Employment Court of New Zealand

ITE v ALA [2015] NZEmpC 211 (1 December 2015)

Last Updated: 4 December 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 211

EMPC 196/2015

IN THE MATTER OF	an application for order removing interim non-publication orders
AND IN THE MATTER	of an application for order allowing video recording of employment hearing
BETWEEN	ITE Plaintiff
AND	ALA Defendant

Hearing:	By way of telephone conference on 26 November 2015 following papers filed on 18, 19, 23 and 24 November 2015 (Heard at Auckland)
Appearances:	Plaintiff in person M Ward-Johnson, counsel for defendant
Judgment:	1 December 2015

INTERLOCUTORY JUDGMENT OF JUDGE CHRSTINA INGLIS

[1] There are two interlocutory applications before the Court for determination prior to the substantive hearing which is set down for two days, commencing 10

December 2015. Both applications are advanced by the plaintiff. The first is for an order removing the interim non-publication orders made by Chief Judge Colgan on 1

September 2015.1 The second is for an order allowing the plaintiff to video-record

the entire hearing. Both applications are opposed by the defendant.

[2] I heard further from the parties in respect of the two applications during the course of a telephone conference on 26 November 2015.

1 *ITE v ALA* [2015] NZEmpC 151.

Removal of interim non-publication orders

[3] The plaintiff's application arises against the backdrop of earlier interim orders made by the Chief Judge prohibiting publication and other identifying details of both parties. The application for non-publication orders had been jointly advanced. Prior to making the orders sought the Chief Judge directed that further evidence be filed in support of the application. His Honour's reasons for granting

the orders are set out in his interlocutory judgment. He concluded that:2

I am now satisfied from a consideration of detailed affidavit evidence filed by the defendant and submissions made by counsel for the defendant, that there should be an interim order prohibiting from publication the names or other information identifying the parties. The grounds for this order include the significant deleterious effects on staff of the defendant as a result of communications sent to them and others by the plaintiff. This was where the plaintiff had committed himself to confidentiality about the circumstances that led to the conclusion of his employment relationship with the defendant. That requirement of confidentiality was included within terms of settlement certified under s 149 of the Employment Relations Act 2000, but which settlement the defendant alleges the plaintiff has breached.

[4] The Chief Judge further noted that the interim order may be affirmed, cancelled or modified by a subsequent order of the Court "most probably following the hearing of the plaintiff's challenge".3 The plaintiff does not wish to wait until the substantive hearing to seek removal of the interim orders. The basis upon which his application is advanced is primarily that he does not consider that the defendant has established a proper evidential basis for non-publication orders, despite his earlier consent to such orders being made. This reduces his argument to a submission that the Chief Judge was wrong to conclude, on the basis of the evidence before him, that

non-publication orders were appropriate. I would not have accepted this submission, even if was an appropriate question for me to consider on the present application.

[5] The only 'new' matter, or change in circumstance, which has arisen since the interim orders were made is the fact that the parties did not attend a Judicial Settlement Conference which had been scheduled. The reasons for that do not need to be traversed. The plaintiff submits that the fact that the conference did not

proceed is relevant because the desirability of non-publication pending such a

2 At [4].

3 At [5].

conference has effectively fallen away. I understood this submission to be based on the proposition that the conference would have had more prospect of success in the absence of pre-conference attendance publicity. While that may be so, it was not a factor that appears to have been identified by either party in pursing their joint application for non-publication and I am not persuaded that the fact that the conference did not proceed outweighs the other factors identified by the Chief Judge in support of the orders made.

[6] Finally, the defendant will be seeking an order at the substantive hearing that permanent non-publication orders be made. Lifting the interim orders at this stage would render that application moot. There is, as counsel for the defendant (Mr Ward-Johnson) submitted, no identifiable prejudice to the plaintiff in leaving the interim orders in place in the meantime and until a detailed consideration, based on fully contested evidence, can be given.

[7] I accept the plaintiff's submission that all factors need to be weighed by the Court in making a non-publication order, either on an interim or a permanent basis, and this includes the status of the parties. This was a matter considered by the Chief Judge in making the interim orders and can be fully advanced at the substantive hearing, in the context of the defendant's application for permanent orders which the plaintiff intends to oppose.

[8] I am satisfied that it is in the overall interests of justice that the non- publication orders remain in place on an interim basis. The plaintiff's application to lift those orders prior to hearing is accordingly declined.

Application for order allowing video recording of hearing

[9] The plaintiff wishes to video the hearing on 10 and 11 December. The defendant is opposed to the plaintiff's application. It submits that the application is frivolous and vexatious and observes that a similar application was unsuccessfully advanced by the plaintiff before the Employment Relations Authority. It is submitted that the Court cannot be satisfied that the plaintiff would not use any video recording of the proceedings for an inappropriate collateral purpose and that there is

a risk that the plaintiff's obligations to maintain confidentiality will be breached. The plaintiff submits that the defendant's concerns could adequately be addressed by the Court making orders as to what parts of the recording can, and cannot, be published at the conclusion of the hearing.

[10] It is not uncommon for accredited media organisations to apply to record Court proceedings. Such applications are dealt with in accordance with established guidelines. The fact that the plaintiff is a litigant, rather than a member of a media organisation, does not mean that the application ought to be rejected.

[11] An application to record proceedings is at the Court's discretion. That discretion must be exercised judicially. A number of factors will be relevant, including the need for a fair trial, the desirability of open justice, the importance of fair and balanced reporting of hearings, the interests and reasonable concerns and perceptions of witnesses, and the ability to accommodate recording equipment in the hearing venue having regard to the reasonable requirements of the parties, counsel, witnesses and the Court. At the heart of the plaintiff's application is a concern to educate the public about what has allegedly gone on in the defendant organisation, leading to his dismissal. He explained that he considers it desirable that the proceedings be video recorded to enable quicker dissemination of information to interested members of the public. While he understands that a transcript of evidence is taken, and is available to the parties, he considers that it would be more efficient for others to be able to view a recording rather than read through a transcript. The plaintiff considers that this would have the advantage of providing an accessible means of sharing valuable learnings, which he

suggests are likely to come out of the Court case.

[12] Proceedings in the Employment Court are open and any interested member of the public is entitled to be present. I do not accept the plaintiff's broader submission that video recording the proceedings is necessary in the public interest. In particular, I am not persuaded by the asserted educational benefits of such a recording. Further, the defendant has raised valid concerns about the integrity of any recording and its dissemination. Where a media application is granted, it is generally subject to conditions; and a number of ethical obligations apply to the organisation in question.

This provides a measure of protection over the coverage itself and the use to which it is placed. The plaintiff would not be subject to the same ethical obligations. The defendant's concerns are underscored by the alleged breached of confidentiality that has occurred, the interim non-publication orders currently in place and the potential for breach of such orders (or any permanent orders that may be made) if the application is granted, even subject to conditions.

[13] The plaintiff's application to video the Court hearing is declined.

[14] Costs on both applications are reserved.

Christina Inglis

Judge

Judgment signed at 11 am on 1 December 2015
