

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 93
5619335

BETWEEN PEGGY BURROWS
Applicant

AND BEVERLY MOORE,
COMMISSIONER OF
RANGIORA HIGH SCHOOL
Respondent

Member of Authority: Vicki Campbell

Representatives: David Fleming for Applicant
Anne Toohey for Respondent

Investigation Meeting: On the papers before the Authority

Determination: 21 June 2016

**PRELIMINARY DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The pleadings, evidence of all witnesses, including the names of those who are to give evidence and all documents relied on by those witnesses will be subject to non-publication orders until after the Authority has issued its determination on the merits of the parties' employment relationship problem.**
- B. Costs are reserved.**

Employment relationship problem

[1] Ms Peggy Burrows has lodged proceedings which are currently before the Employment Relations Authority and will be subject to investigation in September 2016.

[2] Ms Burrows claims one or more conditions of her employment were affected to her disadvantage by unjustifiable actions of Beverly Moore, Commissioner of Rangiora High School (the Commissioner) and then was unjustifiably dismissed from her position as Principal of Rangiora High School. The Commissioner denies the claims.

[3] Ms Burrows' application has attracted a significant level of interest and support from the Rangiora community. The support for Ms Burrows has demonstrated itself by the posting of public commentary on social media sites such as Facebook and other blogs available to the general public. These postings include comments from Ms Burrows herself including posting the Notice of Investigation Meeting issued by the Authority.

[4] The Commissioner has applied to the Authority seeking non-publication orders prohibiting the publication of all of the pleadings and evidence lodged in the proceedings including documentary evidence and the names of all witnesses. Ms Burrows opposes the application.

[5] By the consent of the parties this preliminary matter has been determined on the papers currently before the Authority.

[6] As permitted by section 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all of the submissions received from Ms Burrows and the Commissioner but has stated the law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Power to order non-publication

[7] The Authority derives its powers from the Act. In particular Clause 10(1) of Schedule 2 of the Act provides the Authority with the power to prohibit publication in respect of any matter and:

order 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 Authority thinks fit.

[8] Also relevant to this determination is section 160(1)(f) which allows the Authority to follow whatever procedure the Authority considers appropriate.

[9] In [*Davis v Bank of New Zealand*](#)¹ the Court held that the presumption previously stated in relation to an Employment Tribunal case² that all evidence should be given in public and freely reportable may not have the force it formerly had. The Court held that the issue is one of process for the Authority to determine.

Sub judice

[10] In their comprehensive submissions the parties have referred the Authority to a number of authorities dealing with the rule of sub judice (latin for under judgment) and the issue of contempt. The text *Media Law in New Zealand*³ describes the sub judice rule in the following terms:

If a case is being tried in court, or even if it is due to be tried in court, one should not say or do anything that might create a real risk of prejudice to a fair trial.⁴

[11] The Commissioner has referred me to a number of cases dealing with the issue of sub judice communications and contempt of Court. The majority of the cases referred to are distinguishable on the basis that they apply to criminal trials where the possibility exists of potential jurors being influenced by the public commentary and which may affect the defendants' right to a fair trial. That is not the case in the Authority. Ms Burrows' application will be investigated and determined by the Authority which will not be influenced by public commentary.

[12] There is however an issue of how the matter is perceived by the parties and the public generally, particularly in relation to the maintenance of public confidence in the administration of justice in the Authority and potentially the Court, should the Authority's determination be challenged.

[13] As recognised by the Employment Court in *Sidebotham v Capital Coast Health Ltd*⁵ attempts to publish full details of a case when it is about to be heard by a Court, or in this case, the Authority, is often an attempt at manipulating the machinery of justice.

¹ [\[2004\] 2 ERNZ 511](#)

² [Anderson v Employment Tribunal \[1992\] 1 ERNZ 500.](#)

³ *Media Law in New Zealand*, 7th Edition, Lexis-Nexis, 2015.

⁴ Ibid Chapter 9: Contempt of Court at [9.3].

⁵ WEC 53/94, Employment Court Wellington. 7 October 1994, Goddard CJ.

Freedom of expression

[14] Both parties have referred to Ms Burrows' right to freedom of expression⁶ which right can only be subject to such reasonable limits as are necessary in a free and democratic society⁷.

[15] In her affidavit, the content of which has not been tested by the Authority, Ms Burrows says her use of a Facebook page is a closed forum and only includes participants who have been invited to communicate with her family, colleagues and friends.

[16] The use of social media, including Facebook to express opinions and provide information to others is widespread and has been the subject of judicial comment.

[17] The Employment Court in *Hook v Stream Group (NZ) Pty Limited*⁸ stated in respect of the use of social media:

The use of social networking posts in employment disputes has only risen sporadically in New Zealand, predominantly at an Authority level. It has received a greater degree of judicial attention elsewhere.

It is apparent that the increased use of social networking sites by individuals to express dissatisfaction with their employers is becoming more prevalent. This carries a risk. It is well established that conduct occurring outside the workplace may give rise to disciplinary action, and Facebook posts, even those ostensibly protected by a privacy setting, may not be regarded as protected communications beyond the reach of employment processes. After all, how private is a written conversation initiated over the internet with 200 "friends", who can pass the information on to a limitless audience.

[18] The Court referred to the potentially far reach of Facebook posts as noted in *Senior v Police*⁹. This case concerned criminal proceedings involving an alleged breach of a protection order. There the High Court observed that:

The court takes judicial notice that persons who use Facebook are very aware that the contents of the Facebook are often communicated to persons beyond the "Friends" who use Facebook. When information is put on a Facebook page, to which hundreds of people have access, the persons putting the information on the page know that that information will likely extend way beyond the defined class of "friends". Very strong personal abuse directed at

⁶ New Zealand Bill of Rights Act 1990 (NZBORA), s 14.

⁷ NZBORA, s 5.

⁸ [2013] NZEmpC 188; [2013] ERNZ 357.

⁹ [2013] NZFLR 356 (HC).

a former partner, placed on Facebook, read by a large number of friends, some of whom will inevitably have contact in the natural social network with the person being abused, is at the very least highly reckless. It is somewhat improbably to say, which was not said here, “Oh, I never thought it was possible that the person I was abusing could possibly have known about this”.

[19] The Court also referred to comments made by a Commissioner of Fair Work Australia in *Fitzgerald v Smith t/a Escape Hair Design*¹⁰:

It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences.

[20] This sentiment was later echoed by a full bench of Fair Work Australia in *Linfox Australia Pty Ltd v Stutsel*.¹¹ The full bench commented that:

Conversations conducted in electronic form have a different characteristic to a conversation carried out in a pub or café. The electronic comments have a potentially wider circulation which may include a number of company employees. Comments made in Facebook and other electronic communication on the internet means that the comments might easily be forwarded on to others. Widening the audience for their publication. These conversations leave a permanent written record of statements and comments made by the participants, which can be read at any time into the future until they are taken down by the page owner.

[21] The reality is that comments made on social media networks can readily permeate into real-life networks. Facebook posts have a permanence and potential audience that casual conversations around the water cooler at work or at an after-hours social gathering do not.

[22] Ms Burrows has demonstrated that she is prepared to continue to comment on her case even in light of the application for non-publication orders. Of particular concern to the Commissioner is that evidence given by witnesses may be posted online and thereby be made available to the public at large thereby leading to witnesses being intimidated.

[23] I am satisfied that making non-publication orders relating to the evidence and names of witnesses up to the date of the investigation meeting, will neither prevent

¹⁰ [2010] FWA 7358 at [52].

¹¹ [2012] FWAFB 7097.

Ms Burrows from commenting on her own case nor intrude on her right to freedom of speech.

Contempt

[24] The submissions of the parties addressed also the issue of contempt. This is dealt with under section 196 of the Act. Contempt of the Authority will arise where any person:

...assaults, threatens, intimidates, or wilfully insults any person, being a member of the Authority, a Judge, an officer of the Authority, a Registrar of the Court, any other officer of the Court, or any witness, during that person's sitting or attendance in the Authority or the Court, or in going to or returning from the Authority or the Court.

[25] During the Authority's investigation process of these proceedings I will take very seriously any allegations of any behaviour by either party that falls within the conduct set out in section 196 of the Act.

Determination

[26] The Authority's role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case.¹² It is in the public interest that the independence and impartiality of the decision making process not be undermined. It is also in the public interest that conduct which may be prejudicial, or appear to be prejudicial, to a fair hearing be prevented.

[27] To avoid any possibility of witnesses being intimidated or allegations of such conduct being made during the Authority's process, it is in the interests of both parties to prohibit publication of the pleadings as filed, all witness names and their evidence until after the substantive matter has been determined.

[28] Accordingly the pleadings, evidence of all witnesses, including the names of those who are to give evidence and all documents relied on by those witnesses will be subject to non-publication orders until after the Authority has issued its determination on the merits of the parties' employment relationship problem.

¹² Employment Relations Act 2000, s 157(1).

[29] Ms Burrows is free to express her opinions about her employment relationship problem and to seek support provided such opinions do not breach the non-publication order.

Costs

[30] The costs associated with this application are reserved and will be dealt with at the same time as the costs associated with the investigation of the substantive matter.

Vicki Campbell

Member of the Employment Relations Authority