IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 54
EMPC 363/2021

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application to access Court documents
BETWEEN	HOSEA COURAGE, DANIEL PILGRIM AND LEVI COURAGE Plaintiffs
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR INSPECTORATE First Defendant
AND	HOWARD TEMPLE, FERVENT STEDFAST, ENOCH UPRIGHT, SAMUEL VALOR, FAITHFUL PILGRIM, NOAH HOPEFUL AND STEPHEN STANDFAST Second Defendants
AND	FOREST GOLD HONEY LIMITED AND HARVEST HONEY LIMITED Third Defendants
AND	APETIZA LIMITED Fourth Defendant

Hearing: On the papers

Appearances: B P Henry, D Gates and A Kenwright, counsel for plaintiffs
J Catran and A Piaggi, counsel for first defendant
S G Wilson, counsel for second, third and fourth defendants

Judgment: 25 March 2022

INTERLOCUTORY JUDGMENT (NO 10)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application to access Court documents)

Introduction

[1] An application has been made by the Gloriavale Leavers' Support Trust to access a copy of the notes of evidence for the hearing. The Trust supports people who have left, or who are considering leaving, Gloriavale. Members of the Trust attended the hearing (which was conducted via virtual meeting room technology).

[2] The Trust says that there were times during the hearing when the technology failed and they missed portions of the evidence. They wish to fill the gaps and access to the notes of evidence would enable them to do so. The Trust also says that there are a number of other people who have lived in Gloriavale over the past 50 years, and who have family and friends remaining there. It is said that access to the notes of evidence would facilitate "an accurate and honest record of events, and an opportunity for discussion and commentary."

[3] I directed that the application be provided to the parties. The second, third and fourth defendants oppose the application; the first defendant abides the decision of the Court; and the plaintiffs do not oppose the application.

Analysis

[4] The Employment Relations Act 2000 does not deal with access to documents held on the Court file, nor do the Employment Court Regulations 2000. The Senior Courts (Access to Court Documents) Rules 2017 (the Rules) have been applied by way of reference to reg 6 of the Regulations and/or by way of helpful analogy.[1]

[5] The Rules are made under the Senior Courts Act 2016. Section 173 of that Act provides that "[a]ny person may have access to court information of a senior court to

[1] *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 160 at [4].

the extent provided by, and in accordance with, rules of court." As the Rules make clear, the Court may adopt a range of procedures for dealing with a request and any objections, including on the papers, which is the approach I consider appropriate in this case.[2]

[6] The Rules provide a general right of access to the formal Court record;[3] there is no general right of access to other documents held on the Court file – a request must be advanced under r 11.[4] Notes of evidence (to which access is sought in this case) do not comprise part of the formal Court record.[5] That means that a request is required.

[7] Rule 11(2) sets out the requirements for requests. It provides that the person seeking access must:

- Identify themselves and give their address;
- Set out sufficient particulars of the document to enable it to be identified;
- Give reasons for asking to access the document, which must set out the purpose for which access is sought;
- Set out any conditions of the right of access that the person proposes as conditions they would be prepared to meet were a Judge to impose those conditions (for example, conditions that prevent or restrict the person from disclosing the document or contents of the document, or conditions that enable the person to view but not copy the document).

[8] A Judge may grant a request for access in whole or part, and may impose any conditions considered appropriate.[6]

[9] A request may be refused solely for the reason that the request does not comply

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2 Rule 14.
3 Rule 8(1).
4 Noting that the rules relating to access do not affect the Court's inherent power to control its own proceedings: r 5(1).
5 Defined in r 4.
6 Rule 11(7)(a).

with any of the requirements set out above.[7]

[10] The principle of open justice is recognised as being fundamental to the common law system of justice.[8] The principle may need to be departed from in certain circumstances when it is in the interests of justice to do so.[9]

[11] Rule 12 of the Rules specifies a range of matters that must be considered when determining an application for access. It provides:

> **12 Matters to be considered**
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> In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:
>
> (a) the orderly and fair administration of justice:
>
> …
>
> (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
>
> (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
>
> (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
>
> (f) the freedom to seek, receive, and impart information:
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> …
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> (h) any other matter that the Judge thinks appropriate.

[12] Rule 13 deals with the approach to balancing the matters to be considered under

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7 Rule 11(8).

8 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]; *Commissioner of Police v Doyle* [2017] NZHC 3049; and *Berry v Crimson Consulting Ltd* [2017] NZHC 3026 upheld on appeal in *Berry v Crimson Consulting Ltd* [2018] NZCA 460.

9 See the discussion in *Schenker AG v Commerce Commission* [2013] NZCA 114, (2013) 22 PRNZ 286; referred to in *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30 at [32]. See too [33].

r 12:

> **13 Approach to balancing matters considered**
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> In applying rule 12, the Judge must have regard to the following:
>
> (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:
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> (b) during the substantive hearing, open justice has—
>
> (i) greater weight than at other stages of the proceeding; and
>
> (ii) greater weight in relation to documents relied on in the hearing than other documents:
>
> (c) after the substantive hearing,—
>
> (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
>
> (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[13] As I have said, the second, third and fourth defendants oppose the application. Mr Wilson, counsel for the Gloriavale defendants, makes the point that the application has not been brought by a media organisation for the purpose of reporting on the proceedings; and nor does it relate to facilitating public access to and participation in the proceedings - rather the application has been made by a private organisation for its own purposes. In this regard it is said that the application does not accord with the principles underlying the Rules and the principle of open justice carries less weight accordingly.[10]

[14] It is further submitted that while the Trust has said that it is happy to be bound by the same conditions as media outlets, it is not a media outlet and the defendants would have no recourse against the Trust if issues arose as to their use of the notes of evidence if the application was granted.

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[10] Citing the approach recently taken in *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 2376.

[15] Finally, it is submitted that the reasons why access is sought have not been sufficiently articulated to enable the Court to properly weigh the mandatory considerations provided for in the Rules and, in any event, the interests of open justice have already been served in light of the fact that the Trust attended the hearing and took notes.

[16] The application has been advanced after the hearing, and prior to judgment. The timing of the application is relevant to the assessment exercise, as r 12 makes plain. That is because the effect of r 13(b) is to accord open justice a higher priority at the operative date of the application. As Simon France J pointed out in *Cridge v Studorp Ltd*,[11] in the context of the Rules that can only mean that access to information covered by the Rules is to be given greater weight than at other stages of the proceedings.

[17] The point has relevance to one of the key reasons why the application has been advanced, namely because the Trust's attendance at the hearing (conducted via remote technology) was interrupted from time to time by outages and it wishes to find out what evidence was given during those times. In these circumstances I cannot agree with the submission advanced by the Gloriavale defendants that the access sought does not relate to facilitating public access to the proceedings.

[18] The same point can be made in respect of the objection that the interests of open justice have already been served because the Trust attended the hearing and took notes. The Trust's capacity to take notes was compromised by technological difficulties at times when the evidence was being given.

[19] The Gloriavale defendants point out that access to the notes of evidence has been granted to a media outlet in these proceedings and that this, and the media coverage that ensued, is sufficient to meet any public interest needs. The one does not, however, preclude the other. In the *Electrix Ltd* line of access cases, Palmer J granted access to the notes of evidence (along with various other documents) to Business Desk and subsequently granted access to the same documentation sought by a private

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[11] *Cridge v Studorp Ltd* [2020] NZHC 1836 at [16].

individual for apparently private purposes.[12] And while there have been numerous media reports of the hearing, I do not see that as an adequate substitute in the particular circumstances. In my view providing the Trust with access to a complete record of the notes of evidence supports, rather than detracts from, the purposes underlying the access Rules. A similar point was made in the first *Electrix Ltd* judgment with reference to current modes of accessing information and the need to view open justice, what it means and how it is met in modern times, more widely.[13]

[20] In my view, access to the notes of evidence will enable the Trust to do precisely what it would otherwise have been able to do had it been able to attend the hearing in person (namely hear all of the evidence given). It could not attend in person because the hearing was conducted via remote means in light of COVID-19 restrictions. Leave was sought, and granted, for the Trust to attend remotely. As the Court of Appeal made clear in *Greymouth Petroleum Holdings*:[14]

> When a court is engaged in hearing a dispute its workings, including documents referred to or relied on, should be open to full scrutiny by all members of the public, unless there are particular and strong reasons to the contrary. The public should be able to follow and understand the hearing process.

[21] It is true, as counsel for the Gloriavale defendants points out, that the request is made by a private entity rather than a media organisation, but I do not see that point as carrying much weight in the circumstances, including for the reasons I have already touched on. The Trust provides support for a number of people, all of whom have lived in Gloriavale at some stage or who have or have had family members there. The Trust's application is distinguishable from those in which an individual seeks access for a speculative or irrelevant purpose.[15] Nor is this a situation such as the High Court found in *New Zealand Animal Law Association v Attorney-General* where a private organisation was seeking access for private reasons in a manner inconsistent with the purposes underlying the Rules.[16]

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12 Access was granted by minute and then referred to in *Electrix Ltd v the Fletcher Construction Co Ltd (No 3)* [2020] NZHC 2348, 25 PRNZ 483 at [3].

13 *Electrix Ltd v the Fletcher Construction Co Ltd* [2019] NZHC 2678 at [11].

14 *Greymouth Petroleum Holdings Ltd v Empresa Nacional del Petróleo* [2017] NZCA 490, [2017] NZAR 1617 at [25].

15 See the discussion in *Greymouth*, above n 14, at [56]-[61].

16 *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 2376, (2020) 25 PRNZ 488 at [21].

[22] Rather, the Trust seeks access for the legitimate purpose of providing a full and accurate picture of the evidence to those of its members who were unable to attend the hearing but who wish to be informed about the case.

[23] The Gloriavale defendants raise concerns about possible use of the notes of evidence. In my view any such concerns can adequately be dealt with by way of imposition of conditions, which I deal with below.

[24] Nor do I accept that the basis for the application has not been sufficiently articulated to enable the Court to properly weigh the mandatory considerations provided for in the Rules. It is clear why the Trust seeks access to the notes of evidence and the use it wishes to make of them, namely for informational purposes for those the Trust supports, consistent with the freedom to seek, receive and impart information recognised in r 12(f). As Palmer J recently observed in *Electrix Ltd v Fletcher Construction Company Ltd*:[17]

> … the freedom to seek, receive and impart information, a mandatory relevant consideration under s 12(f), is also guaranteed by s 14 of the New Zealand Bill of Rights Act 1990. Freedom of expression is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, under s 5. Because, under s 3, the Bill of Rights governs judicial decision-making, the guarantee means freedom of expression is not only a mandatory relevant consideration but a requirement with which the judge's decision must be consistent.

[25] No confidentiality, commercial sensitivity or privacy interests have been identified which might otherwise carry weight in the balancing process. Nor do I think that granting access in the circumstances of this case would cut across the interest in the orderly and fair administration of justice. Rather, access by the Trust to the notes of evidence could reduce the need for numerous individual applications to be advanced by those the Trust supports.

[26] Standing back and considering the matters in rr 12 and 13, and the authorities I have referred to, I consider it to be in the interests of justice to grant access sought to the notes of evidence. I consider it appropriate, including having regard to the

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[17] *Electrix Ltd v the Fletcher Construction Company Ltd* [2020] NZHC 2348 at [7].

concerns identified by the Gloriavale defendants, to impose the following conditions on access:

(a) the notes of evidence are not to be made publicly available, for example, on a website or social media;

(b) the Trust may provide the notes of evidence on request to those it supports who express an interest, provided that person agrees in writing to comply with the requirement set out in (a) above. If they do not agree they remain able to advance their own application to the Court.

Christina Inglis
Chief Judge

Judgment signed at 2.25 pm on 25 March 2022