Employment Court of New Zealand

FGH v RST [2018] NZEmpC 145 (6 December 2018)

Last Updated: 12 December 2018

IN THE EMPLOYMENT COURT WELLINGTON

[2018] NZEmpC 145

EMPC 259/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a permanent non- publication order
BETWEEN	FGH Plaintiff
AND	RST Defendant

Hearing:	On the papers
Appearances:	S Henderson and D H O'Leary, counsel for the plaintiff S Dyhrberg and A Clarke, counsel for the defendant
Judgment:	6 December 2018

JUDGMENT OF JUDGE B A CORKILL: (Application for a permanent non-publication order)

Introduction

[1] As I record in a consent judgment issued today, all issues in this challenge have been resolved, except for the plaintiff's application for a permanent order of non-publication of name, which the parties have requested the Court to determine.1

This judgment relates to that issue.

Background

[2] In an interlocutory judgment of 2 February 2018, I considered an application for an interim non-publication order of names and identifying details of the parties.

1 *FGH v RST* [2018] NZEmpC 144.

The defendant abided the decision of the Court. After considering the evidence which had been placed before the Court, and submissions, I directed that until further order of the Court, no person was to publish the names of the parties to this proceeding, or any version of the determinations of the Employment Relations Authority (the Authority) to which the proceeding related which may contain the names of, or otherwise identify, the parties.2

[3] A hearing then took place in late March 2018, which resulted in the Court determining that Ms H had established her disadvantage grievance, as explained in my judgment of 1 June 2018;3 I directed that remedies would be considered at a subsequent hearing.

[4] Prior to the remedies hearing, which was ultimately scheduled for

29 November 2018, an application for permanent non-publication orders was filed. It was supported by evidence of the plaintiff, Ms H, as given for the purposes of the interlocutory application, and at the first hearing; and by affidavits taken from her parents, her general practitioner (GP), and a psychiatrist.

[5] Counsel for RST, Ms Dyhrberg, confirmed that it would abide the decision of the Court on the application for a permanent order.

[6] In his supporting submissions, counsel for Ms H, Mr Henderson, said that suppression of the plaintiff's name is a matter which lies within the discretion of the Court and has to be justified by cogent evidence before the principles of open justice may be displaced.

[7] He referred to a report obtained from Ms H's GP, Dr K Hurst, which concludes:

I believe it is in her best interest to permanently suppress any identifying particulars due to the associated stress this would cause her across her wider employment and/or social network should members of it become aware of these details ... as well as potential discrimination in future employment opportunities.

2 *FGH v RST* [2018] NZEmpC 1.

3 *FGH v RST* [2018] NZEmpC 60.

[8] Counsel also referred to the conclusions of the psychiatrist, Dr J Barry-Walsh, who stated:

My view is that ADHD and secondary problems with depressed mood and anxiety render [Ms H] more vulnerable to feelings of criticism and humiliation and diminish her resilience. From a psychiatric perspective, I consider continuation of name suppression to be in her best interests and find legitimate grounds to maintain to justify name suppression ... loss of name suppression would likely cause a worsening in her mental health condition.

[9] Mr Henderson submitted that this was evidence of sufficient cogency as to justify the making of the order.

Discussion

[10] The present application is to be resolved under cl 12 of sch 3 of the

Employment Relations Act 2000 (the Act) which provides:

12 Power to prohibit publication

(1) In any proceedings the court may order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not to be published, and any such order may be subject to such conditions as the court thinks fit.

...

[11] In *Crimson Consulting Ltd v Berry*, I considered the correct approach in respect of the discretion thus bestowed, and concluded:4

[A]n applicant for a non-publication order under the Act is not required to establish exceptional circumstances, though the standard for departing from the principle that justice should be administered openly is high. The party seeking such an order must show specific adverse consequences which would justify a departure from the fundamental rule. A case-specific balancing of the competing factors is required. The position may be different at the interim stage.

[12] I have now had the advantage of considering a significant volume of evidence, ranging from the affidavit evidence considered for the purpose of the interim application, the oral evidence given at the first hearing by Ms H, and the further

evidence now tendered to the Court.

4 *Crimson Consulting Ltd v B*erry [2017] NZEmpC 94 at [96].

[13] I do not propose to refer again to the difficulties occasioned by the condition from which Ms H suffers, as these were fully traversed in my substantive judgment.

[14] It is appropriate to refer to the opinions expressed by the medical practitioners. These are sound and must be respected by the Court; they are supported by the evidence from Ms H and her parents. I consider that the nature of the evidence considered by the Court in this proceeding, including personal medical information, is such that non-publication of names and identifying information is necessary in light of the ADHD condition from which Ms H suffers.

[15] I am left in no doubt that there are specific adverse consequences which justify a departure from the fundamental principles of open justice. The factors raised for

Ms H outweigh to the necessary degree the principle that would normally apply, to the effect that names and identifying details should be published.

[16] In this case, the view has been taken throughout that the identity of the employer should also be the subject of a non-publication order, so as not to undermine the non-publication order in respect of Ms H. At this stage of the case, and in light of the position taken for RST, that aspect of the Court's original order should also be maintained.

[17] Accordingly, the Court's interim orders are made permanent; that is, no person is to publish the names of the parties to this proceeding, or any version of the determinations of the Authority to which this proceeding relates which may contain the names of, or otherwise identify the parties.

[18] No issue as to costs arises in respect of this application.

B A Corkill

Judge

Judgment signed at 10.10 am on 6 December 2018
