

Reference No. HRRT 021/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN MARIKA NGATAUIRA BEAUCHAMP

PLAINTIFF

AND B & T CO (2011) LIMITED TRADING AS ADZUKI BEAN CAFÉ

FIRST DEFENDANT

AND BING DU

SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:

Ms E Tait for plaintiff

Mr J Todd for defendants

DATE OF HEARING: On the papers

DATE OF DECISION: 14 October 2019

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**DECISION OF TRIBUNAL DECLINING APPLICATION BY DEFENDANTS FOR  
INTERIM NON-PUBLICATION ORDERS<sup>1</sup>**

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**Introduction**

[1] By application dated 20 August 2019, the defendants, B & T Co (2011) Ltd and Bing Du apply for an interim order under s 95(1) of the Human Rights Act 1993 prohibiting publication of their names or of any details which could lead to the identification of the parties to these proceedings prior to the substantive hearing.

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<sup>1</sup> [This decision is to be cited as *Beauchamp v B & T Co (2011) Ltd (Application for Interim Non-Publication Orders)* [2019] NZHRRT 46.]

[2] The plaintiff, Ms Beauchamp, who is represented by the Director of Human Rights Proceedings, opposes the application.

[3] Ms Beauchamp does not seek name suppression for herself.

### **Background**

[4] B & T Co (2011) Ltd trades as Adzuki Bean Café and Restaurant (Adzuki Bean Cafe). Ms Du is a company director of Adzuki Bean and operates the business with her husband.

[5] Ms Beauchamp was employed at Adzuki Bean Café during 2016. Ms Beauchamp's statement of claim filed in May 2018 alleges the defendants breached s 22(1)(c) and (d) of the Human Rights Act 1993 by discriminating against her in employment on the grounds of her sex. In particular, Ms Beauchamp alleges she was disadvantaged and dismissed because of her pregnancy.

[6] The defendants deny the allegation.

[7] The substantive hearing of this matter is to commence on 18 November 2019.

### **Grounds for the application**

[8] The grounds for this interim application are set out in the defendant's application dated 20 August 2019 and in the affidavit of Bing Du in support of that application dated 6 September 2019. In summary they are:

[8.1] Adzuki Bean Café can be identified as linked to these proceedings as B & T Co (2011) Ltd publicly trades as Adzuki Bean Café and Restaurant. Ms Du has run the business for ten years and is well known as its proprietor.

[8.2] The allegations of discrimination directed at the defendants are serious and prospective customers are unlikely to support a business that allegedly discriminates against pregnant women, especially when there are so many other competing establishments operating in close proximity. Adzuki Bean is situated on a street where, so Ms Du attests, approximately 87 similar café and restaurant businesses also operate.

[8.3] There is a real risk that publication will result in both damage to the goodwill of the business and financial loss from reduced custom that would persist until the substantive hearing.

[8.4] The allegations are strongly denied. It would be unfair to suffer financial loss and detriment to the business before having a chance to be heard by the Tribunal.

[8.5] Ms Du has also expressed concern about her three school-age children and the impact publication of her name would have on them. She worries about the distress they would experience knowing their friends, school peers and others generally were aware of the allegation made against their mother and she is particularly concerned about the effect of publication on the two eldest children who have NCEA exams to prepare for and sit at the end of this year.

[8.6] In summary the case is that the prejudice likely to arise from publication exceeds mere embarrassment or detriment to reputation and outweighs the principle of open justice and any genuine pre-hearing public interest in this matter.

### **Basis of opposition**

[9] Ms Beauchamp filed a notice of opposition dated 13 September 2019 supported by an affirmation by Pamela Rowe of the same date. It is submitted:

[9.1] The principle of open justice creates a presumption of disclosure of all aspects of civil court proceedings. There is a high threshold for departure from this fundamental rule and that threshold has not been met here.

[9.2] The evidence does not establish the order sought is necessary in the interests of justice.

[9.3] The defendants' concerns are unsubstantiated and wholly speculative.

[9.4] In relation to the possible impact on the defendants' business arising from publication, the defendants have already voluntarily disclosed the existence of these proceedings to customers and those customers have remained supportive of the defendants. Reliance is placed on the affirmation of Pamela Rowe who annexes four documents disclosed by the defendants in the discovery process. Those documents comprise four witness statements provided by regular, longstanding customers of Adzuki Bean Café. In each case they express their support for Ms Du. The authors specifically acknowledge they are aware of the complaint made by Ms Beauchamp and express continuing support for Ms Du despite knowledge of that complaint.

[9.5] In relation to Ms Du's concerns about her children, she has not pointed to any specific adverse consequences serious enough to justify the making of an exception to the fundamental rule of open justice. It is submitted the prospect of unwelcome or embarrassing publicity is not sufficient to justify the making of the order sought.

### **The law – interim orders and non-publication orders**

[10] Section 95(1) of the Human Rights Act confers on the Chairperson jurisdiction to make an interim order if satisfied the order is necessary in the interests of justice to preserve the position of a party pending final determination of the proceedings.

[11] The relevant principles applicable to interim order applications under s 95 are summarised in *IDEA Services Ltd v Attorney-General (No. 4) – Interim Order Application* [2013] NZHRRT 24 (10 June 2013) at [50] to [52] and in *Scarborough v Kelly Services (NZ) Ltd (Application for Non-Publication Orders)* [2015] NZHRRT 43 at [11]. It is unnecessary to set out those principles here.

[12] The "interests of justice" in s 95 require account to be taken of the principle of open justice. The open justice principle informs the approach of the Tribunal to non-publication orders as discussed below.

[13] The Human Rights Act, s 107(1) provides every hearing of the Tribunal must be held in public, however the Tribunal may make non-publication orders under s 107(3) if satisfied it is desirable to do so.

[14] The Tribunal's approach to non-publication orders and the "desirable" threshold is set out in the recent decisions in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 and *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33. Summarising its approach to s 107 of the Human Rights Act in *Waxman* the Tribunal stated:

[66] In summary (and at the risk of some repetition) the following principle points (they are not intended to be exhaustive) should be kept in mind when interpreting and applying s 107(1) and (3) of the Human Rights Act. It is these points which will assist the determination whether the Tribunal is satisfied that it is "desirable" to make a suppression order:

[66.1] The stipulation in s 107(1) that every hearing of the Tribunal be held in public is an express acknowledgement of the principle of open justice, a principle fundamental to the common law system of civil and criminal justice. The principle means not only that judicial proceedings should be held in open court, accessible to the public, but also media representatives should be free to provide fair and accurate reports of what occurs in court.

[66.2] There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. This is recognised by s 107(1), (2) and (3) of the Act.

[66.3] The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one.

[66.4] In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:

[66.4.1] whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.

[66.4.2] whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.

[66.4.3] whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

## Discussion

[15] The defendants must satisfy the Tribunal that a non-publication order is necessary in the interests of justice to preserve their position pending final determination of the proceedings. Those interests must be of sufficient weight to displace the principle that judicial proceedings should be held in open court, accessible to the public with media representatives free to provide fair and accurate reports of what occurs in court. The threshold of satisfaction is high because any suppression order necessarily derogates from the principle of open justice.

[16] In the present case the position sought to be preserved is that there has been no publication to date of these proceedings.

[17] At the core of the defendants' application is the contention that publication of their names could lead to financial loss from reduced custom and damage to the goodwill of the business. But as to this the claims made by Ms Du in her affidavit are in truth no more than a series of assertions unsupported by evidence. Furthermore the assertions are undermined by the witness statements which Ms Du has provided to the plaintiff in the discovery process. Those statements show that Ms Du herself has disclosed to at least some of her clients the nature of the claim brought by Ms Beauchamp and that those customers have remained loyal customers.

[18] Nor does the scant evidence establish a real risk Ms Du's children will suffer serious adverse consequences given the circumstances of this case. The highly speculative prospect of unwelcome or embarrassing publicity for the family is not sufficient to justify the making of an order. See *Erceg v Erceg* [2016] NZSC 135 at [13].

[19] In conclusion there is insufficient evidence to show it is necessary in the interests of justice that an interim order be made suppressing the names of the defendants. As the Supreme Court in *Erceg v Erceg* emphasised, the obligation is on the party applying to show "specific adverse consequences" sufficient to justify an exception to the fundamental rule of open justice, at [13]. This has not been done here.

[20] It follows that the "interests of justice" referred to in s 95(1) of the Human Rights Act do not favour the making of the non-publication order sought. It has not been shown it is necessary in the interests of justice for the order to be made to preserve the position of either of the defendants.

### **Conclusion**

[21] For the reasons given, application for interim non-publication orders under ss 95 and 107 of the Human Rights Act 1993 is dismissed.

### **Costs**

[22] Costs are reserved.

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**Mr RPG Haines ONZM QC**  
**Chairperson**