Employment Court of New Zealand

ITE v ALA [2018] NZEmpC 140 (29 November 2018)

Last Updated: 4 December 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 140
EMPC 282/2016

IN THE MATTER OF	an application for rescission or variation of compliance and non-publication orders
BETWEEN	ITE Plaintiff
AND	ALA Defendant

Hearing:	(on the papers dated 8 – 26 November 2018)
Appearances:	ITE in person M Ward-Johnson, counsel for the defendant
Judgment:	29 November 2018

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Background

[1] ITE has applied for either a rescission or variation of previous compliance and non-publication orders made by the Court, so that he can make submissions to a review currently being conducted by the State Services Commission (the SSC).

[2] The review concerns possible reform to the Protected Disclosures Act 2000 (the PDA). The SSC has issued a consultation document and has invited feedback on the contents of that document. Submissions must be filed by 5.00 pm on 7 December 2018. It is this process in which ITE wishes to participate, referring to matters that are the subject of compliance and non-publication orders of this Court.1

1. *ITE v ALA* [2016] NZEmpC 42, (2016) 15 NZELR 16; *ALA v ITE* [2017] NZEmpC 39; *ALA v ITE* [2017] NZEmpC 109; *ALA v ITE (No 2)* [2017] NZEmpC 128 and *ALA v ITE (No 3)* [2017] NZEmpC 130.

[3] After ITE filed his application and a supporting affirmation, the Court timetabled the matter for prompt disposition. A notice of opposition was then filed by ALA, together with a supporting affidavit and submissions. Finally, submissions from ITE were filed in response.

[4] Initially, ITE sought a rescission or variation of the Court's non-publication orders only. In his submissions, however, he expanded his request submitting that because there was a link between the Court's compliance orders and non-publication orders, it would be necessary to discharge or vary both.

[5] In summary, ITE submits that the thrust of the SSC review is to ensure that the PDA assists in the maintenance of high standards of integrity in New Zealand. He submits that the circumstances in which his employment with ALA came to an

end, when a mediated settlement agreement was entered into under s 149 of the Employment Relations Act 2000 (the Act), were an example of circumstances where an organisation descended "into a pit of low integrity". He argues that the public interest requires him to be able to participate in the SSC review, and that he should be enabled to provide information previously submitted to the Court to it.

[6] Mr Ward-Johnson, counsel for ALA, submits that the reasons given originally for the making of compliance and non-publication orders remain valid, that there is no justification or countervailing public interest which should lead to the orders ITE seeks being granted, and that the application is frivolous and vexatious.

[7] The background to this proceeding has been canvassed in several previous judgments of the Court.2 As many of the points now raised by ITE have been considered in depth in those judgments, I will refer to them only briefly, as may be necessary.

2 See judgments at n 1.

Key facts

[8] The procedural history of this matter is somewhat complex, but it is summarised in the various preceding judgments.

[9] ALA employed ITE as an IT Network Specialist. Issues arose as to whether he was accessing a computer system and deleting data without authorisation. He was suspended on full pay pending an investigation, entered into on 10 June 2014.

[10] The parties resolved the employment issues between them, recording their settlement in an agreement under s 149 of the Act. The settlement agreement contained express reference to ITE's obligations of confidence, which included undertakings of confidentiality in relation to matters arising from the employment investigation.

[11] The obligations were comprehensive; since they are at the heart of the present application, it is appropriate to set these out:3

Clause 1

These terms of settlement and the fact that a settlement has been reached and all matters discussed on a without prejudice basis at the meeting between the parties ... shall remain, as far as the law allows, or [the defendant] policy requires, strictly confidential to the parties and/or their professional, legal and financial advisers.

...

Clause 5

... [The plaintiff] expressly acknowledges and agrees that clause 9.2 of his IEA applies to the termination of his employment in that during the 12 week notice period in that he remains an employee of [the defendant] and will continue to be bound by his duties of confidentiality and fidelity, which duties [the plaintiff] agrees survive the termination of his employment pursuant to clause 14 of his IEA (refer clause 11 herein).

Clause 6

... [the parties] agree that no statement will be made to staff at [the defendant] or any other third party about the reason for termination or [the plaintiff's] employment until his employment end date ... and from that date any statement will be limited to termination by redundancy.

...

3 *ITE v ALA* [2016] NZEmpC 42, (2016) 15 NZELR 16 at [13].

Clause 11

[The plaintiff] expressly acknowledges and agrees that clause 14 (confidentiality and non disclosure) of his IEA continues to apply despite the termination of his employment. [The plaintiff] further agrees that this obligation of confidentiality includes and extends to disclosures to [the defendant's] staff (past or present) and to:

11.1 any and all information and/or reports and/or data of any kind whatsoever provided to him during the course of [the defendant's] employment investigation into him (investigation data) and/or the resulting disciplinary process;

11.2 any and all information and/or data related to his employment at [the defendant] in his possession, power or control regardless of whether or not that information and/or data relates to the employment investigation and/or the resulting disciplinary process; and

11.3 the scope of the employment investigation and/or resulting disciplinary process including (but not limited to) [the plaintiff's] own position in response to any issue raised with him during the course of the investigation and/or the resulting disciplinary process.

Clause 12

[The Plaintiff] further agrees: to return and/or not retain copies of; not to disseminate or disclose to any third party (verbally or otherwise); destroy if any copies have been made and not interfere with in any way; all of the investigation data provided to him during the course of [the defendant's] employment investigation and/or resulting disciplinary process and/or any other information and/or data related to his employment at [the defendant] in his power, possession or control regardless of whether or not that information and/or data relates to the employment investigation and/or the resulting disciplinary process. The clause does not apply to the file held by [the plaintiff's lawyer].

Clause 13

[The plaintiff] agrees and acknowledges that, if he breaches clauses 11 and/or 12 of this agreement, he will be liable for any of [the defendant's] costs and/or disbursements (including expert fees and/or solicitor/client costs) incurred in addressing, responding to or dealing with the breach.

[12] Subsequently, consideration was given to the making of compliance orders. In this Court, Chief Judge Inglis made such orders in these terms on 15 April 2016:4

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 11 March 2014) by way of his website, video recordings and/or email or other

4 At [75].

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 adviser) about matters subject to his confidentiality obligations to the defendant organisation.

The timeframe for compliance is *immediate*.

[13] At the same time, the Court also made an order "permanently prohibiting the publication of the names of the parties and of any information leading to either parties' identification".5 An order was also made that no person is to have access to the Court file without the consent of a Judge. Subsequent judgments of this Court repeated these orders.

First issue: discharge the previous orders?

[14] I do not consider that it is appropriate to discharge the previous orders in their entirety, so as to permit a submission to be made to the SSC in its current review.

[15] To do so would completely undermine the settlement agreement entered into by the parties. That agreement was not time-limited in any way. It contained ongoing and comprehensive mutual obligations.

[16] ITE submitted that the Court should not conclude there was a necessary linkage between the making of the compliance orders and non-publication orders, and that one possibility would merely be to discharge or vary the non-publication orders which would permit him to provide information the parties filed with this Court to the SSC. This would allow an evaluation of the events which were considered by the Court.

[17] I do not agree that this approach would be appropriate. When making the non- publication orders, Chief Judge Inglis said:6

The defendant is a public organisation and there is an interest in knowing its identity, including concerns and issues relating to its operations. This factor weighs against an order being made. However there are other factors to be

5 At [84].

6 At [81] and [83].

considered in the particular circumstances of this case. The proceedings arise out of an established breach of the confidentiality provisions of a s 149 settlement agreement which the defendant was entitled to rely on. Further, there is evidence before the Court to support the defendant's submission that non-publication orders are necessary to protect the defendant's relationships with other organisations. It is also clear that the plaintiff's actions have had a significant negative impact on staff whom he used to work with. That is unsurprising, having regard to the evidence before the Court.

...

I accept, based on the evidence before the Court that employees of the defendant have been negatively impacted by the plaintiff's disclosures and that there are well placed concerns that identification of the parties could lead to their identification and scrutiny, which is likely to exacerbate the impact on them. I have not found it necessary to name the affected employees in this judgment. To some extent that mitigates the potential impact. I do not, however, consider that it would adequately address the concerns raised on behalf of the defendant. And while the plaintiff does not wish his name to be suppressed, the reality is that naming him will effectively name the defendant.

> [18] In my view, there is no possible justification for departing from this reasoning now. The s 149 settlement agreement remains in effect. There is no reliable evidence to suggest that the position is any different as regards ALA's relationships with other organisations. Nor am I satisfied that the fact some employees have left ALA leads to a conclusion that publication would not now have a significant negative impact on them, when I have regard to all the background information which is before the Court which includes adverse statements made by ITE about those persons.
>
> [19] In short, to discharge the non-publication orders could lead to an undermining of the provisions of the settlement agreement; the justification for the making of the compliance and non-publication orders remains.

Second issue: countervailing public interest?

> [20] There is a further factor which appears to be raised by ITE, to the effect that there is a countervailing public interest which requires the Court to permit him to make a submission to SSC, which could be achieved by varying the current orders.
>
> [21] In previous judgments, it has been necessary to consider the circumstances in which a countervailing public interest might arise, which could trump a protective

order of the Court. In my judgment of 12 April 2017, I reviewed the applicable principles as follows:7

> [60] ... Any analysis as to whether there is a justification for not complying with a Court order is one that must be approached in a careful and principled fashion; and the relevant principles must be considered on a case by case basis.
>
> [61] I begin my consideration of this issue by describing those principles.
>
> [62] With regard to the protection of confidential information, the correct approach as to how public interest factors should be assessed was confirmed in the speech of Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2):*8

... [A]lthough the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply ... to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

Embraced within this limiting principle is, of course, the so-called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud" ... it is now clear that the principle extends to matters of which disclosure is required in the public interest ...

> [63] The Court of Appeal has put it in this way:9

What has been called ever since *Gartside v Outram* (1857) ... the defence of iniquity, is an instance, and probably the prime instance, of the principle that the law will not protect confidential information if the publication complained of is shown to be in the overriding public interest.

[64] Contemporary authorities are clear that in order to be justified, a disclosure should usually be made to a person who has a proper interest in receiving the information. So, the learned authors of *Law of Torts* state:10

In some cases the public interest may favour publication, but not necessarily to the world at large. Often disclosure to an authority competent to deal with the matter will be sufficient, in which case wider publication will be a breach of confidence. So disclosure of alleged financial wrongdoing solely to the Inland Revenue Department,11 of photographs of a habitual shoplifter to local shopkeepers12 of convictions for paedophilia of caravan dwellers to the site owner,13 and of statements

7 *ALA v ITE* [2017] NZEmpC 39.

8 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) at 282.

9. *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] NZCA 273; [1994] 3 NZLR 43 (CA) at [46]. The citation for *Gartside v Outram* is (1857) 26 LJ Ch 113.
10. Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 806.

11 *Re a Company's Application* [1989] Ch 477.

12 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804.

13 *R v Chief Constable of the North Wales Police, ex parte Thorpe* [1998] EWCA Civ 486; [1999] QB 396 (CA).

by a registered nurse to the police when under caution to the regulatory body for nursing14 in each case was permissible.

[65] As it is put by the learned authors of *Gurry on Breach of Confidence*, the cases confirm that "making a restricted disclosure to a limited circle, in particular to a regulatory or other proper authority, is likely to be considered the most proportionate way of advancing the public interest".15

[22] The Court considered these principles on two previous occasions. Now, ITE argues that the circumstances which gave rise to the settlement agreement, and events which have occurred subsequently, illustrate failings of ALA in a variety of respects, including obligations it might have under the Local Government Act 2002 relating to integrity, accountability and transparency; and that it would be in the public interest for him to be permitted to make a submission to the SSC review on these matters.

[23] I am well satisfied that the circumstances giving rise to the making of the compliance orders and non-publication orders by the Court are such that they must prevail over ITE's ability to refer to the information which has come before the Court, for the purposes of a submission to the SSC.

[24] The obligations ITE entered into when signing the settlement agreement remain. Further, the history of this matter demonstrates that ITE has on multiple occasions chosen to circumvent those obligations. In those circumstances, the Court can have no confidence that any orders the Court might make would be respected. On that point, I note that orders of this Court made as along ago as 1 September 2017 that ITE remove videos and posts from certain Facebook pages, and from a YouTube channel, have not been complied with.16 ITE does not come to the Court with clean hands when seeking the exercise of a discretion.

[25] For all these reasons, I am not satisfied that the Court should conclude that it is in the public interest for the confidentiality and non-publication obligations to be varied, so as to enable a submission to be made to SSC.

14 *Woolgar v Chief Constable of the Sussex Police* [1999] EWCA Civ 1497; [2000] 1 WLR 25 (CA).

15. Tanya Aplin and others *Gurry on Breach of Confidence*: *The Protection of Confidential Information* (2nd ed, Oxford University Press, Oxford, 2012) at 697.

16 *ALA v ITE* [2017] NZEmpC 109 at [28].

Third issue: frivolous and vexatious application?

[26] Mr Ward-Johnson also made a submission that the application was frivolous and vexatious and should be dismissed for that reason. I make two points regarding this submission. First, it is somewhat academic, given the conclusions I have already reached. Second, I am not persuaded that the threshold for making an order that an application be dismissed on the grounds it is frivolous and vexatious would in any event be met in this case.17 As ITE submitted, the Court has previously indicated that it would be wise for a party who is bound by orders of the kind which this Court has made, to apply for leave to take a step rather than acting unilaterally;18 he applied for such leave.

Disposition

[27] I dismiss ITE's application.

[28] There is an order of non-publication of the names of the parties, and information filed with the Court for the purposes of the application which this judgment resolves.

[29] Costs are reserved.

B A Corkill Judge

Judgment signed at 8.45 am on 29 November 2018

17. The criteria are explained in *Lumsden v SkyCity Management Ltd* [2015] NZEmpC 225, [2015] ERNZ 389.

18 *ALA v ITE,* above n 7, at [98].
