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Bourne v BOC Limited [2011] NZERA 14; [2011] NZERA Auckland 12 (12 January 2011)

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Bourne v BOC Limited [2011] NZERA 14 (12 January 2011); [2011] NZERA Auckland 12

Last Updated: 4 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 12 5298850

BETWEEN MATTHEW BOURNE

Applicant

AND BOC LIMITED

Respondent

Member of Authority: Dzintra King

Representatives: Anne-Marie McNally, Counsel for Applicant

Nura Taefi, Counsel for Respondent

Investigation Meeting: 10 December 2010 at Auckland

Determination: 13 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Matthew Bourne, claims he was unjustifiably dismissed by the respondent.

[2] This decision deals solely with the matter for name suppression.

[3] The applicant seeks name suppression to prevent his identity being published in the event of media coverage of the Authority's proceedings or determination.

[4] Ms McNally submitted there was a high probability of media interest in this case.

[5] The respondent's defence to the personal grievance is that the non-employment related offending by Mr Bourne necessitated the termination of his employment.

[6] She submitted that what distinguished this from other cases where that defence has been raised is that there was absolutely no connection between the work and the offence committed by Mr Bourne.

[7] Mr Bourne was convicted of a criminal offence and was required to wear a home detention anklet bracelet. The sentence was three months' home detention. Mr Bourne did not have the benefit of a suppression order at the time of his conviction, but there was no public reporting of the offence.

[8] Ms McNally says that a suppression order would be of material value to Mr Bourne and would protect his identity from public disclosure.

[9] Mr Bourne says that the disadvantage he is likely to suffer as a consequence of name disclosure far outweighs the benefits to the public. He has already been punished by the Crown for his criminal offending. He has been further punished by the respondent. The disclosure of his name and the nature of his offending create an insurmountable barrier to him finding employment, moving on with his life and being a contributing member of society.

[10] The respondent says the offending is already in the public domain because Mr Bourne disclosed details of the offending to workmates and he would have to disclose his criminal record to a future employer if asked.

[11] Section 10 of Schedule 2 of the [Employment Relations Act 2000](#) gives the Authority power to prohibit publication of the name of a party:

The Authority may, in respect of any matter, order that all or any part of evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[12] In *Anderson v Employment Tribunal* [1992] 1 ERNZ 500 Goddard CJ provided guidance on the question of suppression. He said there had to be some serious impairment to the interests of justice if the order was not made.

[13] The principle of open justice is a fundamental foundation stone of the legal system and includes a wider purpose than the interests represented in a particular case.

In *X v ADHB* [2007] ERNZ 66 at para. [232] Colgan CJ said that generally

compelling reasons would be required for the suppression of a person's identity in legal proceedings. To this end the employment institutions recognised that justice is best served when carried out under public scrutiny. The presumption in favour of publication applies to proceedings in the Authority and the applicant must discharge the onus of displacing the presumption in favour of publication.

[14] In *Davis v Bank of New Zealand Ltd* [2004] NZEmpC 130; [2004] 2 ERNZ 511 at para.[6] the Court cited *Anderson v Employment Tribunal* and set out the legal analysis in striking the balance:

In most cases the Tribunal will find it safe to use as a test the question posed by Penlington J in R v. Patterson at p.50: 'Other exceptional circumstances which reveal a real risk that the administration of justice will be frustrated or rendered impracticable if the evidence is published.'

[15] The respondent says that the applicant has not displaced the presumption in favour of openness and transparency in the justice system. He has not demonstrated any exceptional circumstances which reveal a real risk that the administration of justice would be frustrated or be rendered impracticable if his name was published.

[16] In the exercise of its discretion the Authority must balance the justice of the particular party's position and also the public interest in open justice.

[17] The exceptional circumstances must amount to *reasons of compelling principle consistent with the interests of justice and plainly cogent grounds* for making the order.

[18] The respondent says the applicant has not demonstrated that any exceptional circumstances exist. The respondent says the applicant has put forward the unlikely proposition that Mr Bourne's offending could be made publicly known to the *New Zealand Herald* or similar publication. However, there has been no media interest in this case. The applicant has not demonstrated that there is a real risk that the Authority's proceedings would be the subject of media coverage in the future.

[19] The applicant's claim for a grievance relates to his dismissal by the respondent. The case is not novel or newsworthy but falls within the ambit of usual employer/employee relations. While the case may be reported in law reports, it is unlikely that it will be reported in the mainstream media.

[20] While the applicant submitted that it would be harsh for Mr Bourne to be thrust into an unwelcome spotlight of publicity now and this could potentially undermine his rehabilitation, there had been no evidence put forward to support the proposition that media publicity would undermine his rehabilitation.

[21] Media coverage of proceedings does not amount to exceptional circumstances. In *Y v D* [\[2004\] 1 ERNZ 1](#) the Employment Court accepted that the nature and details of the case were such that there was a real risk of publicity in the news media and that this would include publication of the parties' names unless prohibited. The case had salacious elements of employment and migration exploitation and same sex sexual harassment that the Court found was likely to excite the interests of the news media. Regardless, the risk of media publicity did not amount to exceptional circumstances. The exceptional circumstance in that case was a real risk to the plaintiff's mental health and life. A report from the plaintiff's psychiatrist pointed to a risk that publication of details identifying the plaintiff created a significant risk of suicide.

[22] Therefore, even if the applicant was to demonstrate that there was a real risk of media publicity, this would not amount to exceptional circumstances. The applicant must still demonstrate that there are reasons of compelling principle consistent with the interests of justice and plainly cogent grounds for making the order.

[23] The applicant says that he should not have to shoulder the burden of public humiliation for an offence as a gateway requirement to justice. However, his humiliation is not sufficient grounds on which to warrant name suppression: *Y v D* and *White v Auckland District Health Board* [\[2007\] NZCA 227](#); [\[2007\] ERNZ 441](#).

[24] In *White* (supra) the Court of Appeal acknowledged that publicity would be very painful for Dr White and his family, but had Dr White not challenged his dismissal *the whole affair would have remained under wraps*.

[25] It would be contrary to natural justice to allow the applicant to benefit from anonymity when he has elected to pursue his claim in a public forum.

[26] The applicant submitted the publication would affect his efforts to find employment. All employees bringing a claim against an employer take the risk that their future employer will become aware of the details of the case. This is the possibility inherent in any public litigation.

[27] In *White* (supra) Dr White expressed concern that patients or those he dealt with over research funding might view him differently if they were able to find out what had happened. The Court's response was (at para.[16]):

While Dr White's concern is understandable, it is not appropriate for the Courts to be arbiters of what information those who deal with Dr White have access to, particularly information they might consider relevant. Further, open justice considerations are also extremely important and the reality is that those who litigate necessarily put themselves and their affairs in the public domain.

[28] Mr Bourne does not have name suppression so any employer who conducts a criminal record search is able to gain access to that information. Any non-suppression order should be limited to the extent necessary to achieve the interests of justice: *Y v D* at para. [19].

[29] Having given consideration to the submissions I accept the respondent's position that there is a presumption in favour of openness and that the applicant has not displaced this.

[30] I have looked at whether there would be a serious impairment to the interests of justice if Mr Bourne's name were

disclosed. While I apprehend that the matter is embarrassing for Mr Bourne that cannot constitute a serious impediment to the interests of justice. He has chosen to litigate. I understand the issue of access to justice that has been raised by the applicant, but in the circumstances of this case any concerns the applicant has about disclosure do not override the principle of open justice.

[31] I therefore decline to order suppression of Mr Bourne's name. **Costs**

[32] Costs are reserved. It is preferable for the matter of costs to be dealt with after the hearing and determining of the substantive matter. If the issue does not proceed to a substantive hearing the parties may agree a timetable for the filing of costs memoranda if they are unable to resolve the issue.

Dzintra King

Member of the Employment Relations Authority

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