ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-3267
[2018] NZHC 1131

BETWEEN	FMV Plaintiff
AND	TZB Defendant

Hearing: 23 April 2018

Counsel: A Sharp for Plaintiff
T Clarke and H Musgrave for Defendant

Judgment: 21 May 2018

JUDGMENT OF BREWER J

This judgment was delivered by me on 21 May 2018 at 4:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors:
HDA Lawyers Ltd (Auckland) for Plaintiff
Bell Gully (Auckland) for Defendant

Introduction

[1] FMV was employed by TZB. It was a very unhappy experience for FMV and she alleges that TZB failed her in a number of ways which give rise to causes of action.

[2] FMV commenced her employment with TZB on 9 February 2009. She resigned on 21 January 2010.

[3] On 22 December 2016, FMV filed the current proceeding. The next day she lodged an application to commence proceedings in the Employment Relations Authority (the Authority). The Authority has stayed FMV's proceeding until she provides certain evidence going to her mental health at relevant times.[1]

[4] On 20 December 2017, after the Authority had issued its stay, the proceeding was served on TZB. This was the day before the expiry of the 12 months service period provided for by r 5.72(2).[2]

[5] TZB applies for FMV's proceeding to be struck out for abuse of process. Two grounds are given:

(a) The Court has no jurisdiction. This is an employment dispute and under the Employment Relations Act 2000 (the ERA) the Authority has exclusive jurisdiction.

(b) FMV's claim duplicates the proceeding already filed before the Authority in that the same facts and issues are pleaded and the same relief is sought.

[6] TZB also seeks a suppression order and, if the application for strike-out is unsuccessful, an extension of time for filing a statement of defence.

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1 *[FMV] v [TZB]* [2017] NZERA Auckland 112.
2 High Court Rules.

[7] The Court may strike out a cause of action if it does not have jurisdiction to hear it.[3]

[8] The Court may also strike out all or part of a pleading if it considers it is an abuse of process.[4] The enquiry will entail a "broad, merits-based judgment".[5]

[9] Attempting to bring a proceeding will amount to an abuse of process if it is duplicative of another proceeding which is extant but stayed.[6] The rationale for this can be found in the words of the English Court of Appeal in *Buckland v Palmer*.[7] The decision of that Court is set out succinctly in the headnote:[8]

> It was an abuse of process of the Court to bring two actions in respect of the same cause of action but where there had been no judgment in the first action, that action could in appropriate circumstances be revived and amended to enable an adjudication to be made on the whole of the plaintiff's claim. Since it was open to the insurers to apply for a removal of the stay on the first action and to amend the plaintiff's claim in that action they would suffer no injustice if the Court were to exercise its discretion by refusing to permit them to commence a fresh action.

[10] There must be a duplication of issues. Proceedings will not be duplicative if they are sufficiently different in nature and character.[9]

Jurisdiction

[11] TZB contends FMV's claim falls squarely within the definition of an "employment relationship problem" over which the Authority has exclusive jurisdiction pursuant to s 161 of the Act. The corollary of this is that the High Court does not have jurisdiction to hear the claim.

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3 For examples of this Court considering strike-out applications for a want of jurisdiction see *Ecostore Company Ltd v Worth* [2017] NZHC 1480, (2017) 15 NZELR 93; *Clarke v Forsyth Barr Ltd* [2017] NZHC 842 at [41]; *Opai v Culpan* [2015] NZHC 2010.

4 Rule 15.1(1)(d).

5 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at 31.

6 *Otis Elevator Co Ltd v Linnel Builders Ltd* (1991) 5 PRNZ 72 (HC); *Stevenson v Office of Police Commissioner* [2015] NZHC 1408 at [11]; *Jo v Park* HC Christchurch CIV-2009-409-2847, 23 April 2010.

7 *Buckland v Palmer* [1984] 1 WLR 1109 (CA).

8 Cited in *Otis Elevator Co Ltd v Linnel Builder Ltd* at 74; *Antoniou v KLS International Finance Ltd* [2015] NZHC 1195 at [20]

9 *Commerce Commission v Harmoney Ltd* [2017] NZHC 2421 at [35] and [41].

[12] An employment relationship problem is defined as including a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship.[10] Section 161 provides a non-exhaustive list of examples.

[13] TZB submits the Authority has exclusive jurisdiction because FMV's claim, in substance:

(a) Alleges a breach of an employment agreement;[11]

(b) Constitutes a personal grievance;[12] or

(c) Relates to or arises out of an employment relationship.[13]

[14] I set out FMV's claims in detail from [43] in my discussion on whether the proceeding in this Court duplicates the proceeding before the Authority. Generally, however, FMV sets out grievances arising from the way she says she was mistreated in her capacity as an employee of TZB. This mistreatment, she claims, forced her to resign and has adversely affected her health.

[15] FMV's claims could certainly be characterised as including allegations of breaches by TZB of her employment agreement and/or personal grievances.[14]

[16] However, FMV points out that although s 161(1) gives the Authority its broad exclusive jurisdiction, there is an exception if an action is founded on tort. Section 161(1)(r) extends the Authority's exclusive jurisdiction:

> Any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort).

[17] TZB submits that the focus of whether an action arises from the employment relationship should be on the "gist of the claim" and that the exclusive jurisdiction will

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10 Section 5.
11 Section 161(1)(b).
12 Section 161(1)(e).
13 Section 161(1)(r).
14 Section 103 of the ERA has within the definition of 'personal grievance': "The employee's employment was disadvantaged by some unjustifiable action of the employer".

only fail to cover situations "where the rights or interest claimed by the plaintiff do not derive from a contract of service".[15]

[18] It is further submitted that FMV's claim is not founded in tort as the duty to provide a safe workplace only arises by virtue of an employment contract. The exception housed within s 161(1)(r) is therefore not satisfied.

[19] FMV disagrees. She submits her claim does not spring from the employment agreement but rather is a distinct action founded in tort. In her original statement of claim, FMV submitted TZB owed her the following duties:

(a) The duty not to cause her psychiatric damage by reason of the work she was required to perform or the environment in which she was to perform it;

(b) The duty to set up and implement a safe system of work and support and to ensure her health and safety at work; and

(c) The duty to communicate accurately and candidly with her, inform her of any risks relevant to her health and safety, and provide her with information in its possession regarding her state of health.

[20] In the hearing before me, however, counsel for FMV was of the view that the statement of claim could be repleaded to include the tort of breach of statutory duty, specifically the duty to establish and maintain a safe work environment in accordance with the Health and Safety in Employment Act 1992.

Discussion

[21] In *JP Morgan Chase Bank NA v Lewis*, the Court of Appeal held that the exclusive jurisdiction can only be invoked under s 161(1) where the problem is one that "directly and essentially concerns the employment relationship".[16]

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15 *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, 14 August 2001 at [23].

16 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 225, [2015] 3 NZLR 618 at [95].

[22] The Court of Appeal drew on two High Court decisions. First, the comments of Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*:

> [22] To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem. In the words of the definition of that concept is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. Is the issue in a particular claim an employment relationship one, or is the subject-matter of the claim some right or interest which is not directly employment related at all?

[23] And *BDM Grange Ltd v Parker*:[17]

> [66] … "relating to" in the definition of "employment relationship problem" must be read in a limited way to mean any cause of action, the essential character of which is to be found entirely within the employment relationship itself. This would not encompass claims arising from tortious conduct even if arising between an employer and employee, since the relationship merely provides the factual setting for the cause of action; the duty arises independently.

[24] The issue is whether FMV's claim is one that directly and essentially concerns her employment relationship with TZB. If it is, it will fall under the Authority's exclusive jurisdiction.

[25] I am satisfied FMV's claim is wholly dependent on the existence of a relationship between an employee and employer and is therefore not subject to the exception for tort in s 161(1)(r). This is because the entire claim is founded upon the employer/employee relationship between TZB and FMV.[18] Absent this relationship, the claim falls down. It is not merely background as counsel for FMV contends, but rather colours the whole picture.

[26] The repleading of the claim suggested by counsel does not save it in this sense. The breach of a statutory duty to maintain a safe workplace under the Health and Safety in Employment Act hinges on there being an employment relationship in the first place. Section 6(a) of that Act provides:

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17 *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC).

18 The content of FMV's statement of claim in this proceeding is quoted in some detail at [44].

> Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to provide and maintain for employees a safe working environment.

[27] To adopt the language of *BDM Grange*, the essential character of FMV's claim is found entirely within the employment relationship.

[28] In *RPD Produce Holdings Ltd v Miller*, Duffy J distilled the relevant principles of *Pain Management* and *BDM Grange* into three questions:[19]

(a) Is the determination about an employment relationship problem?

(b) Does the underlying problem as alleged involve some employment right or interest?

(c) Are the rights and interests of the plaintiff derived from the contract of employment or do they arise independently of it?

[29] I consider FMV's claim satisfies all three of these propositions. Every aspect of her claim alleges mistreatment by TZB during her employment there. The alleged mistreatment arises only by virtue of her relationship to TZB as an employee and the rights she derives therefrom. FMV has failed to satisfy me that what she is seeking is redress for the infringement of a right or interest which arises independently of her employment relationship with TZB. The very fact she has subsumed her claims within the alleged breach of a duty to maintain a safe workplace makes it difficult for me to accept the conclusions she would have me reach.

[30] By way of illustration, the following cases involve claims which were considered to be sufficiently independent of the employee relationship to be brought in this Court. In each case it will be seen that the employee relationship, to adopt the analogy used by counsel for FMV, was merely background to the dispute in question. It is not so for FMV's claim.

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[19] *RPD Produce Holdings Ltd v Miller* [2013] NZHC 705, (2013) 10 NZELR 521 at [32].

[31] In *Ecostore Co Ltd v Worth*, an employer brought proceedings against a former employee for retaining and misusing confidential information. Justice Gilbert found that the rights relied on by the employer were:[20]

(a) The right in equity to enforce a duty of confidence in respect of its confidential information;

(b) Property rights enforceable through the tort of conversion; and

(c) Its rights as a copyright owner conferred under the Copyright Act 1984.

[32] Justice Gilbert held that none of these rights depended on the existence of an employment agreement and that the agreement merely provided the factual setting for the causes of action.

[33] *RPD Produce Holdings Ltd* involved an employer alleging that its employee owed it a fiduciary duty of loyalty and a duty not to profit secretly at its expense. Justice Duffy held:

> [32] … The determination required here is not about an employment relationship problem; instead it is about someone who is alleged to have taken advantage of another's dependency on him in order to enjoy a secret and dishonest profit. Claims of this type arise in a multiplicity of circumstances; they do not hinge on there being an employment relationship… Instead the employment relationship merely provided the opportunity for Mr Miller to take advantage of the plaintiff's dependency and trust.

[34] In *Opai v Culpan*, Sargisson AJ refused to strike out a defamation claim by an employee against his employer. The Judge held that the duty at the heart of the claim arose independently of the employment relationship.[21]

[35] FMV's claim, on the other hand, is wholly dependent on the existence of her employment relationship with TZB. I therefore consider it is subject to the Authority's exclusive jurisdiction under s 161(1). This Court has no jurisdiction to determine it.

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20 At [25].
21 At [13].

Abuse of process

[36] In case I am wrong about the issue of jurisdiction, I will now consider whether the Court should strike out FMV's claim on the basis that it is an abuse of process for duplication.

[37] TZB submits that FMV's claim in the High Court is a duplication of the proceeding she filed in the Authority. It is said both claims stem from events taking place during FMV's employment with TZB and are both based on the following substantive allegations:

(a) FMV was bullied in various ways;

(b) FMV was required to work unreasonably long hours;

(c) TZB failed to address the matters that were causing stress to FMV;

(d) FMV was not provided with the opportunities for career advancement despite good performance;

(e) TZB failed to provide adequate supervision;

(f) FMV was harassed by anonymous text messages allegedly sent by TZB staff; and

(g) TZB failed to provide FMV with information about her medical condition.

[38] In addition, it is pointed out that FMV seeks the same remedy in both proceedings, namely compensation for loss of wages, general damages and loss of benefits.

[39] TZB acknowledges FMV filed her claim in the High Court the day before proceedings were lodged with the Authority. However, FMV did not serve the High Court claim on TZB for another year, and only once the proceeding before the

Authority had been stayed. It is submitted that FMV's proceeding before this Court is an attempt to circumvent the stay ordered by the Authority.

[40] FMV submits that the claims made before the High Court are of a different nature and are considered in a different context than those before the Authority. She relies on the same arguments referred to above to advance this proposition, namely that her claims here are based in tort and not contract.

[41] It is pointed out that, given the matter before the Authority is currently subject to a stay, there is no danger of duplication of recovery.

Discussion

[42] The primary question for me to answer is whether the proceedings traverse the same issues.

[43] I set out the relevant sections of FMV's statement of problem, filed before the Authority:

> During my employment, I was subjected to:
>
> **Bullying:** TZB allowed a hostile and unsafe work environment to persist. Particularly, employees of TZB:
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> - Made consistent and unjustified threats to terminate my employment;
> - Made frequent bullying comments to and about me, and made unjustified criticisms of me including that I: was incompetent; could do nothing but smile; was unable to properly communicate; would soon be dismissed; was only employed because I was in a relationship with one of the partners; and was only employed because I was attractive.
>
> **Discrimination:** TZB was aware of my disability but failed to accommodate it:
>
> - As itemised above; and
> - As I was required to work unreasonably long hours and TZB did not reduce my workload;
> - As TZB did not take steps to reduce the stressors that were affecting me.
>
> I was also subjected to **different treatment on the basis of my disability**:

- As itemised above; and
- As, following my year-end review, and despite good performance, I was not permitted to progress to my second year and was required to repeat my first year because of my disability;
- As TZB did not provide me with a copy of my year-end review.

Different treatment:

- As itemised above; and
- As I was required to do more work than colleagues but was not provided with similar opportunities to develop;
- As senior staff refused to be my supervisor/coach;
- As I was excluded from social events; and
- As I was the object of harassing behaviour, receiving anonymous texts that appear to have emanated from TZB staff (starting after I joined TZB and ending after I left TZB).

Negligence/breach of contract: TZB caused a hazardous workplace environment, or allowed one to persist, and did not do all it should have done in the circumstances, and failed to take proper care of me (its employee):

- As itemised above, and;
- As it failed to advise me or my parents of my medical condition, even when my parents made specific inquiries, so my family and I were unaware of my diagnosis and unable to address my condition; and
- As TZB failed to notice or address the effect that the above items had on me, and failed to address my complaints and requests for help or proactively address the situation.

[44] The relevant portions of FMV's statement of claim for the proceeding before this Court are as follows:

Breach

4. During her employment:

    a. The Plaintiff was subjected to bullying by employees of TZB, for which TZB is vicariously liable;

    b. TZB caused a hazardous workplace environment or allowed one to persist, did not set up and implement a safe system of work and support, and did not ensure her health and safety at work; and

c. TZB failed to do all it should have done in the circumstances to take proper care of the Plaintiff and failed to take reasonable steps to prevent unreasonable or undue stress.

   i. Employees of TZB made consistent and unjustified threats to the Plaintiff, threatening her with dismissal.

   ii. Employees of TZB made frequent bullying comments to and about the Plaintiff, and made unjustified criticisms of her. The criticisms included that she:

      1. Was incompetent;

      2. Could do nothing but smile;

      3. Was unable to properly communicate;

      4. Would soon be dismissed;

      5. Was only employed because she was in a relationship with one of the partners; and

      6. Was only employed because she was attractive.

   iii. The Plaintiff was required to work unreasonably long hours and TZB did not reduce her workload.

   iv. The Plaintiff was required to do more work than her colleagues at a similar level and was not provided with similar opportunities to develop.

   v. The Plaintiff was the object of apparently harassing behaviour, receiving anonymous texts that appear to have emanated from TZB staff (starting after she joined TZB and ending after she left TZB).

   vi. TZB failed to provide the Plaintiff with safe fellow workers.

   vii. TZB failed to address the causes of the Plaintiff's ill-health and did not take steps to reduce the stressors that were affecting her.

   viii. TZB failed to provide the Plaintiff with suitable training in stress management or stress counselling.

   ix. TZB failed to give the Plaintiff adequate supervision.

   x. TZB failed to warn the Plaintiff of the dangers of working as she was working or otherwise prevent her from so doing.

   xi. TZB failed to carry out an assessment of the risks associated with the Plaintiff's employment or act upon such an assessment. Such assessment would, if properly conducted, have demonstrated the risks to the Plaintiff's health and required remedial steps.

xii. TZB failed to address the Plaintiff's complaints or address what it was or should have been aware of, the bullying continued and the work environment did not improve.

5. TZB was aware of the Plaintiff's illness and the deterioration of her mental state but failed to advise her of what it knew of her medical condition and its assessment. TZB failed to communicate candidly with the Plaintiff and inform her of risks relevant to her health.

…

6. As a result, the Plaintiff was unaware of her diagnosis and her state of health and was unable to properly address her ill-health.

7. The Plaintiff complained about the bullying, work-load, harassment, and work environment, and was clearly suffering from ill-health. The Plaintiff's psychiatric injury was foreseeable.

[45] TZB contends these statements traverse identical issues. I agree. There are pleadings from the statement of problem replicated in the statement of claim verbatim. Importantly, the statement of claim does not introduce any substantive issue not contained in the statement of problem. Although FMV seeks to advance her case in each proceeding by means of a different action, the substance at the heart of her claim is the same. She has merely dressed it in a different garb. When examining the substance of the dispute, a clear duplication of issues can be seen.

[46] I acknowledge FMV's submission that, as the proceeding in the Authority is stayed, there can be no argument that she is seeking double recovery. However, that is not determinative of the question as to whether the proceeding before this Court is an abuse of process. As Bell AJ commented, the primary purpose of striking out duplicative proceedings is to protect a party from having to litigate the same matter in separate proceedings.[22] It is not to prevent a plaintiff attempting to recover twice for the same matter. Further, a proceeding which is stayed pending satisfaction of a condition can be reactivated if the condition is satisfied.

[47] FMV submitted that the proceeding in the High Court was filed first. If there is duplication, striking out the earlier proceeding is not appropriate.

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[22] *Edwards v Edwards* [2012] NZHC 1630 at [26] cited in *Walker v Forbes* [2017] NZHC 1090 at [41].

[48] This argument fails to take into account the fact that by FMV's choice, the proceeding before the Authority has progressed far beyond the High Court proceeding.

[49] I have taken guidance from the decision of this Court in *Cowley v Shortland Publications Ltd*.[23] In that case the plaintiff instituted proceedings against the defendant relating to alleged breaches of a series of publishing agreements. The defendants lodged a statement of defence and each party went through discovery processes, but no further steps were taken to advance the proceeding. Instead it remained inactive for the next eight months.

[50] The plaintiff then applied for summary judgment against the defendant. This application was made in a separate proceeding but based on similar causes of action. After the defendant applied to strike out the summary judgment application as an abuse of process the plaintiff attempted to file notice discontinuing the original proceeding. Master Towle found that filing the second proceeding without the earlier proceeding having been discontinued amounted to an abuse of process, and that the plaintiff's late attempt to discontinue the earlier proceeding did not cure this.

[51] Master Towle then decided which proceeding to strike out:[24]

> It is also for consideration as to whether it would be right or fair for a defendant who has already been involved in expensive litigation over defending the earlier claim in respect of which it claims to have an arguable defence or cross-claim, to have to go through the expense of opposing a summary judgment application where if it could show that such a cross-claim was reasonably arguable, the summary judgment application would be unlikely to succeed in any event. It would seem to me that the course now confronting the Court is to require one of these proceedings to be stopped in its tracks and I have given careful consideration as to which should be allowed to proceed. If the summary judgment proceeding is to continue at all… it could only be after the earlier proceeding has been discontinued in its entirety and all costs in relation to that proceeding paid. The alternative would simply be to dismiss the summary judgment application and require the plaintiff to continue in the same arena as originally chosen… From the point of view of having the dispute between the parties resolved in the shortest space of time, I do not believe that the plaintiff would be significantly disadvantaged by the former course although there is some risk of prejudice and additional cost to the defendant if the latter course were to be chosen.

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23 *Cowley v Shortland Publications Ltd* (1991) 5 PRNZ 76 (HC).
24 At 80.

[52] I do not consider anything turns on the fact that the High Court proceeding was filed first. FMV clearly chose to advance the Authority proceeding before this one. Adopting the reasoning of *Cowley*, I do not consider it would be just to allow FMV to change lanes to this proceeding simply because the proceeding before the Authority has stalled. To allow FMV to pursue her proceeding in this Court risks causing a real degree of prejudice to TZB given the expenses they have already incurred defending a duplicative claim before the Authority.

[53] On the other hand, FMV would not be significantly disadvantaged by striking out this proceeding. The proceeding before the Authority has been stayed until FMV provides relevant medical information to satisfy the Authority she has capacity to continue with the proceeding. FMV would likely encounter a similar requirement in this Court.

[54] I consider this proceeding is an abuse of process because it is a duplication of the extant yet stayed proceeding currently before the Authority, and I would strike it out as such.

Suppression

[55] In a minute dated 19 March 2018, Davison J made an interim order suppressing the parties' names in this proceeding.

[56] TZB seeks a continuation of this order on the basis that refusing to do so would render nugatory the suppression order made by the Authority on 12 April 2017. TZB also submits that suppression should be granted because they have not yet had the opportunity to respond to the allegations FMV has made against them.

[57] FMV submits that the genesis of the suppression order made by the Authority was to preserve confidentiality for the purposes of the mediation processes in that proceeding, as is required by the ERA.

[58] She argues that the nature of the allegations in this proceeding per se, being a claim that an employer has acted negligently in failing to provide a safe working

environment, does not warrant suppression notwithstanding the order made by the Authority.

[59] The starting point is the Supreme Court decision in *Erceg v Erceg*.[25] That case endorsed a high standard for suppression in civil proceedings:

> [13] … We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers. The need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised, are obvious examples of situations where such orders may be justified. However, the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may… be embarrassing… or unwelcome... We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.
>
> (Citations omitted)

[60] I have also been referred to the decision of this Court in *Russell McVeagh v Auckland District Law Society*.[26] That case states, appositely:

> [5] In support of the application, counsel for the plaintiff argued that:
>
> > [a] Similar orders have been made in *B & Ors v ADLS & Anor* in both the High Court and the Court of Appeal, and in *ADLS v Russell McVeagh & Ors*. He argued that the same considerations applied in this case, and a refusal to make similar orders would mean the orders made in the other cases would be rendered ineffective;
>
> …
>
> [9] I accept that there is some strength in the arguments made by the plaintiffs that if the application for the orders is declined, then the confidentiality of the ADLS process and the orders in the other cases will be negated. On the assumption that there are justifiable reasons for conducting the complaint process on a confidential basis, as recognised in relation to the earlier litigation between these parties, there needs to be a good reason to depart from it in this case.

[61] TZB, by analogy, argues the Authority made its suppression order for justifiable reasons and that I would require a good reason to depart from its decision.

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25 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.

26 *Russell McVeagh v Auckland District Law Society* HC Auckland M1534-SD01, 16 November 2001.

[62] The Authority stated three reasons for making a suppression order:

> [2] Firstly, the capacity of FMV to proceed has become a preliminary issue to determine. As a result, the parties have not yet attended mediation about the application lodged in the Authority. They have not yet had the opportunity that a direction to mediation normally provides to discuss, on a confidential basis and without their respective names becoming a matter of public record, whether the matter can be resolved without continuing through the public process of an Authority investigation.
>
> [3] Secondly, FMV has expressed some concerns about her personal health information being publicly disclosed.
>
> [4] Thirdly, FMV has made serious allegations about how she was treated during her former employment by TZB that have yet to be tested.

[63] FMV now resists the continuation of suppression. The Authority's reasoning at [3] therefore no longer applies.

[64] However, I consider the concerns raised by the Authority at [2] and [4] are still applicable. These, in combination with my findings above, justify an exception to the rule expressed by the Supreme Court in *Erceg*.

[65] I have found this Court has no jurisdiction to hear FMV's claim and alternatively I would strike it out for duplication of the case before the Authority. Accordingly, the proceeding will not be advanced in this Court. As a matter of principle, I do not consider a failed attempt to relocate a proceeding to a different forum should have the inadvertent effect of dismantling a suppression order made in the original forum in which the proceeding was brought.

[66] I note the Authority commented that if the proceeding were to advance to the further stages of investigation and determination before the Authority, the order would more likely than not be revoked. However, that is a matter for the Authority to decide, not this Court. In any event, the proceeding before the Authority is still stayed. It may be that those further stages of investigation and determination are never reached.

[67] In the circumstances, I consider it inappropriate essentially to undo the suppression order of the Authority. I make permanent the temporary suppression order made by Davison J in respect of these proceedings.

Decision

[68] The application is granted. The proceeding is struck out.

Costs

[69] TZB is entitled to costs. If the parties cannot agree on them, TZB may file its memorandum within 21 days of the date of this Judgment. FMV may reply within a further 14 days.

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Brewer J