

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2015] NZEmpC 114  
EMPC 117/2015**

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

AND IN THE MATTER    of an application for stay of proceedings

BETWEEN                TGP  
   Plaintiff

AND                        TFE  
   First Defendant

AND                        SDI  
   Second Defendant

AND                        TDI  
   Third Defendant

Hearing:                11 May 2015 (by Directions Conference and on papers filed)  
   (Heard at Auckland)

Appearances:        A Twaddle, counsel for the plaintiff  
   K Radich, counsel for the defendants

Judgment:             16 July 2015

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**JUDGMENT OF JUDGE M E PERKINS**

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- A. There will be an interim order until further order of the Court prohibiting publication of the parties' identities and all identifying particulars of the parties including, but not limited to:**
- a) The location of the place of work;**
  - b) The nature of work and industry;**

- c) **The allegations about the plaintiff contained in correspondence published by the first and second defendants, and**
- d) **Any other particulars which might reveal the parties' identities.**

## **Introduction**

[1] These proceedings consist of a challenge to an interim determination of the Employment Relations Authority (the Authority) dated 9 April 2015.<sup>1</sup> The determination dismissed the plaintiff's application for orders prohibiting publication of the plaintiff's name or any identifying particulars.

[2] The determination dismissing the application for non-publication orders followed an earlier interim determination of the Authority dated 24 February 2015.<sup>2</sup> This earlier determination dealt with proceedings commenced by the plaintiff relating to alleged breaches of a record of settlement. The defendants applied to the Authority to strike out the plaintiff's proceedings. The Authority elected to deal with the matter as an application that the parties should not be directed by the Authority to mediation.<sup>3</sup> The Authority declined to dispense with mediation. No challenge was made to this determination and it is presumed that the parties have, as required, now attended mediation.

## **Factual chronology**

[3] A summary of the factual position which has led to the present challenge to the Court is set out in an interlocutory judgment of Chief Judge G L Colgan dated 8 May 2015.<sup>4</sup> This was a judgment dealing with an urgent application by the plaintiff for an order staying the execution of the determination of the Authority pending the hearing and the outcome of the challenge. In declining to make the orders

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<sup>1</sup> *TGP v TFE* [2015] NZERA Auckland 105, parties anonymised by Employment Court judgment of Chief Judge Colgan *TGP v TFE* [2015] NZEmpC 60 at [12].

<sup>2</sup> *TGP v TFE* [2015] NZERA Auckland 60.

<sup>3</sup> Employment Relations Act 2000, s 159(1)(b).

<sup>4</sup> *TGP v TFE* [2015] NZEmpC 60.

prohibiting publication the Member of the Authority deferred the release of the determination in order to give the plaintiff the opportunity to challenge.

[4] The interlocutory judgment of Chief Judge Colgan set out reasons for interim orders he had included in a Minute issued the day before. These included an interim order pursuant to cl 12 of sch 3 of the Employment Relations Act 2000 (the Act) that no person is to publish the identities of the parties to these proceedings or to the proceedings before the Authority from which this challenge emanates or any information which may tend to identify any of those parties.<sup>5</sup>

[5] In addition, Chief Judge Colgan made an interim order staying the Authority's direction declining the application that the parties not be referred to mediation.<sup>6</sup> While there was no challenge to that determination the interim order was made to simply hold the matter in abeyance until the entire matter could be considered by a Judge at a directions conference. Both the orders prohibiting publication and staying the Authority's direction to mediation were interim orders at that stage pending further order of the Court.

[6] There is no need in this judgment to repeat the factual background to the matter as this is fully set out in the interlocutory judgment of Chief Judge Colgan.<sup>7</sup>

[7] A telephone directions conference was held on 11 May 2015. Counsel had helpfully filed memoranda in preparation for that conference. It was confirmed that there would be no challenge to the determination of the Authority referring the parties to further mediation. However, in respect of the challenge by the plaintiff to the determination refusing prohibition on publication of name or other particulars the defendants indicated that they would not be opposing the plaintiff's challenge. It was agreed the challenge could be decided on the papers already filed in Court. In order to preserve the position pending issue of this judgment, a further interim order was made extending the earlier interim order prohibiting publication of name or other particulars pending further order of the Court.

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<sup>5</sup> At [12].

<sup>6</sup> At [13].

<sup>7</sup> At [2]-[10].

[8] Even though the plaintiff's challenge is not going to be opposed by the defendant, the Court nevertheless needs to give consideration to the wider public interest issue in respect of the challenge. In particular there needs to be a balancing exercise between the fundamental principle of open justice and whether the public has a legitimate interest in knowing the identity of the parties against whether the circumstances put forward by the plaintiff support and justify an exception to that fundamental principle. That is always an important factor for the Court to take into account before making an order prohibiting publication, even on an interim basis. Accordingly, the fact that the defendants would not be opposing the plaintiff's application in this case, while needing consideration, is not necessarily conclusive.<sup>8</sup> The Court is still required to consider the wider public interest issues. For this reason judgment was reserved; the plaintiff's position in the meantime protected by the extension of the interim order initially made by Chief Judge Colgan in his interlocutory judgment.

### **The Authority's determinations**

[9] Before considering the facts specifically relating to the plaintiff in this case the Authority dealt with the extent of its jurisdiction to make orders prohibiting publication contained in cl 10, sch 2 of the Act. The discretion of the Authority to make such an order is statutory. Similarly the discretion vested in this Court to make such an order is contained in virtually identical terms in cl 12, sch 3 of the Act. The discretion vested in both the Authority and the Court is wide.

[10] In dealing with precedent on the point, the Authority stated as follows:<sup>9</sup>

[6] The Court of Appeal has repeatedly stated that the principle of open justice is the appropriate starting point in cases involving non-publication orders and that this applies in both civil and criminal proceedings. The principle of open justice includes the public identification of all involved in proceedings.

[11] The Authority then gave consideration to the decision of *H v A Ltd*<sup>10</sup> a full Court decision of the Employment Court. While the determination then went on to

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<sup>8</sup> *Q v W* [2013] NZEmpC 143 at [4].

<sup>9</sup> *TGP v TFEI*, above n 1 (footnotes omitted).

<sup>10</sup> *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.

consider, but dismiss as inadequate grounds, matters put forward by the plaintiff to support the application, it is not exactly clear whether the principles established by the majority of the Court in *H v A Ltd* which are binding on the Authority, were applied. It appears the Authority may have decided to be bound by narrower standards adopted in authorities of the Court of Appeal referred to in footnotes in the determination to support the statements set out in [10] above. The Authority did not refer to the Court of Appeal's judgment in *Jay v Jay*.<sup>11</sup> While the determination has referred to the decision in *H v A Ltd*, it is unclear whether the plaintiff was given the benefit of the principles established in that decision.

### **Principles applying in this Court**

[12] In the decision of *H v A Ltd*, this Court considered whether, in view of its specific statutory jurisdiction establishing the discretion, it was bound by statements in the common law Courts. In particular consideration was given to the Court of Appeal's judgment in *Clark v Attorney-General (No 1)*<sup>12</sup> that the principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court proceedings which can be overcome only in exceptional circumstances.<sup>13</sup>

[13] The majority decision of the full Court in *H v A Ltd* set out its views on the statutory discretion as follows:

[78] We agree that non-publication of names or other identifying particulars in employment cases will be "exceptional" in the sense that such orders are and will be made in a very small minority of cases. However, we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that Parliament has prescribed for such orders in this Court or the Authority.

[79] By making a non-publication order in a case in which the interests of justice warrant that order does not mean, in our view, that the Court has abandoned a commitment to "open justice". Whilst the identification of all persons involved in a case is a contributor to "open justice", so too are a number of other safeguards that are not at issue, and therefore at risk, in this case. These include a public hearing of the case, a publicly issued and

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<sup>11</sup> *Jay v Jay* [2014] NZCA 445.

<sup>12</sup> *Clark v Attorney-General (No 1)* (2004) 17 PRNZ 554 (CA).

<sup>13</sup> At [42].

reasoned judgment of it, together with the rights of appeal and judicial review to attach to all of the work of the Authority and the Court. In addition, the statute clearly allows for a change to the presumption (and the reality in the vast majority of cases) that there will be no restriction on publishing any relevant information about a proceeding or of the judgment deciding the case.

[80] There are, of course, other circumstances in which this Court (and the Authority and other courts) prohibit publication of information about cases. Commercially sensitive information that may be misused by a competitor, if published, is perhaps the most common example of non-publication orders in this jurisdiction. Others have included information about the security arrangements of prisons which, if publicised, might endanger prison staff; the identities of persons who have been subjected to criticism in evidence but have had no opportunity to challenge or refute that criticism; and the identities of hospital patients whose care and treatment are the subject of proceedings involving professional health staff. There are many other instances of ad hoc non-publication orders which are, nevertheless, very much the exception than the rule.

[14] While in [78] it is stated that non-publication of names or other identifying particulars in employment cases will be exceptional, that is only in the sense that such orders, because of their very nature, will only occasionally be sought and required, rather than establishing a proof standard of exceptional circumstances being imposed upon an applicant for such an order. It appears that the Authority may have misunderstood the intent of that paragraph in the decision of *H v A Ltd* if it then in turn has been swayed by statements such as those contained in *Clark*. As the majority decision of the full Court in *H v A Ltd* has emphasised, the Court and the Authority are required to exercise their discretion in accordance with the statutory provisions rather than under the inherent jurisdiction prevailing in the common law Courts or the narrower statutory considerations prevailing in criminal cases.<sup>14</sup> Of course, fair trial principles justifying departure from the fundamental principle of open justice, which can predominate in criminal proceedings particularly before a jury,<sup>15</sup> do not apply in proceedings before this Court.

### **Applying the principles to this case**

[15] This challenge involves the whole of the determination of the Authority, and seeks a full hearing of the matter by way of a hearing de novo. The circumstances

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<sup>14</sup> See *Jay v Jay*, for a discussion by the Court of Appeal as to the approach to be taken in a civil case, above n 11, at [118].

<sup>15</sup> See Criminal Procedure Act 2011, ss 200-204.

upon which the plaintiff relies to claim the need for an order prohibiting publication of name, and any matters which may lead to identification were set out in an affidavit in support of application for stay of proceedings. The plaintiff now relies upon the affidavit to support the challenge itself. No evidence in rebuttal is before the Court because of course the defendants have indicated that they do not intend to oppose the challenge. In the affidavit the plaintiff sets out events that are alleged to have occurred since the parties entered into the terms of settlement, which unfortunately through administrative oversight, were not endorsed by a mediator. As a result of the events which have occurred since that settlement and as indicated in the interlocutory judgment of Chief Judge Colgan, a complaint of professional misconduct has been lodged against the plaintiff with a relevant professional body. In addition there are defamation proceedings now before the High Court.

[16] Also set out in the affidavit are circumstances showing that as a result of the dispute with the defendants, the plaintiff has been unable to obtain alternative employment and that further publication of the plaintiff's name, or particulars which might lead to identification will exacerbate that difficulty. The affidavit also adverts to the deep distress which has been caused to the plaintiff and the plaintiff's family, which is significant. Some evidence from a specialist medical consultant confirms the need for medication for depression and sleep difficulties. Also adverted to is the fact that because of difficulties in obtaining an alternative position in the plaintiff's chosen profession, the plaintiff has commenced retraining in a new field and that publication would also lower prospects of a career in such alternative field of employment.

[17] It can, of course, be counter-productive to deal too specifically with the factors the plaintiff has now put forward as grounds for the challenge as that in itself may raise a danger of possible identification. However, in the present case the plaintiff has set out quite substantial grounds in the affidavit and the supporting documents justifying an exception to the fundamental principle of open justice, which appear to have been too readily dismissed in the determination of the Authority. The adverse consequences of publicity on reputation and the fetters it will impose upon the ability to obtain alternative employment in the plaintiff's chosen or alternative profession are likely to be significant. In addition, the evidence as to the

adverse personal consequences on the plaintiff, the plaintiff's family and in particular the plaintiff's physical and mental state are persuasive. Until the allegations that untrue and damaging statements were made about the plaintiff by the defendants have been fairly tried in other jurisdictions the consequences to the plaintiff at this stage if publication of the details of this challenge is not prohibited will be irremediable.

[18] While not conclusive, the fact that the defendants do not oppose the challenge is a significant factor to take into account in exercising the discretion. If in the proceedings between the parties in other jurisdictions there is a need for there to be an order prohibiting publication of the plaintiff's name or other particulars, which might lead to identification of the plaintiff or any other party involved in those proceedings, then now declining the plaintiff's application in this Court would be counter-productive. Proceedings in some form, of course, are still before the Authority. They may be resolved by the attempts at mediation which may also include agreements as to confidentiality and the like. These are all significant reasons for the Court to exercise its discretion and allow the plaintiff's challenge. Presently, until the outcome on the merits of the other litigation is known, the public have no legitimate interest at this stage in knowing the identity of the plaintiff.

[19] For all of these reasons the challenge is allowed. As sought in the statement of claim there is an interim order prohibiting publication of the parties identities and all identifying particulars of the parties including, but not limited to:

- a) the location of the place of work;
- b) the nature of work and industry;
- c) the allegations about the plaintiff contained in correspondence published by the first and second defendants, and
- d) any other particulars which might reveal the parties' identities.



[20] To ensure there is no misunderstanding the decision of the Authority is set aside and this judgment stands in its place.<sup>16</sup> The prohibition order extends to the proceedings before the Authority.<sup>17</sup> As an interim order it is to continue until further order of the Court. Leave is reserved to apply to the Court for review if required once the remaining matters before the Authority are concluded. Obviously the Court has no jurisdiction in respect of the other proceedings before the High Court and professional tribunal. The orders now made cannot extend to those proceedings.

[21] Insofar as costs are concerned, it may well be that no issue as to costs arises. However, in case it is necessary, costs are reserved. If the parties wish an issue of costs to be considered, appropriate applications can be made by memoranda in the usual way.

M E Perkins  
Judge

Judgment signed at 11.30 am on 16 July 2015

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<sup>16</sup> Employment Relations Act 2000, s 183(2).

<sup>17</sup> *Q v W*, above n 8, at [6].