



Employment Court of New Zealand

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P v A [2018] NZEmpC 99 (22 August 2018)

Last Updated: 27 August 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[\[2018\] NZEmpC 99](#) EMPC 62/2017 EMPC 170/2017

EMPC 231/2017

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	P Plaintiff
AND	A Defendant

Hearing: On the papers filed on 10 and 13 August
2018

Appearances: P, plaintiff in person
H Pryde, counsel for defendant

Judgment: 22 August 2018

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE M E PERKINS APPLICATION FOR ORDERS PROHIBITING PUBLICATION

[1] These proceedings involve challenges by the plaintiff to two determinations of the Employment Relations Authority (the Authority). The challenges have now been settled at mediation and discontinuances have been filed, subject to the Court considering whether to make an order prohibiting publication.

[2] The first determination related to claims by the plaintiff surrounding the termination of his employment. He was partially successful in his claims at the Authority but filed a challenge against the whole of the determination and sought a hearing de novo. The second determination related to applications for a re-opening of the Authority's investigation and for orders prohibiting publication. The applications were refused, but the Authority made an interim order initially to last for seven days (and later extended), prohibiting publication of the two determinations to enable the

P v A NZEmpC AUCKLAND [\[2018\] NZEmpC 99](#) [22 August 2018]

plaintiff to exercise his right of challenge. In the application to the Authority for prohibition on publication, the plaintiff had emphasised that he did not seek an order prohibiting publication of his name, but simply prohibiting publication of the contents of the determinations, as he considered there were errors in the findings which required correction. He wished to have the prohibition on publication of the determinations continued until the errors he considered existed were corrected.

[3] The plaintiff filed a challenge against the whole of the second determination. He again sought a hearing de novo. When the challenge was filed, there was an ancillary application to the Court seeking an extension of the Authority's interim order prohibiting publication. That application was granted. In order to protect the entire matter until the challenges could be heard, the Court ordered that the prohibition was to encompass both the names of the parties and the contents of the determinations. The extension was initially to last until further order of the Court. This was subsequently clarified so that it was made clear that the interim order was extended until the hearing of the challenges. Technically, the orders would lapse upon the hearing of the challenges. If the plaintiff was successful in his challenge against the Authority's refusal to grant an order prohibiting publication, then obviously an order would be made granting a permanent prohibition on publication. Other issues relating to the first challenge and the question under the second challenge of whether the Authority should re-

open its investigation would also have been dealt with if a hearing had gone ahead. Those other issues are now collateral to the subject of this judgment, as the challenges have been settled.

[4] Following the settlement and at the time of the filing of the notice of discontinuance, the plaintiff has made an application for a permanent order prohibiting publication of the determinations. This is sought to give effect to a consent position reached between the parties. They acknowledge that it is ultimately for the Court to decide whether the discretion to do so should be exercised. No formal application has been filed by the plaintiff, but an application is contained in a memorandum which he has filed with the Court. Despite the informality, the Court will treat the memorandum as an application.

[5] The Court's power to prohibit publication is contained in cl 12 of sch 3 to the [Employment Relations Act 2000](#) (the Act). It provides:

- (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 be published, and any such order may be subject to such conditions as the court thinks fit.
- (2) Where proceedings are resolved by the court making a consent order as to the terms of settlement, the court may make an order prohibiting the publication of all or part of the contents of that settlement, subject to such conditions as the Court thinks fit.

[6] In exercising the discretion within the jurisdiction, the Court should have regard to the Court of Appeal's decision in *Jay v Jay*.¹ In that decision, the Court of Appeal stated:²

[118] It is true the starting point is generally based on the principle of open justice of proceedings. The desirability of open justice must be weighed against competing considerations arising in particular cases and each case must be addressed on its merits. Unlike in the criminal context, "extraordinary circumstances" are not required to justify suppression in a civil case. This Court's judgment in *Muir v Commissioner of Inland Revenue* made no reference to the need for "extraordinary" or "exceptional" circumstances. In refusing leave in that case the Supreme Court observed that situations warranting confidentiality are "likely to differ between the [civil and criminal] categories", and also "within them". Ultimately, bearing in mind the requirements for open justice in a civil context the court must exercise a discretion as to whether to make a suppression order in the particular circumstances of the case.

[7] *Jay v Jay* was referred to by the Court of Appeal in its judgment refusing leave to appeal the Employment Court's decision in *H v A*, which dealt with this Court's approach to applications for prohibition on publication.³

In the present case, the parties have reached a settlement using mediation services in accordance with the provisions of the Act. That mediation has taken place prior to the hearing of the grievances in this Court. Hearing time had been allocated to the matter, but that hearing has now been vacated as a result of the notice of discontinuance which have been filed. In all circumstances existing, the legitimate interest of the public in the proceedings has been reduced to a significant degree because the parties have

¹ *Jay v Jay* [\[2014\] NZCA 445](#), [\[2015\] NZAR 861](#).

² Footnotes omitted.

³ *H v A Ltd* [\[2014\] NZEmpC 92](#), [\[2014\] ERNZ 38](#); *A Ltd v H* [\[2015\] NZCA 99](#).

chosen to settle their differences and the challenges have been abandoned prior to a hearing.⁴ The plaintiff has referred to appropriate legal authorities in his memorandum of submissions. He submits that the Court has the ability and power to order a prohibition on publication of the determinations as it thinks appropriate.

[8] In this case, where the plaintiff has not had and will not now have the opportunity of fully arguing his concerns about the accuracy of the determinations, whether or not ultimately legitimate, the interests of justice would require that there be a permanent order prohibiting publication of their contents. It is also appropriate that, in addition, there be a permanent order prohibiting publication of the names of the parties. I note that while the plaintiff had indicated earlier that he did not necessarily seek an order prohibiting publication of his or the defendant's name, his submissions are partly aimed at that effect and refer to authority where that was the outcome. In the present circumstances where the defendant has specifically indicated it does not oppose the application, the defendant would have a reasonable expectation on the basis of the submissions presented by the plaintiff that identification of the parties would also be prohibited.

[9] There is also another legitimate reason for suppression of the parties' identity. This case is already the subject of two previous interlocutory judgments and one substantive judgment published on the Court's webpage and in other legal sources. Therefore, there may be matters contained in those judgments which might, by inference, reveal matters contained in the determinations. Publication of the identity of the parties in respect of those judgments would cut across the plaintiff's purpose for seeking an order suppressing publication of the contents of the determinations. Presently, the judgments of the Court have the names of the parties anonymised, and that should continue.

[10] Accordingly, there will be an order permanently prohibiting publication of the parties' names or the publication of any details that might lead to their being identified.

4. For a discussion of such circumstances in other cases see *Dr X v A District Health Board* [2013] NZEmpC 160; *The Chief Executive of the Department of the Prime Minister and Cabinet v Sisson- Stretch* EmpC Wellington WC 20/06, 25 October 2006; and *Ryan v Auckland District Health Board* HC Auckland CIV-2007-404-6177, 5 December 2008.

In addition, there will be an order permanently prohibiting publication of the Authority's determinations relating to the plaintiff's claims against the defendant dated and numbered as File Number 5542775 and File Number 3005851.

[11] Issues as to costs no longer arise.

M E Perkins Judge

Judgment signed at 4.30 pm on 22 August 2018

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