



# Employment Court of New Zealand

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## Roy v Tamaki College Board of Trustees [2015] NZEmpC 216 (3 December 2015)

Last Updated: 15 December 2015

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2015\] NZEmpC 216](#)

ARC 92/13

IN THE MATTER OF      a challenge to a determination of  
                                 the  
                                 Employment Relations Authority

AND IN THE MATTER   of an application for leave to  
                                 inspect the court file

BETWEEN                CHRISTOPHER SCOTT ROY Plaintiff

AND                        TAMAKI COLLEGE BOARD OF  
                                 TRUSTEES  
                                 Defendant

Hearing:                By written application and memoranda filed on 25  
                                 November  
                                 (from Kirsty Johnston, New Zealand Herald), 30  
                                 November  
                                 2015 (from plaintiff) and 2 December 2015 (from  
                                 defendant)

Appearances:        S Govender, counsel for plaintiff  
                                 RM Harrison and E McWatt, counsel for defendant

Judgment:             3 December 2015

### INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE G L COLGAN

[1] Kirsty Johnston, a reporter with the New Zealand Herald newspaper has applied to the Court to “search, inspect and copy a document on the Court file” and, in particular, “those [documents] laying out the claim, and the defence in this case”.

[2] The hearing of the case concluded on 30 September 2015 and the Court’s judgment has been reserved. The parties were advised at that time that it might not be until early 2016 that the judgment is released.

[3] Because this is the first occasion on which I am aware that a representative of the news media has applied to search and copy parts of the court file in reliance on

CHRISTOPHER SCOTT ROY v TAMAKI COLLEGE BOARD OF TRUSTEES NZEmpC AUCKLAND [\[2015\] NZEmpC 216](#) [3 December 2015]

the [High Court \(Access to Court Documents\) Amendment Rules 2009](#), and because the New Zealand Herald’s application is opposed stoutly by the defendant, I have decided to record my decision on the application in the form of an interlocutory judgment.

[4] Mr Roy claims that he was dismissed constructively and unjustifiably by the defendant. The Employment Relations Authority dismissed his claims on the basis that these were not raised with the Board of Trustees of Tamaki College (the Board) within time and noted, also, the difficulties that Mr Roy would face arising from what appeared to be a contract of settlement between him and the Board, precluding

him from bringing such claims in any event.<sup>1</sup>

[5] The Court upheld Mr Roy's challenge to the out-of-time conclusion by the Authority, allowing him to have the merits of his grievances reviewed in this proceeding.<sup>2</sup> The parties then agreed that it would be more convenient to deal with the question of settlement of those as part of the substantive hearing.

[6] Mr Roy was unrepresented until shortly before the start of the hearing in this Court, which may account for the several consecutive versions of his statement of claim which have been filed, culminating in the last version, on which the case will be decided, being settled by his counsel.

[7] The hearing of evidence and submissions took place over a number of days in July and September 2015. There were no orders sought restricting publication of any part of the case at that stage and, to my recollection, there was no representative of the news media in court at those times. Any part of what was said in open court could have been reported without restriction.

[8] Questions of access to the Court's file are not addressed expressly in the [Employment Relations Act 2000](#) (the Act) or subordinate legislation which govern the conduct of proceedings in the Employment Court. Especially in respect of a

proceeding that has been heard but not decided, applications such as that made by

<sup>1</sup> *Roy v Board of Trustees of Tamaki College* [2013] NZERA Auckland 514.

<sup>2</sup> *Roy v Board of Trustees of Tamaki College* [2014] NZEmpC 153, [2014] ERNZ 332.

the New Zealand Herald in this case are to be determined by a Judge. The test is the interests of justice, balancing considerations of open access to court proceedings, and interests of the privacy of persons and reputations. As was said by the High Court in *Mafart v TVNZ Ltd*:<sup>3</sup>

[7] Public access to court files, both in respect of current and completed cases, must be considered in the context of contemporary values and expectations in relation to freedom to seek, receive and impart information, open justice, access to official information, protection of privacy interests, and the orderly and fair administration of justice. ...

[9] In this case, also, the plaintiff has made a number of very serious allegations against other persons which have been denied adamantly and the resolution of which will be an essential part of the Court's decision. The factual basis of a number of allegations made by the plaintiff following the first part of the hearing, concerning both the evidence given by witnesses and statements made by the Court, have been the subject of subsequent consideration and have been established in cross-examination of Mr Roy to be false. That means that the Court must examine very carefully and critically the other very serious allegations that the plaintiff has made, particularly about the school's Principal and its then Board's Deputy Chair. Some of those allegations may be described as sensational and they are certainly serious ones of criminal offending. Even if they are found by the Court to be false, publication of them in a newspaper may damage reputations in a way which cannot be completely and effectively exonerated subsequently.

[10] As the Court has noted already and as counsel for the defendant emphasised in its submissions, the [High Court \(Access to Court Documents\) Amendment Rules](#)

2009 do not apply statutorily to the decision of this request by the Court. They are, nevertheless, relevant in the exercise of the Court's discretion in deciding this application.

[11] The Rules are contained in Part 3 Subpart 2 (Access to court documents) of the High Court Rules. They are covered by rr 3.5-3.16 (inclusive). Several definitions under r 3.5 are important to define the scope of such an application.

Those include the following:

<sup>3</sup> *Mafart v TVNZ Ltd* [2006] NZSC 33; [2006] 3 NZLR 18, (2006) 22 CRNZ 720 (SC) at [7].

**access** means to search, inspect, or copy under the supervision of an officer of the court

**court file** means a collection of documents in the custody or control of the court that relate to a proceeding (including any interlocutory application associated with the proceeding)

**document**—

(a) means any written material in the custody or control of the court that relates to a proceeding (including any interlocutory application associated with the proceeding), whether or not kept on a court file; and

(b) includes documentary exhibits, video recordings, records in electronic form, films, photographs, and images in electronic form; but

(c) excludes—

(i) notes made by or for a Judge for his or her personal use; and

(ii) any material that relates to the administration of the court

**formal court record** means any of the following kept in a registry of the court:

(d) a judgment, order, or minute of the court, including any record of the reasons given by the Judge:

...

[12] Rule 3.9 provides relevantly:

### **3.9 Access to documents during substantive hearing stage**

- (1) This rule applies during the hearing of a proceeding (other than the hearing of an interlocutory application) and until—
- (a) the close of the 20th working day after the court has given the final judgment on the proceeding; or
  - (b) the discontinuance of the proceeding before the final judgment is given.
- (2) During the period to which this rule applies, any person may access any of the following documents relating to the proceeding:
- (a) any pleading, reference, notice, or application filed in the court:
  - (b) affidavits, depositions, or other written statements admitted into evidence for the purposes of the hearing;
  - (c) documents admitted into evidence for the purposes of the hearing;
  - (d) if any evidence given orally at the hearing has been transcribed, a transcript of that evidence.
- (3) Despite subclause (2), a Judge may, on his or her initiative or on request, direct that any document, or part of a document, relating to the proceeding not be accessed without the permission of a Judge.
- (4) A request for access to a document under this rule is made informally to the Registrar by letter that—
- (a) identifies the requested document; and
  - (b) gives the reasons for the request.
- (5) The following provisions apply when a request for access to a document is made under subclause (4):
- (a) the Registrar must promptly give the parties or their counsel a copy of the request:
  - (b) a party who wishes to object must, before the relevant deadline (within the meaning of rule 3.10), give written notice of the objection to the Registrar, to the person who made the request, and to the other parties or their counsel:
  - (c) on receipt of an objection, the Registrar must promptly refer the objection and the request to the Judge for determination:
  - (d) unless the document is subject to a restriction stated in subclause (3) or in rule 3.12, the Registrar must promptly give the person who made the request access to the document—
    - (i) if the Registrar receives no objection before the expiry of the relevant deadline (within the meaning of rule 3.10); or
    - (ii) if the parties or their counsel earlier agree that the person be given access to the document:
  - (e) every request that relates to a document that is subject to a restriction stated in subclause (3) or in rule 3.12 is taken to be a request for the permission of a Judge, and must be promptly referred to the Judge by the Registrar.
- (6) The Judge may determine an objection referred to the Judge under subclause (5)(c) or a request for permission under subclause (3) or (5)(e) in any manner the Judge considers just.

...

### **3.13 Applications for permission to access documents, court file, or formal court record other than at hearing stage**

- (1) This rule applies whenever the permission of the court is necessary under these rules and is sought to access a document, court file, or any part of the formal court record, except where access may be sought under rule 3.9.
- (2) An application under this rule is made informally to the Registrar by a letter that—
- (a) identifies the document, court file, or part of the formal court record that the applicant seeks to access; and
  - (b) gives the reasons for the application.
- (3) The application is heard and determined by a Judge or, if a Judge directs the Registrar to do so, by the Registrar.
- (4) On receipt of an application made in accordance with subclause (2), the Judge or Registrar may direct that the person file an interlocutory application or originating application.
- (5) The applicant must give notice of the application to any person who is, in the opinion of the Judge or Registrar, adversely affected by the application.
- (6) The Judge or Registrar may dispense with the giving of notice under subclause (5) if it would be impracticable to require notice to be given.

(7) The Judge or Registrar may deal with an application on the papers, at an oral hearing, or in any other manner the Judge or Registrar considers just.

### 3.14 Decisions on applications under rule 3.13

...

(2) A Judge may permit access to a series of files for the purposes of research.

...

### 3.16 Matters to be taken into account

In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge or Registrar must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

- (a) the orderly and fair administration of justice:
- (b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
- (c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:
- (d) the freedom to seek, receive, and impart information:
- (e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:
- (f) any other matter that the Judge or Registrar thinks just.

[13] If this was a case to which the High Court Rules are applicable, it would fall for consideration under r 3.9 because the application has been made between the conclusion of the hearing and the close of the 20th working day after the Court has given final judgment on the proceeding. Following r 3.9, that would encompass within the Court's discretion any pleading, document admitted into evidence for the purpose of the hearing and any evidence given orally at the hearing which had been

transcribed and a transcript produced.

[14] This case does not include any affidavits, depositions or other written statements admitted into evidence for the purposes of the hearing. Briefs of evidence which the parties were required to exchange and file before the hearing are indications of the nature of the evidence likely to be given by a witness. The evidence given by a witness from the witness box under oath or affirmation, and as is recorded in the transcript of evidence, supersedes those briefs. It may also differ, at

times significantly, from them indicating, for example, a determination of inadmissibility of some evidence.

[15] As the defendant points out, the application by the New Zealand Herald reporter, Ms Johnston, does not provide reasons for her application to inspect the court file and does not identify what she intends to do with any information so obtained. That application ought to have done so and future applications of this sort must do so. It is only because of the nature of the documents to which I am prepared to grant access and the means by which this will be done, that have persuaded me not to go back to the applicant for this necessary information thus delaying further the decision of the substantive case.

[16] Although not governing the position in this case, a useful analogy is to the Media Guide for Reporting the Courts<sup>4</sup> under which representatives of the news media are required to seek the Court's consent to record, by sound, still pictures or moving pictures, what goes on in court during a hearing. Such applications must include at least a general statement of the purpose of doing so and the use to which the material so recorded will be put.

[17] I acknowledge, of course, that there is no such restriction on a reporter sitting in on a hearing, making notes and reporting publicly on what that reporter heard said. There is a cogent argument that the best record of precisely what has been said during a hearing is the digital recording that the Court makes and which forms the basis of a transcript that is distributed periodically to the Judge and to the parties' representatives. In that sense there is a compelling argument for making that full and accurate record available not only to those who were in court, but also to those who would have been entitled to be so and to have reported thereon.

[18] The defendant's position is that its serious concerns for a number of individual persons involved in the proceedings outweigh collectively the principle of open justice and count against the release of the documents sought. The defendant,

through counsel, says that there is a risk that if the New Zealand Herald is allowed

<sup>4</sup> Ministry of Justice, *Media guide for reporting the courts and tribunals* (ed 3.1, July 2013)

<http://www.justice.govt.nz/media/documents/media-information-documents/media-guide-for-reporting-the-courts-and-tribunals-edition-3.1>.

access to the pleadings alone, but not to the notes of evidence, unproven serious allegations of criminal offending and other wrongdoing against a number of persons, may be reported in the public arena without reference to the evidence given to contextualise or otherwise support Mr Roy's accusations.

[19] The defendant also identifies, in addition to the individual persons, Tamaki College as an institution which is likely to sustain damage to its reputation if Mr Roy's allegations in his pleadings are reported in the public arena without appropriate reference to context. That is said to be particularly so in the case of Tamaki College which, as a low decile school, faces problems in recruitment of staff in a number of curriculum areas, which could be exacerbated by adverse reporting of Mr Roy's allegations.

[20] The defendant cannot and does not oppose publication of information relating to Mr Roy's case once the Court has made a decision which will itself become a public document. Subject to rights of appeal, the judgment will be the last word in deciding what happened leading up to Mr Roy's resignation and the consequences in law of that. The defendant submits, in effect, that the Court's conclusions in a judgment will be from a balanced consideration of both parties' cases according to law but which balance is unlikely to be achieved by simply publishing Mr Roy's allegations and, on the pleadings, the defendant's bare denials of the truth of any of these.

[21] Despite the absence of reasons for the request and advice to the Court about the intended use of information in the documents, I consider that the interests of justice favour providing Ms Johnston and the New Zealand Herald with an electronic copy of the transcript of evidence, together with the operative (that is the last filed) statements of claim and defence. In the case of the statement of claim, leave was granted to the plaintiff in the course of the hearing to add a further remedy to this and the Minute or other record of that should also be provided to Ms Johnston. The Registrar is to provide these to Ms Johnston, perhaps most conveniently by scanning them electronically and emailing them. There is to be no inspection of the file or access to other documents on it.

[22] Finally, it may assist if I reiterate the Court's practice about making available publicly copies of its judgments. These are sent, immediately after being issued, to the parties themselves. Judgments are not posted to the Court's website for at least three clear days unless there are exceptional reasons for posting them earlier than this. There are no such extraordinary reasons in this case. This practice is to allow the parties themselves to know first of the result of the case and the reasons for it. That three-day practice will be adhered to in this case.

GL Colgan  
Chief Judge

Judgment signed at 2 pm on Thursday 3 December 2015

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