

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV 2014-485-11211
[2022] NZHC 3615**

IN THE MATTER OF an application to access court documents
under the Senior Courts (Access to Court
Documents) Rules 2017 in relation to the
Court's file in *Osborne v Ministry of
Business, Innovation and Employment*

CHRISTOPHER HARDER
Applicant

On the papers

Counsel: Applicant in person (McKenzie Friend for Dean Dunbar and
Bernie Monk)
A Martin and A Hill for Worksafe New Zealand

Judgment: 22 December 2022

JUDGMENT OF MALLON J

Introduction

[1] Christopher Harder applies for access to the High Court's file in CIV-2014-485-11211 (*Osborne v Ministry of Business, Innovation and Employment*).

[2] The file arises out of the tragedy at Pike River coal mine in 2010 when 29 workers lost their lives. Anna Osborne and Sonia Rockhouse, who lost a husband and a son respectively in the tragedy, brought a judicial review of the decision not to proceed with charges against Peter Whittall, the Chief Executive Officer of Pike River Coal Ltd (PRCL), which owned and operated the mine.

[3] The High Court's judgment was appealed. Parallel requests have been to the Court of Appeal and the Supreme Court for the appeal files.

The Osborne proceeding

[4] Following the tragedy, Worksafe New Zealand filed prosecutions in the District Court against PRCL (then in receivership), VLI Drilling Pty Ltd (a contractor) and Mr Whittall for breaches of provisions of the Health and Safety in Employment Act 1992. VLI Drilling Pty Ltd pleaded guilty to three charges and was fined \$46,800. PRCL did not defend the charges. It was convicted on nine charges, fined \$760,000 and ordered to pay \$3.41 million.

[5] Following discussions between counsel on behalf of and with the instructions of their respective clients, a voluntary reparation payment on behalf of the directors and officers of PRCL of \$3.41 million was made to the families of the 29 men who lost their lives and the two survivors. No evidence was offered on the charges against Mr Whittall on the basis it was not in the public interest to do so. The District Court then dismissed the charges against Mr Whittall.

[6] The High Court dismissed Ms Osborne and Ms Rockhouse's judicial review.¹ It found that there was no unlawful departure from the Prosecution Guidelines pursuant to which the prosecution had decided to offer no evidence on the charges against Mr Whittall. It also found that the District Court's decision to dismiss the charges was not ultra vires. An appeal to the Court of Appeal was dismissed.² An appeal to the Supreme Court succeeded, it finding that there was an understanding or promise not to prosecute in return for valuable consideration and this was unlawful.³

The request

[7] Mr Harder's application for access states that he is making it as a "McKenzie Friend" for Dean Dunbar and Bernie Monk. I understand Mr Dunbar and Mr Monk lost family members in the tragedy. Mr Harder explains that his request is to compare the various versions of the correspondence pursuant to which the arrangement between MBIE (for Worksafe New Zealand) and Mr Whittall was reached "to try & rebut

¹ *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485.

² *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

³ *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.

provisional opinion of Ombudsman [sic] use for Ombudsman subs only under supervision Former HCJ Davidson KC”.

[8] Through the Registry I made an enquiry of Mr Harder asking if he could elaborate on the “provisional opinion of the Ombudsman” and in particular what the Ombudsman’s opinion relates to and the applicant’s interest in that provisional opinion. To date I have not received a substantive response to that enquiry but understand that one will be provided soon.

[9] Worksafe New Zealand, who through Crown Law has responded to the request, apprehends it relates to a re-opened request made by Mr Dunbar and Mr Monk to Worksafe on 17 October 2019 for “copies of all emails and attachments, reports and documents between the person who made the decision to drop the charges and those who provided the advice”. That provides me with a little more context for Mr Harder’s application.

[10] However, I would still like to receive more context from Mr Harder. In particular, I would like to understand what precipitated the re-opened investigation, what Messrs Dunbar and Monk’s role (and Mr Harder for them) is in that investigation and how access to the Court’s file will assist. For example, if the request is granted, will it mean that the Ombudsman’s inquiry will be unnecessary? I would also like to understand and have confirmation of the Hon Davidson KC’s role in this and have confirmation from Mr Dunbar and Mr Monk that Mr Harder has authority to act as their McKenzie Friend.

[11] Those matters aside, I note that the application for access to the Court’s file seeks access to:

- (a) the transcript of the audio recording of the complete High Court hearing;
- (b) all affidavits filed in the High Court for the judicial review hearing by either party;

- (c) all written submissions filed with the Court by the applicants and respondent;
- (d) an index of all documents;
- (e) all minutes and or rulings by Brown J; and
- (f) any affidavit of documents.

Access rules

[12] The Senior Courts (Access to Court Documents) Rules 2017 applies to the request. Under r 8, every person has a right of access to the formal court record. This includes judgments and minutes.

[13] In addition, pursuant to r 11(7) a Judge may:

- (a) grant a request for access under this rule in whole or part—
 - (i) without conditions; or
 - (ii) subject to any conditions that the Judge thinks appropriate; or
- (b) refuse the request ...

[14] Rule 12 requires the Judge to consider the nature of, and the reasons given for, the request. The Judge must also take into account the matters set out in r 12 that are relevant to the request or any objection to the request.

[15] Rule 13 provides that the Judge must have regard to the fact that following a substantive hearing, open justice has greater weight in relation to documents that have been relied on in a determination than other documents, but the protection of confidentiality and privacy interests have greater weight than would be the case during the hearing.

Responses from interested parties

[16] Pursuant to r 11(3), the Registry sent Mr Harder's application to counsel who acted in the judicial review. Unfortunately, counsel for the applicants has passed away

so the Registry then forwarded the request to the instructing solicitors, but no response was received from them. There were also changes in personnel for Worksafe but other lawyers at Crown Law were able to respond on its behalf. Their response was received on 14 and 18 October 2022.

[17] It appears that no consideration was given to forwarding the request to Mr Whittall's lawyers (MinterEllisonRuddWatts). If the application is to be pursued beyond the aspects I am able to deal with at this point, I direct that the Registry forward the request to Minters. I also ask Crown Law to advise if it considers there is any other interested party who should receive a copy.

[18] Worksafe objects to Mr Harder being granted access to any part of the court file that contains confidential, without prejudice and privileged content except to the extent that content is referred to in the High Court judgment or has already been released to him. It does not understand there to be any transcript of the hearing but, if there is, it seeks the opportunity to review it for redaction of privileged information. Worksafe does not oppose the release of any other information.

Assessment

Formal court record

[19] Mr Harder may have access to the judgments on the file. There are two: the judgment of Brown J on the substantive judicial review; and the judgment of Dobson J on discovery of file notes (which traverses in general terms the privilege asserted by Worksafe). There are some minutes on the file but they are all of an administrative nature. Mr Harder may, however, have access to them if he wishes.

Transcript

[20] A transcript of the hearing does not exist.

Privileged documents

[21] Worksafe says that there are privileged documents in the file that were subject to a limited waiver for the Court proceedings only. It objects to Mr Harder's access to

them on the grounds that it is contrary to the orderly and fair administration of justice. It says that granting access will discourage recourse to the courts and a party granting a limited waiver for the purpose of proceedings before the courts for fear that privileged information will be disclosed to third parties.

[22] Worksafe does not, however, object to access to three privileged documents it provided to Mr Harder in response to his official information request (a letter of 7 August 2012, one of the versions of a 16 October 2013 letter, and an email dated 7 December 2013 [but not the other emails in the chain]). As I understand it, it provided those documents because they became publicly available through the judgments on the judicial review. As Mr Harder already has those documents, granting access to him pursuant to his application to this Court seems somewhat pointless. Mr Harder is to confirm whether he still wishes to have access to them even though he apparently already has them.

[23] If Mr Harder wishes to pursue his request for documents over which Worksafe claims privilege, I consider the application should be the subject of a short hearing where submissions can be made on behalf of Mr Dunbar and Mr Monk and for Worksafe. This will help clarify the purpose of the request. It will also enable proper consideration to be given to the privilege claim. If there are other interested parties that wish to be heard (refer [17] above), they will need to advise the Court. I direct the Registry to set down a two-hour hearing before me when the Court resumes sitting in the new year. I suggest Thursday 2 February 2022 at 10 am when I am duty judge and am scheduled to hear short cause appeals. However, I will leave it to the court schedulers to arrange the date (whether the suggested date or otherwise) with counsel.

Other documents

[24] Worksafe does not oppose the release of other documents on the file, subject to redactions of any privileged information. I am likely, therefore, to grant this once I have a better understanding of the purpose of the application and Mr Harder's role in that, and once any other interested parties (refer [17] above) have had the opportunity to comment.

Result

[25] Mr Harder may have access to the two judgments on the file. Determination of the balance of the application is deferred pending further information (refer [10] above), and the directions I have made (refer [17] and [23] above). A two-hour hearing is to be scheduled (refer [23] above).

Mallon J