THERE IS AN ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE PARTIES AND ANY INFORMATION LEADING TO THE PARTIES' IDENTITY

IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 128
EMPC 218/2017

IN THE MATTER OF	an application for sanctions
BETWEEN	ALA Plaintiff
AND	ITE Defendant

Hearing:	17 October 2017 (heard at Tauranga)
Appearances:	M Ward-Johnson, counsel for the plaintiff ITE in person
Judgment:	26 October 2017

ORAL JUDGMENT (NO 2) OF JUDGE B A CORKILL

Procedural background

[1] This judgment deals with yet further issues which have arisen from a settlement agreement the parties entered into on 10 June 2014. This Court has had to consider whether there have been significant breaches of its confidentiality provisions on no fewer than three previous occasions.[1]

[2] Recently, ALA was constrained to bring yet another application which sought urgent takedown orders, and for sanctions for breach of a compliance order which had been made on 15 April 2016 (the compliance order). The urgent application was dealt with in my judgment of 1 September 2017, when I ordered the immediate

[1] *ITE v ALA* [2016] NZEmpC 42; *ALA v ITE* [2017] NZEmpC 39 and *ALA v ITE* [2017] NZEmpC 109.

removal of videos and posts from certain Facebook pages and from a YouTube channel.[2]

[3] The sanctions sought were the imposition of a fine or the imposition of a term of imprisonment. It was alleged this was appropriate because of continued and serious breaches of the Court's compliance order by ITE. The hearing to consider such a possibility was fixed for 9 October 2017.

[4] ITE did not take part in the hearing for takedown orders. Subsequently, and during a telephone conference which was held on 12 September 2017, he indicated he would take part in the balance of the proceeding as to sanctions. Then, at his request, the fixture was rescheduled to accommodate his personal circumstances. It duly proceeded on 17 October 2017.

[5] ITE contends in effect that he was justified in pursuing the steps he has taken. He says he was entitled to place information on a YouTube channel, on Facebook together with posts on a OneDrive cloud-based facility and to send a great deal of information by email and letters to various other persons. He also states he was entitled to breach the Court's orders of non-publication of names and identifying details.

[6] This issue must be resolved before any question of sanctions can arise.

[7] At the conclusion of the hearing on 17 October 2017, I reserved my judgment on the justification issue, indicating that I would deliver this, my judgment, at a resumed hearing on 26 October 2017.

Factual context

[8] Before coming to the elements of ITE's justification argument, it is necessary to describe the history in more detail.

---

2 *ALA v ITE* [2017] NZEmpC 109 at [28].

[9] As already mentioned, the settlement agreement was entered into on 10 June 2014. Ultimately, allegations of breach were brought to this Court, and Judge Inglis, as she then was, made a compliance order on 15 April 2016. The background is fully set out in her judgment,[3] but because of their importance, the terms of the Court's compliance order bear repeating:

> [75] The plaintiff is ordered to comply with all of his obligations under the terms of the settlement agreement, including (but not limited to):
>
> (i) Not publishing any information about the employment investigation and disciplinary process (including information about his activities in deleting data on 11 March 2014) by way of his website, video recordings and/or email or other communications. This includes but is not limited to publication to past or present staff and/or elected members of the defendant organisation;
>
> (ii) Ceasing any and all communication by any means with any third party (including employees of other local authorities but not including his own legal advisor) about matters subject to his confidentiality obligations to the defendant organisation.
>
> The timeframe for compliance is *immediate.*

[10] The Court also imposed a penalty of $6,000 and ordered payment of indemnity costs.[4]

[11] The compliance order was made because ITE had emailed employees of ALA, and other local authority employees, links to his webpage and to certain videos; the Court found that these steps breached the obligations of the agreed terms of settlement, a personal undertaking, and ITE's employment agreement.

[12] It is also relevant to mention that the Court on that occasion drew ITE's attention to the potential consequences of breaching the compliance orders. It referred expressly to s 140(6) of the Employment Relation Act 2000 (the Act), and stated that if he did not comply with the compliance orders, ALA could apply to the Court for an order that he be imprisoned, that he be fined up to $40,000 and/or that his property be sequested. It was emphasised that these were significant orders and

---

3 *ITE v ALA* [2016] NZEmpC 42.

4 Which were quantified in a judgment dated 15 November 2016: *ITE v ALA* [2016] NZEmpC 147.

reflected the importance which the Act placed on individuals complying with orders imposed on them.[5]

[13] The Court also made permanent non-publication orders prohibiting the publication of the parties' names, and any information leading to the identification of either party.[6]

[14] In early November 2016, ITE sent by email to newly elected members of ALA copies of a submission which he had made under the Protected Disclosures Act 2000 (PD Act), as well as links to videos and an affidavit which he had filed in bankruptcy proceedings brought by ALA in the High Court.

[15] In a judgment of 12 April 2017, I concluded that the provision of this material to those members constituted a clear breach of the compliance order. I fined ITE $7,500. In doing so, I said I was not persuaded that a term of imprisonment should be imposed, a possibility which had been raised with the Court on behalf of ALA. But I went on to say that it was very likely that any further breaches of the Court's order would result in the imposition of a considerably more serious sanction or sanctions, as illustrated in previous cases. I said that all options under s 140(6) of the Act would fall for consideration.[7]

[16] I also made permanent non-publication orders in the same terms as had applied previously.[8]

[17] Then followed the events which it is alleged breached the compliance order.

[18] On 16 August 2017, ITE sent letters together with flashdrives which contained videos and PDF documents to the chief executives of several local authorities. Three days later he published six videos on YouTube and Facebook. These traversed the entire history of issues between ITE and ALA, as summarised in the Court's earlier judgments. They referred to details of his employment at ALA

---

5 *ITE v ALA*, above n 3, at [77].
6 At [78] – [84].
7 *ALA v ITE* [2017] NZEmpC 39 at [176].
8 At [177] – [181].

with reference to a particular project in which he had been involved at the time of his departure under the settlement agreement; the background of an employment investigation which ALA undertook; the deletion of information by ITE after that investigation had commenced; comments regarding his perceptions as to organisational failures within ALA; the entering into of the settlement agreement; and reference to the subsequent litigation which ensued.

[19] Links to the six videos which had been published on his YouTube channel were also created on ITE's Facebook page, together with a post to which third parties responded; with yet further comments then being made by ITE. A link to the same videos were created on the Facebook page of a Mr G. There were also relevant posts on that Facebook page, including from ITE.

[20] In my judgment, I found that the steps which I have just described followed ITE being adjudicated bankrupt on the petition of ALA on 7 August 2017, and that the steps he had taken were retaliatory in nature.[9] ITE now says that the adjudication was a minor aspect of his decision to take those steps.

[21] On 22 August 2017, ALA filed the present proceedings, initially seeking takedown orders on an ex parte basis. Later that day, I ruled that the urgent application should proceed on notice, and issued a minute establishing directions for the urgent hearing.

[22] In my minute I stated that ITE should understand that the matters raised in the proceeding were potentially very serious indeed. I said that the effect of the existing compliance order continued. I explained that any further breaches of that compliance order, whilst the proceeding was on foot, would likely form part of the Court's consideration of ALA's current application for sanctions, which include a term of imprisonment and/or a fine. Any further breach was very likely to lead to an even more serious outcome than might otherwise be the case. Although it was a matter for ITE, I indicated that it may well be appropriate for him to consider obtaining independent legal advice as quickly as possible.

---

9 *ALA v ITE*, above n 2, at [6].

[23] On 25 August 2017, the proceedings, and a copy of my minute, were served on ITE.

[24] On 26 August 2017, ITE sent to candidates of previous local body elections links to the videos, and encouraged the bringing of requests for documentation either under the Official Information Act 1982, or under the Local Government Official Information and Meetings Act 1987, for documents which he had filed in the litigation.

[25] As I have mentioned, ALA's urgent application proceeded on 1 September 2017. Despite it having been delayed by a day to accommodate ITE's circumstances, he did not attend the Court hearing. Takedown orders were duly made in an oral judgment which was issued that day, which ALA served on him immediately thereafter.

[26] On 3 September 2017, ITE sent a yet further email. This was by way of response to a particular individual who he says then doctored the email to suggest that he had sent it to some 34 other recipients. He produced no evidence to support this rather surprising assertion, either a copy of the original email as sent to the individual involved (which I infer he could have obtained easily as an IT consultant); or by requiring the individual to give evidence. The more plausible explanation is that he sent the email on a 'reply all' basis; this conclusion is reinforced by the fact that the multiple recipients had local authority links and it is likely he hoped the content would be of concern to them. I find it is probable ITE intended to copy the email to those persons.

[27] In that email he said that he suspected that elected members of ALA were not aware of his views, because of legal advice. He went on to refer to an "axis of bad management" and referred to named individuals of ALA who had been involved in the employment investigation and disciplinary process. He also provided a link to a document titled "Document Bundle referred to in Videos", which provided a link to a OneDrive cloud-based data storage facility to which he subscribed. There, PDF documents were stored and available in an open format for anyone clicking on the link, both for viewing and downloading. The documents were the same as had been

previously sent to chief executives of various local authorities. Links were also provided to the videos described earlier.

[28] On the same day, ITE sent another email, expressing his views as to the issues he was concerned about, as detailed in the earlier emails, stating amongst other things that he had provided information (in the emails and videos) that was not normally available. This email was also sent to multiple recipients; I find this was sent on the same basis as was ITE's first email of that day.

[29] As already mentioned, on 12 September 2017, I held a telephone conference with Mr Ward-Johnson, counsel for ALA, and ITE. ITE indicated that he intended to participate in the upcoming hearing, notification of which had been given in my judgment of 1 September 2017.

[30] On 18 September 2017, ITE sent a further email to various persons associated with the Wellington City Council (some 22 recipients) which contained links to YouTube and the OneDrive facility mentioned earlier.

[31] On 4 October 2017, I considered an application brought by ITE for an adjournment of the upcoming fixture. It was granted, reluctantly, so that the fixture would proceed on 17 October 2017. I also recorded that Mr Ward-Johnson had stated that ITE continued to refuse to comply with the Court's oral judgment of 1 September 2017, from which I inferred that the takedown orders had not by then been complied with.

[32] I made it clear that the granting of the application for adjournment should in no way be seen as condoning non-compliance, and repeated that ITE should consider very carefully the risks involved in continuing not to comply with the Court's takedown order. I said that he would be well advised to take immediate independent legal advice as to his personal position.

[33] On 9 October 2017, ITE emailed the chief executive officer of a local authority organisation, creating links to the videos held on YouTube and to the PDF documents held on OneDrive.

[34] At the commencement of the hearing on 17 October 2017, ALA was granted leave to amend its first amended statement of claim, so that sanctions were sought in respect of the compliance order of 15 April 2016, and of the compliance order, which I have described as a takedown order, of 1 September 2017. Despite being directed to file and serve a statement of defence, ITE has not done so. ITE has nonetheless been permitted to present a case in opposition to ALA's case.

Breaches of the Court's compliance orders?

[35] In my judgment of 1 September 2017, I found that the six videos referred to material that was within the confines of the Court's compliance order.

[36] I also found that those videos had been placed on YouTube, and could be accessed from Facebook pages in ITE's name which he could operate, and on the Facebook page of Mr G.

[37] Further, I held that there were posts appearing on both ITE's Facebook page and on Mr G's Facebook page ascribed to ITE about the content of the videos; and by others, also about those videos.

[38] I was also satisfied that ITE was responsible for the videos and posts being placed on those media platforms.

[39] I find now that he is also responsible for the provision of links to the PDF documents on OneDrive in the relevant emails which have been sent since 1 September 2017.

[40] I also find that he was responsible for sending the emails which I described above.

[41] In short, I am satisfied beyond reasonable doubt that the various steps just described fall within the scope of the compliance orders. Those breaches have continued notwithstanding the commencement of the present proceeding in late August 2017, notwithstanding the making of takedown orders on 1 September 2017, and notwithstanding the multiple warnings which have been given both originally

when the compliance order was made on 15 April 2016, and by this Court in its judgment of 12 April 2017 and minutes of 22 August and 4 October 2017.

[42] At the 17 October 2017 hearing, ITE confirmed he had not taken down the YouTube and Facebook videos, and that he had no intention of doing so because he believed the information he had publicised about ALA had to be disseminated so that it could be held accountable.

[43] Against this background must be considered whether, as ITE asserts, he was justified in taking these steps.

ITE's case for justification

[44] The evidence as to justification which ITE gave to the Court was very similar to that which he provided on this topic at the hearing in February of this year, which resulted in my judgment of 15 April 2017. At the October hearing he again contended that he was justified in releasing confidential information to those who were directly associated with ALA, and also to other local government authorities, as well as the public at large. He said this was so that all concerned could reach their own conclusions as to the issues he wished to raise.

[45] ITE said he was justified in doing so in light of certain provisions of the Local Government Act 2002 (LG Act), the salient features of which will be referred to in greater depth shortly. He also said that it was necessary to have regard to the purpose of the courts of New Zealand, as described in a website statement;[10] it says that the three outcomes which the courts strive for are safer communities, increased trust in the justice system, and maintenance of the integrity of the country's constitutional arrangements. He asserted that those objectives were relevant when considering whether the Court's orders were appropriate and/or should be complied with.

---

[10] Ministry of Justice "About Us" (19 September 2016) <www.justice.govt.nz/about/about-us>.

[46] He said that the issues he was and is concerned about need to be addressed; public accountabilities of a local authority goes "head on with … employment confidentiality requirements …".

[47] He argued that the local authority legislation does not grant such organisations the same protection as is afforded to businesses via "employment confidentiality". The orders that have been made by this Court, he said, did not recognise the "needs of the local community and the region at large". He concluded that in the face of orders which he considered were "fundamentally flawed", he had the "innate right to discard [them] and apply [his] own logic to determine the best path forward".

[48] Then he stated that according to feedback he had received from "several people", circumstances had improved within ALA as a result of his videos, although he believed there was still bullying and harassment of workers, which was an important health and safety issue.

[49] Finally, ITE repeated that the purposes of the courts had not been met in this case, because there had been an interpretation of the confidentiality agreement which permitted ALA to operate inappropriately. He said this meant that the courts had taken "the lowest integrity path and [had chosen] to disregard various legislative requirements from the LG Act to promote the benefit [of] a few in management".

ALA's case in response

[50] Mr Ward-Johnson submitted that ITE's justification defence must fail. He said it had been considered and rejected by this Court twice. The first consideration of the issue was in Judge Inglis' judgment of 15 April 2016, when she found that the disclosures which were under consideration in that instance could not be justified in the broader public interest, or otherwise.[11] Her Honour held there was a strong public interest in maintaining the confidentiality of a s 149 settlement agreement freely entered into.

---

[11] *ITE v ALA*, above n 3, at [49] – [50].

[51] The second instance to which Mr Ward-Johnson referred was my consideration of ATA's public interest defence in my judgment of 12 April 2017. I had considered emails sent to the two newly elected members of ALA, which contained links to videos and material filed in court proceedings.[12] I found there was no possible basis for concluding that ITE could be justified in submitting that material because of a countervailing public interest. He had pointed to no relevant statutory provision or common law principle which could justifiably be invoked to override the effect of the Court's compliance order.[13] Mr Ward-Johnson submitted that the present circumstances were on all fours with those which were considered previously.

[52] Then Mr Ward-Johnson developed a submission to the effect that the various recent disclosures[14] were squarely contemplated by the compliance order; and could not be said to have been made to persons who had a proper interest in receiving the information as case law requires.

Discussion

[53] I deal first with the argument advanced by ITE to the effect that the Court's orders are "fundamentally flawed, because the Court has not taken into account the fact that the plaintiff organisation is not a business, and the confidentiality obligations as contained in the settlement agreement and in the court's compliance orders do not necessarily therefore apply".

[54] For several reasons I reject this submission.[15]

[55] First, I refer to the provisions of the Act which provide jurisdiction for the making of the compliance orders: s 137 in the instance of the compliance order made by Judge Inglis on 15 April 2016; and s 139 in the case of the compliance order which I made on 1 September 2017. Also relevant is the provision which provides jurisdiction for the making of non-publication orders which were made on both

---

12 *ALA v ITE*, above n 7, at [101].
13 At [132].
14 That is, those made on 26 August, 3 September, 18 September and 9 October 2017.
15 I considered and rejected a similar submission in my judgment of 12 April 2017, *ALA v ITE*, above n 7, at [46].

occasions: cl 12 of Sch 3 of the Act. None of these provisions suggest that Parliament intended there to be a restriction of the kind advocated by ITE as a matter of law. That is, orders protecting confidentiality would apply to those in business but not to a local authority. The language used is broad and intended to be capable of application to a wide range of circumstances, without any stated limitations. Indeed, the Act reflects Parliament's recognition of the wide variety of employment relationship participants, for example, private and public companies, local authorities, charities, religious organisations or any other employer or employee whether in the private or public sector.

[56] That said, the Court has the ability to determine in a particular case whether a compliance and/or non-publication order is appropriate, given the nature of responsibilities or other features of a particular party. Then, if a party is dissatisfied with the way in which the jurisdiction is exercised, that person may test that conclusion on appeal.

[57] In the case of the first compliance order, ITE exercised his rights, seeking leave to appeal on a point of law to the Court of Appeal, which was declined;[16] and to the Supreme Court, which was also declined.[17] Neither of those courts considered that the Court's first compliance order, which was substantially relied on by ALA for present purposes, was or is fundamentally flawed.

[58] In short, there is no legal or factual basis for reading down the effect of the Court's compliance and non-publication orders.

[59] Secondly, there is no relevant legal authority which would support such a proposition.

[60] Thirdly, the argument is nonsensical and irrational. ITE seems to be saying that even though he agreed to confidentiality obligations which the Court has enforced by way of compliance and non-publication orders, he is nonetheless free to ignore those obligations and the orders of the Court if he wishes.

---

16 *B v ALA* [2016] NZCA 385.
17 *B v ALA* [2017] NZSC 51.

[61] In short, I do not accept the argument that ITE is permitted to act as he sees fit.

[62] I turn next to ITE's assertion that there are countervailing public interest factors which favour disclosure, notwithstanding the Court's compliance orders.

[63] I reviewed the applicable principles as to such a justification in my judgment of 12 April 2017 as follows:[18]

> [60] … Any analysis as to whether there is a justification for not complying with a Court order is one that must be approached in a careful and principled fashion; and the relevant principles must be considered on a case by case basis.
>
> [61] I begin my consideration of this issue by describing those principles.
>
> [62] With regard to the protection of confidential information, the correct approach as to how public interest factors should be assessed was confirmed in the speech of Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)*:[19]
>
> > … [A]lthough the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply … to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.
> >
> > Embraced within this limiting principle is, of course, the so-called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud" … it is now clear that the principle extends to matters of which disclosure is required in the public interest …
>
> [63] The Court of Appeal has put it in this way:[20]
>
> > What has been called ever since *Gartside v Outram* (1857) … the defence of iniquity, is an instance, and probably the prime instance, of the principle that the law will not protect confidential information if the publication complained of is shown to be in the overriding public interest.

---

18 *ALA v ITE* above n 7.

19 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) at 282.

20 *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43 (CA) at [46]. The citation for *Gartside v Outram* is (1857) 26 LJ Ch 113.

> [64] Contemporary authorities are clear that in order to be justified, a disclosure should usually be made to a person who has a proper interest in receiving the information. So, the learned authors of *Law of Torts* state:[21]
>
> > In some cases the public interest may favour publication, but not necessarily to the world at large. Often disclosure to an authority competent to deal with the matter will be sufficient, in which case wider publication will be a breach of confidence. So disclosure of alleged financial wrongdoing solely to the Inland Revenue Department,[22] of photographs of a habitual shoplifter to local shopkeepers[23] of convictions for paedophilia of caravan dwellers to the site owner,[24] and of statements by a registered nurse to the police when under caution to the regulatory body for nursing[25] in each case was permissible.
>
> [65] As it is put by the learned authors of *Gurry on Breach of Confidence*, the cases confirm that "making a restricted disclosure to a limited circle, in particular to a regulatory or other proper authority, is likely to be considered the most proportionate way of advancing the public interest".[26]

[64] These principles were applied with regard to the sending of the protected information to the newly elected members of ALA, in the following passage:[27]

> [104] ITE argued that there was just cause in him sending the emails on a number of grounds. In summary, these were justification because he was in effect acting as a whistleblower raising a serious accountability issue; justification on health and safety grounds; and justification having regard to the specific terms of a variety of statutory provisions. I now deal with each.
>
> [105] The context for his submission was, he said, based on the good employer principles of the LG Act, particularly those contained in s 39(d) and cls 33 and 36 of Sch 7 of that Act.[28] Further, he referred to cl 36(2)(a) of Sch 7, which stipulates:
>
> > … a good employer means an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring … good and safe working conditions.
>
> [106] He claims that those provisions were breached whilst he was an employee of ALA. He says that the seriousness of the issues are such that

---

21 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 806.

22 *Re a Company's Application* [1989] Ch 477.

23 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804.

24 *R v Chief Constable of the North Wales Police, ex parte Thorpe* [1999] QB 396 (CA).

25 *Woolgar v Chief Constable of the Sussex Police* [2000] 1 WLR 25 (CA).

26 Tanya Aplin and others *Gurry on Breach of Confidence*: *The Protection of Confidential Information* (2nd ed, Oxford University Press, Oxford, 2012) at 697.

27 *ALA v ITE*, above n 7.

28 He also refers to s 59, but that provision relates to Council-controlled organisations, which the present plaintiff is not.

the organisation should now be held accountable, so that any of the three bases on which he put his case meant he was permitted to re-submit documents to the newly elected members.

[107] First, was ITE justified in making the disclosure on whistle-blowing grounds? The PD Act contains the applicable statutory provisions. It applies to employees and former employees of an organisation, so that complying disclosures are protected.[29]

[108] However, this was not a qualifying disclosure. Section 6 of the PD Act describes the type of disclosure to which the Act applies. It is clear that the employee must wish the disclosure to have been one made for the purposes of the Act.[30]

[109] In his covering email to the newly elected members, ITE forwarded a range of material so as to describe his concerns. As already described, this included his affirmation as filed in the High Court of 31 October 2016, his PD Act submission of 2 October 2015, and a copy of the video which he had previously placed on a website. The content of these materials overlapped. Specifically, the points made in the PD Act submission were also covered in the other materials.

[110] Plainly ITE was not making a fresh submission under the PD Act. He forwarded a range of documents which he had previously created relating to his concerns.

[111] Nor did he contend that he was making a fresh PD Act disclosure. He said the material was being forwarded in violation of a court order, that it should be treated as confidential, and that he was relying on principles of qualifying privilege.

[112] The disclosure did not comply with the provisions of the PD Act for another reason. Section 7 requires disclosure of information in the manner provided by the internal procedures of an organisation. It is plain from Judge Inglis' findings that ITE's PD Act disclosure was made to ALA, and that when the organisation provided its response it advised ITE that he had rights under the Act to complain to the Ombudsman about that response.[31]

[113] Obviously, ALA's internal procedures did not provide for a re-submission of a previously made disclosure to members of the organisation again. Nor could this step be regarded as a mere "technical failure" for the purposes of s 6A of the PD Act.

[114] I turn to common law principles. Could the forwarding of these materials be justified on the basis that ITE, as a former employee, was justified in acting as a whistleblower on public interest grounds?

[115] The plaintiff organisation was obviously well aware of ITE's concerns, including by means of the video and PD Act submission which he re-submitted to the newly elected members.

---

29 Protected Disclosures Act 2000, s 3.

30 Protected Disclosures Act 2000, s 6(1)(d).

31 *ITE v ALA*, above n 3, at [33] – [35].

[116] A settlement agreement was entered into with ITE which contained strict obligations of confidentiality; this was subsequently reinforced by the making of a compliance order. It could not be right that in these circumstances ITE was at liberty to persist with yet further disclosures to members of the very organisation with whom he had settled. There could be no public interest in allowing this to occur, given the fact and nature of the settlement agreement. To conclude otherwise would render the express statement in para (i) of the compliance order, not to publish to "elected members of the defendant organisation" of no effect at all. In all these circumstances, the public interest in the agreed confidentiality must outweigh any perceived right to continue with such whistle-blowing initiatives.

[117] Secondly, I refer to ITE's contention that there was a public interest in that disclosure having regard to the health and safety obligations held by ALA. In assessing competing contentions as to where the public interest lies, the observations of Bingham LJ in *W v Egdell* are apposite.[32] He observed that the answer to the balancing must not turn on what the person making the disclosure thinks, "… but on what the court rules".[33]

[118] It is also well established that a rigorous approach is to be undertaken, and that there must be cogent evidence to establish a pressing need for the information to be disclosed on health and safety grounds.[34]

[119] I emphasise a point already alluded to. ITE had already raised his concerns – albeit not to his satisfaction – with ALA; and then entered into the settlement agreement and its confidentiality obligations. It could not in those circumstances be said that there was a pressing need on health and safety grounds for the information to be disclosed, given the history of ITE's previous disclosures. I do not consider in those circumstances that the Court should conclude the publication and communication to ALA's newly elected members was justified in the public interest.

[120] Lastly, ITE also relies on a range of other statutory provisions, which he says trump the Court's order. I deal with each separately.

[121] ITE relied on the provisions of the Local Government Official Information and Meetings Act 1987 (the LGOIM Act). He submitted that if information was given to a local authority, then the provisions of this statute required that such information would be generally available under the principle of availability contained in s 5. It provides a presumption of availability of local authority official information, unless there is a good reason for withholding such information.

[122] The application of such a provision, however, begs the question as to whether these provisions should be construed as meaning that ITE could in the public interest *provide* confidential information which was the subject of a compliance order of the Court to newly elected members, so that the local

---

32 *W v Egdell* [1990] Ch 359.

33 At 422.

34 *In re L (Sexual Abuse: Disclosure)* [1999] 1 WLR 299 (CA); *R (on the application of D) v Secretary of State for Health* [2006] EWCA CIV 989, [2006] All ER (D) 268; *R v Local Authority and Police Authority in the Midlands, ex parte LM* [2000] 1 FLR 612.

> authority could be requested subsequently to release that information under the availability provision of the LGOIM Act.
>
> [123] The possibility of a release of information is somewhat different from the question which arises in this case: was it in the public interest for ITE to publish or communicate confidential information in any event to those persons?
>
> [124] I have already found that such a disclosure could not be justified in the public interest. The statutory provisions of the LGOIM Act cannot change that reality.

[65] Although in the present proceeding the range of persons and of types of publication are broader than was the position in my April judgment, I am satisfied that the analysis of the statutory and other provisions applied on that occasion must apply now. For the reasons I have already given, those provisions cannot provide a foundation for a countervailing public interest which would permit disclosure to such a wide range of persons, thereby trumping the compliance order. Nor could they justify a decision not to comply with the takedown order.

[66] Each of the persons to whom communications have been sent were specifically contemplated in the compliance order. As I stated in my judgment of 12 April 2017, no exclusions were referred to in the order. It was obviously intended to have a broad reach.[35]

[67] Information has been published not only to persons having an association with ALA (as specifically referred to in the compliance order) but also to persons associated with other local authorities or related organisations, as well as the public at large. All such persons are within the scope of the original compliance order, so that the sending of the communications identified earlier in this judgment,[36] the placing of protected information on YouTube, and providing access to that and other information on Facebook and OneDrive are all steps that fall squarely within the scope of the compliance orders.

---

35 *ALA v ITE*, above n 7, at [44].

36 Above at paras [23], [25] – [32].

[68] Furthermore, as Mr Ward-Johnson submitted, it could not be said that the disclosure was restricted to a limited circle, such as could be considered a proportionate way of advancing the public interest.[37]

[69] I also make the point that it is now some three years since ITE ceased to be an employee of ALA. I do not consider that the information he has provided to the Court could be regarded as possibly being reliable for the purposes of assessing or grounding an alleged current public interest issue. That consideration, too, militates against a conclusion that there could be a countervailing public interest.

[70] The prevailing public interest must be the maintenance of the confidentiality to which ITE and ALA agreed.

[71] Finally, I do not accept the submission that the Court has not had regard to certain principles identified in a website statement.[38] The Court must proceed on the basis of its statutory obligations, applying the applicable provisions, rules and case law as it is satisfied are appropriate on the basis of reliable evidence. That is what has occurred here.

Conclusion

[72] Accordingly, I find that none of ITE's asserted justifications could possibly entitle him either to ignore the Court's original compliance order, both before and after the inception of the present proceeding, or to ignore the takedown order made in the course of this proceeding.

[73] As was observed by Holland J in *Savill v Roberts:*[39]

> … If orders of the Court are not observed according to the letter anarchy or chaos may ultimately prevail. The fact that a defendant considers [an] injunction should not have been granted or cannot be legally justified likewise makes no difference. It must be obeyed until it is overturned or amended by due legal process …

---

37 Aplin, above n 26, at 697.
38 Above at para [45].
39 *Savill v Roberts* HC Christchurch CP9/86, 10 December 1996.

[74] The reality is that ITE is bound by the Court's compliance orders; they have not been overturned or amended by legal process. This Court is duty bound to proceed on the basis that they should have been complied with to the letter.

[75] In light of that conclusion, it is now appropriate for the Court to receive submissions as to applicable sanctions, as to indemnity costs, and as to the making of permanent non-publication orders.

B A Corkill
Judge

Judgment signed at 9.30 am on 26 October 2017