] For the purposes of that regulation, the Court of Appeal said:<sup>14</sup>

With respect we consider the judge erred in law in drawing for present purposes the distinction between pleadings and proceedings. The pleadings define the ambit of the proceedings and thereby define the issues to which questions of relevance must be related. While the concept of relevance should not be looked at narrowly, it can never be divorced from the issues raised by the pleadings. That is what is meant by the reference in reg 48 to any disputed matter in the proceedings.

[32] The former reg 48 did not state that a document is relevant if it “directly or indirectly” falls within any of the defined categories. That phrase was added when reg 38 of the current Regulations was introduced. But the addition of these words reinforces the conclusion of the Court of Appeal that whilst the pleadings define the ambit of the issues, the concept of relevance should not be looked at narrowly.

[33] It is well established that a court will not order discovery, or disclosure as it is termed in this Court, where an applicant does no more than engage in a ‘fishing’ exercise, that is, when he or she seeks information or documents so as to discover a new cause of action or to discover circumstances which may or may not support a baseless or speculative cause of action.<sup>15</sup>

[34] In *Fox v Hereworth School Trust Board*, Chief Judge Colgan discussed these principles, emphasising that even if documents are relevant, as defined, the Court retains a discretion to refuse unnecessary or undesirable disclosure; whether disclosure would be oppressive is a matter which is to be considered.<sup>16</sup>

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<sup>13</sup> *Airways Corp of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA).

<sup>14</sup> At [5].

<sup>15</sup> *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 190 (HC) at 196.

<sup>16</sup> *Fox v Hereworth School Trust Board* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [41].

[35] The Court also referred to factors described in r 8.4 of the High Court Rules, which address the reasonableness of the scope of a discovery order; it was noted that the rule is relevant by analogy. It indicates that relevant circumstances may include:

- (a) the nature and complexity of the proceedings;
- (b) the number of documents involved;
- (c) the ease and cost of retrieving a document;
- (d) the significance of any document likely to be found; and
- (e) the need for discovery to be proportionate to the subject matter of the proceeding.

[36] I also note that in *Northland Environmental Protection Society Investigation v Chief Executive of the Ministry for Primary Industry*, it was held in the circumstances of that case that the extraction and review of some 9,700 emails would not be considered oppressive, since these could be reviewed reasonably quickly and not at a cost disproportionate to what was at issue in the proceeding.<sup>17</sup> In any event, the expenses incurred could be reflected in costs awarded against the parties seeking disclosure if, at the end of the case, that is appropriate.<sup>18</sup> These are, of course, case specific considerations.

[37] In dicta which was also directed to the applicable High Court Rules, but which in my view is nonetheless relevant in the present context, disclosure was said to constitute a function of relevance, proportionality and discretion.<sup>19</sup>

[38] Mr Dench, counsel for the defendant, submitted that it is a party's responsibility to search for and disclose all relevant documents in its control, under the supervision of its representatives; and that these obligations are onerous. He argued that an assurance to the Court by counsel that relevant documents are privileged or do not exist is usually accepted by the Court. The Court similarly gives

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<sup>17</sup> *Northland Environmental Protection Society Inc v Chief Executive of the Ministry for Primary Industry* [2016] NZHC 406 at [27].

<sup>18</sup> At [28].

<sup>19</sup> *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at [14].

such an acceptance to a statement made on oath, or an affirmation made by a responsible and knowledgeable person, filed by counsel. He pointed to the dicta of Chief Judge Colgan in *Fox* to this effect.<sup>20</sup>

[39] Whilst I respectfully agree with these observations, it is not the case that a statement by counsel will preclude the possibility of the Court needing to consider carefully the pros and cons of relevance under the statutory processes, if issues are raised. The Court in those circumstances must assess the evidence and submissions which may be advanced. That is the case here.

[40] Finally, I note the observation of this Court in *Matsuoka v LSG Sky Chefs New Zealand Ltd*: although disclosure is not available for a cause of action which is for the recovery of a penalty, statutory disclosure is nonetheless available for those causes of action which are not for the recovery of a penalty if these arise in the same proceeding.<sup>21</sup>

[41] I apply the foregoing principles in considering the issues arising in this case.

## **Analysis**

### *Category A:*

Email communications, correspondence, notes, minutes, any documentation whatsoever and/or recordings from or made by any person at the defendant to any other person or organisation (whether internal or external) from 1 September 2015 to the date of discovery discussing or referring to any investigation into the plaintiff's conduct and/or the plaintiff's departure or termination from the defendant.

[42] There are two limbs to this category. The first limb relates to documents which refer to "any investigation" into the plaintiff's conduct. That means not only the investigation leading to Mr Nel's dismissal, but any other investigation.

[43] Mr Vallabh, in his affidavit, stated that disclosure would be given with regard to a second complaint which was raised against Mr Nel, which was put to one side whilst the issue with Ms A was dealt with.

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<sup>20</sup> *Fox v Hereworth School Trust Board*, above n 16, at [4] and [5].

<sup>21</sup> *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605 at [63] – [66].

[44] Since neither party referred to any other investigation into Mr Nel's conduct, I conclude that issues relating to the first limb are thereby resolved.

[45] The second limb relates to documents concerning Mr Nel's departure or termination from the defendant.

[46] Mr Dench submitted that there were issues as to whether all such documents would be relevant and that a search for all of them would be oppressive. He also submitted that if emails revealed adverse comments about Mr Nel in light of his departure, those would not necessarily be relied on by ASB for its opposition to the application for reinstatement.

[47] Mr Dench went on to submit that those giving evidence on the prospect of Mr Nel's reinstatement would be managers at the level of Mr Toomey, or above, in Commercial Banking, or persons to whom the Commercial Banking management would report.

[48] He argued that any comments made by other staff about Mr Nel following his departure, or with regard to the circumstances of his departure, could not be relevant since the makers of such statements would not be required to express their views about Mr Nel for reinstatement purposes.

[49] In my view, it is necessary to consider the following factors:

- (a) Whilst any evidence actually given on behalf of ASB concerning reinstatement will be limited to senior managers, the possibility that such persons will have taken into account the views of a range of staff members cannot be ruled out. Indeed, one of the grounds to be relied on relates to the views of Ms A herself; communications concerning those particular views will obviously be relevant, whether they emanate from Ms A herself, or from other staff.
- (b) The Authority took into account certain communications which occurred between Mr Nel and staff members after his termination; documents relating to these communications were relevant for the

purposes of the Authority's investigation, and are likely to be relevant in this Court. If ASB calls evidence about such post-termination events from persons who are not senior managers, it is not unreasonable for Mr Nel to have access to other documents which will permit him to do the same.

[50] I am satisfied that the request for disclosure meets the test of relevance, as defined, since it relates to the disputed issue of reinstatement.

[51] I do not regard the prospect of searching for such documents as being unduly oppressive. Evidence has been placed before the Court from an ASB Information Security specialist in the Technology and Innovation department. I note the evidence of that specialist that a journal search can be done using appropriate search terms, and this search is not limited to any one user's mailbox.

[52] I conclude that ASB is well able to conduct appropriate searches, and that with a selection of appropriate search terms relating to the Category A request, it should not be unduly difficult to trace the requested documents.

[53] There is no evidence that all such documents have in fact been located to this point, and then assessed by counsel as to relevance. In my view, the appropriate way forward will be for the search to be undertaken and for the results of that search to be disclosed.

[54] The challenge against the objection to Category A documents succeeds. Documents in this category should be listed separately.

*Category B:*

Email communications, correspondence, notes, minutes and documentation whatsoever and/or recordings from or made by any person at the defendant referring to the plaintiff's conduct, performance of duties and professionalism including any matters raised by [Mr B] and/or others in the Manukau office from 1 September 2015 to the date of discovery.

[55] This category has been amended following discussion between counsel.

[56] Mr Dench confirmed that ASB would provide documents with regard to the particular issue referred to in this category, that is, the documents relating to matters raised by Mr B.<sup>22</sup>

[57] Whilst it is not argued by either party that there is any further documentation of an adverse nature as to Mr Nel's conduct, performance of duties and professionalism, there is a dispute as to whether a search should be made for positive communications on this topic.

[58] Mr Dench submitted that this was unnecessary, given the state of the pleadings. He acknowledged that an assertion that Mr Nel's performance had been exceptional, as pleaded in paragraph 8 of his statement of claim, is admitted by ASB. He also indicated that the Court could record that "Mr Nel's professionalism, apart from the events leading to his dismissal, would not be in issue".

[59] Although ASB suggests disclosure of documents of a positive nature is unnecessary given its intended concessions, I consider that the requested disclosure should be allowed. The asserted positive conduct is relevant not only to the issue of reinstatement, but to the question of whether dismissal should have occurred. It is potentially an important issue for Mr Nel's case. It is not unreasonable in those circumstances that he be provided with the documents he has requested. I do not consider that a search for positive communications would be oppressive or that it would only result in documents of an irrelevant nature being disclosed.

[60] I allow this challenge to ASB's objection. Documents in this category should be listed separately.

*Category C:*

Email communications, correspondence, notes, minutes, any documentation whatsoever and/or recordings from or made by any person at the defendant to Mr C, Ms D, Ms E or any other person in relation to the possibility of there being a witness for the plaintiff in his case against the defendant from the date of the plaintiff's termination to date of discovery.

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<sup>22</sup> At this stage, it is appropriate to anonymise the names of Mr Nel's former colleagues.

[61] Mr Dench submitted that although ASB does not necessarily concede the relevance of these documents, they are of a confined scope and will be provided.

[62] The issues relating to Mr Nel's request of former colleagues to give evidence was considered relevant in the Authority and is a live issue on the pleadings in this Court.

[63] I allow the challenge to ASB's objection. Documents in this category should be listed separately.

*Categories D and E:*

Email communications, correspondence, notes, minutes, any documentation whatsoever and/or recordings from or made by Ms A to or referring to the plaintiff from 1 August 2013 to the end of his employment.

Email communications, correspondence, notes, minutes, any documentation whatsoever and/or recordings from or made by the plaintiff to or referring to Ms A from 1 August 2013 to the end of his employment.

[64] These two categories are related and can therefore be considered together.

[65] Ms Stewart submitted that these documents were clearly relevant to Mr Nel's case, since it is his communications with Ms A, and his relationship with her, that led to his dismissal. The starting date of 1 August 2013 was when she joined the commercial team at the Manukau office.

[66] Ms Stewart argued that it is evident from the pleadings that there is a dispute as to whether there was a rational basis for the belief that Ms A had romantic feelings towards Mr Nel; furthermore, this was regarded as a significant factor when the decision to dismiss was made.

[67] Related issues arising from the pleadings were whether Mr Nel and Ms A had a good professional working relationship, whether the relationship between Mr Nel and Ms A changed, whether alleged banter between Mr Nel and Ms A went beyond being good natured and was inappropriate and whether Mr Nel and Ms A worked together constructively on work-related matters without incident.

[68] Ms Stewart emphasised that Mr Nel's case is that ASB had taken many of the communications between himself and Ms A out of context.

[69] She submitted that for all these reasons the requested documents are relevant to issues which are disputed on the pleadings.

[70] In response, Mr Dench referred to evidence filed by ASB's IT specialist. It was his evidence that:

- (a) there are 4,873 emails, as verified by a journal search using Ms A's email address, with the key word phrase "Andre Nel" from 1 August 2013 to 7 October 2015;
- (b) a mailbox search of Ms A's mailbox shows there are 2,087 emails from the same start date and 6 November 2015 that contained the key word phrase "Andre", although this search may have to be repeated; and
- (c) a journal search involving Mr Nel's email address, and the key word phrase of the complainant's first name, revealed 3,082 emails.

[71] Mr Dench submitted that it is inherently unlikely that all such emails would be relevant. He said that if any particular communication stood out, it could be presumed that Mr Nel would have recalled this, would have mentioned it, and could have requested documents relating to specific exchanges.

[72] He also submitted that Mr Nel was not dismissed for good natured banter; nor was it in dispute that he had a good working relationship with Ms A until he stepped over the line with regard to the events giving rise to the dismissal.

[73] He argued that Mr Nel had pleaded that he had reasonable grounds for believing Ms A had developed a romantic interest in him and had provided particulars of those grounds. Mr Dench said that ASB had provided disclosure in relation to those pleaded grounds already.

[74] Mr Dench submitted that in the absence of any further details of particular exchanges, the request which was now made had to be regarded as 'fishing'.

[75] I start with the evidence from the IT specialist. It is evident that although documents have been identified, they have not been reviewed for relevance. The submissions which have been made for ASB are based on the supposition that it is inherently unlikely the requested documents will prove to be relevant.

[76] In my view, however, Mr Nel is entitled to have a process undertaken that would allow documents which could corroborate the allegations he has made to be located and disclosed.

[77] I emphasise the language of the test of relevance, as set out in reg 38. The issue, for disclosure purposes, is not whether a document is or is not actually probative, but whether it may be, whether on a direct or indirect basis.

[78] I do not regard the completion of the search process as necessarily being oppressive – indeed, it was not asserted that this would be the case for this particular category.

[79] The documents have clearly been identified by ASB's IT specialist. What remains to be done is that those documents be printed so that they can be disclosed and assessed.

[80] Accordingly, I allow the challenge to ASB's objection, and direct that:

- (a) The documents are to be made available for disclosure.
- (b) They are to be summarised in a group listing; that listing should state the date range of the disclosed documents and the total number of documents in that range.
- (c) They are to be disclosed only to counsel for Mr Nel and Mr Nel; and may not be disclosed to any other person without leave of the Court.
- (d) The confidentiality of names of ASB customers must be respected; if documents referring to such persons are to be produced to the Court at the hearing, the possibility of appropriate protective orders may need to be considered at that stage.

*Categories F and G:*

- F: Email communications, correspondence, notes, minutes, any documentation whatsoever and/or recordings relating to “the list of actions” by the defendant’s staff attached to Catherine Stewart Barrister’s letter to the defendant of 16 November 2015 including any information in relation to complaints, concerns, outcomes and any disciplinary processes or investigations which may have occurred in relation to those matters.
- G: Email communications, correspondence, notes, minutes, any documentation whatsoever and/or recordings relating to any complaints or concerns raised and/or the investigations, outcomes or disciplinary action in relation to those complaints or concerns raised, in relation to sexual harassment, racial harassment, bullying, intimidation, harassment, use of recreational drugs, alcohol abuse, breach of confidentiality, profane language, and/or breaches of the Code of Conduct within the defendant over the five years prior to the termination of the plaintiff’s employment that had been escalated to any member of the defendant’s HR team and Mr John Toomey and Mr Paul Duncan who were Managers in his team.

[81] Category G was modified for the purpose of the hearing by the addition of the reference to the escalation of complaints or concerns to senior managers.

[82] These categories relate to documents which are potentially relevant to issues of disparity.

[83] Ms Stewart dealt first with a significant objection which had been raised for ASB to the effect that many of the types of concerns or complaints are related to situations different in kind to that which involved Mr Nel.

[84] In resisting this objection, she referred to the decision of *New Zealand Police Association Inc v Commissioner of Police*, where a defendant had argued that a request for disclosure of all records of assault and indecency committed by police officers should be restricted to the specifics of the plaintiff’s offending, which was entering premises unlawfully and committing sexual assault.<sup>23</sup> The defendant’s request raised the possibility of disclosure of some 26 case files spanning a 10-year period.

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<sup>23</sup> *New Zealand Police Association Inc v Commissioner of Police* [1995] 1 ERNZ 658 (EmpC).

[85] Ms Stewart relied particularly on the following dicta of Judge Palmer:<sup>24</sup>

... I conclude that serious misconduct by another police officer, in circumstances occasioning the disciplining of that officer, is relevant in a comparative way to the punishment of dismissal imposed upon Mr Neilsen for his offending, notwithstanding that the offending by the compared officer did not duplicate, through matching identifying characteristics, as it were, the offending by Mr Neilsen ... I consider relevance is a matter of fact and degree. Certain serious misconduct will, upon a comparative approach, obviously be more relevant and some serious misconduct less relevant, but usually, upon a comparative approach, the *weight* to be attached to such evidence in a contended disparity of treatment setting should not be confused *with its relevance*.

[86] In light of these principles the Court was persuaded that 25 out of the 26 files should be disclosed.<sup>25</sup>

[87] Ms Stewart went on to argue that all of the types of conduct referred to in the request were relevant. This was because they related to Mr Nel's concerns that he was treated unfairly by having his employment terminated when there were more serious forms of misconduct that were not investigated and/or acted upon; these related to sexual harassment, racial harassment, bullying, intimidation, use of recreational drugs and alcohol abuse as well as other breaches.

[88] Ms Stewart also stated that ASB's Code of Conduct did not refer expressly to 'romantic relationships'; rather, it referred to more general concepts such as harassment and not treating others with respect. Such concepts necessarily encompass a range of conduct.

[89] In his submissions, Mr Dench emphasised that having regard to the scope of the request, it was clear that irrelevant documents were being sought. He said that a disclosure was "generalised, virtually limitless and breathtakingly wide".

[90] He submitted that Mr Nel only pleaded three particular examples, and ASB was not required to disclose documents about circumstances that were not pleaded. Further, were he to amend his statement of claim to add particulars relating to a wide range of situations, ASB would apply to strike out those particulars as they would go

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<sup>24</sup> At 666 – 667.

<sup>25</sup> At 670.

well beyond any recognised basis for alleging disparity. This was discussed in cases such as *Inland Revenue v Buchanan*<sup>26</sup> and *Samu v Air New Zealand Ltd.*<sup>27</sup>

[91] He submitted that the request was a yet further example of ‘fishing’, which was not the function of disclosure.

[92] Mr Dench said that ASB has over 5,000 staff, and it would be an enormous task to provide disclosure. Further, there would be privacy issues. Disclosure would be oppressive and inappropriate. Although a filter had been added in respect of Category G, he submitted that was unlikely to narrow the task to manageable proportions.

[93] The leading case on disparity is *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)*.<sup>28</sup> There, the Court of Appeal reviewed not only New Zealand case law but English authorities. In the course of that review, the Court referred to a judgment of the Employment Appeal Tribunal, *Hadjioannou v Coral Casinos Ltd.*<sup>29</sup> In that case, the Tribunal had accepted a submission that an argument by a dismissed employee based upon disparity could only be relevant in limited circumstances, namely:<sup>30</sup>

- (a) If there was evidence that employees had been led by an employer to believe that certain categories of conduct would either be overlooked, or at least would not be dealt with by the sanction of dismissal.
- (b) Cases in which evidence about decisions made in relation to other cases supported an inference that the purported reasons stated by the employer, are not the real or genuine reason for dismissal.

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<sup>26</sup> *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [40] – [49].

<sup>27</sup> *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 (CA) at 639.

<sup>28</sup> *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)*, above n 26; leave to appeal this decision was declined by the Supreme Court in *Buchanan v Chief Executive of the Department of Inland Revenue* [2006] NZSC 37, [2006] ERNZ 512.

<sup>29</sup> *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 (EAT).

<sup>30</sup> At [24] – [25].

- (c) Decisions made by an employer in truly parallel circumstances; these cases may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate.

[94] The Court of Appeal in *Buchanan* noted that this approach had been approved in subsequent English cases, including in the English Court of Appeal in *Paul v East Surrey District Health Authority*.<sup>31</sup> In *Buchanan*, it was held there was no suggestion that the first and second sets of circumstances applied, and for the Chief Executive it was argued that the third did not either.

[95] *Buchanan* focused, however, not on what type of conduct would constitute disparity, but on the correct approach to be adopted when a disparity point was to be considered by the Court. That is:<sup>32</sup>

- (a) Was there disparity of treatment?
- (b) If so, was there an adequate explanation for the disparity?
- (c) If not, was the dismissal justified notwithstanding the disparity for which there was no adequate explanation?

[96] The Court of Appeal was satisfied that the third element of this test had not been considered by the Employment Court.<sup>33</sup> The Court did not discuss, as a point of law, the nature of disparity further.

[97] It was necessary, however, for the Court to consider a wide range of circumstances as disclosed in a schedule of some 35 cases.<sup>34</sup> In considering those cases, the Court of Appeal made an observation that can be relevant when multiple cases have to be considered for disparity purposes: different managers may be

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<sup>31</sup> *Paul v East Surrey District Health Authority* [1995] IRLR 30 (CA).

<sup>32</sup> *Chief Executive of the Department of Inland Revenue v Buchanan*, above n 26, at [45].

<sup>33</sup> At [46] – [48].

<sup>34</sup> At [59] – [69].

justified in making different judgement calls.<sup>35</sup> The Court emphasised, as it had in *Samu*, that disparity will not necessarily render a dismissal unjustifiable; all the circumstances have to be considered.<sup>36</sup>

[98] In my view, these conclusions indicate that the Authority/Court may have to consider a range of circumstances. The rubric of “truly parallel circumstances” may indeed be of assistance in some cases, but the acceptance of different categories of disparity cases as outlined in *Hadjioannou* suggests that a broad approach may in some instances be necessary in order to assess whether those are indeed relevant comparables.<sup>37</sup>

[99] There are numerous examples where a plea of “broad parity of treatment in relevantly similar circumstances” has resulted in a consideration of many other circumstances.<sup>38</sup> In *Buchanan*, as already mentioned, some 35 other cases were before the Court. In *Smith* it is evident that a substantial volume of comparative material was considered and assessed.<sup>39</sup> Similarly in *Wikaira v Chief Executive of the Department of Corrections* a wide range of comparable instances were before the Court.<sup>40</sup>

[100] At this stage, it is premature to determine what type of other cases might constitute relevantly similar circumstances. The question for the Court is the scope of disclosure of other instances. It is in that context that *New Zealand Police Association*, a discovery case, must be considered.<sup>41</sup>

[101] I respectfully agree with and adopt the dicta of Judge Palmer cited earlier.<sup>42</sup> In short, actual relevance of comparative material at trial may well be a matter of fact and degree; some comparative examples may be more applicable than others. But at

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<sup>35</sup> At [70].

<sup>36</sup> At [42]. This point was approved by the Supreme Court in *Buchanan v Chief Executive of the Department of Inland Revenue*, above n 26, at [7].

<sup>37</sup> *Paul v East Surrey District Health Authority*, above n 31, at 310: per Sir Christopher Slade and Nourse L.J.

<sup>38</sup> *Smith v Attorney-General for and on behalf of Commissioner of Police* [2009] NZEmpC 139, at [81].

<sup>39</sup> At [82].

<sup>40</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [168] – [170].

<sup>41</sup> *New Zealand Police Association Inc v Commissioner of Police*, above n 23.

<sup>42</sup> At [85].

this stage, the focus has to be on the statutory definition of relevance for disclosure purposes.

[102] Having regard to the manner in which Mr Nel's case as to disparity is advanced on the pleadings, I consider that the scope of the disclosure requests, confined as they are to circumstances which were considered by ASB's Human Resources team, and certain senior managers, is appropriate.

[103] Next, I consider Mr Dench's submission that Mr Nel had an obligation to plead a specific disparity case before ASB could be required to provide disclosure.

[104] Mr Nel's pleading, at present, refers to the assertion that disparity of treatment needed to be considered by ASB in light of its "workplace culture of alcohol abuse and profane language and other incidents involving serious concerns of bullying, use of recreational drugs, sexual and racial harassment and breach of confidentiality, which the defendant was aware of but did not investigate and/or take disciplinary action". Then, the three specific examples are particularised.

[105] I do not consider that in the present circumstances it would be unfair to require disclosure to be given as sought for examples which are not as yet pleaded. The question will be whether ASB has acted justifiably in all the circumstances, taking into account other cases. The fact that a former employee may not necessarily be aware of his or her employer's particular approach on other occasions should not necessarily preclude that person from finding out for the purposes of their case, whether disparity of treatment has in fact occurred, and/or the extent of any lack of parity if this is indeed the case.

[106] Where the focus is on the employer's conduct in other cases which do not involve the particular employee who has been dismissed, I see no objection in principle to the comparative exercise being undertaken with regard to cases known to that employee as well as cases not known to that employee.

[107] I do not overlook Mr Dench's submission that ASB may need to give consideration to striking out any amended pleading relating to cases that should not

be considered for the purposes of a disparity submission. That, however, is a matter for the future.

[108] Mr Dench also touched on the point that disclosure could potentially breach other staff members' legitimate expectation of privacy. Whether there are in fact such difficulties is a matter which can be discussed between counsel; I would have thought appropriate steps could be agreed upon to deal with such issues. In the first instance, however, disclosure of cases that fall within the confines of Categories F and G should be to Mr Nel's counsel, and to Mr Nel, only.

[109] As to oppression, I am satisfied that the additional language which has been added to Category G is appropriate. That said, I have some sympathy for the contention that the request might potentially involve consideration of a substantial volume of material. However, with suitable conditions, I do not consider that the request should be characterised as "virtually limitless". First, the limitation which has been introduced for Category G should also apply to Category F. Secondly, disclosure should be confined to a document, or documents, which describe in brief the conduct involved and the outcome. I do not consider it appropriate at this stage for entire case files to be disclosed, unless that is necessary to provide the essential details as to what occurred.

[110] I allow the challenge to ASB's objection. Disclosure in respect of both categories is to occur on the following terms:

- (a) Disclosure is to be restricted to circumstances that have been escalated to any member of ASB's Human Resources team and/or to Mr John Twomey and Mr Paul Duncan. These circumstances must be confined to the period of five years prior to Mr Nel's dismissal.
- (b) The range of circumstances is to be as pleaded in para 42(d) of Mr Nel's statement of claim (EMPC 257/2016).<sup>43</sup>
- (c) Disclosure should be by way of a document or documents which summarise the circumstances involved, and the outcome (if any). For

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<sup>43</sup> As summarised at [87].

the avoidance of doubt, a full set of documents for each particular circumstance is not, at least at this stage, required to be disclosed unless that is necessary to achieve the disclosure which has been ordered.

- (d) The documents, as disclosed, are to be considered only by Mr Nel's counsel and Mr Nel. They may not be provided to any other person without leave of the Court.
- (e) Listing may be by reference to a one-line description of any individual complaint or concern, date, and number of disclosed documents.
- (f) Disclosure is to be to Mr Nel's counsel, and to Mr Nel, only in the first instance. The parties may need to discuss whether any further protective directions are necessary at the substantive hearing if it is intended that any of the foregoing documents are to be produced.
- (g) Any individual instances to be relied on by Mr Nel at trial are to be specifically pleaded in an amended statement of claim.

### **Other issues**

[111] There are two other issues on which counsel made submissions, flowing from the affidavit of documents already filed by ASB.

[112] The first relates to the fact that confidentiality is claimed by ASB in respect of five particular documents.

[113] Mr Dench indicated that this was an issue that could be discussed directly between counsel.

[114] As these are apparently documents potentially relevant to the disparity argument, I direct that if agreement cannot be reached between the parties, these documents should be disclosed (if they have not been already provided) to Mr Nel's counsel and to Mr Nel. Protective orders can be sought at trial if need be.

[115] Ms Stewart also raised a concern that ASB had claimed legal privilege in respect of various documents commencing on 20 October 2015. She submitted that it was unclear why the commencement date for the claim of legal privilege of 20 October 2015 had been advanced; Mr Nel should have been provided with this information so that he had an opportunity to challenge the claim.

[116] In fact, ASB's affidavit of documents states that the claim is made for certain documents compiled on or after that date "following advice that the plaintiff was in discussion with his Barrister". It states further that this was for the dominant purpose of preparing for an apprehended or existing proceeding from the plaintiff, which ASB had reasonable grounds for contemplating would be a party to the proceeding.

[117] This statement is to be assessed against the evidence that Mr Nel had been summarily dismissed for serious misconduct some two weeks earlier. Although his Barrister had yet to write to ASB raising a personal grievance (on 16 November 2015), I find that litigation was reasonably apprehended. Therefore, the dominant purpose of the documents for which privilege is asserted is likely to have been for advice.

## **Conclusion**

[118] The challenge to ASB's objections succeeds as above.

[119] ASB is to file and serve the necessary affidavit of documents within 21 days of the date of this judgment. That affidavit should list by the categories described in Mr Nel's notice of disclosure. Inspection is to occur within 14 days thereafter.

[120] I reserve leave for either party to apply for any necessary directions as to the implementation of this judgment.

[121] The Registrar is to arrange a telephone directions conference six weeks hence. The Court will need to be advised at that point as to whether there are any further interlocutory issues. Otherwise, the matter will then be timetabled for a trial date.

[122] I reserve costs with regard to the discovery issues. That issue will need to be considered after the substantive hearing. As I have mentioned already, the Court may need to receive submissions as to the costs involved in complying with the disclosure requests. It is premature, however, to consider that topic at this stage.

B A Corkill  
Judge

Judgment signed on 16 May 2017 at 11.00 am