



# Employment Court of New Zealand

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## ITE v ALA [2019] NZEmpC 93 (6 August 2019)

Last Updated: 10 August 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 93](#)

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

Appearances: ITE in person  
M Ward-Johnson, counsel for the defendant

Judgment: 6 August 2019

### INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL

#### Background

[1] For the second time, ITE has applied for a variation of the non-publication orders made by the Court.<sup>1</sup> On this occasion he says it is necessary so that he is not inhibited in making a particular application he wishes to advance. That application needs to be made by 16 August 2019. Accordingly, urgency is sought.

[2] The ground on which the application is made is that another court issued a judgment from which it is possible to identify the parties in the present proceeding.<sup>2</sup> ITE says that whilst in this Court an order has been made “permanently prohibiting the publication of the names of the parties and of any information leading to either

<sup>1</sup> The first consideration of this issue is found in *ITE v ALA* [\[2018\] NZEmpC 140](#).

<sup>2</sup> Because of the conclusion reached in this judgment, I do not identify the court or the judgment in question. These details are, of course, known to the parties.

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parties’ identification”,<sup>3</sup> the intitutment adopted by the external court effectively undermines, and thereby annuls, the orders of this Court.

[3] The defendant opposes the application for a number of reasons. The principal submission is that such an order would compromise the previous non-publication and compliance orders made by the Court, which were made in light of a settlement agreement containing significant confidentiality obligations.

[4] ITE's application was filed whilst I was on leave. Another Judge, however, conducted a telephone directions conference with the parties, and directed the filing of applicable documents including submissions. These documents were referred to me upon my return which has ensured a prompt consideration of the application by me as the Judge who has dealt with this proceeding for the last two years.

[5] As the parties are entirely familiar with the full range of background circumstances, as referred to in the Court's numerous previous judgments, it is unnecessary to describe the procedural background again in any depth.<sup>4</sup> I repeat only the key facts, as summarised in the most recent application which dealt with non-publication issues, that of 29 November 2018:<sup>5</sup>

[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 *ITE v ALA* [2016] NZEmpC 42 at [84].

4. *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; *ALA v ITE (No 3)* [2017] NZEmpC 130 and *ALA v ITE*, above n 1.

5 *ITE v ALA*, above n 1 (footnotes omitted).

#### **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.

...

#### **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:

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 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”. 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.

### **Discussion**

#### *The judgment of the external court*

[6] Apart from the identification of the parties, the external judgment does not refer to the substance of the issues recorded in this Court’s various decisions, which are the subject of the compliance and non-publication orders.

[7] Moreover, there is no evidence whatsoever that the external court intended to bind this Court with regard to its non-publication orders, which are inextricably linked to its compliance orders.

[8] The reason the difficulty occurred it appears to be because the defendant did not seek a non-publication order from the external court until some weeks after it had issued its judgment; and the basis for such an order was not then spelt out adequately.

[9] It is also relevant that after the issuing of the judgment of the external court, the Supreme Court issued a judgment dealing with an application for leave to appeal brought by ITE; that application was dismissed. For present purposes the key point is that the most senior court in this jurisdiction recognised that this Court’s non-publication orders were to be maintained. Accordingly, it anonymised the parties’ names.<sup>6</sup>

[10] I conclude the fact that the external court used the parties’ names was because it was not asked to do otherwise in a timely way. This fact cannot lead to a conclusion that, in the complex circumstances, this Court’s non-publication orders should be varied or discharged.

#### *Other considerations*

[11] The non-publication orders previously made by this Court are inextricably linked to both the settlement agreement entered into between the parties, and as already mentioned, to the compliance orders which the Court has made.

[12] I consider that the obligations arising from that agreement in those orders would be undermined if the Court were now to vary or discharge its current non-publication orders.

[13] I repeat the reasoning of Chief Judge Inglis when she made the original non- publication orders:7

[81] 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 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.

...

6 *B v ALA* [2017] NZSC 51.

7 *ALA v ITE* above n 3.

[83] 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.

[14] As I have said previously, there is no possible justification for departing from this reasoning now. The s 149 settlement agreement remains in effect. Its obligations were not time limited. I have not received any evidence to suggest that the position is any different as regards ALA's relationships with other organisations.

[15] Again, I repeat that although some employees may have left ALA does not suggest that the limitation should be modified, when one considers the significant adverse statements repeatedly made by ITE about those persons.

[16] I remain of the view that the discharge of the non-publication orders made by the Court could lead to an undermining of the provisions of the settlement agreement. The justification for the making of both the compliance and non-publication orders remains.

[17] ITE's submissions refer to other matters which he advanced apparently to support a submission that there would be a public interest in now varying or rescinding the non-publication orders. I have dealt with this issue previously and refer specifically to my analysis in that regard in my judgment of 29 November 2018.8

[18] Finally, I deal with the submission relating to "clean hands". There is evidence before the Court that ITE remains in contempt of the Court's previous orders, including its take-down order, by providing relevant information to a Facebook group.

[19] Despite the history of this matter, which has included a term of imprisonment being imposed on ITE by way of sanction, ITE has chosen not to respect the Court's orders. That is a matter of significant concern. Plainly, ITE does not come to the

8 *ITE v ALA*, above n 1, at [21]-[25].

Court with clean hands. Apart from anything else, the Court can have no confidence that were its non-publication orders to be discharged or varied, ITE would respect the non-confidentiality provisions of the settlement agreement he entered into.

*The consequences of this Court's orders*

[20] The consequences of the Employment Court's non-publication orders are as follows:

- a. No person is at liberty to publish the names of the parties to this proceeding, or of any information which may lead to their identification, whether that information is derived from judgments or any other source. For the avoidance of doubt, that information includes the names of persons whose circumstances were considered by the Court, since they are expressly referred to in the Court's compliance orders.9
- b. That third parties may or may not be able to infer the identity of the parties to the proceeding from an external source is not a reason for the Court to vary or discharge its carefully made orders, in the particular circumstances.
- c. There is evidence that some third parties may have identified the parties to this proceeding. I observe that this Court's non-publication orders apply not only to the plaintiff and the defendant, but also to any other person.
- d. Any breaches of the Court's orders by any person may amount to an actionable contempt.

## Conclusion

[21] For all these reasons, the application is dismissed.

9 At [12] of the extract set out above at para [5].

[22] I make no order for costs. ALA brought these difficulties on itself, because a late application for non-publication orders was made to the external court after it had issued its judgment.

B A Corkill Judge

Judgment signed at 10.15 am on 6 August 2019

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