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ALA v ITE [2017] NZEmpC 109 (1 September 2017)

Last Updated: 5 September 2017

THERE IS AN ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE PARTIES AND ANY INFORMATION LEADING TO THE PARTIES' IDENTITY

IN THE EMPLOYMENT COURT AUCKLAND

[\[2017\] NZEmpC 109](#)

EMPC 218/2017

IN THE MATTER OF an application for a compliance order

BETWEEN ALA Plaintiff

AND ITE Defendant

Hearing: 1 September 2017 (heard at Tauranga)

Appearances: M Ward-Johnson, counsel for the plaintiff

No appearance of defendant (ITE) Judgment: 1 September 2017

ORAL JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Before the Court is an urgent application to remove videos and posts from certain Facebook pages, and from a YouTube channel. The background to the matter is contained in two judgments of this Court, issued on 15 April 2016¹ and

12 April 2017,² to which reference should be made.

[2] The background of this particular proceeding is as follows:

- a. On 21 August 2017, the plaintiff (ALA) brought an ex parte application for an injunction. It was proposed that an urgent order of injunction be

¹ *ITE v ALA* [\[2016\] NZEmpC 42](#).

² *ALA v ITE* [\[2017\] NZEmpC 39](#).

made directing that the subject videos be taken down from the relevant media platforms. I did not consider that the Court had jurisdiction to grant an injunction of this nature.

b) However, I considered there was potentially jurisdiction under [s 139\(2\)](#) of the [Employment Relations Act 2000](#) (the Act) to make a compliance order. But a compliance order could not be brought on an ex parte basis.³ At best, the Court could order the relevant proceeding to be heard on an urgent basis.

c) I was satisfied that ALA's application should be heard urgently, and on notice, given the nature of the circumstances which required consideration. The proceeding was initially set down for hearing yesterday, but ITE advised the Court he would be attending a funeral on Wednesday, and that it would be very difficult for him to attend the hearing yesterday. He preferred to defer the hearing to

18 September 2017. I rescheduled the hearing for today.

d) Early today, ITE sent an email to the Court indicating that he would be dealing with another matter, and he would “leave the Judge to decide on this matter”. He did not attend. I was satisfied that he was on proper notice of the hearing, and it duly proceeded.

ALA’s case

[3] I received evidence from one witness for ALA.

[4] That evidence establishes that on 19 August 2017, ITE published six videos on his YouTube channel, titled P1 to P6. They traverse the entire history of issues ITE has had with ALA, as summarised in the Court’s earlier judgments. They refer to details of ITE’s employment at ALA with reference to a particular project in which he was involved at the time of his departure under a settlement agreement; the

background of an employment investigation which ALA undertook; the deletion of

3. *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZEmpC 154.

information by ITE after that investigation had commenced; comments regarding his perceptions as to organisational failures within ALA; the entering into of a settlement agreement; and reference to the subsequent litigation which ensued. Links to those videos were also created on ITE’s Facebook page together with a post to which third parties have responded, with yet further comments then being made by ITE. A link to the same videos has been created on the Facebook page of Mr G. There are also relevant posts on that Facebook page, including from ITE.

[5] The evidence also establishes other contextual matters. Correspondence relating to these matters was sent to a number of individuals and other organisations on 16 August 2017. The proceeding was served on ITE on 25 August 2017. On

26 August 2017, ITE sent an email to a substantial number of third parties suggesting that they might obtain access to documents relating to these matters. The email stated that if any third party obtained those from ALA, they should be made publicly available, and he should then be notified of this.

[6] These steps all occurred after ALA had obtained an order of adjudication in bankruptcy of ITE in the High Court on 7 August 2017. I find that the steps taken by ITE were retaliatory in nature.

[7] The matters of immediate concern relate, as I have stated, to the removal of the videos and posts.

Discussion

[8] [Section 139\(2\)](#) of the Act, on which ALA’s application is based, is framed in wide terms. For present purposes, the components of the section are:

a) The section applies where any person has not observed or complied with any order made or given under the Act by the Court.

b) Where the section applies, and in addition to any other power the Court may exercise, the Court can order a person to do any specified thing or cease any specified activity.

c) That must be for the purpose of preventing further non-observance of or non-compliance with the order that the declaration relates to.

d) The Court must specify a time within which the order is to be obeyed.

[9] The first question is whether ITE has not observed or complied with an order of the Court. In that regard:

a) The Court made an order of compliance on 15 April 2016, as follows:4

The plaintiff is ordered to comply with all of his obligations under the terms of the settlement agreement, including (but not limited to):

i) Not publishing any information about the employment investigation and disciplinary process (including information about his activities in deleting data on 14

March 2014) by way of his website, video recordings and/or email or other communications. This includes but is

not limited to publication to past or present staff and/or

elected members of the defendant organisation;

ii) Ceasing any and all communication by any means with any third party (including employees of other local authorities but not including his own legal advisor) about matters subject to his confidentiality obligations to the defendant organisation.

The timeframe for compliance is *immediate*.

b) It is clear that ITE was well aware of the order. This is evidenced, for example, by what transpired in the three appeals that have been determined subsequently in both the Court of Appeal and Supreme Court. The orders were specific as to what ITE was prohibited from doing; and the orders had immediate effect.

c) Non-publication orders were made in the same judgment. A permanent order was made prohibiting the publication of the names of the parties

and of any information leading to either party's identification.⁵

⁴ *ITE v ALA*, above n 1, at [104].

⁵ At [103].

[10] In short, ITE was on clear notice, from on or about 15 April 2016, as to the making of compliance and non-publication orders by this Court.

[11] Turning to the question of whether there has been non-observance or non-compliance with those orders, I must consider for present purposes whether the placing of videos and posts on Facebook and YouTube platforms, together with posts, constitute relevant breaches.

[12] My findings as to the content of the videos are briefly:

a) Video one contains:

- Names of the parties and employees of ALA;
- Reference to events and circumstances that were the subject of ITE's employment; and

- Matters that were the subject of the employment investigation, which preceded the settlement agreement.

b) Video two contains:

- Names of the parties, and employees of ALA;
- Reference to matters that were the subject of the employment investigation which preceded the settlement agreement; and
- Reference to the steps that ITE took to delete information after the employment investigation had commenced.

c) Video three contains:

- Names of the parties, and an employee of ALA;
- Reference to matters that were the subject of the employment investigation which preceded the settlement agreement; and
- Reference to some content of the settlement agreement.

d) Video four contains:

- Names of the parties, an employee of ALA, and a psychologist who was involved in the matter.

e) Video five contains:

- Names of the parties, persons who were employees of ALA, and a psychologist who was involved in the matter; and
- Reference to the employment investigation which preceded the settlement agreement.

f) Video six contains:

- Names of the parties, persons who were employees of ALA, and a psychologist who was involved in the matter; and
- Reference to the employment investigation which preceded the settlement agreement.

[13] I am satisfied that each video refers to material that is within the confines of

the Court's compliance order.

[14] I also find that the evidence establishes that these six videos have been placed on YouTube, and may be accessed from the Facebook pages in ITE's name which I find he can operate, and on a Facebook page of Mr G.

[15] There are posts which appear on both ITE's Facebook page and on Mr G's Facebook page ascribed to ITE about the content of the videos; and by others, also about those videos.

[16] I am satisfied ITE is responsible for the videos and posts being placed on YouTube and Facebook pages, and that those steps constitute clear breaches of the compliance order which was made previously.

[17] The next question is whether ITE should be ordered to do a specified thing for the purpose of preventing further non-observance or non-compliance of the Court's order.

[18] As summarised earlier, the chronology shows that not only has ITE placed material on YouTube and Facebook on 19 August 2017, but he has also sent letters/emails to multiple individuals, in further breach of the compliance order on

26 August 2017. This occurred a day after he was served with these proceedings on

25 August 2017.

[19] These facts, when considered against the general background – particularly the deliberate non-compliance of this Court's order which I reviewed in my judgment of 12 April 2017 – lead to a conclusion that there would be a real prospect of further non-observance and non-compliance were the Facebook/YouTube material not to be removed.

[20] The next question is whether a takedown order would fall within the statutory language of doing "a specified thing". Essentially, a takedown order requires the removal of existing materials from searchable online platforms, being materials which persons other than the party who posted them there can view online.⁶

[21] I am satisfied that it is technically feasible for ITE to remove the subject materials from the platforms involved. I am also satisfied that an order to do so would obviously be an order "to do a specified thing". In short, the section can

appropriately be applied to the present circumstances.

⁶ Descriptions utilised in the leading takedown decision of *Lyttelton v R* [2015] NZCA 279, [2016]

[22] I have considered the question of whether making such an order could be characterised as making a compliance order to enforce a compliance order. A case which is sometimes cited to suggest that an order of this kind cannot be made is *New Zealand Building Trades Union v Emergency Glass t/a Day and Night Glazing Ltd*.⁷

There, the Court made a compliance order, ordering a company to comply with a decision of a grievance committee, that it pay to a union, to the use and benefit of an affected member, a sum which had been established by the grievance committee, before a particular date. That did not occur. In a subsequent judgment, when there was a question as to whether a further order could be made, the Court stated that it could not do so. It would not make a further compliance order by way of enforcement of that which it had already ordered. That was because all that was at issue was the original decision of the grievance committee to the effect that a payment should be made. It was still outstanding.

[23] This circumstance, however, is different from the situation which has arisen here.

[24] When the Court made its original compliance order on 15 April 2016, it was satisfied that this was necessary because certain breaches of the settlement agreement which was entered into between the parties on 10 June 2014 had occurred.

[25] However, the Court is required to consider a different situation now. Very recently, breaches of the Court's order have taken place, namely the placing of material on Facebook and YouTube. In contra distinction to the *Emergency Glass* case, where the Court was required to consider whether a *further* compliance order might be made to enforce the previous decision of the grievance committee, here the Court is required to consider whether it should make an order to deal with new circumstances which have arisen that constitute a breach of the Court's earlier

compliance order.

[26] I am satisfied that a consideration of the present circumstances, assessed in the context of the broad language of [s 139](#) of the Act, leads to a conclusion that the Court has jurisdiction to make such an order.

[27] There is a further consideration. It is evident from the material before the Court that the content of the videos involve breaches of the non-publication orders of the Court. The possibility of an order under [s 139\(2\)](#) of the Act must accordingly be considered for a yet further reason: the Court's non-publication orders have not been observed.

[28] The totality of the breaches I am required to consider is very serious, and lead to the conclusion that the relief sought by ALA, as to takedown orders, should be granted. I now make the following orders:

a) ITE is to delete and/or remove the six videos relating to ALA from his

YouTube channel.

b) He is to permanently delete and/or remove from his Facebook page all posts and comments made by him and all posts and comments made by any third party in response or reply to the videos, or to his posts.

c) He is to permanently delete and/or remove the videos from any media platform, including but not limited to Facebook and YouTube, and/or any third party page or channel on Facebook or YouTube or any other media platform.

d) These steps are to be taken *immediately*.

[29] I am satisfied that the interests of justice require the making of an interim non-publication order. This order needs to be made on the same basis as occurred in the previous cases involving the present parties. I consider that the same approach should be adopted for the purposes of this proceeding, and for the same reasons as

applied on former occasions.⁸ I made an interim order on 22 August 2017, which I

⁸ See for example, *ALA v ITE*, above n 2, at [177] – [180].

confirm now: the names of the parties and of any information leading to either party's identification are prohibited. I also order that the file relating to this proceeding may not be searched without the consent of a Judge.

[30] For the avoidance of doubt, I have not today considered the issue of sanctions. The application for those will need to be considered on a later date. This is necessary because were ITE not to comply with the above orders, then on a subsequent occasion when considering the possibility of sanctions being imposed under [s 140\(6\)](#) of the Act, that particular failure would fall for consideration, together with such other breaches as the Court may be required to consider on that occasion.

[31] The Court will deal with these matters at **9.30 am on 9 October 2017**, in court room 1.10 at the Tauranga District Court.

[32] For the purposes of that hearing, I direct:

a) Briefs of evidence of ALA's witnesses are to be filed and served no

later than **4 September 2017**.

b) Briefs of evidence of ITE or any other witness are to be filed and served no later than **18 September 2017**.

c) Any evidence in reply may be given orally at the hearing unless it is extensive or likely to surprise. In that event, briefs of evidence in reply are to be filed and served no later than **25 September 2017**.

d) Submissions are to be filed and served on behalf of ALA by

25 September 2017, and by or on behalf of ITE by **2 October 2017**.

e) Counsel for the plaintiff is to have responsibility for the preparation and the filing of a bundle of documents. Documents in the bundle should be indexed and the pages of the bundle as a whole consecutively numbered. Three copies of the bundle are to be provided to the Court by **4 September 2017**.

f) Each document contained in the common bundle is, unless the Court otherwise directs, to be considered to:

i. be admissible;

ii. be accurately described in the index to the common bundle;

iii. be what it appears to be;

iv. have been signed by any apparent signatory;

v. have been sent by any apparent author and to have been received by any apparent addressee;

vi. have been produced by that party indicated in the index to the common bundle.

g) If either party objects to the admissibility of a document included in the common bundle, the objection will be recorded in the index so that the objection may be determined by the Court prior to or at the hearing.

h) Unless it is subject to a specific objection, each document contained in the common bundle will be regarded as being produced by consent when it is referred to in evidence by a witness.

i) Each brief of evidence is to contain all of the evidence-in-chief it is intended that the witness will give. References to documents and briefs of evidence should be to the page numbers in the common bundle. This direction should be complied with in the briefs filed and served in accordance with the timetable above so that only one set of briefs will be circulating. To that end, the parties should liaise at an early stage about the documents to be included in the bundle.

j) Parties are asked to file briefs of evidence in the form of MS Word files transmitted electronically. Those files should be free from unnecessary

formatting such as tracked changes. This will assist in the preparation of the transcript of the hearing.

k) The purpose of exchanging briefs of evidence is to ensure that the parties are aware in advance of the evidence in chief to be given on behalf of the other party. The parties are expected to use that knowledge of the other party's evidence to prepare succinct and focussed cross-examination.

l) The bundle of documents is to contain only those documents which are to be referred to by the witnesses in their evidence or which are to be the subject of submissions. Documents are not to be included "just in case".

[33] A copy of this judgment is to be served by ALA on ITE in accordance with the directions given in paras 4 and 5 of my minute of 25 August 2017. ALA is also to use its best endeavours to provide a copy to him personally, as soon as can be arranged.

[34] Costs are reserved.

B A Corkill

Judge

Judgment signed at 2.15 pm on 1 September 2017

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