

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 101
EMPC 139/2017**

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

AND IN THE MATTER OF admissibility of evidence

BETWEEN MARIE MCNABB
 Plaintiff

AND SILVER FERN FARMS LIMITED
 Defendant

Hearing: On the papers

Appearances: S R Mitchell, counsel for plaintiff
 T P Cleary, counsel for defendant

Judgment: 10 July 2020

**INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE J C HOLDEN
(Admissibility of evidence)**

[1] The Court was to hear two applications on Tuesday 25 February 2020. Silver Fern Farms Ltd (Silver Fern Farms) has applied to strike out that part of Ms McNabb’s statement of claim in which she seeks reinstatement to her former position at Silver Fern Farms. The application to strike out is made on the basis that Ms McNabb has failed to comply with an unless order made by the Court.¹ Ms McNabb seeks an order for discovery of certain categories of documents, essentially relating to her former partner and his subsequent partner and their engagements with Silver Fern Farms.

¹ *McNabb v Silver Fern Farms Ltd (No 3)* [2019] NZEmpC 71 at [14].

[2] However, shortly before the hearing, Mr Mitchell, counsel for Ms McNabb, raised an issue about some of the documents that Silver Fern Farms has received, including from Ms McNabb, and some that it continues to claim are discoverable but not provided. In short, Mr Mitchell says that the provisions of the Family Court Act 1980, and the Family Court Rules 2002, preclude provision of those documents to Silver Fern Farms, its counsel Mr Cleary, or indeed the Employment Court, at least without the leave of the Family Court.

[3] After discussion with counsel, the applications then before the Court were put on hold while this preliminary issue was determined.

Issue raised on disclosure was relevance

[4] When disclosure was first raised with the Court, the issue between the parties was relevance. Silver Fern Farms sought disclosure of documents relevant to Ms McNabb's interactions with her former partner and/or his subsequent partner, dating from Ms McNabb's separation from her former partner; and documents relevant to a proceeding under the Harassment Act 1987 involving Ms McNabb in the District Court/Family Court.²

[5] Ms McNabb argued that the documents sought were not relevant to the proceedings. She had already provided to Silver Fern Farms copies of the proceedings between her and her former partner in the Family Court. She also was willing to provide documents relating to a Family Court proceeding in connection with a Protection Order application by the former partner, and to a criminal matter, of a charge of breach of a Protection Order. But she said the application by Silver Fern Farms for further documents took the matter too far.³

[6] She did not object to disclosure of relevant documents. In hindsight, the issue now before the Court should have been raised at the outset as an objection to disclosure on the basis that disclosure of the documents would be injurious to the public interest.⁴

² *McNabb v Silver Fern Farms Ltd* [2019] NZEmpC 42 at [4].

³ At [7]-[8].

⁴ Employment Court Regulations 2000, reg 44(3)(c).

[7] Notwithstanding the unorthodox route this matter has taken, that still is the appropriate lens through which to consider the issues now raised.

The first issue is whether disclosure would involve “publication”

[8] The starting point is s 11B of the Family Court Act 1980. Section 11B(3)(b) limits publication of reports of proceedings in the Family Court that include identifying information where a “vulnerable person” is the subject of the proceedings, or a party to the proceedings, or an applicant in the proceedings. In such circumstances, leave of the Family Court to publish the report is required.⁵

[9] A “vulnerable person” includes a person who has applied for a protection order under the Family Violence Act 2018, or in respect of whom a protection order has been made under that Act.⁶

[10] The parties agree that the Family Court proceedings in issue here involve a vulnerable person, and that the information sought included material that would be “reports of proceedings”.

[11] The first issue to be considered is whether, providing that information as part of the discovery process in the Employment Court amounts to “publication”. While Ms McNabb maintains it clearly is, Silver Fern Farms submits that it is not, but rather is “a private transfer of information which was not intended to be, and nor may further be, disseminated any more than has been the case”.

[12] Silver Fern Farms submits that the distinguishing feature here is that the documents are being provided in the context of the Court process in which the documents would remain private and confidential to the parties and the Employment Court. It points out that the documents are protected from further disclosure by reg 51 of the Employment Court Regulations 2000, and that it remains open to the Court to make appropriate suppression orders if that is considered necessary.⁷

⁵ Unless the publication falls into certain exceptions, which are not relevant for present purposes (see s 11B(4)).

⁶ Family Court Act 1980, s 11D(h).

⁷ Employment Relations Act 2000, sch 3 cl 12(1).

Dissemination to Silver Fern Farms would amount to publication

[13] Neither “publication” nor “publish” are defined in the Family Court Act. The Family Court has considered s 11B where a father sent copies of the proceedings to other family members, finding that the father’s actions constituted publication as he had communicated information from a Family Court file to other persons.⁸

[14] In the area of employment, the term “publication” has been considered by the Courts in the context of a suppression order made by the District Court.⁹ In that context, “publication” was held to exclude communication of information to people who, objectively, have a genuine interest in knowing the information.¹⁰ In the circumstances of that case, it was accepted that the employer had a genuine interest in knowing the suppressed information.

[15] In the family context, persons who would have a genuine interest in knowing information in a report of proceedings include people who must be given the information on account of their involvement with the family. For example, where a child is the subject of the proceeding these may include social workers, foster parents and teachers.¹¹

[16] I also accept that the term “publication” cannot extend to the use of the protected information in subsequent Court proceedings, where those proceedings involve the same parties or are connected to the original proceedings.¹² I do not accept that exclusion applies to Court proceedings where (as here) the proceedings involve parties different from and unconnected to the Family Court proceedings. Silver Fern Farms does not have a genuine interest in the Family Court proceedings such that provision to it of the information at issue does not amount to publication.

⁸ *JRT v RAC* [2012] NZFC 1927 at [37].

⁹ Criminal Procedure Act 2011, s 200.

¹⁰ *Hayne, Vice-Chancellor of the University of Otago v ASG* [2014] NZEmpC 208, [2014] ERNZ 562 at [37]-[38]. This was upheld by the Court of Appeal and the Supreme Court: [2016] NZCA 203, [2016] 3 NZLR 289, (2016) 15 NZELR 1 at [43]; [2017] NZSC 59, [2017] 1 NZLR 777, [2017] ERNZ 208 at [79]-[80].

¹¹ *Director-General of Social Welfare v Christchurch Press Company Ltd* HC Christchurch CP31/98, 29 May 1998 at 10.

¹² See *Hero Sportswear Ltd v Underground Fashions Ltd* (1997) 10 PRNZ 655 at 656.

[17] Provision of the reports of proceedings to Silver Fern Farms was contrary to s 11B of the Family Court Act.

Public interest precludes disclosure

[18] The overriding consideration of public interest is that Parliament has clearly seen fit to make publication of details of certain Family Court proceedings, such as the ones in issue here, confidential unless leave is granted by the Family Court.

[19] Leave has not been granted by the Family Court here. There are no overriding considerations that would warrant disclosure. The Family Court proceedings involved persons who are not party to this case, so it is not just Ms McNabb who is affected by publication of the documents. The information is of limited significance to the case; Silver Fern Farms has other evidence about Ms McNabb's engagements with her former partner and his subsequent partner, independent from the Family Court proceedings. Further, any relevance would be to one aspect of remedies only.

[20] In conclusion, the public interest inherent in s 11B of the Family Court Act means reports of the Family Court proceedings ought not have been, and cannot be, disclosed to Silver Fern Farms.

Orders made

[21] The difficulties in the present situation are that orders have already been made that would encompass reports of the Family Court proceedings, and Silver Fern Farms has documents that would be captured by s 11B of the Family Court Act, in many cases provided by Ms McNabb. Silver Fern Farms' application to strike out is based on non-compliance with the Court's earlier orders. Ms McNabb seeks an order that the reports of proceeding be returned to the Family Court and further that any such reports should immediately be removed from the Employment Court file.

[22] To the extent the Court's previous orders encompass reports of protected Family Court proceedings, those orders ought be amended. Accordingly the orders

made in [17] of the Court's previous judgment are discharged and replaced with an order that:¹³

Ms McNabb is to provide a further sworn or affirmed statement setting out the documents, *apart from documents or parts of documents that comprise a report of proceedings in the Family Court*, which are or have been in her possession, custody or control, and if such documents are no longer in her possession, custody or control, when they were parted with and what became of them, relating to:

- (a) Ms McNabb's interactions with her former partner and/or his subsequent partner, dating from Ms McNabb's separation from her former partner up until the date of her dismissal; and
- (b) any proceeding under the Harassment Act 1987 involving Ms McNabb and her former partner and/or his subsequent partner in the District Court/Family Court arising out of events that took place between the date of separation and the date of dismissal.

[23] Silver Fern Farms also is ordered to return to Ms McNabb within 10 working days of the date of this judgment any documents she has provided that comprise a report of proceedings in the Family Court, and to destroy any other copies of reports of proceedings received from other sources.

[24] There are documents attached to affidavits filed in the Employment Court that are or may be reports of proceedings in the Family Court. However, the Employment Court file is not accessible to anyone other than parties to these proceedings without the leave of the Court. Any further dissemination of the documents by either party (including by counsel) without the leave of the Family Court would be in breach of s 11B of the Family Court Act.

¹³ *McNabb v Silver Fern Farms Ltd*, above n 2, at [17].

[25] In those circumstances, there will be a notation placed on the affidavits filed with the Court to date that they cannot be accessed without the leave of the Court, including by the parties. No further order is required.

[26] Silver Fern Farms is to advise the Court and Ms McNabb within 10 working days of this judgment whether, in view of this judgment, it wishes to continue with its application for partial strike out of the statement of claim. Within that time, Ms McNabb also is to advise the Court and Silver Fern Farms whether she wishes to pursue her application for further documents. Thereafter, the Court will consider whether a telephone directions conference is required or whether either or both applications are set down for a resumed hearing.

[27] Costs are reserved.

J C Holden
Judge

Judgment signed at 4.15 pm on 10 July 2020