Employment Court of New Zealand

Q v Commissioner of Police [2015] NZEmpC 8 (5 February 2015)

Last Updated: 14 February 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2015] NZEmpC 8

CRC 8/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	Q Plaintiff
AND	COMMISSIONER OF POLICE Defendant

Hearing:	26 January 2015 (heard at Christchurch)
Appearances:	A Shaw and J Behrnes, counsel for the plaintiff S J Turner and S Clark, counsel for the defendant
Judgment:	5 February 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment determines applications made by the parties immediately prior to the commencement of a fixture which it is estimated will take three weeks, and which commenced on 26 January 2015.

[2] On 23 January 2015, the defendant applied for part of the proceedings to be heard *in camera*, and for non-publication orders to be made in respect of certain individuals who will either give evidence or who were involved in the circumstances which the Court will have to review, and of details relating to certain specialist units of the New Zealand Police.

[3] On 25 January 2015, the plaintiff sought interim orders (up to the date of a substantive decision in the matter) and permanent orders (from the date of the

substantive decision in the matter) prohibiting the publication of the name and

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identifying details of himself, his wife and children, and in respect of other individuals who would appear under subpoena for him.

[4] The application was heard at the commencement of the hearing and orders were made as described below. I now give my reasons for making those orders.

[5] In the course of the presentation of submissions, the Court was informed that the plaintiff consented to the orders sought by the defendant. With regard to the plaintiff's application, the defendant agreed to interim orders in respect of the plaintiff and his wife and children; and submitted that in respect of the remaining individuals for whom non-publication orders was sought for the plaintiff, it consented to a permanent order for a current employee of one of the specialist units, an interim order in respect of a former employee of that unit, and would accept the decision of the Court in respect of the third individual who worked for the police (but not for one of

the units already mentioned).

[6] Although there was substantial consensus between the parties as to the orders sought, I considered it appropriate that the Court reach its own independent view as to the merits of the applications, particularly that relating to the possibility that certain parts of the hearing would be heard *in camera*. That is because such an order is most unusual, and as will be evident hereafter, should only be made in exceptional circumstances.

[7] The context in which this application arises is a challenge involving two situations where it is asserted the plaintiff has suffered personal grievances. The *in camera* application involves one only of the personal grievances where the Court will have to review certain events relating to the operation of one of the specialist units.

Application that part of proceedings be heard *in camera*

[8] The defendant submitted that an order that part of the hearing be heard

in camera was justified on the following grounds:

a. The Court has an inherent jurisdiction to order its proceedings to be heard *in camera*.

b) Discussion of matters relating to either the details of the specialist units involved, or the names of members of those units would prejudice their effective and safe operation, and the safety of their members.

c) The public interest in maintaining the effective and safe operation of those units, and the safety of members outweighed the public interest in having justice administered open and publicly.

d) On the grounds set out in the affidavit of Ms R W Groot, a Senior Legal Advisor in the Employee Relations Team at Police National Headquarters.

[9] Ms Groot's affidavit explained the nature of the operations of the specialist unit of which the plaintiff had been an employee, and the potential harm which would occur were details of its operation and members to become public. Those matters are set out at paras 3 to 10 of Ms Groot's affidavit; the information contained therein is essentially accepted by the plaintiff. I have carefully reviewed that information, which I have been able to consider against a considerable volume of documentary material which has been provided in an agreed bundle for the purposes of the trial. The information in Ms Groot's affidavit is entirely consistent with the documents which are before the Court, many of which refer to the subject activities. I accept the assertions made by Ms Groot about the activities of the specialist unit, and that identification of its members would prejudice the effective and safe operation of that unit and its members. The same applies to the allied units.

[10] I note that the Employment Relations Authority (the Authority), when it considered the proceeding which is now the subject of a challenge, made an order that the investigation meetings would be closed to all persons other than those persons actually involved in the proceeding.1 It also ordered that the name of the plaintiff be "suppressed", as well as the name of any and all witnesses. Finally, it ordered that the pleadings and evidence before the Authority would not be published.

The Authority's decision was written in a manner which respected those orders.

1 *Q v Commissioner of Police* [2013] NZERA Christchurch 12 at [14].

[11] The order that the investigation meetings would be closed to all persons appears to have been made under s 160(1)(e) of the Employment Relations Act 2000 (the Act). There is no parallel provision in respect of the Court.

[12] The defendant's application referred to the possibility of the Court making an *in camera* order pursuant to the Court's inherent jurisdiction. In fact the Employment Court does not have an inherent jurisdiction.2 What the Employment Court does have as a Court of record, however, is an inherent power to control its procedures and to protect its processes from abuse.3

Discussion

[13] In *Watson v Clarke*, Robertson J explained the distinction between the inherent powers of a Court and inherent jurisdiction in the following way:4

The latter [i.e. inherent jurisdiction] connotes an original and universal jurisdiction not derived from any other source, whereas the former [i.e. inherent power] connotes an implied power such as the power to prevent abuse of process, which is necessary for the due administration of justice under powers already conferred.

[14] In *Axiom Rolle PRP Valuation Services Limited v Kapadia,*5 a full Court was required to consider whether the Authority and the Employment Court were empowered to make Anton Piller orders. In the course of its consideration of these issues, the Court discussed the scope of powers inherent in a Court of record.6 The Court concluded that the "implied powers" of a Court of record do not, alone, extend to making Anton Piller orders in the course of proceedings within a Court's jurisdiction. It then stated:

Although a Court of record is not precluded from exercising implied powers, there must be something more to justify the existence of this power.

2 *New Zealand Railways Corporation v New Zealand Seamen's IUOW* [1989] 2 NZILR 613 (LC) at 623; *Attorney-General v Benge* [1997]

NZCA 348; [1997] 2 NZLR 435 (CA) at 439; [1997] NZCA 348; [1997] ERNZ 109 at 113; *BDM Grange v Parker* [2005] NZHC 515; [2005] ERNZ 343 at [18].

3 *Connolly v DPP* [1964] AC 1254 (HL) at 1281 [1979] All ER 745 at 751; *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 (HC) at 701; *Watson v Clarke* [1990] 1 NZLR 715 (HC) at 720.

4 At 720.

5 *Axiom Rolle PRP Valuation Services Ltd v Kapadia* [2006] NZEmpC 73; [2006] ERNZ 639.

6 At [79]-[86].

[15] Under the Employment Court Regulations 2000 (the Regulations), the Court must dispose of a case as nearly as may be practicable in accordance with the provisions of the High Court Rules affecting any similar cases and, if there are no such provisions, then in such manner as the Court considers will best promote the object of the Act and the ends of justice.7

[16] Rule 9.51 of the High Court provides that:

Unless otherwise directed by the court or required or authorised by these rules or by an Act, disputed questions of fact arising at the trial of any proceeding must be determined on evidence given by means of witnesses examined orally in open court.

[17] The presumption that disputed questions of fact be determined in open court is of course an expression of the important principles of open justice, the effect of which is that, except to the extent that any legitimate exception is made out, courts are required to dispense justice in public.8 In *Broadcasting Corporation of New Zealand v Attorney-General* the Court of Appeal held:9

Despite the importance attached to these basic concepts there have been occasional situations of a particularly pressing kind which have led to a court sitting *in camera*. Sometimes there has been statutory authority for that happening but otherwise the judge concerned has drawn upon an inherent jurisdiction of the court to adopt measures that are needed to protect the long-term interests of justice. If an open hearing would prevent the due administration of justice in that wide and general sense then on rare occasions it has been accepted that the quite exceptional step could be taken of closing the court.

[18] The Court in that case accepted the dicta of the English House of Lords by reference to *Attorney-General v Leveller Magazine Limited,*10 which said that any departure from the general rule that the administration of justice should be undertaken in public "is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice."11

[19] In the *Broadcasting Corporation of New Zealand* decision, reference was made to the inherent jurisdiction of the court. Since then the High Court Rules have

7 Employment Court Regulations rr 6(2)(a)(ii) and 6(2)(b).

8 For a full discussion of these principles see, for example, *Anderson v The Employment Tribunal*

[1992] 1 ERNZ 500 (EmpC) at 509-518.

9 *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 123.

10 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 [1979] 1 All ER 745 (HL).

11 At 450, 750.

been enacted, and r 9.51 now specifically states that the court must conduct its proceedings in open court, "unless otherwise directed by the court". That is, the High Court may now consider the issue under a rule rather than pursuant to its inherent jurisdiction.

[20] Having regard to the importance of this issue, I conclude that it is appropriate for this Court to find that although there is no specific statutory provision such as is bestowed on the Authority under s 160(1)(e) of the Act, it does have the power as a Court of record to do so. In my view it was not considered necessary to bestow a specific statutory provision on the Court, since it is a Court of record containing an inherent power to control its procedure and to protect its processes from abuse, and specifically to have recourse to the High Court Rules; in this case r 9.51 applies.

[21] Although the Court has the power to order that some or all of any proceeding may be heard *in camera*, however, I consider that the principles set out by the Court of Appeal in *Broadcasting Corporation of New Zealand* must apply; such an order may only be made on rare occasions because the step of making such an order is an exceptional step.

[22] Counsel's research has ascertained only one previous case where such an order has been made in this Court. In *Service Workers' Union of Aotearoa Inc v IHC New Zealand Inc,* the Court was required to consider the question of how the evidence of two intellectually handicapped clients of the respondent was to be taken.12 A number of directions were made to ensure this evidence was taken appropriately. Screens were used to screen off the grievant from the witnesses view while they were giving their evidence, although the witnesses would be in the observable presence of counsel and the Judge and of necessity the Court Clerk, along

with the Judge's Assistant who recorded their evidence. The Court also directed that the evidence be given *in camera* using the screens described, with counsel seated without wigs and gowns. The decision does not record the jurisdictional basis for the making of these

orders, although it is apparent that the circumstances of those persons required exceptional steps to be taken.

[23] Applying the principles I have identified to the present case, I am satisfied that the evidence establishes that there are exceptional circumstances which require the Court to be closed when details of the specialist unit and its allied units are to be discussed, and when names of members of those units are to be discussed in evidence.

[24] During submissions, counsel raised the possibility that there may be alternative procedural steps which could be taken; I made an interim order in the terms sought to allow counsel an opportunity to explore these issues further. No other procedural possibility thereby emerged, and so later in the course of the hearing on 26 January 2015, I made the order sought on a permanent basis.

[25] As mentioned earlier, the order sought related to one of two personal grievances. The effect of the making of the order is that for some portions of the evidence the Court will be able to conduct its proceedings in public; whilst for other stages of the proceeding it will be required to sit *in camera*. I indicated that the order made by the Court was generic in nature. As a practical matter at any stage during the hearing, I directed that if any member of the public attends the hearing counsel is to draw that matter to the Court's attention. Any necessary clarifications can then be given particularly as to whether the *in camera* order applies at that point in time.

[26] So as to ensure the position is as clear as possible during the course of the hearing, I invited counsel where possible to conduct their questioning of witnesses on the matters which required protection in a compendious way, so that any necessary transitions from sitting in public to sitting *in camera* could be minimised.

[27] I also indicated as a consequence of the making of the order that the Court's decision would of necessity be written in such a way as would protect the evidence heard *in camera*,13 although the same effect will be created by the making of non-publication orders, the topic to which I now turn.

[28] The defendant sought non-publication orders in respect of details of the specialist units, the identity of three persons who were the subject of the second

personal grievance (being members of the public who were not witnesses), and in respect of other officers referred to in the evidence whose circumstances would be considered as evidence of alleged disparity of treatment by the defendant.

[29] The principles relating to the making of orders for non-publication are well known. Clause 12(1) of Sch 3 of the Act permits orders of non-publication by the Court, and the applicable principles were recently considered by this Court in both the interlocutory and substantive judgments of *H v A Limited*.14

[30] As I stated in that case:15

The principles of open justice, as articulated in many cases to the highest level ... also warrant very careful consideration, along with any other factors pointing to publication. Factors against publication must also be carefully assessed, so that a proper balancing exercise is undertaken. It will often be necessary for reliable evidence to be produced in relation to relevant factors especially where an application for a non-publication order is opposed. Whilst the weighing of all factors must be undertaken carefully the Court or Authority must determine what outcome in all the circumstances is in the interest of justice; it does not have to find that there are exceptional circumstances.

[31] I note that non-publication orders have been granted by the civil courts where there is evidence that sensitive work is undertaken. So, in *Dotcom v Attorney-General* the High Court granted orders releasing certain details relating to the defendant's Special Tactics Group and the Armed Offenders Squad as there was significant public interest in the effective and safe operation of those agencies, and

the safety of their members.16

[32] It is appropriate to make the non-publication orders sought in respect of the specialist units and their members, as in that case, and for the reasons discussed above.

[33] The three members of the public, and other police officers whose circumstances are to be discussed in evidence, none of whom are giving evidence or are able to express a point of view on any relevant issues or respond to criticisms

made about them, are entitled to protection of name. The prejudicial consequences

14 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38; [2014] NZEmpC 189.

15 *H v A Ltd* [2014] NZEmpC 189 at [141].

16 *Dotcom v Attorney-General* [2012] NZHC 2000 (HC) at [10], [12].

to them of publication of their identities outweigh any public interest in their identity being published.17

[34] Accordingly I made the non-publication orders sought by the defendant.

[35] In relation to the plaintiff's application, for the same reasons I made an interim order of non-publication in respect of the plaintiff's name and identifying details, and of his wife's name and identifying details (including the couple's children); these orders will continue to apply until further order of the Court. I also made permanent orders in respect of the three persons referred to in the plaintiff's application who were to appear under subpoena for the same reasons as justified the making of non-publication orders in respect of the defendant's application.

Conclusion

[36] The Court made an *in camera* order as sought by the defendant; it has made directions to ensure this order is effective during the course of the hearing. Leave has been reserved to counsel to apply for any further necessary directions, if need be.

[37] Non-publication orders have been made as sought, either until further order of the Court or on a permanent basis as indicated above.

[38] Finally, I have made an order that the Registrar is not to permit access to information on the Court file to any person other than a party or authorised representative of a party, without leave of a Judge.

B A Corkill

Judge

Judgment signed at 4.30 pm on 5 February 2015

17 See *Alatipi v Chief Executive of the Department of Corrections* [2014] NZEmpC 67 at [8].
